Fundamental Rights:
- Right to Counsel - Duty of Police to inform arrested person of right soon after arrest and detention ï Effect of failure to exercise duty on confessional statement allegedly made, upon which a conviction was made - Chase (Athelston) v. Court of Appeal of Barbados

Chase (Athelston)

v.

R

COURT OF APPEAL OF BARBADOS

FEDERAL HIGH COURT, NIGERIA PORT HARCOURT DIVISION

Sir Denys Williams CJ
Moe JA
Chase JA

Thursday, 23rd January, Tuesday, 11th February 1997

FUNDAMENTAL RIGHTS - Right to Counsel - Duty of Police to inform Arrested person of Right soon after Arrest and Detention ï Effect of failure to exercise duty on confessional statement allegedly made, upon which a conviction was made

Issue for Determination:
Whether failure of police to inform accused soon after his arrest and detention, and before in-custody-interrogation takes place of his (accused's) right to retain and communicate with a legal adviser at any stage while in custody invalidates the accused's confessional statement.

Facts
Athelston Chase was charged with murder of Winston Skinner-Young, an eighty year old man he knew and regularly visited. While in detention, Chase was interrogatd and he made a confession. However, he was not told of his right to retain a lawyer before he made the confession. During his trial, Chase maintained that the confession was not voluntary. Nevertheless, he was convicted for manslaughter on the strength of the confession and evidence of his fingerprints on the deceased's window pane.

Held (Unanimously allowing the Appeal):
Chase' conviction was quashed, and the Court of Appeal reserved its reasons for a later date. In the reserved judgment, the Court of Appeal held that there had been a deliberate and unexplained breach of the appellant's constitutional right to be informed of his right to retain and instruct without delay, a legal adviser of his own choice. The court drawing inspiration from judicial precedents held that a person in custody ought to be informed about his rights to a legal adviser of his choice before any ón-custody interrogation' takes place. On the fingerprint evidence, the court held that the fingerprints were not irrefutable evidence of the appellant's commission of murder as they may have been placed on the deceased's window pane on any one of the appellant's friendly visits.

On the Record: Per Sir Denys Williams CJ
ñ.. a passage from the judgment of Davis JA in the Court of Appeal of Trinidad and Tobago in the Whiteman case ... should be of assistance to police officers in carrying out thier investigation ((1990) 39 WIR 397 at page 407):

ót would seem to me, therefore, that the interests of justice may best be serviced if police officers were to note or require an accused person to note on any statement from him, the fact that that person has been informed of his

munication with him at any stage of the investigation, emphasizing was in custody. In addition, the accused should be invited to sign e evidential burden which is on the prosecution to be discharged much more effectively, and will go a long way in assisting the court and jury in determining the question they have to determine, namely, ówas the statement a voluntary one?'ò[page 233 paras B-F]

Case(s) referred to in the Reasons for Judgment
Attorney-General v. Whitmen (1990,1991) 39 WIR 397, (1991) 2 AC 240, (1992) 2 All ER 924, (1991) 2 WLR 1200, Trinidad and Tobago CA and PC.

Representation
1. R. Worrell for the appellant
2. Olton Springer for the Crown.
Sir Denys Williams (Delivering the Reasons for Judgment): On 28th October 1993 the appellant Athelston St Elmo Chase was arraigned on an indictment in which he was charged with the murder of Winston Skinner-Young and on Friday, 5th November 1993, the jury returned a majority verdict of eleven to one of óGuilty of Manslaughter'. On Monday, 8th November 1993, he was sentenced to twenty years imprisonment.

On Thursday, 23rd January 1994, leave was granted to argue the following amended grounds of appeal:

1. That the trial judge erred in law by failing to exercise his discretion in favour of the appellant by not excluding the written and oral statements of the appellant and therefore withdraw them from the consideration of the jury.

2. That the trial judge failed properly and/or adequately to direct the jury on the question of circumstantial evidence as it related to the issues in the matter under consideration.

3. That the trial judge failed properly to direct the jury as to the approach they should take in considering the evidence of Mr Victor Forde, especially as it related to the question of mental responsibility of the appellant to read the written statement in the matter.

4. That the trial judge failed properly to direct the jury as to the approach they should take in evaluating the evidence of the police, in particular the evidence in the station diary and the police notebooks.

5. That in all the circumstances of the case the verdict is unsafe and unsatisfactory and should be set aside.
6. That the verdict is against the weight of evidence

7. That the sentence is excessive in the circumstances.

At the conclusion of the submissions for the appellant, counsel for the Crown was asked to respond and he felt unable to argue against the submission that the verdict is unsafe and unsatisfactory. We set aside the conviction and sentence and stated that we would give our reasons at a later date. We now do so.

Winston Skinner ï Young aged eighty-eight, lived alone at Jackson, St. Michael. His niece, Esther Rowe, who lived at St. Lawrence Main Road, Christ Church, looked after him. On 25th July 1992 she received a telephone call from one of his neighbours after which she tired to contact him by telephone. When there was no answer she went to his home. There she found him in his bedroom lying on his bed. His hands were tied in front of him and a belt was tied loosely about his neck. He appeared to be dead. She called the police who visited the scene, took photographs and carried out investigations.
He was indeed dead and the autopsy on the body revealed that he had died from asphyxia as a result of ligature strangulation. Sr. Ramulu who performed the autopsy, gave his opinion that a belt could have been used to strangle him.

The case against the appellant rested on a confession and on the discovery of his fingerprint on a louver pane of glass in the window of the bedroom where the body was found. The confession which was admitted in evidence after a voire dire reads as follows:

es in Rock Hampton Road, Jackson. I go by she pun a day or night
ny girlfriend I would see an old man who live in front of my girlfriend
talk to he. About a year ago he start to call me and I would go pun
he door step and talk wid he for a few minutes. He would always tell me to save my money when I work so I thought he had money save and was always telling me if I can't be good be careful.

ñLast Friday night, 24th July this year, the same night as the semi-finals calypsoes at de stadium, I went up by my girlfriend Angela about 7 o'clock. When I did up by my girlfriend Jolly call me. I went to he at de window. He asked me how I is. I tell he I alright. He look through the front window and pat me on my shoulder. I did drinking a beer at the time. I then tell he I gone. He then tell me If I can't be good be careful. I then left he watching the TV and went by my girlfriend. My girlfriend went inside the house and nurse the little baby. I then went inside about minutes to 8 and tell she I gone. I then walk down the road by the wrought iron shop in de gap.

ó I then walk through the track above the wrought iron shop, then walk the track to the back of Jolly house. I then climbed over the guard wall to the back of he house. After I get in he house I see the back two section wooden door open. I went in the open bathroom and hide, because Jolly did still watching the TV. I waited in the bathroom until I think he went to sleep. I come out the bathroom and went in he bedroom. I see he lying on he back like he sleeping. I see a black tie on a ledge near he bed and I take it down and tie he two hands in front of he. I take up a pillow that was near he and I put it over he face and nose and he ain't move. When I did feeling around de bed I find a leather belt and I put round he neck. I then feel and search he shirt and pants pockets to see if he got any money. I ain't find no money. I then remove the pillow from the face and put it on de bed and left de belt pun he. I ain't search nuh other part of de house.

ñAfter I ain't find nuh money I ain't carry away nothing from de house. I get frighten and I run back through the back door. When I did in the bedroom I think I touch some glass louvers when I did feeling beside the bed. After the incident I run straight home. My sister Cheryl open the door for me about 10.30 in the night. The next day I hear that Jolly dead and I went up by my girlfriend and she tell me that Jolly was found dead. I sorry that he get kill. Today the police come for me and question me about it and I tell them truth about what I do. That is all to it.

The appellant elected to make an unsworn statement from the dock and said:

ðThe statement that the police had I did not give them. Mr. Brancker gave me two ear bangs. I was frightened. He forced me to sign my name. He told me to trust him that he would help me because I would only get fifteen years in jail. I told him that I ent kill the man. He told me that when I come out I can come and look for him. The man Jolly was my good friend. I used to help him do anything around the house that he asked me to do. That is all.'

Section 13(2) of the constitution enacts as follows:

ó Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted, at his own expense, to retain and instruct without delay a legal adviser of his own choice, being a person entitled to practise in Barbados as an attorney at law, and to hold private communication with him.'

It is crucial to this case to note this is a substantive provision of the Constitution and has application not only to a person who is arrested but to someone who is detained.

It is necessary too to refer to Attorney-General v Whiteman (1991) 39 WIR 397 where Lord Keith who delivered the opinion of the Judicial Committee said (at page 412):

ðThe language of the Constitution falls to be construed not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit and this is particularly true of those provisions which are concerned with the protection of human rights. In this case the right conferred by section 5(2)(c)(ii) [of the Constitution of Trinidad and Tobago] upon a person who has been arrested and detained, namely the right to communicate with a legal adviser, is capable in some situations of being of little value if the person is not informed of the right. Many persons might be quite ignorant that they had this constitutional right or, if they knew, might in the circumstances of their arrest be too confused to bring it to mind.

3);

sons who have been arrested or detained have a constitutional right ith a legal adviser both upon a proper construction of section 5(2)(h) of the Constitution of 1976 [of Trinidad and Tobago] and on the basis of a settled practice existing when that Constitution was introduced. Davis JA said towards the end of his judgment of the Court of Appeal: ñI am not prepared to lay down any general rule as to the precise point in time when a person in custody ought to be informed of this right, [but it should be] as early as possible, and in any event before any ón-custody interrogation' takes place.ò

ðTheir lordships would endorse that. It is possible to envisage circumstances where it would not be practicable to inform the person of his right immediately upon his arrest. They would add that it is incumbent upon police officers to see that the arrested person is informed of his right in such a way that he understands it. He may be illiterate, deaf, or unfamiliar with the language. It is plain that the mere exhibition of notices in the police station is insufficient in itself to convey the necessary information.'

In Barbados, anyone who is arrested or detained has a constitutional right to be informed of his or her right to communicate with a legal adviser by virtue of section 13(2) of the Constitution. And according to the decision of the Privy Council in the Whiteman case, a person who is arrested or detained ought to be informed of this right as early as possible and in any event before any ñin-custody interrogation' takes place. It is against this background that we turn to the questioning of the appellant in this case.

Station Sgt Brancker did the questioning and Cons Carter was present with him. The record discloses some inconsistencies and contradictions about dates and times. No comment need be made on what took place on 28th July; the appellant was at the police station for about half an hour between 8.00 and 8.30pm and during that period was questioned for about twenty minutes and then released.

On the following night, the police picked up the appellant at his home and arrived at the police station at 9.55 pm. Questioning began at 10.30pm and the appellant made an oral confession fifty-five minutes afterwards (at 11.25pm). Before that confession he had made denials, but these were not recorded. According to the police, the confession began at 11.30pm and concluded at 12.15am

The record of the evidence of Sgt Brancker discloses some inconsistencies. At page 153 ñThe first time I arrested him was on 29th July 1992. But at page 156 ó did not arrest him on 29th July 1992; he was not free to leave the station that day'. At page 158 the following evidence appears:

ó would have released the (appellant) if I were satisfied that his story was true: that he knew nothing about the crime. I did not believe him, and he told me eventually. I told the (appellant) that he had a right to consult with a lawyer who could be present and the (appellant) said ñI don't want no lawyer or anybody now. I sorry bout what I doò. I told him of his right to have a lawyer or friend present after I had been speaking to him for about fifty-five minutes. I agree I should have informed him of that right as soon as practicable after he was taken into custody. I did not tell him of this right when he was at home at Haynesville. He did answer the door when I knocked.

Police Cons Carter testified that the appellant was questioned for about fifty-five minutes before the written statement was recorded. He also said that the appellant was free to leave the station before 10.30pm (when the questioning began), but this evidence does not fit comfortably with Sgt Brancker's or the other evidence. Cons Carter further said that the appellant was told that he could have a lawyer or friend present, but not before he started to give the written statement.

It is clear from the evidence that not only was there a breach of section 13(2) of the Constitution and of the law as laid down by R v Whiteman but that it was deliberate and unexplained.

In all the circumstances and bearing in mind the real possibility that the appellant's fingerprint could have been paced on the glass louver in the deceased's bedroom on an occasion when he was in the house innocently, we were of the view that the safe course was to quash the conviction and set aside the sentence.

ment of Davis JA in the Court of Appeal of Trinidad and Tobago in
nce to police officers when they are carrying out thier investigations

ôIt would seem to me, therefore, that the interests of justice may best be serviced if police officers were to note or require an accused person to note on any statement taken from him, the fact that that person has been informed of his right to retain a legal adviser and to hold communication with him at any stage of the investigation, emphasizing the fact that this is so even while the accused is in custody. In addition, the accused should be invited to sign such notation. In my view, this may enable the evidential burden which is on the prosecution to be discharged much more effectively, and will go a long way in assisting the court and jury in determining the question they have to determine namely, ówas the statement a voluntary one?'

Appeal allowed, conviction quashed.

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Fundamental Rights:
- Tribunal of Inquiry Act (Decree No. 42), 1966 ï Extent to which, pursuant to Section 315 of the 1999 Constitution, the Act took effect as law enacted by the National Assemblyï Whether the Act related to matters with respect to which the National Assembly had power to legislate for the whole Federation - Fawehimi v. Babangida

Epeli Seniloli
Attorney-General of fiji

v.

Semi voliti,
On behalf of Poasa Ravea Oawaoawa Voliti

HIGH COURT, Fiji, (Appellate Jurisdiction)

Civil Appeal No: HBA 0033 of 1999

Nazhat Shameem, J.
Tuesday, 22nd February, 2000

Fundamental Rights: Remedy for Infringement of Fundamental Rights ï Damages ï Relevance of different types of damages to nature and gravity of infringement suffered.

Fundamental Rights: Children ï Special Protection of Children's Rights ï Particular Sensitivity to detention of Children ï Aggravated Damages appropriate where detention of Child violates protective measures designed for children.

Issue for Determination:
Whether the award of the sum $10,000 as aggravated damages, and $5,000 as punitive damages for the detention of a 14 year old child lasting four hours was a justifiable scale of damages given the length of the unlawful detention.

y on 28th of March 1998 for four hours by some policemen. He was d to a post inside the police post until his release. The learned trial Magistrate found that the circumstances of the detention were traumatic given the evidence of his friends of Poasa Voliti weeping, and that his rights under the Convention on the Rights of the Child (and under the Judges Rules) had been breached. She also found that there had been a deliberate abuse of power by the police, the flouting of the plaintiff's rights, and that these had caused the plaintiff trauma, distress and humiliation. The appeal was against the award of a total of $15,000 to the Plaintiffs

Held:
The United Nations Convention on the Rights of the Child (which Fiji ratified), is in conformity with the Constitution of Fiji and its Juvenile Act and is intended to ensure that children in conflict with the law, and who are vulnerable because of age and powerlessness in relation to law enforcement agencies are provided special measures of protection. Given that the police officers deliberately disregarded these protective measures and took advantage of the plaintiff's vulnerability, the award of aggravated damages was appropriate.

Cases Referred to in the Judgment:
1. Josaia Vakacoko v. The Commissioner of Police Civil Action HBC 145 of 1998S
2. Marika Lawanisavi v. Kapieni ABU 49/98
3. Nirmala Wati v. A. Hussain &C0. Ltd. 32 FLR 1
4. Sivorosi Raikali-v- Attorney- General Civil Action No. HBC 95 of 1999
5. Thompson v. Commissioner of Police for the Metropolis (1997) 3 WLR 403,
6. X v. Attorney- General (1996) NZLR 623

- Statutes Referred to in the Judgment:

1. The Constitution of Fiji Island, Section 27
2. Juveniles Act

International Instruments Referred to in the Judgment:
ÅUN Convention on the Rights of the Child, Article 37

Nazhat Shameem J. (Delivering the Judgment): This is an appeal against quantum of damages awarded in the Suva Magistrate's Court for the false imprisonment of 14-year-old boy, Poasa Ravea Voliti at the Nadera Police Post for four hours.

The Plaintiff filed a writ of summons claiming damages for false imprisonment in August 1998. After a trial, the learned trial magistrate delivered her judgment on 20th July 1999. She found that Poasa Voliti was taken into police custody at Nadera on 28th March 1998 for four hours. He was 14 years old and was arrested as he walked past the Police Post on Ratu Dovi Road. He was questioned and searched. A tin of fish and boiled cassava found in his pocket was taken from him and he was hand-cuffed to a post inside the police post until he was released some hours later. The learned trial magistrate found that the circumstances of the detention were traumatic given the evidence of the friends of Poasa Voliti weeping.

The learned trial magistrate found that the plaintiff's constitutional rights, his rights under the Convention on the Rights of the Child and his rights under the Judges Rules had been breached. She found that the deliberate abuse of power by the police, the flouting of the plaintiff's rights, the trauma and distress caused to him and the humiliation he suffered were sufficient to justify the award of punitive damages. She awarded $10,000 as aggravated damages and a further $5,000 in punitive damages on the ground of the gross misconduct of the police officers concerned.

This appeal is against the award of $15,000 damages. The grounds of appeal are

ñ1 That the award is so high as to make it an entirely erroneous estimate of the damage to which the Respondent is entitled.

2. That the learned trial magistrate when awarding punitive damages in this case, acted on a wrong principle of law.

annot be supported having regard to all the evidence and the

The appeal was heard on 11th February 2000.

Ms M. Rakuita for the Appellant submitted that the learned magistrate should have considered local cases on false imprisonment, in awarding damages. She suggested that awards of $500 to $1,500 had been given in cases where the plaintiff had been detained unlawfully for several hours. She submitted that there was no evidence that the plaintiff had suffered pain or distress and that $15,000 is in excess of comparable cases.

Mr. S. Valenitabua for the Respondent submitted that given the gross misconduct of the police at the police station, and the age of the plaintiff, the circumstances were exceptional and justified the award.

In Thompson v. Commissioner of Police for the Metropolis (1997) 3 WLR 403, the Court of Appeal suggested the following principles as guidelines in wrong ful arrest and imprisonment cases:
1. The total award should not exceed what is a fair compensation for the injury the plaintiff has suffered.

2. Exemplary damages will only be awarded in exceptional cases.

3. The starting point for normal wrongful arrest and imprisonment cases is E500 for the first hour and E3000 for 24 hours on a progressively reducing scale for each day thereafter.

4. Awards of damages for false imprisonment should bear some relationship to awards for personal injuries.

In Sivorosi Raikali-v- Attorney- General Civil Action No. HBC 95 of 1999, Scott J awarded $11,000 for a man who was imprisoned in jail for 11 months more than he should have been, the only aggravating features of the detention being the length of the wrongful detention. In that case, Scott J said:

ñAn award of damages arising from false imprisonment has as its primary purpose compensation for the loss of the plaintiff's liberty and its consequences such as indignity, mental suffering, disgrace, humiliation and loss of reputation or social status. In addition, there may be recovery for any resultant physical injury, illness or discomfort as where the imprisonment has had deleterious effect on the plaintiff's healthé

Awards of damages under these heads are termed compensatory and will be liable to aggravation or mitigation depending on the whole circumstances of the case .In addition to such awards, there may in special circumstances be an award of exemplary damages, the purpose of which is to punish the Defendant for inflicting the harm on the Plaintiff.ò

I have read the local authorities on unlawful arrest and detention referred to me by counsel, and note that none relates to the unlawful detention of children. In Nirmala Wati v. A. Hussain &C0. Ltd. 32 FLR 1, the Court awarded $500 for the unlawful arrest of a young married woman, and her detention at the police station for about an hour. In Josaia Vakacoko v. The Commissioner of Police Civil Action HBC 145 of 1998S, the court awarded $4,000 to a plaintiff wrongfully detained by police for 6 days.

However, these cases are not really comparable because the detainees were not children, and because the court did not find as the magistrate did in this case, that ñthe conduct of the police officersé . was outrageous, a gross abuse of powers and an absolute disregard o the fact that Poasa is a child. The plaintiff was compelled to institute these proceedings ï the outcome of the police internal inquiry being entirely unsatisfactory and no wonder- the pertinent officers had all colluded to cover up the events of 20/3/98.ò

The evidence of the witness Poasa, at page 107 of the record, which the learned magistrate accepted, shows that he was stopped by the police officer Cakacaka, as he was walking along the road.He was asked what he had in his pocket. He told the officer that it was a tin of fish, and that he was taking it to his friends. The evidence during examination -in- chief then ran as follows:

o?

olice post and said to me ñthat's the way you supposed to talk to a policeman.ò They called me into the police post and asked me questions.

Q: What happened in the police post?

A: They asked me again the question and asked me whether those two boys were fucking each other's arses.

Q: Then?
A: I said no. I told them we were going to eat this food for lunch

Q: The two policemen told me, brother and sister didn't own anything in the house and that was why he was stealing the Westpac Handycardé

Q: Were your hands handcuffed?

A: Yes.

Q: Both hands.

A: Only my left handé . they handcuffed my left hand to a cross-bar in the police post. I was sitting.ò

The evidence disclosed that the handcuffs were eventually removed. No attempt was made to explain to Poasa the reasons for arrest or detention.

Apenisa Drova (PW3) told the court that Poasa's left hand was cuffed to his foot and that he was crying. Kaveni Quni, a 16 year old boy (PW5) also gave evidence of the handcuffing and of Poasa's distress.

The entire incident was a shameful one. The evidence of the children who witnessed the plaintiff's detention, clearly showed the incident to be distressing and humiliating to the plaintiff and his friends.

Furthermore, the denials of the police witnesses that there was no arrest, no detention and there were no handcuffs, constituted an equally shameful attempt to disguise an outrageous breach of duty to the public.

The rights of juveniles are protected with adult suspects, by section 27 of the Constitution. Those rights include the right to be told of reasons for the arrest and detention, the right to prompt release if no charge is brought, the right to consult a legal practitioner, the right to communicate with next-of-kin and the right ñto be treated with humanity and with respect for his or her inherent dignity.ò None of these rights were accorded to the plaintiff.

The Juveniles Act provides for special measures to be taken in the detention of juveniles, the emphasis being to avoid detention except in exceptional circumstances. The spirit of the Juveniles Act was not observed by the officers at the Nadera Police Post.

Furthermore, the evidence of the police officers shows that they were aware of the procedures, which ought to have been followed under the Judges Rules and the Juveniles Act.

The learned magistrate clearly found that this was not a case of an ñerror of judgmentò as in X v. Attorney-General (1996) NZLR 623. It was a case of the deliberate flouting of the rights of a child in custody.

The UN Convention on the Rights of the Child, which Fiji ratified in 1993, provides by virtue of Article 37:

ñ(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishmenté .

rty unlawfully or arbitrarily. The arrest, detention or imprisonment of shall be used only as a measure of last resort and for the shortest

The Convention in relation to the custody of children, is in conformity with the Juveniles Act and the Constitution.It is intended to ensure that children in conflict with the law, and who are vulnerable because of age and powerlessness in relation to the administration of law enforcement agencies, are accorded special protective measures.

The facts of this case show that the police officers at the Nadera police post deliberately disregarded these protective measures and took advantage of the plaintiff's vulnerable position.

In the circumstances I can find no fault in the learned magistrate's finding that aggravated damages were called for.

In X v. Attorney- General (1996) 2 NZLR 623, Williams J said at p.630:

ñAs to the law, in the pithy phrase employed by the learned authors of Hewston and Buckley: Salmond and Hewston on the Law of Torts 19th Ed. (1987) P.594. ñAggravated damages are given for conduct which shocks the plaintiff: exemplary damages for conduct which shocks the jury.ò

At page 631 of his judgment Williams J went on to say:

ñAs to punitive or exemplary damages,é it is enough to note that such damages are only awarded to punish the defendants because of the outrageous or contumelious way in which they have conducted themselves in committing the tort for which they are sued (Donselaar v. Donselaar (1982) 1 NZLR 97é As Auckland City Council v.Blundell (1986) 1 NZLR 732 at p.739 makes clear, exemplary damages must be ñfairly and reasonable commensurate with the gravity of the conduct thus condemned.ò

Having considered the evidence of the conduct of the police officers in this case, I am of the view that the breaches of the plaintiff's rights under the Juveniles Act, the Judges Rules, the Constitution and the Convention on the Rights of the Child, justify an award for aggravated damages. Furthermore, I consider that this was not a case of an honest error of judgment by the police. This was a case of a deliberate flouting of the law, and of conscious acts on a vulnerable and young member of the public, which caused distress and humiliation to the plaintiff. I am therefore of the view that the outrageous and contumelious conduct of the defendant justified an additional award of punitive or exemplary damages.

The question remaining is as to whether the amount awarded was unrealistically high. The Court of Appeal in Marika Lawanisavi v. Kapieni ABU 49/98 emphasized the need to consider local, social and economic conditions when approaching quantum of damages. Scott J in Sivorosi Raikali v. A-G (supra) considered $1,700 per hour, to be a generous award for false imprisonment in Fiji. However, he was considering an award for an adult who had lawfully served 12 years imprisonment, but who had been unlawfully detained for 11 months longer than he should have. Nor was that award one for aggravated damages.

I considering an award of $1,700 per hour for a child whose arrest and detention were unlawful and who should never have been arrested at all, entirely appropriate. The award of $ 10,000 by the learned magistrate seems to be higher than is appropriate given Fiji's social and economic conditions. I therefore allow the appeal against the award for aggravated damages to the extent I reduce the award to $6,800.

However, I consider the amount of $5,000 as punitive damages entirely appropriate in the circumstances of the case. It adequately reflects the outrageous conduct of the defendant, and is not an unrealistic amount in Fiji's conditions.

The appeal is successful to the extent that total damages awarded are reduced to $11,800.The Respondent must pay the appellant's costs which I set at $200.

ï Extent to which, pursuant to Section 315 of the 1999 Constitution, onal Assemblyï Whether the Act related to matters with respect to which the National Assembly had power to legislate for the whole Federation - Fawehimi v. Babangida

CHIEF GANI FAWEHINMI
HON MR. JUSTICE CHUKWUDIFU OPUTA (RTD)
HUMAN RIGHTS VIOLATIONS INVESTIGATION COMMISSION
v.
GENERAL IBRAHIM BABANGIDA (RTD)
BRIGADIER-GENERAL A.K. TOGUN (RTD)
BRIGADIER-GENERAL HALILU AKILU (RTD)

SUPREME COURT (NIGERIA)

SC.360/2001

Muhammadu Lawal Uwais,CJN. (Presided)
Idris Legbo Kutigi, JSC.
Uthman Mohammed, JSC.
Sylvester Umaru Onu, JSC.
Aloysius Iyorgyer Katsina-Alu, JSC.
Samson Odemwingie Uwaifo, JSC. (Read the Leading Judgment)
Akintola Olufemi Ejiwunmi, JSC.
Friday, 31st January, 2003

FUNDAMENTAL RIGHTS - Tribunal of Inquiry Act, 1966 ï The Human Rights Violations Investigation Commission (Oputa Panel) - Powers of the Commission under the Tribunal of Inquiry Act to compel witnesses' appearance before the Commission and to impose punishment ï Whether in breach of rights to personal liberty and fair trial by a court of law guaranteed under Sections 35 and 36 of the 1999 Constitution?

FUNDAMENTAL RIGHTS ï Tribunal of Inquiry Act ï Compulsive power to impose punishment such as fine or imprisonment - Power void for incompatibility with guaranteed rights

CONSTITUTIONAL LAW - Tribunal of Inquiry Act (Decree No. 42), 1966 ï Extent to which, pursuant to Section 315 of the 1999 Constitution, the Act took effect as law enacted by the National Assemblyï Whether the Act related to matters with respect to which the National Assembly had power to legislate for the whole Federation?

CONSTITUTIONAL LAW ï Tribunal of Inquiry Act ï Federal and State legislative competencies in respect thereof under the 1999 Constitution ï Tribunal of inquiry as a subject in respect of which the National Assembly and State Houses of Assembly possessed residual legislative powers under the 1999 Constitution

Issues for determination:
1. Whether the Court of Appeal did not in its judgment go beyond the answer required for the first question referred to it by the Federal High Court.

2. Assuming (but without conceding) that the answer provided by the Court of Appeal to the first question was not excessive, whether the said answer is accurate enough to meet the requirements of section 295(2) of the 1999 Constitution

3. Whether the Court of Appeal was right in holding that sections 5(c), 10, 11(1)(b), 11(3), 11(4) and 12 of the Tribunal of Inquiry Act contravene section 35 or 36 of the 1999 Constitution and are therefore unconstitutional and invalid.

Facts:
The President of the Federal Republic of Nigeria, in exercise of powers conferred on him by Section 1 of the Tribunals of Inquiry Act, 1966 issued a Statutory Instrument No. 8 of 1999 (later amended by a Statutory Instrument No. 13 of 1999) to constitute a Judicial Commission of Inquiry for the investigation of human rights

4 and 28th of May 1999.

sued summonses on Respondents to appear and testify before it. The Respondents consequently instituted two separate suits before the Federal High Court against the 1st and 2nd appellants to challenge the powers of the Commission to compel their attendance at the Commission's sittings. The 3rd appellant applied and was joined as a party. The respondents claimed inter alia that it is unlawful for the 1st and 2nd Defendants to summon them to appear before it to testify or produce documents. They prayed the court for an order prohibiting the 1st and 2nd appellant from compelling them to attend the 2nd Appellant's sitting to answer questions or produce documents. The grounds of the application, amongst others, were that the

Act is not an existing law within the meaning of section 315 of the 1999 Constitution and that the compulsive powers granted the Commission under the Act are in breach of their fundamental rights contained in sections 35 and 36 of the Constitution.

At the Federal High Court, the parties agreed that some constitutional questions be referred for the consideration of the Court of Appeal pursuant to the provisions of section 295(2). The Federal High Court accordingly formulated the following questions for the Court of Appeal:

a. Whether or not the Tribunals of Inquiry Decree 1966 (No. 41) took effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the Constitution of the Federal Republic of Nigeria 1999.

b. Whether or not sections 5(c), 5(d), 10, 11(1) (b), 11(3), 11(4) and 12 of the Tribunals of Inquiry Decree 1966 (No. 41) (or any of them) are constitutional and valid or contravene Sections 35 or 36 of the Constitution of the Federal Republic of Nigeria 1999.

On 31st of October, 2001, the Court of Appeal gave answers to the questions. On question 1, the Court of Appeal held that the Tribunal of Inquiry Act took effect as existing law on 28-5-99 pursuant to section 315 of the 1999 Constitution, but went beyond the question to hold that the President, as the rightfully constituted authority needed to bring the Act into conformity with the 1999 Constitution by some textual modification, which he had failed to do. On question 2, the Court of Appeal declared the compulsive powers of the 2nd Appellant/Defendant unconstitutional and in violation of the Respondents' Fundamental Rights contained in sections 35 and 36 of the constitution. Dissatisfied with the decision, the Respondents appealed to the Supreme Court. The Appellant also crossed appealed.

Held (Unanimously allowing the Appeal in Part):
The Court of Appeal was wrong to have gone beyond question 1 to hold that the President needed to bring the Act into conformity with the 1999 Constitution. The Tribunal of Inquiry Act became existing law under the 1999 Constitution pursuant to section 315

thereof, but the Constitution does not confer powers on the National Assembly to enact a general law on tribunals of inquiry as neither the Exclusive or Concurrent Legislative lists include tribunals of inquiry as a legislative item, quite unlike the 1963 Constitution under which tribunals of inquiry was a specific item under the Exclusive Legislative List. It follows that tribunals of inquiry falls within the residual powers of both the National Assembly (for the Federal Capital Territory) and State Houses of Assembly for their respective States. The Tribunal of Inquiry Act of 1966 therefore took effect under the 1999 Constitution as an Act of the National Assembly for the Federal Capital Territory, Abuja only and a Law of the State House of Assembly under the residual powers of both legislatures. On question 2, the Court of Appeal rightly held that Sections 5(d) 11(1) (b), 11 (4) and 12(2) of the Tribunals of Inquiry Act are unconstitutional and invalid in so far as they empower a tribunal of inquiry to compel attendance or impose a sentence of fine or imprisonment. The sections contravene sections 35 and 36 of the Constitution of Nigeria 1999. Under the Constitution, only a court of law can make an order to deprive a citizen of his Fundamental Rights to Personal Liberty. The Court of Appeal was however wrong to declare sections 5(c), 10 and 11(3) of the Act unconstitutional and invalid.

Details of Principles in the Judgment

mbly viz a viz the Tribunal of Inquiry Act
gislative powers is limited by the powers granted to it by the 1999 Constitution does not confer powers on the National Assembly to make laws of a general nature with regards to Tribunals of Inquiry, to have effect throughout the federation. The power to enact such a law has become a residual matter under which the National Assembly may only enact law to constitute a Tribunal of Inquiry for the Federal Capital territory, and the State House of Assembly for the State. [Page 24 Paras C-E].

On the Record: Per Uwaifo JSC
ñThe power given to Parliament to make laws in regard to tribunals of inquiry as reflected in the Legislative Lists contained in the relevant provisions of the Schedule to the 1963 Constitution (Item 39 of the Exclusive Legislative List and Item 25 of the Concurrent Legislative List) was, for whatever reason, denied the National Assembly in both the 1979 and 1999 constitutions of the Federal Republic of Nigeria. Without such constitutional provisions, no valid law can be made, or can exist, standing on its own and of general nature, to apply throughout the Federation of Nigeria on the strength of which the President may set up a tribunal or commission of inquiry. This is because no law not specifically authorized or backed up in [our] constitution can be lawfully passed for the Federation of Nigeria by the federal legislature. It is the limits set under relevant provisions of the constitution that define and determine the frontiers of the laws that can be enacted. That is the hallmark of constitutional democratic governance which is seen as a reflection of the power granted by the people to meet their aspirations, and none else. In essence, that means that the National Assembly cannot enact a general Law for the establishment of tribunals of inquiry for, and applicable in, the Federation of Nigeria. The power to enact such a law has become a residual matter for the States in respect of which the Houses of Assembly can legislate for their respective States by virtue of section 4(7)(a) of the 1999 Constitution .... . As the Federal Capital Territory is under the Jurisdiction of the Federal Government, the constitution of tribunals of inquiry for the territory has accordingly become a residual matter over which the National Assembly can Legislate as if the FCT Abuja were a State by virtue of sections 4(4)(b) and 299 of the 1999 Constitution.ò[page 24 paras A-H]

Per Ejiwunmi JSC (concurring)
ñé the National Assembly in its exercise of its legislative powers is limited by the provisions of the Constitution as the Constitution of 1999 did not make provision for the Tribunals of Inquiry as clearly shown in item 39 of the Exclusive List [of the 1963 Constitution]. In the absence of such provision, the National Assembly cannot pass a general law on Tribunals of Inquiry to affect the entire Federation. However, the National Assembly can pass such law with regard to the Federal Capital Territory. It remains to be said that under the 1999 Constitution, the establishment of Tribunals of Inquiry is now a residual matter, which only the States can promulgate.ò[page 62 paras G-I]

2. Compulsive Powers of Tribunals of Inquiry: Whether Constitutional
Sections 5(d) 11 (b), 11 (4) and 12 (2) of the Tribunals of Inquiry Act, under which a tribunal of inquiry may compel witnesses to testify and produce documents and impose a sentence of fine or imprisonment are void being in contravention of sections 35 and 36 of the Constitution of Nigeria 1999. Only duly constituted courts of justice may impose a sentence of fine or imprisonment.[page 30 paras D-E]

On the Record: Per Ejiwunmi, JSC (concurring)
ñé I must hold that the provisions of sections 5(c), 5(d) 10 and 11(3) of the Act which do not offend the provisions of Sections 35 and 36 of the Constitution are valid to the extent that they apply to the Federal Territory only. é The Court of Appeal was right in holding that sections 5(d) 11(1)(b), 11(4) and 12(2) are unconstitutional and invalid in so far as they purport to empower the Tribunal of Inquiry to impose a sentence of fine or imprisonment which is a power in contravention of and not in conformity with sections 35 subsection (1) (a) and 36 subsection (1) of the Constitutioné .ò[page 63 paras H-I, page 64 paras A-C]

Per Onu, JSC (concurring)
ñIt is worthy of note that the 1999 Constitution has made no provision for Tribunals of Inquiry as was very clear in item 39 of the Exclusive List and item 25 of the Concurrent List in the 1963 Constitution. Be it however, noted that the decision in Balewa v. Doherty based on the 1960 Constitution is a guidance to the fact that Regional (now state) legislature could legislate on matters not directly specified as an item in either the Exclusive or Concurrent Legislative List. Also it shows that there can be no giving of compulsive powers to the Commissions of Inquiries, for instance, to impose a sentence of fine or imprisonment in conflict with a constitutional provision which gives such powers to the Courts, as such will be invalid.ò[page 49 paras H-I, page 50 paras A-B]

7) 116
eration (2002) 6 NWLR (Pt. 763) 263
3. Attorney-General of Benue State v. Ogwu (1983) 4 NCLR 213
4. Attorney-General Imo State v. Attorney-General Rivers State (1983) 8 SC 10
5. Attorney-General of Lagos State v. Dosunmu (1989) ANLR (reprint) 504
6. Bamaiyi v. Attorney-General of the Federation (2001) 12 NWLR (Pt. 727) 468
7. Balewa v. Doherty (1963) 2 SCNLR 155
8. Din v. Attorney-General Federation (1988) 4 NWLR (Pt. 87) 147
9. Doherty v. Balewa (1961) 2 SCNLR 256
10. Governor of Kaduna State v. Kagoma (1892) 3 NCLR 1092
11. Ikine v. Edjerode (2001) 18 NWLR (Pt 745) 446

Nigerian Laws Referred to in the Judgement:
1. Constitution of the Federal Republic of Nigeria 1999, Section 42
2. Tribunals of Inquiry Act 1966, CAP 447 Laws of the Federation of Nigeria 1990

Representation:
1. O. Oyetibo Esq., (with him G. Ogokeh Esq.,) for the 3rd Defendant/Appellant
2. M.I.N. Duru Esq (DPP Federation) for the 1st and 2nd Defendants/Appellants
3. Chief Chris Uche (with him C.A.C. Nnadi Esq., A. Dimonye Esq and G.M. Obey Esq.,) for the Plaintiffs/Respondents

UWAIFO, JSC (Delivering the Leading Judgment): On 31 October, 2001, the Court of Appeal, Lagos Division, gave answers to questions set out in a reference made to it by the Federal High Court, Lagos under section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999. The questions are as follows:

1. Whether or not Tribunals of Inquiry Decree 1966 No. 41 took effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the Constitution of the Federal Republic of Nigeria 1999.

2. Whether or not sections 5(c), 5(d), 10, 11(1) (b), 11(3), 11(4) and 12 of the Tribunals of Inquiry Decree No. 41 (or any of them) are constitutional and valid or contravene section 35 or 36 of the Constitution of the Federal Republic of Nigeria 1999.

The answers given by the Court of Appeal provoked the two appeals with which I shall deal in this judgment. Before I come to those answers, I state some relevant facts of the case. The President of the Federal Republic of Nigeria constituted a Judicial Commission of Inquiry (the Commission) for the investigation of human rights violation in Nigeria. It was by a Statutory Instrument No.8 of 1999(later amended by a Statutory Instrument No. 13 of 1999) which states that it was made by Mr. President in exercise of the powers conferred on him by section 1 of the Tribunals of Inquiry Act 1996, now to be found in Cap. 447 Laws of the Federation of Nigeria 1990, (the Act) and of ñall other powersò enabling him in that behalf. The Commission was composed of eight members under the Chairmanship of the Honourable Justice Chukwudifu Oputa JSC (Rtd) who was made the 1st defendant to the two actions brought to contest the validity of the Act and certain actions taken by the Commission. The appellant in one of the appeals ï Chief Gani Fawhinimi ï was, upon application by him, joined as the 3rd defendant in the actions. The Commission was given terms of reference which were that it shall -
ñ(a) ascertain or establish the causes, nature and extent of human rights violations or abuses with particular reference to all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria between the 1st day of January 1984 and the 28th of May 1999;

(b) identify the person or persons, authorities, institutions or organizations which may be held accountable for such mysterious deaths, assassinations or attempted assassinations or other violations or abuses of human rights and determine the motives of the violations or abuses, the victims and circumstances thereof and the effect on such victims or the society generally of the atrocities;

(c) determine whether such abuses or violations were the product of deliberate State policy or the policy of any of its organs or institutions or whether they arose from abuses by State officials of their office or whether they were the acts of any political organisations, liberation movements or other groups or individuals;

n whether judicial, administrative, legislative or institutional to redress all future violations or abuses of human rights;

(e) make any other recommendations which are, in the opinion of the Judicial Commission, in the public interest and are necessitated by the evidence.ò

In the course of the inquiry, the Commission issued summonses for service on persons to testify as witnesses, among whom were the plaintiffs. The plaintiffs resisted being compelled to attend as witnesses. They proceeded to court instead. In the originating summons by one of them ï Brig. General A. K. Togun (Rtd) ï he stated his claim as follows:
ñ(i) A declaration that the Tribunals of Inquiry Act, 1966 No. 41 is not an enactment on any matter with respect to which the National Assembly is empowered to make laws under the Constitution of the Federal Republic of Nigeria, 1999, and it accordingly took effect as a law enacted by the House of Assembly of a State.

(ii) A declaration that it is not lawful for the 1st or 2nd Defendant to summon the Plaintiff to appear before it to testify or to produce documents.

(iii) An order of prohibition prohibiting the 1st and 2nd defendants, their servants and agents whosoever or howsoever from ï
(a) sitting as a body empowered to exercise powers of functions claimed to be conferred upon it pursuant to the Tribunal of Inquiries Act, Cap. 447, Laws of the Federation of Nigeria of exercising any of the aforementioned powers.

(b) using the powers conferred or purported to be conferred on him or them by the Tribunal of Inquiry Act, 1966, to compel the Plaintiff to attend a sitting of the 2nd defendant body to answer questions or to produce documents.ò

The Federal High Court sitting in Lagos, presided over by Belgore, C.J., made the reference in question to the Court of Appeal. In the leading judgment delivered by Oguntade JCA with which Obadina and Nzeako JJCA concurred, the following answers were given:

ñAnswer to Question 1
Cap. 447 was promulgated as Decree No. 41 of 1966 by the Federal Military Government in 1966. Being an enactment of the Federal Military Government, it took effect on 28 -5 - 99 as an existing law pursuant to Section 315 of the 1999 Constitution. As such existing law, it needed to be brought into conformity with the 1999 Constitution of Nigeria by the appropriate authority, who is Mr. President. Appropriate authority has failed and or neglected to make textual modification in the said Cap. 447 as would bring it in conformity with the 1999 constitution as provided under Section 315 of the same Constitution. Only the President, as the appropriate authority can make such textual modification. Even if this court is aware of what needs to be done, the best efforts of this court would amount to no more than merely speculation. In any case, the court is without the jurisdiction to exercise a power reserved in the Constitution for only Mr. President as the appropriate authority.

Question No. 2
Arising from my observations above in the answer to question1, the inevitable conclusion to be arrived at in relation to question No. 2 is that Sections 5(c), 10, 11 (1) (b), 11(3), 11(4), and 12 (altogether collectively referred to as ôthe compulsive powers under Cap. 447) are unconstitutional, invalid and contravene Section 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999.

It only remains for me to add that the invalidity and or unconstitutionality of sections 5(c), 10, 11(1)(b), 11(3), 11(4) and 12 of Cap. 447 arises from the fact that as the said provisions were made in excess of the Legislative competence of the National Assembly, they could not be relied upon as basis to supplant or infract the rights enshrined in section 35 or 36 of the 1999 Constitution of the Federal Republic of Nigeria.ò[Note: Section 5(d) was inadvertently omitted.]

In his appeal against the judgment, Chief Gani Fawhinmi (hereinafter referred to as the 3rd defendant/appellant) has set down three issues for determination as follows:

judgment go beyond the answer required for the first question

(2) Assuming [but without conceding] that the answer provided by the Court of Appeal to the first question was not excessive, whether the said answer is accurate enough to meet the requirements of section (295)(2) of the 1999 Constitution.

(3) Whether the Court of Appeal was right in holding that sections 5(c), 10, 11(1) (b), 11(3), 11(4) and 12 of the Tribunals of Inquiry Act contravene section 35 or 36 of the 1999 Constitution and therefore are unconstitutional and invalid.ò[Note section 5(d) was inadvertently omitted.]

I may as well say here that the appellants in the second appeal, namely, the 1st and 2nd defendants / appellants, jointly raised two issues for determination thus:

ñ1. Whether or not the Court of Appeal was right in holding that the Tribunals of Inquiry Act Cap 447 is an existing law and that sections 5(c), 10, 11 (1) (b), 11(3), 11(4) and 12 of the same Act were invalid for not having been brought into conformity with section 315 of the 1999 Constitution of the Federal Republic of Nigeria? [Note: section 5(d) was inadvertently omitted.]

2. Whether or not the Court of Appeal was right in holding that sections 5(c), 5(d), 10, 11(1) (b), 11(3), 11(4) and 12 altogether collectively referred to as the compulsive powers under Cap 447 are unconstitutional, invalid and contravene sections 35 and 36 of the Constitution of the Federal Republic of Nigeria 1999?ò

Sections 35, 36 and 315 of the 1999 Constitution and sections 5(c), 5(d), 10, 11(1)(b), 11(3), 11(4) and 12 of the Act are the relevant provisions to be considered in these appeals. The constitutional provisions read as follows:

ñ35.- (1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law -

(a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty:

36. - (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.

315. ï (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be -

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws.

(2) The appropriate authority may at any time by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.ò

The relevant sections of the Act provide thus:
ñ5. Subject to the provisions of this Act, a tribunal shall have and may exercise any of the following powers that is to say -

(c) the power to summon any person in Nigeria to attend any meeting of the tribunal to give evidence or produce any document or other thing in his possession and to examine him as a witness or require him to produce any document or other thing in his possession, subject to all just exceptions. Summons issued under this paragraph

and shall be served by the police or by such person as the members

(d) the power to issue a warrant to compel the attendance of any person who, after having been summoned to attend fails or refuses or neglects to do so and does not excuse such failure or refusal or neglect to the satisfaction of the tribunal, and to order him to pay all costs which may have been occasioned in compelling his attendance or by reason of his failure or refusal or neglect to obey the summons, and also to fine such person a sum not exceeding twenty Naira, such fine to be recoverable in the same manner as a fine imposed by a magistrate's court. A warrant issued under this paragraph may be in Form B in the Schedule to this Act and may be executed by any member of the Police force and by any person authorized by an area or customary court, or local government authority to effect arrests.

10. Any person who, after service on him of a summons to attend as a witness or to produce a book, document or any other thing and, notwithstanding any duty of secrecy however imposed, fails or refuses or neglects to do so or to answer any question put to him by or with the concurrence of the tribunal shall be guilty of an offence, and liable on summary conviction to a fine of two hundred naria or to imprisonment for a term of six months:

Provided that no person shall be bound to incriminate himself and every witness shall, in respect of any evidence written by him for or given by him before the members, be entitled to the same privilege to which he would have been entitled if giving evidence before a court of justice.

11.(1) Any person who commits an act of contempt, whether the act is or is not contempt in the presence of the members sitting in an inquiry, shall be liable -

(b) on the order of the tribunal to a fine of twenty naira, such fine being recoverable in the same manner as if it were imposed by a magistrate.

11.(3) Where an act of contempt is alleged to have been committed but not in the presence of the members sitting in an inquiry, the tribunal may by summons in Form C or to the like effect in the Schedule to this Act require the offender to appear before the tribunal, at a time and place specified in the summons, to show cause why he should not be judged to have committed an act of contempt and be dealt with accordingly. Summonses issued under this subsection shall be served by the police or by such other person as the tribunal may direct.

11.(4) If any person who has been summoned in accordance with subsection(3) of this section fails or refuses or neglects to attend at the time and place specified in the summons, the tribunal may issue a warrant in Form D or to like effect in the Schedule to this Act to compel the attendance of such person to pay all costs which may have been occasioned in compelling his attendance or by his failure or refusal or neglect to obey the summons, and may in addition fine such person a sum of twenty naira, such costs and fine to be recoverable in the same manner as if they were imposed by a magistrate's court.

12.(1) For the purposes of section 11 of this Act, the following shall be deemed to be an act of contempt ï

(a) any act of disrespect and any insult or threat offered to a tribunal or any member thereof while sitting in a tribunal;

(b) any act of disrespect and any insult or threat offered to a member at any other time and place on account of his proceedings in his capacity as a member;

(c) any publication calculated to prejudice an inquiry or any proceedings therein.

(2) No punishment for contempt shall be imposed by a tribunal until the members shall have heard the offender in his defence.ò

Similar provisions were considered by both the Federal Supreme Court: See Doherty v. Balewa (1961) 2 SCNLR 256, and the Privy Council: see Balewa v. Doherty (1963) 2 SCNLR 155. In that case, the sections which empowered the Commission of Inquiry to impose a sentence of fine or imprisonment were declared void being in

nstitution which forbade a deprivation of personal liberty by any order situation has arisen in the present case as regards violation of itution.

Mr. Oyetibo, learned counsel for the 3rd defendant / appellant, contends with particular reference to the answer to question No. I given by the court below, as already quoted in this judgment, that it was not only a rigmarole but also a contradiction in itself, and was wrong. He submits that the Court of Appeal did not answer the questions referred to it. It did not say, according to him, whether or not the Act took effects as an Act passed by the National Assembly but that from an erroneous and inadequate approach went to what could be no part of the answer, namely, that Mr. President had failed and / or neglected to make modification in the text of the Act. He contends that the court should simply have answered the questions and had no jurisdiction to rehear the case, citing by analogy Bamaiyi v. Attorney-General of the Federation (2001) 12 NWLR (Pt.727) 468. He says while the first two sentences of the first answer were direct enough, the remaining part of the answer went astray and introduced a confusion to the earlier part. His further submission as contained in the brief of argument is that ï

ñNo question was referred to the Court of Appeal as to who was the appropriate authority in respect of Decree No. 41 of 1966 and whether or not the appropriate authority has made necessary textual modification to the said Cap. 447 as would bring it in conformity with the 1999 Constitution as provided in section 315 of the Constitution. It must be noted that the question whether or not textual modification has been made to a particular law by the appropriate authority is one of fact or at best mixed law and fact. A party who wishes to prove such a fact would necessarily have to tender the relevant gazette in proof of that fact or the court would, by virtue of section 74 (1)(b) of the Evidence Act, have to take judicial notice of (the) same.ò

Learned counsel for the plaintiffs / respondents, Chief Uche, has argued that it was not expected and it would not have been enough that the Court of Appeal should give an answer to question No. 1 and stop short of answering whether or not the Act is also ña law with respect to any matter on which the National Assembly is empowered by the Constitution to make laws.òHe then concluded that ñthe Court of Appeal was correct in deciding that in the absence of necessary modification or textual amendment of the Tribunals of Inquiry Decree by the President, the Decree did not take effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the 1999 Constitution.ò

The learned Director of Public Prosecutions, Mr. Duru, who is counsel for the 1st and 2nd defendants / appellants, put up as his main argument that the court has no jurisdiction to question the validity of the Act which was promulgated by the Federal Military Government as a Decree i.e. Decree No.41 of 1966, citing such cases as Uwaifo v. Attorney-General, Bendel State (1982) 7 SC 124; Attorney-General Imo State v. Attorney-General Rivers State (1983) 8 SC 10; Din v. Attorney-General Federation (1988) 4 NWLR (Pt.87) 147; Attorney-General Lagos State v. Dosunmu (1989) ANLR (Reprint) 504. I think I should dispose of this misconceived submission off-hand which Chief Uche adequately replied to on behalf of the 1st and 2nd defendants / appellants. The cases cited do not fit into the facts of the present case. Section 6(6)(d) of the 1979 Constitution [then relevant and applicable but repeated still as s.6(6)(d) of the 1999 Constitution] was meant to protect the de jure authority and the integrity of the competence which the Military Government assumed to make laws for the country between 15 January, 1966 and 30 September, 1979 from being questioned in court. It has nothing to do with whether such laws, if still existing, cannot be considered by the court as to their consistency with the 1979 Constitution or any other law and therefore as to their validity. That was provided under section 274(3) of that Constitution thus:

ñ274. (3) Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say-

(a) any other existing law;
(b) a Law of a House of Assembly;
(c) an Act of the National Assembly; or
(d) any provision of this Constitution.ò

This provision is repeated in section 315(3) of the 1999 Constitution. Chief Uche cited Adisa v. Oyinwola (2000) 10 NWLR (Pt.674) 116 at 173 and Ikine v. Edjerode (2001) 18 NWLR (Pt.745) 446 at 475-476 to support his argument that the court's jurisdiction is accordingly preserved in that regard although, upon a perusal, I was unable to see the relevance of the former case cited.

ents' case submits that the Court of Appeal was expected to give a and not simply to restrict itself to a yes or no format in answering s that for the Act to be valid as an existing law, it must qualify as one which the National Assembly is capable of enacting under the 1999 Constitution, citing Governor of Kaduna State v. Kagoma (1982) 3 NCLR 1092; Attorney-General Benue State v. Ogwu (1983) 4 NCLR 213. His contention is that the Act is not an enactment within the competence of the National Assembly because there is no item concerning tribunal of inquiry in either the Exclusive or Concurrent Legislative List of the 1999 Constitution, and he relies on Attorney-General Abia State v. Attorney ï General Federation (2002) 6 NWLR (Pt.763) 263 at 457 ï 458. It is important to examine this contention closely because of its fundamental consequences to these appeals, and I certainly intend to do so. As to the constitutionality of some of the sections of the Act, he submits that those which confer compulsive powers on the tribunals of inquiry are inconsistent with sections 35 and 36 of the 1999 Constitution being an interference with the personal liberty of persons and therefore invalid, relying on Balewa v. Doherty (1963) 2 SCNLR 155.

It seems to me that if the status of the Act is not carefully examined from the background of the legislative powers conferred on the National Assembly to make laws by the 1999 Constitution, any process of reasoning in an attempt to answer the questions referred to the Court of Appeal is likely to be faulty. The court below failed to realise this, and as I shall show in the course of this judgment, it faltered in its answers to those questions. This occurred, I believe, because it took a fundamentally wrong approach in the first place and also, as partially pointed out by Mr. Oyetibo, with whom I agree, it introduced the element of failure of the appropriate authority to make textual modification to the Act when that did not necessarily arise from the reference in question No. 1. The answer to question No. 2, or more correctly the reasoning which led to the answer, was not quite satisfactory either. This was due to inadequate understanding, or improper application, of the decision in Balewa v. Doherty (1963) 1 WLR 949; (1963) 2 SCNLR 155.

Before dealing with some other submissions made before this court, it is pertinent to consider how it is the Constitution which has had the effect of restricting the powers of the Federal Government to set up a tribunal of inquiry in this country. I consider that as a useful preface to the proper decision of these appeals. In order to discuss the constitutional position in this regard, it is unnecessary to go beyond the 1960 Constitution. Under that Constitution, the powers of Parliament to make laws were given by section 64. The Schedule was divided into Parts I, II and III. Part 1 contained 44 items placed on the Exclusive Legislative List; Part II contained the Concurrent Legislative List of 28 items; while part III had 2 paragraphs under the heading ñInterpretationò which was common to both Parts I and II and dealt with incidental or supplementary matters. It was both item 44 under the Exclusive Legislative List and item 28 under the Concurrent Legislative List which were concerned with incidental or supplementary matter. Item 44, which was the last item on the Exclusive List, was stated thus:

ñ44. Any matter that is incidental or supplementary-
(a) to any matter referred to elsewhere in this list; or
(b) to the discharge by the Government of the Federation or any officer, court or authority of the Federation of any function conferred by this Constitution.ò

Paragraph 1 of Part 111 (Interpretation) was in the following terms:

ñ1. In this Schedule references to incidental and supplementary matters include, without prejudice to their generality-
(a) offences;
(b) the jurisdiction, powers, practice and procedure of courts of law;
(c) the compulsory acquisition and tenure of land; and
(d) the establishment and regulation of tribunals of enquiry.ò

As can be seen, the power to set up tribunals of inquiry was given under the 1960 Constitution both on the Exclusive List and Concurrent List. It was, however, not made a subject item but an incidental or supplementary matter on both Lists. It was in that state of the Constitution that the Commissions and Tribunals of Inquiry Act, 1961 was enacted. That Act purported to confer a general power on the Prime Minister to authorise the establishment of tribunals of inquiry into any matter within Federal competence. When a tribunal of inquiry was set up by the Prime Minister to inquire into the affairs of the National Bank of Nigeria, it led to litigation which ended in the Privy Council in the case reported as Balewa v. Doherty (1963) 1 WLR 949; (1963) 2 SCNLR 155.

y Act, 1961 under which the Prime Minister acted, was enacted ncidental or supplementary matter of the Exclusive List of the 1960 Federal Supreme Court on the point, observed that the object of the Act was to confer a blanket power on the Prime Minister to direct inquiries into any matters within Federal competence but said that this was improper because the legislative power conferred by Item 44 was not wide enough to authorise inquiries into subjects about which Parliament might have the competence to legislate, unless there was actual legislation in existence or a function of the Federal Government actually being discharged under the law relevant to and connected with the inquiry. Lord Devlin who delivered the judgment of the Privy Council observed further:

ñIt would indeed be quite natural for the Constitution to give to Parliament the power to establish a tribunal of inquiry into any matter about which it could legislate. But the simple and obvious way of doing that would be to add to the end of each legislative list an item such as 'the establishment and regulation of tribunals of inquiry into any of the above matters.' If there were an item in that form, a general Act authorising the establishment of tribunals of inquiry into any matter on the list might well be valid.ò

See (1963) 1 WLR at p. 960; (1963) 2 SCNLR at p. 168

It was this observation, it would appear, which led to the insertion in Item 39 on the Exclusive Legislative List and Item 25 on the Concurrent Legislative List of the 1963 Constitution, a subject item which read: ñTribunals of inquiry with respect to all or any of the matters mentioned elsewhere in this list.òIt was therefore without dispute that under that Constitution, Parliament could enact a general Act to empower the appropriate authority to institute a commission of inquiry into any matter mentioned in both the Exclusive and Concurrent Lists. As a result of that constitutional provision, the Tribunals of Inquiry Act, 1966 (now in question) which was promulgated by the Federal Military Government as Decree No.41 of 1966 within its very wide powers, could validly have been enacted as an Act by a National Assembly operating under the 1963 Constitution, although, as I shall show later, only to the extent the very terms of the constitutional provision allowed.

The provision for the establishment and regulation of tribunals of inquiry made in the 1960 Constitution created limited scope for the institution of tribunals because it was a power given to Parliament to enact any relevant law only as an incidental or supplementary matter. That was the cause of the difficulty the Prime Minister faced in not being able, in pursuance of the Act passed under such constitutional provision, to institute a commission of inquiry to investigate the activities of the National Bank of Nigeria, even though banking was an item under the Exclusive List. That difficulty could not be surmounted notwithstanding the wide powers section 3(1) of the 1961 Act purported to confer on the Prime Minister as follows:

ñ3(1) The Prime Minister may, whenever he shall deem it desirable, issue a Commission appointing one or more Commissioners, or any quorum of them that may therein be mentioned, to hold a Commission of Inquiry into any matter or thing within or affecting the general welfare of the Federal Territory [of Lagos], or into any matter or thing within Federal competence anywhere within the Federation, in respect of which in his opinion, an inquiry would be for the public welfare, or into the conduct of any chief or the management of any department of the public service. The Prime Minister may also appoint a secretary to the Commission who shall perform such duties, as the Commissioners shall prescribe.ò[Square brackets supplied]

There was no dispute as to the power under the Act relating to the Federal territory of Lagos which was then the sole responsibility of the Federal Government which, if I may say, was exercised under its residual powers over Lagos. The problematic issue was whether the incidental or supplementary powers in Item 44 were wide enough to enable Parliament to enact a legislation for the whole Federation in terms of the Act, including the giving of compulsive powers to the Commissioners to take evidence on oath, to compel the attendance of witnesses and the production of documents. The initial approach of the Privy Council to that problem was stated by Lord Devlin when he observed inter alia thus:-
ñSince banking is a subject within Item 43 of the Exclusive List, it must be beyond doubt that Parliament has power to provide for an inquiry in some form into banking. But their Lordships do not have to decide whether if Parliament had authorised directly an inquiry on the same terms as the Prime Minister did on July 21, 1961, by Government Notice No. 1446, the legislation would have been good or bad é But their Lordships are not considering any specific legislation. They are concerned with a statute which confers upon the appellant, the Prime Minister of the Federation, wide powers to set up commissions or tribunals of inquiry generally. It is upon the validity of the statute that the appellant's action in ordering an inquiry into the affairs of the Bank of Nigeria (sic) depends. That is why

to note that baking is a Federal subject but have had to study the
ution gives to Parliament.ò

See Balewa v. Doherty (1961) 1 WLR at p. 953; (1961) 2 SCNLR at pp. 161-162

The Privy Council in that case in the answers they gave to the questions finally decided ï
(1) that the Act of 1961 was not within the competence of the legislative power of the Federal Parliament in so far as section 8(a), (b), (c), and (d) purported to have effect in relation to matters and things within Federal competence anywhere within the Federation. [Note: The section cited is similar to section 5(a), (b), (c), and (d) of the Act of 1966 in question in these appeals].

(2) that section 3(4) of the said Act was void. [Note: The section is similar to section 1(1) of the Act of 1966].

(3) that section 8(c) was valid in so far as it purported to have effect in relation to matters or things within or affecting the general welfare of the Federal Territory of Lagos. SecStions 8(d), 15(a) and 18(1)(b) were declared void to the extent that they empowered the Commissioners to impose a sentence of fine or imprisonment [Note: The power given in section (15(a) of the 1961 Act which empowered the tribunal to impose a penalty on a person for failing to give evidence was removed from section 10 of the 1966 Act. Section 18(1)(b) of the 1961 Act is similar to Section 11(1) (b) of the 1966 Act].

In essence the Act of 1961 was held valid in so far as it authorised tribunals or commissions of inquiry with compulsive powers (other than power to impose a sentenced of fine or imprisonment) in relation to any matter or thing within or affecting the general welfare of the Federal Territory of Lagos only. But it was held not to be within the competence of the legislative power of the Federal Parliament to enact that Act with compulsive powers to Commissioners to compel the attendance of witnesses so as to testify and/or produce documents in relation to any matter within federal competence not restricted to the Federal Territory of Lagos. It goes without saying that the Tribunals of Inquiry Act, 1966 cannot fare any better under the 1999 Constitution.

But as I have said, under the 1963 Constitution the said Act would be valid subject, of course, to any aspect of it that may be regarded unconstitutional. The power of the President to constitute a tribunal of inquiry is provided in section 1(1) of the Act, and it reads:

ñ1. (1) The President (hereinafter in this Act referred to as ó the proper authority' may, whenever he deems it desirable, by instrument under his hand (hereafter in this Act referred to as ó the instrument') constitute one or more persons (hereafter in this Act referred to as ó member' or ó members') a tribunal to inquire into any matter or thing or into the conduct or affairs of any person in respect of which in his opinion an inquiry would be for the public welfare; and the proper authority may by the same instrument or by an order appoint a secretary to the tribunal who shall perform such duties as the members shall prescribe.ò[Emphasis mine]

I draw attention to the emphasised part of section 1(1). When this is related to Item 39 of the Exclusive Legislative List and Item 25 of the Concurrent Legislative List of that Constitution which provided explicitly for ñTribunals of Inquiry with respect to all or any of the matters mentioned elsewhere in this listò, it would be seen that even under the 1963 Constitution, the powers conferred on the President by the said section 1(1) would be regarded too wide as it relates to the Federation as a whole. The consequence of that would be that the President could be prevented from setting up a tribunal of inquiry to look into any matter outside the then Federal Territory of Lagos (now to be taken as the Federal Capital Territory, Abuja) not permitted under either the Exclusive or Concurrent Legislative List no matter whether he was of the opinion that it was for the ñpublic welfareò. From the foregoing, it would appear plain that it is always a constitutional issue whether a statute which authorises the setting up of a tribunal of inquiry is valid or not, and the extent of its invalidity. First, there is the question whether there is a constitutional provision giving power to enact such a statute. Second, whether the statute has been enacted strictly within the purview of the constitutional provision conferring that power. Third, whether the tribunal of inquiry has been given a mandate within the contemplation of both the Constitution and the statute. If the power to enact the statute does not exist constitutionally, of course that is the end of the matter. The statute will have no validity. If the power exists but it has been exceeded because the statute is not in conformity with the Constitution, the statute is invalid except to the extent it can be made to conform. These are founded on basic constitutional principles. The power given to Parliament to make laws in regard to tribunals of inquiry as reflected in the Legislative Lists contained in the relevant provisions of the Schedule to the 1963 Constitution [Item 39 of the Exclusive Legislative List and Item 25 of the Concurrent Legislative List] was, for whatever reason, denied the National Assembly in both the 1979 and

Nigeria. Without such constitutional provisions, no valid law can be
a general nature, to apply throughout the Federation of Nigeria on
a tribunal or commission of inquiry. This is because no law not specifically authorised or backed up in our Constitution can be lawfully passed for the Federation of Nigeria by the Federal legislature. It is the limits set under relevant provisions of the Constitution that define and determine the frontiers of the laws that can be enacted. That is the hallmark of constitutional democratic governance which is seen as a reflection of the power granted by the people to meet their aspirations, and none else. In essence, that means that the National Assembly cannot enact a general law for the establishment of tribunals of inquiry for, and applicable in, the Federation of Nigeria. The power to enact such a law has become a residual matter for the States in respect of which the Houses of Assembly can legislate for their respective States by virtue of section 4(7)(a) of the 1999 Constitution which provides that:

ñ4(7). The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say-
(a) any matter not included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution.ò
As the Federal Capital Territory (FCT) Abuja is under the jurisdiction of the Federal Government, the constitution of tribunals of inquiry for the territory has accordingly become a residual matter over which the National Assembly can legislate as if the FCT Abuja were a State by virtue of sections 4(4)(b) and 299 of the 1999 Constitution, the provisions of which are as follows:
ñ4(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say-

(b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

299. The provisions of this Constitution shall apply to the Federal Capital Territory, Abuja as if it were one of the States of the Federation; and accordingly-

(a) all the legislative powers, the executive powers and the judicial powers vested in the House of Assembly, the Governor of a State and in the courts of a State shall, respectively, vest in the National Assembly, the President of the Federation and in the courts which by virtue of the forgoing provisions are courts established for the Federal Capital Territory, Abuja;

(b) all the powers referred to in paragraph (a) of this section shall be exercised in accordance with the provisions of this Constitution; and

(c) the provisions of this Constitution pertaining to the matters aforesaid shall be read with such modifications and adaptations as may be reasonably necessary to bring them into conformity with the provisions of this section.ò

I shall later discuss the effect of this on the Tribunals of Inquiry Act, 1966 and how it will lead to the resolution of the issues canvassed in these appeals and the questions referred to the court.

Mr. Oyetibo on behalf of the 3rd defendant/appellant has made a number of further submissions which I ought to briefly deal with. First, he cautions against reliance on the decision in Balewa v. Doherty (supra). It would appear the reason for this, from his argument, is that the case was decided on the basis of the legislative power of the Federal Parliament as it stood under the 1960 Constitution with particularreference to the Items contained in the Exclusive Legislative List; whereas the Exclusive Legislative List under the 1999 Constitution is more expansive than that of the 1960 Constitution. I am afraid, with due respect to learned counsel, that there is no substance in this argument which obviously seems to miss the constitutional highlight in the Balewa v. Doherty decision both in the Federal Supreme Court and the Privy Council. What is relevant is the extent of the power, if any, conferred under the Constitution on the National Assembly (or Parliament) to enable it to enact a general law for the establishment and regulation of tribunals of inquiry. This will not necessarily depend on the length or expansiveness of the Legislative Lists. Admittedly, whether the Lists are long or short, nothing prevents the legislature from enacting a law or laws directed at enabling or authorising the holding of an inquiry or inquiries into a particular Item or Items on the Lists. But in order to have a general law for that purpose, there ought to be an Item in itself on the Exclusive List or Concurrent List or both. That was not quite available in the 1960 Constitution because what was provided in the Lists was under incidental or supplementary matter. This inadequacy was

have already given full consideration to this earlier in this judgment. I uide which this court is bound to follow.

The second submission of learned counsel for the 3rd defendant / appellant which I wish to discuss is that the Commission in question was properly set up under ñHuman Rightsò and, according to him, this is one of the matters on which the National Assembly is empowered to legislate. He drew attention to the power of the National Assembly under section 4 subsection (2) of the 1999 Constitution to make laws and then referred in particular to subsection 4(b) which provides that in addition the National Assembly shall have power to legislate on ñany other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.ò Relying thereafter on Item 67 of the Exclusive Legislative List which provides for ñAny other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitutionò, the argument continued that one of such matters is ñHuman Rightsòfor which the Constitution makes provision in section 12(2). I think it will make for better understanding to reproduce section 12(1) and (2) as follows:
ñ12-(1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.ò

Learned counsel argued that the African Charter on Human and Peoples' Rights is a treaty which this country has enacted into law now in Cap. 10 Laws of the Federation of Nigeria 1990. He relied on Articles 1 and 62 of the Charter which, inter alia, require member/party States to adopt legislative or other measures to give effect to the rights and freedoms recognised and guaranteed in the Charter, and to submit a report every two years on this. All this argument was intended to support the position taken by the 3rd defendant/appellant that the Commission being in essence an aspect and in furtherance of human rights obligation of Nigeria, it was constitutionally empowered under the Tribunals of Inquiry Act, 1966, or under ñother measures to give effect to the rights and freedomsò enshrined in the Charter.

I do not think the argument has carried the matter any further. It has not been shown that the 1966 Act is wholly valid under the 1999 Constitution in the sense that the National Assembly can validly enact it as it is to operate throughout the Federation of Nigeria. Unless that was shown, the Commission cannot be said to be constitutionally empowered for the assignment it was given purportedly under that Act. Even assuming that ñHuman Rightsòwas an Item or a matter on which the National Assembly can legislate for the Federation, the position would still remain that there would need to be an Act enacted by the National Assembly to authorise an inquiry into Human Rights of the nature the Commission in question was meant to accomplish. But if, as learned counsel seemed to have placed emphasis in his oral submission, the Commission could as well be set up through ñother measuresòto give effect to human rights, I can only say that that might be a possibility except that such a Commission, without an appropriate legislation backing it, would have no inquisitorial powers but would be a powerless body set up by ordinary ministerial act to seek and receive information from anyone willing to offer it: see Balewa v. Doherty (1963) 2 SCNLR at p. 166.

The other submission by learned counsel, Mr. Oyetibo, is that the Commission was endowed with compulsive powers to obtain evidence from witnesses because ñEvidenceòis among the Items on which the National Assembly has legislative powers and that ñSections 10, 11 and 12 of the 1966 Act are matters incidental to matters of ôevidence' and therefore are covered by section 4(2) and item 68 of the Exclusive Legislative List of he Constitution.òI do not find this contention tenable. It is true that ñEvidenceòis under the Exclusive Legislative List (Item23) so that it is only the National Assembly that the Constitution gives authority to look into all matters concerning ñEvidenceòas a subject and to enact a law establishing the nature of evidence that can apply throughout the Federation in any competent court of law bound by the strict rule of evidence, and be able to amend it as it considers fit. Such evidence is applicable and enforceable in such court or other body which, under the Constitution, may be empowered to impose an obligation on any person to testify before it. But it must first be shown that a body (such as a tribunal of inquiry wishing to exercise authority to receive evidence) which wishes to compel evidence to be given before it was set up under a law that was validly enacted and which law entitles it to do so.

The submission of Mr. Oyetibo, as I understand it, was that because under the 1999 Constitution, the National Assembly can legislate on ñEvidenceòas a subject under item 23, there can be no complaint about the compulsive powers contained in the 1966 Act for a tribunal of inquiry to call for evidence. This was how he put it in the appellant's brief of argument inter alia:

tion 4(2) and Item 23 of the Exclusive Legislative List of the 1999 to legislate on óevidence.' It has also been shown that by virtue of power to constitute a Commission of Inquiry into matters referred to in the Exclusive Legislative List with respect to which National Assembly could legislate. It will now be shown that the compulsive powers complained of in this case come within the purview of óEvidence' with respect to which the National Assembly is authorised to make laws for the Federation. It is respectfully submitted that the compulsive powers contained in section 5(1)(a), (b), (c), (d) and (g) of the 1966 Act are strictly speaking matters relating to óevidence' and are therefore covered by section 4(2) and item 23 of the Exclusive Legislative List of the 1999 Constitution whilst the provisions contained in sections 10, 11 and 12 of the Act are matters incidental to matters of óevidence' and therefore are covered by section 4(2) and item 68 of the Exclusive Legislative List of the Constitutionò

In view of what I have said above, this submission is completely flawed as a red herring. It is not in dispute that the National Assembly has power to legislate on óevidence' as a subject. That is not in issue here, nor is the law of Evidence. What is in dispute in the said section 5 of the 1966 Act is whether the Commission is properly empowered thereunder to compel witnesses to testify and produce documents. That has nothing to do with the power of the National Assembly to legislate on óevidence'. It has to do with whether the National Assembly has power at all under the 1999 Constitution to enact a law of the type of the 1966 Act which confers certain compulsive powers on commissions of inquiry. To resolve the dispute depends principally to what extent the said Act is valid vis-à-vis the 1999 Constitution. It is that which must decide the power Mr. President can exercise under it and the jurisdiction of the Commission both operationally in regard to the subject matter and territorially in regard to areas outside the Federal Capital Territory, Abuja.

When it is remembered that the 1999 Constitution has made no provision for tribunals of inquiry as did the 1963 Constitution in Item 39 of the Exclusive List and Item 25 of the Concurrent List, it follows that, to repeat myself on the point, the power to make a general law for the establishment and regulation of tribunals of inquiry in the form of the Tribunals of Inquiry Act 1966 is now a residual power under the 1999 Constitution belonging to the States. However, in regard to the Federal to Capital Territory Abuja, the power resides in the National Assembly. The failure of the Court of Appeal to appreciate the absence of that constitutional provision from the 1999 Constitution and to reach these conclusions, led it to give answers to the questions referred to it by the Federal High Court in a manner not entirely satisfactory, in particular by introducing the question of Mr. President not having brought the Act in conformity with the Constitution.

Having regard to what I have discussed above, the issues which have arisen in the two appeals will now have to be resolved. I start with the issues raised by the 3rd defendant/appellant for determination.

Issue No. 1
The Court of Appeal went beyond the answer required for the first question referred to it by the Federal High Court. I would give the answer to the question from what I have considered above as follows:

The Tribunals of Inquiry Act, 1966 promulgated by the Federal Military Government for the entire federation under the enabling laws is an existing law pursuant to section 315 of the 1999 Constitution and is deemed to be an Act enacted by the National Assembly for the Federal Capital Territory Abuja only and a Law enacted by a State House of Assembly under the residual powers of both legislatures. This is because the National Assembly has no power under the 1999 Constitution to enact a general law on tribunals of inqury in the form of the said Act to have effect throughout the Federation of Nigeria.

Issue No. 2
Having regard to the above-stated answer, this issue has been rendered unnecessary.

Issue No. 3
The Court of Appeal was right that sections 5(d), 11(1)(b), 11(4) and 12(2) of the Act are unconstitutional and invalid in so far as they purport to empower a tribunal of inquiry to impose a sentence of fine or imprisonment in contravention of sections 35(1)(a) and 36(1) of the 1999 Constitution. But the court was wrong to declare sections 5(c), 10 and 11(3) of the Act unconstitutional and invalid.

The two issues for determination raised by the 1st and 2nd defendant / appellants being substantially the same as the issues answered above are accordingly so resovled.

e said to have succeeded in part. In the event, I make no order for

UWAIS, CJN: Two suits were instituted in the Federal High Court, Lagos. The first suit which was numbered as FHC/L/CS/1158/2000 was brought by Brigadier-General A. K. Togun (Rtd.) as plaintiff against the 2nd and 3rd Appellants herein as 1st and 2nd defendants respectively. The second suit, numbered as FHC/L/CS/1163/2000 was instituted jointly by the 1st and 3rd Respondents, herein as 1st and 2nd plaintiffs respectively against the same parties (defendants) as in the first case. Pursuant to application by the 1st Appellant in the trial court, he was joined as a defendant (i.e 3rd defendant) in each case by an order of the trial court. The two suits which were commenced each by originating summons were then consolidated as one.

The reliefs sought in each case were the same. They read as follows:-
ñ(i) A declaration that the Tribunals of Inquiry Act, 1966 No. 41 is not an enactment on any matter with respect to which the National Assembly is empowered to make laws under the constitution of the Federal Republic of Nigeria, 1999 and it accordingly took effect as a law enacted by the House of Assembly of a state.

(ii) A declaration that it is not lawful for the 1st and 2nd defendant to summon the plaintiff to appear before it to testify or to produce documents.

(iii) An order of prohibition prohibiting the 1st and 2nd defendants, their servants and agents whomsoever or howsoever from-
a) sitting as a body empowered to exercise powers or functions claimed to be conferred upon it pursuant to the Tribunal of Inquiries Act, Cap. 447, Laws of the Federation of Nigeria or exercising any of the aforementioned powers.

b) using the powers conferred or purported to be conferred on him or them by the Tribunals of Inquiry Act, 1996, to compel the plaintiff to attend a sitting of the 2nd defendant body to answer questions or to produce documents.ò

The grounds upon which the reliefs were sought read thus:-
(i) By the provisions contained in the Constitution of the Federal Republic of Nigeria, 1999 the National Assembly are conferred with power to make laws with respect to matters specifically mentioned in Section 4(2) and (4) of the said Constitution.
(ii) During a period of military regime, the Federal Military Government enacted the Tribunals of Inquiry Decree 1966 No. 41 pursuant to its power to make laws for the peace order and good government of Nigeria ñwith respect to any matter whatsoeverò as per the Constitution (Suspension and Modification) Decree which was then in force.

(iii) The aforementioned Tribunals of Inquiry Decree 1996 No. 41 was republished as Tribunals of Inquiry Act, Cap. 447, Laws of the Federation.

(iv) In the premises, at the end of the military regime in Nigeria in May 1999, the aforementioned Tribunals of Inquiry Act was an ñexisting lawòwithin the meaning of that expression in Sectiom 315 of the 1999 Constitution.

(v) No modifications have been made by the President of the Federal Republic of Nigeria in the text of the said Tribunals of Inquiry Act so as to bring the said Act into conformity with the 1999 Constitution as a law of the Federation.

(vi) As it stands the Tribunals of Inquiry Act is not a law on any matter with respect to which the National Assembly is empowered to make laws.

(vii) The 2nd defendant is a body set up in purported exercise of powers conferred on the President of the Federal Republic of Nigeria by the aforementioned Tribunals of Inquiry Act and the 1st Defendant is the Chairman of the said body.

he defendants have decided or purportedly decided to issue and
efore them and give evidence or produce documents.ò

During the proceedings in the Federal High Court the parties agreed that some constitutional questions should, pursuant to the provisions of section 295 subsection (2) of the Constitution of the Federal Republic of Nigeria, be referred to the Court of Appeal to answer. The Federal High Court (per Belgore, CJ) granted the request of the parties.
Section 295 subsection (2) provides:-
ñ(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.ò

The questions referred to the Court of Appeal were two. They read as follows:-

ñ1. Whether or not the Tribunals of Inquiry Decree 1966 No. 41 took effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the Constitution of the Federal Republic of Nigeria 1999.ò
2. Whether or not Sections 5(c), 5(d), 10, 11(1)(b), 11(3), 11(4) and 12 of the Tribunals of Inquiry Decree 1966 No. 41 (or any of them) are Constitutional and valid or contravene Section 35 or 36 of the Constitution of the Federal Republic of Nigeria 1999.ò

The Court of Appeal (Oguntade, Nzeako and Galadima, JJ.C.A.) answered the questions (per Oguntade, JCA) thus:-

ñAnswer to Question 1
Cap. 447 was promulgated as Decree No. 41 of 1966 by the Federal Military Government in 1966. Being an enactment of the Federal Military Government, it took effect on 28- 5 - 99 as an existing law pursuant to Section 315 of the 1999 Constitution. As such existing law, it needed to be brought into conformity with the 1999 Constitution of Nigeria by the appropriate authority, who is Mr. President. Appropriate authority has failed and or neglected to make textual modification in the said Cap. 447 as would bring it in conformity with the 1999 Constitution as provided under Section 315 of the same Constitution. Only the President, as the appropriate authority can make such textual modification. Even if this court is aware of what needs to be done, the best efforts of this court would amount to no more than merely speculation. In any case, the court is without the jurisdiction to exercise a power reserved in the Constitution for only Mr. President as the appropriate authority.

Question No. 2
Arising my observations above in the answer to question 1, the inevitable conclusion to be arrived at in relation to question No. 2 is that Sections 5(c), 10, 11 (1) (b), 11(3), 11(4), and 12 (altogether collectively referred to as the compulsive powers under Cap. 447) are unconstitutional, invalid and contravene Section 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999. [Note: Section 5(d) was inadvertently omitted].

t only remains for me to add that the invalidity and or unconstitutionality of sections 5(c), 10, 11(1) (b), 11(3), 11(4) and 12 of Cap. 447 arises from the fact that as the said provisions were made in excess of the Legislative competence of the National Assembly, they could not be relied upon as a basis to supplant or infract the rights enshrined in section 35 or 36 of the 1999 Constitution of the Federal Republic of Nigeria.ò
Not satisfied with the decision, the 1st Appellant appealed against it to this Court. Similarly the 2nd and 3rd Appellants jointly appealed also to this Court. The 1st Appellant formulated in his brief of argument three questions for us to determine. These are:-

ñ(1) Whether the Court of Appeal did not in its judgment go beyond the answer required for the first question referred to it by the Federal High Court.

(2) Assuming (but without conceding) that the answer provided by the Court of Appeal to the first question was not excessive, whether the said answer is accurate enough to meet the requirements of section (295)(2) of the 1999 Constitution.

olding that sections 5(c), 10, 11(1) (b), 11(3), 11(4) and 12 of the
or 36 of the 1999 Constitution and therefore are unconstitutional and

The 2nd and 3rd Appellants, for their part, formulated two issues for our determination, which read as follows:-

ñ1. Whether or not the Court of Appeal was right in holding that the Tribunals of Inquiry Act Cap. 447 is an existing law and that sections 5(c), 10, 11 (1) (b), 11(3), 11(4) and 12 of the same Act were invalid for not having been brought into conformity with section 315 of the 1999 Constitution of the Federal Republic of Nigeria?

2. Whether or not the Court of Appeal was Right in holding that sections 5(c), 5(d), 10, 11(1) (b), 11(3), 11(4) and 12 altogether collectively referred to as the compulsive powers under Cap. 447 are unconstitutional, invalid and contravene sections 35 and 36 of the Constitution of the Federal Republic of Nigeria 1999?ò

Now, I have read the judgment of my learned brother Uwaifo, JSC and I entirely agree with him that the appeal by the 1st Appellant succeeds in part and so also the appeal by the 2nd and 3rd Appellants.

While the Court below rightly held the Tribunals of Inquiry Act, Cap. 447 of the Laws of the Federation, is an existing law pursuant to the provisions of section 315 of the 1999 Constitution, it erred in going further to hold that the Act had not been modified by the President of the Federal Republic of Nigeria as provided by section 315 of the Constitution. The questions as formulated by the Federal High Court did not call for such decision.

With regard to the second question sections 35 and 36 of the 1999 Constitution deal with the fundamental rights to personal liberty and the right to fair hearing respectively. Sections 5(c), (d), 10, 11(1) (b), (3)and (4) and 12 of the Tribunals of Inquiry Act provide as follows:-
ñ5(c) the power to summon any person in Nigeria to attend any meeting of the tribunal to give evidence or produce any document or other thing in his possession and to examine him as a Witness or require him to produce any document or other thing in his possession, subject to all just exceptions. Summonses issued under this paragraph maybe in Form A in the Schedule to this Act, and shall be served by the police or by such person as the members may direct;

(d) the power to issue a warrant to compel the attendance of any person who, after having been summoned to attend fails or refuses or neglects to do so and does not excuse such failure or refusal or neglect to the satisfaction of the tribunal, and to order him to pay all costs which may have been occasioned in compelling his attendance or by reason of his failure or refusal or neglect to obey the summons, and also to fine such person a sum not exceeding twenty naira, such fine to be recoverable in the same manner as a fine imposed by a magistrate's court. A warrant issued under this paragraph may be in Form B in the Schedule to this Act and may be executed by any member of the Police force and by any person authorized by an area or customary court, or local government authority to effect arrests;ò

ñ10. Any person who, after service on him of a summons to attend as a witness or to produce a book, document or any other thing and, notwithstanding any duty of secrecy however imposed, fails or refuses or neglects to do so or to answer any question put to him by or with the concurrence of the tribunal shall be guilty of an offence, and liable on summary conviction to a fine of two hundred naira or to imprisonment for a term of six months:

Provided that no person shall be bound to incriminate himself and every witness shall, in respect of any evidence written by him for or given by him before the members, be entitled to the same privilege to which he would have been entitled if giving evidence before a court of justice.ò

ñ11. (1) Any person who commits an act of contempt, whether the act is or is not committed in the presence of the members sitting in an inquiry, shall be liable

(b) on the order of the tribunal to a fine of twenty naira, such fine being recoverable in the same manner as if it were imposed by a magistrate.ò

ñ(3) Where an act of contempt is alleged to have been committed but not in the presence of the members sitting in an inquiry, the tribunal may by summons in Form C or to the like effect in the Schedule to this Act require the

e and place specified in the summons, to show cause why he should ntempt and be dealt with accordingly. Summonses issued under this such other person as the tribunal may direct.ò

ñ12.(1) For the purposes of section 11 of this Act, the following shall be deemed to be an act of contempt ï
(a) any act of disrespect and any insult or threat offered to a tribunal or any member thereof while sitting in a tribunal;
(b) any act of disrespect and any insult or threat offered to a member at any other time and place on account of his proceedings in his capacity as a member;

(c) any publication calculated to prejudice an inquiry or any proceedings therein.

(2) No punishment for contempt shall be imposed by a tribunal until the members shall have heard the offender in his defence.ò

As can be seen all these provisions of the Act contain elements of compulsion and infraction of the fundamental rights specified under sections 35 and 36 of the Constitution. The question is: is the Tribunals of Inquiry Act in conformity with the Constitution in those respects? In the Privy Council decision of Balewa v. Doherty, (1963) 1 WLR 949 at p. 960 it is stated that it would be natural for the Constitution to give the National Assembly the power to establish a tribunal of inquiry into any matter about which it could legislate, and the simple and obvious way to do so was to add to the items under the Exclusive Legislative List the subject of establishment and regulation of inquiry into any subjects of the Exclusive Legislative List. Under the 1999 Constitution there is no such item. Consequently, the National Assembly has no power to legislate a general law, such as the Tribunals of Inquiry Act, Cap. 447. It may be argued that the Act does not wholly meet the provisions of section 315 subsection (1) (a) of the Constitution which provides:-
ñ315. (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provision of this constitution and shall be deemed to be ï

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; andò

However, by the provisions of section 4 subsection (7) of the 1999 Constitution, the House of Assembly of a State has the power to make laws for the peace order and good government of the State with respect to matters not included in the Exclusive Legislative List. Since the establishment of Tribunals of Inquiry is not a subject under the Exclusive Legislative List, it seems to me that a State House of Assembly has the power to enact the Tribunals of Inquiry Act, Cap. 447 and therefore the Act qualifies as an ñexisting lawò under section 315 subsection (1)(b) of the 1999 Constitution and is valid as a State Law.

Section 299 of the Constitution provides ï
ñ299. The provisions of this Constitution shall apply to the Federal Capital Territory, Abuja as if it were one of the States of the Federation; and accordingly-

(a) all the legislative powers, the executive powers and judicial powers vested in the House of Assembly, the Governor of a State and in the courts of a State shall, respectively, vest in the National Assembly, The President of the Federation and in the courts which by virtue of the foregoing provisions are courts established for the Federal Capital Territory, Abuja;

(b) all the powers referred to in paragraph (a) of this section shall be exercised in accordance with the provisions of this Constitution; and

(c) the provisions of this Constitution pertaining to the matters aforesaid shall be read with such modifications and adaptations as may be reasonably necessary to bring them into conformity with the provisions of this section.ò

It follows that the National Assembly has the power to enact the Tribunals of Inquiry Act, Cap. 447 in so far as it operates in the Federal Capital Territory only. To this limited extent, the Act is an ñexisting lawò under the provisions of section 315 of the Constitution. However, this does not make the Act operative throughout Nigeria as

ng summons to be served outside the Federal Capital Territory, for

It is clear therefore, that though the Tribunals of Inquiry Act is an ñexisting law,ò its application is limited and has no general application. I therefore hold that the provisions of sections 5(c), (d); 10; and 11 (3) of the Tribunals of Inquiry Act which do not offend the provisions of sections 35 and 36 of the Constitution are valid to the extent that they apply to the Federal Capital Territory only.

Finally, in answer to the issues raised by all the Appellants for our determination I state as follows:-

(1) The Court of Appeal went in its judgment beyond the answer required for the first question referred to it by the Federal High Court.

2) In view of the foregoing answer, the second question raised by the second issue for determination formulated by the 1st Appellant in the alternative does not arise.

(3) The Court of Appeal was right in holding that sections 5(d), 11(1) (b), 11(4) and 12 (2) are unconstitutional and invalid in so far as they purport to empower the Tribunal of Inquiry to impose a sentence of fine or imprisonment, which is a power in contravention of and not in conformity with sections 35 subsection (1) (a) and 36 subsection (1) of the Constitution. On the other hand, Sections 5(c), 10 and 11(3) of the Tribunals of Inquiry Act, are constitutional and valid in so far as they apply to the Federal Capital Territory.

In the result both appeals succeed in part. I make no order as to costs. Each party shall bear its costs.

KUTIGI, JSC: This is an appeal against the judgment of the Court of Appeal holden at Lagos in respect of a constitutional reference of two questions made to it by the Federal High Court, Lagos under Section 295 (2) of the 1999 Constitution as follows-
ñ1. Whether or not the Tribunal of Inquiry Decree No. 41of 1966 took effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the Constitution of the Federal Republic of Nigeria 1999.

2. Whether or not section 5(c), 5(d), 10, 11(1)(b), 11(3), 11(4) and 12 of the Tribunal of Inquiry Decree No. 41 of 1966 (or any of them) are Constitutional and valid or contravene section 35 or 36 of the constitution of the Federal Republic of Nigeria 1999.ò

The Court of Appeal in its judgment answered the two questions and which answers may be summarised thus-

Question 1. The Tribunal of Inquiry Act (Decree No. 41 of 1966) took effect as an existing law but it needed to be brought into conformity with the 1999 constitution by the appropriate authority who is Mr. President of the Federal Republic of Nigeria. The appropriate authority has failed and or neglected to make textual modification to the said Act to bring it into conformity with the Constitution as provided under section 315 of the same Constitution.

Question 2. Sections 5(c), 10, 11(1)(b), 11(3), 11(4) and 12 of the Act (collectively referred to as the compulsive powers under cap. 447) are unconstitutional, invalid and contravene section 35 or 36 of the Constitution as the said provisions were made in excess of the legislative competence of the National Assembly.

Being dissatisfied with the judgment of the Court of Appeal, the 3rd Defendant has appealed to this Court. He raised three issues-

ñ(i) Whether the Court of Appeal did not in its judgment go beyond the answer required for the first question referred to it by the Federal High Court.

(ii) Assuming (but without conceding) that the answer provided by the Court of Appeal to the first question was not excessive, whether the said answer is accurate enough to meet the requirements of section 295(2) of the 1999 Constitution.

holding that sections 5(c.), 10, 11(1)(b), 11(3), 11(4) and 12 of the or 36 of the 1999 Constitution and therefore are unconstitutional and invalid.ò

The 1st and 2nd Defendants who also appealed filed a joint brief of argument and raised two issues for determination thus-

ña Whether or not the Court of Appeal was right in holding that the Tribunal of Inquiry Act cap. 447 is an existing law and that sections 5(c), 10, 11(1)(b), 11(3), 11(4) and 12 of the same Act were invalid for not having been brought into conformity with section 315 of the 1999 Constitution of the Federal Republic of Nigeria.

b Whether or not the Court of Appeal was right in holding that sections 5(c), 5(d), 10, 11(1)(b), 11(3), 11(4) and 12 altogether collectively referred to as the compulsive powers under cap. 447 are unconstitutional, invalid and contravene sections 35 and 36 of the Constitution of the Federal Republic of Nigeria 1999.ò

It is apparent that even from the summarized answers of the Court of Appeal to the two reference questions above that the Court below went beyond the answers required for the questions by introducing new matters and therefore failed to answer them precisely or accurately. But the answers are such that they cannot be wholly or completely voided which is why the appeals ought to succeed in parts only.

The facts of the case are as contained in the lead judgment of learned brother Uwaifo JSC. I do not need to repeat them here. He has also very admirably summarised the relevant submissions of counsel and authorities on which they relied on the vital issues for determination in the appeal. I do not wish to repeat what he has already said. It is sufficient for me to say that having read in advance the said lead judgment, I agree with the reasoning and conclusions arrived at therein.

My answer to the first reference question above is therefore simply that the Tribunals of Inquiry Decree No. 41 of 1966 (cap. 447) took effect as an existing law enacted by the National Assembly for the Federal Capital Territory Abuja only, pursuant to section 315 of the 1999 Constitution.

And my answer to the second reference question is that sections 5(c), 10 and 11(3) of Decree 41 of 1966 (Cap. 447) are constitutional and valid in so far as they are restricted to matters or things in the Federal Capital Territory, Abuja only; whereas sections 5(d), 11(1)(b), 11(4) and 12(2) of the same Decree 41 of 1996 are unconstitutional, null and void in so far as they purport to empower the Tribunal of Inquiry to impose a sentence of fine or imprisonment in contravention of sections 35 (1)(a) and 36(1) of the 1999 Constitution.

The two appeals are accordingly each allowed in part. I endorse the order for costs.

MOHAMMED, JSC: I agree with the judgment delivered by my learned brother, Uwaifo, JSC. I have had the advantage of reading the judgment in draft before now. The wo questions posed by the Federal High Court for the determination of the Court of Appeal under Section 295(2) of 1999 Constitution were couched in the following words:

ñ1. Whether or not the Tribunals of inquiry Decree 1966 No. 41 took effect as a law enacted by the National Assembly Pursuant to the provisions of the section 315 of the Constitution of the Federal Republic of Nigeria 1999.

2. Whether or not Sections 5(c), 5(d), 10, 11(b), 11(3), 11(4) and 12 of the Tribunals of Inquiry Decree 1966 No. 41 (or any of them) are constitutional and valid or contravene Section 35 or 36 of the Constitution of the Federal Republic of Nigeria 1999.ò

Oguntade JCA, learned justice of the Court of Appeal with whom Nzeako and Galadima JJCA, concurred, gave answer to the questions posed by the High Court in the following words:

41 of 1966 by the Federal Military Government in 1966. Being an , it took effect on 28 -5 - 99 as an existing law pursuant to Section law, it needed to be brought into conformity with the 1999 Constitution of Nigeria by the appropriate authority, which is Mr. President. Appropriate authority has failed and or neglected to make textual modification in the said Cap. 447 as would bring it in conformity with the 1999 Constitution as provided under Section 315 of the same Constitution only the President, as the appropriate authority can make such textual modification. Even if this court is aware of what needs to be done, the best efforts of this court would amount to no more than mere speculation. In any case, the court is without the jurisdiction to exercise a power reserved in the constitution for only Mr. President as the appropriate authority.

ñ2. Arising from my observations above in the answer to question 1, the inevitable conclusion to be arrived at in relation to question No. 2 is that Sections 5(1), 10, 11(1), (b), 11(3), 11(4) and 12 altogether collectively referred to as ñthe compulsive powers under Cap. 447 are unconstitutional, invalid and contravene Sections 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999. It only remains for me to add that the invalidity and or unconstitutionality of Sections 5(c), 10, 11(1) (b), 11(3), 11(4) and 12 of Cap. 477 arises from the fact that as the said provisions were made in excess of the legislative competence of the National Assembly, they could not be relied upon as a basis to supplant or infract the rights enshrined in Section 35 or 36 of the 1999 Constitution of the Federal Republic of Nigeria.ò

Being dissatisfied with the decision of the Court of Appeal the 1st, 2nd and 3rd defendants filed appeals to this Court. My learned brother, in the lead judgment, has reproduced the issues identified by the appellants and I need not repeat them in my contribution. I agree that the Court Appeal went beyond the answer required for the first question referred to it by the Federal High Court.

In determining this appeal reference has been made to the Privy Council decision in Balewa v. Doherty (1963) 1 WLR 949. The case arose when the Federal Parliament passed into law The Commissions of Inquiry Act, 1961. By Section 3 of the Act the Prime Minster was given power to appoint a Commission of Inquiry into any matter or thing within Federal competence anywhere within the Federation. In pursuance of that power the Prime Minister appointed a tribunal to inquire into the affairs of the National Bank. Chief Adebayo Doherty, a Director of the National Bank, applied to the High Court for injunction to restrain the tribunal from proceeding with the inquiry and the High Court referred to the Federal Supreme Court a number of questions raising issues as to the constitutionality of the Act of 1961. The three questions referred to the Federal Supreme Court are as follows:
ñ1. Whether or not the Commissions and Tribunals of Inquiry ñAct, 1961, is within the competence of the legislative powers of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal Competence anywhere within the Federation.

ñ2. Whether or not Section 3(4) of the said Act is constitutional and valid or contravenes Sections 21, 31 and 108 of the Constitution of Nigeria.

ñ3. Whether or not Sections 8(c), 8(d), 15(a) and 18(1) (b) of the Commissions and Tribunals of Inquiry Act, 1961 (or any of them), are constitutional and valid, or contravene sections 20 or 21 of the Constitution of the Federation of Nigeriaò

The Federal Supreme Court answered the questions referred to them as follows:

ñ1. The Commissions and Tribunals of Inquiry Act, 1961, is not within the competence of the legislative power of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal competence anywhere within the Federation.

ñ2. Section 3(4) of the said Act is void.

ñ3. Section 8(c) is valid. Section 8(d), 15(a) and 18(1) (b) are void to the extent that they empower the commissioners to impose a sentence of fine or imprisonmentò.

The Federal Prime Minister, Balewa appealed to the Privy Council. The Privy Council dismissed the appeal after making minor variations to the decision of the Federal Supreme Court. The Privy Council concluded its judgement in the following words:

Act, 1961, is not within the competenece of the legislative power of
a), (b), (c) and (d) purports to have effect in relation to matters and
ithin the Federation.
2 Section 3(4) of the said Act is void.

3. Section8(c) is valid, in so far as it purports to have effect in relation to matters or thing within or affecting the general welfare of the Federal territory. Sections 8(d), 15(a), 18(1) (b) are void to the extent that they empower the commissioners to impose a sentence of fine or imprisonmentò

Except so far as it is required to effect these variations, their Lordships will humbly advise Her Majesty to dismiss this appeal.ò

It is important to note that 1999 Constitution has made no provision for Tribunals of Inquiry as was very clear in item 39 of the Exclusive List and item 25 of the Concurrent list in 1963 Constitution upon which Balewa v. Doherty was considered. But the decision on Tafawa v. Doherty is a guidance to the fact that only the Regional (now state) legislature could legislate on matters not specified in either Exclusive or concurrent legislative list. Also it shows that giving compulsive powers to Commissions of Inquiries for example to impose a sentence of fine or imprisonment is invalid. Coming back to the case in hand the power to make a law under the 1999 Constitution for the establishment of a Tribunal of Inquiry is now a Residual Power which only the States can promulgate. The National Assembly can only pass such law in regard to the Federal Capital Territory, Abuja.

The Commission of Inquiry Act Cap. 447 is therefore an existing law but it has no general application. It is only applicable to the Federal Capital Territory.

My answer to the two questions posed by the High Court to the Court of Appeal are as follows:

Question 1
The National Assembly has the power to enact the Tribunals of Inquiry Act, Cap. 447 with respect to the Federal Capital Territory, Abuja only. The provision of the Act cannot be applied to issue summons to be served on witnesses residing outside the Federal Capital Territory, Abuja.

Question 2
Sections 5(c), (d); 10 and 11(3) do not offend Sections 35 and 36 of 1999 Constitution and are therefore valid. They are however only applicable to the Federal Capital Territory, Abuja. Sections 5(d), 11(1) (b), 11(4) and 12(2) are unconstitutional and invalid in so far as they purport to empower the Tribunal of Inquiry to impose a sentence of fine or imprisonment which is a power in contravention of, or is not in conformity with Section 35 Subsection (1) (a) and section 36 (1) of 1999 Constitution.

Having found merit in some aspects of the two appeals I agree that they succeed in part. I also make no order as to costs.

ONU, JSC Having had the advantage of reading in draft the judgment of my learned brother Uwaifo, JSC just delivered I agree with his reasoning and conclusion.

Acting pursuant to Section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999, two questions by way of reference were posed to the Court of Appeal (hereinafter in this judgment referred to as the Court below) as follows:
ñ1. Whether or not the Tribunals of Inquiry Decree 1966 No. 41 took effect as a law enacted by the National Assembly pursuant to the provisions of Section 315 of the Constitution of the Federal Republic of Nigeria 1999".

ñ2. Whether or not Sections 5(c), 5(d), 10, 11(b), 11(3), 11(4) and 12 of the Tribunals of Inquiry Decree 1966 No. 14 (or any of them) are constitutional and valid or contravene Section 35 or 36 of the Constitution of the Federal Republic of Nigeria 1999.ò

Oguntade, JCA writing the leading judgment and concurred in by Nzeako and Galadima, JJ.C.A. answered the questions to the following effect:

41 of 1966 by the Federal Military Government in 1966. Being an , it took effect on 28th of May, 1999 as an existing law pursuant to Section 315 of the 1999 Constitution. As such existing law, it needed to be brought into conformity with the 1999 Constitution of Nigeria by the appropriate authority, which is Mr. President. Appropriate authority has failed and or neglected to make textual modification in the said Cap. 447 as would bring it in confirmity with the 1999 Constitution as provided under Section 315 of the same Constitution. Only the President, as the appropriate authority can make such textual modification. Even if this Court is aware of what needs to be done, the best efforts of this Court would amount to no more than mere speculation. In any case, the Court is without the jurisdiction to exercise a power reserved in the Constitution for only Mr. President as the appropriate authority".

2. Arising from my observations above in the answer to question 1, the inevitable conclusion to be arrived at in relation to question No. 2 is that Section 5(1), 10, 11(1) (b), 11(3), 11(4) and 12 altogether collectively referred to as ñthe compulsive powers under Cap. 447 are unconstitutional, invalid and contravene Sections 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999. It only remains for me to add that the invalidity and or unconstitutionality of Sections 5(c), 10, 11(1) (b), 11(3), 11(4) and 12 of Cap. 447 arises from the fact that as the said provisions were made in excess of the legislative competence of the National Assembly, they could not be relied upon as a basis to supplant or infract the rights enshrined in Section 35 or 36 of the 1999 Constitution of the Federal Republic of Nigeria.ò

Aggrieved by this decision, the 1st Appellant of the one part and 2nd and 3rd Appellants of the other part, respectively filed appeals to this Court.

The three issues 1st Appellant formulated in his brief for our determination are as follows:
ñ(1) Whether the Court of Appeal did not in its judgment go beyond the answer required for the first question referred to it by the Federal High Court.

(2) Assuming (but without conceding) that the answer provided by the Court of Appeal to the first question was not excessive, whether the said answer is accurate enough to meet the requirements of Section 295(2) of the 1999 Constitution.

(3) Whether the Court of Appeal was right in holding that Sections 5(c), 10, 11(1)(b), 11(3), 11(4) and 12 of the Tribunal of Inquiry Act contravene Section 35 or 36 of the 1999 Constitution and therefore are unconstitutional and invalid.ò

The 2nd and 3rd Appellants, on the other hand, submitted two issues as arising for determination, to wit:
ñ1. Whether or not the Court of Appeal was right in holding that the Tribunals of Inquiry Act, Cap. 447 is an existing law and that Sections 5(c), 10, 11 (1) (b), 11(3), 11(4) and 12 of the same Act were invalid for not having been brought into conformity with Section 315 of the 1999 Constitution of the Federal Republic of Nigeria?

2. Whether or not the Court of Appeal was right in holding that Sections 5(c), 5(d), 10, 11(1) (b), 11(3), 11(4) and 12 altogether collectively referred to as the compulsive powers under Cap. 447 are unconstitutional, invalid and contravene Sections 35 and 36 of the Constitution of the Federal Republic of Nigeria 1999?ò

Having been privileged to read before now the judgment of my learned brother Uwaifo, JSC, I am in entire agreement with him that the Court below exceeded the answer required for the first question referred to it by the Federal High Court (per Belogre, CJ.)
In determining the appeal in hand reference has been made to the Privy Council decision in Balewa v. Doherty (1963) 1 WLR 949. The case was sequel to the Federal Parliament enacting into law, by virtue of some provisions in the Nigeria Constitution 1960, the Commission of Inquiry Act, 1961 and Section 3 thereof which empowered the Prime Minister to appoint a Commission of Inquiry into any matter or thing within Federal competence anywhere within the Federation. Pursuant to powers conferred by that Act, the Prime Minister (Sir Abubakar Tafawa Balewa) appointed a tribunal to enquire into the affairs of the National Bank. Chief Adebayo Doherty, a Director of that bank, applied to the High Court for injunction to restrain the tribunal from proceeding with the inquiry and the High Court referred to the Federal Supreme Court the following three questions as to its constitutionality ,viz:

unals of Inquiry ñAct 1961, is within the competence of the legislative
the said Act purports to have effect in relation to matters and things
ne Federationò

ñ2. Whether or not Section 3(4) of the said Act is constitutional and valid or contravenes Sections 21, 31 and 108 of the Constitution of Nigeria.

ñ3. Whether or not Sections 8(c), 15(a) and 18(1) (d), 15(a) and 18(1)(b) of the Commissions and Tribunals of Inquiry Act, 1961 or any of them), are constitutional and valid, or contravene Sections 20 or 21 of the Constitution of the Federation of Nigeriaò

The Federal Supreme Court's answers to these questions were as follows:
ñ1. The Commissions and Tribunals of Inquiry Act, 1961, is not within the competence of the legislative power of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal competence anywhere within the Federation.

ñ2. Section 3(4) of the said Act is void.

ñ3. Section 8(c) is valid: Section 8(d), 15(a) and 18(1) (b) are void to the extent that they empower the Commissioners to impose a sentence of fine or imprisonment.ò

Tafawa Balewa, the Federal Prime Minister being dissatisfied, appealed to the Privy Council to which his appeal then lay. That Court dismissed his appeal after making minor variations to the decision of the Federal Supreme Court. It then concluded its judgment as follows:

ñ1. The Commissions and Tribunals of Inquiry Act, 1961 is not within the competence of the legislative power of the Federal Parliament in so far as Section 8(a), (b), (c) and (d) purports to have effect in relation to matters and things within Federal competence anywhere within the Federation.

2. Section 3(4) of the said Act is void.

3. Section 8(c) is valid, in so far as it purports to have effect in relation to matters or thing within or affecting the general welfare of the Federal territory. Section 8(d), 15(a), 18(1) (b) are void to the extent that they empower the Commissioners to impose a sentence of fine or imprisonment.

Except so far as it is required to effect these variations, their Lordships will humbly advise Her Majesty to dismiss this appeal.ò

It is worthy of note that the 1999 Constitution has made no provision for Tribunals of Inquiry as was very clear in item 39 of the Exclusive List and item 25 of the Concurrent List in the 1963 Constitution. Be it, however, noted that the decision in Balewa v. Doherty based on the 1960 Constitution is a guidance to the fact that the Regional (now State) legislature could legislate on matters not directly specified as an item in either the Exclusive or Concurrent Legislative List. Also, it shows that there can be no giving of compulsive powers to the Commissions of Inquiries, for instance, to impose a sentence of fine or imprisonment in conflict with a constitutional provision which gives such powers to the Courts, as such will be invalid. Returning to the case in hand, the power to make a law under the 1999 Constitution for the establishment of a Tribunal Inquiry is now a residual power, which only the States can exercise. The National Assembly can only pass such a law in regard to the Federal Capital Territory, Abuja. Thus, while the Commission of Inquiry Act, Cap. 477 is an existing law, it has no general application to Nigeria. It is only applicable to the Federal Capital Territory a law deemed enacted by each House of Assembly for the respective States. In the result, my answer to the two questions posed by the High Court to the Court of Appeal are as follows:

Question 1
The National Assembly has the power to enact the Tribunals of Inquiry Act, Cap. 447 with respect to the Federal Capital Territory, Abuja only. In other words Issue No. 1 formulated by the 1st Appellant and Issue No. 2, which is in the alternative to Issue No. 1 by 1st Appellant, does not arise since Issue No. 1 succeeds.

tions 35 and 36 of the 1999 Constitution and are therefore valid.
nconstitutional and invalid in so far as they purport to empower the Tribunal of Inquiry to impose a sentence of fine or imprisonment which is a power in contravention of, or is not in conformity with Section 35(1)(a) and Section 36(1) of the 1999 Constitution.

KATSINA-ALU, JSC: I have had the advantage of reading in draft the judgment of my learned brother Uwaifo JSC in this appeal. I entirely agree with it.

The Federal High Court posed two questions for the determination of the Court of Appeal under section 295(2) of the 1999 Constitution. The two questions were couched thus:

ñ1. Whether or not the Tribunals of Inquiry Decree 1966 No. 41 took effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the Constitution of the Federal Republic of Nigeria 1999.ò

2. Whether or not sections 5(c), 5(d), 10, 11(3), 11(4) and 12 of the Tribunals of Inquiry Decree 1966 No. 41 (or any of them) are constitutional and valid or contravene section 35 or 36 of the Constitution of the Federal Republic of Nigeria 1999.ò

The Court of Appeal gave answer to the questions referred to it by the Federal High Court in the following terms:

ñ1. Cap. 447 was promulgated as Decree No. 41 of 1966 by the Federal Military Government, it took effect on 28 - 5 - 99 as an existing law pursuant to section 315 of the 1999 Constitution. As such existing law, it needed to be brought into conformity with the 1999 Constitution of Nigeria by the appropriate authority, which is Mr. President. Appropriate authority has failed and or neglected to make textual modification in the said Cap. 447 as would bring it in conformity with the 1999 Constitution as provided under section 315 of the same Constitution. Only the President, as the appropriate authority can make such textual modification. Even if this court is aware of what needs to be done, the best efforts of this court would amount to no more than mere speculation. In any case, the court is without the jurisdiction to exercise a power reserved in the Constitution for only Mr. President as the appropriate authority."

ñ2. Arising from my observations above in the answer to question 1, the inevitable conclusion to be arrived at in relation to question No. 2 is that sections 5(1), 10, 11(1) (b), 11(3), 11(4) and 12 altogether collectively referred to as 'the compulsive powers' under Cap. 447 are unconstitutional, invalid and contravene sections 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999.ò

ñIt only remains for me to add that the invalidity and or unconstitutionality of sections 5(c), 10, 11(1) (b), 11(4) and 12 of Cap. 447 arises from the fact that as the said provisions were made in excess of the legislative competence of the National Assembly, they could not be relied upon as basis to supplant or infract the rights enshrined in section 35 or 36 of the 1999 Constitution of the Federal Republic of Nigeria.ò

These answers did not satisfy the 1st, 2nd and 3rd defendants who consequently appealed to this Court. The 1st and 2nd defendants filed a joint brief of argument.
In their brief of argument, the 1st and 2nd appellants raised the following issues for determination: .
ñ(1) Whether the Courts ï High Court, Court of Appeal and this Court have jurisdiction to question the validity of the Tribunals of Inquiry Act Cap. 447 Laws of Nigeria, 1990 ï being an existing law made by the military between 15th January 1966 and 29th May, 1999.

(2) Whether having regard to the fact that Cap. 447 is an existing law in accordance with the provisions of S. 315 of the Constitution of the Federal Republic, 1999 (ñthe Constitutionò) and was in force when the Constitution was promulgated in 1999, it was still necessary to start comparing the present position of the law with the past which had no such law (i.e the Tribunals of Inquiry Act Cap. 447) and to which the present has no relevance.

(3) Whether by its own provisions the Constitution of the Federal Republic 1999 does not recognize the power of having the Tribunals of Inquiry Act, or Tribunals of Inquiry Laws by the Federal and States Governments respectively.

d) 10, 11(1) (b), 11(3), and 12 of the Tribunals of Inquiry Act,
ıtion.

(5) Assuming but not conceding that Tribunals of Inquiry are state matters only, whether, having regard to the ónature of the subject of inquiry in Oputa Commission ï EVIDENCE AND HUMAN RIGHTS ï the action of the President is not within Federal Competence.ò

The 3rd appellant, for his part, has raised three issues-
ñ(1) Whether the Court of Appeal did not in its judgment go beyond the answer required for the first question referred to it by the Federal High Court.

(2) Assuming (but without conceding) that the answer provided by the Court of Appeal to the first question was not excessive, whether the said answer is accurate enough to meet the requirements of Section 295(2) of the 1999 Constitution.

(3) Whether the Court of Appeal was right in holding that sections 5(1), 10, 11(1)(b), 11(4) and 12 of the Tribunals of Inquiry Act contravene Section 35 or 36 of the 1999 Constitution and therefore are unconstitutional and invalid.ò

My learned brother Uwaifo JSC has set out in the leading judgment the submissions of the parties and I believe that it is not necessary for me to repeat them. The contention of the appellants that the Court of Appeal went beyond the answer required for the first question is well taken. In the light of the submissions of counsel for the appellants, my answer to the two questions under reference to the Court of Appeal is as follows:

Question 1
The National Assembly has the power to enact the Tribunals of Inquiry Act, Cap. 447 with respect to the Federal Capital Territory, Abuja only for service on witnesses to appear before the 1st and 2nd Appellants in Abuja.

Question 2
Sections 5(c), 10 and 11(3) of the Tribunals of Inquiry Act do not offend the provisions of sections 35 or 36 of the 1999 Constitution and are valid to the extent that they apply to the Federal Capital Territory, Abuja. Sections 5(d), 11(1) (b), 11(4) and 12(2) are unconstitutional and invalid in so far as they purport to empower the Tribunal of Inquiry to impose a sentence of fine or imprisonment ,which is a power in contravention of or is not in conformity with sections 35 subsection(1)(a) and 36(1) of the 1999 Constitution.

In the result, I also agree that the appeals succeed in part. I too make no order as to costs.
EJIWUNMI, JSC: I have had the privilege of reading before now the judgment of my learned brother, Uwaifo JSC that has just been read. And I agree with him for the reasons given as to the outcome of this appeal. But I need to add a few words of my own.

This appeal is against the judgment of the Court of Appeal (Lagos Division). The matter came before that Court as a result of the reference made to the Court by the Chief Judge of the Federal High Court sitting in Lagos. This was sequel to the two suits that were filed before it. The first suit numbered FHC/L/CS/1158/2000 was brought by originating summons by Brigadier-General A. K Togun (Rtd.) as plaintiff against the 1st and 2nd defendants, now the 2nd and 3rd appellants. The second suit, numbered as FCH/L/CS/1163/2000 which was also commenced by originating summons jointly by the 1st and 3rd respondents, and who are the 1st and 2nd plaintiffs respectively against the same parties (defendants) as in the first case. The 1st appellant pursuant to an application in the trial Court was joined as a 3rd defendant in each case by the order of the Court. The trial Court being satisfied that though the two suits were filed separately, the claims and the reliefs sought were identical, therefore that the two suits be consolidated and heard together as one.

The reliefs sought in each case read thus:-

ñ(i) A declaration that the Tribunals of Inquiry Act, 1966 No. 41 is not an enactment on any matter with respect to which the National Assembly is empowered to make laws under the Constitution of the Federal Republic of Nigeria, 1999 and it accordingly took effect as a law enacted by the House of Assembly of a state.

and 2nd defendant to summon the plaintiff to appear before it to

(iii) An order of prohibition prohibiting the 1st and 2nd defendants, their servants and agents whomsoever from-
(a) sitting as a body empowered to exercise powers or functions claimed to be conferred upon it pursuant to the Tribunal of Inquiries Act, Cap. 447, Laws of the Federation of Nigeria or exercising any of the aforementioned powers.

(b) using the powers conferred or purported to be conferred on him or them by the Tribunals of Inquiry Act, 1996, to compel the plaintiff to attend a sitting of the 2nd defendant body to answer questions or to produce documents.ò

The grounds upon which the reliefs were sought read thus:-
ñ(i) By the provisions contained in the Constitution of the Federal Republic of Nigeria, 1999 the National Assembly are conferred with power to make laws with respect to matters specially mentioned in Section 4(2) and (4) of said Constitution.

(ii) During a period of military regime, the Federal Military Government enacted the Tribunals of Inquiry Decree 1966 No. 41 pursuant to its power to make laws for the peace, order and good government of Nigeria ñwith respect to any matter whatsoeverò as per the Constitution (Suspension and Modification) Decree which was then in force.

(iii) The aforementioned Tribunals of Inquiry Decree 1996 No. 41 was republished as Tribunals of Inquiry Act, Cap. 447, Laws of the Federation.

(iv) In the premises, at the end of the military regime in Nigeria in May 1999, the aforementioned Tribunals of Inquiry Act was an ñexisting lawò within the meaning of that expression in Section 315 of the Constitution.

(v) No modifications have been made by the President of the Federal Republic of Nigeria in the text of the said Tribunals of Inquiry Act so as to bring the said Act into conformity with the 1999 Constitution as a law of the Federation.

(vi) As it stands the Tribunals of Inquiry Act is not a law on any matter with respect to which the National Assembly is empowered to make laws.

(vii)The 2nd defendant is a body set up in purported exercise of powers conferred on the President of the Federal Republic of Nigeria by the aforementioned Tribunals of Inquiry Act and the 1st Defendant is the Chairman of the said body.

(viii)In exercise of powers conferred on them the Defendants have decided or purportedly decided to issue and serve on the plaintiff a summons to appear before them and give evidence or produce documents.ò

In the course of the hearing before the trial Court, the parties agreed that some constitutional questions should, pursuant to the provisions of section 295 subsection (2) of the Constitution of the Federal Republic of Nigeria, be referred to the Court of Appeal to answer. The Federal High Court (per Belgore, CJ) granted their request accordingly.
Now, section 295 subsection (2) reads thus:-

ñ(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 part 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 trial 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.ò

The questions referred to the Court of Appeal are as follows:-
ñ1. Whether or not the Tribunals of Inquiry Decree 1966 No. 41 took effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the Constitution of the Federal Republic of Nigeria 1999.

)(b), 11(3), 11(4) and 12 of the Tribunals of Inquiry Decree 1966 No.
d or contravene Section 35 or 36 of the Constitution of the Federal

To all these questions the Court of Appeal (Oguntade, Nzeako and Galadima JJCA) gave the following answers (per Oguntade, JCA) thus:-

ñAnswer to Question No.1
Cap. 447 was promulgated as Decree No. 41 of 1966 by the Federal Military Government in 1966. Being an enactment of the Federal Military Government, it took effect on 28 -5 -99 as an existing law pursuant to Section 315 of the 1999 Constitution. As such existing law, it needed to be brought into conformity with the 1999 Constitution of Nigeria by the appropriate authority, who is Mr. President. Appropriate authority has failed and or neglected to make textual modification in the said Cap. 447 as would bring it in conformity with the 1999 Constitution as provided under Section 315 of the same Constitution. Only the President, as the appropriate authority can make such textual modification. Even if this court is aware of what needs to be done, the best efforts of this court would amount to no more than merely speculation. In any case, the court is without the jurisdiction to exercise a power reserved in the Constitution for only Mr. President as the appropriate authority.

Answer to Question No. 2
Arising from my observations above in the answer to Question1, the inevitable conclusion to be arrived at in relation to question No. 2 is that Sections 5(c), 10, 11 (1) (b), 11(3), 11(4), and 12 (altogether collectively referred to as the compulsive powers under Cap. 447) are unconstitutional, invalid and contravene Section 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999. (Note: Section 5(d) was inadvertently omitted).
It only remains for me to add that the invalidity and or unconstitutionality of sections 5(c), 10, 11(1) (b), 11(4) and 12 of Cap. 448 arises from the fact that as the said provisions were made in excess of the legislative competence of the National Assembly, they could not be relied upon as a basis to supplant or infract the rights enshrined in section 35 or 36 of 1999 Constitution of the Federal Republic of Nigeria.ò

As the 1st appellant was not satisfied with the decision, he appealed against it to this Court. The 2nd and 3rd appellants who were not also satisfied with the decision filed an appeal jointly to this Court. In accordance with practice, briefs were filed and exchanged between the parties. The 1st appellant in his brief identified three questions for the determination of the appeal. These are:-

ñ(1) Whether the Court of Appeal did not in its judgment go beyond the answer required for the first question referred to it by the Federal High Court.

(2) Assuming (but without conceding) that the answer provided by the Court of Appeal to the first question was not excessive, whether the said answer is accurate enough to meet the requirements of section 295(2) of the 1999 Constitution.

(3) Whether the Court of Appeal was right in holding that sections 5(c), 10, 11(1) (b), 11(3), 11(4) and 12 of the Tribunals of Inquiry Act contravene section 35 or 36 of 1999 Constitution and therefore are unconstitutional and invalid.ò

The 2nd and 3rd appellants also set down in their brief the following issues as the issues for determination of the appeal.

ñ1. Whether or not the Court of Appeal was right in holding that the Tribunals of Inquiry Act Cap. 447 is an existing law and sections 5(c), 10, 11 (1) (b), 11(3), 11(4) and 12 of the same Act were invalid for not having been brought into conformity with section 315 of the 1999 Constitution of the Federal Republic of Nigeria?

2. Whether or not the Court of Appeal was right in holding that sections 5(c), 5(d), 10, 11(1) (b), 11(3), 11(4) and 12 altogether collectively referred to as the compulsive powers under Cap. 447 are unconstitutional, invalid and contravene sections 35 and 36 of the Constitution of the Federal Republic of Nigeria?ò

Issue 1 raised by the 1st appellant will be considered first. In respect of this issue,the 1st appellant asked pointedly, whether the Court below did not by its judgment go beyond the answer required of it by the Federal High

st appellant was proper. The question was limited to whether or not
acted by the National Assembly pursuant to the provisions of section
c of Nigeria, 1999. It is clear that in the first part of its answer, the Court below rightly held that Cap. 447 was promulgated as Decree No. 41 of 1966. Secondly, it is also rightly held that as it was an enactment of the Federal Military Government, it took effect on 28 - 5 - 99 as an existing law pursuant to section 315 of the 1999 Constitution. The Court below fell into error when it went to hold in the latter portion of this answer concerning what the President should have done to bring the Decree No. 41 of 1966 (Cap.447) in conformity with the 1999 Constitution pursuant to section 315 of the 1999 Constitution. As it is totally unnecessary and should not have been part of the answer to the question referred to it by the trial Court, that part of the answer is therefore struck down. It follows that the appeal succeeds in part and so also the appeal by the 2nd and 3rd appellants.

Next would be considered the question as to whether or not the Court of Appeal was right in holding that sections 5(c), 5(d), 10, 11(1)(b), 11(3), 11(4) and 12 altogether collectively referred to as the compulsive powers under Cap. 447 are unconstitutional, invalid and contravene sections 35 and 36. The sections of the Tribunals of Inquiry Act are those referred to as compulsive powers vested in the Human Rights Violations Investigation Commission, the 3rd appellant, by virtue of the fact that the 3rd appellant was set up under the Tribunals of Inquiry Act of the said power. The question that falls for determination in this appeal is therefore, whether they are unconstitutional, invalid and contravene sections 35 and 36 of the Constitution of 1999. My approach to this question is to consider first the constitutional portion of the Act in relation to the 1999 Constitution. Upon a perusal of the briefs filed by learned counsel for the parties, it is manifest that their argument for and against this question revolve round the case of Doherty v. Balewa (1961) 1 ALL NLR 604, which went on appeal to the Privy Council as Balewa v. Doherty (1963) 1 WLR.

In order to answer this question, it is in my view apposite to give briefly the history of legislation on this point and the constitutional changes that had occurred in our country in recent times. For this purpose, may I refer to Balewa v. Doherty (1963) 1 WLR 949 where Lord Devlin at pages 951-953 delivering the judgment of the Court, said thus:-

ñIn 1940, when Nigeria was still a unitary state, there was enacted an ordinance empowering the Governor ï General to set up commissions of inquiry. This ordinance was of the same sort as the Tribunals of Inquiry (Evidence) Act, 1921, in force in Great Britain. The Act of 1961 is a repetition with minor alternations of the Ordinance of 1940. The Constitution of 1954 established the Federation out of three regions of Nigeria, Northern, Western and Eastern, the South Cameroon's (which for the purposes of this appeal their Lordships can ignore) and the Federal Territory of Lagos. The Federal Legislature was given Complete power in the Federal Territory of Lagos, but in the regions the legislative power was divided between the Federal Legislature and the legislatures of the Regions. The Constitution specified two legislative lists, one called the Exclusive and the other Concurrent. The Federal legislature alone could legislate with respect to any matter on the Exclusive List. Both the Federal and the appropriate Regional Legislature could legislate on any matter on the Concurrent list. The Regional legislature alone could Legislate on matters not specified on either list. All this is to be found in section 51 of the Constitution. So that, as was said in the principal judgment delivered in the Supreme Court in the present case by the Chief Justice of the Federation, the Chief Justice of Eastern Nigeria and Unsworth F. J. , ñthe Nigerian Constitution is a truly federal constitution in which the residual powers are vested in the ñregional government.ò

In the 1954 Constitution ñCommissions of Inquiryòwas a subject specified in the Concurrent list. The result of this would appear to be that either the Federal or a Regional legislature could set up a commission to inquire into any subject, even one that was within the exclusive competence of the other legislature.
The 1960 Constitution by section 64 retains with some alterations the Exclusive and Concurrent lists and the division of legislative powers initiated by section 51 of the 1954 Constitution. But the 1960 Constitution also gives power directly to Parliament, that is, the Federal legislature, to make laws on a number of matters specified in separate and independent sections.

The Schedule to the 1960 Constitution is headed ñThe Legislative listsòand is divided into three parts ï the Exclusive list, the Concurrent list and a third part headed ñInterpretationòwhich is common to both. The interpretation is concerned entirely with the amplification of the general and incidental item which concludes each list. Item 44, the last item on the Exclusive list, is in the following terms:-

ó44. Any matter that is incidental or supplementary -
(a) to any matter referred to elsewhere in this list; or
(b) to the discharge by the Government of the Federation .. of any function conferred by this Constitution.'

llowing terms:-
ıd supplementary matters include, without prejudice to their

(a) offences;
(b) the jurisdiction, powers, practice and procedure of courts of law;
(c) the compulsory acquisition and tenure of land; and
(d) the establishment and regulation of tribunals of inquiry,ò

Now, when in 1966, the Tribunals of Inquiry Act Cap. 447 came into being, it was enacted by the then Federal Military Government, the legislative powers of that government were as laid down in section 3(1) of Decree 1966 No. 1 of 1966. By its provisions, the Federal Military Government was empowered to make laws for the peace, order and good government of Nigeria or any part thereof ówith respect to any matter whatsoever.'

It is manifest from the narration given above that up to 1960, there was a clear provision in the Constitution for the enactment of legislation for the establishment and regulations of tribunals of inquiry. However ñitem dòin the 1960 Constitution was clearly omitted from the corresponding provision of the 1979 Constitution. Also in the 1999 Constitution, the omission was retained.

Cap. 447 was enacted then as a Federal enactment. As I have said earlier, Cap. 447 became an existing law by virtue of the provisions of section 315 of the 1999 Constitution. In order to determine whether the National Assembly is vested with the plenitude of powers enjoyed as aforesaid by the Federal Military Government when Cap. 447 was enacted, it is also pertinent to refer to the legislative powers given to the National Assembly in the 1999 Constitution. In this regard, I refer to section 4 of the Constitution of 1999, which read:-

ñ4. (1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.

(2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution.

(3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of State.

(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say -

(a) any matter in the Concurrent Legislative list set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

(b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.ò

It is clear from a perusal of the above provisions, that the National Assembly in its exercise of its legislative powers is limited by the provisions granted to it by the Constitution as the Constitution of 1999 did not make provision for the Tribunals of Inquiry as clearly shown in item 39 of the Exclusive List. In the absence of such a provision, the National Assembly cannot pass a general law on Tribunals of Inquiry to affect the entire Federation. However the National Assembly can pass such a law with regard to the Federal Capital Territory. It remains to be said that under the 1999 Constitution, the establishment of Tribunals of Inquiry is now a residual matter, which only the States can promulgate. It is pertinent to refer in this regard to the aforementioned case of Balewa v. Doherty (supra). In that case, by section 3(1) of the Commissions of Tribunals of Inquiry Act, 1961 of the Federation of Nigeria, the Prime Minister may appoint a commission to inquire into ñé any matter or thingòwithin Federal competence anywhere within the Federation. The appellant's power to appoint Commission was challenged by the respondent the matter was first referred to the Federal Supreme Court and ended on appeal in the Privy Council, where it was held that ñthe Act of 1961 was valid in so far as it authorised tribunals or commissions of inquiry of any sort within the Federal territory and tribunals or commissions of inquiry without compulsive powers into Federal

of the legislative power of the Federal Parliament in so far as section
ulsive powers to the commissioners to take evidence on oath, to
roduction of documents ï purported to have effect in relation to matters and things within Federal competence anywhere within the õFederation' as defined by section 3 (1) of the Act, and the power to direct any inquiry into banking fell into that category.ò

From all I have said above, it is my conclusion that the National Assembly has the power to enact the Tribunals of Inquiry Act, Cap. 447 with the limitation that it operates in the Federal Capital only. To this limited extent, the Act is an ñexisting lawò by virtue of the provisions of section 315 of the Constitution. It must be emphasized that though the Tribunals of Inquiry Act is ñan existing lawò its application is limited and has no general application. I need to point out that perhaps this litigation might have been unnecessary if the framers of our Constitution had borne in mind the necessity of ensuring that the powers of each component part of the Federation are carefully set out in the Constitution.

As the Tribunals of Inquiry Act is not of general application, I must hold that the provisions of sections 5(c), 5(d) 11 and 11(3) of the Act which do not offend the provisions of sections 35 and 36 of the Constitution are valid to the extent that they apply to the Federal Territory only. In the result, my answers to the issues raised by the appellants for our determination are as follows:-

(1) The Court of Appeal went in its judgment beyond the answer required for the first question referred to it by the Federal High Court.

(2) In view of the foregoing answer, the second question' raised by the second issue for determination formulated by the 1st appellant does not arise.

(3) The Court of Appeal was right in holding that sections 5(d), 11(1)(b), 11(4) and 12(2) are unconstitutional and invalid in so far as they purport to empower the tribunal of inquiry to impose a sentence of fine or imprisonment, which is a power in contravention of and not in conformity with sections 35 subsection (1) (a) and 36 subsection (1) of the Constitution. On the other hand, sections 5(c), 10 and 11(3) of the Tribunals of Inquiry Act, are constitutional and valid in so far as they apply to the Federal Capital Territory.

In the result both appeals succeed in part. I make no order as to costs. Each party shall bear its costs.

- Constitutional Law
- ï Constitution - The Preamble ï ï Purpose of and how construed ï Whether to be read as part and parcel of the Constitution ï When may courts have recourse to the preamble - Folatalu v. Attorney General

FOLATALU

V.

ATTORNEY- GENERAL (SOLOMON ISLANDS)

HIGH COURT SOLOMON ISLANDS

Palmer Ag. CJ.

Friday, 19 October 2001

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

ciation ï Right to form or belong to a political party ï Legislation
r parliamentary elections ï Amendment substantially increasing fee -
tion on freedom of association and plaintiff's right to stand for election

CONSTITUTIONAL LAW ï Constitution - The Preamble ï ï Purpose of and how construed ï Whether to be read as part and parcel of the Constitution ï When may courts have recourse to the preamble

Issue for Determination:
Whether the increase in deposit required to be paid by an intending candidate for parliamentary election from $SB2,000 to $SB5,000 is excessive and, if so, whether it is unreasonable and in violation of the plaintiff's constitutional rights

Facts:
The National Parliament Electoral Provisions Act Cap 87 (the Act) provided in section 27 that a candidate in a general election has to pay a deposit before he can take part in the election. The initial amount fixed when the Act was enacted in 1980 was $SB100. Subsequently in 1992, the deposit was increased to $SB500 and $SB2,000 in 1997. In September 2001, it was further increased to $SB5,000

The plaintiff, a man of limited means who maintained his family of four on subsistence farming and fishing aspired to stand for election in the next parliamentary elections but could not afford the deposit. He challenged the constitutionality of the September 2001 increase in deposit fee, claiming that the upward review was inconsistent with the 2001 increase in deposit fee, claiming that the upward review was inconsistent with the Constitution as it placed unreasonable restrictions on his right to associate freely and offer himself for election at the parliamentary elections. At the time of instituting the action, the plaintiff had $SB17 in his bank account. The plaintiff also made the case that the increase discriminates against him as a rural dweller.

Held:
The requirement that candidates vying for electoral office should pay a deposit is common practice in democracies of the world. Nevertheless, it must be borne in mind that primary responsibility for bearing the costs of election remains with the government,as it touches the fundamental rights of the citizens to go to the polls to choose the candidate that will best represent and agitate their views in government. Imposing deposits in order to recoup part of costs of election or rationalize ballot ought not to play too rigid a significant role in the upward review of election deposit, as it may preclude eligible and serious-minded candidates from contesting for inability to pay the deposit. Having said that, the deposits imposed must be reasonably commensurate to prevailing economic conditions in the country so as not to unduly restrict the rights of citizens to stand for election. Deposits that are excessive in a way as to restrict the constitutional rights to associate, in this case, for political reasons, and to stand for elections, will therefore be inconsistent with the Constitution. In the case at hand, the prevailing economic downturns in the Solomon Islands, indicated by a low gross national product per capita, do not justify the upward review of the deposit from $SB2,000 to $SB5,000. The review is excessive and unreasonably restrictive of the plaintiff's right to stand for election. The review is therefore unconstitutional and void. The plaintiff's case that the increase discriminates against persons dwelling in rural areas however must fail because he has not demonstrated how the increase discriminates between rural and urban dwellers. Urban dwellers are also affected by the increase.

Details of Principles in the Judgment:
1. Impact of Requiring Excessive Deposit Fees from Intending Candidates for Electoral Office on Rights to Stand for Election
The imposition of an exorbitant deposit on candidates aspiring to an elective office does not impede them from forming or belonging to a political party. The hindrance lies in the fact that although an aspirant has met the constitutional requirements for eligibility to stand for election, he is nevertheless unable to qualify as a candidate for election unless he is able to overcome the requirement of an exorbitant deposit. In not being able to pay the deposit, the plaintiff is deprived of his right to associate with other persons in political parties irrespective of his seriousness to contest the elections. That contravenes his fundamental right under the Constitution to associate freely with other persons to form or belong to political parties. [pages 297 para A-D]

On the Record: Per Palmer Ag CJ
ñWhilst the requirement of a deposit is acknowledged as a common universal practice in all democracies and imposed as a means of regulating voter rationality, limiting the ballot size, deterring frivolous candidates and

rative costs of elections, it should not be used as a means to restrict
g to contest the elections by imposing an excessive deposit. When
ng off persons like the applicant by how much they can pay. With respect, I do not think that was what was intended in the original enactment of s 27 of the Act and the purposes of a deposit.

ñBurger CJ recognized this in Lubin (1974) 415 US 709ò
ðThis legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability to political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through the candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and it is intertwined with rights of voters. é '
é é

Not only is the right of the applicant to associate freely with other persons to form or belong to a political party affected, but the rights of the voters to choose

the upward review of the deposit from $SB2,000 to $SB5,000. The review is excessive and unreasonably restrictive of the plaintiff's right to stand for election. The review is therefore unconstitutional and void. The plaintiff's case that the increase discriminates against persons dwelling in rural areas however must fail because he has not demonstrated how the increase discriminates between rural and urban dwellers. Urban dwellers are also affected by the increase.

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or express their preferences through those candidates who will be contesting will also be hindered or affected by such increase. é [T]he rights of voters are so inextricably linked with the choices they have and can make, as to the candidates contesting in the elections. Their preferences can only be expressed through the political groupings or individuals contesting and if the applicant and others in the same boat as him are hindered from so participating in the national elections because of this exorbitant increase, then the voters are being deprived too of a right provided for and secured by the Constitution.ò[page 297 paras H-I, page 298 paras A-D, page 299 paras D-F]

2. Prescribed Deposit must be Reasonably Justifiable Under Prevailing Economic Realities
To justify increase in deposit for candidates aspiring to participate in an election, the State ought to present evidence to show that the increase was such that could be reasonably justified under prevailing economic realities. The material submitted by the State falls far short of demonstrating any logical and reasonable basis for the increase. The court therefore accepts the applicant's evidence and hold that the increase in deposit cannot be reasonably justified in a democratic society. [page 303 paras C-H]

3. On the Significance of the Preamble of a Constitution or Other Legislation
Although it is partly correct to say that the preamble sets out the guiding principles on which the Constitution is founded, it nevertheless is part and parcel of the Constitution, to be read together with other provisions in the Constitution as a single document. Recourse may be had to the preamble for assistance in construing the enacting provisions of the constitution or other statute, but only when there is ambiguity in the provisions. [page 305 para G, pg 308 paras C-D]

Cases Referred to in the Judgment
1. A-G V v Prince Ernest Augustus of Hanover (1957) 1 All ER 49, (1957) AC 436,UK HL
2. Cheranci v Cheranci (1960) NRNLR 24
3. Kauesa v Minister of Home Affairs (1994) 2 LRC 263, 1994(3) BCLR 1, Nam HC; rvsd (1995) 3 LRC 528, Nam SC
4. Law Union and Rock Insurance Co Ltd v Carmichael's Executor 1917 AD

2d 702, US SC
AIR 1952 SC 196, Ind SC
7. Minister of Provincial Government v Guadalcanal Provincial Assembly (11July 1997, CAC 3, unreported)
8. Sakeasi Butadroka v A-G&Electoral Commission (1992, unreported), Fiji HC
9. Special Reference by PNG Ombudsman Commission (1982, unreported), PNG SC
10. UDM v Governor General (1991) LRC (Const) 328, Maur SC
11. Uganda v Comr of Prisons, ex p Matovu (1966) EA 514, Uganda HC
12. Williams v Rhodes (1968) 393 US 23,21 L Ed 2d 24, US SC

Legislation referred to in Judgment
Nigeria:
ÅNorthern Region Children and Young Persons Law 1958

Papua New Guinea:
ÅConstitution of Papua New Guinea 1975

Solomon Islands:
1. Constitution of Solomon Islands 1978, Preamble, ss 2,13, 15, 47, 48,49,55,56
2. National Parliament Electoral Provisional Act 2001(Cap 87), as amended, ss 2,27

Other Resources referred to in judgment:
1. CPC Report (1974)
2. Hansard (Parliamentary Debates, Solomon Islands) 13 August 2001
3. Kelly (Hogan and Whyte (eds) The Irish Constitution (3rd edn, 1994)
4. Solomon Islands Government Report on the 1999 Population and Housing Census.
Representation:
1. A Radclyffe for the Applicant.
2. J Keniapisia for the Attorney General.

PALMER Ag CJ . The plaintiff applies by originating summons, filed 29 August 2001, hat s 2 of the National Parliament Electoral Provisions (Amendment) Act 2001 is inconsistent with the Constitution and, by virtue of s 2 of the Constitution, is void to the extent of the inconsistency on the grounds that the increase of the non-refundable deposit from $2,000 to $5,000, to be paid by intending candidates contesting the upcoming national elections, was unreasonable and amounted to an unreasonable restriction of the right of the plaintiff to stand in the national elections and discriminatory against him as a non-wage earner living in the rural areas. The third ground relied on is that it is inconsistent also with the national objectives set out in the introductory part of the Constitution (ôthe Preamble').

The background facts
The right of any person in Solomon Islands to qualify for election as a member of Parliament is provided for and governed by ss 47, 48 and 49 of the Constitution. The two latter provisions set out the qualifications for membership on one hand and, on the other hand, the disqualifications from membership. As they are important to the issues raised in this application I will set them out in full.

ôSection 48
Subject to the provisions of the next following section, a person shall be qualified for election as a member of Parliament if, and shall not be so qualified unless-
(a) he is a citizen of Solomon Islands; and
(b) he has attained the age of twenty-one years.'

ôSection 49
(1) No person shall be qualified for election as a member of Parliament who-
(a) is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state;
(b) holds, or is acting in, any public office;
(c) is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law for the time

:h;
ged to be of unsound mind under any law for the time being in force

(e) is under sentence of death imposed on him by a court in any part of the world, or is under a sentence of imprisonment (by whatever name called) for a term of , or exceeding, six months, other than a sentence in lieu of a fine, but including a suspended sentence, imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court;
(f) is disqualified from membership of Parliament or from registration as an elector or from voting at elections under any law for the time being in force in Solomon Islands relating to offences connected with the elections; or
(g) holds, or is acting in any office the functions of which involve any responsibility for, or in connection with, the conduct of any election to Parliament or the compilation or revision of any electoral register for that purpose.

(2) For the purpose of paragraph (e) of the preceding subsection two or more terms of imprisonment that are required to be served consecutively shall be regarded as a single term of imprisonment for the aggregate period of those terms'

Apart from the above constitutional requirements, there is one further crucial requirement, imposed by law under the National Parliament Electoral Provisions Act (Cap 87) (ôthe Act'). This is contained in S 27, which provides that a candidate in a general election has to pay a deposit before he can take part in the election. The validity of this provision is not in issue as it is made under s 47(1) of the Constitution: ôand subject thereto, in such manner as may be prescribed.' The amount fixed in 1980, when this legislation was enacted, was $SB100. It was increased in 1992 to $SB500 and $SB2,000 in 1997. The latest increase was made less than two months ago on 5 September 2001 to $SB5,000. It is this latest increase that has been the subject of this application. All other increases had never been challenged. Why?

The plaintiff's arguments
The plaintiff deposes in his affidavit, filed on 29 August 2001, that he is a man of limited means. He has a family of four children, three of whom he and his wife support. He says that he is not in any paid employment and exists by subsistence farming and fishing. Occasionally he earns a small amount of income by selling marine products such as beche-de-mer. He does not have any savings and at the date of execution of his affidavit his bank balance was $SB17. He deposes that he intends to stand as a candidate for his Lau/Mbaelelea constituency in the upcoming elections but that with the recent increase made by Parliament it is too much for him to afford. He contends that his right as an eligible person to stand for election has been unreasonably restricted and that the amendment discriminates against him. I accept the facts deposed to by the plaintiff as correctly setting out his state of affairs. No challenge has been made as to the verity of the matters deposed to and no notice to have him cross-examined as to his means had been filed and served at the time of hearing of this application. Hence, when it was sought to be suggested otherwise from the bar table by counsel for the defendant and objection raised by counsel on the other side, the objection was sustained.

The applicant's legal arguments can be summarized as follows. His counsel, Mr Radclyffe, takes his starting point from s 2 of the Constitution. That if any other law is inconsistent with the Constitution that other law shall, to the extent of the inconsistency, be void. Learned counsel submits that anything which unreasonably restricts the right of an eligible person to stand for election must be condemned as inconsistent with the Constitution and struck out. He submits that the increase of the deposit to $5,000 takes away the opportunity of the majority of eligible persons from exercising their right to participate in the general elections. He submits the increase is excessive and thereby unconstitutional in that it offends against (a) the national objectives set out in the Preamble to the Constitution (b) s 13 of the Constitution and (c) s 15. Three cases ï Special Reference by PNG Ombudsman Commission (1982, unreported) (ôPNG Reference No 2'), Sakeasi Butadroka v A-G & Electoral Commission (1992, unreported) and Lubin v Panish (1974) 415 US 709 have been relied on by learned counsel in support of his contentions.
The defendant's arguments
Learned counsel, Mr. Keniapisia, for the defendant, submits that the power to impose fees is based on legislative and constitutional scheme of enactments and is necessary for parliamentary elections. He also submits it is a universal practice for all democracies and is imposed on candidates standing for election.He argues that the increase of fees is not discriminatory against the poor or rich as it applies to both groups alike. On the constitutional grounds raised, he argues that for the plaintiff to succeed under s 13 of the Constitution, he would need to establish (1) that a violation of his rights had occurred against his consent, (2) he must belong to a political party and (3) that it is shown that the thing done therewith is not reasonably justifiable in a democratic society. He submits the plaintiff had failed to show that this so under this section.

plaintiff must show that the increase in fee applies differently to to their respective description by place of origin. The plaintiff has not submits that the Preamble relied on cannot be a ground for relief as it merely sets out guiding principles upon which the Constitution is made.

The Law
A brief discussion of the law at this juncture is pertinent. The starting point must be s 47(1) of the Constitution, which sets out the constitutional requirements for persons intending to contest any national election. Section 47(1) of the Constitution provides:

ñParliament shall consist of persons elected in accordance with the provisions of this Constitution and, subject thereto, in such manner as may be prescribedò

Sections 48 and 49 of the Constitution set out the minimum requirements for such intending candidates in an election. Section 47 (1} of the Constitution, however, also provides for other requirements as may be prescribed. One such requirement, which is not challenged per se, is the deposit required under s 27 of the Act. I have already pointed out that as unamended the applicant does not take issue with its validity and legality.
The effect of s 27, however, is crucial. It imposes an absolute condition on the validity of the nomination of an intending candidate .If the deposit is not paid, the candidate is disqualified from running for office. How the deposit is calculated and what factors are to be taken into account, therefore, are relevant matters to be considered in determining the deposit.

The issues for determination
It is not contented by the applicant that the imposition of a deposit as stipulated in the original legislation (as unamended) is inconsistent with the provisions of the Constitution and therefore invalid. He does not take issue with the deposit where it is reasonable. He does and has objected where he considers the recent increase to be excessive. He submits it contravenes his rights provided in the Constitution. It can be summarised as follows. First, that the recent amendment raising the amount of the deposit from $2,000 to $5,000 is excessive. Second, that as a result thereby it violates his constitutional rights contained in the Preamble to the Constitution and ss13 and 15 and, accordingly, should be struck out as inconsistent by this court.

Is the deposit of $5,000 excessive?
The first question that must be asked is whether this recent increase is excessive. This raises the question as to who fixes the amount and how is it to be fixed? Is there a set formula to be followed? What factors, if any, are to be taken into account? I do not think it is in dispute that the mandate for fixing the deposit lies with Parliament under s 27 of the Act. But how do they fix that amount? Can they simply fix any arbitrary figure from the sky and put it in? In my respectful view, like in any organisation, there is a responsibility attached to such power or duty. That responsibility is based on the fundamental requirement under our Constitution enshrined in s 2 thereof, that it is the Constitution that is supreme, not Parliament. Hence our honourable Parliament, with respect, cannot do as it pleases, enact any law as it pleases and fix any deposit as it pleases. It has to bear in mind that what it does, like any other government department, including the courts, does not contravene or is inconsistent with any provision of the Constitution. And if it does enact legislation that is inconsistent with the Constitution, then the responsibility of dealing with that and making such appropriate orders as is deemed necessary lies with the High Court of Solomon Islands. That jurisdiction has been given under ss 18 and 83 of the Constitution itself.
Various reasons have been given for the increase, deposed to in the affidavits of the Chief Electoral Officer, John Babalu, filed on 21 September2001 and by the caretaker Minister for Home and Ecclesiastical Affairs Robins Mesepitu, filed on 13 September 2001, justifying the increase on the need to meet election and ongoing expenses of the Electoral Office and the need to set a fee that would ensure that only serious-minded people do contest in the elections. Learned counsel, Mr Radclyffe, has also filed for purposes of consideration by the court, extracts from Hansard, the proceedings of Parliament for 13 August 2001 which contain the reasons for the increase given by the Hon Minister Robin Mesepitu in his speech to Parliament. The same reasons deposed to by Mr Babalu and the caretaker minister were mentioned in the speech of the minister.

The applicant has also filed an affidavit of his means, which is undisputed. It is clear that as far as his affordability to pay the said deposit is concerned, the fee is excessive. Mr. Radclyffe has also filed a table of election deposits in other jurisdictions together with the various levels of gross national product per capita in US dollars, I presume for the year 2000, as the year is not stated in the table, for comparison purposes. The data shown is quite revealing.
I set out table in full:

	ocal	Deposit in $SB	GNP per capita
		at 31 August 2001	in $US
Solomon Islands	$SB5, 000	5,000	870
Australia	$AU350	1,000	20,650
New Zealand	$NZ300	680	15,830
Papua New Guinea	PGKI, 000	1,610	930
Tonga	TOP200	515	2,200
Fiji	$FJ500	1,202	2,460
UK	£GB500	3,906	21,800

Mr. Radclyffe seeks to show by this that whilst Solomon Islands has the lowest gross national product per capita, by comparison it also has the highest deposit to be paid by a candidate for election. The point sougth to be made is well taken. If the basis on which the fee increase was made is to hold water, that it is intended to distinguish the serious from the spurious, one would expect the deposit to be higher in other countries in the table. Clearly that is not so, simply reaffirming the doubts expressed by Chief Justice

Burger in Lublin (1968) 39 L Ed 2d 702 at 717:

ñFilling fees, however large, do not in and of themselves, test the genuineness of candidacy or the extent of the voter support of an aspirant for public office. A large filing fee may serve the legitimate function of keeping ballots manageable, but, standing alone, is not a certain test of whether the candidacy is serious or spurious. A wealthy candidate with not the remotest of chance of election may secure a place on the ballot by writing a check. Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public. We have also noted that prohibitive filing fees, such as those in Bullock, can effectively exclude serious candidatesò

Learned counsel has also submitted for my consideration, and which I take judicial notice of, a copy of the Solomon Islands Government Report on the 1999 Population and Housing Census. He submits that the following pertinent statistics showed that only a small minority of eligible people could afford to pay a deposit of $5,000:

(a) Table B1.02 on page 31 shows that the urban population of the Solomon Islands is 63, 732 and the rural population is 345,310.

(b) Table B1 .06 on page 59 shows that there are 208, 391 eligible voters. The Electoral Commission says that about 280,000 have been registered (see report dated 11September 2001).

(c) Table B6.02 on page 308 shows that only 27% of eligible voters are in paid employment.

The vast majority, particularly people like the plaintiff who live in rural areas and do not receive a regular income, would not be able to pay this unreasonably high deposit.
The respondent has not filed any other affidavit, apart from the affidavits of Mr. Babalu and Mr. Mesepitu, to contradict the claims of the applicant.

ons
has gone through the courts in other jurisdictions. In Fiji, in
h the imposition of a deposit of $FJ1, 000 by the Electoral Commission for intending candidates. The fee previously charged was $FJ100. This was challenged on the same grounds that this applicant now appears before this court. Fatiaki J found as follows:

ñIf I may say so, after hearing and considering the evidence of Mr. Bale this court was left with the distinctly unfavourable impression that the figure of $FJ1, 000 was an entirely arbitrary one quite unrelated to the common realities of the situation prevailing in Fijiò

In another similar jurisdiction, in PNG Reference No 2, the Supreme Court of Papua New Guinea also considered whether the increase of the deposit from PGK100 to PGK1, 000 contravened the constitutional provisions protecting the rights of a person to be elected to for office under s 50 (1) and (2) of the Constitution of Papua New Guinea. In that case, substantial material was placed before the court for its consideration (see the judgment of Kearney DCJ at pp 12- 17). This included statistical figures from the 1980 Census and the consideration of well-recognized economic indicators, including: the proportion of people engaged in agriculture and entitled to stand for election, the proportion of the population earning a regular cash income, minimum wage levels, the average earnings of public servants and per capita incomes. After considering all these data, Kearney DCJ concluded as follows:

ñThe conclusion appears irresistible that a PGK1, 000 deposit would either effectively prohibit all but a relative a few of all eligible citizens from standing, or act as a substantial deterrent to their doing so, in so far as they rely on their own resources. I do not consider that the court is required to determine, in terms of the structure of society and the levels and distribution of income as they are at present, what is a reasonable deposit on nomination. It is sufficient I think to say that on the material put before us whatever sum may be reasonable cash deposit today, a requirement of PGK1, 000 is unreasonably high in that it would deny to a majority of eligible citizens the reasonable opportunity to stand for election given them by the Constitution, s 50(1). Accordingly, I would uphold the Commission's submissions on the point. I should add that considerable weight must be given to the views on matters of what is reasonable, to the people's representatives in Parliament. I have therefore examined the parliamentary debate on the November Act. It does not appear that there was any examination of the relevant issues in any depth by the Parliament which does not appear to have been favoured by the statistical information put before this court. In these circumstances, the deliberations of Parliament are not of any assistance.ò

I, too, have been provided with copies of the debates in Parliament on the relevant issue by Mr. Radclyffe but I also find them to be of little assistance in deciding whether the increase was justifiable.

Conclusion on submission of an unreasonably high deposit
Respectfully, I find myself reaching the same and inevitable conclusion reached by the courts in the two cases referred to above, that the increase in the deposit from $2,000 to $5,000 was arbitrarily fixed, without due consideration for the economic realities of the situation prevailing in the country. Since the armed rebellion, breakdown of law and order and lawlessness experienced by this country some two or so years ago, the economy of this country has been on a downward spiral. Many services provided by government and other essential bodies like the Solomon Islands Electricity Authority (SIEA) and Solomon Islands Water Authority (SIWA) have been affected. Many businesses have had to downsize and streamline operations, including laying off workers, either on unpaid leave for an indefinite period or making them redundant. Some of our major industries, Solomon Islands Plantation Ltd (SIPL) and Gold Ridge Mining Ltd. have had to close down, laying off thousands of workers. Some businesses have simply closed due to sheer inability to make ends meet. Some appear to be on verge of closing down. No one in his right mind would describe the economy of the country as buoyant and or experiencing growth or prosperity. Rather the opposite is true. The country is going through hard and difficult times. Investor confidence is at a low. There has been a squeeze and a reduction in the size of the working population and those who are able to earn income on a regular basis. Many families, even workers, are struggling to make ends meet. One would have expected in the light of the prevailing circumstances facing the country that the deposit should either have been reduced or unamended. Solomon Islands has not, in its short history from independence in 1978 to the present, experienced such trying and difficult times as it has encountered in the last two or so years. I do not think anyone would readily say, in the light of what the country had just come through, that the increase was not excessive or justifiable.

One of the reasons given for the increase was to recoup election expenses. Whilst that might be a factor in determining an increase, it should not, in my respectful view, play a significant part. Elections are not cheap and so

e to be funded by the deposits to be paid by intending candidates. If
h and only the rich or those who have the means would run for
lection expenses are to be funded from the consolidated fund (see s
8 of the Act):

'All expenses, including costs in proceedings, properly incurred in the registration of electors and in the holding of elections shall be a charge on the consolidated fund.'

The costs of holding an election are the responsibility of the government and rightly so, as it touches on a fundamental right of the people of this nation to go to the polls to choose the candidate that would best represent and agitate their views in Parliament, a body charged, inter alia, with the responsibility of forming the government of the day that would lead the country for the next four years. That is an awesome responsibility and every encouragement and opportunity must be given to responsible leaders in all walks of life to be able to contest without hindrance for an office in Parliament. Elections are held only once in every four years and so the argument of recouping costs should never be an excuse for raising the deposit to an unacceptable level. Any government of the day need not be taken by surprise. This should be an ongoing thing such that well before the elections fall due, except, of course, in unusual circumstances, funds should be either set aside for the elections or sought for well before the due date. The intending candidates should not be unnecessarily burdened by a national obligation to fund elections. That is the responsibility of the government, for the people of Solomon Island.

I accept there are good reasons for requiring the payment of a deposit. This is obvious from the way this application has been lodged. The applicant does not take issue with the requirement of a deposit to be paid. It is a common universal practice in all democracies and is imposed on aspiring candidates standing for elections, as stated in Butadroka by Fatiaki J. But in PNG Reference No 2 Kearney DCJ made the following pertinent observations on the imposition of a substantial cash deposit:

'Undoubtedly, the effect of a substantial deposit is in one sense to make elections more manageable, by limiting the ballot only to "serious" candidates, and by strengthening the position of the well organized political parties. It is arguable that a more orderly election would result, voters would be less confused than perhaps they are by the sheer multiplicity of candidates, and so the election result would more truly reflect the will of the majority.'

I accept the requirement of a deposit does play a useful role in limiting the size of the ballot and in minimizing voter confusion. But, as pointed out by Burger CJ in Lubin, it is a superficial test of the genuineness of a candidate to contest in the national elections. The same cannot be said of the applicant before this court, a genuine intending candidate who, because of the exorbitant deposit, is hindered in his desire and right to stand as a candidate. Respectfully, I find the increase to be unreasonably high and therefore excessive.

Does it contravene the right of the applicant as stipulated in s 13 of the Constitution?
Section 13 of the Constitution provides:

'(1) Expect with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or form or belong to trade unions or other associations for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with ot in contravention of this section to the extent that the law in question makes provision -
(a) in the interests of defence, public safely, public order, public morality or public health;
(b) for the purpose of protecting the rights or freedoms of other persons;
or
(c) that imposes restrictions upon public officers, and except so far as that provision or, as the case may be, [any act done] .. under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

Subsection 13(1) spells out the right, which the applicant complains of, that he has been hindered from freely associating with other persons to form or belong to a political party. Subsection 13(2) makes provision for laws which may regulate that right, provided it is done under the authority that it is reasonably justifiable in a democratic society. What this means is that if a law is made falling within s 13(2)(a)-(c), it will not be held to be inconsistent with or in contravention of the rights in s 13(1), provided it is also reasonably justifiable in a democratic society. If a

(2)(a)-(c), the burden lies with the applicant to show that such law is ety.

Mr. Keniapisia, for the respondent, submits that under the first requirement above, the applicant must show that the violation had occurred without his consent and that he is a member of a political party. Mr. Radclyffe counters by arguing that the applicant was not a member of Parliament anyway and so would not have been in position to oppose the amendment sought in Parliament. I agree. The most one can do perhaps is to write and let Hon Minister know of his opposition to the proposed amendment. The fact he has not done that or has remained silent does not necessarily imply he has consented to the increase. There is no evidence before me to suggest that the applicant consented at any time to the increase. Rather the opposite is true.

The second argument raised in opposition by Mr. Keniapisia was that the applicant must show that he belonged to a political party. Unfortunately, that is not correct. Section 13(1) talks about the right to assemble freely and associate with other persons and to form or belong to political parties, trade unions or other associations for the protection of his interests. The applicant does not have to be a member of a political party to contest the elections. He can do so as an individual or independent candidate and choose to associate freely with other political parties if elected. He need not prove that he is a member of a political party. All he needs to prove or show is that his right to freely associate with other persons to form or belong to political parties had been hindered. And that is what he seeks to show in this application.

Has the applicant been hindered in the enjoyment of his freedom to associate with other persons in political parties?

This was one of the issues, which Fatiaki J in Butadroka had to consider. After considering the definition of óto hinder' as including óto delay or frustrate action, to bear obstacle or impediment' his Lordship went on to express his view as follows:

ón that regard this court too is firmly of the opinion that in fixing a nomination deposit of $1,000 without any alternative means of seeking nomination for election, the Electoral Commission has substantially and effectively hindered the enjoyment of the right of voters and candidates to associate freely for the advancement of their common political interests. In my view, the right to vote and the right to stand for election are so inextricably bound up that any form of restriction imposed on candidates seeking nomination for election directly impacts on the right on the right of voters to form political associations with and vote for like-minded persons of their choice in the pursuit of their legitimate political and ideological interests. Needleless to say, a nomination deposit which is so high as to effectively debar the nomination of serious (albeit impecunious) candidates hinders in a not insignificant manner the availability of sympathetic persons with whom the poorer voter may wish to association in the furtherance of his interests.'

Does the exorbitant increase hinder the applicant in the enjoyment of his right to associate freely with other persons in a political party? What is the effect of the increase? As far as the applicant is concerned, in not being able to pay the deposit he is unable to participate in the elections as a candidate and thereby deprived of the constitutional right to associate freely with other like-minded persons to form a political party or to belong to a political party, if he is so minded or even to remain as an independent member with other like-minded persons. As I understand his application, there is no impediment of associating with other persons for the purposes of forming or belonging to a political party now, the hindrance or blockage lies in the fact that in order to qualify as a candidate for the elections he has to overcome the requirement of an unreasonable high deposit. In not being able to pay the deposit, he is deprived of his right to associate with other persons in political parties irrespective of his seriousness to contest in the elections. He claims thereby that his fundamental rights under the Constitution had been contravened. I agree.

There is no evidence to suggest otherwise to me that the applicant does not meet the requirements spelled out in ss 48 and 49 of the constitution. That is, that he is a citizen of Solomon Islands and has attained the age of twenty one years, and that he is not disqualified from membership under the provisions set out in s 49. Having met those constitutional requirements he is thereby entitled to contest the national elections provided of course he pays the deposit stipulated under S27 of the Act. He has a right thereby under S13 (1) to associate freely with other persons to form or belong to any political parties. Unfortunately, in this case, the excessive deposit means that although he is qualified to stand for election as a member of Parliament under ss 48 and 49 and thereby has a right to

belong to poliltical parties, that right is being hindered by that ion and the inconsistency.

Whilst the requirement of a deposit is acknowledged as a common universal practice in all democracies and imposed as a means of regulating voter rationality, limiting the ballot size, deterring frivolous candidates and recovering to a certain extent administrative cost of elections, it should not be used as a means to restrict or prohibit serious aspiring individuals intending to contest the election by imposing an excessive deposit. When that is done, it takes on the role of a dagger, cutting off persons like the applicant by how much they can pay. With respect, I do not think that was what was intended in the original enactment of s 27 of the Act and the purposes of a deposit.

Burger CJ recognized this in Lubin (1974) 415 US 709:

õThis legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through the candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with rights of voters. ñThe right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamouring for a place on the ballot.ò(See Williams v Rhodes (1968) 393 US 23 at 31.) This must also mean that the right to vote is ñheavily burdenedò if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamouring for a place on the ballot. It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars'.

Fitting words for the case before this court, that the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars. In fact, the Constitution has already spoken in ss 47,48 and 49. Nowhere is a monetary value required before a person can qualify for election as member of Parliament. The requirement of a deposit is simply appended as an administrative prescription under the Act and though it operates in a similar way as a qualifying factor, its imposition must be based on grounds of reasonableness matched with the prevailing economic realities of the country. In Australia for instance, a country many times more well off than Solomon Islands, the deposit required is roughly $SB1, 000; in New Zealand, about $S680; even in neighbouring countries like Papua New Guinea and Fiji it is approximately $SB1, 700 and $SB1, 300 respectively. It is pertinent to note that in the PNG Reference No.2 Kearney DCJ noted the CPC Report (1974) on the size of the nomination deposit as follows:

õWe have given careful consideration to the question of what deposit should be paid by candidates in respect of their nominations for election to the Parliament. We agree that a reasonable deposit should be paid to help ensure that the act of nominating is regarded with appropriate seriousness. However, we believe that the deposit should not be set at a figure so high that it is likely to exclude a great many people merely because they cannot afford the sum involved.' (My emphasis.)

Not only is the right of the applicant to associate freely with other persons to belong to a political party affected, but the rights of the voters to choose or to express their preferences through those candidates who will be contesting will also be hindered or affected by such increase. I agree with Fatiaki J's comments in Butadroka that the rights of voters is inextricably linked with the choices they have and can make, as to the candidates contesting in the elections. Their preferences can only be expressed through the political groupings or individuals contesting and if the applicant and others in the same boat as him are hindered from so participating in the national elections because of this exorbitant increase, then the voters are being deprived too of a right provided for and secured by the Constitution.

I am satisfied the increase of the deposit to $SB5, 000 hinders and will hinder (Unless the applicant experiences a windfall in the meantime) his right to associate freely with other persons to form or belong to political parties under s 13(1) of the constitution.

ratic society
3 (2) of the Constitution. I can only presume he takes the view that 13(2) (a) of the constitution, as the other two subsections,(b) and (c) would not apply. I presume it is that the increase was made in the interest of public order. I say this because that is the only way he could raise the argument, that the applicant needs to show that the increase was such as not to be reasonably justified in a democratic society. The hurdle Mr. Keniapisia faces is that in raising that argument, the onus lies on him to show that the increase was in the interest of public order. The applicant has filed affidavit evidence and raised a prima facie case that even if the increase was made in the interest of public order it was not reasonably justified in a democratic society.

The phrase órreasonably justifiable in a democratic society' has been dealt with in other jurisdictions in similar applications and I draw useful assistance from those cases. In PNG Reference No2, where the deposit had been increased from PGK100 to PKG1, 000,Kearney DCJ observed as follows:

ówhatever the weight to be given to these matters, it appears to me that it is heavily outweighed by the emphasis in the Constitution on the right and duty of citizens to take part in the political process which I have set out. I do not express that as a personal evaluation, but as an evaluation which is very manifest from the Constitution. If the values consciously favoured in the Constitution, which this court is directed to implement, create difficulties in practice, that can be remedied only by a reconsideration of these values and by constitutional amendment. It is the duty of this court, meanwhile, to enforce the values in the Constitution as expressing, in terms of the Constitution s 50(2), and the ñproper regard for the rights and dignity of individualsò of this country. It follows that I would uphold the commission's submission on this point. I do not think that the reasonable citizen would consider a law fixing the deposit at PGK1, 000 as reasonably justifiable in this society today, in the light of the values expressed in the constitution'.

In the same case Kapi J, in determining the meaning of the phrase óreasonably justifiable in a democratic society', considered and adopted the standard of reasonableness applied by Patanjali Sastri CJ in the India case State of Mandras v Row AIR 1952 SC 196 at 200, as to what is the standard of reasonableness to be applied:
ót is important in this context to bear in mind the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern, or reasonableness, can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable in all circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decisions should play an important part, and the limit to their interference to the legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorizing the imposition of the restrictions considered them to be reasonable'.

His Lordship also considered the approaches in two other jurisdictions. In Uganda v Comr of Prisons, ex p Matovu (1966) EA 514 at 543 the High Court of Uganda considered the same question in s 30 (5) of its Constitution and said:

ósuch measures must reasonably be justifiable for the purposes of dealing with the situation which exists at any particular time and therefore whatever measures adopted must depend upon how grave the situation is at any given time.'

The second case was Cheranci v Cheranci (1960) NRNLR 24, where the Nigerian court considered whether the provisions of the Northern Region Children and Young Persons Law 1958 was a Law which was reasonably justifiable in a democratic society in the interest of public order, public defence etc. Bate J said: ó€ a restriction upon a fundamental human right must before it may be considered justifiable ï (a) be necessary in the interest in the public defence, public order, etc; and (b) must not be excessive or out of proportion to the object which it is sought to achieve.'

Kapi J then considered the burden of proof, holding that where it is shown on a prima facie basis that a law is unconstitutional that the onus then falls on the person asserting its validity. His Lordship said:

endment Act is a law that is ñreasonably justifiable for the purpose in ghts and dignity of mankind''. In this regard, absolutely no materials r the imposition of PGK1, 000. I am left with the impression that the imposition of PGK1, 000 has no regard for the level of income of all citizens of this country. It could not be said that there was any intelligent and careful consideration given to the levels of income of all citizens. The PGK 1,000 nomination fee is excessive having regard to the facts in the statistical data. The nomination fee in question is contradictory to the principles stated in the National Goals and Directive Principlesé Principal Legal Advisor arguing the validity of this Act has not discharged the onus of showing that this Amendment is a law that is reasonably justifiable for the purpose in a democratic society which has proper regard for the rights and dignity of mankind. I would declare the law invalid for this reason.

In Butadroka Fatiaki J also found that the imposition of the $1,000 deposit was not reasonably justifiable in a democratic society. After referring to the PNG Reference No.2 and quoting with approval the test of reasonableness of Patanjali Sastri CJ in State of Madras v Row AIR 1952 SC 196 at 200, he went on to find as follows:

ón the present case whilst the court accepts that the Electoral Commission was properly empowered to enact a law requiring a nomination fee, the amount fixed however, prima facie contravenes a voter's right to vote and hinders the applicants freedom to associate freely. The Solicitor General as the proponent of the law in question accordingly has the burden of proving that the law in question satisfies the criteria laid down in art 14(2) of the Constitution. This he has failed to do and the court is driven to conclude that the amount of $1,000 is not ñreasonably jusitiable in a democratic society in which all peoples may to the full extent of their capacity play some part in the institutions of national lifeò

No issue has been raised as to where the onus of proof lies but it is my respectful view that it is different in our Constitution. It lies with the applicant to show that the increase is not reasonably justifiably provided the defence is raised by the state under one of the paragraph in s13(2). I have pointed out Mr. Keniapisia had not shown under what paragraph in s 13(2) he seeks to base the validity of the increase under, but since he has raised the submission that the applicant needed to show that the increase was such as not to be reasonably justifiable in a democratic society, I would have expected him to produce evidence in rebuttal justifying the increase.

I have already canvassed in detail and accepted the material evidence submitted by the applicant in support of his submission that the increase was excessive. That raises a prima facie case against the state that the increase was not reasonably justifiable in a democratic society. I have also considered the affidavit material submitted by Mr. Keniapisia in support of the increase. The material submitted with due respect did not show how the increase could be justified in the light of prevailing circumstances facing the country. It fell far short of demonstrating any logical and reasonable basis for the increase. All that was deposed to were the reasons for the increase, being to recoup or meet election and ongoing expenses. Nothing has been submitted to show how such an increase could be justified in the dire economic straits the country has faced in the last two years or so and is still going through. Respectfully, I must find that the applicant had amply demonstrated that the increase was such as not to be reasonably justifiable in a democratic society, definitely not in Solomon Islands.

Discriminating against people in rural areas (place of origin)
The second ground under which this application is made, is that the increase discriminates against people living in the rural areas in that they are unable to pay such fees even if they desired to run for elections. Subsection 15 (1) provides as follows:
óSubject to the provisions of sub-s (5), (6) and (9) of this section, no law shall make any provision that is discriminatory either of itself or in its effect'.

Subsections (5), (6) and (9) do not apply to the facts of this case and so it is not necessary to quote them in full. Subsection 15(4) sets out the definition of ódiscriminatory'.

ón this section, the expression ñdiscriminatoryòmeans affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.'

The applicant would need to show according to the said definition to that of others living in urban centers. With respect he has failed to centres, as opposed to rural areas, who are faced with the same increase. I take note though of the point which the applicant seeks to establish, that the increase, makes it more difficult and in some instances, well in his case, impossible, to pay the deposit and thereby disqualifying him from running for office in the coming elections. I think the more accurate word to use in his case is that he is being penalized (disadvantaged) by this increase, but not discriminated (treated unfairly) against. In Butadroka Fakiaki J also found in a similar argument raised before him that there was no discrimination:

ón this latter regard learned counsel for the applicant argued that a nomination fee of $1,000 unlawfully discriminated against the poor as opposed to the rich. I cannot agree. The requirement of a $1,000 refundable deposit on nomination is a general requirement which applies to all persons who are nominated for election to Parliament. It applies to both rich and poor alike and although it may cast an unequal burden on the latter that does not in my view render the requirement discriminatory in terms of art 16 of the Constitution'.

Kearney DCJ rejected the same argument in PNG Reference No 2. Kapi J also rejected the issue of discrimination, but approached it from different angle. He took the view that the issue of discrimination was covered anyway in sub-s 50(2) as going beyond the regulatory powers provided therein and held that the amendment was invalid in that it ógoes outside the limitation given by s 50(2) and in effect prohibits or denies a class of citizens who are incapable of raising PGK1, 000

I am not satisfied it has been shown that the applicant has been discriminated against by virtue of this increase. I reject that submission.

Increase inconsistent with the national objectives set out in the Constitution
Finally, the last argument raised against the validity of the increase is that it is inconsistent with the national objectives and purposes set out in the agreement and pledge (the Preamble) in the Constitution and therefore ought to be set aside as well. Mr. Keniapisia submits that they are merely guiding principles upon which the Constitution is made, that they do not guarantee absolute constitutional rights to anyone and that they do not strictly form part of the Constitution. Hence no relief can really be based on them.

I think the starting point must be, to avoid all doubts, that the agreement and pledge, whilst it is partly correct to say that they set out the guilding principles on which the constitution is founded, nevertheless they are part and parcel of the Constitution and to be read as a whole with the rest of the provisions of the Constitution (see Minister of Provincial Government v Guadalcanal Provincial Assembly (11 July 1997, CAC 3, unreported) (ôMPG) at p9 per Kapi P (Ag), at p 22 per Williams JA and at p 32 per Goldbrough JA).

Secondly, it is important to understand how the Preamble is to be construed and applied. MPG again sets out in clarity how this is to be done. Recourse can be made to the Preamble for assistance in construing the enacting provisions of a statute or Constitution. See judgment o Kapi P (Ag) at pp 8-9

óThere is authority which supports the proposition that it is permissible to have recourse to the terms of a Preamble as an aid to construing the enacting provisions of a statute. However, this is only permissible where there is obscure or indefinite enacting provisions (see A-G v Prince Ernest Augustus of Hanover (1957) I ALL ER 49)é It is permissible to have recourse to a Preamble as an aid to construction of the provisions of a Constitution as in common law, where there is an ambiguity in the enacting provisions. These authorities, however, go beyond the common law in that a Preamble may be used as an aid to construction even where the enacting provisions are not so ambiguous (See Kauesa v. Minister of Home Affairs (1994) 2 263 at 297-298).'

His Lordship then refers to JM Kelly The Irish Construction (3rd edn, 1994) and states:

ó do not have easy access to the Irish reports but a reading of the material provided illustrate that the Preamble is part of the Constitution and often stipulates the spirit of the Constitution which may help to determine the meaning or effect to be given to particular provisions of the Constitution.'

General (1991) LRC (Const) 328, which confirms the same view in o the terms of the Preamble to interpret other provisions of the the same view at p 31 of his judgment:

ôResort has often been made to the words of a Preamble in a statute when deciding on provisions which themselves have been found to be ambiguous, and there is ample authority for this'.

All three learned justices of appeal agreed that where there is no ambiguity it is not necessary to have recourse to the terms of the preamble for assistance. Kapi P put it this way: ól consider that the Preamble to the Constitution of Solomon Islands is no no different to the nature of preambles in other Constitutions. The Preamble is a general statement of jurisprudential philosophy or underlying principles or beliefs by the people as the basis of the new nation. To this extent it is permissible as has been illustrated by decisions from other jurisdictions for courts to have regard to Preambles in construing provisions of the Constitutution. However, in my opinion, these general statements must not be read as constituting legal principles on their own'.

Williams JA said (at p 22):

ôThe whole document must be read together, subject of course to the general principle that a specific provision would prevail over a general intent derived from the use of the words of wide import.'

And Goldsbrough (at p 31):

ôI am not aware of any authority which permits resort to be made to a Preamble, however, where no ambiguity is found. As Innes CJ said in Law Union and Rock Insurance Co Ltd v Carmichael's Executor 1917 AD 593 at 597: ñA Preamble has been described by an old English judge as óa key to open the minds of the makers of the Act and the mischief which they intended to redress'. But the key cannot be used if meaning of the enacting clause is clear and plain. In cases however where the wording is ambiguous, and in cases where the court is satisfied that the legislature must have intended to limit in some way the wide language used, then it is proper to have recourse to the Preambleò. The ñagreement and pledgeòfound at the beginning of the Constitution , which as I said earlier is only referred to here for the sake of convenience as a Preamble, is as much a part of the Constitution as other provisions. But from its words one can see that it does not set out to make specific provisions. Where such specific provisions do appear later in the Constitution these later provisions will stand alone expect where their meaning cannot be ascertained without reference to other material.

The words of Kapi P (Ag) are apposite. That ôthe Preamble is a general statement of jurisprudential philosophy or underlying principles or beliefs by the people as the basis of the new nation'. They contain statements of general principles which in turn are enacted in the other provisions of the Constitution. In our particular case, the general statements that ñour government shall be based on democratic principles of universal suffrage' and that ówe shall uphold the principles of equality, social justice and the equitable distribution of incomes' and that ówe shall ensure the participation of our people in the governance of their affairs' have been defined in the specific provisions set out in ss 47,48,49,55 and 56 of the Constitution. There has been no suggestion of any ambiguity in those provisions that I should have recourse to the terms of the Preamble for their construction. Indeed ss 47, 48 and 49 had been relied on by the applicant as constituting the springboard from which he alleges that his rights had been contravened under ss 13 and 15 of the Constitution.
With respect, the action founded on the terms of the Preamble is conceived and must be dismissed .

Effect of the court's ruling
The effect of this court's ruling is that having found that the application of the applicant is established under s 13 of the Constitution, I must rule that the amendment of s 27 of the Act is unconstitutional as being inconsistent with s 13 of the Constitution. This means that the deletion of the words ôtwo thousand dollars' and substituting therefore the words ôfive thousand dollars' is unconstitutional and thereby void. The legal effect of this is that the original provision, as unamended, for purposes of the deposit, that is $2,000, remains valid and applicable. I grant orders as sought in the Originating Summons filed 29 August 2001.

Section 42 of the 1979 Constitution on Jurisdiction of the High Court to entertain Fundamental Rights Enforcement Actions ï Whether confers parallel jurisdiction on State and Federal High Courts in relation to Fundamental Rights Enforcement Actions - H.R.H. Oboi Ubi UjongUnah v. Mr. Marcus Ukoi more>>

H.R.H. OBOL UBI UJONG UNAH
BARRISTER OBETEN OKORM OBETEN
BARRISTER UTUM UBI ETENG
BARRISTER CLEMENT OJOR
CORNELIUS IKPI EDET (OKPEBIRI)

v.

MR MARCUS UKOI

COURT OF APPEAL CALABAR DIVISION

CA/E/195/98

Dennis Onyejife Edozie, JCA. (Presided and Read the Leading Judgement)
Okechukwu Opene, JCA.
Simeon Osuji Ekpe, JCA.

Thursday, 29th November, 2001

FUNDAMENTAL RIGHTS - Fundamental Rights (Enforcement Procedure) Rules ï Ex parte Application for leave of court to enforce fundamental right ï Whether court may grant ex parte application without hearing the applicant thereon

FUNDAMENTAL RIGHTS - Fundamental Rights (Enforcement Procedure) Rules ï Statements in support of application to enforce fundamental right (Order 2 Rule 2(1)) ï Whether applicant may file different statements in support of motion ex parte for leave to enforce fundamental right and the motion on notice

FUNDAMENTAL RIGHTS - Fundamental Rights (Enforcement Procedure) Rules ï Order 2 Rule 1(2) which requires that notice of motion for enforcement of fundamental right be entered for hearing within fourteen days of grant of leave to enforce - Whether the time stipulation of fourteen days mandates hearing of the notice of motion or the filing thereof within fourteen days of grant of leave to enforce

CONSTITUTIONAL LAW - Section 42 of the 1979 Constitution on Jurisdiction of the High Court to entertain Fundamental Rights Enforcement Actions - Whether confers parallel jurisdiction on State and Federal High courts in relation to Fundamental Rights Enforcement Actions

Issues for determination:
1. Whether the Federal High Court has jurisdiction to entertain applications for enforcement of fundamental rights based on Reliefs claimed by the respondent/applicant.

2. Whether the conditions precedent for the Federal High Court to assume jurisdiction to hear and determine the motion on notice have been fulfilled.

gep. In 1996 the Respondent lodged a complaint with the Nigerian omplaint, the Commissioner of Police, Calabar, invited the Traditional Ruler of Ugep, the first Appellant and certain other persons to his (Commissioner's) office, where they were advised to maintian peace. On return from the police station however, the people of Ugep set up a committee consisting 12 persons, including the 2nd to 5th appellants to look into the circumstances of the invitation of their Traditional Ruler by the police. The committee after its deliberations resolved that the Respondent should give a live cow and the sum of N10,000.00 to appease their Traditional Ruler. The Respondent refused to comply with the directive and was consequently declared an enemy. He was stripped of his chieftancy title and the 1st Appellant went around the town with a town crier cursing anyone who would buy the respondent's goods. The Appellants also mobilized their agents to obstruct the Respondent's business. The Respondent then sought leave of the Federal High Court, Calabar to enforce his fundamental right, by a motion ex parte filed on the 16th of December, 1996.

Pursuant to the leave granted on the 15th of January, 1997, the applicant brought a motion on notice dated and filed on the 23rd day of January 1997 praying for a declaration that his right to life, personal liberty, dignity and movement had been violated, and N10,000,000.00 damages. Hearing of the motion on notice was slated for 30th January, 1997, a period of 15 days from the date of the ex parte order. The Appellants filed a counter affidavit denying threats to the Respondent's life or interference with his business. They also objected to the jurisdiction of the court to hear the suit and opposed hearing the application on grounds of non-fulfillment of conditions precedent to the hearing of the application, namely, that the Respondent filed separate statements and affidavits in support of the Motion Ex parte and Motion on Notice. Besides, they contended that the applicant was not in court to move his motion Ex parte and that the hearing of the Motion on Notice after a period of 15 days from the date of the Ex parte order is against the Fundamental Rights Enforcement Procedure Rules. The Federal High Court dismissed these objections and the Appellants appealed to the Court of Appeal.

Held (Unanimously allowing the Appeal):
The Respondent's application for the enforcement of his fundamental rights in terms of the reliefs sought is not cognizable under Chapter 4 of the Constitution to confer jurisdiction on the Federal High Court to entertain the case. The respondent's claims must be founded on jurisdiction expressly conferred on the Federal High Court under section 230(1) of the 1979 Constitution as amended by Decree 107 of 1993 before the Federal High Court can assume jurisdiction.

Details of Principles in the Judgment

1. A Fundamental Rights Application Before the Federal High Court must be Predicated on the Court's Express Jurisdiction
An application for enforcement of fundamental rights in accordance with the reliefs sought is not cognizable before the Federal High Court when the reliefs sought do not touch or arise from matters within the express jurisdiction of the court.[page 448 paras H-I, page 449 para A]

2. Litigant who Files a Motion to Invoke the Discretion of the Court must be at Hand to Move his Motion
It is the settled principle of law that a person who wants to invoke the exercise of the discretion of any court in his favour ought not to only file his motion before the court but also move the motion in court. [page 452 para D]
3. On Whether Applicant in a Fundamental Rights Enforcement Action can use Different Statements in the Ex parte Motion and Motion on Notice:
An application for enforcement of a fundamental right based on two different Statements will be rendered incompetent. Order 2 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 1979 is meant to avoid a situation where an applicant obtains leave to seek certain reliefs upon certain grounds only to somersault in the motion on notice with different reliefs based on different grounds. [page 454 paras E-G]

4. Import of ñEntering Motion on Notice for Hearing within 14 Days of Grant of Leave to Enforce Fundamental Rightsòunder the Fundamental Rights (Enforcement Procedure) Rules
Entering a motion on notice for hearing in the context of Order 2 Rule 1(2) of the Rules can only mean the filing of the motion for it to be fixed for hearing and this may only be done after leave to enforce fundamental right has been granted. It is when leave has been granted that the motion is filed and subsequently fixed for hearing by court officials. If the motion on notice is filed in the court registry within 14 days from the date the motion ex parte was

Rule 1(2), notwithstanding that the motion on notice is heard after the
E-G]

Word and Phrases

ñEntered for hearingò
ñEntered for hearingòcan be nothing more than the process whereby the motion or summons is entered in the records of the court.[page 458 para B]

Editor's Note - This judgment expounds on the proper construction to place on the jurisdiction conferred on the Federal High Court to entertain fundamental rights enforcement suits under Section 230 of the 1979 Constitution as amended by Decree 107 of 1993. Although both statutes have now been replaced by section 251 of the 1999 Constitution, the principles of interpretation espoused by the judgment in relation to the repealed statutes are very much apposite when construing the jurisdiction of the Federal High Court under the 1999 Constitution

Nigerian Cases Referred to in the Judgment:
1. Adewoyin v. Adeyeye (1962) SCNLR 310
2. Adeyemi v. Opeyori (1976) 9-10 SC 31
3. African press of Nigeria v. Federal Republic of Nigeria (1985) 1 All NLR 50
4. Agbakoba v. The Director SSS (1994) 6 NWLR (Pt. 351) 457
5. Alhaji Saidu v. Alhaji Abdulahi (1989) 4 NWLR (Pt. 116) 387
6. Alh Umaru Abba Tukur v. Govt of Gongola State (1989) 4 NWLR (Pt. 117) 517
7. Aluminium Manaufacturing Co (Nig) Ltd v. N.P.A. (1987) 1 NSCC. 224
8. A.G. Federation v. Att-Gen Abia State & Ors (2001) 1 NWLR (Pt. 725) 690
9. A.G. Federation v. Ajayi (2000) 12 NWLR (Pt. 682) 509
10. A.G. Lagos State v. Dosumu (1989) 3 NWLR (Pt 111) 552
11. Barclays Bank of Nigeria Ltd v. Central bank of Nigeria (1976) All NLR 409
12. Din v. A.G. Federation (1986) 2 NSCC (Pt. 11) 449
13. Ezeadukwa v. Maduka (1997) 8 NWLR (Pt. 518) 638
14. Ezeokafor v. Ezeilo (1999) 9 NWLR (Pt. 619) 513
15. Ezomo v. A.G Bendel State (1986) 4 NWLR (Pt. 36) 448
16. Faleye & Ors v. Otapo & 2 Ors (1995) 3 NWLR (Pt. 381) 276
17. Izenkwe v. Nnadozie (1953) 14 W.A.C.A. 361
18. Madukolu & Ors v. Nkemdilim (1962) 1 All NLR 587
19. Military Administrator, Benue State v. Abeyilo (2000) F.W.L.R. (Pt 45) 602
20. Mokelu v. Fed Comm for Works and Housing (1976) 3 S.C. (Pt..) 329 or (1976) NSCC 187.
21. National Bank of Nigeria Ltd & Anor v. Shoyoye & Anor (1973) 5 SC 181
22. Nneji v. Chukwu (1980) 3 NWLR (Pt. 21) 181
23. Nwabueze v. Okoye (1988) 4 NWLR (Pt. 91) 664
24. Nwosu v. Imo State Envi Sanitation Authority (1990) 2 NWLR (Pt. 135) 688
25. Oamen v. Owana (1993) 8 NWLR (Pt. 311) 358
26. Oguche & Ors v. Mba & Ors (1994) 4 NWLR (Pt. 336) 75
27. Ogugu v. State (1994) 9 NWLR (Pt. 366) 1
28. Ogunremi v. Dada (1962) 2 SCNL 417
29. Okafor v. A.G. Anambra State (1991) 6 NWLR (Pt. 2001) 659
30. Oshodi v. Eyifunmi (2000) 13 NWLR (Pt. 684) 332
31. Oyakhire v. Jen (2000) F.W.L.R. (Pt 20) 699
32. State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 23
33. Umoh v. Nkah (2000) 3 NWLR (Pt.) 512
34. Western Steel Works v. Steel Workers (1989) 1 NWLR (Pt. 49) 284

Nigerian Laws Referred to in the Judgment:
1. Constitution of the Federal Republic of Nigeria 1979, Sections 30, 31, 32, 38, 42, 230, 277
2. Constitution (Suspension and Modification) Decree No. 107 of 1993
3. Federal High Court Act, Cap 134, LFN 1990, Section 7
4. Federal Revenue Court Act, 1973

gment:
e) Rules 1979, Order 1 Rule 2(3), Order 2 Rule 2(1), (2) & (4)

Texts Referred to in the Judgment:
Å Halsbury's Laws of England (4th Edition)
ÅSupreme Court Practice 1991

Representation:
1. James Iwara Ofem Esq., for the Appellants
2. B. Olusegun Esq for the Respondent
EDOZIE, JCA (Delivering the Leading Judgment): This interlocutory appeal raises in the main the controversy or vexed question of the power of the Federal High Court to entertain applications for the enforcement of Fundamental Rights under Chapter IV of the 1979 Constitution.

The parties in this appeal are from Ugep in Yakurr Local Government Area of Cross River State. The 1st Appellant is the Traditional Ruler of Ugep and holds the title of Obol Lopon of Ugep.

The Respondent Marcus Okoi is a businessman trading on drinks and fish at Ugep. In 1996, he lodged a complaint to the Nigerian Police Force about threat to his life. In the course of investigation the police invited certain persons including the respondent and 1st appellant herein to the office of Commissioner of Police, Calabar where they were advised to maintain peace.

On return to Ugep, the people of Ugep set up a committee comprising 12 persons of whom, 2nd to 5th appellants were alleged to be members to look into the circumstances of the invitation of their Traditional Ruler by the Commissioner of Police. The Committee after its deliberations resolved that the respondent should, inter alia, give a live cow and the sum of N10,000.00 (Ten Thousand Naira) to appease their traditional ruler, that is the 1st appellant. It is the Respondent's case that as he refused to comply with the committee's recommendation, the appellants declared him an enemy. He was stripped of his chieftaincy title and the 1st appellant went round the town with a town crier cursing anyone who would buy his goods.

The Appellants further mobilised their agents, servants and privies to physically block the respondent's business premises to prevent customers from doing business with him in consequence of which he had lost millions of naira. Based on the foregoing premises, the respondent as Applicant commenced proceedings against the appellants as respondents in the Federal High Court, Calabar in Suit No. FHC/CA/M50/GR by filing on 16th December, 1996 an ex parte application for leave to apply to enforce or secure the enforcement of his Fundamental Rights. Pursuant to the leave granted on the 15th day of January, 1997, by the Federal High Court, the applicant brought a motion on notice dated 23rd day of January 1997 filed on the same note. The application was brought under Order 2 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules 1979 and Section 42(1) and (2) of the 1979 Constitution with the following reliefs :-

ñ1) A declaration that the continued blockage obstruction and / or interference with the applicant's business, movement and life by the respondents, their agents, servants or privies is unlawful, illegal, unconstitutional null and void.
2) An order directing the respondents to unblock or stop interferring with the applicant's business, movement and life forthwith.
3) An order restraining the respondents, their agents, servants or privies from further blocking, obstructing and or interferring with the applicant's business, movement and life.

4) N10,000.000.00 (Ten Million Naira) only, being damages / compensation for the said unlawful, illegal and unconstitutional violation as aforesaid of the Applicant's rights.

Any other order(s) as this Honourable Court may seem just.ò

The Application was supported by a 24 paragraphs verifying affidavit with exhibits, a further and better affidavit and a statement made pursuant to Order 1 Rule 2(3) of the Fundamental Rights Enforcement Procedure Rules wherein the grounds on which the reliefs were sought are stated to be:-

nd / or interference with the Applicant's business, movement and life privies is not permitted by law and is a violation of his rights to life, nteed by Section 30, Section 31, and Section 32 and Section 38 of the Constitution of the Federal Republic of Nigeria, 1979.

b) The Applicant is entitled to the protection of his fundamental rights to life, personal liberty and dignity as well as damages / compensation for the violation of the said rights.ò

In opposition to the application the Respondents filed counter- affidavit denying any threat to the applicant's life or interference with his business.

At the hearing of the application, several objections were raised by the respondents. The objections included lack of jurisdiction by the Federal High Court to entertain the application and the non-fulfilment of the conditions precedent to the hearing of the application. After taking arguments of learned counsel on the objections, the learned trial Judge Nwaogwugwu J. in a reserved ruling delivered on 23rd June, 1998 dismissed the objections holding that the application was within the jurisdiction of the Federal High Court and that the applicant had complied with the requirements of the Fundamental Rights (Enforcement) Procedure Rules in bringing the application.

Dissatisfied with that ruling, the Respondent hereafter referred to as Appellants filed the instant appeal. Parties through their counsel filed and exchanged briefs of argument. The Appellants filed and relied on their main brief and reply brief while the Applicant henceforth to be referred to as the Respondent relied on his brief. The crucial issues contested in the court below are substantially the same issues being canvassed in this appeal. The two issues as formulated in the Appellants' Brief and adopted in the Respondent's brief are as follows:-

ñ) Whether the Federal High Court has jurisdiction to hear and grant any of the reliefs claimed by the Respondent in that court.

ii) Whether the conditions precedent for the Federal High Court assuming jurisdiction to hear and determine the motion on notice have been fulfilled.ò

On the question of Jurisdiction under the first issue for determination reference was made in the Appellants' brief to Section 42(1) of the 1979 Constitution. It was then submitted on the authority of the case of Tukur v. Gongola State (1989) 4 NWLR (Pt. 117)517 that the Sub-section does not confer any jurisdiction on the High Court but merely provides an access to enable any person whose Fundamental Rights are threatened or breached to invoke the jurisdiction of the High Court. It was also submitted that the court below was wrong to have held that the provision confers jurisdiction on the High Court.

Counsel further referred to Sub-section (2) of Section 42 of the 1979 Constitution and submitted that it is subject to Section 230(1) and (2) of the said Constitution as amended by Decree No. 107 of 1993 which sets out the jurisdiction of the Federal High Court. It was then submitted that as the Respondents' claims did not fall within the matters upon which the Federal High Court was expressly conferred jurisdiction as spelt out in Section 230(1) of the 1979 Constitution as amended by Decree 107 of 1993 violations of fundamental rights arising outside those matters cannot be entertained by the Federal High Court. In support of this proposition, counsel relied on the case of Tukur v. Gongola State (1989) 4 NWLR (Pt. 117) 517. Referring to the Respondent's reliefs, counsel pointed out that the right of the respondent allegedly breached or threatened to be breached bordered on Tort, that is, trespass to the person or to goods which wrongs are cognisable in the High Court and not in the Federal High Court. The case of Oamen vs. Owana (1993) 8 NWLR (Pt. 311) 358 was cited. We were therefore urged to strike out the Respondent's case.

In reply, counsel to the respondent, in his brief of argument first drew attention to the reliefs sought by the respondent in his application; he then referred to Section 42(1) of the 1979 Constitution which provides that any person who alleges that any provisions of Chapter IV thereof has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress. Reference was also made to Section 277 of the said Constitution which defines ñHigh Courtòto mean Federal High Court or a High Court of a State. It was therefore argued that whenever a citizen's rights are infringed in any State, the citizen has a choice either to go to the Federal High Court or the State High Court in that State. It was submitted that both Federal and State

enforcement of fundamental rights simpliciter and in addition the
tions that touch on or pertain to those matters over which by virtue of
r this submission counsel cited the cases of Oyakhire v. Jen (2000) FWLR (Pt. 20) 699 at 703 Tukur v. Government of Gongola State (1989) 4 NWLR (Pt.117)517; Military Administrator, Benue State v. Abayilo (2000) FWLR (Pt.45) 602 at 620.

The word ôJurisdiction' has been defined in Halsbury's Laws of England 4th Edition Vol. 10 paragraphs 715 at p. 232 as follows:-

ñBy Jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute or Charter or Commission under which the court is constituted and may be rescinded or restricted by similar means. If no restriction is imposed the jurisdiction is said to be unlimited. The limitation may be either as to kind and nature of the actions and the matters of which the particular court has cognizance or as to the area of which jurisdiction extends or it may partake of both these characteristics.

See National Bank of Nigeria Ltd & Anor v. Shoyoye & Anor (1973) 5 S. C 181; See also A.G. Lagos State v. Dosunmu (1989) 3 NWLR (Pt.111) 552. Jurisdiction is a radical and crucial question of competence for if the court has no jurisdiction to hear the case, the proceedings are and remain a nullity, however well conducted and brilliantly decided they might otherwise have been as defect in competence is not intrinsic to but rather extrinsic in the adjudication; see Madukolu & Ors v.Nkemdilim (1962) I ALL NLR 587 at 595. Where a court's jurisdiction is challenged, the court however still has jurisdiction to enquire into the question whether it has jurisdiction to hear the case vide Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria (1976) ALL NLR 409 at 421; Okafor v. AG Anambra State(1991) 6 NWLR (Pt. 2001) 659.

It is a fundamental principle of law that it is the claim of the plaintiff and in the application under consideration, the claim of the applicant / respondent that determines the jurisdiction of the court; see Adeyemi v. Opeyori (1976) 9-10 SC 31; Izenkwe v. Nnadozie(1953) 14 WACA 361; Attorney-General of the Federation v. Att-Gen Abia State & Ors (2001)1 NWLR (Pt. 725) 690 at 675. In other words, it is the claim before the court that has to be looked at or examined to ascertain whether it comes within the jurisdiction conferred on the court; See Western Steel Works v. Steel Workers (1989) 1 NWLR (Pt. 49) 284.

Since it is the claim of the Respondent that determines the jurisdiction of the court and since the Federal High Court is a creature of statute it is necessary to refer to the reliefs sought by the Respondent and to see if they or any of them falls within the jurisdiction of the Federal High Court. For ease of reference, the Respondent's reliefs at the risk of repetition are:-
ñ1. A declaration that the continued blockage, obstruction and / or interference with the applicant's business, movement and life by the Respondents, their agents, servants or privies is unlawful, illegal, unconstitutional, null and void.
2. An order directing the Respondents to unblock or stop interfering with the applicants' business, movement and life forthwith.

3. An order restraining the Respondents, their agents, servants or privies from further blocking, obstructing and or interfering with the applicant's business, movement and life.

4. N10,000,000.00 (Ten Million Naira) only being damages/compensation for the said unlawful, illegal and unconstitutional violation as aforesaid of the Applicant's rights.ò

The jurisdiction conferred on the Federal High Court is set out in Section 7 of the Federal High Court Act Cap 134 Laws of the Federation of Nigeria 1990 and Section 230 (1) of the 1979 Constitution as amended by Decree No. 107 of 1993 and these provisions read as follows:-

Section 7(1) Federal High Court states,
7(1) The Court shall have and exercise jurisdiction in civil causes and matters.
(a) Relating to the revenue of the Government of the Federation in which the said government or any organ thereof or a person suing or being sued on behalf of the said Government is a party.
(b) Connected with or pertaining to;

lies established or carrying on business in Nigeria and all other

(iii) Banking, foreign exchange, currency or other fiscal measures.
(c) Arising from
(i) the operation of the companies and Allied Matters Act or any enactment regulating the operation of companies incorporated under the Companies and Allied Matters Act.
(ii) any enactment relating to copyright, patent designs, trade marks and merchandise marks;
(d) of Admiralty jurisdiction.

(2) The court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters arising out of or connected with any of the matters in respect of which jurisdiction is conferred by Sub-section (1) of the Section.

(3) é ..

(4) é ..

Section 230(1) of the 1979 Constitution as amended by Decree No. 107 of 1993 enacts:-

230(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arisingfrom:-

(a) The revenue of the Government of the Federation in which the said government or any organ thereof being sued on behalf of the said government is a party.

(b) The taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation;

(c) Customs and excise duties and export duties, including any claim by or against the department of customs and excise or any member or officer thereof arising from the performance or purported performance of any duty imposed under any regulation relating to customs and excise duties and export duties;

(d) Banking, banks, other financial institutions, including any action between one bank and others, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, carriage, legal tender, bills of exchange, letter of credit, promissory note and other fiscal measures provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank;

(e) The operation of any Act or Decree relating to companies and allied matters and any other common law relating to the operation of companies.

(f) Any Federal enactment relating to copyright, patents, designs, trademarks, and passing-off, industrial designs and merchandise marks, business names and commercial industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards;

(g) Any admirality jurisdiction, including shipping and navigation on the River Niger or River Benue and their affluents and on such other inland waterway as may be designated by any enactment to be an international waterway, all Federal Ports, including the constitution and powers of the Ports Authorities or Federal Ports and carriage by sea;

(h) Diplomatic, consular and trade representation;

rtation of persons who are not citizens of Nigeria, extradition, passports and visas;

(j) Bankruptcy and insolvency
(k) Aviation and safety of aircraft
(l) arms, ammunition and explosives
(m) Drugs and poisons
(n) Mines and minerals (including oil fields, oil mining, geological surveys and natural gas);
(o) Weight and measures;
(p) The administration or the management and control of the Federal Government or any of its agencies;
(q) Subject to the provisions of this constitution the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;
(r) Any action or proceeding for a declaration or injunction affecting the validity of any execution or administration action or decision by the Federal Government or any of its agencies and
(s) such other jurisdiction civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly;

Provided that nothing in the provisions of paragraphs (p), (q) and (r) of this sub-section shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment law or equity.

2. The Federal High Court shall have and exercise jurisdiction and powers in respect of treason, treasonable felony and allied offences.

3. The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction if conferred by subsection (1) of this section.ò

It is manifest that none of the reliefs claimed by the Respondent falls within the above provisions delimiting the jurisdiction of the Federal High Court nor does the Respondent's claim to infraction of his fundamental rights arise from or relate to any of the matters to which jurisdiction is conferred on the Federal High Court. Judges have no duty and indeed no power to expand the jurisdiction conferred on them but they have a duty and indeed jurisdiction to expound the jurisdiction conferred on them: African Press of Nigeria v. Federal Republic of Nigeria (1985) 1 ALL NLR 50 at 175; (185) 2 NWLR (Pt. 6) 137 at 165.

In holding that he has jurisdiction over the Respondent's claims, the learned judge of the court below at p. 15 et seq of the report reasoned as follows:-

ñé é . the relief brought by the appellants is for the enforcement of his fundamental right under Cap 4 of the 1979 Constitution of the Federal Republic of Nigeria as amended. By Section 42(1) and (2) of that Constitution, the High Court, is conferred with original jurisdiction to hear the applicant's application and the applicant is empowered to apply to a High Court in the State where his fundamental right is contravened for redress. Thus Section 42(1) and (2) of the Constitution provides as follows:

42(1) Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to the High Court in the State for redress.

42(2) Subject to the provisions of this constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state or any rights to which the person makes the application maybe entitled under the For avoidance of doubt, Section 277 of the Constitution defined High Court to mean the Federal High Court or the State High Court. It therefore goes without saying that since the alleged violation of the applicant's fundamental right being complained against took place at Ugep in Cross River State, the applicant is at liberty to bring his application before the Federal High Court, Calabar, or the State High Court, both being High Courts in the Cross River State where his fundamental right is alleged to have been contravened.

ndent's counsel that this court has no jurisdiction to entertain the
nd in grave error.ò

With profound respect to the learned judge of the court below, I couldn't disagree more. The provisions of Sections 42(1) and 42(2) of the Constitution relied upon by him have received judicial interpretation by the Supreme Court and this was in the celebrated case of Alhaji Umaru Abba Tukur v. Government of Gongola State (supra). It was held therein that sub-section (1) of Section 42 of the Constitution does not confer any jurisdiction on the High Court but merely provides an access to enable any person whose fundamental rights are threatened or breached to invoke the jurisdiction of the High Court. It was further held that sub-section (2) of Section 42 confers special jurisdiction on a High Court to hear and determine any application made to it in pursuance of the sections. But the court held that the jurisdiction conferred is made subject to the provision of the Constitution. After considering the provisions of the Constitution to which Section 42(2) is subjected to, that is, Section 230(1) and (2) and Section 236(1) and (2),the Supreme Court per Obaseki JSC who delivered the majority judgments of the court statedt p. 541 et seq of the report:-

ñThus while the matters in respect of which a High Court of a State has jurisdiction are unlimited, the matters in respect of which the Federal High Court has jurisdiction are strictly limited by the Constitution. This limitation imposed by the Constitution must necessarily affect the matters involving fundamental rights violation which can be adjudicated upon by the Federal High Court. Rather than expand the jurisdiction of the Federal High Court as erroneously held by Belgore J. (as he then was) Section 42 (2) of the Constitution has by the opening phrase ñsubject to the provisions of this Constitution limited the jurisdiction to enforce the fundamental rights provision to matters in respect of which the Constitution has granted or invested it with jurisdiction.ò

Referring to the matters listed in Section 7 (1) and (2) of the Federal Revenue Act 1973). His Lordship at p. 546 continued thus:-

ñThe matters listed above and in the Constitution in respect of which jurisdiction has been expressly conferred on the Federal High Court lie within the competence of the Federal High Court with regard to the enforcement of Fundamental Rights provisions of the Constitution of the Federal Republic of Nigeria 1979 outside those specific matters the Federal High Court is incompetent to exercise jurisdiction.ò

Emphasising the same point, His Lordship at p. 549 concluded thus:

ñSince the jurisdiction conferred by Section 42(2) of the Constitution is a special jurisdiction and made subject to the provisions of the Constitution the enforcement of the fundamental rights in matters outside the jurisdiction of the Federal High Court is not within and cannot be in the contemplation of the section. If any consideraion and determination of the civil rights and obligation in matters outside the jurisdiction of the Federal High Court inextricably involves the consideration and determination of the breach or threatened breach of any of the fundamental rights provisions,the exercise of jurisdiction which the Federal High Court does not posses is a nullity. The lack of jurisdiction inexorably nullifies the proceedings and judgment. It is therefore an exercise in futility.ò

See also the case of Oamen v. Owema (1993) 8 NWLR (Pt.311) 358. In the face of the above weighty pronouncement by the Supreme Court, the decisions of which I am bound by precedent to follow, I entertain no doubt in my mind that the Respondent's application for the enforcement of his fundamental rights in accordance with the reliefs sought is not cognisable before the Federal High Court as those reliefs do not touch or arise from matters within the express jurisdiction of the court. The learned judge of the court below was therefore in grave error to have held otherwise.

There is therefore merit in the first issue for determination which accordingly succeeds.
The second issue for determination poses the question ñwhether the conditions precedent for the Federal High Court assuming jurisdiction to hear and determine the motion on notice have been fulfilled?ò

In his brief of argument, counsel for the Appellants contended that the conditions precedent were not complied with in that

(a) the motion ex parte filed on 16 / 12 / 96 was granted on 15 / 1 / 97 without its being moved by the Respondent or his counsel.

e ex parte motion filed on 16 / 12 / 96 were different from those filed
notice in breach of Order 2 rule 2(1) and Order 1 rule 2(4) of the
Rules 1979 citing the case of Ogwuche & Ors v. MBA & Ors. (1994) 4 NWLR (Pt. 336) 75.

(c) the return date for the hearing of the motion on notice was fixed for 30 / 1 / 97, that is 15 days outside the mandatory 14 days from the grant of leave contrary to Order 2 rule 2 of the Fundamental Right (Enforcement Procedure) Rules 1979 relying on Ogwuche & Ors v. Mba & ors supra.
t was therefore submitted that since the conditions precedent for bringing the application for the enforcement of the Appellants' fundamental rights had not been fulfilled, the entire proceedings before the lower court were a nullity.

Responding, counsel to the Respondent through his brief referring to the case of Agbokoba v. The Directors SSS (1994) 6 NWLR (Pt. 351) 457 at 489 contended that the procedure for the enforcement of fundamental rights was complied with. It is the further submission of counsel through his brief that the inference to be drawn from the presence of the Respondent's counsel in court on 15 / 1 / 97 and the granting of the application for leave was that the application was duly presented to the court and argued, and that both the provisions of order 2 Rule 2(1) and order 1(2) were duly complied with citing the case of Attorney-General of the Federation of Nigeria v. Ajayi (2000) 12 NWLR (Pt. 682) 509.
The issue being canvassed by counsel touches on the competence of a court to adjudicate over a matter brought before it. It is well established that a court is competent to hear a case only when all the conditions precedent to hearing the case are fulfilled. In the often quoted case of Madukolu v. Nkemdilim (1962) 1 ALL NLR 587 at 595 Brett F.J. stated:

ñA Court is competent when-
1) It is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another; and

2) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

3) the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the ad judication.ò

See The State v. Onogoruwa (1992) 2 NWLR (Pt. 221) 23. The Appellant's complaint falls under item No. 3 above, that is, that the Respondent's application for the enforcement of his fundamental rights was not commenced by due process of law. Pursuant to sub-section 3 of Section 42 of the 1979 Constitution the Chief Justice of Nigeria made the Fundamental Rights (Enforcement Procedure) Rules, 1979 to regulate the practice and procedure for those seeking redress in the High Court for violation of their fundamental right under Chapter IV of the 1979 Constitution. Despite the said Rules, there appears to be among jurists a cleavage of opinion as to whether those Rules and no other rules of court should be adopted in seeking redress from the court. In Din v. A-G of the Federation (1986) NSCC (Pt.11) 449; (1986) 1 NWLR (Pt.17) 47; the Supreme Court per Nnaemeka ï Agu JSC said, inter alia,

ñthat the Fundamental Right (Enforcement Procedure) Rules 1979 have prescribed the correct and only procedure for the enforcement of fundamental rights which arise under chapter iv of the Constitution.ò

In Alhaji Saidu v. Alhaji Abdullahi (1989)4 NWLR (Pt. 116) 387 at 419. Eso JSC speaking on the same topic observed:-

ñAssuming the Statutory Instrument SI.1 of 1979 had not been made, the person seeking redress could bring the motion to court in any manner that clearly depicts complaint of the infringement of the Rights.

Indeed the Statutory Instrument is so clearly worded that it does not lay the procedure therein down as the only procedure by which redress could be sought.ò

1994) 9 NWLR (Pt. 366) I at p. 26, Bello CJN expressed a similar

ñI am inclined to agree with Mr. Agbakoba that the provision of Section 42 of the Constitution for the enforcement of the fundamental rights enshrined in Chapter IV of the Constitution is only permissible and does not constitute a monopoly for the enforcement of those rights. The object of the Section is to prove (sic) a simple and affective judicial process for the enforcement of fundamental rights in order to avoid the cumbersome procedure and technicalities for their enforcement under the rules of the common law or other statutory provisions. The object has been achieved by the Fundamental Rights (Enforcement Procedure) Rules 1979. It must be emphasised that the section does not exclude the application of the other means of their enforcement under the common law or statues or rules of courts. These are contained in the several laws of our courts, for example sections 18, 19 and 20 of the High Court of Lagos relating to mandamus, prohibition, certiorari, injunction and action for damages. A person whose fundamental right is being or likely to be contravened may resort to any of these remedies for redress.ò

Notwithstanding the divergent views expressed above, I think the bone of contention in the instant case which needs to be addressed is whether the Respondent had complied with the procedure he has chosen, that is, the procedure under the Fundamental Rights (Enforcement Procedure) Rules to be referred to as the Rules simplicitier.

As I had stated earlier in this judgment the first complaint of the Appellant's counsel under the issue being considered is that the Respondent's motion ex parte filed on 16 / 12 / 96 was granted on 15 / 1 / 97 without its being moved by the Respondent or his counsel. Regrettably, counsel did not indicate the relevant provisions in the rules which makes such a course mandatory. I am however not unaware of the settled principle of law that a person who wants to invoke the exercise of the discretion of any court in his favour ought to not only file his motion before the court but also move the motion in court. See State v. Onogoruwa (1992) 2 NWLR (Pt. 221)33 at p.58. In the case in hand, on 15 / 1 / 97 when the motion ex parte came up before the court, according to the record of proceedings at p. 14, the Applicant's / Respondents' counsel was in court and although it was not recorded that he moved the ex parte application for leave the court granted the application for leave for the applicant to enforce his fundamental rights. The order drawn up pursuant to the proceedings (p. 15 of the record) stated that the respondent counsel moved in terms of the motion. I am of the view that since the motion was ex parte, not contentious and duly filed and the Respondent's counsel appeared in court, it is reasonable to presume that he moved the motion before it was granted.

The Appellants could not complain of lack of fair hearing because the Rule in question provides as an initial step for ex parte application for leave. The Appellants' complaints in my view border on mere technicality. The attitude of our courts has shifted away from the narrow technical approach to justice to do substantial justice. The courts now take the view that not every slip is fatal to the course of justice. See Nneji v. Chukwu (1980) 3 NWLR (Pt. 21) 181; Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688 at 717.
The Respondents second complaint is that the statement and affidavit used for the ex parte motion filed on 6/12/96 were at variance with those filed on 22/1/97 in support of motion on notice in breach of Order 2 rule 2(1) and Order I Rule 2(1) of the Rules. These Rules provide as follows;
Order 2 Rule 2(1)

ñCopies of the statement in support of the application for leave and must be served with the motion on noticeé é é é é é é é é ...
and subject to paragraph (2) of this rule no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and reliefs set out in the said statement.ò

Order 1 Rule 2(4)

ñThe applicant must file in appropriate court, the application for leave not later than the day preceeding the date of hearing and must at the same time lodge in the said court enough copies of the statement and affidavit for service on any other party or parties as the court may order.ò

I think that it is Order 2 Rule 2(1) and not Order 1 Rule2(1) that bears relevance to this arm of the appellants' complaint. The record of appeal reveals that the ex parte motion and the supporting statement and verifying affidavit were dated 16/12/96 while the motion on notice and verifying affidavit were dated 23/1/97 and the statement dated January 1997 without any indication of the date in January. It is this discrepancy that hasrompted

ement and verifying affidavit used in respect of the ex parte motion
motion on notice, whereas the intendment of Order 2 Rule 2(1)
ard to this complaint, the court below in the ruling at p. 18 et seq of the record commented thus:

ñI have perused the affidavit and statement used in the ex parte application for leave and those now used for the motion on notice although the statement was not stamped and did not bear any dates. As far as the court is concerned that goes to the issue of form and not substance. I have gone through the averments in the verifying affidavit used in the application for leave as well as the statement used and I have compared them with those used now in the motion on notice. I am unable to see any difference in them in terms of substance. The averments in the affidavits and their paragraphs are the same, the deponents same. The statement setting out the reliefs sought, the grounds and the description of the applicant are just the same. The Respondents throughout their argument on the issue did not refer me to any material difference between the affidavits or statement used in the ex parte application and the one now being used in the application on notice.ò

There is no appeal against the crucial finding. It is the law that if a finding or decision of a trial court whether on an issue of fact or law is not challenged in an appeal to the Court of Appeal, such a finding or decision rightly or wrongly must not be disturbed for the purpose of the appeal in question; See Nwaebueze v. Okoye (1988) 4 NWLR (Pt. 91) 664; Oshodi v. Eyifunmi (2000) 13 NWLR (Pt. 684) 332. I have myself examined and compared the documents in question and agree that there is no material difference in their content. It needs to be emphasised that the essence of Order 2 Rule 2(1) is better appreciated from the second part of the provision, to wit, ñSubject to paragraph (2) of this Rule, no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and reliefs set out in the statement.òIt is to avoid a situation where an Applicant obtains leave to seek certain reliefs upon certain grounds only to summersault in the motion on notice with different reliefs based ondifferent grounds. Such an application will be rendered incompetent as was the case in Ogwuche v. Mba (1994) 4 NWLR (Pt. 366) 1. The situation is however different in the instant case. I find no merit in the Appellant's contention in regard to the complaint under consideration.

The third and last ground of complaint of non-compliance with the rules relates to Order 2 Rule 2 of the rules which provides:

ñThe motion or summons must be entered for hearing within 14 days after such leave has been granted.ò(italics supplied)
In the instant case, learned counsel to the Appellants stated that leave was granted on 15/1/97 while hearing of the notice of motion was slated for 30/1/97, a period of 15 days from the day leave was granted. This, learned counsel to the appellant submitted has rendered the application incompetent. He relied on the decision of this court (Jos Division) in Ogwuche's case supra where it was held that the word ómust' used in order 2 Rule 2 is mandatory and not directory and that the return date for the hearing of the motion on notice must be 14 days from the date leave was granted hence proceedings undertaken after the statutory period are invalid. In his response counsel to the Respondent referred to the case of Attorney ï General of the Federation of Nigeria v. Ajayi (2000) 12 NWLR (Pt. 682) 509 a decision of this court (Lagos Division) in which the word óentered' in Order 2 Rule 2 of the Rules was interpreted to mean the filing of the motion on Notice in the Court Registry so that if the motion on notice is filed within 14 days from the granting of leave but not fixed for hearing within that period, that was in compliance with the Rule. The case of Umoh v. Nkan (2000) 3 NWLR 512 was also alluded to.

The question under consideration is predicated on the construction of Order 2 Rule 2 already set out above and in particular the meaning of the expression óentered for hearing' that is, does it imply filing of the motion on notice or fixing the motion for hearing. In the cause of the Attorney-General of the Federation of Nigeria v. Ajayi supra, the court (Lagos Division) per Aderemi JCA at pp 531 ï 533 had this to say on the issue:

ñNext I shall take together issue 2 in each of the briefs of the appellant and the respondent. The complaint here is whether the breach of the provisions of Order 2 rule 2 of the Fundamental Rights (Enforcement Procedure) Rules is fatal to enforcement of the rights.ò

Order 2 Rule 2 provides:
ñThe motion or summons must be entered for hearing within fourteen days after such leave has been granted.ò

it is crucial by the provision of the rule quoted above that the return ve to enforce the fundamental right was granted; in the instant case was granted and the date the motion was set down for hearing; that non compliance with the provisions of the law renders the whole proceedings a nullity, he relied on the decision in Ogwuche v. Mba (1994) 4 NWLR (Pt. 336) 75. To counter that submission, the respondent through his brief, referred to Order 53 rule 5(5) of the Supreme Court Practice (White Book) of England (1997) which, according to him, is in pari materia with the provisions of Order 2 rule 2 and argued that the phrase ñEntered for hearingòwithin the context of the rule means no more than the process whereby the motion or summons is entered in the records of the court; and that, he further argued, is filing of the process in the court registry. The meaning ascribed to the word ñEnteredòin the Ogwuche case relied on by the appellant cannot stand while relying on the decisions in Ezomo v. A-G Bendel State (1986) 4 NWLR (Pt.36) 448; and Ogunremi v. Dada (1962) 2 SCNLR 417; (1962)1 ALL NLR 663. Order 53 of the Supreme Court Practice of England (1965) RSC regulates the bringing of applications for judicial review in England. Rule 5(5) of the said order which is in pari materia with our Order 2 rule 2 provides:

ñA motion must be entered for hearing within 14 days after the grant of leave.ò

In their commentaries on the phrase ñentry for hearingòthe authors of the Supreme Court Practice 1991 volume at page 837 under the chapter 53 /1 ï 14 / 40 said and I quote:
ñThis is the process whereby the substantive application for judicial review is entered in the records of the Crown Office. In order to enter a case for hearing the applicant must in each case, within 14 days of the date of the grant of leave:

i) File with the Crown Office an affidavit of service Cr 5(6). The affidavit of service (sic)
a) give the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of motion or summon; and (b) if any person who ought to be served under r. 5(3) has not been served, state the fact and the reason of it.

ii) Lodge with the Crown Office by way of entry for hearing a copy of the notice of motion (or presumably, the summons if the court has directed that the application be made by originating summons).ò

The learned counsel for the plaintiff/respondent has argued that within the context of the English provision afore-mentioned ñenter for hearingòcan be nothing more than the process whereby the motion or summons is entered in the records of the court; and in England, in construing that provision it is the process of lodging a copy of the process with the Crown Office by the applicant. I cannot but agree with that submission. But does that phrase connote different meaning in Nigeria? In the case of Ezomo v. A.G Bendel State (1986) 4 NWLR (Pt. 36) 448, the Supreme Court held that until an appeal is óentered' in the appellate court, that court is lacking in power to control the proceedings as between the parties. In answering the question ñwhen is an appeal enteredòthe Federal Supreme Court (as our highest court used to be called) said inOgunremi & Anor v. Dada (1962) 2 SCNLR 417; (1962) 1 ALL NLR 663 per the judgment of Brett F.J thus:
that an appeal to the Supreme Court is entered when the record of appeal is received in that court and entered in the cause list. Prior to the delivery of the judgment in Ogunremi's case by the then Federal Supreme Court on the17th of December 1962, the High Court of the old Western Region presided over by Oyemade J. had on 15th January 1962 in Adewoyin & Ors. v. Adeyeye (1962) SCNLR 310; (1962) 2 ALL NLR 108 held that an appeal is entered when the Registrar of the court below has forwarded the record of appeal to the registrar of the Appeal Court who shall in due course enter the appeal inhe cause list. The practical meaning in my view, is that the notice or the process shall be filed in the court within the time prescribed by the rule. Once that is done, the applicant in my view, has complied with the provisions of the rule. The fixing of the application for hearing is the exclusive function of the officials of the court and an applicant has no control over that. I have read the decision of this court (Jos Division) in Ogwuche & Ors v. Mba & Ors. (1994) 4 NWLR(Pt. 336) 75 on which the appellant placed reliance; in interpreting the provision of Order 2 rule 2 the court said at page 85:

ñThe word ñmustòas used is mandatory. Effect must be given to the word. Therefore the court must fix it for hearing within 14 days. I am of the opinion that the construction to be drawn from the provision is that the proceedings that took place fourteen days after leave has been granted amounts to a nullity.ò

This court (Jos Division) did not consider the Supreme Court decisions in Ezomo and Ogunremi cases. As I have said, the fixing of matters for hearing in the court is an exclusive function of the court officials. Where there is any

he court the blame cannot and must never be placed at the door ut his own duty under the law or the rule. Faced with the two ove and being bound by them I refuse to follow the decision of this court (Jos Division) on Ogwuche's case.

Indeed, the Supreme Court, has recently reiterated the same principle in its decision in Ezeokafor v. Ezeilo (1999) 9 NWLR (Pt.619) 513. In the instant case leave of the court below to enforce the fundamental rights of the applicant was granted on the 9th of June 1995, the motion on notice was filed on 12th June, 1995 (within the 14 days period and the motion on notice was set down for hearing on 26th June, 1995. When the applicant filed the motion on 12th June, 1995 he has by so doing performed his own duty to see to it that the application was entered for hearing within 14 days after the grant of the leave.
I am in agreement with the above observation. Entering a motion on notice for hearing in the context of Order 2 Rule 2 of the Rules can only mean the filing of the motion forit to be fixed for hearing. It must be borne in mind that as at the time the ex parte motion for leave to enforce the fundamental right is being granted the motion on notice is not before the court and therefore could not strictly speaking be fixed for hearing. It is when it is filed that it is fixed for hearing by court officials. I am therefore of the firm view that if the motion on notice is filed in the Court Registry within 14 days from the date the motion ex parte was granted, that is due compliance with the sub-rule under discussion notwithstanding that the motion on notice was fixed for hearing or heard outside the statutory period of 14 days.

In the case of Ezeadukwa v. Maduka (1997) 8 NWLR (Pt.518) 638, the motion ex parte was granted on 26th April, 1989 to enable the applicant to file motion on notice but that was not done until 16th June 1989 a period of about fifty-one days. It was held that it was a clear breach of Order 2 Rule 1(2) of the Fundamental Rights (Enforcement Procedure) Rules, 1979. In Umoh v. Nkan (supra) the Respondents therein were granted the ex parte motion for leave to enforce their fundamental right on 4th August, 1997 by the court below which also adjourned the case to the 6th October, 1997 for hearing. They filed their motion on notice on 20th August, 1997 instead of 18th August, 1997 which by computation of the fourteen days period for filing the motion on notice was the 14th day. They were held to be two days out of the statutory period. In the instant case, the Respondent filed in the court below his ex parte application to enforce his fundamental rights on 16th December, 1996. The leave was granted on 15th January, 1997 and the case adjourned to 30th January, 1997 for hearing but although ruling was delivered on 23rd June, 1998, the record shows the motion on notice was filed on 23rd January, 1997. The relevant period for consideration is the 15th January, 1997 when the ex parte application for leave was granted and 23rd January, 1997 when the motion on notice was entered or filed. This is a period of eight days which is within the fourteen days statutory period prescribed in Order 2 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules. The contention by the Appellants that the conditions precedent for the Federal High Court to assume jurisdiction (assuming it had jurisdiction) had not been complied with is not well founded.

In my consideration of the first issue for determination on the jurisdiction of the Federal High Court, I reached the conclusion that it lacked the jurisdiction to entertain theRespondent's application for the enforcement of his fundamental rights. The inevitable implication is that the proceedings before it in regard to that matter were a nullity. This makes it unnecessary for the consideration of the second issue. I have however, ventured to express my view on it in the event my conclusion of the question on jurisdiction is faulted.

Granting as I have opined that the Federal High Court lacked jurisdiction to entertain the respondent's claims, it remains to consider the appropriate order to make in the circumstance. In this connection, I refer to Section 22(2) of the Federal High Court Act, Cap 134 Laws of the Federation 1990 which enacts:-

ñNo cause or Matter shall be struck out by the court merely on the ground that such cause or matter was taken in the court instead of the High Court of a State or the Federal Capital Territory, Abuja in which it ought to have been brought and the Judge of the court below before whom such cause or matter to be transferred to the appropriate High Court of a State or of the Federal Capital Territory, Abuja in accordance with Rules of Court to be made under Section 44 of this Act.'

In Interpreting an identical provision of the Federal Revenue Court Act 1973, in the case of Mokelu v. Federal Commissioner for Works and Housing (1976) 1 NWLR 329 at p. 323,the Supreme Court per Madarikan JSC had this to say:-

d when he submitted that where an action is instituted in the Federal hich it ought to have been brought, Section 22(2) enjoins the Federal rely on that ground. In the expression ñno cause or matter shall be struck out by the Federal Revenue Court,ówe are of the view that the word óshall' must be given its natural and proper meaning which is that a mandate is enjoined. Having so construed the word ñshallòwe will now proceed to consider what interpretation to give to the word ñmayòappearing in the following portion of the subsection: ñthe judge of the Federal Revenue Court before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate High Court of a Stateé é ..òMay' is an enabling or permissive word. In that sense it imposes or gives discretionary or enabling power. But where the object of the power is to effectuate a legal right, ñMayòhas been construed as compulsory or as imposing an obligatory duty.

We have carefully considered the wording of Section 22(2) of the Federal Revenue Court Decree 1973 and we are convinced that for a true and correct meaning to be given to the word ñmayòit must be construed as imposing an obligatory duty. Absurdity or repugnancy would follow from holding that a discretion was given; because when a judge of the Federal Revenue Court holds that he has no jurisdiction and then refuses to order a transfer, he can neither strike out the case nor dispose of it in any other manner. In our view, the learned trial judge having rightly held that he had no jurisdiction was clearly in error when he ordered that the case be struck out as this is contrary to the provisions of Section 22(2) of the Federal Revenue Court Decree. The proper order in the circumstances was to transfer the case to the appropriate High Court in pursuance of the provisions of Section 22(2).ò

It is clear from the above passage that court below is invested with the power to transfer the case to the appropriate State High Court having jurisdiction if it had arrived at the conclusion that it lacked jurisdiction to entertain the subject-matter before it. See also Aluminum Manufacturing Co. (Nig) Ltd v. NPA (1987) 1 NSCC 224. By the provisions of Section 16 of the Court of Appeal Act this court is empowered to make the order which the court below could have made: See Faleye &Ors. v.Otapo & 2 Ors. (1995) 3 NWLR (Pt. 381) 1 at 276. Since the court below had no jurisdiction to entertain the Respondent's application for the enforcement of his fundamental rights, the motion on notice filed pursuant to the exparte order granted by that court is invalid and so what remains is theexparte order for leave and this is what can be remitted to the appropriate High Court.
From the foregoing, this appeal is allowed. The Ruling of Nwaogwugwu J. delivered on 23rd June, 1998 is hereby set aside. The Respondent's ex parte application for leave to enforce his fundamental rights is remitted to Ugep High Court for determination. The sum of N5,000.00 costs is awarded the Appellants.

OPENE, JCA: I have read in advance the judgment just delivered by my learned brother, Edozie, JCA, I agree with him that the appeal is meritorious and therefore ought to be allowed.

I also agree with him that the Federal High Court lacks the jurisdiction to entertain this suit and that the appropriate order to be made is that the ex parte application for leave to enforce the Respondents' fundamental rights be remitted to Ugep High Court for hearing and it is accordingly remitted to that Court.

The Appellant is awarded N5,000.00 costs.

EKPE, JCA: I have been privileged to read in advance the leading judgment just delivered by my brother, Edozie, JCA and I entirely agree with his reasoning and conclusions. Indeed, he has so exhaustively dealt with the issues raised in the appeal that I do not find it expedient to add any thing more.

I hereby also allow the appeal and abide by the orders made in the leading judgment including the consequential order as to costs.

Constitutional Law
ï Interpretation ï The liberal approach to interpreting constitutional provisions ï Whether court will resort to liberal interpretation where the intention of the makers of the Constitution is clear - INEC V. Alhaji Abdulkadir Balarabe Musa

Independent National Electoral Commission
Attorney-General of the Federation

v.

Alhaji Abdulkadir Balarabe Musa
(For and on behalf of Peoples Redemption Party)
Alhaji Kalli Algazali
(For and on behalf of Movement for Democracy and Justice)
Alhaji M. I. Attah
(For and on behalf of Nigerian Peoples Congress)
Alhaji Musa Bukar Sani
(For and on behalf of Community Party of Nigeria)
Chief Gani Fawehinmi
(For and on behalf of National Conscience Party)

SUPREME COURT (NIGERIA)

SC. 228/2002
Muhammadu Lawal Uwais, CJN (Presided)
Saliu Modibbo Alfa Belgore, JSC
Idris Legbo Kutigi, JSC
Anthony Ikechukwu Iguh, JSC
Akintola Olufemi Ejiwunmi, JSC
Emmanuel Olayinka Ayoola, JSC (Read the Leading Judgement)
Niki Tobi, JSC
Friday, January 24 2003

FUNDAMENTAL RIGHTS ï Freedom of Association as enshrined in Section 40 of the 1999 Constitution of the Federal Republic of Nigeria ï Whether it contemplates that civil servants may become members of political parties

CONSTITUTIONAL LAW ï Supremacy of the Constitution ï When an Act of National Assembly (or other regulation) purported to have been enacted under powers conferred by the Constitution is inconsistent with Constitution ï Effect of ï Where Enactment purports to legislate a field already exhaustively covered by Constitution ï Effect of such Enactment

CONSTITUTIONAL LAW ï Section 222 of the 1999 Constitution on conditions of eligibility for political associations seeking registration as political parties ï Whether confers powers on the National Assembly or National Assembly or Independent National Electoral Commission to legislate or issue additional conditions of eligibility ï Extent to which the National Assembly or Independent National Electoral Commission may legislate or issue guidelines relating to the registration of political parties

CONSTITUTIONAL LAW ï Interpretation ï The liberal approach to interpreting constitutional provisions ï Whether court will resort to liberal interpretation where the intention of the makers of the Constitution is clear

Issues for Determination
1. Whether, as regards the impugned provisions of the Electoral Act 2001, the Constitution empowered the National Assembly to set additional conditions of eligibility for the functioning of political associations as political parties

ed by National Assembly or Independent National Electoral
National Assembly to legislate to empower National Assembly or
o set such additional conditions.
3. In relation to provisions of the Electoral Act under attack, did they constitute additional conditions beyond those enumerated by the Constitution?

Facts
The civilian government which was inaugurated in May, 1999 had three political parties namely, Alliance for Democracy (AD), People's Democratic Party (PDP) and All People's Party (APP) which latter changed its name to All Nigeria People's Party (ANPP). In the year 2002, the Independent National Electoral Commission (INEC) saw the need for the registration of more political associations as political parties and set up guidelines for the registration of new political parties. INEC purportedly set up the guidelines in the exercise of the power conferred on it by the Constitution of the Federal Republic of Nigeria 1999 and the Electoral Act, 2001. INEC put up the necessary advertisements in the national papers, and several political associations, amongst who were the respondents applied to be registered as political parties under the guidelines. Applying the guidelines, INEC found only three political associations registrable and registered hem as political parties. The respondents were aggrieved and sued INEC before the Federal High Court, Abuja Division, seeking 17 reliefs. Among the reliefs sought were prayers for a declaration that certain provisions of the guidelines, to wit guidelines 3(a), (c), (d)(iv), (e), (f), (g), (h); 59b); and 2(d) & (c), and sections 74(2)(g) & (h), 74(6), 77(b, 78(2)(b) and 79(2)(c) of the Electoral Act 2001 were unconstitutional, null and void for purporting to add to, enlarge, alter or curtail constitutional provisions setting down conditions of eligibility that political associations must meet before they may be recognised for registration as political parties, a field which the plaintiffs argued had been sufficiently covered by section 222 of the 1999 Constitution. They also argued that guideline 5 (c) and section 79 (2)(c) of the Electoral Act, 2001, which precluded public servants from becoming members of political parties were unconstitutional, null and void for purporting to curtail the constitutionally guaranteed fundamental right of all persons to freely associate with other persons and to form or belong to any political party. The trial judge met the plaintiffs much less than half way, granting four reliefs in full and two in part. The plaintiffs appealed to the Court of Appeal, which allowed the appeal and granted all the reliefs. The court also issued an injunction to restrain INEC from basing the registration of political associations as political parties on the impugned provisions of the guidelines and Electoral Act 2001. Aggrieved, the appellants went before the Supreme Court, which considered the scope of the powers of the National Assembly to legislate for the registration of political parties and in particular, whether the National Assembly and INEC were competent to enact the impugned provisions of the Electoral Act and guidelines.

Held (allowing the appeal in part):
The legislative powers of the National Assembly in relation to political parties are delimited by the provisions of section 228 and item 56 of the Exclusive Legislative List of the 1999 Constitution, while section 222 exhaustively sets out the conditions of eligibility for political association aspiring to function as political parties. By virtue of those provisions, the National Assembly may only issue legislation or authorize INEC to issue guidelines to facilitate the process of registering political parties that have satisfied the conditions of eligibility spelt out in section 222, and for regulating and monitoring registered political parties. Legislation or guidelines issued in relation to the registration of political parties therefore may only be administrative, procedural or evidential in nature. Where they purport to add to the conditions of eligibility in section 222, they would be invalid and unconstitutional.

The Court also held that INEC's guidelines 3 (a), 3(c), 3(d)(iv), 3(e), 3(f), 3(g), 3(h) and 5(b), and sections 74(2)(h) & (g) of the Electoral Act 2001 were invalid additional conditions of eligibility, the provisions being, as it were, unrelated to the administration or procedure for registering political parties. The remaining impugned provisions were held to be valid as being within the legislative competence of the National Assembly, or the regulatory competence of INEC. Finally, the court held that members of the public service had constitutional rights to be registered members of political parties.

Details of Principles in the Judgment

1. Constitutional Supremacy implies that all powers of Government must derive from the constitution.
For legislative, executive or judicial powers to be valid, they must derive authority from the constitution. Legislative acts that are inconsistent with constitutional provisions will be invalid to the extent of their inconsistency. [page 93 para G]

On the Record: Per Ayoola JSC
ñé some interrelated propositions é flow from the acknowledged supremacy of the Constitutioné . First, all

t be ultimately traced to the Constitution. Secondly, the legislative inconsistently with the Constitution. Where it is so exercised, it is lly, where the Constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly where the Constitution sets the condition for doing a thing, no legislation of the National Assembly can alter those conditions in any way, directly or indirectly, unless, of course the Constitution itself as an attribute of its supremacy expressly so authorized.ò[page 93 paras F-I]

2. Doctrine of Covering the Field: Constitutional Limitations on the Legislative Powers of the National Assembly under the 1999 Constitution;
Under the 1999 Constitution, the National Assembly is empowered to make laws for the peace, order and good government of the Federation or any part thereof, exclusively in respect of matters itemized in the Exclusive Legislative List of the Constitution, and to the extent prescribed in respect of matters set out in the Concurrent Legislative List; it can also legislate with respect to any other matters with respect to which it is empowered to make laws consistent with constitutional provisions. To enjoy constitutional validity however, an Act of the National Assembly must be consistent with constitutional provisions. An Act of the National Assembly (or a law of the State House of Assembly) will defer to a constitutional provision if the Act (or law), though enacted pursuant to legislative powers conferred by the Constitution, legislates the same subject matter as the constitutional provision. [page 94 paras A-C]

On the Record: Per Ayoola, JSC
ñAlthough the Constitution does not state that an Act of the National Assembly cannot duplicate the provisions of the Constitution, by judicial interpretation, verging on policy, the consequence of such duplication has been variously described as ñinoperativeò, ñin abeyanceò, ñsuspendedò (See A-G Ogun State v. A-G Federation [1982] NSCC 1, at pp 11, 27-29, 35). Howsoever it is described, where the Constitution has covered the field as to the law governing any conduct, the provision of the Constitution is the authoritative statement of law on the subject. The Constitution would not have ócovered the field' where it had expressly reserved to the National Assembly or other legislative body the power to expand or to add to its provisions in regard to the particular subject. Where the Constitution has provided exhaustively for any situation and on any subject, a legislative authority that claims to legislate in addition to what the Constitution had enacted must show that, and how, it has derived its legislative authority to do so from the Constitution itself.ò[page 94 paras C-F]

Per Niki Tobi JSC (concurring)
ñI agree é that item 56 [of the Exclusive Legislative List] empowers the National Assembly to make law for the regulation of political partiesé . But I should give a warning in the application of item 56 é . that the National Assembly should not in any way go outside the provisions of section 222 in making laws for the regulation of political parties. é .the powers of the National Assembly to enact an Act empowering the 1st appellant to register political parties, will only be valid, if such Act is in conformity with the provisions of the 1999 Constitution. As Act which is inconsistent with the provisions of the 1999 Constitution will be void ab initio. [page 137 paras F-G, page 138 paras C-D]

Per Niki Tobi JSC (concurring)
ñThe doctrine of covering the field can arise in two distinct situations. First, where in the purported exercise of the legislative powers of the National Assembly or a State House of Assembly, a law is enacted which the Constitution has already made provisions covering the subject matter of the Federal Act or State law. Secondly, where a State House of Assembly, by purported exercise of its legislative powers enacted a law which an Act of the National Assembly has already made provisions covering the subject matter of the State law. In both situations, the doctrine of covering the field will apply because of the ñfederal mightòwhich relevantly are the Constitution and the Act.

In my humble view, a State law which is not necessarily inconsistent with either the Constitution or an Act of the National Assembly is é merely a surplusage. In line with the decision of Eso, JSC in Attorney-General of Ogun State v. Attorney-General of the Federation, such a law of a State House of Assembly is in abeyance and could be revived and becomes operative if for any reason the federal legislation is repealed.ò[pg 142 paras H-I, pg143 paras A-C]

3. Whether the National Assembly or INEC can by Legislation Amplify, Alter or Curtail Constitutional Provisions on Eligibility for Political Associations Seeking Registration as Political parties
Section 222 of the Constitution sets out the conditions upon which an association can function as a political party.

lation alter those conditions by addition or subtraction and could not the Constitution itself has permitted.[page 94 paras F-G]

On the Record: Ayoola JSC
ñThe National Assembly has powers, by virtue of section 228(d) of the Constitution, to confer by law powers on INEC as may appear to it to be necessary or desirable for the purpose of enabling the Commission [INEC] more effectively to ensure that political parties observe the provisions of sections 221-229 which deal with political parties, and by virtue of item 56 of the Exclusive Legislative List, to legislate for the regulation of political parties. INEC has direct power granted by the Constitution to register political parties. Any enactment of the National Assembly referable to this purpose cannot be held invalid. By the same reasoning, any guideline or regulation made by the Commission that carries into execution the same purpose cannot be unconstitutional'

..... Where, however, in the exercise of legislative power to make laws to provide for the registration, monitoring and regulation of political parties the National Assembly purports to decree conditions of eligibility of an association to function as a political party the National Assembly would have acted outside its legislative authority as stated in the Constitution. Similarly, INEC acting under such law to prescribe conditions of eligibility would have acted inconsistently with the Constitution.ò[pg 94 paras H-I, pg 95 para A, pg 96 paras D-F]

Per Niki Tobi JSC (concurring)
ñIn my view, the conditions [prescribed in section 222] set the constitutional standards which must be fulfilled before a political association can be recognized as a political party. Nothing stops the National Assembly to use its powers to enact an Act, which confers on the 1st appellant the power to make any regulations or guidelines which add to or edify the conditions set out in section 222. The only time the courts will raise their eyebrows is when the regulations or guidelines are inconsistent with the six conditions set out in section 222. It is my view that while section 222 sets out constitutional conditions, the 1st appellant can make guidelines under section 162 of the Electoral Act and in respect of issues of administration on the registration of parties.ò[page 140 paras G-I, page 141 para A]

4. Purport of Section 222 of the 1999 Constitution
Section 222 sets out the conditions of eligibility that a political association aspiring for registration as political party must satisfy before it can gain recognition of its existence as a political party. By setting out the conditions of eligibility, Section 222 evinces an intention to be exhaustive on the subject of eligibility, and draws the inference such matters are removed from the realm of the National Assembly's legislative powers. Any political association that satisfies the conditions set out in the section therefore becomes entitled to a recognition of its existence as a political party, to engage in activities only political parties are sanctioned to engage in, by virtue of section 221 of the Constitution. A recognition of existence as a political party must however be differentiated from registration as a political party, as the two are not the same, and section 222 does not in fact deal with registration of political parties. ñAccording recognition to a political party is the fact of acceptance of the existence an association eligible to function as a political party, while registration is the recording and certification of that fact.òIt is with regards to the latter (i.e the process of registration) that the National Assembly has constitutional powers to regulate by legislation, and by legislation, to authorize INEC to issue guidelines that are incidental thereto [page 95 para I, page 96 para B]

On the Record: Per Niki Tobi JSC (concurring)
ñé once a political association fulfills or satisfies the six conditions in section 222, the 1st appellant is constitutionally bound to recognize it as a political party. But where a political association does not fulfill or satisfy the conditions in section 222, the 1st appellant will not recognize the political association as a political party. The six conditions stipulated in section 222 are conjunctive and not disjunctive. Accordingly, a political association must fulfil or satisfy all the six conditions contained in the Section.... No political association can be a political party without fulfilling or satisfying the conditions contained in section 222. The position is as sacrosanct as that.ò[page 135 para E-H]

5. Legislation or Guidelines Issued Pursuant to Section 222 must be Incidental to the Process of Registration in Order to Pass the Test of Constitutional Validity
ñA é distinction should be drawn between guidelines which are administrative or procedural or evidential in nature. Guidelines which are administrative in nature merely relate to the administrative mechanism of the process of registration. Guidelines which are of a procedural nature relate to the procedure to be followed in seeking registration. Evidential guidelines relate to proof of compliance with the conditions of eligibility. Where the requirements for registration stated in any guideline or in the Act are not purely administrative or procedural or

ility beyond the conditions prescribed by section 222, such
the conditions of eligibility in section 222 and be consequently void,
cribed as requirements for registration.ò[page 96 paras H-I, page 97 paras A-B]

6. On Whether Section 79(2)(c) of the Electoral Act, 2001 which excludes Members of the Public or Civil Service From Membership of Political Parties is Constitutional
There is nothing in the provisions of the 1999 Constitution that suggest that members of the civil service cannot be registered members of political parties. On the countrary, the Constitution in section 40, entrenches the non-derogable right of every person to form, or belong any trade union, political party or other association for the purpose of promoting their common interests. It is a right that extends to members of the Federal, State or Area Council civil service. It may well be that considerations of public interest may justify some form of restrictions on the extent that civil servants may participate in political activities.

On Record: Per Ayoola JSC
ñSection 79(2)(c) of the Act [is] invalid because it [is] inconsistent with section 40 of the Constitution. In terms of section 45(1)(a) of the Constitution, there is nothing reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health in prohibiting a member of the Public Service or Civil Service of the Federation, a State or Local Government or Area Council from eligibility to be registered as a member of a political party. The submission that the restriction is a valid derogation from section 40 by virtue of section 45(1)(a) of the Constitution is erroneous. However, this conclusion is limited to the question of the validity of section 79(2)(c) of the Act and is not related to any question, not now before this court é ., of the extent to which the activities, as members of a political party, of the category of persons mentioned in that section can be validly restricted by relevant legislation in the interest of the public service. It may well be that the need to ensure objectivity of officers entrusted with the implementation of government programmes, continuity of administration and to foster é public confidence in and a healthy public perception of the public service are factors that may influence and justify some sort of restrictions. But, as earlier stated, that was not the issue in this appeal.ò[page 97 paras H-I, page 98 paras A-C]

Per Uwais CJN (concurring)
ñThe provisions of section 40 of the Constitution are clear. Their import is to allow ñevery personò, including public officers and civil servants the freedom to freely assemble and associate with other persons to form or belong to any political party or trade union or any association for the protection of his interests. The section has made no exception and there is no proviso therein limiting its application to civil servants or public officers.ò[page 102 paras G-H]

Per Niki Tobi JSC (concurring)
ñBy é section [40], every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or other association for the protection of his interests. The proviso is to the effect that [section 40] shall not derogate from the powers conferred by the Constitution on é INEC with respect to political parties to which the INEC does not accord recognition. é . [T]he proviso restricts the right [to form or belong to any political party], to the effect that the provision [of section 40] will not derogate from the powers of INEC with respect to political parties to which the Commission does not accord recognition. In other words, section 40 applies only to political parties which INEC accords recognition. In this respect, section 222 of the Constitution comes into play as that section provides for conditions to be fulfilled or satisfied before an association can function as a political party. ò[page 136 paras B-D]

7. Lack of Fair Hearing must be Specifically Proved
Fair hearing in essence means giving equal opportunity to the parties to be heard in the litigation before the court. Where parties are given opportunity to be heard, they cannot complain of breach of the fair hearing principles. It is not enough to say that fair hearing has been breached in a matter. The circumstances of the breach must be proved by evidence, and the evidence must be that the party was not given an opportunity to state his case in is own way.[page 133 paras B-C, paras D-E]

8. Provisions of the Constitution are of Equal Strength and Constitutionality
Provisions in the Constitution, whether they are contained in the main body of the Constitution, or in a schedule of the Constitution are of equal strength and constitutionality. No basis exists for judging certain provisions of the Constitution superior or inferior to others. Constitutional provisions are very much unlike Federal Acts or State laws that play a subservient role to the Constitution. [page 138 paras G-H]

greatest respect when it held that item 15(b) is inferior to sections 222 ground or field. The doctrine [of covering the field] cannot be applied in respect of two constitutional provisions which vest powers on the National Assembly to make laws. After all, the doctrine of covering the field stems from the federal might of the National Assembly and it will be a contradiction to the whole concept, if item 15(b) which vests power in the National Assembly is said to be inferior. I ask: inferior to what? And what is more, item 15(b) is not in any way in conflict with any other provision on political parties. As I said, the law making power of the National Assembly can only be valid if an Act arising from the Item is not in conflict with the Constitution.ò[pg 138 para I,pg139 prs A-C]

9. Doctrinal Propositions and Safeguards Relating to the Interpretation of the Constitution
The intention of the law maker remains the golden rule of interpreting statutes, including provisions of the Constitution. Although the liberal rule to interpretation is consistently applied to enlarge the borders of the Constitution to accommodate the dynamics of a developing society, the courts will not resort to the rule when the provisions of a statute and the intention of the law maker are clear, for to do so would amount to judicial legislation. Even where the liberal approach must be applied, it must be done to the extent the relevant proximate situation requires, in a manner that sustains constitutionality and constitutionalism.

On the Record: Per Niki Tobi JSC (concurring)
ñWhile this court has consistently championed the liberal interpretation of the Constitution for the purpose of expanding the frontier of the Constitution to accommodate as much foreseeable and proximate situations as possible, this court cannot do so when the provisions of the Constitution are clear and the intention of the makers of the Constitution are obvious. The golden and main rule of the interpretation of statutes, including the Constitution, is the intention of the law-maker. Once the intention of the law-maker is clear, resort cannot be made to any liberal interpretation of the Constitution. This is because a liberal interpretation of the Constitution beyond and above the intention of the law-maker will amount to the Judge making law. While there is a vibrant debate as to whether the Judge should make law, it will be against the principle of separation of powers for the judge to make law where the intention of the law-maker is clear. Perhaps the Judge could be involved in making the law if the intention of the law-maker is not clear and he is in a difficult position in the circumstances of the case before him. In such a circumstance, since he cannot adjourn the matter for the legislature to make a law to place the situation on his hands, he could make law.

ñLiberal approach to the interpretation is good in relevant situations, but this court cannot do so excessively to the extent that it destroys the fabrics of constitutionality and constitutionalism. All interpretation of the Constitution must bow or kowtow to these twin principles or pillars of constitutional law in our democracy in which the rule of law, democracy's lifeblood, triumphs to the egalitarian advantage of Nigeria and its people.

é . If a liberal interpretation of the Constitution will do grave injustice to one of the parties, this court would be loath in taking that course.

In other words, this court would keep the borders of interpretation of the Constitution closed if opening them will result in destroying the intention of the makers of the Constitution. This court cannot add one extra word outside the intention of the makers of the Constitution where the constitutional provision is obvious and clear.ò[page 152 paras G-I, page 153 paras A-G]

Nigerian Cases Referred to in the Judgement:
1. Attorney-General of Ogun State v Attorney-General Federation (1982) NSCC 1
2. Attorney-General Abia State and 35 others v. Attorney -General of the Federation (2002) NWLR (Pt. 763) 264
3. Attorney -General Ogun State v. A.G. Federation (1982) NSCC 1
4. Ude v. Attorney-General River State (2002) 4 NWLR (Pt. 756) 66
5. Onyema v. Oputa (1987) 3NWLR (Pt. 60) 259
6. Petrojessica Enterprises Ltd v. Leventis Trading Co.Ltd. (1992) 5 NWLR (Pt.244) 675
7. Sken Consult v. Ukey (1981) 1 SC 6
8. Akagbejo v. Atage (1988) 1 NWLR (Pt. 534) 459
9. Madukola v. Nkemdilim (1962) 1 All NLR (Pt.4) 587
10. Attorney-General Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt. 763) 264
11. Attorney-General Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt. 772) 383
12. Adesanya v. President of the Federal Republic of Nigeria (1981) 2 NCLR 158
13. Attorney-General of Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt .763) 264

-General of the Federation (1982) 3 NCLR 1
orney-General of the Federation (1982) 3 NCLR 166
rn State (1971) 1 UILR 201
17. Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt 772) 222
18. Rabiu v. The State (1980) 8-11 SC 130
19. Attorney-General of Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt. 763) 264
20. Aqua Ltd v. Ondo State Sports Counsel (1988) 4 NWLR (Pt. 117) 517
21. Ishola v. Ajiboye (1994) 6 NWLR (Pt. 352) 506
22. Attorney-General for Province of Ontario v. Attorney-General for the Dominion of Canada (1912) AC 571
23. New South Wales v. Brewery Employees Union of South Wales (1908) 6 CLR 469
24. Bank of the New South Wales v. The Commonwealth (1947-1948) 76 CLR 1
25. Attorney-General of Abia State and Attorney-General of the Federation (2002) 6 NWLR (Pt. 763) 264
26. Director SSS v. Agbakoba (1999) 3 NWLR (Pt. 595) 314 at 365
27. Salami v. Mohammed (2002) 9 NWLR (Pt. 673) 469
28. Oshatoba v. Ohijitan (2002) 5 NWLR (Pt. 655) 159
29. Ogunbamnjo v. Owoyemi (1993) 1 NWLR (Pt. 271) 517 at 535
30. Oyebode v. Ajayi (1993) 1 NWLR (Pt. 269) 313
31. Buhari v. Takuma (1994) 2 NWLR (Pt. 325) 183 at 190
32. Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt. 772) 222
33. Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt. 772) 222
34. Lakanmi v. The Attorney-General of the West (1971) 1 UILR
35. Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 3 NCLR 166
36. Nigeria Bottling Company Ltd v. Ngonadi (1985) 1 NWLR (Pt. 4) 793
37. Mogaji v. Cadbury Nigeria Ltd (1985) 2 NWLR (Pt. 7) 393
38. Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt. 772) 383
39. CCB (Nig) Plc v. Samed Investment Co. Ltd (2000) 4 NWLR (Pt. 651) 19
40. Kaul v. Odili (1992) 5 NWLR (Pt.130) at 170

Ayoola, JSC (Read the Leading Judgment): The Respondents in this appeal were the Plaintiffs in the Federal Court Abuja Division (Adah J.). In the Originating Summons commencing the action, the Plaintiffs asked for the following reliefs:-

ñ1. A DECLARATION that the registration of political parties in Nigeria is governed by the provisions of the Constitution of the Federal Republic of Nigeria, 1999.

2. A DECLARATION that the 1st defendant, Independent National Electoral Commission (INEC) cannot prescribe guidelines for the registration of political parties outside the conditions stipulated by the Constitution of the Federal Republic of Nigeria, 1999.

3. A DECLARATION that guideline No. 3(a) contained in the 1st defendant's Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendants, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit ñthe names, residential addresses and States of origin respectively of the members of its National and State Executive Committees, and the records of proceedings of the meeting where these officers were electedòis unconstitutional, and therefore null and void, in so far as it enjoins such association to submit the names, residential addresses and States of origin respectively of the members of its State Executive committees, and the records of proceedings of the meetings where both members of its National and State Executive Committees were elected.

4. A DECLARATION that guideline No. 3(c) contained in the 1st defendant's Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña register showing that its membership is open to every citizen of Nigeriaòis unconstitutional and therefore null and void.

5. A DECLARATION that guideline No. 3(d) (iv) contained in the 1st defendant's Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must show ña provision that its Constitution and Manifesto conform with the

ral Act of 2001 and these guidelinesòis unconstitutional and
e relates to ñthe Electoral Act, 2001 and these guidelines.ò

6. A DECLARATION that guideline No. 3(e) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must have ña register showing the names, residential addresses of persons in at least 24 states of the Federation and FCT who are members of the associationòis unconstitutional and therefore null and void.

7. A DECLARATION that guideline No. 3(f) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña n affidavit sworn to by the Chairman and Secretary of the association to the effect that no member of the National Executive of the association is a member of any other existing party or existing political Associationòis unconstitutional and therefore null and void.

8. A DECLARATION that guideline No. 3(g) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña bank statement indicating the bank account into which all income of the proposed political association has been paid and shall continue to be paid and from which all expenses are paid and shall be paidòis unconstitutional and therefore null and void.

9. A DECLARATION that guideline No. 3(h) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit ñthe addresses of its offices, list of its staff, list of its operational equipment and furniture in at least 24 States of the Federationòis unconstitutional and therefore null and void.

10. A DECLARATION that guideline No. 3(h) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 in so far as it prescribes that a party seeking registration must submit a list of its staff, list of its operational equipment and furniture in its headquarters offices at Abuja is unconstitutional and therefore null and void.

11. A DECLARATION that guideline No. 5(b) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that ña person shall not be eligible to be registered as a member of political association seeking to be registered a political party if he/she is in the civil service of the Federation or of a Stateòis unconstitutional and therefore null and void.

12. A DECLARATION that guideline No. 2(d) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that each association seeking registration as a political party must accompany its application with twenty (20) copies of the Association's Constitution is unconstitutional and therefore null and void.

13. A DECLARATION that guideline No. 2(c) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes payment of N100,000.00 (One Hundred Thousand Naira) by an association, that applies for registration is unconstitutional and therefore null and void.

14. A DECLARATION that section 74(2)(g) and (h), 74(6), 77(b) and 78(2)(b) of the Electoral Act, 2001 which enlarge and 79(2)(c) of the said Act which curtails the provisions of the 1999 Constitution on the registration of political parties are unconstitutional and therefore null and void and of no effect whatsoever.

the 1st defendant, Independent National Electoral Commission the registration of political parties either in whole or in part on (g), 3(h), 5(b), 2(c), and 2(d) or from acting on the said guidelines in the consideration or process of the registration of political parties.

16. AN ORDER compelling the 1st defendant, Independent National Electoral Commission (INEC) to refund the sum of N100,000.00 (One Hundred Thousand Naira) paid by each of the associations that applied for the registration as political parties.

17. AN ORDER compelling the 1st defendant, Independent National Electoral Commission (INEC) to return 19 of the 20 copies of the association's constitution submitted to the Independent National Electoral Commission (INEC) by the political associations that have applied for registration as a political party.ò

The trial judge granted reliefs Nos. 1, 2, 13 and 16 in full and granted in part reliefs No. 14 in respect of section 74(2) (g) of the Electoral Act, 2001 only and No. 15 in respect of Guidelines Nos. 2(c) and 3(g). The remaining reliefs were not granted by him. The Plaintiffs, aggrieved by the decision, appealed to the Court of Appeal, Abuja Division (Musdapher, JCA, (as he then was) Muntaka-Coomassie and Bulkachuwa, JJ.C.A). The 1st Respondent also cross-appealed.

The Court of Appeal allowed the main appeal by the Plaintiffs and set aside part of the judgment of the trial court refusing several of the reliefs sought by the Plaintiffs. The Court below declared the guidelines issued by the 1st Defendant, namely, 2(c), 2(d), 3(a), 3(c), 3(d) (iv), 3(e), 3(f), 3(g), 3(h) and 5(b) unconstitutional, null and void, It also declared sections 74 (2) (g) and (h), 74(6), 77(b), 78(2) (b) and 79(2) (c) of the Electoral Act, 2001 unconstitutional, null and void. The Court finally made an order of injunction against the 1st Defendant restraining it, its agents, officers, privies ñfrom basing the registration of political associations as political parties on the aforesaid offending provisions of the Guidelines and the Electoral Act, 2001ò and dismissed in its entirety the cross-appeal brought by the 1st Defendant.

The defendants appealed to this Court against the decision of the Court of Appeal. At the conclusion on 29th October, 2002 of the argument of counsel the court gave its judgment on the 8 November 2002 and reserved the reasons for the judgement till 24th January, 2003. The appeals by both the 1st and 2nd Defendants succeeded only in part and to the extent only that the court below was in error in granting the 2nd and 12th reliefs and in granting the 14th and 15th reliefs in their entirety. Consequently, the court granted relief nos. 1,3,4,5,6,7,8,9,10 and 11 but refused relief no 2, 12, 13, 16 and 17. Relief nos. 14 and 15 were granted in part only, respectively as follows: That relief no 14 is granted in part only, that is, in respect of sections 74 subsection (2) (h) and 79 subsection (2) of the Electoral Act, 2001 but not in respect of the other sections of the Act. That relief No 15 is granted in part only, that is, in respect of Guidelines Nos. 3(a), 3(c), 3(d) (iv), 3(e), 3(f), 3(g), 3(h) and 5(b) but not in respect of guidelines 2(c) and 2(d).

The plaintiffs were associations seeking registration as political parties. By virtue of section 221 of the Constitution ñNo association, other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an electionò and by virtue of section 222 of the Constitution:

ñNo association by whatever name called shall function as a political party, unless-
(a) the names and addresses of is national officers are registered with the Independent National Electoral Commission;
(b) the membership of the association is open to every citizen of Nigeria irrespective of his place of origin, circumstance of birth, sex, religion and ethnic grouping;
(c) a copy of its constitution is registered in the principal office of the Independent National Electoral Commission in such form as may be prescribed by the Independent National Electoral Commission;
(d) any alteration in its registered constitution is also registered in the principal office of the Independent National Electoral Commission within thirty days of the making of such alteration;
(e) the name of the association, its symbol or logo does not contain any ethnic or religious connotation or give the appearance that the activities of the association are confined to a part only of the geographical area of Nigeria; and
(f) the headquarters of the association is situated in the Federal Capital Territory, Abuja.ò

National Electoral Commission (ñINECò or ñthe Commissionò) for May, 2002 INEC released guidelines for the registration of political and (d), 3(a), (c), (d) (iv), (e), (f), (g), (h); and 5(b) (ñthe impugned guidelinesò) were ñinconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 relating to the registration of political partiesòand that they should not be made to comply with the guidelines, the plaintiffs commenced the proceedings from which this appeal arose by originating summons whereby they sought, among other things, declaration of invalidity those impugned guidelines and also of sections 74(2)(g) and (h), 74(6), 77(b), 78(2)(b) and 79(2)(c) of the Electoral Act 2001.

INEC is one of the Federal Executive Bodies established by section 153(1) of the Constitution of the Federal Republic of Nigeria 1999 (ñthe Constitutionò). Its composition and powers are by virtue of section 153(2) contained in Part 1 of the Third Schedule to the Constitution, paragraph 15(b) of which empowers it to: ñregister political parties in accordance with the provisions of the Constitution and an Act of the National assemblyò, while paragraph 15(c) and (d), respectively, provided that the Commission shall have power to ñmonitor the organization and operation of the political parties, including their financesòand ñcarry out such other functions as may be conferred upon it by an Act of the National Assembly.ò

Section 228 of the Constitution empowers the National Assembly to make laws, among other things-

ñfor the conferment on the Commission of other powers as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that political parties observe the provisions of this Part of this Chapter.ò

The phrase ñThis part of this Chapterò is that part dealing with political parties as are contained in sections 221-229 of the Constitution.

Pursuant to its power under section 228 of the Constitution the National Assembly enacted the Electoral Act 2001 (ñthe Actò), part III of which made provisions for political parties. Section 74(1) of the Act provided that INEC shall have power to register political parties and regulate their activities from time to time. Subsection 2 of section 74 went on to provide that no association by whatever name called shall function as a political party, unless certain conditions are fulfilled. Therein was listed in paragraphs (a) ï (f) thereof identical conditions of eligibility to function as a political party as have been specified in section 222 of the Constitution. The conditions in section 74(2) of the Act questioned by the Plaintiffs were those they regarded as additional conditions prescribed in paragraphs (g) and (h) of that subsection. As earlier stated they also questioned the constitutionality of sections 74(6), 77(b), 78(2)(b) and 79(2)(c) of the Act. The trial court declared the invalidity of section 74(2)(g) but upheld the validity of the other provisions challenged. However, the Court of Appeal held that all the impugned provisions of the Act were unconstitutional and, therefore, null and void.

Section 74(2) (g) and (h) provided, respectively, that no association by whatever name called shall function as a political party, unless it provides evidence of payment of registration fee of N100,000 or as may be fixed from time to time by an act of the National Assembly; and, it provides the addresses of the offices of the Political Association in at least two-thirds of the total number of the States of the Federation spread among the six geo-political zones. Section 74(6) makes registration of an association as a political party conditional on compliance with the conditions prescribed in subsection 1 and 2 of section 74 and upon payment of the sum of N100,000 administration and processing fees. Section 77(b) provides that once an association is granted registration as a Political Party by the Commission, that political party shall further submit to the Commission a copy of the party's constitution drawn up in compliance with Chapter II of the Constitution of the Federal Republic of Nigeria and with the requirement of the relevant guidelines issued by the Commission. Section 78(2)(b) provided that the constitution and manifesto produced by a political party shall at all times be in compliance with the provisions of the Constitution, the electoral laws and guidelines made by the Commission. Section 79(c) provides that a person shall not be a member of a political party if he is a member of the Public Service of the Federation, a State or Local Government or Area Council as defined by the Constitution.

To put the issues in the appeal in proper perspective it is expedient to pause to emphasize that by section 14(1) of the Constitution the Federal Republic of Nigerian shall be a State based on the principles of democracy and social justice. Political parties are essential organs of the democratic system. They are organs of political discussion and of formulation of ideas, policies and programmes. Plurality of parties widens the channel of political discussion and discourse, engenders plurality of political issues, promotes the formulation of competing ideas, policies and

n with a choice of forum for participation in governance, whether as a
ty in opposition, thereby ensuring the reality of government by
e final analysis. Unduly to restrict the formation of political parities or stifle their growth, ultimately, weakens the democratic culture. However, to leave political parties completely unregulated and unmonitored may eventually make the democratic system so unmanageable as to become a hindrance to progress, national unity, good government and the growth of a healthy democratic culture. Between the two apparent extremes over-regulation and complete absence of regulation is the need for balanced regulation. In interpreting the provisions of the Constitution and enactment relating to the formation, regulation and monitoring of political parties the recognition of the need for balanced regulation is essential.

Section 40 of the Constitution of the Federal Republic of Nigeria 1999 (ñthe Constitutionò) provides that:

ñEvery person shall be entitled to assemble freely and associate with other persons , and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests;

Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.ò

However, although section 40 of the constitution entrenched the right of every person to form or belong to a political party, it is clear from the proviso to that section and several other provisions of the Constitution that the makers of the Constitution did not opt to leave political parties unregulated by the State. Regulation of political parties by the State manifests in the fact that the Constitution itself has set conditions for the existence and recognition of political parties and empowered the National Assembly to legislate for the regulation of political parties that may have already fulfilled the conditions of eligibility to function as political parties as prescribed by section 222 of the Constitution. Regulation of political parties by the State therefore comes in two forms, namely: regulation directly by the Constitution as in section 222 and regulation authorized by the legislature or other agency of the State as may be permitted by the Constitution. It follows that any attempt to regulate political parties not by the Constitution itself or by its authority is invalid.

The main issue that arose in the case was, thus, the extent to which the National Assembly could legislate to regulate political parties or by legislation authorize INEC so to do. In particular, the question arose whether, as regards the impugned provisions of the Act, the Constitution empowered the National Assembly to set additional conditions of eligibility for the functioning of political associations as political associations as political parties and, as regards the guidelines prescribed by INEC, whether the Constitution had also empowered, or had authorized the National Assembly to legislate to empower INEC

o set such additional conditions. The subsidiary, but not unimportant, question was whether, in regard to each of the impugned provisions, any or which of them amounted to such additional conditions beyond those prescribed by the Constitution. Viewed from a broader perspective, the general question as regards the Act was the real ambit of the powers of the National Assembly to legislate for the registration of political parties, while the particular question was as to the competence of the National Assembly to enact the impugned provisions of the Act. Similar questions arose in relation to the powers of INEC in regard to the guidelines and in particular, the competence of INEC to make the impugned guidelines.

Section 162 of the Act provided that:
ñThe commission may, subject to the provisions of this Act, issue regulations, guidelines, or manuals for the purpose of giving effect to the provisions of this Act and for due administration thereof.ò

It was pursuant to this provision and the Constitution that INEC issued guidelines, some of which are the subject of this appeal. Guideline 2(c) and (d) of the guidelines stipulated, respectively, that the application for registration as a political party shall be accompanied by evidence of payment of prescribed fee of N100,000 in bank draft; and twenty copies of the Association's Constitution. Guideline 3, in so far as is relevant to this appeal, stipulated that:

ñNo association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following

tes of origin respectively of the members of its National and State
ceedings of the meeting where these officers were elected.
xxxxxxxxxxxxx
(c) A register showing that its membership is open to every citizen of Nigeria
(d) i. xxxxxxxx xxxxxxxxx xxxxxxxx
ii xxxxxxxx xxxxxxxxx xxxxxxxx
iii xxxxxxxx xxxxxxxxx xxxxxxxx

iv A provision showing that its constitution and manifesto conform with the provisions of the 1999 constitution (sic: Constitution), the Electoral Act of 2001 and these guidelines.
v. xxxxxx xxxxx xxxxxx
vi. xxxxxx xxxxx xxxxxx
vii xxxxxx xxxxx xxxxxx

(e) A register showing the names, residential addresses of persons in at least 24 States of the Federation and FCT who are members of the association

(f) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(g) A bank statement indicating the bank account into which all income of the proposed political Association has been paid and shall continue to be paid and from which all expenses are paid and shall be paid.

(h) The address of its lawful Headquarters office at Abuja and the address of its offices, list of its staff, list of its operational equipment and furniture in at least 24 States of the Federation.
(i) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Guideline 5(b) stipulated that a person shall not be eligible to be registered as a member of political association seeking to be registered as a political party if he/she is in the civil service of the Federation or of a State. The Court of Appeal held that all these enumerated guidelines were unconstitutional and therefore null and void.

The Court of Appeal held that all the impugned provisions of the Act and of the guidelines, expect one, were unconstitutional. Copious references were made in the leading judgment of the court delivered by Musdapher, JCA (as he then was), to authorities on principles of interpretation of the Constitution which are now well known and about which there was no controversy. For my part, I do not see any issue of interpretation of the Constitution that had arisen in the case. Rather, what was involved was application of clear and straight forward provision of the Constitution. Be that as it may, at end of the day, it is clear that the appeal to the court below was decided on the main ground that ñalthough the National Assembly has powers under section 228 of the Constitution to make any law in relation to an association wishing to be registered as Political Party, it has no power to make any law in relation thereto outside the provisions contained under section 222 and perhaps s. 223 of the Constitution.ò

The submission of counsel for the plaintiffs, who were the appellants in the court below, was that the Constitution having made provisions for the registration of political parties, the National Assembly lacked the ñlegislative competence and vires to either enlarge, alter and curtail the clear provision of the Constitution.òIf that was the view that the Court of Appeal had intended to accept in the passage of the leading judgment quoted above, it is evident that the court below stated the position too narrowly than may be acceptable. What is clear is that the National Assembly cannot legislate inconsistently with the provisions of section 222 or 223 of the Constitution, but it can legislate for matters outside the provisions of either section 222 or section 223 provided there is legislative authority derived from other provisions of the Constitution. Being of the view that ñonce an association meets the conditions spelt out under S.222 and S.223, such an association automatically transforms and becomes a Political Party capable of sponsoring candidates and canvassing for votes in any constitutional recognized elective offices throughout Nigeria,òthe court below struck down all the impugned provisions, both of the Act and of the guidelines, except one. For the sake of completeness, I note the views expressed by the court below as follows: in regard to section 40 of the Constitution, that the only derogation of the right to form or belong to a political party is as contained in the proviso to the section; in regard to section 228 of the Constitution, that the power it confers on INEC is limited to registered parties; in regard to the impugned provisions of the Act, that they were not within the contemplation of the section 228 of the Constitution.

on of the Court of Appeal, Mr. Eghobamien, SAN, learned counsel for s: (1) Whether the court below had jurisdiction to adjudicate in the earing, and (2) ñWhether the 1st appellant (Independent National Electoral Commission) have powers under the 1999 Constitution and the Electoral Act 2001 to make guidelines for political Associations seeking to transform into Political Parties.ò The first issue was unarguably without substance. The 2nd defendant who had not even appealed to the court below was a party to the appeal and had not complained that he was denied an opportunity of a hearing in the court below. It was thus surprising, to say the least, that senior counsel for the 1st defendant had considered the issue worthy not only of canvassing but also of being put at the forefront of his argument in the appeal which raised more serious and important issues. The formulation of the second issue raised by the 1st defendant was unhelpful, it being evident that there was no controversy in the case about the power of INEC to make guidelines. What was in issue was the extent to which such guidelines could be made.

For his part, Mr. Jacobs, learned counsel for the 2nd defendant, raised two issues as follows:
ñ1. Whether the National Assembly is not competent to enact the impugned provisions of the Act and thereby the same were rendered unconstitutional and void; and

2. Whether the impugned guidelines were not within the provisions of the Constitution with regard to the registration of Political Parties

Although the plaintiffs had formulated issues for determination in different words the substance of the issues formulated by counsel on their behalf was the same as that formulated by the 2nd defendant's counsel.

In so far as the argument presented by counsel for the 1st defendant was directed at showing that the National Assembly had power to legislate for the registration of political parties and that INEC had power to make guidelines, the argument of the learned counsel was not of much assistance since the general question was not as to the existence of those powers but as regards the extent of the powers which these bodies have in regard to matters already stated. On the particular issue, counsel for the 1st defendant did not proffer any argument whatsoever on the competence of the National Assembly to enact the impugned provisions of the Act other than section (79)(2) in respect of which he asserted, without any argument in support, that ñit cannot be right in fact and in law for a [civil servant] to be a Card Carrying member of any party in view of the crucial role he/she plays in the affairs of government.ò On the issue of the guidelines, the argument presented by counsel for the 1st defendant was, largely, that the guidelines furthered in several respects the purposes of the Constitution and are in consonance with its provisions.

The submissions by counsel for the 2nd defendant were helpful though rather wide-ranging. On the general question, it was submitted that the competence of the National Assembly to legislate in respect of registration of political parties was not taken away by the doctrine of covering the field because sections 222 and 223 of the Constitution have not ñcompletely, exhaustively and exclusivelyò covered the field of registration of political parties; and that section 222 of the Constitution did not evince an intention to list out exhaustively the requirements for the registration of political parties, nor did it state the modalities for the registration of the national officers of a political party or of its constitution. As to the ambit of the legislative power of the National Assembly, learned counsel for the 2nd defendant referred to item 56 of the Exclusive Legislative List in the Second Schedule to the Constitution where Regulation of Political Parties was placed within the exclusive legislative power of the National Assembly; the proviso to section 40 of the Constitution; section 15(2) and (3)(d) of the Constitution and paragraph 15(b) of the Third Schedule, to support the submission, not only that the National Assembly has legislative power to legislate for the registration of political parties but also that the Constitution does not restrict the source of the powers given to INEC to register political parties only to its provisions but extended it to the provisions of an Act of the National Assembly. He called in aid section 228(d) of the Constitution and submitted that the National Assembly could make laws that may appear to it to be necessary or desirable for the purpose of enabling INEC more effectively ensure that political parties observed the provision of section 222 and 223 of the Constitution. In his submission, most of the impugned provisions struck down by the court below were designed to fulfill the objectives of the Constitution of promoting national integration as spelt out in section 15(3) of the Constitution.

Chief Fawehinmi, SAN learned counsel for the respondents, submitted, on the general issue, that section 222 of the Constitution is exhaustive of the requirements for recognition of a political association as a political party; that no guideline and no Act of the National Assembly can ñadd to, alter, enlarge, curtail, or repeat the conditions contained in section 222ò; that if an Act of the National Assembly duplicates the requirements in section 222 such law is inoperative to the extent of such duplication and if such law adds to, curtails, or alters the said requirements,

id; that section 228 of the Constitution merely empowered the to already registered political parties and that, in any event, section f political parties seeking registration; and, relying on the doctrine of covering the field enunciated in Attorney General, Abia State and 35 others v. Attorney General of the Federation (2002) 6 NWLR (Pt.763) 264, that the National Assembly had no power to enact the impugned sections of the Act and INEC had no power to make guidelines on how an association can become a political party in so far as the Constitution has covered the field in section 222. Testing the impugned sections of the Act and guidelines against the background of principles stated by him, he submitted that those impugned provisions were unconstitutional and therefore null and void.

In the final analysis this case is about the supremacy of the Constitution. Section 1(3) of the Constitution provided that:

ñIf any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be voidò

I take as my starting point some interrelated propositions which flow from the acknowledged supremacy of the Constitution and by which the validity of the impugned provisions will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised inconsistently with the Constitution. Where it is so exercised it is invalid to the extent of such inconsistency. Thirdly, where the Constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those conditions in any way, directly or indirectly, unless, of course the Constitution itself as an attribute of its supremacay expressly so authorized.

he legislative power of the National Assembly consists of the power to make laws for the peace and order and good government of the Federation or any part therof with respect to any matter included in the Excusive Legislative List set out in Part 1 of the Second Schedule to the Constitution, to the exclusion of the House of Assembly of States and to make laws with respect to any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column; and with respect to any other matters with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.

Although the Constitution does not state that an Act of the National Assembly cannot duplicate the provisions of the Constitution, by judicial interpretation, verging on policy, the consequence of such duplication has been variously described as ñinoperativeò, in abeyanceò, ñsuspendedò(See A-G Ogun State v. A. G Federation (1982) NSCC 1, at pp11 27-29, 35). However it is described, where the Constitution has covered the field as to the law governing any conduct, the provision of the Constitution is the authoritative statement of the law on the subject. The Constitution would not have ócovered the field' where it had expressly reserved to the National Assembly or any other legislative body the power to expand on or add to its provisions in regard to the particular subject. Where the Constitution has provided exhaustively for any situation and on any subject, a legislative authority that claims to legislate in addition to what the Constitution had enacted must show that, and how, it has derived its legislative authority to do so from the Constitution itself. In this case, section 222 of the Constitution having set out the conditions upon which an association can function as a political party, the National Assembly could not validly by legislation alter those conditions by addition or subtraction and could not by legislation authorize INEC to do so, unless the Constitution itself has so permitted.

The National Assembly has powers; by virtue of section 228(d) of the Constitution, to confer by law powers on INEC as may appear to it to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that political parties observe the provisions of section 221-229 which deal with political parties; and, by virtue of item 56 of the Exclusive Legislative List, to legislate for the regulation of political parties. INEC has direct power granted by the Constitution to register political parties. Any enactment of the National Assembly referable to this purpose cannot be held invalid. By the same reasoning any guideline or regulation made by the Commission that carries into execution the same purpose cannot be unconstitutional.

te political parties include the power to determine eligibility of an nsideration of this question makes some prefatory observations pon which an association shall function as a political party in section 222, the Constitution has impliedly withdrawn such matters from the ambit of any regulatory enactment that the National Assembly may make. Secondly, section 229 of the Constitution defines a political party in terms of its activities. A political party starts as and is basically an association. However, for an association to be able to engage in the activities which only a political party is permitted to engage in, that is to say function as a political party, it must comply with the provisions of section 222 of the Constitution. Section 222 is thus about conditions of eligibility of an association to engage in the activities that by virtue of section 221 only political parties can engage in as specified in section 229.

In dealing with provisions of the Constitution concerning political parties the Constitution used different words and phrases which must be clearly understood if confusion is not to be engendered. In the proviso to section 40 the Constitution spoke of ‘recognition’; in paragraph 15(b) of the Third Schedule it spoke of registration by INEC of political parties; and in section 222, as has been seen, the provisions are about eligibility to function as a political party. In my judgment, recognition of a political party is not quite the same thing as registration of a political party, while registration of a political party is quite distinct and is not the same thing as eligibility of an association to function as a political party, even though these are all interrelated aspects of the same subject. Registration is the process of recording the existence of a political party and it provides evidence and certification of compliance with section 222 of the Constitution. It is evident that a political party cannot be registered as being in existence unless the association has satisfied the conditions of eligibility in section 222. It is therefore clear that the power to register is not the same as and does not include the power to declare the conditions of eligibility. Similarly, the power to regulate or monitor political parties relates to associations which have a recognized existence as political parties. Such power does not also imply any power to legislate the conditions of eligibility. Registration of political parties facilitate the exercise of the regulatory and monitoring powers of INEC which are within the purview of the legislative competence of the National Assembly. According recognition to a political party is the fact of acceptance of the existence of an association eligible to function as a political party, while registration is the recording and certification of that fact.

In this context, while the submission made by counsel for the 2nd appellant that section 222 of the Constitution does not evince an intention exhaustively to list out the requirements for registration of parties and that the modalities for registration of the National offices is not stated in that section, cannot be faulted as statements of fact, it is besides the point, because section 222 does not deal with registration of parties, there was no doubt that INEC has power to register political parties and the National Assembly can legislate in regard to the exercise of those powers. Where, however, in the exercise of legislative power to make laws to provide for the registration, monitoring and regulation of political parties the National Assembly purports to decree conditions of eligibility of an association to function as a political party the National Assembly would have acted outside its legislative authority as stated in the Constitution. Similarly, INEC acting under such law to prescribe conditions of eligibility would have acted inconsistently with the Constitution.

Applying the test inherent in the distinction between conditions of eligibility on the one hand, and registration, regulation or monitoring of political parties on the other, it becomes much easier to determine which of the impugned provisions of the Act and the guidelines are outside the competence of the National Assembly or INEC. Before this test is applied, a further distinction should be drawn between guidelines which are administrative or procedural or evidential in nature. Guidelines which are administrative in nature merely relate to the administrative mechanism of the process of registration. Guidelines which are of a procedural nature relate to the procedure to be followed in seeking registration. Evidential guidelines relate to proof of compliance with the conditions of eligibility. Where the requirements for registration stated in any guideline or in the Act are not purely administrative or procedural or evidential, but are substantive conditions for eligibility beyond the conditions prescribed by section 222, such guidelines or provisions would have enlarged the conditions of eligibility in section 222 and be consequently void, notwithstanding that they may have been described as requirements for registration.

Applying this test, I felt no hesitation in holding that guidelines 3 (a) 3(c); 3(d)(iv); 3(e) 3(f); 3(g); 3(h) and 5(b) are neither related to administration nor to any procedure for seeking registration nor are they evidence of any conditions stated in section 222 as conditions of eligibility. They have no administrative significance in the process of registration. The conclusion was inescapable that as they stand, on their own and unrelated to any of the conditions of eligibility prescribed in section 222, but are conditions of registration which are not procedural or evidential or required for any administrative purpose related to the process of registration, they are, albeit in a disguised form, fresh conditions for eligibility to function as a political party beyond what the Constitution had prescribed.

yment of prescribed fee of N100,000 is a purely administrative
ed that twenty copies of the associations Constitution and manifesto
n is in furtherance of and is related to section 222(c) of the Constitution.

I now turn to the impugned provisions of the Act. It was clear enough that section 78(2)(b) of the Act which related to a political party already registered was valid as its provision came within the legislative competence of the National Assembly by virtue of section 4(1) of the Constitution and item 56 of the Exclusive Legislative List- Regulation of Political Parties.

Section 79(2)(c) of the Act was invalid because it was inconsistent which section 40 of the Constitution. In terms of section 45(1)(a) of the Constitution, there is nothing reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health in prohibiting a member of the Public Service or Civil Service of the Federation, a State or Local Government or Area Council from eligibility to be registered as a member of a political party. The submission that the estriction is a valid derogation from section 40 by virtue of section 45(1) (a) of the Constitution was erroneous. However, this conclusion is limited to the question of the validity of section 79(2)(c) of the Act and is not related to any question, not now before this court in these proceedings, of the extent to which the activities, as members of a political party, of the category of persons mentioned in that section can be validly restricted by relevant legislation in the interest of the public service. It may well be that the need to ensure objectivity of officers entrusted with the implementation of government programmes, continuity of administration and to foster a public confidence in and a healthy public perception of the public service are factors that may influence and justify some sort of restrictions. But, as earlier stated, that was not an issue in this appeal.

Section 74(2)(h) of the Act was bad because it added to the list of the conditions of eligibility which an association must satisfy before it could be eligible to function as a political party. On the other hand, section 74(2)(g) of the Act was valid because its provisions, relating as they were to production of payment of relevant fees, were purely administrative in relation to the registration process. Section 74(6) was objected to on the ground that it prescribed a requirement for payment of administrative and processing fees. It was argued that the provision was void because it prescribed an additional condition to those prescribed in section 222 of the Constitution. That argument, however, took an unnecessarily narrow view of the matter. The correct starting point is to consider the purpose of the payment and to relate it to the process of registration which is the essential certification of eligibility of an association to function as a political party. Seen in that context, the provisions of section 74(6) are purely administrative in nature. The provision in section 74(6) that only a political association that met the conditions stipulated in section 74(1) and (2) shall be registered as a political party was innocuous once the invalid provision in section 74(2)(h) is removed. Section 77(b) was valid because it related to a political party already registered and its provisions were within the regulatory and monitoring powers of INEC.

The declaration that the registration of political parties in Nigeria is governed by the provisions of the Constitution of Nigeria, 1999 was granted in the sense that and because the ultimate source of any registration or guideline or exercise of power relating to registration of parties must be traced to the Constitution, but not in the sense that the Constitution itself must make direct provisions relating to registration or its mechanism. It was because of this elucidation of the relevance of the Constitution to the registration of political parties that the second declaration was refused. The Constitution does not by itself expressly stipulate conditions for the registration of political parties. It only empowered INEC to register political parties and the National Assembly to legislate for the regulation of political parties. There were several guidelines made by INEC which though not within the conditions prescribed by the Constitution for eligibility of an association to function as a political party were quite valid because they were incidental and relevant to the registration process and were within the regulatory powers of INEC, the details of which cannot be expected to be set out in a Constitution. It is only those guidelines which were of the nature of conditions of eligibility to function as a political party that were invalid as being made without authority of the Constitution. In the result whether INEC could prescribe guidelines for the registration of political parties outside the conditions stipulated in the Constitution or not must depend on the nature of the guidelines. Procedural, evidential and purely administrative guidelines are ñoutside the conditions stipulated by the Constitutionòyet they are valid. When a declaration sought is couched in wide and imprecise terms, as in relief 2 in this case, it should be rejected. To grant such would lead to confusion.

The injunction sought in claims 16 and 17 related respectively to relief's 12 and 13 which have been refused. Consequentially, the two were refused. The declaratory and injunctive relief granted respectively in claims 14 and 15 reflected those sections of the Act and the guidelines which were considered not to be valid.

it is expedient to note that the Electoral Act 2001 has been repealed f the Electoral Act 2002. The reliefs sought related to the toral Act 2001 which have now been repealed and to some of the guidelines made by INEC under the repealed Act. The declarations made in regard to provisions of the Electoral Act are of use only in so far as they were the source of the impugned guidelines. In the Electoral Act 2002 several of these impugned provisions have already been removed.

Be that as it may, it was for the reasons I have stated that I concurred in the orders made by the court on 8th November 2002.

Uwais, CJN: On the 8th day of November, 2002 we delivered judgment in this case allowing the appeals by the 1st and 2nd Appellants and reserving our reasons for the judgment until today.

I have had the opportunity of reading in draft the reasons prepared and read by my learned brother Ayoola, JSC. It was for those reasons that I allowed the appeals by the 1st and 2nd Defendants/Appellants respectively in part with no order as to costs. I adopt the said reasons as mine. However, I wish to comment further on the provisions of guideline No. 5(b) which disqualified civil servants from being members of a political association which seeks to be registered as a political party. Claim No. 11 by the Plaintiffs/Respondents reads:-

ñ11. A DECLARATION that guideline No. 5(b) contained in the 1st Defendant's Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendants, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that ña person shall not be eligible to be registered as a member of political party if he/she is in the civil service of the Federation or of a Stateò is unconstitutional and therefore null and void.ò

Section 79 Subsection (2) (c) of the Electoral Act, 2001 provided:-
ñ79(2) Subject to Subsection (1) of this Section, a person shall not be eligible to be registered as a member of a political party if he:-
(a) é é é é é é é é é é é ..
(b) é é é é é é é é é é é ..
(c) is a member of the Public Service or Civil Service of the Federation, a State or Local Government or Area Council as defined by the Constitution.ò
While guideline No. 5(b) for the Registration of New Political Parties stated:-
ñ5. A person shall not be eligible to be registered as a member of political association seeking to be registered as a political party if he / she:-
(a) é é é é é é é é é é é é é é
(b) is in the civil service of the Federation or of a State.ò

Now, there is a significant difference between the provisions of section 79 subsection (2)(c) of the Electoral Act, 2001 and paragraph 5(b) of the Guidelines. While the former concerned itself with membership of a political party the latter dealt with membership of a political association seeking to be registered as a political party. These bodies are indeed different. This distinction is significant because one is inchoate (i.e political association) while the other is developed or complete (i.e political party).

Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 provides:-
ñ40. Every person shall be entitled to assemble freely and associate with other persons and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.

Provided that the provisions of this Section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission does not accord recognition.ò

Learned counsel of the 1st Defendant / Appellant argued that it could not be right both in fact and in law for a civil servant to be a card carrying member of any party in view of the crucial role he or she played in the affairs of government. I know that it is a notorious fact that as a rule, the Civil (Public) Service Rules place some restrictions on public officer holders, including civil servants, with regard to participation in politics or political activities. For

l (Public) Service Rules provide in Rules 04421 and 04422 as

ñ04421 .- No Officer shall, without express permission of the Government, whether on duty or leave of absence:
(a) hold any office, paid or unpaid, permanent or temporary, in any political organization;

(b) offer himself or nominate anyone else as a candidate for any elective office including membership of a Local Government Council, State or National Assembly;

(c) engage in canvassing in support of political candidates. Nothing in this rule shall be deemed to prevent an officer from voting in an election.

04422:- Resignation necessary before seeking elective public office. Howbeit, any officer wishing to engage in partisan political activities or seek elective public office shall resign his appointment forthwith.ò

The Civil (Public) Service Rules are not a legislation per se as provided by the Constitution nor subsidiary legislation, as they are not made under any enabling or Law. These limitations are emphasized by Rule 01001 of the Rules which provides in respect of some categories of public office holders that:-

ñé é é é é é .these Rules apply only to the extent that they are not inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria in so far as their conditions of service and any other law applicable to these officers are concerned.ò

The provisions of section 40 of the 1999 Constitution are clear. Their import is to allow ñevery person,òincluding public office holders and civil servants, the freedom to assemble freely and associate with other persons to form or belong to any political party, or trade union or any association for the protection of his interests. The section has made no exception and there is no proviso therein limiting its application to civil servants or public officers.

It is important to mention that the provisions of the Civil (Public) Service Rules have not been challenged in this case and therefore their validity is not in issue for determination by this Court. Reference to the restriction has been made merely in passing by learned counsel for the 1st Defendant/Appellant in order to canvass the validity of section 79 subsection (2) (c) of the Electoral Act, 2001.

Since section 40 of the 1999 Constitution has specifically allowed every person the right to assemble and associate with any other persons in order to inter alia form or belong to any political party for the protection of his interests I hold that both the provisions of section 79 subsection (2) (c) of the Electoral Act, 2001 and guideline No. 5 (b) are inconsistent with the Constitution.

I need to instantly add that the proviso to section 79 subsection 2(c) of the Electoral Act, 2001 has not affected the opinion which I have expressed since we are here concerned with political associations which seek to be registered and not political parties to which the 1st Defendant / Applicant does not accord recognition. Section 229 of the Constitution defines ñassociationò and ñpolitical partyòthus:-

ñ229. In this Part of this Chapter, unless the context otherwise requires-
ñassociationòmeans anybody or persons corporate or unincorporated who agree to act together for any common purpose, and includes an association formed for any ethnic, social, cultural, occupational or religious purpose; and ñpolitical partyòincludes any association whose activities include canvassing for votes in support of a candidate for election to the office of President, Vice-President, Governor, Deputy Governor or membership of a legislative house or of a local government council.ò

Finally, It is for all these and the fuller reasons given by my learned brother Ayoola, JSC that I allowed both appeals in part on the 8th day of November, 2002 with no order as to costs.

BELGORE JSC: By Originating Summons, the Plaintiffs/Respondents sought the following remedies:

olitical parties in Nigeria is governed by the provisions of the
, 1999.

2. A DECLARATION that the 1st defendant, Independent National Electoral Commission (INEC) cannot Prescribe guidelines for the registration of political parties outside the conditions stipulated by the constitution of the Federal Republic of Nigeria, 1999.

3. A DECLARATION that guideline No. 3(a) contained in the 1st defendant's Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit ñthe names, residential addresses and States of origin respectively of the members of its National and State Executive Committees, and the records of proceedings of the meeting where these officers were electedò is unconstitutional, and therefore null and void, in so far as it enjoins such association to submit the names, residential addresses and States of origin respectively of the members of its State Executive Committees, and the records of proceedings of the meetings where both members of its National and State Executive Committees were elected.

4. A DECLARATION that guideline No. 3(c) contained in the 1st defendant's 6Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña register showing that its membership is open to every citizen of Nigeriaò is unconstitutional and therefore null and void.

5. A DECLARATION that guideline No. 3(d) (iv) contained in the 1st defendant's 6Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must show ña provision that its Constitution and Manifesto conform with the provisions of the 1999 Constitution, the Electoral Act of 2001 and the guidelinesò is unconstitutional and therefore null and void in so far as the guidelines relates to ñthe Electoral Act, 2001 and these guidelines.ò

6. A DECLARATION that guideline No. 3(c) contained in the 1st Defendant's 6Guidelines for the registration of Political Parties' dated the 15th day of May 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must have ña register showing the names, residential addresses of persons in at least 24 States of the Federation and FCT who are members of the associationò is unconstitutional and therefore null and void.

7. A DECLARATION that guideline No. 3(f) contained in the 1st Defendant's 6Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ñan affidavit sworn to by the Chairman and Secretary of the association to the effect that no member of the National Executive of the Association is a member of any other existing party or existing political Associationò is unconstitutional and therefore null and void.
8. A DECLARATION that guideline No. 3(g) contained in the 1st Defendant's 6Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña blank statement indicating the bank account into which all income of the proposed political association has been paid and shall continue to be paid and from which all expenses are paid and shall be paidò is unconstitutional and therefore null and void.
9. A DECLARATION that guideline No 3(h) contained in the 1st Defendant's 6Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit ñthe addresses of its offices, list of its staff, list of its operational equipment and furniture in at least 24 states of the Federationò is unconstitutional and therefore null and void.

10. A DECLARATION that guideline No. 3(h) contained in the 1st Defendant's6Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 in so far as it prescribes that ña party

aff, list of its operational equipment and furniture in its Headquarters
re null and void.

11. A DECLARATION that guideline No. 5(b) contained in the 1st Defendant's ñGuidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that ña person shall not be eligible to be registered as a member of political association seeking to be registered a political party if he/she is in the civil service of the Federation or of a Stateòis unconstitutional and thefore null and void.

12. A DECLARATION that guideline No 2(d) contained in the 1st Defendant's óGuidelines for the registration of Political Parties' dated the 15th Day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the Public on the 17th day of May, 2002 which prescribes that each association seeking registration as a political party must accompany its application with twenty (20) copies of the Association's Constitution is unconstitutional and therefore null and void.

13. A DECLARATION that guideline No 2(c) contained in the 1st Defendant's óGuidelines for the registration of Political Partiesòdated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes payment of N100,000.00 (One Hundred Thousand Naira) by an association, that applies for registration is unconstitutional and therefore null and void.

14. A DECLARATION that section 74(2)(g) and (h), 74(6), 77(b) and 78(2)(b) of the Electoral Act, 2001 which enlarge and 79(2)(c) of the said Act which curtails the provisions of the 1999 Constitution on the registration of political parties are unconstitutional and therefore null and void and of no effect whatsoever.

15. A PERPETUAL INJUNCTION restraining the 1st Defendant, Independent National Electoral Commission (INEC), its agents, officers, privies from basing the registration of political parties either in whole or in part on guidelines Nos. 3(a), 3(c), 3(d)(iv),3(e), 3(f), 3(g), 3(h), 5(b), 2(c), and 2(d) or from acting on the said guidelines in the consideration or process of the registration of political parties.

16. AN ORDER compelling the 1st defendant, Independent National Electoral Commission (INEC) to refund the sum of N100,000.00 (One Hundred Thousand Naira) paid by each of the associations that applied for the registration as political parties.
17. AN ORDER compelling the 1st defendant, Independent National Electoral Commission (INEC) to return 19 of the 20 copies of the association's Constitution submitted to the Independent National Electoral Commission (INEC) by the political Associations that have applied for registration as a political party.ò

The trial judge, in a reserved judgment granted reliefs 1, 2, 13 and 16 in full and reliefs 14 and 15 in part. All other reliefs i.e 3,4,5,6,7,8,9, 10, 11, 12, and 17 where refused. The Plaintiffs appealed to Court of Appeal being dissatisfied with trial court's decision. The first Defendant also cross appealed.

After hearing arguments on their briefs, Court of Appeal allowed the appeal of the plaintiffs and granted reliefs 3,4,5,6,7,8,9, 10, 11, 12, 13, 14 and 15. It dismissed the cross-appeal of Independent National Electoral commission, the first defendant. This decision led to this appeal. This Court heard the appeal on 29th October 2002 and in view of the urgency of the basis of the suit to the pending elections we reserved judgment to 8th day of November 2002 and full reasons for the judgment to 24th January, 2003. We gave judgment on 8th November 2002 and I now give reasons for that judgment.

I held on 8th day of November 2002 that the appeals of 1st and 2nd Defendants succeeded in part and made orders as follows:

(1) Reliefs numbers, 1, 3,4,5,6,7,8,9, 10, 11, are granted

(2) Relief No. 14 is granted in part in respect of sections 74(2)(h) and 75(2) (c) of the Electoral Act 2002 but not in respect of other sections of the Act.

ect of Guidelines Nos. 3(a), 3(c), 3(d), 3(d) (iv), 39(e), 3(f), 3(g), 3(h), s 2(c) and 2(d).

(4) Reliefs 2, 13, 16, and 17 are refused.

These findings are in consonance with the reasons fully adumbrated in the Reasons for Judgment written by my learned brother, Ayoola JSC which I had the opportunity of discussing at the Court's conference and after reading, which I fully adopt as my own. I make no order as to costs.

KUTIGI, JSC: The Plaintiffs in the Federal High Court Holden at Abuja by Originating Summons sought for the following reliefs-

1. A DECLARATION that the registration of political parties in Nigeria is governed by the provisions of the Constitution of the Federal Republic of Nigeria, 1999

2. A DECLARATION that the 1st defendant, Independent National Electoral Commission (INEC) cannot prescribe guidelines for the registration of political parties outside the conditions stipulated by the Constitution of the Federal Republic of Nigeria, 1999.

3. A DECLARATION that guideline No. 3(a) contained in the 1st defendant's Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendants, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit ñthe names, residential addresses and States of origin respectively of the members of its National and State Executive Committees, and the records of proceedings of the meeting where these officers were electedòis unconstitutional, and therefore null and void, in so far as it enjoins such association to submit the names, residential addresses and States of origin respectively of the members of its States Executive Committees, and the records of proceedings of the meetings where both members of its National and State Executive Committees were elected.

4. A DECLARATION that guideline No. 3(c) contained in the 1st defendant's 6Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña register showing that its membership is open to every citizen of Nigeriaòis unconstitutional and therefore null and void.

5. A DECLARATION that guideline No. 3(d) (iv) contained in the 1st defendant's 6Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must show ña provision that its Constitution and Manifesto conform with the provisions of the 1999 Constitution, the Electoral Act of 2001 and the guidelinesòis unconstitutional and therefore null and void in so far as the guidelines relates to ñthe Electoral Act, 2001 and these guidelines.ò

6. A DECLARATION that guideline No. 3(e) contained in the 1st Defendant's 6Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must have ña register showing the names, residential addresses of persons in at least 24 states of the Federation and FCT who are members of the associationòis unconstitutional and therefore null and void.

7. A DECLARATION that guideline No. 3(f) contained in the 1st Defendant's Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ñan affidavit sworn to by the Chairman and Secretary of the association to the effect that no member of the National Executive of the Association is a member of any other existing party or existing political Associationòis unconstitutional and therefore null and void.

ontained in the 1st Defendant's óGuidelines for the registration of
002 issued by the 1st defendant, Independent National Electoral
on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña bank statement indicating the bank account into which all income of the proposed political association has been paid and shall continue to be paid and from which all expenses are paid and shall be paidòis unconstitutional and therefore null and void.

9. A DECLARATION that guideline No. 3(h) contained in the 1st Defendant's óGuidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit ñthe addresses of its offices, list of its staff, list of its operational equipment and furniture in at least 24 States of the Federationòis unconstitutional and therefore null and void.

10. A DECLARATION that guideline No. 3(h) contained in the 1st Defendant's óGuidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 in so far as it prescribes that ña party seeking registration must submit a list of its staff, list of its operational equipment and furniture in its Headquarters offices at Abuja is unconstitutional and therefore null and void.

11. A DECLARATION that guideline No. 5(b) contained in the 1st Defendant's ñGuidelines for the registration of Political Partiesòdated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that ña person shall not be eligible to be registered as a member of political association seeking to be registered as a political party if he/she is in the civil service of the Federation or of a Stateòis unconstitutional and thefore null and void.

12. A DECLARATION that guideline No. 2(d) contained in the 1st Defendant's óGuidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that each association seeking registration as a political party must accompany its application with twenty (20) copies of the Association's Constitution is unconstitutional and therefore null and void.

13. A DECLARATION that guideline No. 2(C) contained in the 1st Defendant's óGuidelines for the registration of Political Partiesòdated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes payment of N100,000.00 (One Hundred Thousand Naira) by an association, that applies for registration is Unconstitutional and therefore null and void.

14. A DECLARATION that section 74(2)(g) and (h), 74(6), 77(b), and 78(2)(b) of the Electoral Act, 2001 which enlarge and 79(2)(c) of the said Act which curtails the provisions of the 1999 Constitution on the registration of political parties are unconstitutional and therefore null and void and of no effect whatsoever.

15. A PERPETUAL INJUNCTION restraining the 1st Defendant, Independent National Electoral Commission (INEC), its agents, officers, privies from basing the registration of political parties either in whole or in part on guidelines Nos. 3(a), 3(c), 3(d)(iv), 3(e), 3(f), 3(g), 3(h), 5(b), 2(c), and 2(d) or from acting on the said guidelines in the consideration or process of the registration of political parties.

16. AN ORDER compelling the 1st defendant, independent National Electoral Commission (INEC) to refund the sum of N100,000.00 (One Hundred Thousand Naira) paid by each of the associations that applied for the registration as political parties.

17. AN ORDER compelling the 1st defendant, Independent National Electoral Commission (INEC) to return 19 of the 20 copies of the association's Constitution submitted to the Independent National Electoral Commission (INEC) by the political Associations that have applied for registration as a political party.ò

The learned trial judge in a reserved judgment granted reliefs 1, 2, 13 and 16 above in full and reliefs 14 & 15 in parts only. The remaining reliefs were refused.

t, the Plaintiffs appealed to the Court of Appeal Holden at Abuja. The
ment, the Court of Appeal allowed the Plaintiff's appeal and granted
l 15. The 1st Defendant's cross-appeal was dismissed.

Aggrieved by the decision of the Court of Appeal the 1st and 2nd Defendants have appealed to this court. The appeal was heard on 29th October, 2002 in view of the urgency and importance of the case we then decided to give our judgment on 8th November, 2002 (which we did), and the reasons for the judgment to be given today the 24th day of January, 2003. On the said 8th November, 2002 I held that the appeals of both the 1st and 2nd Defendants had succeeded in part and the following orders were made-

1. That relief No. 1 is granted
2. That relief No. 2 is refused
3 That relief No. 3 is granted
4. That relief No. 4 is granted
5. That relief No. 5 is granted
6. That relief No. 6 is granted
7. That relief No. 7 is granted
8. That relief No. 8 is granted
9. That relief No. 9 is granted
10. That relief No. 10 is granted
11. That relief No. 11 is granted
12. That relief No. 12 is refused
13. That relief No. 13 is refused
14. That relief No. 14 is granted in part only, that is, in respect of sections 74 subsection (2)(h) and 79 subsection(2) (c) of the Electoral Act, 2001 but not in respect of the other sections of the Act.
15. That reflief No.15 is granted in part only that is, in respect of guidelines Nos 3(a), 3(c), 3(d)(iv), 39(e), 3(f), 3(g) 3(h) and 5(b) but not in respect of Guidelines 2(c) and 2(d).
16. That relief No. 16 is refused
17. That relief No 17 is refused

There were no orders as to costs.

I shall now proceed to give my reasons for the judgment referred to above. I have before now read the Reasons for the Judgment just rendered by my learned brother Ayoola, JSC. I agree with him that those were the reasons for which I allowed in part the 1st and 2nd Defendants appeal and made the orders of 8th November, 2002 reproduce above. I adopt the Reasons as mine and have nothing more to add.

IGUH, JSC: On the 8th Day of November, 2002, I concurred in the orders made by this court in this appeal and then indicated that I would give my reasons for so doing today.

I have since had the privilege of reading in draft the reasons for judgment just delivered by my learned brother, Ayoola, J.S.C. and I agree entirely with the reasoning and conclusions therein. I need only state that it is for those reasons which I adopt as mine that I concurred in all the orders made by the court on the 8th November, 2002 as aforementioned.

Ejiwunmi, JSC: At the conclusion of the hearing of argument of counsel for the parties on 29th October 2002, the matter was adjourned to the 8th of November 2002 for judgment. On that day, I delivered my judgment in which I held that the appeals of both the 1st and 2nd defendants/appellants had succeeded in part and the following orders were made:-

1. That relief No. 1 is granted
2. That relief No. 2 is refused.
3. That relief No. 3 is granted
4. That relief No. 4 is granted
5. That relief No. 5 is granted
6. That relief No. 6 is granted
7. That relief No. 7 is granted
8. That relief No. 8 is granted
9. That relief No. 9 is granted
10. That relief No. 10 is granted
11. That relief No. 11 is granted

at is, in respect of sections 74 subsection (2)(h) and 79 subsection(2) (c) of the Electoral Act, 2001 but not in respect of the other sections of the Act.
15. That reflief No. 15 is granted in part only that is, in respect of Guidelines Nos. 3(a), 3(c), 3(d)(iv), 39(e), 3(f), 3(g) 3(h) and 5(b) but not in respect of Guidelines 2(c) and 2(d).

16. That relief No. 16 is refused
17. That relief No. 17 is refused

There were no orders as to costs.

I will now give my reasons for the judgment I delivered on the 8th November 2002. This action was commenced by an originating summons against the defendants, wherein the following questions were raised for determination by this court. The questions read thus:-
(a) Whether the 1st defendant, Independent National Electoral Commission (INEC) established under section 153 of the Constitution of the Federal Republic of Nigeria, 1999 is bound to observe the conditions stipulated under sections 222-229 of the 1999 Constitution relating to registration of political parties.

(b) Whether the 1st defendant, Independent National Electoral Commission (INEC) can by its guidelines enlarge, curtail or amend the provisions stipulated in the Constitution of the Federal Republic of Nigeria, 1999 for the registration of political parties.

(c) Whether the guidelines released by the 1st defendant, Independent National Electoral Commission (INEC) on 17th May 2002, wholly or partly conflict with or violate the provisions of the Constitution of the Federal Republic of Nigeria, 1999 relating to the registration of political parties.
(d) Whether the National Assembly is competent to enact sections 74(2)(g) & (h), 74(6), 77(b), 78(2)(b) and 79(2)(c) of the Electoral Act 2001 in relation to the registration of political parties when the Constitution of the Federal Republic of Nigeria 1999, has made provisions covering the field in those areas.

The above questions were preceeded with the following reliefs:-
ñ1. A DECLARATION that the registration of political parties in Nigeria is governed by the provisions of the Constitution of the Federal Republic of Nigeria, 1999.

2. A DECLARATION that the 1st defendant, Independent National Electoral Commission (INEC) cannot prescribe guidelines for the registration of political parties outside the conditions stipulated by the Constitution of the Federal Republic of Nigeria, 1999.

3. A DECLARATION that guideline No. 3(a) contained in the 1st defendant's 6Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit ñthe names, residential addresses and States of origin respectively of the members of its National and State Executive Committees, and the records of proceedings of the meeting where these officers were electedòis unconstitutional, and therefore null and void, in so far as it enjoins such association to submit the names; residential addresses and States of origin respectively of the members of its State Executive Committees, and the records of proceeding of the meetings where both members of its National and State Executive Committees were elected.

4. A DECLARATION that guideline No. 3(c) contained in the 1st defendant's 6Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña register showing that its membership is open to every citizen of Nigeriaòis unconstitutional and therefore null and void.

5. A DECLARATION that guideline No. 3(d) (iv) contained in the 1st defendant's 6Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association

how ña provision that its Constitution and Manifesto conform with the
ral Act of 2001 and the guidelinesò is unconstitutional and therefore
s to ñthe Electoral Act, 2001 and these guidelines.ò

6. A DECLARATION that guideline No. 3(e) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must have ña register showing the names, residential addresses of persons in at least 24 states of the Federation and FCT who are members of the associationò is unconstitutional and therefore null and void.

7. A DECLARATION that guideline No. 3(f) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ñan affidavit sworn to by the Chairman and Secretary of the association to the effect that no member of the National Executive of the association is a member of any other existing political Associationò is unconstitutional and therefore null and void.

8. A DECLARATION that guideline No. 3(g) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present ña bank statement indicating the bank account into which all income of the proposed political association has been paid and shall continue to be paid and from which all expenses are paid and shall be paidò is unconstitutional and therefore null and void.

9. A DECLARATION that guideline No. 3(h) contained in the 1st defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit ñthe addresses of its offices, list of its staff, list of its operational equipment and furniture in at least 24 States of the Federationò is unconstitutional and therefore null and void.

10. A DECLARATION that guideline No. 3(h) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 in so far as it prescribes that a party seeking registration must submit a list of its staff, list of its operational equipment and furniture in its headquarters office at Abuja is unconstitutional and therefore null and void.

11. A DECLARATION that guideline No. 5(b) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that ña person shall not be eligible to be registered as a member of political association seeking to be registered as a political party if he/she is in the civil service of the Federation or of a Stateò is unconstitutional and therefore null and void.

12. A DECLARATION that guideline No. 2(d) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that each association seeking registration as a political party must accompany its application with twenty (20) copies of the Association's Constitution is unconstitutional and therefore null and void.

13. A DECLARATION that guideline No. 2(c) contained in the 1st Defendant's ó Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes payment of N100,000.00 (One Hundred Thousand Naira) by an association, that applies for registration is unconstitutional and therefore null and void.

14. A DECLARATION that section 74(2)(g) and (h), 74(6) 77(b) and 78(2)(b) of the Electoral Act, 2001 which enlarge and 79(2)(c) of the said Act which curtails the provisions of the 1999 Constitution on the registration of political parties are unconstitutional and therefore null and void and of no effect whatsoever.

the 1st defendant, Independent National Electoral Commission the registration of political parties either in whole or in part on (g), 3(h), 5(b), 2(c), and 2(d) or from acting on the said guidelines in the consideration or process of the registration of political parties.

16. AN ORDER compelling the 1st defendant, Independent National Electoral Commission (INEC) to refund the sum of N100,000.00 (One Hundred Thousand Naira) paid by each of the associations that applied for the registration as political parties.

17. AN ORDER compelling the 1st defendant, Independent National Electoral Commission (INEC) to return 19 of the 20 copies of the association's Constitution submitted to the Independent National Electoral Commission (INEC) by the political associations that have applied for registration a political party.ò

Since the delivery of the judgment referred to above, I have had the opportunity of reading the draft of the judgment just delivered by my learned brother Ayoola JSC wherein he gave his reasons for reaching the same conclusions as I have reached in my said judgment. As the reasons so given accord with my views on the issues raised in this appeal, it is also adopted by me. I hereby affirm my earlier judgment in the matter for the reasons given in the said judgment of my learned brother.

Tobi, JSC: I have read the reasons for the judgment of 8th November, 2002 just delivered by my learned brother, Ayoola, JSC and I entirely agree with him. In view of the novel and unique nature of this appeal in the jurisprudence of this court, I shall make my contribution in full.

The civilian government, which was inaugurated in May, 1999 had three political parties. They are, in their alphabetical order, as follows: Alliance for Democracy (AD), Peoples Democratic Party (PDP) and All Peoples Party (APP) which changed its name last year to All Nigeria Peoples Party (ANPP).

In the year 2002 the Independent National Electoral Commission (INEC) saw the need for the registration of more political associations as political parties. The Commission set the ball rolling. The Commission set up Guidelines for the Registration of New Political Parties. The Guidelines were purportedly set up ñin the exercise of the power conferred on it by the Constitution of the Federal Republic of Nigeria 1999 and the Electoral Act, 2001. I will return to this.

For now, I continue with the facts. INEC put up the necessary advertisements in the National Papers. Political Associations responded. They applied for registration under the Guidelines. INEC did not see its way clear in registering all the political associations. They were quite a number, though not a legion. Applying the Guidelines, INEC found only three of the Political Associations registerable as political parties. INEC did exactly that. The Commission registered only three of the Associations as political parties.

The respondents who were the plaintiffs in the Federal High Court, Abuja Division did not like the action of INEC. They went to court and sought a number of declarations centered on INEC's Guidelines. The declarations sought were fourteen. They felt that the Guidelines were a nullity in the light of section 222 of the Constitution. There were also other reliefs sought by the respondents.

The learned trial judge, Adah, J., met the respondents some way; less than half way. He did not grant most of the reliefs sought. He made the following final orders:
ñFrom the foregoing therefore, I come to the following conclusion on the consequential reliefs of the Plaintiff:
Relief 1: Granted
Relief 2: Granted
Relief 3: Not granted
Relief 4: Not granted
Relief 5: Not granted
Relief 6: Not granted
Relief 7: Not granted
Relief 8: Not granted
Relief 9: Not granted
Relief 10: Not granted

Relief 14: Granted in respect of section 74(2) (g) of the Electoral Act only. The rest not granted.
Relief 15: Not granted in respect of Guideline No. 2(c) and 3(g).
Relief 16: Granted
Relief 17: Not granted.ò

Dissatisfied with the judgment of the trial judge, the respondents appealed to the Court of Appeal. That court upheld the respondents' appeal and granted all the reliefs sought by the respondents. In his lead judgment Musdapher, JCA (as he then was) said:

ñApplying all the principles mentioned above once an association meets the conditions spelt out under s. 222 and s.223, such an association automatically transforms and becomes a Political Party capable of sponsoring candidates and canvassing for votes in any constitutional recognized elective offices throughout Nigeriaò

Aggrieved by the judgment, the Appellants have come to this court. As usual, briefs were filed and duly exchanged. The 1st Appellant formulated the following issues for determination
ñ2.1 Whether the Justices of the Appeal Court had jurisdiction to adjudicate on this suit when the 2nd respondent was denied fair hearing as enshrined in s.36(1) of the Constitution of the Federal Republic of Nigeria 1999.

3.1 Whether the 1st Appellanté have powers under the 1999 Constitution and the Electoral Act, 2001 to make guidelines for Political Associations seeking to transform into Political Parties.

4.1 Whether the learned Justices of the Court of Appeal where right in law in holding that the guidelines made by the 1st Appellant were unconstitutional, null and void,

Although the 2nd Appellant, the Attorney-General of the Federation, was a party to the proceedings in the High Court and the Court of Appeal, he did not participate in the two lower courts. He however participated in this court. The following issues were formulated for determination by the 2nd Appellant:

ñ(1) Whether the National Assembly is not competent to enact the provisions of sections 74(2)(g) and (h); 77(b) 78(2)(b) and 79(2)(c) of the Electoral Act of 2001 and thereby rendering same unconstitutional and void.

(2) Whether the guidelines Numbers 3(a), 3(c), 3(d)(iv), 3(e), 3(f) 3(g), 3(h),5(b), 2(c) and 2(d) of the Guidelines issued and released on the 17th day of May 2002 for the registration of Political Parties are not within the provisions of the Constitution of the Federal Republic of Nigeria, 1999 with regards to the registration of Political Parties and thereby making them unconstitutional.ò

The respondents formulated the following issues for determination:
ñ(1) Whether the 1st Appellant (Independent National Electoral Commission) have powers under the 1999 Constitution and the Electoral Act 2001 to make guidelines for Political Associations seeking to transform into Political Parties.

2) Whether the learned Justices of the Court of Appeal where right in Law in holding that the guidelines made by the 1st Appellant were unconstitutional, null and void.ò

Learned counsel for the 1st Appellant, Mr. A. O Eghobamien, SAN submitted on issue No. 1 that the Court of Appeal lacked jurisdiction to hear the appeal on the ground that the 2nd respondent who was a party to this suit was neither present in court nor represented when the court made the order of 3rd July, 2002 in respect of the record of proceedings and the filing of briefs. Citing the case of C.C.B (Nig.) Plc v.Samed Investment Co. Ltd (2000) 4 NWLR (Pt. 651) 19 at 33-34, learned counsel submitted that it is not fair hearing to shut a party out in the litigation. He argued that since the vacation of the court commenced on 15th July, 2002, the 2nd respondent's period of filing his brief was on 15th October, 2002. Since time does not run during vacation, the appeal was not ripe for hearing until 15th October, 2002 and not on 11th July 2002 when the appeal was heard. To learned Senior Advocate, the whole proceedings of 11th July 2002 were a nullity. Counsel cited Order 6 Rule 4(1) of the Court of

nsult v. Ukey (1981) 1 SC 6 at 22 and Ude v. Attorney-General
.

Still on the issue of jurisdiction, learned Senior Advocate submitted that when a condition precedent to exercise of court's jurisdiction has not been fulfilled, the court has no jurisdiction. He cited Madukolu v. Nkemdilim (1962) 1 All NLR (Pt.4) 587 at 589. On how and when to raise issue of jurisdiction and the format, learned Senior Advocate cited Akagbejo v. Atage (1988) 1 NWLG (pt.534) 459 at 468; Petrojessica Enterprises Ltd v. Leventis Trading Co. Ltd. (1992) 5 NWLR (Pt.244) 675 at 693 and Onyema v. Oputa (1987) 3 NWLR (Pt.60) 259 at 293.

On issue No. 2, learned Senior Advocate examined the powers of the 1st Appellant in item 15a(i) of the 3rd Schedule to the Constitution and section162 of the Electoral Act 2001 and submitted that the 1st Appellant by the Constitution and the Electoral Act are to engage in the exercise of regulating the Electoral process from the beginning to the end. Calling in aid the case of Attorney-General Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt. 763) 264 at 485-486, on the interpretation of the Constitution,

earned counsel submitted that since it is impossible to legislate with certainty to meet all the dynamic processes that a body like the 1st appellant will have to contend with in a fledging democracy like Nigeria, the court should construe the provisions of item 15(b)(xi) of the 3rd Schedule to the Constitution and section 162 of the Electoral Act, 2001 to accommodate the intention of the provisions.

It was the argument of learned Senior Advocate that if the framers of the Constitution thought that the requirements made in sections 222 and 223 were absolute and exhaustive and would indeed meet all possible eventualities of formation of Political Parties, they would not have given INEC powers in the same Constitution to make regulations, guidelines that would enhance the formation of Political Parties.

Learned Senior Advocate submitted that the Court of Appeal fell into grave error in failing to appreciate the fundamental principle of interpretation of constitutional provisions. Examining further the provision of section 162 of the Electoral Act, counsel argued that the section gives powers to the 1st Appellant to make guidelines, rules and regulations for the formation of Political Parties. He contended that the section was enacted pursuant to the powers given to the National Assembly under section 228(d) of the 1999 Constitution.

Learned Senior Advocate argued in the alternative that the National Assembly has powers given to it by the Constitution to legislate for good governance and in view of the fact that political objectives as contained in section 15(2)(d) are to promote or encourage the formation of associations that cut across ethnic, linguistic, religious or other sectional loyalties, section 162 of the Electoral Act being a proper enactment of the National Assembly ought to be given effect by this court. He cited Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt.772) 383 to 385.

Urging the court to hold that the Court of Appeal erred in law when it held that the 1st Appellant has no powers to make guidelines for Political Associations seeking to transform into Political Parties, learned Senior Advocate enumerated basic principles in the interpretation of constitutional provisions in paragraphs 3. 19, 3.20 and 4.7 of his brief. He cited Adesanya v. President of the Federal Republic of Nigeria (1981) 2 NCLR 158; Attorney-General Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt. 763) 264 at 485 to 485 and Attorney-General Bendel State v. Attorney-General of the Federation (1982) 3 NCLR 1. Learned Senior Advocate urged the court to hold that 1st Appellant has powers under the 1999 Constitution and section 162 of the Electoral Act, 2001 to make guidelines for registration of Political Associations seeking to transform into political parties.

Issue No. 2 is duplicated in the body of the brief. Issue No. 2 appears at page 6 of the brief as well as page 11. This must be a typographical error. I therefore renumber issue No. 2 at page 11 as issue No. 3.

On that issue (that is issue No. 2 as renumbered issue No. 3), learned Senior Advocate argued that it is clear and trite that any person or organization is bound by the constitutional provisions and other laws properly enacted. The point whether or not the 1st Appellant should prepare guidelines in accordance with the provisions of the 1999 Constitution and related laws is not open to argument, learned counsel contended. He quoted verbatim ad literatim some of the Guidelines at pages 12 and 13 of the brief and presented arguments at pages 15 and 16 of the brief, contending essentially that the Guidelines were essential and made in consonance with the provision of the Constitution. He cited Kalu v. Odili (1992) 5 NWLR (Pt. 240) 130 at 170. He dealt specifically with Regulation

9(2)(a) of the Electoral Act, 2001 as they relate to and affect the Civil
al.

Learned counsel for the 2nd Appellant, Mr. Rotimi Jacobs submitted on Issue No. 1 that the principle of covering the field is inapplicable to the case. Citing Attorney-General Abia State v. Attorney-Generation of the Federation (2002) 6 NWLR (Pt.763) 264; Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 3 NCLR 166 and Lakanmi v. Attorney-General of Western Nigeria (1971) 1 UILR 201 at 209, learned counsel contended that it is clear from the cases that for the principle of covering the field to apply in construing the Constitution and the Act of the National Assembly, the provisions of the Constitution on the matter must be complete, exhaustive, exclusive and covers the whole field. In other words, for the provisions of sections 222 and 223 of the Constitution to cover the field as to the registration of political parties by INEC as was held by the Court of Appeal, so as to render the provisions of sections 74(2)(g) and 74(b), 77(b), 78(2)(b)

and 79(2)(c) inoperative and void, it must be shown that sections 222 and 223 of the Constitution are complete, exhaustive, exclusive and cover the whole field of the registration of the political parties.

It was the argument of learned counsel that section 222 does not evince an intention to exhaustively list out the requirements for registration of parties. What is required to be registered with INEC under the section are the names and addresses of such political association, its national officers and the constitution of the association and no more, counsel argued.

Dealing with the provision of section 223 of the Constitution, learned counsel submitted that the section does not prescribe the modality for the registration but the content of the Constitution of the party. The only requirement prescribed by section 223, counsel argued, is for the Political Party's Constitution to make provision for periodic election and to ensure that its executive committee and the governing body reflect federal character.

On the Electoral Act of 2001, learned counsel submitted that by the failure of the respondents to challenge the provisions of section 74(4) and (5), (7) (8), 79(2) (a) (b) (c) (d) (e), they have unwittingly conceded that sections 222 and 223 of the Constitution did not cover the field of the requirement of the registration of political parties, by INEC. Counsel submitted that the Court of Appeal was wrong when it held on the authority of Attorney-General of Abia State v. Attorney-General of the Federation (supra) that the Constitution adequately covered the field. To counsel, the case was not applicable in the circumstances.

On the legislative powers of the National Assembly, learned counsel referred to the provisions of section 4(2)(4), 15(2) and (3), 40, 45(1)(a), 153(1), 228(d) and items 56, 67 and 69 of the Exclusive Legislative List and submitted that the National Assembly has the legislative power to enact the Electoral Act dealing with party registration. He cited Attorney-General of Ondo state v. Attorney-General of the Federation (2002) 9 NWLR (Pt.772) 222 at 334; Rabiu v. The State (1980) 8-11 SC 130 at 148; Attorney-General of Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt.763) 264: Aqua Ltd. v. Ondo State Sports Council (1988) 4 NWLR (Pt. 117) 517; Ishola v. Ajiboye (1994) 6 NWLR (Pt.352) 506; Attorney-General for Province of Ontario v. Attorney-General for the Dominion of Canada (1912) AC 571; New South Wales v. Brewery Employees Union of South Wales (1908) 6 CLR 469 at 611-612 and Bank of the New South Wales v. The Commonwealth (1947-1948) 76 CLR 1 on the interpretation of the Constitution.

It was the contention of learned counsel that the guidelines voided by the Court of Appeal are intended to ensure that the political parties to be registered through the exercise have national spread, whilst other items are intended to enable the 1st Appellant to effectively perform its functions under Part D of Chapter VI of the Constitution as prescribed by section 228(d) of the Constitution. He contended further that the provisions of the Electoral Act voided are also to achieve the same objective.

On issue No. 2 learned counsel submitted that the Court of Appeal was not right in holding that the guidelines issued by the 1st appellant requesting Associations to comply when seeking to become political parties are not within the contemplation of the Constitution and therefore void. Conceding that the 1st appellant has not legislative competence to make laws, counsel submitted that the guidelines released by the 1st appellant are not laws. He relied on the dictionary definition of guidelines and urged the court to allow the appeal.

, Chief Gani Fawhinmi, submitted on the two issues taken together
m or belong to a political party by virtue of section 40, of the
, 1999. He argued that from the proviso to section 40 the enjoyment of the section is predicated upon the recognition by the 1st appellant in accordance with the Constitution.
He contended that section 222 of the Constitution has made specific, direct, distinct, exclusive, definitive, clear and unambiguous provisions on conditions for recognition of political associations as political parties. By the opening sentence in section222, the Constitution has evinced the intention to cover the field with regards to the conditions or requirements that must be fulfilled before a political association can become a political party in Nigeria, learned Senior Advocate argued. And once a political association ulfils those conditions, the 1st appellant has no choice but to recognise such association as political party, counsel maintained. Accordingly, no guideline and no Act of the National Assembly can add to, alter, enlarge, curtail, or repeat the conditions contained in section 222. This is so, notwithstanding item 15(b), Part 1 of the Third Schedule and section 228(d) of the Constitution, counsel submitted

It was the submission of learned Senior Advocate that if the National Assembly pursuant to item 15(b) promulgates any law that duplicates the requirements of section 222 such law is inoperative. If such law enlarges the requirements in section 222 the law is unconstitutional and therefore null and void. If such law adds to the requirements in section 222, such law is unconstitutional and therefore null and void. I f such law curtails the requirements in section 222, such law is unconstitutional and therefore null and void. If such law alters any of the requirements in section 222, such law is unconstitutional and therefore null and void, learned Senior Advocate submitted.

It was the argument of learned Senior Advocate that the National Assembly is not empowered under section 228(d) to make laws with respect to political associations seeking registration as political parties. Section 228(d), counsel argued, merely empowers the National Assembly to make laws with respect to already registered political parties.
Learned Senior Advocate argued, in the alternative, that if the National Assembly claimed umbrage of refuge under section 228(d) of the Constitution, those contested sections of the Electoral Act, 2001 can still not be saved because the Constitution has already covered the filed in respect of political associations seeking registration as political parties.
He submitted that the enactment of the challenged sections of the Electoral Act, 2001 by the National Assembly is not within the powers conferred on the legislative body by section 228(d) of the Constitution because the same Constitution has already covered the field on the matter of registration of political associations as political parties and section 228(d) of the Constitution relates to political parties that have been recognized and have qualified to function as such, and not association seeking to be registered as political parties.

Learned Senior Advocate submitted further that the National Assembly has no power to enact the contested sections of the Electoral Act, 2001 and the 1st appellant has no power to make guidelines on how an association can become a political party in so far as the Constitution has covered the field in section 222. Counsel relied on Attorney-General of Abia State v. Attorney General of the federation (2002) 6 NWLR (Pt.763) 264.

Arising from the decision in Attorney-General Abia State v. Attorney General of the Federation, learned Senior Advocate submitted that section 222 of the Constitution has completely and exhaustively covered the field with respect of when a political association can become a political party. He relied on the opening words of section 222 which provides as follows: ñNo association by whatever name called shall function as a political party unlessé òTo learned Senior Advocate, that expression is definitely categorical and with the six conditions stated in section 222, the Constitution has evinced the intention to completely and exhaustively cover the field with respect to how an association can become a political party in Nigeria, bearing in mind that it is a fundamental right given and guaranteed in section 40 of the Constitution to every person, to belong to or form a political party for the protection of his interest.

Learned Senior Advocate submitted that a constitution of the political association to be registered with the 1st appellant pursuant to section 222(c) of the Constitution ought to comply with section 223 of the Constitution only to the extent that the provisions stated in section 223 are reflected in the association's condition before the constitution of the association is registered with 1st appellant. To learned Senior Advocate, this is to prevent section 222(c) from being read with stultifying narrowness.

Dealing painstakingly with section 74 of the Electoral Act, learned Senior Advocate submitted that section 74(2) has added additional requirements to section 222 of the Constitution. These are subsections (g) and (h) thereof.

operative because they merely repeated or duplicated the provision the additional requirements in section 74(2) (g) and (h) are void ldition, which are inconsistent with section 222 of the Constitution.

On section 74(6), learned Senior Advocate submitted that in so far as it prescribes a requirement for payment of N100,000 administrative and processing fees, is void by an addition of a requirement to conditions under section 222 and in so far as it encompasses the requirements in section 74(2), it is equally void.

On section 77(b) of the Electoral Act, 2001, learned Senior Advocate submitted that in so far as the subsection recognizes section 74, it is unconstitutional and in so far as it recognizes the guidelines, it is unconstitutional.

On section 78(2)(b) learned Senior advocate submitted that the subsection is void in that what the Constitution of a party must contain has been provided for in section 223 of the 1999 Constitution. Consequently the National Assembly cannot make laws stipulating requirements other than those in section 223.

On section 79(2)(c), learned Senior Advocate contended that the membership of a political association seeking registration as a political party appears unrestricted by section 40 and 222(b) of the Constitution. He stated the provisions of section 40 and the provisions of section 222(b) at pages 22 and 23 of his brief. It was the further contention of learned Senior Advocate that section 79(2)(c) has already curtailed the provisions of sections 40 and 222(b) of the Constitution by restricting and prohibiting certain persons from exercising their fundamental right to associate freely, form or belong to a political party of their choice. He contended also that there is nothing in section 228(b) which gives the National Assembly or the 1st Appellant the right to curtail, and/or alter the fundamental right guaranteed under the provisions of the Constitution. Accordingly, he submitted that section 79(2)(c) is an alteration by restricting the provisions of sections 222(b) and 40 of the Constitution and to that extent it is void.

Dealing with the Guidelines, learned Senior advocate submitted that Guideline 3(a) is contrary to section 222(a) of the Constitution in so far as it enjoins such association seeking recognition and registration to function as a political party to submit names, residential address and States of origin, respectively of the members of its National and State Executive Committees and the records of proceedings of the meeting where these officers were elected. To learned Senior Advocate, the Guidelines are partly a repetition and partly an enlargement of the provisions of section 222, which the 1st appellant has no constitutional competence to do. Guideline No 3(a) is therefore void, counsel submitted.

On Guideline 3(c), learned Senior Advocate submitted that once the Constitution of the association, which must be registered with the 1st appellant, contains a provision that the association is open to every citizen of Nigeria irrespective of his place of origin, circumstance of birth, sex, religion or ethnic grouping, as stipulated by section 222(b), then it is not and cannot be a binding legal requirement that such an association must keep a register to reflect the fact that its membership is open to every citizen of Nigeria. To learned Senior Advocate, no party's register can feasibly reflect membership of every citizen of Nigeria.

Learned Senior Advocate submitted further that Guideline No. 3(c) is not only contrary and inconsistent with the Constitution, it is also contrary to 1st appellant's prescription in Exhibit 02. To the extent that a register should be provided, the Guideline is an enlargement of section 222(b) of the Constitution and therefore void. The procurement of a register showing that the membership of the association is open to every citizen of Nigeria is not a prescription, stipulation or condition made by section 222(b), accordingly, Guideline No. 3 (c) is therefore unconstitutional, null and void, learned Senior Advocate contended.

On Guideline 3(d)(iv), learned Senior Advocate argued that the requirement of the guideline cannot be found in section 222. He therefore submitted that the guideline is an addition to the requirement in section 222. The matter of manifest which can be found in section 224, relates to registered political parties rather than to political associations seeking registration as political parties, counsel contended.
On Guideline 3(e), learned Senior Advocate submitted that the guideline cannot be found in section 222, and accordingly an addition to the requirements of the section and to that extend void.

ubmitted that there is no provision in section 222 which makes the dent for registration of a political association seeking registration as a

On Guideline 3(g) and 3(h), learned Senior Advocate submitted that the guidelines cannot be found in section 222 and therefore null and void. He also examined Guideline 3(h) in relation to section 222(f) and submitted that the Guideline was an enlargement of the subsection.

On Guideline 2(d), learned Senior Advocate submitted that the guideline is another classic example of arbitrariness and usurpation of power that is not vested in the 1st appellant, and therefore unconstitutional, and void.

On Guideline 5(b), learned Senior Advocate submitted that it is clearly an alteration by restricting the provision s of section 40 and 222(b) of the Constitution, and therefore void. Counsel tabulated in Appendix A in his brief at pages 38 and 45, the effect of the decision of this court in Attorney-General of Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt.763) 264 in respect of some provisions of the Electoral Act, 2001. He urged the court to dismiss the appeal.

In his Reply brief, learned counsel for the 2nd appellant, submitted that the right to form and belong to a political party is not at large as it is prescribed under the Constitution itself. He relied on the proviso to section 40 of the Constitution. To entitle a citizen to take advantage of section 40, the political parties (as against political associations), must have been registered or recognized by the 1st appellant, counsel contended. He made reference to section 45(1) of the Constitution on derogation from all the guaranteed rights under section 40.

Learned counsel submitted that since the respondents did not challenge the provision of section 74(2)(e) ï (f) in the two lower courts, they cannot do so in this court without leave of the court. He urged the court to disregard the argument. Relying on Director SS v. Agbakoba (1999) 3 NWLR (Pt.595) 314 at 365; Salami v. Mohammed (2002) 9 NWLR (Pt.673) 469; Oshatoba v. Ohijitan (200) 5 NWLR (pt.655) 159; Ogunbamnjo v. Owoyemi (1993) 1 NWLR (Pt.271) 517 at 535; Oyebode v. Ajayi (1993) 1 NWLR (Pt.269) 313; Buhari v. Takuma (1994) 2 NWLR (Pt.325) 183 at 190, learned counsel submitted that the respondents who did not appeal or cross appeal should not be allowed to enlarge the scope of their claims or even raise fresh matter in their brief. He urged the court to ignore the challenge to the provisions of section 72(2)(a) and (f) of the Electoral Act.

Fair hearing, in essence, means giving equal opportunity to the parties to be heard in the litigation before the court. Where parties are given opportunity to be heard, they cannot complain of breach of the fair hearing principles.

There is no evidence before the court that the 2nd appellant, who was the 2nd respondent in the lower court, was denied a hearing. He was a party. He decided not to contest the suit. He has the legal right not to contest the suit. Of course, he cannot complain. He did not complain. Paradoxically, the 1st appellant now complains. Can the 1st appellant protect the interest of the 2nd appellant better than the 2nd appellant himself? I think not.
Learned Senior Advocate for the 1st appellant did not indicate or show in his brief in what circumstances the 2nd appellant was denied fair hearing. It is not enough for counsel to say that the right to fair hearing was breached in a matter; counsel must show by the evidence available the circumstances of such breach. And the evidence must be that the party was not given an opportunity to state his case which he wanted to state in his own way. I reject the submission of learned counsel for the 1st appellant on fair hearing. It totally lacks merit.

The main focus of this appeal is whether the Guidelines made by the 1st appellant are constitutional in the light of section 222 of the Constitution. Section 222 of the Constitution provides as follows:

ñNo association by whatever name called shall function as a political party, unless:
(a) the names and addresses of its national officers are registered with the Independent National Electoral Commission;
(b) the membership of the association is open to every citizen of Nigeria irrespective of his place or origin, circumstance of birth, sex, religion or ethnic grouping;

(c) a copy of its constitution is registered in the principal office of the Independent National Electoral Commission in such form as may be prescribed by the Independent National Electoral Commission;

is also registered in the principal office of the Independent National making of such alteration;

(e) the name of the association, its symbol or logo does not contain any ethnic or religious connotation or give the appearance that the activities of the association are confined to a part only of the geographical area of Nigeria; and

(f) the headquarters of the association is situated in the Federal Capital Territory, Abuja.ò

The preamble to the Guidelines reads:
ñIn exercise of the power conferred on it by the Constitution of the Federal Republic of Nigeria 1999 and the Electoral Act, 2001, the Independent National Electoral Commission (in these guidelines referred to as the Commission) hereby issues the following guidelines for the registration of Political Parties.ò

The preamble tells a lie when it provides that the Constitution of the Federal Republic of Nigeria, 1999 confers on the 1st appellant the power to make guidelines. There is no such provision in the Constitution. Similarly, the submission of learned Senior Advocate for the 1st appellant that the 1st appellant has powers to make guidelines under the Constitution, with the greatest respect, is not correct. There is no enabling provision in the 1999 Constitution which vests power in the 1st appellant to make guidelines.

However the second arm of the preamble which provides that the Electoral Act, 2001 confers on the 1st appellant the power to make guidelines is correct because section 162 of the Act conferred on the 1st appellant power to ñissue regulations, guidelines or manuals for the purpose of the Act and for its due administration.ò
I should start from section 40 of the Constitution. By the section, every person shall be entitled to assembly freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests. The proviso is to the effect that the above provision shall not derogate from the powers conferred by the Constitution on the INEC with respect to political parties to which the INEC does not accord recognition.

While the section vests in the individual the right to associate, and assembly with other persons and form or belong to any political party, the proviso restricts the right, and the restriction is to the effect that the provision will not derogate from the powers of INEC with respect to political parties to which the Commission does not accord recognition. In other words, section 40 applies only to political parties which INEC accords recognition. In this respect, section 222 of the Constitution comes into play as that section provides for conditions to be fulfilled or satisfied before an association can function as a political party.

By the proviso to section 40, the 1st appellant has the right not to accord recognition to political parties. The question arises whether 1st appellant has a discretionary power not to accord recognition to a political party. In my humble view, once a political association fulfils or satisfies the six conditions in section 222, the 1st appellant is constitutionally bound to recognize it as a political party. But where a political association does not fulfil or satisfy the six conditions in section 222, the 1st appellant will not recognize the political association as a political party. The six conditions stipulated in section 222 are conjunctive and not disconjuctive. Accordingly, a political association must fulfil or satisfy all the six conditions contained in the section.

Section 222 is mandatory with the compulsory ñshallò and the conjunction ñunlessòwhich means, ñif not, on the condition thatò Put in another language, no political association can become a political party without fulfilling or satisfying the six conditions contained in section 222. The position is as sacrosanct as that.

Let me take section 228(d) of the Constitution, a provision which vests in the National Assembly the power to make laws in furtherance of the provisions of section 162 of the Electoral Act, 2001. Learned Senior Advocate for the respondents submitted that section 228(d) does not empower the National Assembly to make laws with respect to political associations seeking registration as political parties but merely empowers the National Assembly to make laws with respect to already registered political parties. I think learned counsel for the 2nd appellant made similar submission is his Reply brief. I entirely agree with the submission. After all, the subsection does not contain the words ñpolitical associationsòbut rather provides for political parties.

In my humble view, the Guidelines made by the 1st appellant cannot seek refuge under section 228(d) of the Constitution. This is because the subsection does not vest in the 1st appellant the power to make guidelines. The

e National Assembly qua legislature only and does not extend to the

If I may go further on a comparative analysis of section 222 and 228. The two sections provide for distinct and separate situations. While section 222 provides for formation of political parties, section 228 provides for powers of the National Assembly with respect to existing political parties. In other words, section 222 must be fulfilled before section 228 comes into operation. Putting it in another language, it is after the formation of political parties under section 222 that the National Assembly can confer on the 1st appellant ñother powersò to ensure that political parties within the meaning of section 222 can effectively ensure and observe the provisions of Part III, Chapter 6 of the Constitution. Section 228(d) ends on the door step of the National Assembly. It cannot be extended to the 1st appellant.

Learned counsel for the 2nd appellant invoked the provision of section 45(1)(a) in the construction of section 40. To counsel, since section 45(1)(a) allows an enactment of a legislation which derogates from the right conferred under section 40 if such an enactment is in the interest of public safety, public order or public morality, the restriction to section 40 is not limited to section 222.

In other words, the sky is the limit of section 45(1) of the Constitution as it affects the exercise of legislative powers of the National Assembly. With respect, I do not agree with him. His submission has not taken into consideration the supremacy clause of the Constitution, in section 1, an aspect I will deal with in this judgment. If the contention of learned counsel is correct, then the National Assembly has the legislative powers to enact an Act which vests more powers on the 1st appellant, clearly beyond the provisons of section 222. That cannot be the correct legal position. The supremacy of the National Assembly is subject to the overall supremacy of the Constitution. Accordingly, the National Assembly which the Constitution vests powers cannot go outside or beyond the Constitution. Where such a situation arises, the courts will, in an action by an aggrieved party, pronounce the Act unconstitutional, null and void. See Attorney-General of Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt.763) 264.

Learned counsel also made reference to sections 4, 15, 53 of the Constitution and items 56, 67 and 68 of the Exclusive Legislative List in strengthening his argument that the National Assembly is empowered to make regulations and laws for the registration of political parties. Section 4 provides for the general legislative powers of the Legislatures. It does not specifically provide for the power of the National Assembly to make laws for the registration of political parties. Section 15 is in Chapter II on Fundamental Objectives and Directive Principles of State Policy. There is nothing in the section dealing specifically on political parties. Section 53 provides for who presides in the Senate or the House of Representatives at the National Assembly and at joint sittings of both Houses. There is nothing in the section on political parties.

That takes me to the Executive Legislative List. I agree with learned counsel that item 56 empowers the National Assembly to make law for the regulation of political parties. Items 67 and 68 are omnibus provisions which are not directly concerned with political parties. Perhaps one can see the relevance of section 4, particularly section 4(2) in relation to item 56 of the Exclusive Legislative List. But I should give a warning in the application of item 56 and the warning is that the National Assembly should not in any way go outside the provisions of section 222 in making laws for the regulation of political parties.

Learned counsel for the 2nd appellant also referred the court to item 15(b) of the Third schedule to the Constitution. The item provides as follows: ñThe Commission shall have power to register political parties in accordance with the provisions of this Constitution and an Act of the National Assembly.ò

The provision anticipates all the sections in the Constitution which deal with registration of political parties and the Electoral Act of 2001, the Act which was in operation at the material time. The issue before this court, in the way I understand it, is not that the respondents are questioning the power of the 1st appellant to register political parties; rather they question the power of the 1st appellant to make guidelines which are outside the provision s of section 222. I should perhaps say here to complete the picture for whatever it is worth, that the powers of the National Assembly to enact an Act empowering the 1st appellant to register political parties, will only be valid, if such Act is in conformity with the provision of the 1999 Constitution. An Act which is inconsistent with the provision of the 1999 Constitution will be null and void ab initio. See Attorney-General of Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt. 763) 264; Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt.772) 222.

esponding to the decision of the court below on the status of Item
ed that a community reading of sections 4, 40, 45 and Item 15(b) of
ould not subordinate Item 15(b) to other provisions of the Constitution. The intention of the Constitution is to confer power on the National Assembly to make law for the registration of political parties; learned counsel submitted.

The submission is sound. I entirely agree with counsel. Provisions in a Constitution are of equal strength and constitutionality. No provision is inferior to the other and a'fortiori no provision is superior to the other. We do not have here a situation of an Act of the National Assembly or a Law of the House of Assembly of a State; where those legislation play an inferior role in respect of a constitutional provision.

I do not agree with the court below, with the greatest respect, when it held that Item 15(b) is inferior to sections 222 and 223 of the Constitution which covered the ground or field. While I will take the issue/doctrine of covering the field, later, I should say here that the doctrine cannot be applied in respect of two constitutional provision which vest powers on the National Assembly to make laws. After all, the doctrine of covering the field stems from the federal might of the National Assembly and it will be a contradiction to the whole concept, if Item 15(b) which vests power in the National Assembly is said to be inferior. I ask: inferior to what? And what is more, Item 15(b) is not in any way in conflict with any other provision on political parties. As I said, the law-making power of the National Assembly under Item 15(b) can only be valid if an Act arising from the Item is not in conflict with the Constitution.

Both counsel for the appellants cited section 15 of the Constitution. While learned Senior advocate for the 1st appellant, submitted that section 15(2)(b) should be read with section 162 of the Electoral Act, learned counsel for the 2nd appellant referred us to the decision of this court in Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt.772) 222, particularly the dictum of Ogwegbu, JSC. Learned counsel for the 1st appellant also cited Attorney-General of Ondo State. He relief on the dictum of Uwaifo, JSC.

The submissions have the same purport and impact and it is that section 15 goaded or propelled the Electoral Act, 2001. In Attorney-General of Ondo State v. Attorney-General of the Federation (supra), this court held that the Fundamental Objectives and Directive Principles of State Policy can be made justiciable legislation. Although the court dealt specifically with section 15(5) of the Constitution, the pronouncement could apply mutatis mutadis to section 15(2) of the Constitution.

In Attorney-General of Ondo State, this court did not decide that the sky is the only limit to the powers of the National Assembly to make laws. This court correctly held some of the provisions of the Corrupt Practices and Other Related Offences Act, 2000 unconstitutional, null and void. And that is the only context in which I should deal with the submission of both counsel.

The next issue I should deal with is whether section 222 is exhaustive. Both Chief Eghobamien and Mr. Jacobs submitted that the section is not exhaustive. Chief Fawehinmi submitted that the section is exhaustive. He submitted at page 10 of his brief:

ñI submit that the expression, No association by whatever name called shall function as a political party unless, the Constitution has evinced the intention to cover the field with regards to the conditions or requirements that must be fulfilled before a political association can become a political party in Nigeria.ò

Counsel for the 2nd appellant submitted at page 8 of his brief:

ñThis section does not evince an intention to exhaustively list out the requirements for registration of parties: What is required to be registered with INEC under the section is the names and addresses of such political association, its national officers and the Constitution of the association and no more.ò

The word ñexhaustiveòsimply means complete. Are the six conditions provided for in section 222 exhaustive or complete of all situations in respect of recognising political associations as political parties? That is the fundamental question. I do not think so. In the first place, it is not the role of a Constitution to provide for all conditions and situations in respect of the recognition of political associations as political parties. The Constitution, the fons et origo of the Legal System, cannot provide for all conditions and situations in respect of recognition of political associations as political parties.

he conjunction ñunlessò does not mean that the conditions are constitutional standard which must be fulfilled before a political arty. Nothing stops the National Assembly to use its powers to enact an Act, which confers on the 1st appellant the power to make any regulations or guidelines which add to or edify the conditions spelt out in section 222. The only time the courts will raise their eyebrows is when the regulations or guidelines made under an Act of the National Assembly are inconsistent with the six conditions set out in section 222. It is my view what while section 222 sets out constitutional conditions, the 1st appellant can make guidelines under section 162 of the Electoral Act in respect of issues of administration on the registration of parties. One such example is in section 74(2) (g) of the Electoral Act, 2001. This is a matter which is essentially of an administrative nature which the Constitution needs not provide, particularly in view of the fact that the daily rising and racing inflation may catch up with the fee payable for registration. I know as a matter of fact that Government spends money for the procurement of registration forms and other services related to registration and I do not expect the Government to provide forms and the services gratis. The days when Government played the role of father Christmas are gone. Political associations wishing to be registered as political parties must bear part of the financial burden, if not all of it.

I think this is a convenient point to take the issue of the doctrine of covering the field, which all the three counsel dealt with. Counsel cited the relevant decisions which I find most useful. The doctrine of covering the field is one of American and Australian constitutional Law origin. To my restricted knowledge, the doctrine was invoked for the first time in Nigerian law in the case of Lakanmi v. The Attorney-General of the West (1971) 1 UILR 201. The Supreme Court held in that case that Decree No. 51 of 1966 promulgated by the Federal Military Government covered the same field as Edict No. 5 of 1967 promulgated by the Western State Military Government. The court accordingly declared Edict No. 5 of 1967 a nullity.

In Attorney General of Ogun State v. Attorney-General of the Federation (1982) 3 NCLR 166, Fatayi-Williams, CJN, said at page 176:

ñWhere identical legislations (sic) on the same subject matter are validly passed by virtue of their constitutional powers to make laws by the National Assembly and a State House of Assembly, it would be more appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter. To say that law is inconsistent in such a situation would not in my view, sufficiently portray clarity or precision of language.ò

Idigbe, JSC, of blessed memory, said at page 194:

ñWhere under a Federal set up, both the Federal and State Legislatures, each empowered by the Constitution so to do legislate on the same subject then if it appears from the provisions of the Federal Law on the subject that the Federal Legislature intends to cover the entire field of the subject matter and thus provide what the law on the subject should be for the entire federation, then the State law on the subject is inconsistent with the Federal Law and the latter must prevail and the State law on the subject is invalid. If no general intention to cover the entire field on the subject can be gathered from the Federal Law, then the mere concurrence of the two laws (i.e the Federal and the State Laws) on the subject is not eo ipso an inconsistency although the detailed rules in the provisions of both laws may lead to different results on the same facts.ò

Eso, JSC, took a fairly different course when he said:
ñWhere é the legislation enacted by the State is the same as the one enacted by the Federal Government where the two legislation is in pari material, I respectfully take the view that the State legislation is in abeyance and becomes inoperative for the period the Federal legislation is in force. I will not say it is void. If for any reason, the Federal legislation is repealed, it is my humble view that the State legislation, which is in abeyance, is revived and becomes operative until there is another Federal legislation that covers the field.ò

See also Attorney-General of Abia State v. Attorney-General of the Federation (supra)

The doctrine of covering the field can arise in two distinct situations. First, where in the purported exercise of the legislative powers of the National Assembly or a State House of Assembly, a law is enacted which the Constitution has already made provisions covering the subject matter of the Federal Act or the State Law. Second, where a State House of Assembly, by the purported exercise of its legislative powers enacted a law which an Act of the National Assembly has already made provisions covering the subject matter of the State law. In both situations, the

e of the ñfederal mightò which relevantly are the Constitution and the

In my humble view, a State law which is not necessarily inconsistent with either the Constitution or an Act of the National Assembly but merely covers the legislative field of the National Assembly is not that harmful as it is merely a surplusage. In line with the decision of Eso, JSC, in Attorney-General of Ogun State (supra), such a law of a State House of Assembly is in abeyance and inoperative and could be revived and becomes operative if for any reason the Federal legislation is repealed.

In Attorney-General of Abia State v. Attorney-General of the Federation (supra), Uwais, CJN, said at pages 391 to 392.

ñI agree that the doctrine of covering the field can conveniently be extended to apply to a situation where the Constitution has covered the field vis-à-vis-a Federal or State legislation, such legislation is not void simpliciter but will not be operative in view of the provisions of the Constitution. However, if the legislation is inconsistent with the provisions of the Constitution, then, the legislation is void to the extent of the inconsistency vide section 1 subsection 3 of the Constitution.ò

Applying the above principles of law to the Electoral Act of 2001, Uwais, CJN had no difficulty in holding that some sections of the Act were either void for being inconsistent with the constitution or inoperative for repeating what the Constitution has provided.

Relying on the above case, learned Senior Advocate for the respondents urged this court to pronounce unconstitutional and void the provisions of sections 74(2) (6),77(b), 78(2)(b), 79(2)(c) and some of the Guidelines unconstitutional and void. I should recall here the submission of learned counsel for the 2nd appellant in his reply brief that the submission of learned Senior Advocate on the unconstitutionality of section 74(2)(e)-(f) of the Electoral Act was not raised in the court below and that he needed leave to raise the issue as a fresh issue That may well be so but it is also the law that the Supreme Court, as a court of last resort, is competent to entertain a point of law raised for the first time before it when the justice of the case demands. Such point must, however, be a substantial point. However, the Supreme Court may refuse to entertain a question of law if it is satisfied that the court below would have been in a more advantageous position to deal with the matter. See Nigerian Bottling Company Ltd v. Ngonadi (1985) 1NWLR (Pt.4) 793. See also Mogaji v. Cadbury Nigeria Ltd. (1985)2NWLR (Pt.7)393.

In my view, the issue raised on section 74(2) (e) and (f) is a substantial point of law which this court can take in the interest of justice. And what is more, it is an issue in which the court below is not in a more advantageous position to deal with. And so, I will take section 74(2) (e) and (f) along with the other provisions of the repealed Act for the purpose of this appeal. The point to be taken is whether the sections were valid or unconstitutional at the time they were in operation, and relevantly in relation to this case.
I will not take the provisions of the Electoral Act complained of by learned Senior advocate for the respondents in the order he raised them.

Section 74(2) (g) and (h). The subsections provide as follows:

ñNo Association by whatever name is called shall function as a political party unless:

(g) it produces evidence of payment of registration fee of N100,000.00 or as may be fixed from time to time by an Act of the National Assembly;

(h) it provides the addresses of the offices of the Political Association in at least two-thirds of the Federation spread among the six geo-political Zones.ò

It is clear from section 222 of the Constitution that both subsection 2(g) and (h) are not contained in the section. I do not expect the Constitution to provide for section 74(2)(g) which is more of an administrative matter. It is common knowledge that process of registration involves money. The application forms and other accompanying documentation involve money. As I said above, I do not expect the 1st appellant to play the role of a father Christmas. Somebody has to defray part of the expenses, and it should be the political association that wants to be

22. Considering the cost of production of materials and labour, I do nuch.

I entirely agree with learned Senior Advocate that subsection (h) is clearly an enlargement of section 222 which is most unwarranted. Apart from section 222, the provision is clearly against the spirit of section 40 of the Constitution. Although the section 40 is vested in a person while section 74(2) (g) deals with political association, the end result is clear; it is that a person who wants to belong to a particular party which cannot satisfy the provision of section 74(2)(g) as a political association, will be denied the section 40 right. While I cannot speculate the intention of the lawmaker, the subsection is most likely provided to make it difficult for political associations to function as political parties.

Section 74(6): The subsection provides as follows:

ñAny Political Association that meets the conditions stipulated in subsections 1 and 2 of this section shall be registered by the Commission as a political party within 30 days upon payment of the sum of N100,000.00 administrative and processing fees and if after the 30 days the Association is not registered by the Commission it shall be deemed to be so registered.ò

In my humble view, there is nothing wrong in the subsection, particularly in the light of my decision in respect of section 74(2)(g). Like in section 74(2)(g), the financial burden has to be passed on the political associations.
Section 77(b): The subsection provides as follows:

ñ77. Without prejudice to the provisions of section 74, once a particular association is granted registration as political party by the Commission, that political party shall further submit to the commission the following particulars-(b) a copy of the party's Constitution drawn up in compliance with Chapter II of the Constitution of the Federal Republic of Nigeria and with the requirements of the relevant guidelines issued by the Commission.ò

In my humble view, there is nothing unconstitutional in the subsection as it affects the submission of the party's Constitution to the 1st appellant. The subsection is not specific as to the guideline and I will make my opinion known when I am dealing with the guidelines.
Section 78(2)(b): The subsection provides as follows:

ñ78(2) The Constitution and Manifesto produced pursuant to subsection (1) of this section shall:

(b) at all times be in compliance with the provisions of the Constitution, the electoral laws and guidelines made by the Commissionò

The subsection is not unconstitutional in so far as the electoral laws and guidelines are not inconsistent with the provisions of the Constitution.

Section79(2)(c): The subsection provides as follows:
ñ79(2) Subject to subsection (1) of this section, a person shall not be eligible to be registered as a member of a political party if he:

(c) is a member of the Public Service or Civil Service of the Federation, a State or Local Government Area Council as defined by the Constitution.ò
This provision is unconstitutional, particularly in view of section 40 of the Constitution. The opening words of section 40, ñevery personò cover a member of the Public Service or Civil Service of the Federation as well as a State or Local Government or Area council. The above apart, the provision is also against section 222(b) of the Constitution which provides that the membership of the association is open to every citizen of Nigerian irrespective of his place of origin circumstance of birth, sex, religion or ethnic grouping.

That takes me to the Guidelines. Section 162 of the Electoral Act, 2001 vests in the 1st appellant ñthe power to issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of the Act and for the due administration thereof.ò
In his lead judgment, Musdapher, JCA (as he then was) declared as follows at page 387 of the Record:

d) (iv),3(e),3(f),3(g), 3(h), 2(d) and 5(g) and 5(b) unconstitutional, ctions 74(2)(g) and (h), 74(6), 77(b) and 78(2)(b) and s.79(2)(c) of the e null and voidò

Muntaka-Commasie, JCA ordered at page 402 of the Record:

ñIt is my decision that the following guidelines issued by the Independent National Electoral Commission (INEC) are unconstitutional and inoperative, same are not only set aside but also struck down. They are guidelines 3(a), 3(c), 3(d)(iv), 3(e), 3(f), 3(g), 3(h), 2(d) and 5(b). This court also agreed that the following sections of the Electoral Act, 2001 are in conflict with the relevant provisions of the 1999 Constitution. They are sections 74(2)(h), 74(6) and 79(2)(c) of the Act.ò

Bulkachuwa, JCA added at page 405 of the record:

ñIn view of the above therefore the Independent National Electoral Commission guidelines 2(d), 3(a), 3(c), 3(d)(1), 3(e), 3(f), 3(g), 3(h) and 5(b) are not in conformity with constitutional provisions and are therefore null and void. Similarly the provisions of section 74(2)(h), 74(6), 77(b), 78(2)(b) and 79(2) (c) of the Electoral Act, 2001 are unconstitutional therefore null and void.ò

I should pause here to say that the final orders given by the three learned justices are not exactly the same. The orders given by each of the three learned justices are slightly different in terms of the number of sections that were declared unconstitutional, null and void. Final orders are the most important aspect of a judgment and it is mosnecessary that the orders made by the panel must be exactly the same. Difference in orders of a panel can only be justified where a justice writes a minority judgment. But there was no minority judgment in the appeal heard by the court below. I would like to think that the difference in the orders could be typographical errors.

I now take the guidelines in the order learned Senior Advocate for the respondents took them.

Guideline 3(a): This guideline provides as follows:

ñ3. No Association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following:

(a) The names, residential addresses and States of origin respectively of the members of its National and State Executive Committees and the records of proceedings of the meeting were these officers were elected.ò

This guideline is unconstitutional as it enlarges and adds to the provision of section 222 of the Constitution. While section 222 stops at national officers, guideline 3(a) includes state officers. In addition, the guideline also include ñrecord of proceedings of the meeting where these officers were elected.òThere is no such provision in section 222. It is therefore null and void ab initio.
Guideline 3(c): This guideline provides as follows:

ñ3. No Association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following:
(c) A Register showing that its membership is open to every citizen of Nigeria.ò

This guideline is unconstitutional. In view of the clear provision in section 222(b), the further requirement in the guideline that a register showing that the membership of the political association is open to every citizen of Nigeria is unconstitutional, because it is not a requirement in section 222(b). It is therefore null and void ab initio.

Guideline3(d)(iv): The guideline provides as follows:
ñ3. No Association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following:

(d) A copy of the Association's Constitution, which must contain among other things:

d manifesto conform with the provision of the 1999 Constitution, the

This guideline is unconstitutional as it enlarges and adds to section 222. There is no requirement of submission of manifesto in section222. It is null and void ab initio.

Guideline3(e): The guideline provides as follows:
ñ3. No Association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following:

(e) A register showing the names, residential addresses of persons in at least 24 States of the Federation and FCT who are members of the Association.ò

This guidelines is unconstitutional. It is not in section 222. It is an enlargement and addition to section 222. It is therefore null and void ab initio.

Guideline 3(f): The guideline provides as follows:
ñ3. No Association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following:

(f) An affidavit sworn to by the Chairman and Secretary of the Association to the effect that no member of the National Executive of the Association is a member of any other existing party or existing political association.ò

The guideline is unconstitutional. There is no such requirement in section 222. As a matter of law, section 222 does not provide for the Chairman and the Secretary or any other person for that matter swearing an affidavit. I entirely agree with Chief Fawehinmi (SAN), that guidelines 3(f) is a condition precedent for the registration of a political association as a political party. It is therefore null and void ab initio.

Guideline 3(h): The guidelines provides as follows:
ñ3. No Association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following:

(g) A bank statement indicating the bank account into which all monies of the proposed political Association has been paid and shall continue to be paid and from which all expenses are paid and shall be paid.ò

This guideline is unconstitutional as it is an enlargement and addition to section 222. It is therefore null and void ab initio. Although the learned trial Judge described the guideline in his judgment as an ñunworthy clog, which has no legitimacyò, he refused to grant the plaintiffs' relief No. 8 seeking for declaration that the guideline is unconstitutional, and therefore null and void. With the greatest respect, the learned trial Judge contradicted himself by not granting the relief after declaring the particular guideline null and void and of no effect whatsoever. I do not think he had any option in the matter. Did he forget that he had come to such a conclusion at page 24 of his judgment? He ought not to have forgotten, or better still, he could not have forgotten because the final orders he made immediately followed the above order he gave. I do not think the learned trial Judge was fair to the respondents. He was not even fair to himself. I say no more.

Guideline3(h): The guideline provides as follows:
ñ3. No Association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following:

(h) The address of its Headquarters office at Abuja and the address
of its offices, list of its staff, list of its operational equipment and furniture in at least 24 States of the Federation.ò

This guideline is unconstitutional. There is no such provision in section 222. It enlarges and adds to the provision of section 222. The only provision in section 222(f) is that the headquarters of the association must be situated in the Federal Capital Territory, Abuja. The guideline is therefore null and void ab initio.

ws:

party shall be made on the Commission's Form PA1 in twenty copies and shall be accompanied by documents showing the following:

(d) Twenty copies of the Association's Constitution and Manifesto.ò

The guideline is not unconstitutional. The requirement is more of an administrative matter which the 1st appellant can carry out, particularly in the light of the provisions of section 223 of the Constitution. I do not expect the Constitution to spell out administrative functions of the 1st appellant. With respect, I do not agree with Chief Fawhinmi (SAN) that this guideline is another classic example of arbitrariness and usurpation of power. It is not.

Guideline 5(b): The guideline provides as follows:
ñ5. A person shall not be eligible to be registered as a member of political association seeking to be registered as a political party if he/she

(b) is in the Civil Service of the Federation or of a State.

This guideline is unconstitutional. It clearly offends the provisions of section 40 and 222(b) of the Constitution and therefore null and void ab initio. Civil servants are subject to and governed by the existing Civil Service Rules. Such Civil Service Rules make the guideline otiose and unnecessary.

All that I have said above on the provisions of the Constitution vis-à-vis the Electoral Act, 2001 and the Guidelines made by the 1st appellant zero on the supremacy of the Constitution. Section 1(i) of the Constitution provides for the supremacy of the Constitution. By section 1(3), if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall, to the extent of the inconsistency, be void. This court has consistently upheld the above supremacy clause. See the most recent cases of Attorney-General of Abia State v. Attorney-General of the Federation, (2002) 6 NWLR (Pt.763) 264: Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt.772) 383.

In the total package of the supremacy of the Constitution in this appeal are mainly sections 40 and 222. The provision of Chapter IV in which section 40 is a part are sacrosanct. The procedure for the amendment of the Chapter is tedious and difficult as spelt out in section 9(3) of the Constitution. Since section 40 vests in every person the right to freely associate with other persons and belong to any political party, an Act of the National Assembly or a guideline of the 1st appellant ambitiously trying to take away the rights guaranteed in the section cannot stand. This is because the constitution is supreme.

The same applies to section 222. Since that section has provided for six conditions for a political association to be recognized or registered by the 1st appellant as a political party, neither the National Assembly nor the 1st appellant can now enact any Act or make guidelines respectively detracting from the provision of section 222. Until section 222 is amended in accordance with section 9(2) of the Constitution, it remains the constitutional yardstick upon which political associations can become political parties.
Learned counsel for the 1st appellant dealt exhaustively with the liberal interpretation of the Constitution. His ally, learned counsel for the 2nd appellant supported him. The liberal approach they commended to this court was aimed at accommodating the guidelines made by the 1st appellant.

While this court has consistently championed the liberal interpretation of the Constitution for purposes of expanding the frontiers of the Constitution to accommodate as much foreseeable and proximate situations as possible, this court cannot do so when the provisions of the Constitution are clear and the intention of the makers of the Constitution are thus obvious. The golden and main rule of the interpretation of statutes, including the Constitution, is the intention of the law-maker. Once the intention of the law-maker is clear, resort cannot be made to any liberal interpretation of the Constitution. This is because a liberal interpretation of the Constitution beyond and above the intention of the law-maker will amount to the Judge making law. While there is a vibrant debate as to whether the Judge should make law, it will be against the principle of separation of powers for the Judge to make law where the intention of the law maker is clear. Perhaps the Judge could be involved in making the law if the intention of the law-maker is not clear and he is in a difficult position in the circumstances of the case before

adjourn the matter for the legislature to make a law to place the .

Liberal approach to the interpretation of the Constitution is good in relevant situations, but this court cannot do so excessively to the extent that it destroys the fabrics of constitutionalism and constitutionality. All interpretation of the Constitution must bow or kowtow to these twin principles or pillars of constitutional law in our democracy in which the rule of law, democracy's life blood, triumphs to the egalitarian advantage of Nigeria and its people.

Liberalism in the interpretation of the Constitution is good, but too much of it, or better, excess of it, like excess of everything could be bad and dangerous if a liberal interpretation of the Constitution will do grave injustice to one of the parties, this court should be loath in taking that course.

In other words, this court should keep its borders of interpretation of the Constitution closed if opening them will result in destroying the intention of the makers of the Constitution. This court cannot add one extra word outside the intention of the makers of the Constitution where the constitutional provision is obvious and clear.

I realize that learned Senior Advocate for the 1st appellant is taking us on a long and apparently difficult journey in the interpretation of some sections of the Constitution and if we follow him, it will be difficult for us to retrace our steps in other cases in the future. We cannot embark upon such a dangerous journey. No.

In the light of the foregoing, I come to the conclusion and hold that the appeals by both 1st and 2nd appellants succeed in part.