

COURT OF APPEAL LAGOS DIVISION
12TH DECEMBER, 1996. CA/L/141/96
CORAM:- D. MUSDAPHER, R. D. MUHAMMAD,
I. C. PATS-ACHOLONU, JJCA.

CHIEF GANI FAWEHINMI APPELLANT
VS.
1. GENERAL SANI ABACHA
(The Head of State and Commander-in-
Chief of Nigeria) RESPONDENTS
2. ATTORNEY-GENERAL OF THE FEDERATION
3. STATE SECURITY SERVICE
4. INSPECTOR-GENERAL OF POLICE

ADMINISTRATIVE LAW - *Legislative judgment - Detention Order - Does not qualify as a legislative judgment by any means.*

ADMINISTRATIVE LAW - *Discretionary powers - Under the Detention (of persons) Decree No. 2 of 1984 - The Donee is not accountable to the court.*

CONSTITUTIONAL LAW - *Enforcement procedure Rules - Made under s. 42 of the Constitution - Cannot be employed in a claim - Based on the African Charter.*

EVIDENCE - *Admissibility - Detention Order - Where produced in Court but not tendered or exhibited - And no objection was raised at the trial court - It Cannot now be impugned at the appeal stage.*

INTERNATIONAL LAW - *Treaties - African Charter on the peoples and Human Rights provisions - Are in a class of their own - And the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria.*

JURISDICTION - Ouster provision - In Decree No. 2 of 1984 - Can not stop the court from adjudicating - On the issue of detention for a period - Not covered by the Detention Order.

PRACTICE AND PROCEDURE - Enforcement of - The provisions of African Charter on peoples and Human Rights - Can be done vide applicable Rules of Practice in courts.

STATUTES - Detention Order - Decree 2 of 1984 - Amended by Decree No. 11 of 1994 - The rational interpretation and construction - Is that the Inspector General of Police is empowered to issue a detention Order.

FACTS

The appellant amongst other things is a famous legal practitioner of many years standing. On Tuesday, January 30th 1996 at about 6.00 a.m, security officers acting on behalf of the respondents arrested him and took him to a detention centre where he remained incommunicado for about one week. He was thereafter transferred to Bauchi prison. Pursuant to the provisions of section 42 (i) of the 1979 Constitution, Order 1 Rule 2 (1), (3) and (6) and Orders 4 and 6 of the Fundamental Rights (Enforcement procedure) Rules, 1979, the appellant applied successfully by a motion Ex Parte for leave of the lower court for the following reliefs, inter alia:

1. A declaration that the arrest of the applicant constitutes a violation of the applicant's Fundamental rights guaranteed under ss. 31, 32 and 38 of the 1979 constitution and Articles 4, 5, 6 and 12 of the African charter on Human and Peoples' Rights (Ratification and Enforcement) Act cap. 10 Laws of the Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

3. A mandatory Order compelling the respondents whether by themselves or by their officers, agents, servants, privies or otherwise howsoever to forthwith releases the applicant.

The motion on Notice was filed accompanied with all the necessary documents. Before the motion of the applicant could be heard and

while dealing with other interlocutory matters, the respondent caused to be filed a notice of Preliminary Objection in the following terms, to wit:

"That the applicant/respondent cannot maintain this action against the respondents/applicants on the ground that this Honourable court lacks the competence to entertain this action"

3 Grounds for the objection were raised.

The learned trial Judge permitted counsel to address him on the preliminary objection. The trial judge upheld the preliminary objection and ruled that his jurisdiction to hear the applicant has been ousted and struck out the application.

The applicant felt aggrieved with the decision and has now appealed to the Supreme Court. The learned counsel for the appellant from the grounds of appeal filed, identified and formulated seven issues for the determination of the appeal.

ISSUES FOR DETERMINATION

1. Whether the learned trial Judge was right when he held that the Inspector General of Police is conferred with the powers to issue out a detention order under Decree No. 2 of 1984.

2. Whether the trial court was right when it held that the detention order though not exhibited or tendered was covered under Order 27 of the Federal High Court (Civil Procedure) Rules and Sections 74(1) and 75(1) of the Evidence Act and that therefore, the court can take judicial notice of the said detention order.

3. Whether the Articles of the African Charter on Human and Peoples Rights are inferior or subject to municipal laws particularly Decrees made by the Federal Military Government .

4. Whether the Articles of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 are not enforceable in Nigerian courts and in particular under the Rules made pursuant to Chapter IV of the Constitution of the Federal Republic of Nigeria 1979.

5. Whether the detention order is not a legislative judgement which can be declared void by the court.

6. Whether the court cannot inquire into the circumstances that

informed the satisfaction of the Inspector-General of Police that the appellant was a security risk.

7. Whether the learned trial Judge was right in failing to consider the submission of the appellant's counsel as to the four days in which the appellant was detained which were not covered by the detention order and if the answer is in the negative, whether the jurisdiction of the Federal High Court is ousted in respect of the four days not explained by the Detention order.

C HELD (Unanimously allowing the appeal in part per lead judgment of **MUSDAPHER JCA**)

Decree No. 2 of 1984 - The rational interpretation

1. I agree that the amendment made by virtue of Decree No. 11 of 1994 looks inelegant, but the intention of the legislature cannot be mistaken by a mere technical printing oversight or clerical error which, as already said, is to empower the Inspector-General of Police to issue Detention Orders. This is made more clearly by the amendment made in Section (b) of Decree No.11 of 1994. It provides:-

"(b) By replacing Section 2 thereof with the following:

'The Chief of General Staff or the Inspector General of Police as the case may be after the order made him.....

By applying the doctrine of harmonious interpretation, that is by looking at the statute as a whole, the intention is clear, manifest and unmistakable. To interpret the statute otherwise will not only make a mockery of common sense but will amount to drawing comfort from a mere technicality to defeat the intention of the legislature. I have been mindful of all the safeguards the courts adopt as expounded by the numerous cases cited above, but, in my view, the rational interpretation and construction to give to the amendment in Decree No.11 of 1994 is to hold that the Inspector General of Police is empowered to issue a detention Order in the terms of Decree No.2 of the 1984 as amended. I accordingly answer the first issue in the affirmative. I hold that the learned trial Judge was right in coming to the conclusion that the Inspector General of Police is empowered to issue a detention Order under the provisions of Decree No.2 of

1984 as amended and that he had no jurisdiction to entertain the matter in that by virtue of the provisions of Section 4 of Decree No. 2 of 1994, the jurisdiction of the court is ousted to entertain the appellant's case. (p.376H)

Admissibility - Detention order

2. A party to any civil proceedings who knowing of an irregularity , allows the irregular procedure to be adopted and indeed used document irregularly produced in the proceedings cannot complain on appeal on the procedure adopted: See Akhiwu v. The Principal Lotteries Officer, Mid-Western State (1972) 1 A11 NLR (Pt. 1) 229 The detention order should have been exhibited or somehow tendered. It was not tendered. The learned counsel for the respondents produced it. It was accepted by the learned counsel for the appellant who not only read it but also relied upon it to show the illegality of the arrest or detention of the appellant for a few days. I am of the view, that under these circumstances the appellant cannot now at the appeal stage impugn the admissibility of the detention order. (p. 379 G)

International law - Treaties - African Charter

3. The member countries - parties to the protocol - recognized that the fundamental human rights stem from the attributes of human beings which justify their international protection and accordingly, by the promulgation of Cap.10 the Nigerian State attempted to fulfil its international obligation. It is an international obligation to which the nation voluntarily entered and agreed to be bound. The arrest and detention of the appellant on the facts adduced clearly breached the provisions of the Charter and can be enforced under the provisions of the Charter. The contracting States are bound to establish some machinery for the effective protection of the terms of the Charter and when the local procedure is exhausted or when delay will be occasioned, the matter will be taken to the International Commission. All these indicate that the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in Labiyi v. Anretiola (1992) 8 NWLR (Pt.258) 139. See Equal

Opportunity Commission and Anor. v. Sec. for State for Empl. (1994) 1 All ER 910. See also Ogugu and Oshevire cases (supra). It seems to me that the learned trial Judge acted erroneously when he held that the African Charter contained in Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government. It is commonplace, that no Government will be allowed to contract out by local legislation, its international obligations. It is my view, that notwithstanding the fact that Cap. 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot effect its operation in Nigeria. (p.383 C)

Enforcement procedure Rules

4. The learned trial Judge held that it is inappropriate to seek redress for the infringements of the charter under section 42 of the Constitution and the enforcement procedure rules made thereunder. The learned trial Judge took the issue suo motu and resolved it against the appellant and held that the Charter cannot be enforced under the Fundamental Rights (Enforcement Procedure) Rules 1979. It is a matter of law, which the learned trial Judge can legitimately raise. The issue of the applicability of the Rules to other forms of claims has been judicially pronounced upon See Ezeonu and David Osuagwu (supra). The learned trial Judge was bound to follow the decisions in those cases. There is (*sic no*) merit in the complaint of the appellant. (p. 384 F)

Enforcement of provisions of African charter

5. I have carefully read the Ogugu's case (supra). The case is no authority for the proposition that the Fundamental Rights (Enforcement procedure) Rules 1979 can be employed in a claim based on the African Charter. Bello CJN at page 26 of the report said:

"I am inclined to agree with Mr. Agbakoba that the provision of Section 42 of the Constitution for the enforcement of fundamental rights enshrined in Chapter IV of the Constitution is only permissible and does not constitute a monopoly for the enforcement of those rights....."

It must be emphasized that the section does not exclude the application of other means for their enforcement under common law or statute or rules of court.

It is apparent from the foregoing that the human and peoples rights of the African Charter are enforceable by several High Courts depending on the circumstances of each case and in accordance with the rules practice and procedure of each court." (Emphasis supplied)..."

What it says is that the African Charter Articles can also be enforced by applicable Rules of Practice in courts. (p. 385 A)

Detention Order - Not a legislative judgment

6. However, it must be pointed out that a Detention Order is not a legislative judgment. It does not pretend to find a detainee guilty of any offence. It is simply a prevention procedure adopted by the State whereby, rightly or wrongly, the detaining authority comes to the conclusion that it is necessary that the person concerned be detained in order to prevent him from committing an offence detrimental to the security of the State. It does not compete with the judgment of a court as the court does not pass judgment with the aim of preventing a person committing an offence. If the detention order is not justified that is a different matter. But the Detention order does not carry sanction such as a fine or a term of imprisonment nor is it a decision giving such relief as a declaration or injunction or damages. It is therefore not a legislative judgment by any means. (p. 387 B)

Discretionary power under Decree No. 2

7. But in Nigeria there are provisions in Decrees such as No. 2 of 1984 which empower the executive to detain people without trial. Usually no reasons are given by the detaining authority as to how a detainee constitutes a menace or threat to the state. It is regarded as a matter of the security of the state which is not open to probing by the courts, also for security reasons. Attempts by courts to order the release of such detainees on application by habeas corpus is even ousted. See Decree No. 22 of 1986. In *Lekwot v. Judicial Tribunal* (1993) 2 NWLR (Pt.276) 410 at 447, I quoted as follows from a paper presented by the Chief Justice of

Nigeria at the Sixth International Appellate Judge's Conference , 1991;-

"Human rights under a military regime may be abberatious. In a democratic government under the rule of law, all judicial powers of the State are vested in the judiciary. Under the military regimes, the powers are invariably eroded. The erosion may be by creating military (or Special) Tribunals..... It may also be the ouster of the jurisdiction of courts of law." (p. 388 A)

Ouster provision - To be effective, condition must be adhered to
 8. This is concerned with the question of the 4 days in which the appellant was under detention before the detention order was issued. Any matter arising from the circumstances of such detention is one that can be appropriately decided after a full trial. This appeal deals largely with the issue of jurisdiction which was raised as a preliminary point. The merit of the case to be presented by the appellant cannot be gone into at this stage. In the result, this appeal partially succeeds. I remit the case back to the trial court to consider the issue of the consequences of the detention for the four days of the appellant which is apparently not covered by the order. (p. 388 H)

NOTABLE POINTS OF INTEREST

MUSDAPHER JCA

1. Issues of jurisdiction to be dealt with promptly
 It is now settled law, that where in any civil proceedings, the competence of the court to deal with the matter is put in issue, the court shall immediately deal with the question of its jurisdiction or competence to adjudicate on the matter before its consideration of the matter first placed before it for determination. This is because if there is want of jurisdiction or competence, the proceedings of the court will be affected by a fundamental vice and the proceedings will be nullity however well conducted it might otherwise be. See for example the State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 33. But, there is a presumption that a superior court established under section 6 of the Constitution of 1979 has jurisdiction to entertain all matters brought before it unless where the jurisdiction is specifically lim-

ited. A statute ousting the jurisdiction of the court must be direct and unequivocal. In any event, the court or tribunal has the jurisdiction to determine whether it has the power or competence to adjudicate on the matter placed before it. See Okafor v. A.G., Anambra State (1991) 6 NWLR (Pt. 200) 659. (p. 365 F)

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2. Duty of counsel appearing in a matter of constitutional importance

We made an order accelerating the hearing of this appeal. At the hearing of this appeal the learned counsel for the respondent failed to appear or give any reason for his non appearance from court. We view this breach very seriously more so when this is a matter of constitutional importance not only dealing with the validity of a statute but also dealing with matters of high constitutional importance affecting the jurisdiction of a High Court and the liberty of an individual. To say the least the learned counsel for the respondent abdicated his duties without due cause contrary to the ethics of the profession and the rules of practice. This is highly deprecated. (p.371G)

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PATS-ACHOLONU JCA

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3. Head of State - Immunity against any civil or criminal action

When I look at this case, I observe that one of the respondents is the Head of State - General Sani Abacha himself - I wonder whether the appellant is unaware of the provisions of Section 267 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against any civil or criminal action or proceedings against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The constitution is the primary law of the land. I hold therefore that the name of the Head of State should not have been reflected in the suit in the first place. It offends the provision of the Constitution. (p.395B)

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4. Ouster clauses - Need to rigidly adhere to the condition

The statute stated in unmistakable terms that the order should be directed to the person being detained. This means that an order cannot be made retrospective but should follow the course intended by the statute, that is, the order should be made before the arrest and subsequent detention.

H

In his judgment, the lower court made this finding of fact which in context of the fact elicited or deposed by the appellant leaves a sour taste in the mouth. He said:

"I therefore hold that this Court has taken judicial notice of the detention order No. 004556 dated 3/2/96 as a subsidiary legislation."

B This finding of fact means that on the date of the arrest and detention made pursuant to provision of Section 10 of the State Security Detention of Persons Act, there was no order of detention in existence. From the affidavit of the appellant, there was equally no warrant of arrest. The question C uppermost then is under what law was he arrested on 30/1/96 since he did not appear to have committed any offence for which he ought to have been charged. Where there is an ouster clause, for the person in authority to seek to take shelter under it, it is important that he brings himself within D the protection affected by the ouster. Ouster clauses are in essence a method to perpetrate legal positivism. But then for ouster clauses to be relevant, the conditions laid down for it to be resorted must be adhered to rigidly... When a body given some powers to act in a certain way, (there being a E law that if it complies with the provision of the law, the court cannot enquire into its action) it shall be understood to mean that where it fails to abide by the strict provision of the law donating the powers, it cannot take resort or have recourse to an ouster clause protection, for then, it has acted ultra vires of the provisions of the law. The day of the arrest it F would seem, was not the date the order of detention was made. There was clear violation of the provision of the statute. It would have been otherwise had the order been served on the appellant exactly on the date of arrest. The order cannot be given a retrospective effect for that is not G the spirit or the intendment of the statute giving the powers. Therefore the resort to ouster clause is inapplicable if indeed the document was made four days afterwards. (p. 408 D)

H 5. *Extent of the power of the Judge to take Judicial notice*

In the present day context of information technology and internet as well as electronic broadcast, the court shall be forgiven if it takes judicial notice of a lot of things which ordinarily it would not have taken... Thus

the author of 12th Edition of Phipson on Evidence said at page 22. para 47:

"Generally, matters directed by statute to be judicially noticed or which have been so noticed by the well established practice or precedents of the courts must be recognized by the Judge, but beyond this they have a wide discretion and may notice much which they cannot be required to notice. The matters noticeable may include facts which are in issue or relevant to the issue as well as the contents of documents and their methods of proof" (p. 411 G)

6. Duty of the court to protect liberty of citizens

It must be stated that liberty in the context of modern times have now assumed a far broader conception than before and it increasingly demands protection. This Court shall take judicial notice of recent laws by way of Decree and statutory instruments and see to it that human rights of Nigeria citizens are well protected. This informed the establishment of Human rights Commission and the recent appointment of a Panel to review the cases of people detained under Decree No. 2 of 1984. As the Government itself is making a serious effort to attenuate the rigours of the Decree No. 2, a Decree not promulgated by the present regime, it is only fair that the court should in its construction duly compliment the effort of the Government to see that the fundamental rights of the citizen is not tampered with. In a democratic set up where the rule of law prevails as in our own, the enforcement of law finds its jurisdiction not only in the interest of authority (of the State) but also in the maintenance of law and order for the protection of the civilization of the people, for once liberty vanishes or cannot be protected, there may be violence, turbulence, disorder in place of the Rule of Law. We are true citizens of a great Republic with immense opportunity for orderly progress inspite of some human difference of views and opinions but we are guided by the tenets or precepts of yore which regulate the conduct of affairs among civilized people. These guarantee the protection and security under the authority of law and the nation becomes highly exalted by it... When one talks of Human Rights and freedom, one means life, liberty, and adequate protec-

tion under the law for one to be left alone to exercise his civil responsibility including rights of dissent within the law. These are the concepts that were uppermost in the mind of our great men who fashioned the Nigerian Constitution over the years. We must therefore guard zealously and B zealously this great heritage and bequeath same to the generation to come... In this regard, I cannot help but restate here the immortal words of Sir Winston Churchill when he said,

C *"We must never cease to proclaim in fearless tones the great principles of freedom and the rights of man, which are the joint inheritance of the English speaking world and, which through Magna Carta, the Bill of rights the habeas corpus trials by jury and the English Common Law which find their most famous expression in the Declaration of Independence"*

D let us by the same token say too that these find their way in the eloquent expression in our primary law so that we live in a society ruled by law and not by men. (p. 412 E)

E *7. Need to consider repeal of Decree No. 2*

I will make bold to suggest that with the modernistic orientation that is now manifest in the characters and persuasion of the present government the time has come to take a hard look at Decree No. 2 with a view F to considering its total repeal or down the rigours and potency of its awesome and loathesome content. Since the Regime that gave birth to it is long gone, this country can do without it. (p. 414 E)

REPRESENTATION

G Rotimi Jacobs, Esq. with Nnaemeka Amaechina Esq., Ebun-Olu Adegboruwa Esq and Uzo Onwukwe Esq. for the Appellant
Respondents absent and not represented

H CASES REFERRED TO

Akhiwu v. The Principal Lotteries Officer Mid-Western State (1972) 1 ALL NLR (Pt. 1) 229
State v. Onagoruwa (1992) 2 NWLR (pt. 221) 33

Okafor v. A-G. Anambra State (1991) 6 NWLR (Pt. 200) 659

Ekekeugbo v. Fiberesima (1994) 3 NWLR (pt. 335) 707

Utih v. Onoyivwe (1991) 1 NWLR (Pt. 166) 166

Uzoukwu v. Ezeonu (1991) 6 NWLR (Pt. 200) 708

Labiya v. Anretiola (1992) 8 NWLR (pt. 258) 139

B

Equal Opportunity Commission v. Sec. for State for Empl. (1994) 1 ALL ER 910

Westminster Corporation v. L.& N.W. Railway (1905) AC 426

Ridge v. Baldwin (1964) A.C. 40

C

Lekwot v. Judicial Tribunal (1993) 2 NWLR (Pt. 276) 410 at 447

Onamen v. Onamen (1989) FHCLR 214

STATUTES & RULES REFERRED TO

Constitution of Nigeria 1979 ss. 1, 12, 31, 32, 38 and 42 (1)

D

Fundamental Rights (Enforcement Procedure) Rules, 1979 0.1. r.2(1), (3) and (6), 0.4 and 0.6

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 Articles 5, 6 and 12

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State Security (Detention) of Persons) Decree No. 2 1984 ss 1, and 4

The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 s 1 (2) (b) (c) and (

F

The Constitution (Suspension and Modification) Decree No. 107 of 1993. Decree No. 11 of 1994

Decree No. 2 1990

Federal High Court (Civil Procedure) Rules, 1976 0. 27 Evidence Act ss. 74 (1) and 75 (1)

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Decree No. 22 of 1986

Decree No. 52 of 1992

Defence (Control of Textiles) Regulations 1945, s. 42

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LEAD JUDGMENT BY MUSDAPHER JCA

Pursuant to the provisions of Section 42(1) of the 1979 Constitution, Order 1 Rule 2(1), (3) and (6) and Orders 4 and 6 of the Funda-

mental Rights (Enforcement Procedure) Rules, 1979, the appellant applied successfully by a motion Ex parte for leave of the lower court for the following reliefs:-

"1. A declaration that the arrest of the applicant, Chief Gani
B Fawehinmi at his residence at 9A Ademola Close, GRA, Ikeja, Lagos on
Tuesday, January 30th, by the State Securities Services (S.S.S.) or Offic-
ers, servant, agents, privies of the respondents and/or of the Federal
C Military Government constitutes a violation of the applicant's funda-
mental rights guaranteed under sections 31, 32 and 38 of the 1979 Con-
stitution and Articles 4,5,6 and 12 of the African Charter on Human and
Peoples' right (Ratification and Enforcement) Act Cap. 10 Laws of the
D Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

2. A declaration that the detention and the continued detention
D of the applicant without charge since Tuesday, January 30, 1996 when
the applicant was arrested by the officers, servants, agent, privies of the
respondents at his residence 9A Ademola Close, GRA, Ikeja, Lagos con-
stitutes a gross violation of the applicant's fundamental rights guaran-
E teed under section 31, 32 and 38 of the 1979 Constitution and Articles
5,6 and 12 of the African Charter on Human and Peoples' Rights (Rati-
fication and Enforcement) Act. Cap. 10 Laws of the Federation of Nige-
ria 1990 and is therefore illegal and unconstitutional.

3. A mandatory order compelling the respondents whether by
F themselves or by their officers, agents, servants, privies or otherwise
howsoever to forthwith release the applicant.

4. An injunction restraining the respondents whether by the them-
selves or by their officers, servants, agents, privies or otherwise whoso-
G ever from further arresting, detaining or in any other manner infringing
on the fundamental rights of the applicant.

5. N10,000,000.00 (Ten million Naira) damages for the unlaw-
ful and unconstitutional arrest and/or detention of the applicant Chief
H Gani Fawehinmi."

The motion on Notice was filed. It was of course accompanied with all the documents statutorily required under the provisions of the Fundamental Rights (Enforcement Procedure) Rules, 1979.

Before the motion of the applicant could be heard and while dealing with other interlocutory matters, the respondents caused to be filed a notice of preliminary objection. The Notice of Preliminary Objection to the hearing of the applicant's motion is in these terms:-

"That the applicant/respondent cannot maintain this action against the respondents/applicants on the ground that this Honourable Court lacks the competence to entertain this action.

Grounds for the Objection.

(i) By a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by State Security (Detention of Persons) Decree No. 2 1984 (as amended) and further by section 4 of the aforementioned Decree. No. 2 of 1984 (as amended) the respondents/applicants are immuned to any legal liabilities in respect of any action done pursuant to the Decree.

(ii) The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993 oust the jurisdiction of this Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree.

(iii) This Honourable Court lacks the constitutional jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1990."

Thus the jurisdiction of the court to entertain the application of the applicant to enforce his fundamental rights was questioned. It is now settled law, that where in any civil proceedings, the competence of the court to deal with the matter is put in issue, the court shall immediately deal with the question of its jurisdiction or competence to adjudicate on the matter before its consideration of the matter first placed before it for determination. This is because if there is want of jurisdiction or competence, the proceedings of the court will be affected by a fundamental vice and the proceedings will be nullity however well conducted it might otherwise be. See for example the State v. Onagoruwa (1992) 2 NWLR

(Pt. 221) 33. But, there is a presumption that a superior court established under section 6 of the Constitution of 1979 has jurisdiction to entertain all matters brought before it unless where the jurisdiction is specifically limited. A statute ousting the jurisdiction of the court must be direct and unequivocal. In any event, the court or tribunal has the jurisdiction to determine whether it has the power or competence to adjudicate on the matter placed before it. See Okafor v. A.G., Anambra State (1991) 6 NWLR (Pt. 200) 659.

Accordingly, the learned Judge permitted counsel to address him on the preliminary objection. It is the ruling of the learned trial Judge on the preliminary objection that is the subject of this appeal. The learned trial Judge upheld that preliminary objection and ruled that his jurisdiction to hear the applicant has been ousted and struck out the application.

The applicant, Chief Gani Fawehinmi, felt aggrieved with the decision and has now appealed to this court. The Notice of Appeal was with the leave of this court amended and the amended Notice of Appeal contains 10 grounds of Appeal which read:-

GROUND OFS OF APPEAL:

1. The learned trial Judge erred in law when he held that he was satisfied that the provision of Decree No.2 of 1984, as amended, conferred power on the Inspector-General of Police to issue detention order under the Decree.

PARTICULARS OF ERROR

(a) The Decree No.11 of 1984 sought to insert the words the 'Inspector-General of Police' into section 1 of Decree No. 2 of 1984 as amended.

(b) Going by the previous amendment of Decree No. 2 of 1984, particularly that effected by Decree No. 24 of 1990, the Decree No. 11 of 1994 failed to confer any power on the Inspector-General of Police as regards issuance of the detention order.

(c) The Inspector-General of Police has no power to issue detention order under Decree No. 2 of 1984 as amended.

(d) The provision of section 1 of Decree No 11 of 1994 is

ambiguous, absurd, oppressive and in conflict with reason.

(e) The provision of section 1 of Decree No. 11 of 1994 which has the effect of depriving a citizen of his vested right of access to court must be construed *fortissime contra preferentes*.

2. The learned trial Judge erred in law in that his construction of the provisions of Decree No. 2 of 1984 as amended runs contrary to established principles of interpretation relating to expropriatory statutes.

PARTICULARS OF ERROR

(a) Decree No. 2 of 1984 as amended is a law that purports to take away citizens right of access to court.

(b) Such Decrees are construed narrowly against anyone claiming its benefits (i.e. *fortissime contra preferentes*).

(c) The construction placed by the learned trial Judge on the Decree favours denial of right of access notwithstanding the obvious ambiguity or lacuna in the statute.

3. The learned trial Judge erred in law when he took judicial notice of a detention order not tendered in evidence or in any manner placed before the court.

PARTICULARS OF ERROR

(a) The learned counsel to the respondents merely brandished the detention order before the court and read out its number.

(b) The detention order was not tendered in evidence nor was it in any other manner made part of the record of proceedings.

(c) The respondents did not place any material before the court (i.e. detention order) to prove that they have complied strictly with the enabling enactment.

(d) The detention order is not capable of being taken judicial notice of without same being produced before and scrutinized by the court *moreso* as same is not gazetted.

(e) The detention order being the basis of the respondents objection and an order directed to the prison authority must necessarily form part of the record of proceedings of court.

(f) Failure to put the detention order in evidence vitiated the respondents objection.

4. The learned trial Judge erred in law when he held that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is a municipal law which is inferior to a Decree of the Federal Military Government.

B PARTICULARS OF ERROR

(a) The learned trial Judge having found that the African Charter on human and Peoples' Rights (Ratification and Enforcement) Act is an international treaty ought not treat the same law as a domestic law.

C (b) Nigeria having ratified the Charter which is an International Treaty its provisions are binding on it and it cannot derogate therefrom through the instrumentality of a Decree which is a domestic legislation.

(c) Ratification of the Charter by Nigeria does not convert the Charter into a domestic legislation.

D (d) Nigeria has an obligation to make its municipal law conform with its undertaking under the charter which is an international treaty.

(e) The decision of the learned trial Judge was contrary to the decision of the Court of Appeal in Oshevire v. British Caledonian Airways Ltd (1990) 7 NWLR (Pt. 163) 507 and the Registered Trustees of C.R.P. v. Gen. Babangida.

F 5. The learned trial Judge erred in law when it held that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is inconsistent with Decree No. 107 of 1993 is void to the extent of the inconsistency.

PARTICULARS OF ERROR

G (a) The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is an international treaty duly ratified by and binding on the Federal Military Government.

(b) The Federal Military Government cannot in any way by legislation derogate from such treaty.

H (c) The provisions of the African Charter were ratified in consonance with a constitutional procedure recognized under the 1979 Constitution and Decree No. 107 of 1993.

(d) The provision of Section 1 of the 1979 Constitution relied upon by the learned trial Judge had been suspended by Decree No. 107

of 1993.

(e) No fact of inconsistency between Decree No. 107 of 1993 and the African Charter had been established before the court to necessitate such decision.

6. The learned trial Judge erred in law in holding that the provisions of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act are not enforceable in Nigerian courts and in particular under the rules made pursuant to Chapter 4 of the 1979 Constitution.

PARTICULARS OF ERROR

(a) The reliefs sought by the appellant are based under Chapter 4 of the 1979 Constitution and Articles 4,5,6 and 12 of the African Charter.

(b) The decision of the learned trial Judge was contrary to the decisions of the Supreme Court and the Court of Appeal in decided cases.

(c) The provisions of African Charter are enforceable in our courts like other laws of the land.

7. The learned trial Judge erred in law by failing to consider material submissions of the appellant's counsel particularly as to 4 days on which the appellant was detained which were not covered by the detention order purportedly issued.

PARTICULARS OF ERROR

(a) The detention order No.00456 brandished by the respondents' counsel was made on 3rd February, 1996.

(b) The appellant was arrested and detained on the 30th January. 1996.

(c) The detention order purportedly issued did not cover the period between January 30, 1996 and February 3, 1996.

(d) The appellants counsel's address to the court on the issue was not reviewed or considered at all by the trial Judge.

(e) There is nothing preventing the court from determining the legality of the appellant's arrest and detention between the period in question.

(f) Detention for however, short a period amounts to a violation of fundamental rights.

(g) By not considering the period between 30/1/96 and 3/2/96 the learned trial Judge gave the detention order a retrospective effect.

8. The learned trial Judge erred in law when he refused to uphold the contention of the appellant that the detention order purportedly issued by the Inspector-General of Police is a Legislative judgment which ought to be declared void by the trial court.

PARTICULARS OF ERROR

(a) The appellant raised the issue that the detention order brandished to court by the respondents' counsel was a legislative judgment which ought to be declared void.

(b) The learned trial court merely heard argument on the issue but refused to decide on it.

(c) The appellant was not given fair hearing in that the issue competently raised was not determined by the trial court.

(d) The detention order brandished to court is to the effect that the appellant has committed an offence and that he has been convicted by the Inspector-General of Police.

(e) The said detention order is a legislative judgment which the court has the power to declare void.

9. The learned trial Judge erred in law when he refused to inquire into the circumstances that informed the satisfaction of the Inspector-General of Police that the appellant has recently been concerned in acts prejudicial to the State Security.

PARTICULARS OF ERROR

(a) The issue was raised before the lower court but it however failed to make any decision thereon one way or the other.

(b) The enabling Decree conferred discretionary power on the donee of the power to issue detention order in certain specified circumstances.

(c) The exercise of the discretionary power is subject to judicial view.

(d) The court has the power to inquire into the circumstances that informed the satisfaction of the Inspector-General of Police to issue detention order in this case.

(e) The present trend is that the courts review the exercise of discretionary powers by the executive so as to avoid the abuse of the powers.

(f) The court readily interfere with wrongful exercise of discretion affecting citizens liberty.

10. The learned trial Judge erred in law when he relied on Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 to hold that the process filed by the respondent without exhibiting detention order was proper.

PARTICULARS OF ERROR

(a) The appellant's suit was brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979.

(b) Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 is not applicable in the circumstances.

(c) Under the Fundamental Rights (Enforcement Procedure) Rules the respondents can only file returns in justification of the appellant's detention.

(d) The returns filed by the respondents in this case did not satisfy the requirement of the special Rules for the enforcement of Fundamental Rights.

(e) Failure to exhibit detention order vitiates the respondents' objection.

In compliance with the rules of this court, learned counsel filed and exchanged briefs of argument. It may also be mentioned that this appeal was allowed to be heard out of turn because it involves matters of extreme public interest dealing with the enforcement of the Fundamental rights of a citizen. We made an order accelerating the hearing of this appeal. At the hearing of this appeal the learned counsel for the respondent failed to appear or give any reason for his non appearance from court. We view this breach very seriously more so when this is a matter of constitutional importance not only dealing with the validity of a statute but also dealing with matters of high constitutional importance affecting the jurisdiction of a High Court and the liberty of an individual. To say the least the learned counsel for the respondent abdicated his duties with-

out due cause contrary to the ethics of the profession and the rules of practice. This is highly deprecated.

Be that it may, the learned counsel for the appellant Mr. Rotimi Jacobs, appeared and brilliantly argued in extenso the issues raised in his brief. I thank him immensely for his assistance to the court to arrive at a decision on this appeal.

The facts may be briefly put. They are hardly disputed. The appellant amongst other things is a famous legal practitioner of many years standing. On Tuesday, January 30th at about 6.00 a.m., security officers acting on behalf of the respondents arrested him and took him to a detention centre where he remained incommunicado for about one week. He was thereafter transferred to Bauchi Prison. He protested the invasion of his rights by resorting to the courts which ultimately resulted in this appeal.

Distilled from the 10 grounds of appeal reproduced above, the learned counsel for the appellant has identified and formulated seven issues for the determination of the appeal. The issues read:-

1. Whether the learned trial Judge was right when he held that the Inspector General of Police is conferred with the powers to issue out a detention order under Decree No. 2 of 1984.

2. Whether the trial court was right when it held that the detention order though not exhibited or tendered was covered under Order 27 of the Federal High Court (Civil Procedure) Rules and Sections 74(1) and 75(1) of the Evidence Act and that therefore, the court can take judicial notice of the said detention order.

3. Whether the Articles of the African Charter on Human and Peoples Rights are inferior or subject to municipal laws particularly Decrees made by the Federal Military Government.

4. Whether the Articles of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 are not enforceable in Nigerian courts and in particular under the Rules made pursuant to Chapter 1V of the Constitution of the Federal Republic of Nigeria 1979.

5. Whether the detention order is not a legislative judgement

which can be declared void by the court.

6. Whether the court cannot inquire into the circumstances that informed the satisfaction of the Inspector-General of Police that the appellant was a security risk.

7. Whether the learned trial Judge was right in failing to consider the submission of the appellant's counsel as to the four days in which the appellant was detained which were not covered by the detention order and if the answer is in the negative, whether the jurisdiction of the Federal High Court is ousted in respect of the four days not explained by the Detention order.

In his brief for the respondents' the learned counsel formulated and identified three issues for the determination of the appeal. They read:-

"1. Whether the Federal High Court was right in holding that the Inspector General of Police can properly sign in law a detention Order pursuant to the powers conferred on him by the State Security (Detention of persons) Decree No. 2 of 1984 as amended.

2. Whether the Federal High Court was right in refusing to hold that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is superior to Decrees of Federal Military Government and Enforceable in the same manner as those of Chapter IV of the 1979 Constitution.

3. Whether the Federal High Court was right in holding that it lacks jurisdiction to entertain the appellant's case by virtue of the ouster clause provisions in Section 4 of the State Security (Detention of Persons) Decree No. 2 of 1984 as amended.

Now, I shall deal with this appeal on the basis of the issues raised by the appellant as they sufficiently encapsulate the grounds of appeal.

Issues No. 1:

Whether the Inspector General of Police is clothed with the power to issue a detention order under Decree No.2. of 1984 as amended.

It is submitted that Courts do guard their jurisdiction jealously and zealously and that any enactment which takes away a citizen's right of access to Court ought to be construed very narrowly against any one claiming its benefit, that is "fortissime contra proferentes". See Peenok

Investments Ltd v. Hotel Presidential (1983) 4 NCLR 122. It is equally the attitude of the courts that ouster clauses are interpreted more liberally on the side of retaining and preserving the Court's jurisdiction vide Barclays Bank of Nigeria v. Central Bank of Nigeria (1976) 1 All NLR (Pt. 1) 409.

B Thus in spite of the ouster clauses in Decree No.2 of 1984 and No.12 of 1984, the Court must consider:

- "(1) *Whether indeed its jurisdiction is effectively ousted, and*
- (2) *Whether there was strict compliance with the provisions of the Decree in question.*

C The following cases were cited.

- 1. Ekekeugbo v. Fibresima (1994) 3 NWLR (Pt. 335) 707;
- 2. Utih v. Onoyivwe (1991) 1 NWLR (Pt. 166) 166;
- 3. Onuzulike v. C.D. Anambra State (1992)3 NWLR (Pt. 163)

D 791

- 4. David-Osuagwu v. A.G. Anambra State (1993) 4 NWLR (Pt. 285) 13;
- 5. Lekwot v. Judicial Tribunal (1993) 2 NWLR (Pt. 276) 410.

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Learned counsel also referred to Madike v. Inspector General of Police (1992) 3 NWLR (Pt. 227) 70 and the case of Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688, which spelt out the attitude of the courts on the construction to be placed on enactments ousting the jurisdiction of the court. If an act, matter or thing is purportedly done under a Decree, the Court has to closely examine and see whether the terms of the Decree are strictly complied with.

F If the perpetrator of the act, matter or thing is to enjoy the immunity against court proceedings, it must be shown that the party seeking the immunity has complied with the provisions of the enactment. See also Okoroafor v. The Miscellaneous Offences Tribunal (1995) 4 NWLR (Pt.387) 59 at 78. Learned counsel also referred to Maxwell on Interpretation of Statutes, 12th Edition, Page 153.

H It is because of the above propositions, that the learned counsel for the appellants submitted that we should accept strict interpretation of the enactments and hold that the trial court has jurisdiction to adjudicate

on the matter. The last amendment to the State Security (Detention of persons) Decree No.2 of 1984 by No. 11 of 1984, it was submitted, was otiose or futile in that it was done on a wrong premise to wit: that it made the existence of the office of the "Chief of General Staff" a condition precedent to the insertion of the office of the "Inspector General of Police". Thus it means that Decree No. 11 of 1994 sought to amend Decree No. 24 of 1990 which recognized only "the Vice President" and not "the Chief of General Staff". It was the contention that there is no place in the Decree to insert "or the Inspector General of Police". Learned Counsel buttressed this propositions by relying on "Legislative Drafting" by G.C. Thorton page 303, Section 4 of the Interpretation Act, Vickers, Sons and Maxim Ltd v. Evans (1910) A.C. 444 at 445, and Thompson v. Goold and Co. (1910) A.C. 409 at 420.

It was further submitted that the court cannot assume the role of remedying this situation since it would amount to a beneficial construction in favour of the respondents who are encroaching on the liberty of the appellant unjustifiably. Learned counsel referred to the Nwosu case (supra) and Madike v. Inspector General of Police (supra). It has been argued that since the Inspector General of Police is not clothed with the legal authority to issue Detention Order, there is no protection or immunity on the arrest and detention of the appellant, citing A.G. of the Federation v. Agwuna (1995) 4 NWLR (Pt.388) 234.

For the respondent, it was submitted that the learned trial Judge correctly interpreted the enactment and rightly found that his jurisdiction has been ousted. It was submitted further that as the provisions in the Decree under reference are plain, unequivocal and unambiguous, the Court has no room to manoeuvre other than to apply them. The powers given to the Inspector General of Police in the amendment does not hinge on the powers of the "Chief of General Staff" and the use of the word "or" is disjunctive. Learned counsel referred to the Nwosu case and Agwuna case both (supra). The Inspector General of Police can sign the detention order whether or not the "Chief of General Staff" has the power or not. Learned counsel also referred to Section 1(2) (b) (i) and (ii) of the Federal Military Government (Supremacy and Enforcement of Powers)

Decree No. 12 of 1994. The jurisdiction of the Court is accordingly ousted he said, citing Osadebay v. A.G. of Bendel State (1991) 1 NWLR (Pt.169) 525 at 571, where it was said that the court is precluded from inquiring into anything "Purported" to have been done under a Decree.

B Now, as shown above, the learned trial Judge held that the Inspector General of Police was empowered to issue Detention Order under the amended Decrees. I have carefully examined all the authorities cited and in summary, the authorities lean towards a liberal interpretation of such enactments that tends to encroach on the liberty of an individual so
C as to guard his liberty. Where the freedom of an individual is curtailed or abridged, it must be shown that such act is brought within the confines of the law.. Detention of Persons Decree has been with us since the inception of the Military rule in Nigeria. Our Law reports are replete with cases on
D this topic. The Decrees have been judicially examined and pronounced. For example in the Nwosu case (supra), Nnaemeka-Agu, J.S.C. said at page 724 -

"I believe that an indubitable offshoot of the principle of construction that the courts must seek out the legislative intention and give effect to it is that every statute must be construed according to its tenor."
E

The intention of the Federal Military Government in the promulgation of the amendment is clear, precise and unambiguous. It was to empower the Inspector General of Police to sign a detention Order along
F with another person. The intention is clearly to give the Inspector General of Police the authority to sign the detention order. I agree with the learned counsel for the respondent that the word "or" used in the amendment is disjunctive. In the Nwosu case (supra), again Nnaemeka-Agu,
G J.S.C. said at page 724:

*"It appears to me that the clear intention of the words 'or purported to have been done' is that even where the Governor's action under the Decree does not fall squarely within any of the paragraphs (a)
H - (d) of sub-section 1, if there is satisfactory evidence.... that he believed and intended that he was acting under the Decree, the ouster provision will apply."*

I agree that the amendment made by virtue of Decree No.

11 of 1994 looks inelegant, but the intention of the legislature cannot be mistaken by a mere technical printing oversight or clerical error which, as already said, is to empower the Inspector-General of Police to issue Detention Orders. This is made more clearly by the amendment made in Section (b) of Decree No.11 of 1994. It provides:-

"(b) By replacing Section 2 thereof with the following:

The Chief of General Staff or the Inspector General of Police

as the case may be after the order made him.....

By applying the doctrine of harmonious interpretation, that is by looking at the statute as a whole, the intention is clear, manifest and unmistakable. To interpret the statute otherwise will not only make a mockery of common sense but will amount to drawing comfort from a mere technicality to defeat the intention of the legislature. I have been mindful of all the safeguards the courts adopt as expounded by the numerous cases cited above, but, in my view, the rational interpretation and construction to give to the amendment in Decree No.11 of 1994 is to hold that the Inspector General of Police is empowered to issue a detention Order in the terms of Decree No.2 of the 1984 as amended. I accordingly answer the first issue in the affirmative. I hold that the learned trial Judge was right in coming to the conclusion that the Inspector General of Police is empowered to issue a detention Order under the provisions of Decree No.2 of 1984 as amended and that he had no jurisdiction to entertain the matter in that by virtue of the provisions of Section 4 of Decree No. 2 of 1994, the jurisdiction of the court is ousted to entertain the appellant's case.

2nd Issue:

Whether the trial court was right when it held that it will take judicial notice of Detention Order was not exhibited or tendered.

The grouse of the appellant is concerned with the holding of the trial Judge on the issue of the detention order as follows:-

"On the second leg of counsel's argument on failure of the

respondent's counsel to tender the detention Order as exhibit after showing it to the court in course of proceedings..... I disagree with this argument, my reason being that the objection of the respondent is based purely on law. Where law is in issue in an objection on point of law, no facts need to be proved. Affidavit and Exhibits in law relate to fact and not law-See Order 27, rules 1 and 2 of the Federal High Court (Civil Procedure) Rules 1976. See also Onamen v. Onamen (1989) FHCLR 214- 216. That notwithstanding, I observed in course of this proceedings the said detention Order No. 004556 was produced in open court and shown to the court. I perused it and was satisfied that it was issued by the Inspector General of Police..... Furthermore, by virtue of Section 74 (1) of the Evidence Act, the court is enjoined to take judicial notice of any legislation, I therefore, hold that this court has taken judicial notice of the Detention Order No. 004556 dated, 3/2/1996 as a subsidiary legislation....."

It has been submitted that the learned trial Judge was wrong in taking judicial notice of the Detention Order under the circumstances it was shown to the court:

(a) Since Decree No. 2 of 1984 as amended contained an ouster clause, it must be shown that the terms of the Decree are complied with strictly and scrupulously, See *Madike v. Inspector General of Police* (supra).

(b) The court must be satisfied that the Order was authentic and was signed by the persons having the power to issue it.

(c) It is imperative for the party relying on detention Order to exhibit or tender it.

(d) Order 27 rules 1 and 2 are not applicable since the facts are not shown to be admitted by the appellant.

(e) Even if the Detention Order was properly received, there is a period of 4 days in detention of the appellant which was not covered by the detention order which the learned trial Judge ought to have considered and adjudicated upon.

It was further submitted that the court will not take judicial notice of a detention order. See *Osafire v. Odi* (No.1) (1990) 3 NWLR 130;

Commonwealth Shipping Representative v. P. and O Branch Services (1923) AC 191. It then submitted that no proper return was made as provided by Order 4 rules (5) and (6) of the Fundamental Rights (Enforcement Procedure) Rules 1979. See also Orubu v. N.E.C. (1988) 5 NWLR (Pt.94) 323 and Abia State University v. Anyaibe (1996) 3 NWLR B (Pt.439) 646.

For the respondents, it was submitted that the detention order is a legislative judgment and also a subsidiary legislation which the courts would take judicial notice of. See Wang Chingyao and Others v. Chief of Staffs Supreme Hq., unreported decision delivered on 1/4/1985 in CA/L/25/85, where it was held that detention order is a subsidiary legislation or instrument of which the courts should take judicial notice. It was further argued that the detention order was in fact produced before the court and was examined by the court and the learned counsel for the appellant. The issue before the court was whether the court had the capacity to deal with the matter and not whether the respondents were liable or not, vide Egbe v. Adefarasin (1985) 1 NWLR (Pt.3) 549. Thus, the issue before court at that stage was whether a detention order was in existence and not whether it was a defence to the respondents' action. D E

There is no dispute that the detention order in the instant case was produced in court and was examined by the learned trial Judge and the appellant's counsel. The issue of admissibility of the detention order was not raised at the trial. It is a new issue first raised on appeal without leave. Throughout his lengthy submissions in the court below, the learned counsel for the appellant did not protest the manner the detention order was introduced in the proceedings. He not only referred to it in his submissions but used it to show that the appellant was arrested and detained days before the detention order was signed. **A party to any civil proceedings who knowing of an irregularity , allows the irregular procedure to be adopted and indeed used document irregularly produced in the proceedings cannot complain on appeal on the procedure adopted: See Akhiwu v. The Principal Lotteries Officer, Mid-Western State (1972) 1 A11 NLR (Pt. 1) 229** The detention order should have been exhibited or somehow tendered. It was not tendered. The learned coun- F G H

sel for the respondents produced it. It was accepted by the learned counsel for the appellant who not only read it but also relied upon it to show the illegality of the arrest or detention of the appellant for a few days. I am of the view, that under these circumstances the
B appellant cannot now at the appeal stage impugn the admissibility of the detention order. In any event, the substantive action has not commenced. What is in contest is whether the court has jurisdiction to entertain the suit. It was on that preliminary issue the detention order was
 C examined by all concerned, the appellant's counsel relying on it to argue that the Inspector General of Police could not in law issue it. I do not think it is of any moment to now argue that the detention order was not formally admitted in evidence. Though the detention order should have
 D been exhibited to the notice of preliminary objection, the way and the manner it was introduced in the court below did not occasion any miscarriage of justice. I find no merit in the complaint under this issue.

Issue Nos 3 and 4:

These deal with the Articles of the African Charter on Human
 E and Peoples' Rights.

It was firstly submitted, that the relevant articles contained in the African Charter are not inferior to the Fundamental Rights provisions in the Constitution. And that the ouster clauses in Decrees made by the Federal Military Government cannot operate to defeat a claim or rights under
 F the African Charter. Perhaps to fully grasp the arguments of counsel which I shall anon consider in detail, it is desirable to set out the summary of the trial Judge's finding on the application of the African Charter.

G The learned trial Judge found:

1. The African Charter on Human an Peoples' Rights is an International Treaty.
2. Nigeria has ratified the Treaty and therefore it is binding on
 Nigeria .
- H 3. by virtue of Cap. 10 Laws of the Federation of Nigeria 1990 the African Charter is adopted and incorporated into Nigerian Law and it forms part of the domestic law of Nigeria.
4. That the African Charter must operate within the context as a

municipal law.

5. The Fundamental Rights Provisions of Chapter 1V of the 1979 constitution are a replica of Provisions of Articles 4,5,6,7 and 12 of the African Charter.

6. That the Charter is guiding rule setting out minimum standards B of human rights for all member nations and that Nigeria by adopting that standard in Cap. 10 Nigerian has discharged its treaty obligations under the African Charter.

7. That any provisions of the African Charter that is inconsistent C with Decree No. 107 of 1993 is void to the extent of the inconsistency.

The learned counsel for the appellant postulates:-

1. A violation of the provisions of the Charter on the rights and freedoms of an individual, the ouster clauses in Decree No. 2 of 1984 as D amended and No 12 of 1994 cannot avail the respondents.

2. Any purported suspension of the provisions of the Charter amounts to a breach of international obligations.

3. No State or Party to a treaty under international law can legislate out of its international obligations. See *Oshevire v. British Caledonian E Airways Ltd. (1990) 7 NWLR (Pt.163) 507.*

4. When Decree No. 2 of 1984 was promulgated, though it suspended the provisions of Chapter 1V of the Constitution, it did not abrogate the provisions of the Charter in Cap.10 Laws of the Federation of F Nigeria, vide *Attorney General v. Unity Dow (unreported judgment) No. 4/91 Court of Appeal Botswana* and the unreported judgment of Onalaja J. (as he then was) in *Constitutional Rights Project v. President of the Republic of Nigeria* 5th May, 1993 reported in the *Journal of Human Rights G Law and Practice 1994 Vol. 4 Nos. 1,2 & 3.*

5. The trend in the Commonwealth countries is to give precedence and superiority to international obligations of a state as against the local provisions in the domestic law. See *Labiya v. Anretiola (1992) 8 H NWLR (Pt 258) 139.*

6. The that the African Charter is incorporated into the Nigerian Domestic laws does not make it subject to any local legislation such as Decree No. 12 of 1994. See *Ogugu v. State (1994)9 NWLR (Pt.366) 1.*

7. The Articles as contained in African Charter and Cap. 10 Laws of the Federation of Nigeria 1990 are enforceable and binding and can be enforced under the Rules made pursuant to Section 42 of the Constitution of 1979.

B On the fourth issue, the learned counsel argued as follows:

"1. *The Articles of the African Charter as enshrined in Cap. 10 of the Laws of the Federation of Nigeria are enforceable in Nigerian courts and that they can be enforced under the Rules made pursuant to section 42 of the Constitution.*

C 2. *The learned trial Judge was in error to have raised the issue of the applicability of the fundamental rights enforcement procedure rules on Articles of the African Charter - suo motu and without affording the appellant to address him on the point, resolved the question and held*
D *that the breach of the Articles of the African Charter could not be secured through the rules made under Section 42 of the constitution. Learned counsel cited the cases of Agbakoba v. Director S.S.S. (1994) 6 NWLR (Pt. 351) 475; Ladejobi v. The Attorney General (1982) 3 NCLR Vol. 3*
E *563; The Ogugu case (supra).*

On these issues, the learned counsel for the respondents argued:-

1. The learned trial Judge was right in holding that by virtue of Cap. 10 Laws of the Federation of Nigeria, the application of the African
F Charter is subject to the provisions of the Nigerian constitution and all other applicable laws. That is to say, the application of the African Charter is subject to other Nigerian Laws.

2. As a Statute Law, the Charter is subject to the Military Decrees vide Anretiola case (supra); see also Attorney General of Anambra
G State v. Attorney General of the Federation (1993) 6 NWLR (Pt. 302) 692, A. G. of Federation v. Sode (1990) 1 NWLR (Pt. 128) 500.

3 The African Charter as enshrined under Cap 10. is inferior to the Decrees of the Federal Military Government.

H On the 4th issue, it was submitted that "No right outside the provisions of Chapter 1V" can found an action under jurisdiction of the court provided by section 42" per Nasir P. in Uzoukwu v. Ezeonu (1991) 6 NWLR (Pt.200) 708. See also David Osuagwu case (supra).

Broadly two points appear for discussion:-

(1) The status of the African Charter on the peoples and Human Rights vis-a-vis the Federal Military Government, that is to say Decree No. 107 of 1993 and Decree No. 12 of 1994 and

(2) How to enforce the provisions of the Charter.

B

Now Article 1 of the charter provides:-

"The member of states of the Organization of African Unity parties to the present charter shall recognize the rights, duties and freedoms enshrined in this chapter and shall undertake to accept legislative or other measures to give effect to them."

C

The member countries - parties to the protocol - recognized that the fundamental human rights stem from the attributes of human beings which justify their international protection and accordingly, by the promulgation of Cap.10 the Nigerian State attempted to fulfil its international obligation. It is an international obligation to which the nation voluntarily entered and agreed to be bound. The arrest and detention of the appellant on the facts adduced clearly breached the provisions of the Charter and can be enforced under the provisions of the Charter. The contracting States are bound to establish some machinery for the effective protection of the terms of the Charter and when the local procedure is exhausted or when delay will be occasioned, the matter will be taken to the International Commission. All these indicate that the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in Labiyi v. Anretiola (1992) 8 NWLR (Pt.258) 139. See Equal Opportunity Commission and Anor. v. Sec. for State for Empl. (1994) 1 All ER 910. See also Ogugu and Oshevire cases (supra). It seems to me that the learned trial Judge acted erroneously when he held that the African Charter contained in Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government. It is commonplace, that no Government will be allowed to contract out by local legislation, its international obligations. It is my view, that notwithstanding the fact that Cap. 10 was

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promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot effect its operation in Nigeria. I agree with the submissions of the learned counsel for the B appellant.

In England, where there is no written Constitution and the parliament is supreme, it could legislate on any issue. But the sovereignty is now somewhat limited through the impact of European Community Act of 1972. Although the British Parliament passed the E.C. Law, and can in C theory, repeal it, but there are constraints and limitations and thus the Parliament in Britain is no longer supreme. The Parliamentary supremacy has been surrendered, by implication, by the signing of the union Laws. Is for the above that I hold that the provisions of Cap.10 of the Laws of the D Federation 1990 are provisions in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the E African Charter. They are protected by the International law and the Federal Military Government is not legally permitted to legislate out of its obligations.

Now it is convenient to deal with the second point. How are the F Articles of African Charter to be enforced? I have alluded to the Article 1 above which enjoins all member states to put up a suitable procedure for the enforcement of the Articles. It is common ground that no procedure has been established for the enforcement of the Charter

The learned trial Judge held that it is inappropriate to seek G redress for the infringements of the charter under section 42 of the Constitution and the enforcement procedure rules made thereunder. The learned trial Judge took the issue suo motu and resolved it against the appellant and held that the Charter cannot be enforced under H the Fundamental Rights (Enforcement Procedure) Rules 1979. It is a matter of law, which the learned trial Judge can legitimately raise. The issue of the applicability of the Rules to other forms of claims has been judicially pronounced upon See Uzoukwu v.

Ezeonu and David Osuagwu (supra). The learned trial Judge was bound to follow the decisions in those cases. There is (*sic no*) merit in the complaint of the appellant. I have carefully read the Ogugu's case (supra). The case is no authority for the proposition that the Fundamental Rights (Enforcement procedure) Rules 1979 can be employed in a claim based on the African Charter. Bello CJN at page 26 of the report said:

"I am inclined to agree with Mr. Agbakoba that the provision of Section 42 of the Constitution for the enforcement of fundamental rights enshrined in Chapter IV of the Constitution is only permissible and does not constitute a monopoly for the enforcement of those rights....."

It must be emphasized that the section does not exclude the application of other means for their enforcement under common law or statute or rules of court.

It is apparent from the foregoing that the human and peoples rights of the African Charter are enforceable by several High Courts depending on the circumstances of each case and in accordance with the rules practice and procedure of each court." (Emphasis supplied)..."

What it says is that the African Charter Articles can also be enforced by applicable Rules of Practice in courts. I am of the view that the appellant was wrong in the procedure he adopted to enforce the Charter under the special jurisdiction of the court in reliance on Section 42 of the Constitution. The learned trial Judge was in the right to decline jurisdiction under the circumstances on the basis of the procedure adopted; vide Uzoukwu and Osuagwu cases (supra)

Issues 5 and 6

These issues can conveniently be taken together. They are concerned:-

- (1) With the legality of the Detention Order.
- (2) With the question whether the court can inquire into the circumstances that the satisfaction of the Inspector General of Police that the appellant was a security risk.

It was firstly submitted that the appellant raised the issue of the

illegality of a legislative judgement which the court failed to consider. I agree that no matter how insignificant a point may appear to a trial court, the court is bound to consider it and make a decision on it. It was argued that Decree No.107 of 1993 preserved the powers of the judiciary in adjudicating vide *Guardian Newspapers case* (supra), section 6 of the Constitution not having been amended by Decree No. 107 of 1993. There is still in Nigeria a separation of powers between the Executive and the Judiciary. See *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Pt.18) 621. It was further contended that under a rule of law the Federal Military Government could not assume judicial powers having preserved Section 6 of the Constitution. See *Okoroafor v. Miscellaneous Offences Tribunal* (1995) 4NWLR (Pt. 387) 59; *Ibrahim v. Emein* (1996) 2 NWLR (Pt.430) 322.

It was submitted that the detention of the appellant in this case under the Detention (of Persons) Decree is a legislative judgment which inflicted punishment of imprisonment on the appellant without due process as enunciated by Section 6 of the constitution. The court should have declared the Decree No. 2 of 1984 as void. See *Liyanage v. The Queen* (1967) A.C 259; the *Guardian Newspaper case* and the *Agwugwu case* (supra).

It was further submitted that the lower court failed to consider the issue whether the court can inquire into the circumstances that informed the satisfaction of the Inspector-General of Police that the appellant was a security risk. It was argued that the issue had not been canvassed adequately in all cases that came to the courts in which their interpretative jurisdiction in situations dealing with the liberty of a citizen where a Statute contains ouster clause has been invoked. See *Bronik Motors v. Wema Bank Ltd* (1983) 1 SCNLR 296; *Ariori v. Elemo* (1983)1 SCNLR 1.

It was submitted that the Inspector-General of Police in the exercise of his discretion was subject to courts in the manner that discretion is exercised. In other words, the decision of the Inspector-General of Police in signing the Detention Order is reviewable by the courts. A number of English decisions directly on the point have been cited for the proposition.

Now, in the case of Lakanmi & Anor v. Attorney General Western State (1971) 1 UILR (Pt.2) 201, the Supreme Court declared that the relevant legislation was a legislative judgment and it eroded the constitutional responsibility of adjudication of courts and was therefore void by the constitution. It is common knowledge that the then Supreme Military Council came out with the Constitution (Supremacy) Decree No. 28 of 1970 which to all intents and purposes overruled the judgment. **However, it must be pointed out that a Detention Order is not a legislative judgment. It does not pretend to find a detainee guilty of any offence. It is simply a prevention procedure adopted by the state whereby, rightly or wrongly, the detaining authority comes to the conclusion that it is necessary that the person concerned be detained in order to prevent him from committing an offence detrimental to the security of the state. It does not compete with the judgment of a court as the court does not pass judgment with the aim of preventing a person committing an offence. If the detention order is not justified that is a different matter. But the Detention order does not carry sanction such as a fine or a term of imprisonment nor is it a decision giving such relief as a declaration or injunction or damages. It is therefore not a legislative judgment by any means.**

The other point is whether, the court should insist on seeing that the donee of a power to do an act under Statute such as the Detention (of Persons) Decree No. 2 of 1984 is accountable to the court in the way and manner he exercises his discretion. It is true that the courts in England and elsewhere have evolved mechanism of interpreting discretionary powers restrictively. In this way the courts have been able to preserve the rule of law. See Westminster Corporation v. L.& N.W. Railway (1905) AC 426; Ridge v. Baldwin (1964) A. C. 40. In Koncarelli v. Duplessis (1959) 16 D.C.R. (2nd) 659, the Supreme Court of Canada condemned the unlawful cancellation of a liquor licence based on extraneous political grounds and awarded damages against the Prime Minister of Quebec.

In such matters involving the ordinary laws, the courts in this country have the jurisdiction to examine in appropriate cases how discretionary powers are exercised. It is part of the administrative law which

frowns at abuse or misuse of power.

But in Nigeria there are provisions in Decrees such as No. 2 of 1984 which empower the executive to detain people without trial. Usually no reasons are given by the detaining authority as to how a detainee constitutes a menace or threat to the state. It is regarded as a matter of the security of the state which is not open to probing by the courts, also for security reasons. Attempts by courts to order the release of such detainees on application by habeas corpus is even ousted. See Decree No. 22 of 1986. In Lekwot v. Judicial Tribunal (1993) 2 NWLR (Pt.276) 410 at 447, I quoted as follows from a paper presented by the Chief Justice of Nigeria at the Sixth International Appellate Judge's Conference , 1991:-

"Human rights under a military regime may be abberations. In a democratic government under the rule of law, all judicial powers of the State are vested in the judiciary. Under the military regimes, the powers are invariably eroded. The erosion may be by creating military (or Special) Tribunals..... It may also be the ouster of the jurisdiction of courts of law.."

In Okeke v. A.-G., Anambra State (1992) 1 NWLR (Pt. 215) 60 at 86, Uwaifo, J.C.A. observed as follows:-

"Decree No.13 of 1984 is an ouster legislation. Once the provisions of a Decree or Constitution ousting the jurisdiction of the courts on any specific matters are clear and unambiguous, the courts are bound to observe and apply them. They are not entitled even when the ouster has drastic effect on the right of any person, to approach its interpretation by a false or twisted meaning given to it by unacceptable restricted construction ."

In view of the authorities, I have to resolve the 5th and 6th issues against the appellant.

Seventh Issue:

This is concerned with the question of the 4 days in which the appellant was under detention before the detention order was issued. Any matter arising from the circumstances of such detention is one that can be appropriately decided after a full trial. This

appeal deals largely with the issue of jurisdiction which was raised as a preliminary point. The merit of the case to be presented by the appellant cannot be gone into at this stage.

In the result, this appeal partially succeeds. I remit the case back to the trial court to consider the issue of the consequences of the detention for the four days of the appellant which is apparently not covered by the order. I make no order as to costs.

MUHAMMAD JCA

I have had the honour to read in advance the judgment of my learned brother Musdapher, J.C.A. just delivered. I agree with the conclusion arrived at. The grundnorm in Nigeria under the present military administration is the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the subsequent Decrees regulating the executive, legislative and judicial powers in the country. Section 5 of Decree No. 107 enacts as follows:-

"No question as to the validity of this Decree or any other Decree made during the period 31st December, 1983 to 26th August, 1993 or made after the commencement of this Decree of an Edict shall be entertained by any court of law in Nigeria."

The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 provides:-

"No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before or after the commencement of this Decree, the proceedings shall abate, be discharged and made void."

These two enactments, which have been judicially examined since the inception of the military regimes in Nigeria in a plethora of cases leave no room for any interpretative mechanisms to found jurisdiction when jurisdiction has been effectively ousted. The courts have always construed such clauses strictly. However, where, as in this case, the language is plain, the courts have to give effect to it. The legislations are

undoubtedly drastic, but the courts are bound to give effect to them and decline adjudicating.

On the issue of the status of the African Charter on peoples right, I agree that ordinarily, a state, which is a party to a treaty will not be permitted to legislate locally out of its obligations. But in this matter, Decree No. 2 of 1984 as amended did not exclude the operation of the clauses of the African Charter. I Decree No. 52 of 1992 which jettisoned the application of the African Charter. I am of the opinion that the ouster clauses contained in the enactments do not affect the African Charter. But the procedure adopted by the applicant is not appropriate.

For the fuller reasons contained in the aforesaid judgment, this appeal succeeds only on the question of the unexplained 4 days which was not covered by the detention order. I too, hold that the appeal succeeds on that ground. The trial court has the jurisdiction to look into that aspect.

I make no order as to costs.

PATS-ACHOLONU JCA

The synopsis of the facts of this case is that on Tuesday 30/1/96 the appellant was arrested by law enforcement agencies. It would appear that the reason for his arrest was not immediately made known to him. On the 1st of February, 1966, the appellant through his Solicitors filed an application in the lower court seeking the leave of the court to enforce the fundamental Rights of the appellant, an application for which leave was granted. Thereafter the appellant pursuant to Section 42 (1) of the Constitution of the Federal Republic of Nigeria and Order 2 Rule 1 of the Fundamental Rights (Enforcement Procedure Rules) prayed the court for these reliefs:-

(1) A declaration that the arrest of the applicant, Chief Gani Fawehinmi at his residence at 9A Ademola Close G.R.A. Ikeja, Lagos on Tuesday, January 30, 1996, by the State Security Service (S.S.S.) or Officers, Servants Agents, Privies of the respondents and /or of the Federal Military Government constitutes a violation of the applicant's fundamental rights guaranteed under Sections 31, 32, and 38 of the 1979 Con-

stitution and Articles 4,5,6 and 12 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap. 10, Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

(2) A declaration that the detention and the continued detention of the applicant without charge since Tuesday, January 30, 1996 when the applicant was arrested by the Officers, Servants, Agents, Privies of the respondents at his residence 9A Ademola Close, G.R.A. Ikeja, Lagos constitutes a gross violation of the applicant's fundamental rights guaranteed under section 31, 32 and 38 of the 1970 Constitution and Articles 5, 6 and 12 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

(3) A mandatory order compelling the respondents, whether by themselves or by their officers, agents, servants, privies or otherwise howsoever to forthwith release the applicant.

(4) An injunction restraining the respondents, whether by themselves or by their officers, agents, servants, privies or otherwise howsoever from further arresting, detaining or in any other manner infringing on the fundamental rights of the applicant.

(5) N10,000,00. (Ten million Naira) damages for the unlawful and unconstitutional arrest and / or detention of the applicant - Chief Gani Fawehinmi.

(6) Such further or other orders as this Honourable Court may deem fit to make in the circumstances.

The application and, the reliefs sought were predicated upon the violation of Sections 30,31,32 and 38 of the 1979 Constitution and Articles 2,4,6 and 12 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act. Cap. 10 Laws of the Federation of Nigeria 1990 Thereupon the respondents filed a notice of Preliminary objection stating that the court below is not vested with the jurisdiction to try the case and, it is therefore not competent to entertain the action, and H carefully set out the following as grounds of their objection;-

(i) By a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by State Security

(Detention of Persons) Decree No.2 of 1984 (as amended) and further by section 4 of the aforementioned Decree No. 2 of 1984 (as amended). The respondent/applicants are immuned to any legal liabilities in respect of any action done pursuant to the Decree.

B (ii) The Federal Military Government (Supremacy and Enforcement) of Powers Decree No. 12 of 1984 and Constitution (Suspension and Modification) Decree No. 107 ousts the jurisdiction of this Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree.

C (iii) This Honourable Court lacks the constitutional jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

D Thereafter issues were joined and the parties by the brilliant advocacy of their respective counsel addressed the court copiously on the motion. One of the arguments of the appellant in that matter in the court below is that no detention order was filed along with the notice of preliminary objection and counsel for the (applicant) appellant then urged the court to ignore any argument that sought to incorporate the detention order in the case of the respondent. He reminded the court that the detention order was not published in any gazette and therefore by the operation of
F Section 14 of the Interpretation Act the order of the government must be published in a gazette arguing that the detention order is not so notorious as such as that court will take judicial notice of it. Rotimi Jacobs Esq. reminded the court that the detention order was said to have been dated
G 3/2/96 while the arrest was made on 30/1/96 therefore the court could not possibly give the order an interpretation that would have a retrospective effect. He pointed out that the respondent did not file any counter affidavit to challenge the averment in the various supporting affidavits. In his reply the counsel for the respondent in the court below stridently
H canvassed on the issue of ouster clause stressing most fervently that the court is incompetent to assume jurisdiction to entertain an action on the validity of the order made pursuant to Decree No.2 of 1984 as extensively amended.

In his considered ruling after stating that he is satisfied that the Inspector-General of Police has been given the power under the Decree as amended to issue detention orders under State Security (Detention of Persons) Decree No.2 of 1984, stated thus in reference to the propriety or otherwise of the detention allegedly made to act retroactively: On the second leg of counsel's argument on failure of respondents counsel to tender the detention order as Exhibit after showing it to the court in the course of proceedings. With respect to the learned counsel for the applicant, I disagree with this argument, my reason being that the objection of the respondents is based purely on law. Where law is in issue in an objection on point of law, no facts need to be proved. Affidavit and Exhibits in law relate facts and not law see Order 27, Rules 1 and 2 of the FEDERAL High Court (Civil Procedure) Rule 1976, see also Onamen v. Onamen (1989) FHCLR 214- 216. That notwithstanding, I observe in course of this proceeding that the said Detention Order No. 004556 was produced in open court and shown to applicant's counsel who had every opportunity to peruse it. It was also shown to the court. I perused it and was satisfied that it was issued by the Inspector-General of police, though the usual thing would have been for the respondent's counsel to annex it to the motion papers or to tender it as exhibit before the court. Furthermore, by virtue of section 74(1) of the Evidence Act, the court is enjoined to take judicial notice of any legislation. I therefore hold that this court has taken judicial notice of the Detention Order No. 004556 dated 3/2/96 as a subsidiary legislation (shown to the court though not tendered) see Section 75(1) of Evidence Act. In view of the above reasons the court cannot question the legality of the Detention Order since it was made by the appropriate authority under the decree."

He further stated that the African Charter on Human and People's Right cannot be relied on by the appellant and after reviewing the matter as addressed by counsel, came to the conclusion that this court has no jurisdiction to entertain the matter.

Dissatisfied with the decision of the trial court, the appellant filed 10 grounds of appeal from which he framed 7 Issues for determination. They are as follows:-

(1) Whether the learned trial Judge was right when he held that the Inspector-General of Police is conferred with powers to issue out a Detention Order under Decree No. 2 of 1994 as amended.

(2) Whether the trial court was right when it held that Detention Order, though not exhibited or tendered, was covered under Order 27 of the Federal High Court (Civil Procedure) Rules and Sections 74(1) and 75(1) of the Evidence Act, and that therefore, the court can take judicial notice of the said Detention Order.

(3) Whether the articles of the African Charter on Human and People's Rights are inferior or subject to municipal laws, particularly Decrees made by the Federal Military Government.

(4) Whether the articles of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria, 1990 are not enforceable in Nigeria courts and in particular under the Rules made pursuant to Chapter 1V of the Constitution of the Federal Republic of Nigeria, 1979.

(5) Whether the detention Order is not a legislative judgment which can be declared void by the court.

(6) Whether the court cannot inquire into the circumstances that informed the satisfaction of the Inspector-General of Police that the appellant was a security risk.

(7) Whether the learned trial Judge was right in failing to consider the submission of the appellant's counsel as to the four days in which the appellant was detained which were not covered by the Detention Order and if the answer is in the negative, whether the jurisdiction of the Federal High Court is ousted in respect of the four days not explained by the Detention Order.

The respondents on their part framed 3 issues for determination which are as follows:-

(1) Whether the Federal High Court was right in holding that the Inspector-General of Police can properly sign in a Detention Order pursuant to the powers conferred on him by the State Security (Detention of Persons) Decree No. 2 of 1984 as amended?

(2) Whether the Federal High Court was right in refusing to

hold that the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act is superior to Decree of the Federal Military Government and enforceable in the same manner as those of chapter 1V of the 1979 Constitution?

(3) Whether the Federal High Court was right in holding that it lacks jurisdiction to entertain the appellant's case by virtue of the ouster clause provisions in section 4 of the State Security (Detention of Persons) Decree No. 2 of 1984 as amended?

When I look at this case, I observe that one of the respondents is he the Head of State - General Sani Abacha himself - I wonder whether the appellant is unaware of the provisions of Section 267 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against any civil or criminal action or proceedings against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The constitution is the primary law of the land. I hold therefore that the name of the Head of State should not have been reflected in the suit in the first place. It offends the provision of the Constitution. Now owing to the nature of the case which bestrides both Constitution and Administrative laws, I will lean towards resolving the questions involved as framed by appellants in order to give the case a comprehensive and holistic consideration and synthesis. To this end, I shall take issues 3 and 4 together. Let me reproduce the relevant articles of African Charter on Human and Peoples Rights which are adopted and incorporated into our legislation by virtue of African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria (1990).

"Article 4. Human beings are violable. Every human being should be entitled to respect for his life and the infringement of his person. No one may be arbitrarily deprived of his right.

Article 5. Every individual shall have the right to the respect of dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, inhuman degrading punishment and treatment shall be prohibited.

Article 6. Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions as previously laid down by law. In particular, no one may be arbitrarily arrested and detained .

B Article 7. Every individual shall have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

C (b) the right to be presumed innocent until proved guilty by a competent court or tribunal.

(c) the right to defence, including the right to be defended by counsel of his choice.

D (d) the right to be tried within a reasonable time by an impartial court or tribunal."

The sovereign State of Nigerian pursuant to the convention or Charter on Human and Peoples rights enacted a legislation incorporating it as our law. The intent of the law can be ascertained or gleaned from the words of the statute. Section 1 of African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 which is now a municipal law by reason of being given a legislative force states thus:

F "As from the commencement of this Act, the provisions of the African Charter on Human and Peoples Rights which are set out in the schedule to this Act shall subject therefore as provided have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."

G Nigeria incorporated the African Charter on Human and People's Rights convention into our Statute Law because it is signatory to the convention.

H By signing same and incorporating it into our laws, it is evident that it seeks to act in accord with the dictates of section 12(1) of the Constitution of the Federal Republic of Nigeria which states thus:

"No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty is enacted into

law by the National Assembly."

In this country, Decrees are made by the Provisional Ruling Council and when signed by the Head of State, it becomes law.

The learned counsel for the respondents in his brief said that since by virtue of Constitution (Suspension and Modification) Decree B No. 1 of 1984 and Decrees No.107 of 1993 which he asserted is now the grundnorm of our law, the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act is a mere Act of the National Assembly which is inferior in status to those Decrees as it is subordinate to their C tenets. The question that would agitate the mind of any jurist is whether it was within the contemplation of the Decree be it that of No.1 of 1984 or 107 of 1993 that Treaties and/or conventions which regulate and guide relations in international laws or affairs are to all intents and purposes not withstanding their incorporation shall be given force of law D according to the words of the convention or may be set aside, ignored and treated as they were never made, and never intended to be enforced having regards to the new exigencies in the body politics of the nation. In their comments on European convention on Human Rights as applied E to U.K. Jeremy Cooper and Rajeev Dhavan in their book "Public Interest Law" said at chap. 5. p. 138 "As the convention is not incorporated into U.K. laws, its provisions cannot be directly enforced in the courts. It would be wrong, however, to assume that for that reason, the convention F is ineffective. This assumption is true to the interpretation of legal ambiguities and uncertainties so as to ensure where possible that U.K. law is in conformity with the countries treaty obligations. See Garland v. British (1982) 1.C.R. 420 (ML) per Lord Diplock. Secondly, the government will have the convention in mind in drafting any new national legislation. G Thirdly, the United Kingdom has accepted the right of individual petition under the convention. As a result any person, non governmental victim of a violation by the United Kingdom of the Rights guaranteed in the convention may petition the European Commission of Human Rights." H I believe by being signatory to the convention i.e. the African Charter, the sovereign government of Nigeria manifested its intention and perhaps willingness to abide by the tenets of the convention. This by itself,

did not connote its enforceability within the corpus juris civilis of Nigeria. Our national government however went further and incorporated the spirit of that treaty into our law thereby giving due notice that it is to be recognized and applied and enforced by the three arms of the government; giving message to all the signatories to the convention that it has adopted the treaty intoto. It was in R.v. Keya (1876) 2 Ex.D.63 that it was held that international law is only part of English law in so far as it is incorporated into English law by a decision of the courts or by an Act of Parliament. This might be construed in the case here to be that Nigerian government did not merely adopt the theory as embedded in the treaty by its signature but went further by processes of incorporation to give it life and practice in the municipal context. The most portent determinant in theory and practice of assimilation and incorporation as I would describe it is the adoption and incorporation and enforceability of it into the municipal lex civilis.

I shall consider the effect of the incorporation alongside the effect of Decrees No. 1 of 1984 and 107 of 1993. Where there is no enactment to give effect to the spirit of a treaty notwithstanding its adoption and recognition, and due regard by a sovereign government, it cannot be justiciable in a municipal court. In *Mortenson v. Peters* (1906) 14 S.L.T 227, a Danish Master of a ship was convicted for trawling off the Scottish Coast, an act forbidden by law that no foreign vessel should fish within 70 miles of the coast. Lord Dunedin stated the law thus:

"In this court we have nothing to do with question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal, sitting to decide whether an act of the legislature is ultra vires as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented by the King is supreme and we are bound to give effect to its terms."

In that same case, Lord Kyllachy said:

A legislature may quite conceivably by oversight or even design exceed, what an international tribunal if such existed might hold to be its international rights. Still there is always a presumption against its in-

tending to do so. I think that is acknowledged. But then it is only a presumption and as such it must always give way to the language used, if it is clear."

In a relatively modern case of *Collco Dealings Ltd. v. I.R.S.* (1962) A.C.I. the (No.2) Act 1955, Section 4(2) referred to 'a person entitled under any enactment to an exception from income, which extends to dividend by shares' Lord Simonds said at p.19:

"It is said that the plain words of the statute are to be disregarded..... in order to observe comity of nations and the established rules of international law. I am not sure on which of these high sounding phrases the appellant company chiefly relies. But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not I hope give ear....."

The problem in the case before us is that the treaty has been given a force of law within municipal context and texture. The intent is that it is to be applied and given effect in our municipal law to which now it forms part. I must state here that the ingredients and provisions of the Articles of the convention are amply covered by chap. 4 of our Constitution in all possible ways. In other words, what the Charter contains when it was formed and agreed upon by member states had been incorporated in our Constitutions. It is nothing new. The Nigerian government could have left the matter there as adequate provision has been made for remedy where there has been violation of the provision of the fundamental Rights of a citizen. There would have been no need to re-enact the convention to give it further force. The impression seemed to be given is that Act 10 of 1990 is to be given full force to obligate Nigeria. That is to say that the government sends a message across that either the contents of Chap. 4 are not adequate enough or that the Cap. 10 is an alternative remedy whose mode and procedure of enforceability might be by declaratory action or originating notice of motion, and in some cases, depending on

the urgency of the matters, a mode that will facilitate to bring the matter most urgently to the court. As to the status of African Charter on Human and Peoples Rights in our corpus juris Nigeria is Bello C.J.N. Ogugu v. The State (1994)9 NWLR (Pt. 366) P. 1 at 27 said;

- B *"However, I am unable to agree with Mr. Agbakoba that because neither the African Charter nor its Ratification and Enforcement Act had made a special provision like Section 42 of the Constitution for the enforcement of its human and peoples' rights within a domestic jurisdiction, there is a lacuna in our laws for the enforcement of these rights.*
- C *Since the charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the judicial powers of the court as provided by the Constitution and all other laws relating thereto....."*
- D It is apparent from the foregoing that the human and peoples rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court..... By not merely adopting the African
- E Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal and as Bello C.J.N. said in Ogugu v. supra, its violability becomes actionable.
- F Indeed in the realms of jurisprudence and citizens right to seek for remedy where there is a violation of right and law, it cannot be said that no remedy exists. The intention of Cap. 10 is that it be accorded full force of law by which Nigeria is seen as a country that not only signs, respects and adopts the full contents and import of the convention or charter but has gone the
- G extra mile of incorporating same into our municipal law. It is to be noted that the Act has neither been abrogated nor repealed neither directly, impliedly or inferentially.

Section 17 of Constitution (Suspension and Modifications) Decree No. 107 of 1993 states as follows:

"All laws (other than any law to which Section 11 of this Decree applies) which whether being a rule of law or a provision of an Act, a Decree, an Edict or a By-law or any other enactment or instrument what-

soever was in force immediately before the commencement of this Decree or made before that date but comes into force or after the commencement of this Decree shall until that law is altered by any authority having power to do so, continue to have effect as if made in exercise of the powers conferred by or derived under this Decree."

The full import of this provision is that an Act such as Cap 10 of 1990 is still a law to which the court, the executive and the legislature which is really the Provisional Ruling Council by virtue of Section 10(2) of the Decree No. 107 of 1993 must give due recognition and enforce. It then means that the obvious interpretation is that the law is in full force, and because of its genesis it has an aura of sacrosancty unlike most municipal laws and may as long as it is in the statute book be clothed with vestment of inviolability (by reason) where a decree specifically repeals it. At this juncture I must say that the government could have avoided being irretrievably immersed into the nuances of this charter by not incorporating it into the law of the land. In that case the attitude of the court would been different. Having unfortunately given it a force of law it cannot resile and pretend that it is not there. Its continued existence continues to give the citizen a right to seek a remedy founded on its infraction in so far as his rights are affected. It should be observed that the English and Scottish cases to which I referred earlier apply and are in respect of situations where there are no incorporation into the municipal law. Even then the courts seemed to be very vigilant in ensuring that treaty obligations are not treated with levity. I am of the view that the holding of the learned trial Judge that because the contents of the charter are the same as the contents of chap. 4 of our Constitution, a citizen may not have recourse to it, is an error of law. The African Charter by the process of incorporation, and its historical and international charter assumes a status of a law that equally like a chap. 4 regulates the freedom or liberty of a Nigerian. Thus an international agreement such as the Hague Rules which is incorporated in an English statute: the statute was construed as to attain some degree of uniformity in the various jurisdiction where the agreement is operative. In *Stag Line Ltd. v. Foscolo Mango & Co. Ltd.* (1932) A.C. 328 at 350, Lord Macmillan said:

"It is desirable that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the Rules should be construed on broad principles of general acceptance."

B In respect to issue 1 as adumbrated by the appellant, the ques-
tion there is, whether the Inspector-General can competently issue a de-
tention Order under Decree No. 2 of 1984. The argument of Rotimi
Jacobs Esq., is that the last amendment to Section 1 of State Security
C (Detention of Persons) Decree No. 1 of 1984 (which underwent several
amendments) was the addition of "or" (using the words of the statute)
State Security (Detention of Persons) Amendment Decree No. 11 of 1984,
(a) by inserting immediately after the words "or the Inspector-General of
Police wherever they occur in the Decree". He said that the amendment
D was otiose in that it was framed on a wrong premise, to wit, it made the
existence of the office of Chief of General Staff a condition precedent
for the insertion of the office of the Inspector-General of Police. Sec-
ondly, it based the purport of its amending effect on earlier amendment
E by reciting them. Thus it means that Decree No.11 of 1994 sought to
amend Decree No. 24 of 1990 which recognized only the office of the
Vice-President and not that of the Chief of General Staff. I admit that the
amendment made in Section 1(a) of Decree No.11 of 1984 ought to read
F as follow (a) "by substituting the words Vice-President wherever they
occur in the Decree with the Words Chief of General Staff" and, insert-
ing immediately the word "or the Inspector-General of Police." However
I must state in all seriousness that the word "or" was used in the amend-
ing statute to make the addition of Inspector General completely disjunc-
G tive. In other words the intention of the statute is that either the office of
Chief of General Staff which office was not yet there or the Inspector
General of Police can detain a subject. If the statute had used the words
and instead of or, then a case of adding something to nothing would have
H been made. Attractive and, I would, even enthuse, that romantically that
argument of Rotimi Jacobs may appear he did not direct his mind to the
fact that the statute provided a window of fresh air for escape from the
cocoon of inelegantly drafted decrees. The intention of the statute is that

any detention that could be done by Chief of General Staff could competently be done by the Inspector General of Police. Indeed, extended and I dare say artificial construction of Decree No.11 of 1984 along the lines suggested and overly espoused by Mr. Jacobs the learned counsel for the appellant would have meant the virtual death of Decree No. 2 of 1984. This is not the intention of the law makers; such construction as canvassed would provide no teeth for the Decree. I am satisfied that the Inspector General of Police is competent to detain under that Decree. B

I am well aware that statutes that encroach into the liberty of an individual and or vested rights must be construed strictly. Thus, the House of Lords per Viscount Simonds held on Re "Wonderland" Cleethorpes (1965) A.C. 58 at 71 that:- C

"If there is any ambiguity about the extent of the derogation by a statute from common law rights the principle is clear that is to be resolved in favour of maintaining common law rights unless they are clearly taken away." D

See also Re Metropolitan Film Studios Application (1962) 1 WLR 1315. But there is a wide degree of difference in this case and the one before this court. E

I now come to issue No. 6 which is as to whether the court can enquire into the circumstances or background that led the Inspector General of Police to believe that the appellant is a security risk. It would seem that in considering this issue it might be pertinent to consider it alongside the issue No. 2 as to whether the court can merely take judicial notice of an order that is not exhibited. The amended version of Decree No. 2 reads thus:- F

"If the (Chief of General Staff) or the Inspector General of Police is satisfied that any person is or recently has been concerned in acts prejudicial to the State Security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such act, and that by reason thereof, it is necessary to exercise control over him, he may by order in writing direct that the person be detained in a civil prison or police station or other places specified by him and it shall be the duty of the person or persons in charge of such a place or places if an order made G H

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in respect of any person is delivered to him to keep that person in custody until the order is revoked."

I think the first consideration that would weight in the minds of discerning and thinking members of the public or even an ordinary man of common intelligence is that the detention is not based on mere fanciful or wishful thinking of the person vested with such awesome powers. In other words, the satisfaction is rooted on empirical facts which a person in the position of Inspector-General of Police can dutifully and honestly would come to. It of course imparts element of discretion but founded on hard core reasoning and endurable and unadulterated facts that would glare. This is because he is discharging the duty on behalf of the public who it must be conceded are entitled to know or come to the conclusion after a calculated reasoning and analysis of the situational premise that the Inspector-General appears to have acted properly in defence of the realm.

It should be noted that since the end of the second world war when legal positivism or juridical formalism was made nonsense of by the despotic regimes of Third reich and Fascist Italy, and the U.N. Universal declaration of Human Rights was enthroned, there is growing tendency in most jurisdictions to protect as much as possible the fundamental right of people in times of Peace in particular. There is no doubt that in times of war or emergency of some sort - like earthquake or internal insurrection, the public might close their eyes to an enactment of laws that appear draconic on their face. Such laws if made are to secure and protect the state in times of emergency. There is of course no affidavit that there is an emergency at the time the appellatant was arrested and detained. Therefore it must be assumed that his detention is due to some act of his that was seen to be detrimental to the public good. In the Secretary of State for Education and Science v. Metropolitan Borough of Thameside (1967) 3 ALL E.R. 65, the House of Lords held:

"If a judgment requires before it can be made the existence of some facts, then although the evaluation of these facts is for the Secretary of State alone, the court must enquire whether these facts exist and have been taken into account, whether the judgment has been made on a proper self direction as to these facts, whether the judgment has not been

made on other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bonafide it may be becomes capable of challenge."

Consider for example, the case of Nakkuda Ali v. Jayaratne (1951) A.C. 66. This was as to the power of discretion by the controller of textiles in Ceylon under Section 42 of the Defence (Control of Textiles) Regulations 1945 to cancel the licence of textile dealers. The House of Lords seemed to depart from the Majority judgment in Liversidge v. Anderson (1942) A.C. 206. It said:

"Their Lordships do not adopt a similar construction of the words Reg. 62 which are now before them. Indeed it would be a very unfortunate thing if the decision of Liversidge's case comes to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words "if A.B. has reasonable cause to believe" are capable of meaning "if A.B. honestly thinks that he has reasonable cause to believe" and that in the context ad attendant circumstances of Defence Regulation 188 they did infact mean just that. But the elaborate consideration which the majority of the House gave to the content and circumstances before adopting that such words are to be understood"

There was therefore a departure which seeks to liberalize the strict construction manifestly evident in Liversidge case. The new line of thinking is now accentuating towards Lord Atkins dissenting judgment. No less a person than Lord Denning delivered a coup de grace on the near strict interpretation given by the House of Lords in Liversidge case, in Padfield v. Minister of Agriculture, Fisheries and food (1968) A.C. 997 in an equally dissenting judgment which was upheld by the House of Lords. In that case Lord Denning said:

"It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. But it is said that the Minister is not bound to give any reason at all. And that if he gives no reason, his refusal, cannot be questioned. So why does it matter if he gives bad reasons. I do not agree. This is the only remedy available to a person aggrieved. Save of

course, for questions in the House which Parliament itself did not consider suitable. Else why did it set up a committee of investigation? If the Minister is to deny the complainant a hearing and a remedy, he should at least have good reasons for his refusal and asked, he should give them. If he does not do so, the court may infer that he has no good reason. If it appears to the court that the Minister has been or must have been influenced by extraneous consideration which ought not to have influenced him, the court has power to interfere. It can issue a mandamus to compel him to consider the complaint properly. That was laid down by two of my predecessors in this place. Lord Esher M.R. in *Reg Vestry of St. Pancras* said of a body who were entrusted with a discretion: "they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion. In the House of Lords in the same case, Lord Reid said, "But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act as to frustrate the Policy and object of the Act, and if it were to appear from all that the circumstances of the case that, that has been the fact of the Minister's refusal, then, it appears to me that the court must be entitled to act."

Let me pause here and examine the case in hand with the background of Section 4 of the State Security (Detention of Persons) Act Cap. 414.

"4(1) No suit or other legal proceedings shall be taken against any person for anything done or intended to be done in pursuance of this Act.

(2) Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into by any court of law and accordingly Sections 219 and 259 of that Constitution shall not apply in relation to any such

question."

Before going further, I wish to remark in passing and in further buttressing of my opinion and holding that the suspension of operation of the provision of African Charter and the Incorporating Act has never been intended nor to my mind carried out.)

On the face of it the purport of the provision is that the jurisdiction of the Court is completely ousted. In the exercise of the power conferred by Cap. 414, the understanding is that the donee of that power shall exercise it in accordance with the spirit of the law. In such a case if he performs it in that spirit, the court can not enquire into it. In his argument the learned counsel for the respondent, Okey Nwamba, a legal officer in the Federal Ministry of Justice, cited many authorities to show that the court has no jurisdiction. Among the cases he cited are Barclays Bank of Nigeria v. Central Bank of Nigeria (1976) 1 ALL NLR 409 of 334; Osadebey v. A-G of Bendel State (1991) 1 NWLR (Pt. 169) 525; A-G of Lagos State v. Dosunmu (1989) 4 NWLR (Pt. 111) 552 of 580; Olaniyi v. Aroyehun (1991) 5 NWLR (pt. 194) 652; A-G Federation v. Sode (1990) 1 NWLR (Pt. 128) 500; Oloba v. Akereja (1988) 3 NWLR (Pt. 84) 508; Agwuna v. A-G. Federation (1995) 4 NWLR (Pt. 396) 418; Okeke v. A-G. Anambra State (1992) 1 NWLR (Pt. 215) 60 at 86. He argued that the courts being creatures of statutes should not be seen to want to grab jurisdiction completely taken away from them even if the liberty of the subject is at stake. It is a pity human nature has not learnt anything from certain practices perpetrated in the Third Reich Germany. They are still ruling us, as it were, the school of Empirical positivism which unwittingly seeks to enthrone despotism. The appellant must have been seen by the detaining officer to be "concerned, in acts prejudicial to State security or has contributed to the economic adversity of the nation or in the preparation or instigation of such acts" In the affidavit in support of the application for the enforcement of the appellant's fundamental rights in the lower court, there are certain averments germane to the resolution of issue in controversy.

Pare 2. That the applicant is a legal practitioner of over 31 years experience, author, publisher, human rights activist, pro-democracy cam-

paigner and National Co-ordinator of the National Conscience Party (NCP).
 Para 4. That no warrant of arrest was shown to the applicant before and
 after his arrest although the applicant demanded for same. Paragraph 6.
 That at the time of the said arrest, the applicant was not informed of the
 offence he had committed. Para. 10 That I verily believe that the appli-
 B cant who has been agitating for enthronement of true democracy in Ni-
 geria and for the restoration of the annulled June 12 Election has not
 committed any offence under the Nigerian Law. I believe that the nature
 of these averments seek to challenge the respondents to show their hands
 C i.e. reasons for arresting and detaining the appellant other than those
 facts deposed in the affidavit. The respondents refused to accept the
 challenge and rather sought to move the court to dismiss the case on the
 ground that the court lacks jurisdiction to adjudicate on the matter. The
 D appellant in that affidavit stated that the arrest was made on 30/1/96. The
 statute stated in unmistakable terms that the order should be directed to
 the person being detained. This means that an order cannot be made
 retrospective but should follow the course intended by the statute, that
 E is, the order should be made before the arrest and subsequent detention.
 In his judgment, the lower court made this finding of fact which in con-
 text of the fact elicited or deposed by the appellant leaves a sour taste in
 the mouth. He said:

"I therefore hold that this Court has taken judicial notice of the
 F detention order No. 004556 dated 3/2/96 as a subsidiary legislation."

This finding of fact means that on the date of the arrest and detention made
 pursuant to provision of Section 10 of the State Security Detention of Per-
 sons Act, there was no order of detention in existence. From the affidavit
 G of the appellant, there was equally no warrant of arrest. The question
 uppermost then is under what law was he arrested on 30/1/96 since he did
 not appear to have committed any offence for which he ought to have been
 charged. Where there is an ouster clause, for the person in authority to
 H seek to take shelter under it, it is important that he brings himself within
 the protection affected by the ouster. Ouster clauses are in essence a
 method to perpetrate legal positivism. But then for ouster clauses to be
 relevant, the conditions laid down for it to be resorted must be adhered to

rigidly. In Okoroafor v. Miscellaneous Offences Tribunal and 2 Ors (1995) 4 NWLR (Pt. 387) 59 at 78, the Court of Appeal stated:

"It cannot be doubted that the various agencies that are empowered by statute to put into effect the procedure leading to trial, frisked away the opportunity designed for the prosecution of such a case. In so doing, they unwittingly flouted the necessary provisions that would preserve the jurisdiction of the tribunal. As guardians of the rich tradition of jurisprudence which we have inherited and imbibed, we must make secure the authority of law as the servant of liberty wisely and conceived as the expression of the righteousness which would exalt the law and indirectly this country."

Dias in his 4th Edition of Jurisprudence, stated at p. 113:

"It is not true to say as positivist philosophers do that nothing is gained by refusing to call an unjust law, for there are always the emotive associations of that word which work powerfully in influencing public reaction"

When a body given some powers to act in a certain way, (there being a law that if it complies with the provision of the law, the court cannot enquire into its action) it shall be understood to mean that where it fails to abide by the strict provision of the law donating the powers, it cannot take resort or have recourse to an ouster clause protection, for then, it has acted ultra vires of the provisions of the law.

The day of the arrest it would seem, was not the date the order of detention was made. There was clear violation of the provision of the statute. It would have been otherwise had the order been served on the appellant exactly on the date of arrest. The order cannot be given a retrospective effect for that is not the spirit or the intendment of the statute giving the powers. Therefore the resort to ouster clause is inapplicable if indeed the document was made four days afterwards.

Another point I wish to discuss is that the Detention of Persons State Security to be appreciated by the people on whose behalf it is made, it to be understood that the donee as well as the detaining authority should be able to show the appellant is a security risk to the State. By this I mean he is accountable to the public whose duty it is to discern whether

the detention order was made in good faith. The new trend in this area of law now imposes on the detaining authority the duty he owes to Nigerian citizens to be ready to explain his actions' if not, an order of mandamus might lie. In such a case he should be precluded from taking any protection under the ouster clause, if it is found that the detention order is not in compliance with the statute.

The issue of ouster of jurisdiction must be understood and considered within the broad line of the prism and contextualisation of a case in as much as the court owes it as a duty to ensure that since the liberty of an individual who is not charged with a specific criminal offence is at stake but is based on matters that border on State security, a liberal construction ought to be adopted particularly in peace time. Liberty which is the very essence of our being is the light and life of the free world. Take it away and there is darkness, misery, frustration, disillusionment, decay and societal death. The court below should take another look.

The next question is the issue of the order itself. The learned trial Judge had held that though the order was not tendered or exhibited as it ought to have been but having seen it and the appellant having equally seen it, he has taken judicial notice of it and he mentioned the provision of Sections 74 and 75 of the Evidence Act. Can the court take judicial notice of an order made and directed at a person and not published? In this case the detention of a citizen is in issue. The order was not served on the appellant when he was arrested. The counsel for the appellant saw the order for the 1st time in the court. The arrest and eventual detention of the appellant was based on the fact that the Inspector-General of Police was satisfied that he was security risk to the good Government of Nigeria and should be incarcerated. Should the court take mere judicial notice of an instrument or any document which obviates the need for strict proof by way of Exhibit. In a case involving the liberty of an individual, is mere cursory look enough? In Defence Secretary v. Guardian Newspapers (1981) 2 WLR 1192-3, the House of Lords by a majority judgment preserved the old system of protecting State documents as to enjoy some protection. In dissenting judgment, Lord Searman said:

"I concluded that where a question as to the interest of

national security arises in judicial proceedings the court has to act on evidence. In some cases a Judge or jury is required by the law to be satisfied that the interest is proved to exist, in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case the court will accept the opinion of the crown or its responsible officers as to what is required to meet it unless it is possible to show that the opinion was one which no reasonable Minister advising the Crown could in the circumstance reasonably have held. There is no abdication of the judicial function, but there is a common sense limitation recognized by the Judges as to what is justiciable and the limitation is entirely consistent with the general development of the modern case law of judicial review.

To state that court would take judicial notice of the order is to over simplify a complex matter without qualification. Because it was not tendered and admitted, even this court is not in a position to evaluate its character with a view to appreciating its nature by way of its contents. Where an order of detention is made, the court should not just look at it but it behoves of the party relying on it to tender it or exhibit it. It is not the law that if a party is making a preliminary objection, he needs not swear an affidavit to help to strengthen his case for facts are the fountain-head of law for ex-facto oritur jus. The convincing force of factual evidence brings clarity to an otherwise vague matter and it eliminates equivocation speculation and presumption as well as other strictures that becloud the matter.

However it will be remiss on my part if I do not consider the other side of the coin. In other words, I will consider how wide conceptually speaking is the Judge's power of taking judicial notice. In the present day context of information technology and internet as well as electronic broadcast, the court shall be forgiven if it takes judicial notice of a lot of things which ordinarily it would not have taken. A presiding Judge unless he is living in a jungle will be presumed to know that American and Russian space crafts docked in the space; that General Sani Abacha was awarded a golden Medal by WIPO; that Nigerian NFA is suspended by CAF from

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fielding our Green Eagles in 1998. Thus the author of 12th Edition of
Phipson on Evidence said at page 22. para 47:

B *"Generally, matters directed by statute to be judicially noticed
or which have been so noticed by the well established practice or prece-
dents of the courts must be recognized by the Judge, but beyond this they
have a wide discretion and may notice much which they cannot be re-
quired to notice. The matters noticeable may include facts which are in
issue or relevant to the issue as well as the contents of documents and
their methods of proof"*

C *"Having considered the two sides of the coin, I am of the view that in this
case where the appellant's counsel saw the order, argued on it, this court
could overlook the issue of non tendering of that Exhibit. However, by
its not being tendered, this Court is precluded from knowing its contents
D and, carefully evaluating the contents in the appeal. The court below
should have admitted it if it is admissible and then make a proper find-
ing. If the intention of the order is to govern the detention from 30/1/96
then the order is incurably faulty."*

E It must be stated that liberty in the context of modern times have
now assumed a far broader conception than before and it increasingly de-
mands protection. This Court shall take judicial notice of recent laws by
way of Decree and statutory instruments and see to it that human rights of
Nigeria citizens are well protected. This informed the establishment of
F Human rights Commission and the recent appointment of a Panel to re-
view the cases of people detained under Decree No. 2 of 1984. As the
Government itself is making a serious effort to attenuate the rigours of the
Decree No. 2, a Decree not promulgated by the present regime, it is only
G fair that the court should in its construction duly compliment the effort of
the Government to see that the fundamental rights of the citizen is not
tampered with. In a democratic set up where the rule of law prevails as
in our own, the enforcement of law finds its jurisdiction not only in the
H interest of authority (of the State) but also in the maintenance of law and
order for the protection of the civilization of the people, for once liberty
vanishes or cannot be protected, there may be violence, turbulence, dis-
order in place of the Rule of Law. We are true citizens of a great Repub-

lic with immense opportunity for orderly progress inspite of some human difference of views and opinions but we are guided by the tenets or precepts of yore which regulate the conduct of affairs among civilized people. These guarantee the protection and security under the authority of law and the nation becomes highly exalted by it.

A Nigeria citizen who was born, bred and educated before the 1966 coup and first saw the emergence of the Military Government in Nigeria and who, was latter made well aware of the doctrinaire tenets that laced, and guaranteed the fountain head of our primary law which in the constitution feels some disquiet at the consistent abridging of the liberties of the individual. Does Nigeria understand the concept of freedom in the true sense having stated that the African Charter on Human rights applies to us. When one talks of Human Rights and freedom, one means life, liberty, and adequate protection under the law for one to be left alone to exercise his civil responsibility including rights of dissent within the law. These are the concepts that were uppermost in the mind of our great men who fashioned the Nigerian Constitution over the years. We must therefore guard zealously and jealously this great heritage and bequeath same to the generation to come. If in the middle ages it was conceived in those far flung years by the great jurists of the time i.e. during the time of absolutism, the writs of protection of the liberty of the subject which were the writs of *de homine replegiando*, main prize and *de odio et atia*.' We must strive not to wring our hands and look helpless for truly I say the executive is highly enamoured of Judges who do not manifest timorous tendencies. In this regard, I cannot help but restate here the immortal words of Sir Winston Churchill when he said,

"We must never cease to proclaim in fearless tones the great principles of freedom and the rights of man, which are the joint inheritance of the English speaking world and, which through Magna Carta, the Bill of rights the habeas corpus trials by jury and the English Common Law which find their most famous expression in the Declaration of Independence"

let us by the same token say too that these find their way in the eloquent expression in our primary law so that we live in a society ruled by law

and not by men.

On the final analysis, I hold that

(1) The Inspector-General of Police is vested with powers to act under Decree No. 2 of 1984 as amended. However there is implicit in that power the duty to explain, if called upon to do so the reasons for the detention. Where he refuses, an order for mandamus will lie.

(2) The African Charter on Human and People Rights having been incorporated into our organic law by legislation is enforceable in this country and the mode of seeking relief could be by the declaratory action or originating notice of motion.

(3) The detention order not made on the date of detention is defective for the days when the appellant is incarcerated up till the date valid detention order is made for the subsequent period.

(4) Although the detention order was not exhibited (it would have been desirable to do so), it is apparent from the record that the parties saw the document and argued on it. It is advised that such detention order be exhibited in future.

I must not fail to state that I take judicial notice (and rightly too of the release from custody of Chief Gani Fawehinmi the appellant. I will make bold to suggest that with the modernistic orientation that is now manifest in the characters and persuasion of the present government the time has come to take a hard look at Decree No. 2 with a view to considering its total repeal or down the rigours and potency of its awesome and loathesome content. Since the Regime that gave birth to it is long gone, this country can do without it.

For the above reasons and the reasons given in the leading judgment of my learned brother, Musdapher, J.C.A. which I read in draft, the appeal is only partially successful. I abide by the consequential order made in the leading judgment.

H