

SUPREME COURT OF NIGERIA

28TH MAY, 1999. SC.4/1996

**CORAM:- A. G. KARIBI-WHYTE, A. B. WALL, S. U. ONU,
A. I. IGUH, A. I. KATSINA-ALU, S. O. UWAIFO,
A. O. EJIWUNMI, JJSC.**

THE ATTORNEY-GENERAL OF THE FEDERATION APPELLANT
AND

1. GUARDIAN NEWSPAPERS LIMITED
 2. RUTAM CRELLON COMPUTERS LIMITED
 3. MELEQ-M
 4. P.M.S. LIMITED
 5. EXPRESS PRINTING AND PACKAGING LIMITED
 6. GUARDIAN SERVICES LIMITED RESPONDENTS
-

CONSTITUTIONAL LAW - Grundnorm - Rule of Law - For the rule of law to survive - Any departure from the grundnorm should be by amendment of it.

CONSTITUTIONAL LAW - Legislation - Federal Military Government - Power to legislate on any matter whatsoever - Must be within the purview allowed in the Legislative lists.

CONSTITUTIONAL LAW - Military Government - Constitutional framework - Decree No 1. of 1984 and Decree No. 107 of 1993 - Form the basic constitutional framework - For the operation of the Government of Nigeria.

CONSTITUTIONAL LAW - Rule of Law - Existing laws - Decree No. 1 of 1984 - Provisions of S.17 - Preserved the rule of law as it existed before the Decree.

CONSTITUTIONAL LAW - Revolution - When it is deemed to have taken place - And nature of it.

CONSTITUTIONAL LAW - Sovereignty - S.14 (2) (a) of the 1979 Constitution - Provisions of - Basis of an usurper's Power.

CONSTITUTIONAL LAW - Usurpation of power - Decree No.12 of 1994 - Nature of military power - And relationship with the 1979 Constitution.

COURTS - Ouster clause - Provisions of - The courts have a duty to examine any ouster clause - To determine its aim and purview.

JURISDICTION - Ouster - Validity of a Decree - Courts are precluded from making a decision - To declare on the validity or otherwise of a Decree.

JURISDICTION - Ouster clause - Extent of - Decree No. 8 of 1994 - Where the decree was specifically directed at the 1st respondent - It is clearly indefensible to extend any ouster clause - To prevent the Court from entertaining the complaint of the other respondents.

JUDICIAL PRECEDENT - LAKANMI case - The decision in that case - And the reaction of the Federal Military Government to it - Are of peculiar circumstances - Distinguishable from the present case.

JURISPRUDENCE - Law - Validity of - Judging the validity of a law - On the basis of ethics, morality and religion - Is erroneous.

LEGISLATION - Legislative Powers - Under Decree [No. 107 of 1993 - Test of determining whether an instrument is a Decree.

SUPREME COURT - Previous decisions - Departure from - The Supreme Court will only take that course - When it is invited to do so - By the procedure Provided for in Ord .6 r.5(4) of the Supreme Court Rules 1985 (as amended).

FACTS

The Respondents herein, as applicants brought an application at the Federal High Court, Lagos seeking the enforcement of their fundamental rights, Pursuant to Order 1 rule 2(1) Fundamental Rights (Enforcement Procedure) Rules. At all material times to this case all the respondents carried on their businesses in the premises known as Rutam House at Isolo Expressway, Lagos. They operated as different and separate businesses. Only the 1st respondent is engaged in the business of Publishing Newspapers and Magazines. At about 12.10 a.m. in the early hours of Monday, 15 August, 1994, about 150 armed policemen entered the said Rutam House Premises and ordered the employees of each of the respondents to leave the Premises forthwith for no apparent reason. No warrant or judicial order was produced to justify the invasion. The Premises were sealed up and kept under armed guard. Hence the respondents applied to the Federal High Court for a number of declaratory reliefs as to the constitutionality of the action of the police, a mandatory injunction and damages. The court Presided over by Kolo.J. gave leave on 17th August, 1994, to the respondents to enforce their fundamental rights. On 30th August, 1994, Auta, J, gave leave to the Inspector-General of Police to join as a respondent (defendant) to the action while the action itself was still before Kolo, J.

Subsequently, in the Federal Republic of Nigeria Official Gazette No. 3 Vol. 81 dated 24th August, 1994, the following two enactments:

- (i) Guardian Newspapers and African Guardian Weekly Magazine (Proscription and prohibition from circulation) Decree 1994 No. 8; and
- (ii) Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 No. 12; were Published. The decrees were made retroactive. As a result, the respondents in the amended Summons filed for that purpose sought a determination of the questions whether the said Decree No.8 and No.12 of 1994 are decrees of the Federal Military Government and whether the proceedings to enforce the fundamental rights of the respondents have accordingly abated..

The learned trial judge in his ruling answered these questions in the affirmative and held that the Court lacked jurisdiction to entertain the

said proceeding. Dissatisfied the respondents appealed to the Court of Appeal which allowed the appeal holding that the Inspector-General of Police was wrongly joined and that the Federal High Court had jurisdiction to hear and determine the action. The appellant has now appealed to the Supreme Court raising three issues while the respondents raised four issues.

ISSUES FOR DETERMINATION

"(i) What are the powers of a Sovereign Government which are exercisable by (a) the Federal Military Government and (b) the courts of law pursuant to the provisions of the Constitution (Suspension and Modification) Decree No. 107 of 1993. (ii) Whether the doctrine and principle of the Rule of Law is binding on the Federal Military Government in its operation of the Constitution of the Federal Republic of Nigeria, 1979, as modified or amended by Decree No. 107 of 1993 and other Decrees of the said Government. (iii) What is it that binds the courts of law to acknowledge an instrument made by the Federal Military Government as a Decree enacted in the exercise of the legislative powers of that Government. (iv) In the light of the answer to the foregoing, whether the judicial powers exercisable by the Federal High Court and other superior courts established by the aforementioned Constitution includes the jurisdiction to determine whether or not an instrument proclaimed by the Federal Military Government to be a Decree is a Decree and therefore binding as law."

HELD (Unanimously allowing the appeal in part per lead judgment of **UWAIFO JSC**)

Constitutional Law - Usurpation of Power

1. It is clearly also undisputed that military power is power seized in a military revolution. In particular, any military revolution which took place after the coming into effect of the 1979 Constitution, abrogated the whole pre-existing legal order except as to what was preserved under the relevant Constitution (Suspension and Modification) Decrees, resulting in an "abrupt political change which was not within the contemplation of the Constitution of the Federal Republic of Nigeria, 1979." See, for ex-

ample, the preamble to Decree No.12 of 1994. In other words, refraining from using veiled terms, such military power is usurped power from the elected representatives to whom the people of Nigeria entrusted power democratically. (p. 1515 A)

B

Constitutional law - Sovereignty

2. It has been argued that the power so usurped belongs still to the people and ultimately resides in them, and that the usurper acts pursuant to the implied mandate of the people. In support of this, section 14(2)(a) of the 1979 Constitution which is unsuspended (and can hardly be suspended because of the unwanted implication of doing so) is cited as follows: C

"that sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority." D

See The Nigeria Judiciary And Military Government by F.R.A. Williams SAN published in The Journal of Nigerian law 1995, Vol.2 No.2 pages 15-17. I think there is much force in that argument. In its real essence, it follows that even the usurper's power is derived from, or at any rate is tolerated by, the people whose sovereignty is in a sense being undermined. (p. 1515 C) E

F

Constitutional law - Rule of law

3. Decree No.107 of 1993 did not in any material way affect or differ from Decree No.1 of 1984. Section 17 of Decree No.1 of 1984 provides:

17. All laws (other than any law to which section 16 of this Act applies) which, whether being a rule of law or a provision of an Act, a Decree or an Edict or of any other enactment or instrument whatsoever, was in force immediately before the commencement of this Act or made before that date but comes into force on or after the commencement of this Act, shall until that law is altered by an authority having power to do so, continue to have effect as if made in exercise of the powers conferred by or derived under this Act." G H

(Emphasis is added by me.)

This provision, among other things, would appear to have preserved the rule of law as it existed before that said Act. (p. 1516 F)

B Constitutional law - Military Government

4. I must here note a few salient matters arising from the said Decree No.1 of 1984 now known as the Constitution (Suspension and Modification) Act (hereinafter called the Act) whose commencement date is 31 December, 1983, the day of the military coup d' etat which removed the democratically elected government. First, the long title of the Act reads:

"An Act to set out the basic framework for the government of the Federal Republic of Nigeria and its component States as from the 31st of December, 1983 under a Federal Military Government; and to provide for the suspension from operation of some of the provisions of the Constitution of the Federal Republic of Nigeria 1979."

It is therefore clear that this Act and Decree No.107 of 1993 whose commencement date is 17 November, 1993, the day another military coup d' etat took place, form the basic constitutional framework for the operation of the government of Nigeria. I think these two laws have been rightly regarded as the grundnorm. (p. 1520 E)

F Constitutional law - Legislation

5. It seems to me that the power of the Federal Military Government to legislate on 'any matter whatsoever' must be the power in respect, and within the allowable purview, of the items whatsoever in the Exclusive and Concurrent Legislative Lists. The Federal Military Government itself has set out the basic constitutional framework for the government of Nigeria by those organic Act and Decree already examined above, in the sphere of its legislative powers including any matter incidental or supplementary to any matter mentioned in the Exclusive Legislative List. It will, in the circumstances, be stretching the limits of constitutionality beyond breaking point to content, as Mr. Onwugbutor appeared to have done, that 'whatsoever' extends to any matter whatever it may be. How could a Decree be defended, for example, if it were to prohibit a named

family in Nigeria from worshipping the Almighty God? That would mean the power to ignore at will the 'basic constitutional framework' already mentioned and be able to saddle the populace with any proclamation in a destructive manner. I think it is a valid argument that that would no longer be the way of making laws for the peace, order and good govern- B ment of Nigeria but tyranny by an absolute despot, ruling as conqueror of a people. I do not think that would be in consonance with the spirit and letter of Decree No.107 of 1993. (p. 1522 A)

Legislation - Legislative Powers

6. I think this very point was given appropriate consideration in the present case in the Court of appeal. The decision of that court is reported as Guardian Newspapers Ltd. v Attorney-General of the Federa- D tion (1995) 5 NWLR (pt.398) 703. There, Ayoola JCA in his concurring judgment observed at p.744:

"Decree No.107 of 1993 leaves no one in doubt that the prescribed means of exercising legislative powers, is by promulgation of Decrees. It follows that an instrument which is not made in exercise of E legislative powers of the Federation, cannot in substance be a 'Decree' under Decree No.107 of 1993 or be subject to such protection from challenge as Decree No.107 of 1993 or other relevant Decrees may provide even if such document purports to be a Decree. This, really is at the heart F of the submission of counsel on behalf of the appellants that 'the only type of instrument which can properly become a "Decree" by being expressed to be so by the Federal Military Government, is one whereunder that Government exercised its power to make laws.' In my view, that is G the correct position. A 'Decree' does not become one within the context of legislative Decrees merely because it is stated to be a 'Decree.' The test in determining whether it is a 'Decree' is whether it is in substance an exercise of legislative power".

I hold the view that this is a legal proposition that can hardly be H put in clearer terms. It deserves endorsement. (p. 1523 B)

Constitutional law - Grundnorm

7. It is of utmost importance that for the rule of law to survive and be amenable to judicial powers of the courts, the organic law or grundnorm established by the Military Government itself, by which it makes laws for the peace, order and good government of Nigeria, should not be controlled by the Decrees rolled out by it from time to time but rather it should control such Decrees. Any departure from the grundnorm should be by amendment of it. It would present a ridiculous legal conundrum for the courts if that were not so because judges would wake up from day to day to find to their discomfiture that they stand on mere sinking sand in the performance of their duty, neither able to apply the rule of law nor to maintain or define it. (p. 1525 F)

D Judicial precedent - Lakanmi case

8. One cannot run away from the fact that the decision in Lakanmi case was nullified by Decree No.28 of 1970. This result was specifically recognized by this court in Adejumo v Military Governor of Lagos State (1972) 1 All NLR (pt.1) 159. However, (a) one must try, no matter how difficult, to understand what was seriously against Lakanmi case; (b) it must be recognized that even though the decision in that case was nullified, some aspects of the law it applied remain valid; and (c) differences exist between the facts in Lakanmi case and the present case that demand a fresh approach to the issues now raised. I think two of the factors to be taken into account in treating Lakanmi case differently are contained to some extent in the argument proffered on behalf of the respondents by Chief Williams in their brief of argument and further in his oral argument before us at the hearing of this appeal. It was probably perceived that this court's decision in Lakanmi case had the tendency to challenge the very existence or base of the Federal Military Government. That may have prompted what can now be considered an over-reaction by the Gown Administration judging from the tenor of Decree No.28 of 1970 which followed. There was, again, the question whether three Decrees promulgated to validate the order of forfeiture of some properties as a result of an inquiry into the assets of public officers of the

Western State were themselves valid. This court regarded them as legislative judgments in that case. I think Chief Williams seems to have been prepared to accept in oral argument before us that when there has been a commission or tribunal of inquiry and there is a law (Decree) to give effect to the decision of the tribunal, that law may not quite be regarded B a legislative judgment. In the present case, there is no evidence that there was a tribunal which looked into the affairs of the respondents and whose decision was sought to be given legal backing and enforced. So on these two factors the decision in Lakanmi and what happened to it by way of C reaction by the Federal Military Government could be regarded as of peculiar circumstances. (pp. 1526 B/1528 D)

Constitutional law - Revolution

9. It seems it must be acknowledged that when there is a successful D abrupt change of government in a manner not contemplated by the Constitution, a revolution is deemed to have taken place. It follows that if such change was brought by the military, it is a military revolution even if it was a peaceful change. (p. 1528 C) E

Jurisdiction - Ouster

10. The Decree No.28 of 1970 is in pari material with Decree No.12 of 1994. There are many other earlier decisions of this court such as F Adamolekun v Council of University of Ibadan (1968) NMLR 253, Kanada v Governor of Kaduna State (1986) 4 NWLR (pt.34) 361, not to mention several recent decisions. In Adenrele Adejumo & Nigeria Construction Co. Ltd. v Col. Mobolaji Johnson (1974) All NLR (2nd edn. vol.1) 26 at G 30, this court said: "The Courts are precluded from making a decision to declare or an inquiry to declare on the validity or otherwise of a Decree or Edict, within the context of the definition in that Decree. Such a decision shall be null and void." (p. 1530 F)

Supreme Court - Previous decisions

11. In order to answer issues (iii) and (iv) above-stated in favour of the respondents, it will require revisiting those cases, and possibly overruling H

them. This court takes the position that that course will be taken only when it is invited to do so by the proper procedure. That procedure is provided for in Ord.6 r.5(4) of the Supreme Court Rules 1985 (as amended), which reads: "If the parties intend to invite the Court to depart from one of its own decisions, this shall be clearly stated in a separate paragraph of the Brief, to which special attention shall be drawn, and the intention shall also be restated as one of the reasons." See Adesokan v Adetunji (1994) 5 NWLR (pt.346) 540 at 562. That seems to be the well entrenched policy which cannot be ignored under any circumstances.

This court was not so invited in this case. The understanding is that in the absence of such procedure, there is no basis, unfortunately, for taking any decision contrary to what has been firmly pronounced on by this court in those cases; that is to say, in substance, to hold that Decree No.8 of 1994 is not valid and binding. As things are, it is. Therefore, Decree No.12 of 1994 effectively ousts the jurisdiction of the courts to entertain any action brought pursuant to the scheme and purpose of Decree No.8 of 1994. (p. 1530 H)

E
Ouster clause - Extent of

12. It is necessary to point out that Decree No.8 of 1994 was specifically directed at the first respondent, the aim being to proscribe its newspapers and magazines. That proscription did not affect the businesses of the 2nd to 6th respondents in any way. But the security agencies which effected the shutting down of Rutam House did not discriminate between the 1st respondent and the other respondents. They acted in a way to close down their respective businesses and did not bother that they were likely to suffer damage thereby. It is clearly indefensible to extend any ouster clause to prevent the court from entertaining their complaint that they were so damaged and therefore entitled to seek redress. (p. 1531 E)

H
Courts - Ouster clause

13. The courts have a duty to examine any ouster clause to determine its aim and purview. When the provisions of an ouster clause are unambiguous on any specific matter, the courts are bound to observe and

apply them: see Attorney-General of Lagos State v Dosunmu (1989) 3 NWLR (pt.111) 552 at 580-581. (p. 1532 A)

Jurisprudence - Law

14. It is true the learned Justice devoted some passages in his judgment to the jurisprudential aspect of positive law and natural law, particularly the general precept of natural law which stands for what is good and that if a law at any point departs from natural law, it is no longer law but a perversion of law. In the course of that, the learned Justice seems to want to judge the validity of a law on the basis of ethics, morality and religion. The learned Justice may, admittedly have gone far and away from the real issues. Somehow, I think it must be conceded that that proposition is not only wholly irrelevant but it cannot be considered right in the circumstances of this case. (p. 1532 C)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. The desirability of the judiciary upholding the rule of law

In order for the judiciary to perform its allocated functions under the constitution effectively and satisfactorily, it must be purposive in upholding the rule of law. It is its sacred responsibility to do so. I believe when the constitution, even in a military regime, which makes this possible remains unamended [I should emphasize formally amended], then it is legitimate to insist that the provisions of that constitution shall prevail. It is antithetical to the idea and practice of the rule of law for anyone to render the judiciary ineffective through any subterfuge, or by sheer exercise of absolute authority or by in terrorem posturing. It is even more so when a glittering facade of judicial independence is presented upon some identified grundnorm only to seek to protect every government action by ouster clause. We should be able to say, and I do say, that is not good for a country such as Nigeria which, in the words of Yaqub Ali, J, of the Supreme Court of Pakistan in Jilani v Government of Punjab, Pak L.D. (1972) S.C.139 at 219, being a perfectly good country was made a laughing stock", in the manner of undemocratic and unconstitutional gover-

nance impinging on the rule of law and human rights, when Pakistan found herself in similar circumstances as Nigeria. (p. 1519 A)

KARIBI-WHYTE JSC

B 2. *How to formulate issues for determination*

It has always been required in the formulation of issues for determination in an appeal for counsel not only to have regard but be confined within the parameters of the grounds of appeal filed. Issues should not be formulated to widen the scope of the grounds of appeal. The issues for determination as formulated by Respondent ignored the grounds of appeal and has raised issues much wider than is necessary for the determination of the appeal. (p. 1540 G)

D 3. *The meaning and determinant factor of jurisdiction*

It is well settled and our courts are replete with decided cases which have established the principle that the word jurisdiction means the authority which a court has to decide matters before it or to take cognizance of matters presented in a formal way for its decision - See Ndaeyo v. Ogunnaya (1977) 1 SC.11. The limits of this jurisdiction may be circumscribed or restricted by statute. See also National Bank v. Shoyoye (1977)5 SC.181. It is a fundamental principle of law that it is the claim of the Plaintiff which determines the jurisdiction of the Court -See Adeyemi v. Opeyori (1976) 6-10 SC.31. This is because it is the Plaintiff who invokes the constitutional right for a determination of his rights and accordingly the exercise of the judicial powers of the Constitution vested in the courts. It follows therefore that in determination of the issue of jurisdiction whether or not to entertain a claim, the applicable law is that which was in force at the time when the cause of action arose and not that which was in force when the issue of jurisdiction was raised - See Uwaifo v. A-G (1982) 7 SC.124. (p. 1546 F)

H

4. *The basis of preliminary objection*

Where the objection to the claim against the defendant in the writ, or originating summons on the grounds of law shows the claim to be pa-

tently unsustainable it would seem to me unnecessary to continue to hear evidence in the action. An application to dismiss the action on the grounds of want of jurisdiction would be granted. As was stated by this Court in Aina v. Trustees of Railway Corporation Pensions fund (1970) 1 ALL NLR. 281, "the whole basis of a demurer is in effect to short circuit the action and by a preliminary point of law to who that the action founded on the writ and statement of claim cannot be maintained" The idea clearly is for economy in judicial time and to reduce litigation expenses and avoid unnecessary litigation resulting in the abuse of the judicial time and to reduce litigation expenses and avoid unnecessary litigation resulting in the abuse of the judicial process. (p. 1548 E)

5. Separation of powers under Military Government

In the light of the foregoing analysis of the Decree No.107 of 1993, it is not easy to accept the contention of the Solicitor-General that the resulting modification of the Constitution 1979 has swept away the observance of the principle of separation of constitutional functions between the various departments as enshrined by the constitutional arrangement of the division and vesting of the exercise of constitutional functions. The vesting of judicial power separately in the Judicature is a cardinal feature of our Constitution which has survived successive revolutions. Even the provisions of Decree No.28 of 1970 in all its sweeping assertion of the revolutionary intention of the Military Government did not abrogate the separate vesting of the exercise of judicial power of the Constitution in the courts. It has been suggested that Decree No.28 of 1970 confirmed the abrogation of a separate judiciary. It did no such thing. The Federal Military Government opted to vest the judicial powers of the constitution in the Courts named. It has not made such a vesting of the exercise of the judicial powers subject to the exercise of its powers. The Federal Military Government has vested in itself the exercise of the legislative and the executive powers of the constitution. It is therefore limited in the exercise of constitutional powers to the legislative and executive powers so vested. (p. 1553 F)

6. Procedural predicates for the validity of a decree

Accordingly, the invalidity of the Decree No. 8 of 1994 cannot be founded on the ground that it was not the product of the Hon. Attorney-General's chambers and that it was not discussed and considered by the Provisional Ruling Council. These are no procedural predicates for the validity of a decree as stated under section 3(1) of decree 107 of 1993. I am satisfied and the learned Solicitor-General is on firm ground that as long as the Decree has been signed by the Head of State, Commander-in-Chief of the Armed Forces, there has been compliance with the provisions of section 3(1) of Decree No.107 of 1993, and there is a valid decree. (p. 1556 G)

WALI JSC

7. Reference to foreign cases in construing local statutes

This court does not need to refer to foreign cases in construing statutes peculiar to this country; its duty is to construe them in order to ascribe to the words therein their appropriate meaning and effect. (p. 1575 F)

ONU JSC

8. Duty of the court with regard to ouster clause

It should be pointed out, however, in relation to ouster, that it is not the law that once an ouster of jurisdiction clause is raised in any proceeding, the court must automatically throw in the towel, decline jurisdiction and proceed to strike out the suit. Unlike what the trial court did in the instant case on appeal, a court of competent jurisdiction where it is faced with an ouster clause, still has a duty to inquire into the issue to enable it to determine whether or not it has jurisdiction to entertain the action. (p. 1579 B)

IGUH JSC

9. Inconsistency between an Edict and a Decree

Although an action lies to challenge an Edict on the ground that it is inconsistent with the provisions of a Decree, no action lies to challenge a Decree on the ground that it is inconsistent with the provisions of the

Attorney-General Fed. v. Guardian Newspapers Ltd (1999) 5 KLR 1507
1979 Constitution or any other Law or Statute. See the Military Governor of Ondo State v. Victor Adewunmi, (supra) Onyiuke v. Eastern States Interim Assets and Liabilities Agency (1974) 1 All N.L.R. (Part 2) 151 etc. (p. 1595 D)

10. Grounds upon which the Supreme Court will depart from its previous decision B

Although this court, with the greatest hesitation, has the power to depart from or to overrule its previous decision, the onus is on the party seeking to have a previous decision of this court overruled to satisfy the court that there is need to do so. The grounds upon which the Supreme Court will depart from and overrule its previous decisions are, inter alia, where C

- (i) it is shown that the previous decision is erroneous in law; or
- (ii) the previous decision was given per incuriam; D

or

(iii) it is shown that the previous decision is contrary to public policy or occasioning miscarriage of justice or perpetuating injustice.

It is however recognized that each case must be decided on its own peculiar facts and circumstances so as, at any rate, to avoid the perpetuation of injustice as a result of the previous decision. See Odi v. Osafire (1985) 1 N.W.L.R. (part 1) 17 at 34 - 35, Cardoso v. Daniel (1986) 2 N.W.L.R. (Part 20) 1, Ifediorah v. Ume (1988) 2 N.W.L.R. (Part 74) 5, (p. 1595 E) F

REPRESENTATION

Mr. T. Onwugbufor SAN, Solicitor-General, Federal Ministry of Justice, with Chiesonu Okpoko Esq. Legal Officer, for the appellant. G
Chief F.R.A. Williams CFR, SAN, with F.R.A. Williams Jr. Esq., for the respondents.

CASES REFERRED TO H

Governor of Lagos State v Ojukwu (1986) 17 NSCC (pt.1) 304
Akanmi v. Attorney-General (Western State) (1970) 6 NSCC 143
Madzimbamuto v Lardner-Burke (1969) 1 A.C. 645 at 735-736

1508 Att-Gen. Fed. v. Guardian Newspapers (1999) 5 KLR Uwaifo JSC

Guardian Newspapers Ltd. v Attorney-General of the Federation (1995)
5 NWLR (pt.398) 703

Attorney-General of the Federation v Sode (1990) 1 NWLR (pt.128) 500
at 518

B Obada v Military Government of Kwara State (1990) 6 NWLR (pt.157)
482 at 497

Labiyi v Anretiola (1992) 8 NWLR (pt.258) 139 at 170-171

Adejumo v Military Governor of Lagos State (1972) 1 All NLR (pt.1) 159

The State v Dosso (1958) 2 P.S.C.R. 180 at 184

C Adejumo v Military Governor Lagos State (1972) All NLR (2nd edn.
vol.1) 164 at 173-174

Adamolekun v Council of University of Ibadan (1968) NMLR 253

Kanada v Governor of Kaduna State (1986) 4 NWLR (pt.34) 361

D Attorney-General of Lagos State v Dosunmu (1989) 3 NWLR (pt.111)
552 at 580-581

A-G of the Federation v. Sode (1990) 1 NWLR. (pt.128) 500 at p.518

Obade v Military Government of Kwara State (1990) 6 NWLR (pt.157)

E 482

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, SS.14 (2) (a), 230(i)
as amended Sch. 2 Parts I and II

F Constitution (Suspension and Modification) act, 1983 cap. 64, Laws of
the Federation of Nigeria, 1990; (Decree No. 1 of 1984); SS. 2, 3(i) and
17

G Constitution (Suspension and Modification) Decree No.107 of 1993; SS.
2 and 3 (i)

Supreme Court Rules 1985 (as amended) O.6 r.5(4)

Decree No. 28 of 1970; S. 1 (I) (2) and (3)

H LEAD JUDGMENT BY UWAIFO JSC

This appeal has raised what no doubt are fundamental constitutional issues of a rather difficult nature requiring very careful consideration. The appeal comes from a decision of the Court of Appeal, Lagos

Division, as contained in the judgments of Kalgo, Ayoola and Pats-Acholonu JJCA, given on 13 June, 1995. The type of questions for determination raised by both sides to the appeal reflects my characterization of the said issues.

On the part of the appellant the following three questions have been raised on this appeal: "1. Whether the court below was right in holding that Decrees Nos.8 and 12 of 1994 are not Decrees within the meaning of Decree No. 107 of 1993 and thus to declare the (said) Decrees null and void. Put the other way, can a court of law declare void a Decree for whatever reason? 2. If the answer to the above issue is in (the) affirmative, which is denied, whether the Court of Appeal was right to apply the concept of judicial legislation (sic), ethics, morality and religion to hold that Decrees Nos.8 and 12 of 1994 are not Decrees of the Federal Military Government and thus to declare it (sic: them) null and void. 3. Whether the court below was right in holding that the ouster clause in Decree No.8 of 1994, Decree No. 12 of 1994 and Decree No. 107 of 1993 did not operate to oust the jurisdiction of the court to determine this suit."

The respondents have set down four questions for the determination of the appeal as follows: " (i) What are the powers of a Sovereign Government which are exercisable by (a) the Federal Military Government and (b) the courts of law pursuant to the provisions of the Constitution (Suspension and Modification) Decree No. 107 of 1993. (ii) Whether the doctrine and principle of the Rule of Law is binding on the Federal Military Government in its operation of the Constitution of the Federal Republic of Nigeria, 1979, as modified or amended by Decree No. 107 of 1993 and other Decrees of the said Government. (iii) What is it that binds the courts of law to acknowledge an instrument made by the Federal Military Government as a Decree enacted in the exercise of the legislative powers of that Government. (iv) In the light of the answer to the foregoing, whether the judicial powers exercisable by the Federal High Court and other superior courts established by the aforementioned Constitution includes the jurisdiction to determine whether or not an instrument proclaimed by the Federal Military Government to be

a Decree is a Decree and therefore binding as law."

I have considered the five grounds of appeal filed by the appellants and will make a few prefatory observations. I am satisfied that the appellant did not frame any issue on ground 1. That ground reads:

B *"The learned Justices of the Court of Appeal erred in law when it was unanimously held:*

'We are here concerned with the legislative authority or powers of the Military Administration, not its executive. It is essential to separate the two for though the Provisional Ruling Council is vested in Federal with legislative powers and its exercise of executive powers is vested in Federal Executive Council, care must be taken in distinguishing the functions of the two bodies. It is therefore grave error of law in my opinion to use provision of section 6(1) to answer a question relating to legislative matters.'

D

PARTICULARS

The combined effect of sections 3(1), 4(1), 6(1) and (2) of the Constitution (Suspension and Modification) Decree No. 107 (1993) is to blur the distinction between the power of the Head of State, Commander-In-Chief of the Armed Forces to legislate and his actual exercise of his executive authority as section 10 of the same Decree which defines functions of the Provisional Ruling Council does not expressly or by any implication whatsoever vest the Provisional Ruling Council with any legislative power or determine the procedure for the exercise of such legislative power."

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The respondents, however, have dealt with that ground of appeal in their issue (i) and also, partially, issue (ii). The appellant raised issue 2 on ground 2 of the grounds of appeal. Ground 3 appears covered by appellant's issue 3 and respondents' issues (ii) and (iii). Ground 4 is treated in appellant's issue 1. This same ground 4 and also ground 5 would appear covered by respondent's issues (i), (ii), (iii), and (iv) while ground 5 is treated in respondents' issues (iv). The sequence can be seen as follows: each of appellant's issues 1 and 2 is treated as part of the respondents' issues (i) to (iv), while appellant's issue 3 can be more specifically seen as falling within respondents' issues (i) to (iv), while

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appellant's issue 3 can be more specifically seen as falling within respondents' issues and in the process answer, hopefully, the issues raised by the appellant.

I should at this stage state the relevant facts of this case. All six respondents carried on at all material times to this case their businesses in the premises known as Rutam House at Isolo Expressway, Lagos. They were (and are) different and separate businesses. Only the 1st respondent is engaged in the business of publishing Newspapers and Magazines. At about 12.10 a.m. in the early hours of Monday, 15 August, 1994, about 150 armed policemen entered the said Rutam House premises and ordered the employees of each of the respondents to leave the premises forthwith. No reasons were given. No warrant of any type or judicial order was produced to support this invasion of private premises, properties and rights. The 2nd respondent is a computer distribution and consultancy company, the 3rd respondent an engineering services company, the 4th respondent a merchandising and trading company, the 5th respondent a printing and packaging company while the 6th respondent is a management consultancy services company. The said Rutam House premises were sealed up and kept under armed guard.

The respondents then approached the Federal High Court to seek redress. They came under the fundamental rights procedure upon an application ex parte with a view to obtain a number of declaratory reliefs as to the constitutionality of the action of the police, a mandatory injunction, damages of N200 million on behalf of the 1st respondents and N50 million on behalf of each of the 2nd to 6th respondents. The Federal High Court presided over by Kolo, J, gave leave on 17 August, 1994 to the respondents to seek to protect their fundamental rights. On 30 August, 1994, Auta, J, sitting in the Federal High Court gave leave to the Inspector-General of Police to join as a respondent (defendant) to the action while the action itself was still before Kolo, J.

The present respondents say that somehow they sighted sometime in September, 1994 in the Federal Republic of Nigeria Official Gazette No.3 vol.81 dated 24 August, 1994 the following two enactments: (i) Guardian Newspapers and African Guardian Weekly Magazine (Pro-

scription and Prohibition From Circulation) Decree 1994 N0.8; and (ii) Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 No.12. The said Decree No.8 of 1994 was promulgated, on the face of it, on 14 August, 1994 (which was a Sunday) and Decree B No. 12 of 1994 on 24 August, 1994 but with the commencement date made retroactive from 18 November, 1993. As a result, the respondents applied for a determination of the questions whether the said Decrees No.8 and No. 12 of 1994 are Decrees of the federal Military Government and whether the proceedings to enforce the fundamental rights of the C respondents have accordingly abated.

The said questions which were raised in the amended summons filed in this connection were:

" (i) *Whether the instruments published as Decrees in the Federal Republic of Nigeria Official Gazette No.3 Volume 81 dated 24th August, 1994 are enactments or Decrees of the Federal Military Government.*

(ii) *Whether the proceedings herein or any portion thereof have E abated and become of no effect whatsoever as a result of the Guardian Newspapers and African Weekly Magazine (Proscription and Prohibition From Circulation Decree 1994 No.8 or as a result of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 No.12 or as a result of any other enactment or law relating to the jurisdiction F and powers of courts of law in general or the Federal High Court in particular."*

Arguments were canvassed as to the true status of Decrees No.8 and No.12 of 1994, i.e. whether they are enactments properly so-called to G qualify as Decree promulgated under the powers to legislate and/or whether they are legislative judgments in the sense that they inflicted punishment on individuals the way a judgment of a court or tribunal would (but after due proceedings).

H On 13 October, 1994, Kolo J, ruled that Decrees 8 and 12 of 1994 were enactments which were properly made by the Federal Military Government, and that the court lacked jurisdiction to entertain the said proceedings. The respondents appealed to the Court of Appeal which,

on 13 June, 1995, overruled Kolo, J, holding that the Inspector-General of Police was wrongly joined and that the Federal High Court had Jurisdiction to hear and determine the action. I have already set out the issues raised for determination on the appeal brought by the appellant against the judgment of the court below. I may only mention that there is no appeal against the decision on the joinder of the Inspector-General of Police.

Chief Williams SAN who presented the respondents' case, argued questions (i) and (ii) together. It is useful to reproduce here again the said questions, which are:

"(i) What are the powers of a Sovereign Government which are exercisable by (a) the Federal Military Government and (b) the courts of law pursuant to the provisions of the Constitution (Suspension and Modification) Decree No.107 of 1993.

(ii) Whether the doctrine and principle of the Rule of Law is binding on the Federal Military Government in its operation of the Constitution of the Federal Republic of Nigeria, 1979, as modified or amended by Decree No.107 of 1993 and other Decrees of the said Government."

The central argument advanced by the respondents is that the Military did not abolish the Judiciary. It took that course in order to ensure the maintenance of the Rule of Law as the foundation for the conduct and administration of public affairs in Nigeria. The relevance of the decision in Governor of Lagos State v Ojukwu (1986) 17 NSCC (pt.1) 304 was stressed and the prevailing grundnorm for the continued administration of Nigeria constitutionally and under the rule of law was identified by Chief Williams.

The further submission of Chief Williams is that the executive and legislative functions now concentrated in the hands of the executive should not be exercised in a manner to usurp the functions of the Judiciary so long as the said grundnorm remained unchanged. On the other hand, the learned solicitor-General, Mr. T. Onwugbufo SAN, submitted that the supremacy of a Decree has been finally acknowledged and accepted in several judicial decision in Nigeria. He argued that this has been demonstrated by ouster clauses precluding the court from questioning

the validity of a decree, by the fact that once a Decree is promulgated, it has superiority over the unsuspended sections of the Constitution and also that s.2(1) of Decree No.107 of 1993 gives power to the Federal Military Government to make laws for the peace, order and good government of Nigeria or any part thereof 'with respect to any matter whatsoever.' If I may say so, Mr. Onwugbufo's is the usual and familiar argument as to the inviolability of a Decree as a supreme instrument while Chief Williams' is not quite so having regard to what he considers the criteria and qualities of a Decree and I think that argument needs therefore to be carefully appraised and understood.

I must admit that the above-stated arguments represent a rather inadequate and perhaps wholly unfair abridgement of the very rich submissions by both learned senior advocates. I felt it would be inexcusable to make the bulk of this judgment submissions of counsel. I rather would allow their arguments to weigh, where necessary, upon the opinion I intend to express in this judgment, and I just hope I will be able to sufficiently reflect this for easy detection in the judgment.

There is no dispute any longer, since the promulgation of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 (Decree No.28 of 1970), that the Military Government of Nigeria came to power by way of a military revolution. That Decree was a reaction to and was meant for dousing the effect of the decision of this court in Lakanmi v. Attorney-General (Western State) (1970) 6 NSCC 143. I shall come back to that case later. I suppose it is the same in terrorem effect of Decree No.28 of 1970 that was rehashed in the federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 (Decree No.12 of 1994). Just as the Federal Military Government established under Decree No.1 of 1966 was with 'absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever' as also proclaimed by Decree No.28 of 1970, so did Decree No.107 of 1993 assert that claim. This is exactly what Decree No.12 of 1994 has done also. It is all by way of repetition or indeed duplication and recycling of the claim as to where the authority to make laws lies.

It is clearly also undisputed that military power is power seized in a military revolution. In particular, any military revolution which took place after the coming into effect of the 1979 Constitution, abrogated the whole pre-existing legal order except as to what was preserved under the relevant Constitution (Suspension B and Modification) Decrees, resulting in an "abrupt political change which was not within the contemplation of the Constitution of the Federal Republic of Nigeria, 1979." See, for example, the preamble to Decree No.12 of 1994. In other words, refraining from using C veiled terms, such military power is usurped power from the elected representatives to whom the people of Nigeria entrusted power democratically.

It has been argued that the power so usurped belongs still D to the people and ultimately resides in them, and that the usurper acts pursuant to the implied mandate of the people. In support of this, section 14(2)(a) of the 1979 Constitution which is unsuspended (and can hardly be suspended because of the unwanted implication of doing so) is cited as follows: E

"that sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority."

See The Nigeria Judiciary And Military Government by F.R.A. Wil- F liams SAN published in The Journal of Nigerian law 1995, Vol.2 No.2 pages 15-17. I think there is much force in that argument. In its real essence, it follows that even the usurper's power is derived from, or at any rate is tolerated by, the people whose sovereignty is G in a sense being undermined. I shall here quote a statement of advice by Hugo Grotius in his De Jure Belli ac Pacis, Bk I, Ch.1V, Sect.XV, as follows:

"We have spoken of him who possesses, or has possessed, the right of governing. It remains to speak of the usurper of power, not after H he has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a bind-

ing force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts."

See Madzimbamuto v Lardner-Burke (1969) 1 A.C. 645 at 735-736.

The extent to which such a usurper can exercise his powers is material to this, appeal. The learned Solicitor- General, Mr. Onwugbutor, has submitted quite tenaciously, that the extent of authority of the Federal Military Government covers powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever, placing full emphasis on the word 'whatsoever.' That would seem to include, as indeed canvassed by Mr. Onwugbutor, the power to make any law to usurp judicial functions by enacting legislative judgment in the guise of Decrees. While Chief Williams concedes that a military government may decide deliberately to extend its frontier of legislative powers, he has argued that once the Federal Military Government has defined the constitutional law framework under which it has shown an intention to govern, like Decree No.107 of 1993, it is expected to act within and obey its own said constitutional law.

For the present purposes, I shall use as point of reference the Constitution (Suspension and Modification) Act, 1983 Cap.64, Law of the Federation of Nigeria 1990, Vol. IV, more particularly known as Decree No.1 of 1984, and the Constitution (Suspension and Modification) Decree No.107 of 1993. **Decree No.107 of 1993 did not in any material way affect or differ from Decree No.1 of 1984. Section 17 of Decree No.1 of 1984 provides:**

17. All laws (other than any law to which section 16 of this Act applies) which, whether being a rule of law or a provision of an Act, a Decree or an Edict or of any other enactment or instrument whatsoever, was in force immediately before the commencement of this Act or made before that date but comes into force on or after the commencement of this Act, shall until that law is altered by an author-

ity having power to do so, continue to have effect as if made in exercise of the powers conferred by or derived under this Act."

(Emphasis is added by me.)

This provision, among other things, would appear to have preserved the rule of law as it existed before that said Act.

I agree with Chief Williams that one major reason for the Federal Military Government ensuring that judicial powers were left in the hands of the judiciary was to maintain the rule of law as a basis for the administration of public affairs. This raison d'etre is exemplified in some pronouncements of this court, notably in Governor of Lagos State v Ojukwu (supra) where Eso JSC said at p.310:

"By virtue of the Constitution (Suspension and Modification) Decree 1984 No.1 a good number of the provisions of the Constitution were suspended. Indeed, what was left was what had been permitted by the Federal Military Government to exist. All the provisions relating to the judiciary were saved. Section 6 of the Constitution, the most important provision, in so far as the institution known as the judiciary is concerned, which vests in courts the judicial powers of the Federation was left extant. The Military government had the power and still has to put an end to the existence of that provision. It has not done so, and that must have been advisedly for it does intend that rule of law should pervade. It is the clearest indication against rule by tyranny, by sheer force of arms against a presumption subjecting the nation to the rule of might as against rule of right."

And at pp 313-314, Obaseki JSC observed:

"The Nigerian Constitution is founded on the rule of law the primary meaning of which is that every thing must be done according to law. It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary power which Coke colourfully spoke of as 'golden and straight metwand of law as opposed to the uncertain and crooked cord of discretion' (see 4 Inst.41). More relevant to the case in hand, the rule of law means that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive

The judiciary cannot shirk its sacred responsibility to the nation to maintain the rule of law. It is both in the interest of the government and all persons in Nigeria."

The amendment introduced by Decree No.107 of 1993 to section 230(1) of the 1979 Constitution lists a number of causes and matters over which the Federal High Court shall have and exercise exclusive jurisdiction. I shall direct attention to three of such causes and matters as they are, in my view, relevant to the present case. Section 230(1) in relation to the said causes and matters reads:

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

.....

(q) the administration or the management and control of the Federal Government or any of its agencies;

(r) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

(s) any action or proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies: Provided that nothing in the provisions of paragraphs (q), (r) and (s) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law and equity."

These are powers conferred specifically on the Federal high Court as part of its jurisdiction under a constitution promulgated by the Federal Military Government itself. Under those powers, the respondents would have unimpeded access to the Federal High Court to seek redress for the alleged injuries they suffered through the action of the Federal Military Government (or its agency). Incidentally, the reliefs sought in the present

case include a number of declarations, an injunction and damages which directly fall within the jurisdiction of the Federal High Court under s.230(1)(s) above-stated.

In order for the judiciary to perform its allocated functions under the constitution effectively and satisfactorily, it must be purposive in upholding the rule of law. It is its sacred responsibility to do so. I believe when the constitution, even in a military regime, which makes this possible remains unamended [I should emphasize formally amended], then it is legitimate to insist that the provisions of that constitution shall prevail. It is antithetical to the idea and practice of the rule of law for anyone to render the judiciary ineffective through any subterfuge, or by sheer exercise of absolute authority or by in terrorem posturing. It is even more so when a glittering facade of judicial independence is presented upon some identified grundnorm only to seek to protect every government action by ouster clause. We should be able to say, and I do say, that is not good for a country such as Nigeria which, in the words of Yaqub Ali, J, of the Supreme Court of Pakistan in Jilani v Government of Punjab, Pak L.D. (1972) S.C.139 at 219, being a perfectly good country was made a laughing stock", in the manner of undemocratic and unconstitutional governance impinging on the rule of law and human rights, when Pakistan found herself in similar circumstances as Nigeria.

Again, to examine Mr. Onwugbufo's submission that the Federal Military Government has power to make laws in respect of any matter whatsoever, I shall refer to the relevant provisions of s.2 of the Decree No.1 of 1984. The statement of the law relied on by Mr. Onwugbufo can be found there. The said s.2 is in pari materia with s.2 of Decree No.107 of 1993. That shows some measure of consistency on the part of the Federal Military Government to define its power in the area of law-making. The marginal note to that section reads: 'Powers of the Federal Military Government and Military Governors (Administrators) of States to make Laws.' Section 2 in both the said Decrees reads inter alia (to be read mutatis mutandis where necessary) as follows:

"2(1) The Federal Military Government shall have power to make laws for peace, order and good government of Nigeria or any part

thereof with respect to any matter whatsoever.

(2) *The Military Governor of a State -*

(a) *shall not have power to make laws with respect to any matter included in the Exclusive Legislative List; and*

B (b) *except with the prior consent of the Federal Military Government, shall not make any law with respect to any matter in the Concurrent Legislative Powers set out in the second column of Part 11 of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1979.*

C (6) *The question whether a law made by the Military Governor of a State with respect to a matter included in the Concurrent Legislative List relating to Federal Legislative Powers was made with the consent required by subsection 2(b) of this section shall not be enquired into in*
D *any court of law.*

(7) *In this section, 'the Exclusive Legislative List' and 'the Concurrent Legislative List' have the same meanings as in the Constitution of the Federal Republic of Nigeria 1979."*

E I must here note a few salient matters arising from the said Decree No.1 of 1984 now known as the Constitution (Suspension and Modification) Act (hereinafter called the Act) whose commencement date is 31 December, 1983, the day of the military coup d'etat which removed the democratically elected government. First,
F the long title of the Act reads:

"An Act to set out the basic framework for the government of the Federal Republic of Nigeria and its component States as from the 31st of December, 1983 under a Federal Military Government; and to
G *provide for the suspension from operation of some of the provisions of the Constitution of the Federal Republic of Nigeria 1979."*

It is therefore clear that this Act and Decree No.107 of 1993 whose commencement date is 17 November, 1993, the day another military coup d'etat took place, form the basic constitutional framework for the operation of the government of Nigeria. I think these two laws have been rightly regarded as the grundnorm. Second,
H reference is made to Exclusive Legislative List and Concurrent Legisla-

tive List. As is well-known, these are terms used to delimit the matters over which the Central and Regional (or State) Governments can legislate. Such matters are listed out. Hence there is the Exclusive Legislative List which, in our case, is for the Central (or Federal) Government and the Concurrent Legislative List for both Federal Government has deliberately defined its legislative powers with reference to the Exclusive and Concurrent legislative Lists as set out in the 1979 Constitution. Third, s.2(7) specifically assigns to the said List the same meaning of Exclusive and Concurrent Legislative Lists as in the 1979 Constitution. The Legislative List are mentioned under legislative powers, i.e. s.4: the Exclusive Legislative List is set out in Part 1 of the Second Schedule to the Constitution while the Concurrent Legislative List is in Part 11 thereof. Both Lists are quite comprehensive, the Exclusive List covering 67 items, the last two which are general in nature being:

"66. Any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitution.

67. Any matter incidental or supplementary to any matter mentioned elsewhere in this list."

Even these two general provisions do not apply to transcend the overall frontier of the other items. There is an obvious limits to the said legislative powers under the Exclusive List. The Concurrent Legislative List has 12 items specifically named.

It is note-worthy that none of the items in both Exclusive and Concurrent Lists remotely suggests any right of intrusion into judicial functions or powers vested in the courts under s.6(6) (b). The said powers are more particularly spelt out in Chapter V11 under the Judicature, as amended by subsequent legislations such as Decree No.107 of 1993. As already shown, s.230 which deals with the jurisdiction of the federal High Court has been amended by Decree No.107 of 1993 to give that court, among others, the power to exercise exclusive jurisdiction in civil causes and matters arising from "any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision of the federal Government or any of its agen-

cies" including the right to seek redress in an action for damages where the action is based on any enactment, law or equity.

It seems to me that the power of the Federal Military Government to legislate on 'any matter whatsoever' must be the power in respect, and within the allowable purview, of the items whatsoever in the Exclusive and Concurrent Legislative Lists. The Federal Military Government itself has set out the basic constitutional framework for the government of Nigeria by those organic Act and Decree already examined above, in the sphere of its legislative powers including any matter incidental or supplementary to any matter mentioned in the Exclusive Legislative List. It will, in the circumstances, be stretching the limits of constitutionality beyond breaking point to content, as Mr. Onwugbufo appeared to have done, that 'whatsoever' extends to any matter whatever it may be. How could a Decree be defended, for example, if it were to prohibit a named family in Nigeria from worshipping the Almighty God? That would mean the power to ignore at will the 'basic constitutional framework' already mentioned and be able to saddle the populace with any proclamation in a destructive manner. I think it is a valid argument that that would no longer be the way of making laws for the peace, order and good government of Nigeria but tyranny by an absolute despot, ruling as conqueror of a people. I do not think that would be in consonance with the spirit and letter of Decree No.107 of 1993.

Section 3(1) of the Act and Decree No.107 of 1993 provides that: "The Power of the Federal Military Government to make laws shall be exercised by means of Decrees signed by the President (Head of State), Commander-in-Chief of the Armed Forces." So it must be expected that an instrument signed by the Head of State, Commander-in-Chief of the Armed Forces will be a Decree when it is in furtherance of a law made under the legislative powers of the Federal Military Government. As has been shown, the items in respect of which the Federal Military Government can legislate are contained in the Exclusive and Concurrent Legislative Lists. From a constitutional

stand-point, an argument that an instrument signed by the Head of State which purports to legislate in respect of a matter not within the purview of the existing Exclusive or Concurrent Legislative List, more so if it usurps the function of the courts, cannot qualify as a Decree, needs to be thoroughly given a second look.

I think this very point was given appropriate consideration in the present case in the Court of appeal. The decision of that court is reported as Guardian Newspapers Ltd. v Attorney-General of the Federation (1995) 5 NWLR (pt. 398) 703. There, Ayoola JCA in his concurring judgment observed at p.744:

"Decree No.107 of 1993 leaves no one in doubt that the prescribed means of exercising legislative powers, is by promulgation of Decrees. It follows that an instrument which is not made in exercise of legislative powers of the Federation, cannot in substance be a 'Decree' under Decree No.107 of 1993 or be subject to such protection from challenge as Decree No.107 of 1993 or other relevant Decrees may provide even if such document purports to be a Decree. This, really is at the heart of the submission of counsel on behalf of the appellants that 'the only type of instrument which can properly become a "Decree" by being expressed to be so by the Federal Military Government, is one whereunder that Government exercised its power to make laws.' In my view, that is the correct position. A 'Decree' does not become one within the context of legislative Decrees merely because it is stated to be a 'Decree.' The test in determining whether it is a 'Decree' is whether it is in substance an exercise of legislative power".

I hold the view that this is a legal proposition that can hardly be put in clearer terms. It deserves endorsement. At page 754, the learned Justice said further:

"In this case even if the two instruments (Decrees No.8 and No.12 of 1994) are effective as Decrees, the Federal High Court ought not to have declined jurisdiction at the stage it did without further inquiry. Ouster of the jurisdiction of a court does not preclude it from exercising jurisdiction to interpret the ouster clause itself or to determine whether or not the action in question comes within the scope of power of authority

conferred by the enabling statute.

Be that as it may, it is sufficient to dispose of this appeal in the ground that the instrument which is not an exercise of legislative power is not a Decree within the provisions of Decree No.107 of 1993."

- B The learned Solicitor-General referred, in the appellant's brief, to the second paragraph of the above-quoted passage and argued that in effect it challenged the validity of Decree No.8 of 1994. He then asked whether a court was competent to challenge the validity of a Decree or to declare it void or unenforceable. He answered this upon the contention as to the superiority of a Decree over the Constitution by saying that 'the Courts are not competent to pronounce on the question as to whether or not a Decree or an Edict has been validly made', citing in support such cases as Attorney-General of the Federation v Sode (1990) 1 NWLR (pt.128) 500 at 518; Obada v Military Government of Kwara State (1990) 6 NWLR (pt.157) 482 at 497; and Labiya v Anretiola (1992) 8 NWLR (pt.258) 139 at 170-171.

I do not think the legislative competence or capacity of the Head of State to enact a Decree is what is the foundation of Chief Williams' argument. Another authority relied on by the learned Solicitor-General is the pronouncement of Nnaemeka-Agu JSC in Labiya v Anretiola (Supra) at 170-171. It is, in my view, a relevant observation if care is taken to understand and analyze it. Said the learned Justice:

"The organic Decree, in this case No.1 of 1984 [also later Decree No.107 of 1993], set out to define the organic law or grundnorm of Nigeria. Subject to its provisions it gave unlimited legislative powers to the Armed Forces Ruling Council and so it has power even to amend the organic Decree by subsequent Decrees To give effect to the intendment of this legislative scheme, the organic Decree left unsuspended section 6 (6)(b) of 1979 Constitution which gives judicial powers to the courts"

H (Parenthesis added by me)

It is to be noted that I have already shown the ramifications of Decree No.1 of 1984 even in relation to the Exclusive and Concurrent Legislative Lists to which the legislative powers of the Federal Military

Government are tied. Subject to that Decree (and Decree No.107 of 1993) which nnaemeka-Agu JSC rightly regarded, in my view, as the organic law or grundnorm, the Federal Military Government has unlimited legislative powers in the sense earlier explained. The learned justice also said that the Federal Military Government has power to amend that organic law. As to this, there can be no dispute. I think Chief Williams conceded that much but argued, and rightly so, that until that organic law was amended, the courts must, in their duty to abide by the rule of law, hold that the Federal Military Government is bound by the said organic law which it has laid down. I have already demonstrated that in Government of Lagos State v Ojukwu (supra) views have been expressed that the Military Government preserved the judicial powers of the courts with the intention that the rule of law should pervade our daily life, particularly in our encounter with governmental actions and that the judiciary cannot therefore shirk its sacred responsibility to the nation to maintain the rule of law. This brings into focus once again what Eso JSC said in Garba v Federal Civil Service Commission (1988) 19 NSCC (pt.1) 306 at 320 about the rule of law under the Military Government of Nigeria that:

"The rule of law knows no fear. It is never cowed down; it can only be silenced. But once it is not silenced by the only arm that can silence it, it must be accepted in full confidence to be able to justify its existence."

It is of utmost importance that for the rule of law to survive and be amenable to judicial powers of the courts, the organic law or grundnorm established by the Military Government itself, by which it makes laws for the peace, order and good government of Nigeria, should not be controlled by the Decrees rolled out by it from time to time but rather it should control such Decrees. Any departure from the grundnorm should be by amendment of it. It would present a ridiculous legal conundrum for the courts if that were not so because judges would wake up from day to day to find to their discomfiture that they stand on mere sinking sand in the performance of their duty, neither able to apply the rule of law nor to maintain or define it.

The learned Solicitor-General has made copious reference to the decision of this court in Lakanmi v Attorney-General (West) (1970) 6 NSCC 143 and Decree No.28 of 1970 made to nullify it. He has relied on the effect of the side Decree which he says has been re-enacted in Decree No.12 of 1994. Chief Williams has also quoted extensively from the decision in Lakanmi case. **One cannot run away from the fact that the decision in Lakanmi case was nullified by Decree No.28 of 1970. This result was specifically recognized by this court in Adejumo v Military Governor of Lagos State (1972) 1 All NLR (pt.1) 159. However, (a) one must try, no matter how difficult, to understand what was seriously against Lakanmi case; (b) it must be recognized that even though the decision in that case was nullified, some aspects of the law it applied remain valid; and (c) differences exist between the facts in Lakanmi case and the present case that demand a fresh approach to the issues now raised.**

I think two of the factors to be taken into account in treating Lakanmi case differently are contained to some extent in the argument proffered on behalf of the respondents by Chief Williams in their brief of argument and further in his oral argument before us at the hearing of this appeal. I shall reproduce the relevant portion of the brief of argument as follows:

"The decision of the Supreme Court in Lakanmi's case was based upon the assumption that the handover of the Administration to General Ironsi in January 1966 was based upon the facts publicly disclosed to the Nation as subsequently published in the Official Gazette. The Supreme Court concluded that the legislative and executive powers exercisable by the Federal Military Government following the events of January and July 1966 were limited to powers exercisable in accordance with the doctrine of necessity and were therefore not absolute. The Court held in addition that the Decree challenged by Lakanmi was void, not only on the ground that it cannot be supported by consideration of the necessity of the occasion of its enactment but also on the ground that it was a legislative judgment. The recital to the Decree enacted by the Gown Administration in its reaction to the Supreme Court judgment contradicted

the assumption of the Supreme Court that the Military took power in 1966 on the invitation of the legitimate Government of the Nation and positively claimed that the Military took power by revolution which occurred in July of the same year. It is submitted as a matter of law that General Gowon's action and pronouncement as contained in the recital to Decree No.28 of 1970 effectively resulted in a complete break or disruption of the legal order prevailing before the Supreme Court Judgment. It cannot reasonably be disputed that from that time onwards the Decrees of the Federal Military Government were no longer limited by considerations of the doctrine of necessity. In that sense, the Supreme Court decision in Lakanmi ceased to be binding on the Gowon Administration in so far as it was decided that the legislative powers exercisable by the Federal Military Government was limited by consideration of the doctrine of necessity."

One aspect that stands out clearly from the above-quoted passage is that this court proceeded on an assumption which turned out to be unacceptable to the Military Government, namely, that what took place in Nigeria in 1966 was not a revolution. It must now be conceded, I think, that it was obviously a presumption, factually and legally, which other jurisdictions would find difficult to make. A similar situation had earlier occurred in or before 1958 in Pakistan, and in The State v Dosso (1958) 2 P.S.C.R. 180 at 184, Muhammed Munir CJ, said:

"It sometimes happens that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order."

Even more instructive is what happened in Uganda on which occasion, at a later period, Sir Udo Udoma CJ of Uganda had this to say in Uganda v Commissioner of Prisons, Ex Parte Matovu (1966) E.A. 514 at 535:

" we hold, that the series of events, which took place in Uganda from February 22 to April, 1966, when the 1962 Constitution was abolished in the National Assembly and the 1966 Constitution adopted

in its place, as a result of which the then Prime Minister was installed as Executive President with power to appoint a Vice-President could only appropriately be described in law as a revolution. These changes had occurred not in accordance with the principle of legitimacy. But deliberately contrary to it. There were no pretensions (sic) on the part of the Prime Minister to follow the procedure prescribed in the 1962 Constitution in particular for the removal of the President and the Vice-President from office. Power was seized by force from both the President and the Vice-President....."

For the two passage from both judgments, see Madzimbamuto v Lardner-Burke (supra) at pages 724, 725. **It seems it must be acknowledged that when there is a successful abrupt change of government in a manner not contemplated by the Constitution, a revolution is deemed to have taken place. It follows that if such change was brought by the military, it is a military revolution even if it was a peaceful change.**

It was probably perceived that this court's decision in Lakanmi case had the tendency to challenge the very existence or base of the Federal Military Government. That may have prompted what can now be considered an over-reaction by the Gown Administration judging from the tenor of Decree No.28 of 1970 which followed. There was, again, the question whether three Decrees promulgated to validate the order of forfeiture of some properties as a result of an inquiry into the assets of public officers of the Western State were themselves valid. This court regarded them as legislative judgments in that case. I think Chief Williams seems to have been prepared to accept in oral argument before us that when there has been a commission or tribunal of inquiry and there is a law (Decree) to give effect to the decision of the tribunal, that law may not quite be regarded a legislative judgment. In the present case, there is no evidence that there was a tribunal which looked into the affairs of the respondents and whose decision was sought to be given legal backing and enforced. So on these two factors the decision in Lakanmi and what happened to it by way of reaction by the Federal

Military Government could be regarded as of peculiar circumstances.

Having regard to what I have discussed so far, I consider I should now set out the respondents' issues (iii) and (iv) again. They read:

"(iii) *What is it that binds courts of law to acknowledge an instrument made by the Federal Military Government as a Decree enacted in the exercise of the legislative powers of that Government.* B

(iv) *In the light of the answer to the foregoing, whether the judicial powers exercisable by the Federal High Court and other superior courts established by the aforementioned Constitution includes the jurisdiction to determine whether or not an instrument proclaimed to be a Decree is a Decree and therefore binding as law."* C

It is hardly necessary to explain that these questions do not involve a challenge by the court to the power of the Federal Military Government to make a Decree in the exercise of its legislative power. D But the difficulty in answering these issues is obvious from the position this court has consistently maintained that no court in Nigeria has jurisdiction to investigate the purview of a Decree with the intention of deciding whether it is valid, operative, or null and void. In Adejumo v Military Governor Lagos State (1972) All NLR (2nd edn. vol.1) 164 at 173-174, Coker JSC, delivering the judgment of this court, said: E

"We are not in any doubt as to the meaning and effect of the Federal Military Government (Supremacy and Enforcement of Powers) F Decree, 1970 (No.28 of 1970). We think that briefly speaking that Decree consists of two parts or divisions the first part including the preamble ends at section 1(1). That section confirms the preamble and gives it legislative effect. The second part consists of section 1(2) to the end of the Decree and that part is designed to ensure that 'any decision G by any court of law which has purported to declare or shall hereafter purport to declare the invalidity of any Decree or of any Edict shall be null and void.....'. Learned counsel for the appellant had referred us to the definition of 'Decree' in section 1(3) (b) H of Decree No.28 of 1970 and has argued that although the respondent's Order No.13 of 1969 may be instrument within that definition yet it could not get the protection which the Decree generally guarantees unless it is

an Order made 'by or under such Decrees or Edict.' The argument clearly overlooks quite a lot of other matters which must be considered alongside with it. The first and perhaps the most important of these is implicit in the Decree No.28 of 1970 itself. The first part of the Decree, as we have already observed, establishes and otherwise confirms the already existing ouster of the jurisdiction of courts of law in respect of a Decree or an Edict or other cognate acts in law comprehended by the definition section, that is to say section 1(3). With respect to the second part of Decree No.28 of 1970 even if it be arguable and indeed argued that that part assumes the possibility of a court assuming jurisdiction with respect to one or the other of the matters envisaged on the ground of manifest excess or incompetence or other type of invalidity (and we make no pronouncement on this point), that part declares (and this is the word used and presumably deliberately so used) any such pronouncement in exercise of such assumed jurisdiction and having the tendencies therein described to be null and void.

Clearly the result of all this exercise is that we cannot hear this appeal. The judgment of the High Court, Lagos was given before the promulgation of Decree No.28 of 1970 and if it had pronounced against the validity or competence of the respondent's Order No.13 of 1969 we entertain no doubt that it would by virtue of the second division of Decree No.28 of 1970 be null and void."

The Decree No.28 of 1970 is in pari material with Decree No.12 of 1994. There are many other earlier decisions of this court such as Adamolekun v Council of University of Ibadan (1968) NMLR 253, Kanada v Governor of Kaduna State (1986) 4 NWLR (pt.34) 361, not to mention several recent decisions. In Adenrele Adejumo & Nigeria Construction Co. Ltd. v Col. Mobolaji Johnson (1974) All NLR (2nd edn. vol.1) 26 at 30, this court said: "The Courts are precluded from making a decision to declare or an inquiry to declare on the validity or otherwise of a Decree or Edict, within the context of the definition in that Decree. Such a decision shall be null and void." In order to answer issues (iii) and (iv) above-stated in favour of the respondents, it will require revisiting those cases,

and possibly overruling them. This court takes the position that that course will be taken only when it is invited to do so by the proper procedure. That procedure is provided for in Ord.6 r.5(4) of the Supreme Court Rules 1985 (as amended), which reads: "If the parties intend to invite the Court to depart from one of its own B decisions, this shall be clearly stated in a separate paragraph of the Brief, to which special attention shall be drawn, and the intention shall also be restated as one of the reasons." See Adesokan v Adetunji (1994) 5 NWLR (pt.346) 540 at 562. That seems to be the well entrenched policy which cannot be ignored under any circumstances. This court was not so invited in this case. The understanding is that in the absence of such procedure, there is no basis, unfortunately, for taking any decision contrary to what has been firmly pronounced on by this court in those cases; that is to say, in D substance, to hold that Decree No.8 of 1994 is not valid and binding. As things are, it is. Therefore, Decree No.12 of 1994 effectively ousts the jurisdiction of the courts to entertain any action brought pursuant to the scheme and purpose of Decree No.8 of 1994. E

It is necessary to point out that Decree No.8 of 1994 was specifically directed at the first respondent, the aim being to proscribe its newspapers and magazines. That proscription did not affect the businesses of the 2nd to 6th respondents in any way. But F the security agencies which effected the shutting down of Rutam House did not discriminate between the 1st respondent and the other respondents. They acted in a way to close down their respective businesses and did not bother that they were likely to suffer damage thereby. It is clearly indefensible to extend any ouster clause G to prevent the court from entertaining their complaint that they were so damaged and therefore entitled to seek redress. Mr. Onwugbufor conceded that they would be against the 1st respondent and not the appellant. With due respect, I consider that contention not H only without merit but ridiculous. The 1st respondent (even if it had been considered it offended the Government by its publications) cannot be seen to have done anything against the 2nd-6th respondents either in

contract or tort which would support a cause of action in their favour against it. **The courts have a duty to examine any ouster clause to determine its aim and purview. When the provisions of an ouster clause are unambiguous on any specific matter, the courts are bound to observe and apply them: see Attorney-General of Lagos State v Dosunmu (1989) 3 NWLR (pt. 111) 552 at 580-581.**

It is by now clear, I think, how questions (i) and (iii) by the respondents have been answered. Questions (ii) is answered in partial affirmative in view of the rights the 2nd-6th defendants can still pursue. Issue (iv) is answered in the negative. As for issue I for determination raised by the appellant, it is answered in the negative also.

Issue 2 refers to some of the observations of Pats-Acholonu JCA in the present case. **It is true the learned Justice devoted some passages in his judgment to the jurisprudential aspect of positive law and natural law, particularly the general precept of natural law which stands for what is good and that if a law at any point departs from natural law, it is no longer law but a perversion of law. In the course of that, the learned Justice seems to want to judge the validity of a law on the basis of ethics, morality and religion. The learned Justice may, admittedly have gone far and away from the real issues. Somehow, I think it must be conceded that that proposition is not only wholly irrelevant but it cannot be considered right in the circumstances of this case.**

I have come to the conclusion that this appeal against the decision of the lower court given on 13 June, 1995 succeeds in part and accordingly I uphold it as far as it concerns the 1st respondent. I hereby hold that the Federal High Court has jurisdiction to entertain this action in regard to the claim of the 2nd-6th respondents and therefore order that the action be remitted to the trial court to be heard by a judge other than Auta J or Kolo J. There shall be no order for costs.

KARIBI-WHYTE JSC

I had the privilege of reading the draft of the judgment of my learned brother Uwaifo, JSC in this appeal. I agree entirely with his reasoning and the conclusion that this appeal succeeds in part. I have despite the very full reasons given by my brother Uwaifo, JSC in his judgment decided to state my views in extenso because of the approach I have adopted in arriving at the same conclusion. This is an appeal by the Hon. Attorney-General for the Federation of Nigeria, against the judgment of the Court of Appeal of the 13th June, 1995 which set aside the decision of Kolo J of the Federal High Court, Lagos dated 13th October, 1994.

The Facts.

The facts which are undisputed are simple and uncomplicated. Concisely stated they are as follows. At about 0.10 a.m. in the early hours of the 15th August, 1994 a number of armed men variously put at 100-150 entered the premises of Rutam House, Isolo Road, Osodi Expressway, and forcibly ordered all the employees of each of the applicants, now Respondents to vacate premises immediately. It is also stated that the armed men thereafter conducted an extensive search of the premises. The applicants and their employees were prevented from gaining further access by a number of armed men stationed at the premises.

On the 16th August, 1996, Respondents herein, as applicants came by way of a motion to the Federal High Court, seeking the enforcement of their fundamental rights, pursuant to Order I rule 2(1) Fundamental Rights (Enforcement Procedure) Rules. The affidavit in support of the application deposed to, the fact that no Judicial or Executive Warrant had been produced ordering the sealing up of the said premises. It was stated that about 15 armed men were left behind preventing anyone from gaining access into the building. About 900 workers of the applicants were being prevented from going to their offices at Rutam House. A further 1,800 workers nation wide were being prevented from performing their duties as a result of the forceful closure. It was deposed that no reasons were given for this action claimed to be costing the Guarding Newspapers the loss of N1.2 million which it makes daily. All the

Respondents had their offices at Rutam House, Isolo Road, Osodi Express Way.

In addition, applicants took out an originating summons seeking a determination.

B (1) Whether the Inspector-General of Police or any of the
officers or men under his command has or can lawfully be authorized to
exercise power to enter the premises where each of the applicants carry
on business, order out or otherwise evict all the employees representa-
tives or licences of each of the Applicants from the said premises and
C prevent such employees or licences from exercising the right of egress
from or ingress into the said premises without informing any of them of
the reasons for doing so or without producing any executive or judicial
warrant or order lawfully authorizing him to do so.

D Applicants further claim the following declarations, mandatory
injunction and damages.

"1. Seek the determination of the Court of the following ques-
tion namely, whether the Inspector-General of Police or any of the offic-
E ers or men under his command has or can lawfully be authorized to
exercise power to enter the premises where each of the Applicants carry
on their various businesses, order out or otherwise evict all the employees
representatives from the said premises and prevent such employees repre-
F sentatives or licences from exercising the right of egress from or ingress
into the said premises without informing any of them of the reasons for
doing so or without producing any executive or judicial warrant or order
lawfully authorizing him to do so?"

G 2. The Applicants also claim against the respondent the follow-
ing reliefs -

(i) a declaration that the forcible taking of possession of the
office equipments, stationery, office furniture and other movable proper-
ties belonging to each of the Applicants herein by officers and men of the
H Nigeria Police in the early hours of Monday the 15th day of August,
1994 at Rutam House Isolo Expressway is illegal and made in contraven-
tion of the Right guaranteed to each Applicant under Section 40(1) of
the Constitution of the Federal Republic of Nigeria;

(ii) *A declaration that the eviction of all officers and employees of the 1st Applicant from their place of work at Rutam House Isolo Expressway by the officers and men of the Nigeria Police is unconstitutional and a violation of the right guaranteed to the 1st Applicant under Section 36(1) of the Federal Republic of Nigeria;*

(iii) *A declaration that the eviction of all officers, employees, licences and invitees of each of the Applicants from the premises at Rutam House Isolo Expressway as well as the action of the officers and men of the Nigeria Police Force in preventing such officers, employees, licensees and invitees from exercising the right of liberty of ingress into and egress out of the aforesaid premises constitutes a contravention of the right guaranteed to each applicant under Section 40(1) of the Constitution of the federal Republic of Nigeria and further and in the alternative Article 14 of the African Charter on Human and People's Right (Ratification and Enforcement) Act;*

(iv) *A declaration that the action of officers and men of the Nigeria Police in (a) forcibly entering the premises of the 1st Applicant at Rutam House Isolo expressway where it carries on business as owner of Newspapers and Magazines and (b) in preventing the employees licensees and invitees of the 1st Applicant from exercising the right of ingress into and egress out of the aforesaid premises is illegal and a violation of the Right guaranteed to the 1st Applicant under Section 36(1) of the Constitution of the Federal Republic of Nigeria;*

(v) *An order of Mandatory Injunction directing all officers and men of the Nigeria Police Force and all other officers or agents of the Federal Government from preventing or continuing to prevent the employees licensees and invitees or any of the Applicants to this action from exercising their right of ingress into or egress out of the premises known as Rutam House Isolo Expressway;*

(vi) *Damages in favour of the 1st Applicant in the sum of N200 million comprising exemplary (or alternatively, aggravated) damages as well as compensatory damages estimated as N1.2 million/day until the release of the said premises and properties thereon to the 1st Applicant;*

(vii) *Damages in the sum of N50 million to each of the 2nd to*

6th Applicants representing exemplary (or alternatively, aggravated) damages for the loss caused to each of them."

The Federal High court heard the application ex parte, and granted the orders sought.

B By an order dated 17th August, 1994 the Federal High Court also granted leave to Applicants to enforce their Fundamental rights in terms of the originating summons. The order stayed and further action on the part of Law Enforcement Agencies thereby maintaining the status quo
C ante before the encroachment on the premises by the Police. The substantive action in the originating summons was adjourned to Monday the 22nd August, 1994 for hearing. Notice was accordingly given to the Attorney-General of the federation.

D On the 17th August, 1994, Applicants herein Respondents brought a motion on Notice seeking an order for interlocutory injunction against the Inspector-General of Police. The relief sought was for

(i) restraining the Inspector-General of Police and all officers and agents of the Federal Government from retaining possession or control of the office equipments, stationery, office furniture and other movable properties belonging to each of the Applicants herein pending the hearing and determination of the above action;

(ii) restraining the Inspector-General of Police and all officers
F and men under his command and all other officers and agents of the Federal Government from preventing or continuing to prevent in any way or manner whatsoever or howsoever the employees, licensees and invitees of any of the Applicants to this action from exercising their right of ingress into or egress out of the premises known as Rutam House,
G Isolo Expressway, Lagos, pending the hearing and determination of the above action.

On the 19th September, 1994, on application, a motion dated 29/8/94 to join the Inspector-General of Police as a respondent in these
H proceedings was granted ex parte. The Inspector-General of Police was struck out as a party in the Court of Appeal. There is no appeal against the decision. Upon information to the applicants, Solicitors to the 1st Applicant, Counsel to the Applicants sought and applied on 8th Septem-

ber, 1994 to amend the originating summons before the court.

In the amended summons dated 8th day of September, 1994, Applicants sought determination of the following questions -

(i) Whether the instruments published as Decrees in the Federal Republic of Nigeria Official Gazette No.3, Volume 81 dated 24th August, 1994 are enactments or Decrees of the Federal Military Government. B

(ii) Whether the proceedings herein or any portion thereof have abated and become of no effect whatsoever as a result of the Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from circulation) Decree 1994 No.8 or as a result of the Federal Military Government (Supremacy and Enforcement of Rivers) Decree 1994 No.12 or as a result of any other enactment or law relating to the jurisdiction and powers of courts of law in general or the Federal High Court in particular. C D

(iii) If the proceedings herein or any portion thereof remain valid and subsisting, whether Mr. Dixxy Oddiri can lawfully represent the Inspector-General of Police as a legal practitioner for the purposing of moving an application to join the said Inspector-General of Police as a Co-Defendant to the suit. E

It is relevant to state that on the 15th August, 1994 aforementioned these decrees had not been promulgated.

On the 19th September, 1994, the Attorney-General of the Federation, presumably confident and armed with the publication of the aforementioned decrees gave notice of a preliminary objection to the claim in the summons filed by the applicants on grounds of law that F

(a) This Honourble Court lacks the jurisdiction to determine this matter. G

(b) Any decision of this Honourable Court granting the reliefs sought in this action by the Respondents shall be null and void and of no effect whatsoever in law.

(c) That this Honourable Court lacks advisory jurisdiction. H Applicant relied for this preliminary objection on the provisions of

(a) The Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No.8

of 1994.

(b) Section 6 (6)(b) of Constitution of the federal Republic of Nigeria, 1979

(c) (Constitution (Suspension and Modification) decree 1993
B No.107 of 1993

(d) The Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 (Decree No12 of 1994).

The Federal High Court was accordingly invited to rule that it lacked
C jurisdiction to determine the claims in the originating summons. Decision
of the Federal High Court -

After hearing argument of counsel for the parties on the issues
above stated, the learned trial Judge held that he lacked the necessary
D jurisdiction to determine the action because his jurisdiction had been ousted
by Decrees 8 and 12 of 1994. He held that these Decrees were properly
made and promulgated by the Federal Military Government. The basis of
the decision as that Decrees are superior to provisions of the 1979 Con-
stitution and that Decree 107 of 1993 has suspended a good portions of
E the 1979 Constitution and that the unsuspended portions of the Constitu-
tion are subordinate to any Decree on the same matter.

Decision of the Court of Appeal and grounds of appeal to the Supreme
Court

F The Applicants, now Respondents, appealed to the Court of
Appeal: The Court of Appeal allowed the appeal, and held that the Judge
of the Federal High Court was wrong to have declined jurisdiction to
entertain the action. The Attorney-General for the Federation dissatisfied
G with this decision of the Court of Appeal, appealed to this court on five
grounds.

Summary of the Grounds of Appeal

The grounds of appeal to this court which are entirely on law,
are summarized as follows:-

H Ground one challenges the opinion expressed by the Court of Appeal on
the exercise of legislative authority by the Military Administration involv-
ing the interpretation of the provisions of the Constitution (Suspension
and Modification) Decree No.107 of 1993. Ground 2 criticizes the opin-

ion of the court which is based on morality rather than justiciable issues Republic of Nigeria, 1979. Ground 3 is founded on the alleged error of the Court of Appeal for relying on the concept of rule of law. This found complains about the disregard of the superiority of Decrees or provisions of the unsuspended portions of the Constitution. It also claims that the B doctrine of judicial legislation has no relevance within the Nigeria legislative structure. On Ground 4, the Applicants challenge the exercise of the jurisdiction to question the validity of the provisions of any Decree promulgated by the Federal Military Government. Ground 5 complains of C error in law to hold that the Federal High Court should assume jurisdiction, over the suit.

Formulation of issues by Respondents

Both parties have formulated issues for determination in this appeal. Appellant has formulated the following three issues for determination as arising from the grounds of appeal filed and relied upon. D

"1. Whether the court below was right in holding that Decree No.8 and 12 of 1994 are not Decrees within the meaning of Decree No.107 of 1993 and thus to declare the Decrees null and void. Put the other way, E can a court of law declare void a Decree for whether reason.

2. If the answer to the above issue is in the affirmative which is denied, whether the Court of Appeal was right to apply the concept of F judicial legislation, ethics, morality and religion to hold that Decree No.8 and 12 of 1994 are not Decree of the Federal Military Government and thus to declare it null and void.

3. Whether the court below was right in holding that the ouster clause in Decree No.8 of 1994, Decree No.12 of 1994 and Decree No.107 G of 1993 did not operate to oust the Jurisdiction of the court to determine this suit."

Formulation of issues by Respondents

Learned Counsel to the Respondents formulated the issues for determination differently even though aiming at the same issues as the H Appellant; namely whether the Federal High Court judge correctly declined jurisdiction in this suit. The four issues formulated by the Respondents are as follows -

(i) What are the powers of a sovereign Government which are exercisable by (a) the Federal Military Government and (b) the courts of law pursuant to the provisions of the Constitution (Suspension and Modification) Decree No.107 of 1993.

B (ii) Whether the doctrine and principle of the Rule of Law is binding on the Federal Military Government in its operation of the Constitution of the Federal Republic of Nigeria, 1979, as modified or amended by Decree No.107 of 1993 and other Decrees of the said Government.

C (iii) What is it that binds courts of law to acknowledge an instrument made by the Federal Military Government as a Decree enacted in the exercise of the legislative powers of that Government.

(iv) In the light of the answer to the foregoing, whether the judicial powers exercisable by the Federal High Court and other superior
D courts established by the aforementioned Constitution includes the jurisdiction to determine whether or not an instrument proclaimed by the Federal Military Government to be a Decree is a Decree and therefore binding as law.

E Observation on the issues formulated

It is obvious from the issues formulated that their determination would raise and seek answers to the questions of the nature and structure of the Federal Military Government and its relationship to the Constitution 1979. It will also involve a critical analysis of the relationship
F between the law making powers of the federal Military Government and the Judiciary in the exercise of the right to determine the rights of parties before the courts. In my view this will involve a determination of the nature and scope of the exercise of judicial power extant in the courts as
G a result of the modification of the Constitution 1979 by the Decree No.107 of 1993. It has always been required in the formulation of issues for determination in an appeal for counsel not only to have regard but be confined within the parameters of the grounds of appeal filed. Issues
H should not be formulated to widen the scope of the grounds of appeal. The issues for determination as formulated by Respondent ignored the grounds of appeal and has raised issues much wider than is necessary for the determination of the appeal. There is no doubt the determination

whether the Federal High Court has jurisdiction to hear the claims before it will depend on a correct analysis of the issues formulated. The issues as formulated by the Appellant appears to me direct, straightforward and relevant to the determination of the question whether the Court of Appeal was right in setting aside the decision of the learned Judge of the Federal High Court who had declined jurisdiction. B

Submissions by Appellants

Tochukwu Onwugbufor, S.A.N, the learned Solicitor-General for the Federation who argued Appellant's case adopted Appellant's brief and a reply brief to the brief of the Respondents. The position of learned counsel in the brief filed and his oral expatiation before us is that the supremacy of Decrees of the Military Government cannot be questioned. He submitted that Decrees are superior to the Constitution and that once a Decree was promulgated, it is not to be questioned by the courts. He referred to the case of A-G of the Federation v. Sode (1990) 1 NWLR. (pt.128) 500 at p.518 Obade v Military Government of Kwara State (1990) 6 NWLR (pt.157) 482 Labiya v. Anretiola (1992)8 NWLR (pt.258) 139, 170-1. He rested his submission on his interpretation of the provisions of section 1(2) of Decree No.107 of 1993 which is in pari materia with the identical provision of Decree No.1 of 1984. The learned Solicitor-General emphasizing the supremacy of Decrees referred to section 1(3) of Decree No.107 of 1993 which provides that the unsuspended provisions of the Constitution 1979 shall have effect subject to the modification specified in the second schedule to the Decree subordinates all laws including the provisions of the Constitution to Decree . Learned Counsel referred to S.2(1) of Decree 107 of 1993 and to the omnipotent nature of Decrees. Section 2(1) provides - G

"The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria, or any part thereof with respect to any matter whatsoever"

Counsel referred specifically to the validity of Decrees Nos.8 and 12 1994 by citing and relying on section 4 (1) of Decree No.107 of 1993. The section provides that "A Decree is made when it is signed by the Head of State, Commander-in-Chief of the Armed Forces whether or H

nor it then comes into force."

Relying on the provision of section 5 of Decree 107 of 1993 and Adejumo v Military Government of Lagos State (1972) 1 All NLR. (pt.1) 159, he submitted that there are no circumstances under which the courts can challenge the validity of a Decree. This is so whether the ground of challenge is conflict with the Constitution or with another Decree.. It was submitted that statutes ut res magis valeat quam pereat should be adopted.

The learned Solicitor-General submitted that the Federal Military Government by the nature of the revolution which brought it into power has and exercised absolute powers. This power in his view overrides the observance of the provisions for separation of powers and the Rule of Law in the Constitution 1979. Accordingly any provision of a Decree inconsistent with such concepts is by implication overruled. Even if Decree No.8 of 1994 was in conflict with Decree No.107 of 1993, which was not conceded, the Court of Appeal is not competent to hold that going submissions learned counsel submitted that the Court of Appeal was in error in holding that Decree No.8 of 1994 is not a Decree within the meaning of Decree No.107 of 1993.

Submissions by Counsel to Respondents

Chief Williams, S.A.N., Learned counsel to the Respondents in his submission sought to examine the general structure of the Military Government and the distribution of constitutional functions within the extant provisions of the Constitution. He argued and this was not disputed, that the basic law under which the Federal Military Government exercises powers today is Decree No.107 of 1993. The effect of the Decree is to modify the 1979 Constitution, which vests legislative powers of the Federal Government in the National Assembly, and executive powers in an elected President. The Judicial powers of the Constitution are vested in the Courts named.

Modifying this arrangement, section 1(3) of Decree No.107 of 1993, now in accordance with the amendments in the second schedule vests legislative Ruling Council and the Federal Executive Council. The Judicial powers of the Constitution remain vested in the Courts in accor-

dance with section 6. It was submitted that the consequences of vesting judicial powers in the courts of law is to render unconstitutional usurpation of the exercise of such powers by any of the other arms of the Government. Counsel cited and relied on Liyanage v. The Queen (1967) 1 AC.259. It was submitted that the current Military administration recognizes the doctrine of the separation of powers in its arrangement. It has been argued that if the legislature usurps or arrogates to itself judicial power by passing sentence or by adjudicating in a particular controversy it will be held not to be exercising legislative power. Such a purported exercise of judicial power or function through legislative is a nullity. The opinion of Lord Pearce in Liyanage v. The Queen (*supra*) at p.2QD-1 and Blackstone, Commentaries, Vol.1 p.44 were cited and relied upon. Lakanmi & ors. v. A-G (West) & ors. (1970) Vol. 6 NSCC. 143. C

Learned Counsel to the Respondents recognized the plausibility of the interpretation of section 1(3) of Decree 107 of 1993. Section 1(3) provides - D

"Subject to this and any other decree made before or after the commencement of this Decree, the provisions of the said Constitution which are not suspended by sub-section (2) of this section shall have effect subject to the modifications specified in the second Schedule to this Decree." E

Chief Williams, SAN, for the Respondent recognized the plausibility of construing this subsection as meaning that the legislative powers conferred on the Military government are intended to override constitutional limitations imposed expressly or by implication on the three organs of government. Learned Counsel then submitted that such an interpretation will result in ascribing to the legislative arm of the Government, the power to ignore the separation of powers and to ride roughshod over one of the most sacred principles of the Rule of Law. Counsel cited section 1(2) of Decree No.1 of 1966. Section 1(2) of Decree No.1 of 1984, the decisions of the Supreme Court in Lakanmi v. A-G (West) & ors. (*ibid*) Ojukwu v. Military Governor, Lagos state (1986) Vol. 17 NSCC pt.1,304. Adopting the first interpretation would be absurd F G H

Learned Counsel to the Respondents referred to the decision of

this court in Uwaifo v A-G. Bendel State (1983) 4 NCLR.1 relied upon by learned Counsel to the Appellants and submitted that the dicta relied upon therein are more in favour of the Respondents. In Uwaifo v A-G Bendel (ibid) Idigbe, JSC, said, the cases of Lakanmi and Liyanage

B *"deal with the question whether the legislature under a Constitution which clearly stipulates the functions of the three arms of government, the Executive, the legislature and the Judiciary can lawfully make a law which in effect trespasses into the area of jurisdiction of the judiciary (when it clearly has no constitutional power)."*

C He continued,

"A legislative judgment amounts to legislative exercises of judicial power; but in my view, there is no such exercise of judicial powers unless it can be shown that there was not the 'safeguard of a trial' or
D *inquiry by courts to which section 6 of the 1979 Constitution applies (and this by virtue of section 6 (5) or the Constitution aforesaid could include tribunals of inquiry) with regard to events and proceedings on which the legislative exercise is based."*

E Learned Counsel to the Respondents submitted that the law as laid down by the Supreme Court. In Lakanmi and Uwaifo are sound considering the facts of the cases. It was finally submitted on this issue and we are invited to hold that since the Plaintiff's claim is based on the contention
F that the Guardian Newspaper and African Guardian Weekly Magazine (Proscription and Prohibition From Circulation) Decree 1994 No.8 is a usurpation of judicial functions.

Arguments on Legislative Judgment.

G The question whether the Decree No.8 of 1994 is a legislative judgment was a matter of serious contention both in the briefs filed by Counsel and in their oral arguments before us. The learned Solicitor-General citing and relying on the words of section 1 and 2 of Decree No.8 of 1994 submitted the Decree No.8 of 1994 is not a legislative
H judgment. Learned Counsel, cited the decision of the Judicial Committee of the Privy Counsel in Liyanage v R. (ibid) relied upon by the Respondent as not an authority on legislative judgment; but a case dealing with legislative interference on the exercise of judicial power by the Courts.

Counsel criticized the Respondents for not stating precisely the constitutive elements of a legislative judgment.

The learned Solicitor-General then went on to cite and rely on the decision of the Supreme Court of the United States in Cummings v. State of Missouri (1866) 4 Wall 277, where the court spelt out what was regarded as the elements of a legislative judgment. The decision of Lakanmi & anor. v A-G (West) (ibid) and Kariapper v Wijesinha (1967) 3 ALLER. 485 were considered to be on all fours and as not being cases decided on the principle of legislative judgment. Counsel submitted that Decree No.8 of 1994 did not confiscate the property of the Respondents, it did not pronounce a finding of guilt for any criminal offence on their part. Accordingly proscribing the publication and sealing up their business premises at Isolo cannot constitute an exercise of judicial power.

Finally on this point, the Solicitor-General referred to the ad hominem nature of the decrees and submitted that in the exercise of their absolute powers as a corrective regime, not subject or limited by the provisions of any law, the Federal Military Government has always made extensive use of ad hominem law enacted by means of Decrees similar to the provisions of section 3(1) of Decree 107 of 1993. Three main Decrees together with many others were cited as examples of the exercise of such powers by the Federal Military Government. The Decree are

1. Investigation of Assets (Public Officers and other Persons) Decree 1968
2. Public Officers (Special Provision) Decree 1976
3. Recovery of Public Property (Special Military Tribunals) Decree 1984.

Reference was also made to Assets (Validation) Decree 1968, Tribunals of Inquiries (validation, etc.) Decree 1977. There were also certain decrees ordering forfeiture of sums of money, movable and immovable properties to the Federal Military Government pursuant to its corrective mission are not decrees within the meaning of the definition in the suspension and Modification Decrees. It also cannot be suggested that the ouster clauses contained in them are ineffective.

Respondent's Counsel

Chief Williams in his submission in Respondent's brief stated that their case on the invalidity of Decree No.8 of 1994 is not founded on the sole ground that the legislation was ad hominem. The Respondent is concerned with the answer to the question whether Decree No.8 of 1994 is or is not a legislative judgment. Chief Williams submitted that the admission of Appellant the "each case depends on its own facts" is an admission that the Federal High Court does have jurisdiction to look into the facts of this case and to decide whether the Decree challenged by the Respondents is one which interfered with the functions of the judiciary.

Concisely stated the above are the principal submissions of Counsel in this appeal. The facts as I have already stated, are not disputed or controverted. Indeed by the nature of the application of the Learned Attorney-General to dismiss this action on the grounds of law, they are deemed to have been admitted -See J.A. Amawo v. A-G North Central State & ors (1973) 6 SC.47.

Analysis and Appreciation of the arguments.

It is pertinent for a clear understanding of the issues for determination this court to identify the real issue before the learned Judge of the Federal High Court. The issue before the learned Judge was the decision whether he can exercise jurisdiction in respect of the matters stated in the originating summons, as amended, filed by the Applicants/Respondents in this court.

It is well settled and our courts are replete with decided cases which have established the principle that the word jurisdiction means the authority which a court has to decide matters before it or to take cognizance of matters presented in a formal way for its decision - See Ndaeyo v. Ogunnaya (1977) 1 SC.11. The limits of this jurisdiction may be circumscribed or restricted by statute. See also National Bank v. Shoyoye (1977)5 SC.181. It is a fundamental principle of law that it is the claim of the Plaintiff which determines the jurisdiction of the Court -See Adeyemi v. Opeyori (1976) 6-10 SC.31. This is because it is the Plaintiff who invokes the constitutional right for a determination of his rights and accordingly the exercise of the judicial powers of the Constitution vested in the courts. It follows therefore that in determination of the issue of

jurisdiction whether or not to entertain a claim, the applicable law is that which was in force at the time when the cause of action arose and not that which was in force when the issue of jurisdiction was raised - See Uwaifo v. A-G (1982) 7 SC.124.

The competence of a court in the exercise of its jurisdiction is B determined if it is (a) properly constituted with respect to the number and qualification of its membership, (b) the subject matter of the action is within its jurisdiction, (c) the action is initiated by due process of law; and (d) any condition to the exercise of its jurisdiction had been fulfilled C - See Madukolu v. Nkemdilim (1962) 1 All NLR.587. The jurisdiction of the Federal High Court as modified by Part B of the second schedule to Decree No. 107 of 1993 provides Section 230(1)

"Notwithstanding anything to the contrary contained in this Constitution, and in addition to such other jurisdiction as may be con- D ferred upon it by an Act of the National Assembly or a Decree, the Federal High court shall have and exercise to the exclusion of any other court in civil causes and matters arising from

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(q) the administration or the management and control of the federal Government or any of its agencies;

(r) Subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies; and F

(s) any action proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies."

The claims of the Respondent in the originating summons as amended G has already been set out in this judgment. There is no doubt they are within the jurisdiction conferred on the Federal High Court by section 230(1) of the Constitution 1979 as modified by the Decree 107 of 1993.

The jurisdiction of the Federal High Court was not challenged on H the ground of the defect in the qualification of the judge or that it is not properly constituted. It is also not suggested that the action is not initiated by due process of law; or that any condition precedent to the exer-

cise of jurisdiction has not been fulfilled. The effect and implication of a successful contention based on the provisions of Decrees Nos. 8 and 12 of 1994 is that the subject matter of the action ordinarily within its jurisdiction is taken out of the jurisdiction.

B As a matter of practice, a preliminary objection as to the jurisdiction of the court with respect to a particular matter can be taken at any time; and even before pleadings have been ordered in the case - See National Bank v. Shoyoye (1977) 5 SC. 181, Ramage & anor. v. Womach (1900) 1 QB. 114.

C The ouster provisions relied upon comes by way of defence to the claims of the plaintiff. The contention of the learned Solicitor-General is that the jurisdiction of the Court was ousted by virtue of the provisions of Decree Nos. 8 and 12 of 1994 and s. 5 of Decree No. 107 of D 1993. This ground of law appears on the face of the motion and would if established, be conclusive even if there was no evidence documentary or otherwise in support of the issue before the Court:- See Adejumo v. Military Governor, Lagos State (1972) 1 ALL NLR (pt. 1) 159 Martins v. Federal Administrator-general (1962) 1 all NLR. 120; Habib v. Principal Immigration Officer (1958) 3 FSC. 79, Katagun & ors. v. Roberts (1967) NMLR 167 at p. 170.

F Where the objection to the claim against the defendant in the writ, or originating summons on the grounds of law shows the claim to be patently unsustainable it would seem to me unnecessary to continue to hear evidence in the action. An application to dismiss the action on the grounds of want of jurisdiction would be granted. As was stated by this Court in Aina v. Trustees of Railway Corporation Pensions fund (1970) 1 G ALL NLR. 281, "the whole basis of a demurer is in effect to short circuit the action and by a preliminary point of law to show that the action founded on the writ and statement of claim cannot be maintained" The idea clearly is for economy in judicial time and to reduce litigation expenses H and avoid unnecessary litigation resulting in the abuse of the judicial time and to reduce litigation expenses and avoid unnecessary litigation resulting in the abuse of the judicial process. The rationale was very well expressed in the early west African Court of Appeal case of Mills v.

Renner (1940) 6 WACA at p. 145 where it was said,

It would be manifestly absurd to suggest that a court was bound to proceed with the taking of lengthy evidence of the parties to a suit where it appeared that the whole suit could be decided upon the pleadings without any evidence being called."

Hence whenever it is clear on the grounds relied upon in the preliminary objection that the ground of law relied upon for the dismissal of the action is unanswerable and likely to dispose of the action in Limine, the Judge will be right to decline the exercise of jurisdiction. This is because it will be inappropriate and futile to exercise jurisdiction where there is non - See Peenock Ltd. v. Hotel Presidential Ltd. (1982) 12 SC. 1, Kalio v. Daniel-Kalio (1972) 2 SC. 13.

The real issues before the learned Judge in the instant case is fairly clear. The Respondent is here contending, and it is the case all through, that

(i) The Decree relied upon by the learned Solicitor-General as ousting the jurisdiction of the Court are not Decrees of the Federal Military Government, as defined and properly so called having not been made in that regard following the procedure for promulgating decrees.

(ii) That the Decree No. 8 of 1994 relied upon as proscribing the publication of the first Respondent Newspaper and Magazine being a legislative judgment and a usurpation of the judicial powers of the Constitution is null and void, and cannot be relied upon to oust the jurisdiction of the court. Accordingly

(iii) The learned Judge was wrong to have declined jurisdiction. The Court of Appeal was right to have reversed his ruling.

The question is whether these are issues which require the leading of evidence before the learned trial Judge before he can come to a decision either way. It seems to me these are issues which do not require evidence, documentary or viva voce for their resolution. They are all matters of construction of the relevant provisions of the Decrees. These issues raise the fundamental question in this litigation of the scope and plenitude of the exercise by the Federal Military Government of the Constitutional powers to legislate.

The Solicitor-General of the Federation who has relied on the words of the ouster clauses in the Decrees has dwelt at great length and tenaciously on the fact that the Federal Military Government has always emphasized since 1970 Federal in Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28 that what has taken place is a revolution and an abrupt change of government not based on the Constitution. In short what took place was a revolution. It was not a mere change of government compelled by necessity of the occasion. This attitude has been repeated in 1984 in a decree of the same name and in 1993. Consequently the Federal Military Government it has been pleased to permit. It has therefore subjected and subordinated the provisions of the Constitution to its absolute will. The Constitution in the opinion of the learned Solicitor-General is what the Federal Military Government permits. Based on this theory, it was submitted, the principle of the separation of powers clearly and implicitly expressed by the provisions of the Constitution, and the doctrine of the Rule of law have no place in the government of the Federal Military Government.

The learned Solicitor-General relies on this view of his construction of the provisions to argue that provisions in a Decree inconsistent with the exercise by the Judiciary of the judicial powers of the Constitution overrides the exercise of such judicial powers. Similarly any provision ousting the exercise of jurisdiction by the courts cannot be challenged having been thus expressed by a Decree.

The contention of the learned Solicitor-General is sedulously attractive and comes naturally within the general notions and perceptions of the ordinary person of the powers of a Military Government. This is not necessarily the strict legal position as the realities of practice clearly demonstrate. It seems to me that a better construction could be approached more meaningfully by a critical analysis of the policies of the Federal Military Government on its ascendancy to power and how it has continued to conduct the affairs of governance ever since. It is not strictly necessary for this purpose to trace earlier situations though relevant. It is sufficient to consider the provisions of Decree No.107 of 1993 from which the present Federal Military Government derives its powers. This

decree re-enacts the provisions of earlier similar decree. It is helpful and invaluable to refer to the nature and structure of the constitution 1979, which was modified by Decree No.107 of 1993. It is pertinent to adumbrate on the nature and structure of the amended Constitution.

The Nigerian Constitutional Structure.

A notable feature of the amended Constitution of 1979 is the distribution of the exercise of governmental functions among the three principal and separate departments of the Legislature, the Executive and the Judiciary. The Constitution also prescribed the scope and limits for each department and that within its jurisdiction, the exercise of power is supreme. Accordingly, implicit in the powers so vested, the one was not to interfere in the exercise of the powers of the other, except to the extent to which the Constitution confers such power of interference. This is the hallowed principle of the separation of powers first formulated by Montesqui and nearly perfected in the Constitution of the United States of America. As a general rule therefore, except otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the judiciary cannot exercise either executive or legislative power. The Constitution has established this doctrine by vesting the Legislative powers of the federation in the National Assembly, (S.4(1) and for the States, in the House of Assembly of the States (S.4(2). Each is limited to the subject matters prescribed in the Legislative (S.4(2) (3) (5).

The Executive powers are vested for the Federation in the President and for the States in the Governors. The exercise of the judicial powers of the Constitution are vested in named courts both in respect of the Federation and of the States (S.6(5). These powers involve and include all inherent powers and sanctions of law; and for the determination of any actions and proceedings relating to questions as to the civil rights and obligations in all matters between persons, or between government or authority and any person in Nigeria (S.6(6)(a)). Certain causes are constitutionally excluded (S.6(6)(d)).

The Constitution has enjoined all organs of government and all persons and authorities exercising legislative, executive or judicial pow-

ers to conform to, observe and apply the provisions of the fundamental objectives and directive principles of state policy which are not justifiable. The distinct characteristic of this Constitution is the rigidity in the membership of the principal departments of the constitution. The Legislature and the Executive are constituted by different persons. No member of the Legislature is also a member of the Executive or the Judiciary. The Executive, with the President or the governor as the Head is a separate department independent of the Legislature. Similarly, no member of the Judiciary, both at the Federal or State level is a member of the Executive or the Legislature.

Nature and Structure of the Federal Military Government

Now, the Federal Military Government in Decree No.107 of 1993, has amended the Constitution of 1979 consistent with its own perception of governance, thereby altering the status quo ante, By the provisions of this Decree the Federal Military Government; by section 1(1) of the Constitution (Suspension and Modification) Decree No.107 of 1993, which came into force on the 17th November, 1993, the Constitution of 1979 as suspended was restored with Modifications. The suspended provisions in so far as is relevant to this judgment are sections 1(2) and (3), sections 4 and 5 on the legislature and the Executive. The legislative powers of the Constitution as modified is now vested in the federal Military Government to make laws for the peace order and good government of Nigeria or any part thereof with respect to any matter whatsoever - S.2(1). Similar powers are vested in the Administrator of states with respect to States - S.2(3). The mode of exercising legislative powers is provided for in section 3 both of the Federal Military Government and for the Administrators of State Governments. Section 4 provides that -

"(1)" A Decree is made when it is signed by the Head of State, .Commander-in-Chief of the Armed Forces, whether or not it then comes into force.

Section 6 provides for and vests the Executive Authority of the federal Republic in the Head of State, Commander-in-Chief of the Armed forces and shall be exercised by him in consultation with the Provisional Ruling Council. By the provisions of sub-section (2) the question whether there

has been consultation with the Provisional Ruling Council with respect to the exercise of the executive authority is excluded from the jurisdiction of the courts by S.5.

By the suspension of sections 4 and 5 of the Constitution 1979 with respect to the exercise of legislative and Executive powers of the Constitution and the vesting of such powers in the Federal Military Government and the Administrators of States. The combined legislative and executive powers of the Constitution hitherto exercised by the Legislature and the Executive are now vested in the Federal Military Government and the Administrators of States, See S.6 of Decree No.107 of 1993. Accordingly the erstwhile tripartite division of powers in the Constitution into the Legislative, Executive and Judiciary, no longer exists. What we now have is a division of the exercise of powers between the Federal Military Government and the Judiciary. This is because the First Schedule to the provisions of the (Suspension and Modification) Decree No.107 which amended the Constitution 1979 left unaffected the provisions of section 6 of the Constitution 1979 which vested the Exercise of the Judicial powers of the Constitution in the courts named - See the First Schedule to Decree No.107 of 1993. This is the arrangement which the Federal Military Government has adopted for the administration of the affairs of the nation.

In the light of the foregoing analysis of the Decree No.107 of 1993, it is not easy to accept the contention of the Solicitor-General that the resulting modification of the Constitution 1979 has swept away the observance of the principle of separation of constitutional functions between the various departments as enshrined by the constitutional arrangement of the division and vesting of the exercise of constitutional functions.

The vesting of judicial power separately in the Judicature is a cardinal feature of our Constitution which has survived successive revolutions. Even the provisions of Decree No.28 of 1970 in all its sweeping assertion of the revolutionary intention of the Military Government did not abrogate the separate vesting of the exercise of judicial power of the Constitution in the courts.

It has been suggested that Decree No.28 of 1970 confirmed the abrogation of a separate judiciary. It did no such thing.

The Federal Military Government opted to vest the judicial powers of the constitution in the Courts named. It has not made such a vesting of the exercise of the judicial powers subject to the exercise of its powers. The Federal Military Government has vested in itself the exercise of the legislative and the executive powers of the constitution. It is therefore limited in the exercise of constitutional powers to the legislative and executive powers so vested.

The learned Solicitor-General has submitted that the effect of the provision of section 2(1) of Decree No.107 of 1993 that the "Federal Military Government shall have power to make laws for the peace, order and good Government of Nigeria or any part thereof with respect to any matter whatsoever" suggests that there is no longer any separation of the exercise of constitutional powers in the other departments of the Constitution. Accordingly the Federal Military Government can in the exercise of its combined legislative and executive powers of the Constitution also exercise the judicial powers vested in the courts. I do not think the provisions can be so construed. It is necessary to point out at once that the expression with respect to any matter whatsoever used in the enabling legislative powers of the Federal Military Government in section 2(1) can only meaningfully be referable to its legislative powers and to the plenitude of the exercise of legislative powers of the Constitution as vested in the Federal Military Government. Expressio unius est exclusio alterius. Section 2(1) speaks of and only concerns the exercise of legislative powers. The expression any matter whatsoever cannot be extended to include matters outside the exercise of legislative powers not contained therein, such as the exercise of judicial powers.

It is important to emphasize the constitutional difference in the exercise of legislative and judicial powers of the Constitution. The Federal Military Government cognizant thereof has considered it in the interest of its administration to observe the distinction and maintain the principle of the separation of the exercise of judicial functions even if in its attenuated form. The legislative power consists of the enactment of

general rules determining the structure and powers of public authorities and regulating the conduct of citizens and private organizations. In the strict connotation, it is the law making power of the Constitution vested in the legislature.

The primary judicial function vested by the Constitution in the Courts is to decide disputed questions of fact and law in accordance with the law laid down and expounded by the Court. Judicial power is the Constitution charged with the declaration of what the law is and its construction. The exercise of judicial power involves the investigation of facts.

The Federal High Court Judge declined the exercise of jurisdiction because he was satisfied his jurisdiction was ousted by the provisions of Decree setting aside that decision held that these Decrees are invalid, both because they were not validly made in accordance with the provisions of Decree 107 of 1993 and that Decree No.8 of 1994 which proscribed the publication and circulation of the Guarding Newspapers, etc. constitutes a legislative judgment.

The first issue for determination is the jurisdiction of a court to pronounce on the validity of Decrees Nos.8 and 12 of 1994. Specifically in the instant case it is whether the Court of Appeal is competent to declare that Decree No. 8 and 12 of 1994 made by the Federal Military Government are not decrees within the meaning of Decree No.107 of 1993

It seems to me hardly arguable that if the Decrees complained of namely Nos.8 and 12 of 1994 are not decrees within the meaning of Decree No.107 of 1993, S.5, then the question whether the ouster provisions become properly applicable does not arise. Cassus Cadit. The contention of the Respondent before the Federal High Court and in the court below, is that Decree No.8 of 1994 was not promulgated in accordance with the provisions of Decree No.107 of 1993. This is undoubtedly a criticism of how the Decree No.8 was promulgated by the Federal Military Government. Certainly this does not extend to the Constitutional power to make laws.

Section 3(1) of Decree No.107 of 1993 which provides for the

procedure making of laws, states -

"The power of the Federal Military Government to make laws shall be exercised by means of Decrees signed by the Head of State ..."

This provision is short, terse and seems to me complete and self-explanatory. It has prescribed any procedure. It merely says how the making of laws shall be exercised. Whatever procedure was adopted by the Federal Military Government in the exercise of its law making powers it appears would satisfy the constitutional requirement. It may prescribe no procedure as in the instant case.

The Respondents have relied on a statement by the Attorney-General that the Decrees are not products of his Ministry and that they were never discussed by the Provisional Ruling Council. Accordingly they are not decrees within the meaning of the constitution. I find nothing in the provisions of the Constitution of 1979 as amended, or in any other decree in support of the contention or that the participation of members of the procedure in the promulgation of a Decree. Certainly there is no implication from S.3(1) that the validity of a decree is predicated on any other action. The meaning of section 3(1) of Decree No.107 of 1993 is that a Decree signed by the Head of State, Commander-in-Chief of the Armed Forces simpliciter is a complete demonstration of the exercise of the constitutional law making powers of the Federal Military Government. The sublime duty of courts to supervise compliance with law involves recognition of observance of adherence to formal rules of procedure. There seems to be no legal warrant or judicial discretion for prying into the observance of unwritten procedural rules fashioned for convenience. Such in my opinion are non justiciable, and if for anything should be avoided for their uncertainty.

Accordingly, the invalidity of the Decree No. 8 of 1994 cannot be founded on the ground that it was not the product of the Hon. Attorney-General's chambers and that it was not discussed and considered by the Provisional Ruling Council. These are no procedural predicates for the validity of a decree as stated under section 3(1) of decree 107 of 1993.

I am satisfied and the learned Solicitor-General is on firm ground

that as long as the Decree has been signed by the Head of State, Commander-in-Chief of the Armed Forces, there has been compliance with the provisions of section 3(1) of Decree No.107 of 1993, and there is a valid decree.

The Question of Ouster-Determination.

B

The ouster provisions are to be found in section 5 of Decree No.107 of 1993, and Decree Nos.8 and 12 of 1994. Decree No.107 of 1993 S.5 provides 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 thereafter the commencement of this Decree or of an Edict shall be entertained by any Court of law in Nigeria."

C

The Federal Government Supremacy and Enforcement of Powers (Amendment) (No.2) Decree No.16 of 1994 provides -

D

"No civil proceedings shall be 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"

E

The Decree excludes the application of chapter IV of the Constitution 1979.

The contention of the learned Solicitor-General for the Federation is that the combined effect of these Decrees completely oust the jurisdiction of the Court. He relies on several decisions of this Court and on dicta in Osadebey v. A-G. Bendel State (1991) 1 NWLR. (pt.169) 533 at p.571 of Belgore JSC and Nwosu v. Imo State Environmental Sanitation Authority (1990)2 NWLR (pt. 135) 688 at p.729. I think the contention is right.

F

G

The crux of the case and gravamen of the preliminary objection of the Attorney-General before Kolo J of the Federal High Court, the argument in the court below and quite tenaciously before this court is that since Decree No.8 of 1994 is a decree made by the Federal Military Government, and its unambiguous provisions concern the proscription of publication and prohibition of Circulation of the Guardian Newspapers

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and African Weekly Magazine, and stating unequivocally that the jurisdiction of Courts of law relating thereto, has been ousted, this is to say the subject matter of the claim as stated in the Decree No.8 of 1994, has excluded the jurisdiction vested in the court by S.230(1) of the Constitution. The trial Judge was precluded from exercising jurisdiction in respect of the claims of the Respondents brought before him.

The exercise of jurisdiction by our Courts is founded on the provisions of the Constitution and any other jurisdiction that may be vested in it by other law. Courts are bound to observe the provisions of the Constitution and other enabling laws in the exercise of their jurisdiction.

By the promulgation of the Constitution (supremacy and Enforcement of Powers) decree No.28 of 1970, courts of this country were brought under the absolute control of Military Decrees. Successive Military Governments, in 1984, and now Decree No.107 of 1993 have adopted this same position. The resulting position in these decrees is that no court in Nigeria has jurisdiction to question the vires of the Military Government to promulgate a decree, or the validity of the decree, or to declare any decree, null and void. There is a long line of decided cases of this court in support of the position. The following decisions represent a consistent line of such judicial decisions of this Court. Hope Harriman v. Mobolaji Johnson (1970) All NLR. 503, Adenrele Adejumo Nigerian Construction Co. Ltd. v. Col. Mobolaji Johnson (1974) All NLR. (2nd Edn. Vol.1) 26 at 30 Adejumo v. Military Governor of Lagos State (1972) 1 ALL NLR. (pt.1) 159, Uwaifo v. A-G. Bendel State (1983)4 NCLR.1 A-G of the Federation v. Sode (1990) 1 NWLR (pt.128) 500 at p.518, Obada v Military Governor, Kwara State (1990) 6 NWLR (pt.157) 482, Labiya v. Anretiola (1992) 8 NWLR (pt.258) 139, Osadebey v.A-G. Bendel State (1991) 1 NWLR. 533. These decisions support the proposition that no court has jurisdiction where a Decree has ousted its exercise of jurisdiction with respect to a matter stated therein. No court has jurisdiction to consider the validity of such Decree or the scope of the decree so made. Any decision made on the exercise of such jurisdiction shall be null and void. In view of the state of the authorities, the question whether Decree No.8 of 1994 is a legislative judgment is not

within the jurisdiction of the court. I say no more about it.

This court is bound by its own previous decisions. We have not been invited in this appeal to depart from the above decisions and no arguments were presented to us to justify a departure.

The procedure for departing from established authorities is provided in Order 6 r.5 (4) RSC. 1985 as amended - See Adesokan v Adetunji (1984)5 NWLR (pt.346) 540 at p.562. In the absence of invitation there is no basis for embarking on a decision contrary to the well settled proposition as clearly enshrined in our earlier decisions. It is appreciated that this court should not knowingly perpetuate errors, but it can only correct itself in the manner provided under its own rules - See Bucknor-Maclean v. Inlaks Ltd. (1980) 8-11SC.1. Accordingly this Court must hold and has no basis for considering the contention that there are other reasons for holding notwithstanding its formal validity that Decree No.8 of 1994 is not valid and binding because of an alleged substantive invalidity. The legal position inevitably is that the Decree is valid and binding. It follows therefore that Decree No.12 effectively ousts the jurisdiction of the Courts to entertain any action brought to challenge the provisions of Decree No.8. of 1994. It is well settled that where the ground of law relied upon in a preliminary objection is unanswerable and likely to dispose of the action in limine it will be mandatory and right for the judge to decline the exercise of jurisdiction . It will be futile in such a situation to do otherwise as there is no jurisdiction. - See Timitimi v. Amabebe 14 W.A.C.A. 374.

There is no doubt on the state of the law in this case, the provisions of Decree No.8 of 1994 clearly proscribe the publication of the Guardian Newspapers and the African Guardian Weekly Magazine. It also prohibits their circulation. Decree No.12 ousts the jurisdiction of the Court from exercising any jurisdiction in such cases. This in my considered opinion is an unanswerable ground of law. The learned Judge cannot be faulted in his decision with regard to the exercise of jurisdiction over the 1st Respondent.

The case of the 2nd-6th Respondents;

I now turn to the relatively very simple case of the 2nd-6th Re-

spondents. In his ruling the learned Judge did not make any distinction between the case of the 1st Respondents and that of the 2nd-6th. He declined jurisdiction to hear the claims of all of them basing his want of jurisdiction on the provisions of Decree No.8 of 1994 and the ouster provisions already discussed.

It is quite clear from the provisions of section 1 and 2 of Decree No.8 of 1994 that only the 1st Respondent was affected. The 2nd-6th Respondents who share the same premises namely Rutam House, Isolo Road, Osodi, are not directly concerned by the proscription of publication and prohibition from circulation of the Guardian Newspapers and African Guardian Weekly Magazine. They are however affected by sealing off of Rutam House shared with the 1st Respondent. There is doubt not being publishers of the Newspapers and African Guardian Weekly, they are not perfected by section 1 of Decree No.8 of 1994. The learned Judge had jurisdiction to hear the claim, the ouster provisions notwithstanding. By declining jurisdiction he had thrown out the baby with the bath water. This is what he should not do. This is a matter in respect of which the court has jurisdiction under section 230 of the Constitution 1979. There is no provision of the Constitution or Decree taking away the jurisdiction.

I hold that this appeal be allowed in part. The decision of the Court of Appeal was right to the extent that the Federal High Court has jurisdiction to determine the case of the 2nd-6th respondents. The case is remitted to the Federal High Court for a determination on its merits before another Judge.

Appellants shall; pay the costs of this appeal to the 2nd-6th respondents which I assess at N10,000.

WALI JSC

By an-parte application filed by the present respondents in the Federal High Court holden in Lagos, for leave to enforce the Fundamental Rights of each of them in terms of the Originating Summons exhibited in support of the said application, Kolo J, the presiding Judge, ruled as

follows:-

" IT IS HEREBY ORDERED AS FOLLOWS:-

(1) That each of the Applicants is hereby granted leave to enforce their respective fundamental rights under our constitution.

(2) That no member of the Applicants, their officers and /or servants shall be harassed or arrested on this matter pending the determination of the Originating Summons on this matter.

(3) That this order, the originating summons, Motion on Notice and all the other relevant processes of this Court in this matter be served on the Honourable Attorney-General of the Federation to enable him or his representative appear before this Court on the basis for the action now being complained of.

(4) That by virtue of Order I Rule 6 of Fundamental Rights Enforcement Procedure Rules, this order is also for stay of any further action by the Law Enforcement Agencies in the direction of the present on the premises complained of.

(5) That the status quo of the situation be maintained as it was before the encroachment on the premises by the Police.

(6) And that the case is hereby adjourned to Monday the 22nd of August, 1994 for the Originating Summons and Motion on Notice to be heard and to enable the Attorney General of the Federation or his representative to come and explain to this Court accordingly."

The relevant contents of the Originating Summons served on the present appellants are as follows:-

"1. Seek the determination of the Court of the following question namely, whether the Inspector General of Police or any of the officers or men under his command has or can lawfully be authorized to exercise power to enter the premises where each of the Applicants carry on their various businesses, order out or otherwise evict all the employees representatives or licensees, of each of the Applicants from the said premises and prevent such employees representative or licensees from exercising the right of egress from or ingress for doing so or without informing any of them of the seasons for doing so or without producing any executive or judicial warrant or order lawfully authorizing him to do so.?"

2. *The Applicants also claim against the respondent the following reliefs -*

(i) *A declaration that the forcible taking of possession of the office equipments stationery, office furniture and other moveable properties belonging to each of the Applicants herein by officers and men of the Nigeria Police in the early hours of Monday the 15th day of August 1994 at Rutam House Isolo Expressway is illegal and made in contravention of the Right guaranteed to each Applicant under Section 40(1) of the Constitution of the Federal Republic of Nigeria;*

(ii) *A declaration that the eviction of all officers and employees of the 1st Applicant from their place of work at Rutam House Isolo Expressway by the officers and men of the Nigeria Police is unconstitutional and a violation of the right guaranteed to the 1st Applicant under Section 36(1) of the Constitution of the Federal Republic of Nigeria;*

(iii) *A declaration that the eviction of all officers, employees, licensees and invitees of each of the Applicants from the premises at Rutam House Isolo Expressway as well as the action of the officers and men of the Nigeria Police Force in preventing such officers, employees, licensees and invitees from exercising the right or liberty of ingress into and egress out of the aforesaid premises constitutes a contravention of the right guaranteed to each applicant under Section 40(1) of the Constitution of the Federal Republic of Nigeria and further and in the alternative Article 14 of the African Charter on Human and People's (Ratification and Enforcement) Act;*

(iv) *A declaration that the action of officers and men of the Nigeria Police in (a) forcibly entering the premises of the 1st Applicant at Rutam House Isolo expressway where it carries on business as owner of Newspapers and Magazines and (b) in preventing the employees licensees and invitees of the 1st Applicant from exercising the right of ingress into and egress out of the aforesaid premises is illegal and a violation of the Right guaranteed to the 1st Applicant under Section 36(1) of the Constitution of the Federal Republic of Nigeria;*

(v) *An order of Mandatory Injunction directing all officers and men of the Nigeria Police Force and all other officers or agents of the*

Federal Government from preventing or continuing to prevent the employees, licensees and invitees of any of the Applicants to this action from exercising their right of ingress into or egress out of the premises known as Rutam House Isolo Expressway;

(vi) *Damages in favour of the 1st Applicant in the sum of N200 million comprising exemplary (or alternatively, aggravated) damages as well as compensatory damages estimated at N1.2 million/day until the release of the said premises and properties thereon to the 1st Applicant;*

(vii) *Damages in the sum of N50 million to each of the 2nd to 6th Applicants representing exemplary (or alternatively, aggravated) damages for the loss caused to each of them."*

By another Motion ex-parte filed before the Federal High Court holden in Lagos and presided over by Auta J, seeking for leave of that court to join the Inspector General of Police as a Respondent in the proceeding, the learned trial judge granted the application and ordered as follows:-

"1. *That the Inspector-General of Police is hereby joined as a Respondent.*

2. *That the Motion on Notice is to be served on the Applicant/ Respondents.*

3. *That the case herein do stand adjourned to the 6th day of September, 1994 for hearing."*

On 9th September, 1994 Learned Senior Counsel for the respondents filed the following Amended Summons dated 8th September, 1994:

(i) *Whether the instruments published in Nigeria Official Gazette No. 3 Volume 81 dated 24th August, 1994 are enactments or Decrees of the Federal Military Government.*

(ii) *Whether the proceedings herein or any portion thereof have abated and become of no effect whatsoever as a result of the Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition From Circulation) Decree 1994 No. 8 or as a result of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 No. 12 or as a result of any other enactment or law relating to the jurisdiction and powers of courts of law in general or the Federal*

High Court in particular.

(iii) *If the proceedings herein or any portion thereof remain valid and subsisting, whether Mr. Dixy Oddiri can lawfully represent the Inspector General of Police as a legal practitioner for the purpose of moving an application to join the said Inspector General of Police as a co-defendant to the suit."*

The appellants, after being served with the Amended Summons, filed a Notice of Preliminary Objection on 19th September, 1994 raising the following questions:-

"(a) *This Honourable Court lacks the jurisdiction to determine this matter .*

(b) *Any decision of this Honourable Court granting the reliefs sought in this action by the Respondents shall be null and void and of no effect whatsoever in law.*

(c) *That this Honourable Court lacks advisory jurisdiction.*

AND TAKE NOTICE that the grounds are as follows:-

1. *That upon reading through the motion on notice, Origination summons, Amended summons and the affidavits in support and all other documents filed by the Respondents, the reliefs sought would not avail him by virtue of the provisions or:-*

(a) *The Guardian Newspapers and African Guardian Weekly Magazine (Prosecution and Prohibition from Circulation) Decree No. 8 of 1994.*

(b) *By virtue of the provisions of s. 6(6)(b) of the Constitution of the federal Republic of Nigeria 1979.*

(c) *By virtue of the provision of the Constitution (Suspension AND Modification) Decree 1993 (Decree No. 107 of 1993).*

(d) *By virtue of The Federal Military Government (Supremacy And Enforcement of Powers) Decree 1994 (Decree No. 12 of 1994).*

2. *That this Honourable court has no jurisdiction to hear and/or determine this matter."*

The Motion was heard by Kolo J and in a considered Ruling delivered on 13th October, 1994, he concluded:-

"The Ruling of this court in the present application before it is

therefore that judging from all the above this Court cannot but hold as follows:-

1. Decrees are superior, in our present day Nigeria, to even the 1979 Constitution and this fact makes cases such as the Liyoniyi case not quite relevant to the present Nigerian situation. B

2. Decree 107 that suspended a good portion of the 1979 Constitution also provides that unsuspended portions of the said 1979 Constitution are subject or subordinate to any Decree on the same matter.

3. That Decree 8 and 12 of 1994 were properly made and promulgated by the Federal Military Government of Nigeria. C

4. That the said Decrees 8 and/or 12 of 1994 have ousted the jurisdiction of this Court in the present application as before it.

5. As in Nwosu v Imo State Environmental Sanitation Authority (1990) 2 NWLR (135) 688 per Belgore JSC "..... there is no dancing round the issue to found jurisdiction that been taken away. D

This Court therefore declines jurisdiction accordingly."

Aggrieved by the Ruling of Kolo J, the present Respondents appealed to the Court of Appeal, Lagos Division. Pursuant to the Rules of that court parties filed and exchanged briefs of argument. The present respondents as appellants raised the following issues in their brief for determination - E

"2.1 The Major and Dominant Question: The Appellants respectfully submit that one major and dominant question lies at the basis of the questions of law to be decided by the court in this appeal. That major question may be stated as follows: F

Whether the government of Nigeria or the administration of its affairs by the Federal Military Government must be conducted according to the laws of the land at the material time or whether it is lawful to conduct such government or administration in contravention of the laws of the land in particular cases whenever the Federal Military Government so pleases. G H

This major question, and its import on the question of law which arise in the appeals herein will be considered after a discussion of the questions of law directly raised

2.2 Questions of Law: It is submitted that having regard to the arguments canvassed in the court below, the decision appealed from and the grounds of appeal contained in the relevant Notices of Appeal, the questions for determination in the appeals now before the Court are as follows:-

(i) Whether the Federal High Court has jurisdiction to entertain or to continue to entertain an action in which a person seeks redress against the Federal Military Government on the ground that the Government has infringed his legal or constitutional rights:-

(a) by acting pursuant to provisions contained in an instrument setting out the penalties imposed on the Applicants herein for undisclosed offence or offences; or

(b) by acting pursuant to provisions contained in an instrument not made by the Provisional Ruling Counsel but purporting to be a Decree.

(ii) If the answer to Question (i)(a) and or Question (i)(a) are or is in the affirmative, whether, the Federal Military Government has the power to make a law taking away the jurisdiction of courts of law to entertain an action of the type envisaged in either or both parts of the said question.

(iii) Whether Auta J had jurisdiction to entertain and grant the ex parte application of the Inspector General of Police for joinder co-defendant when the proceedings in which he sought to be joined were pending before Kolo J."

Learned counsel for the 1st appellants then as the 1st respondent formulated the following Issues in his own brief -

"3.01 whether the Federal High Court lacks the jurisdiction to adjudicate over the suit in the light of the combined effect of the clear provisions of the ouster clauses in the Guardian Newspapers and African Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No. 8 (1994) and the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 (1994).

3.02 Whether the Federal High Court has the jurisdiction to go

behind to investigate and ascertain whether a Decree signed by the Head of State, Commander-in-Chief of the armed Forces pursuant to Section 4(1) of the Constitution (Suspension and Modification) Decree No. 107 was legally or illegally made.

3.03 *It is respectfully submitted that the issue of inconsistency of Decree with Article 7(2) of the African Charter on Human and Peoples Right Cap. 10 Laws of the Federation raised in the ground of Appeal has not been raised in the issue for determination or canvassed in the brief by the learned Senior Advocate. As the Argument in the brief did not cover this ground of appeal this aspect of the appeal should be considered as abandoned: Kolawole v. Alberto (1989) 1 NWLR (Pt. 98) 382 SC; Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130 SC; Ceekay Traders Ltd. v. General Motors Co. Ltd. (1992) 2 NWLR (Pt. 222) 132 SC. Showa v. Mustafa (1993) 4 NWLR (Pt. 290) 740 CA."*

Learned counsel for the 2nd appellant then as the 2nd respondent did not formulate any issue in his brief but seemed to have adopted the Issues formulated in Respondent's brief.

The Court of Appeal, Lagos Division after considering the appeal, unanimously allowed the appeal, set aside the Ruling of Kolo J. For the purpose of clarity I shall quote here the concurring judgment of Ayoola JCA [as he then was] to the lead judgment of Pats-Acholonu JCA where the former stated -

"I now turn to the question of the ouster clauses contained in section 3 of Decree NO. 8 of 1994 and SI(2) (b)(i) Decree No. 12 of 1994. Section 3 of Decree NO. 8 of 1994 reads in full as follows:-

"Any person who on the direction of the appropriate authority had or at any time before the commencement of this Decree dealt with or acted in compliance with this Decree or thereafter deals with any copy of the Daily or weekly Newspaper proscribed or prohibited from circulation pursuant to this Decree, shall stand indemnified in respect thereof and no suit or any other proceedings whatsoever shall be brought at the instance of any persons aggrieved in respect of any act, matter or thing done or purported to be done in respect of such direction or compliance, and whether any such suit or other proceedings has been instituted in any

court, it shall abate and be of no effect whatsoever"

Section 1(2) (b)(i) of Decree NO. 12 of 1994 provides that:

"No civil proceedings shall be 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, on or after the commencement of this Decree the proceedings shall abate, be discharged and made void."

If the instrument described as Decree No. 8 of 1994 is not a Decree within the intendment of Decree 107 of 1994, it is evident that both ouster clauses are incapable of affecting the jurisdiction of the Court below. As regards the Decree No. 8 of 1994, the whole instrument had failed as a legislative document, and as regards the ouster clause in Decree No. 12 of 1994, it being predicated on the existence of a Decree enabling the thing done to be done, the act done or purported under an instrument which is not a Decree would not attract the protection of that clause. On the view that I hold that the instrument described as Decree No. 8 of 1994 cannot rank as a Decree within the contemplation of Decree No. 107 of 1994, the conclusion follows inexorably that the ouster clauses relied on by the Federal High Court as ousting its jurisdiction are ineffective."

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"In this case even if the two instruments (Decree No. 8 and No. 12 of 1994) are effective as Decrees, the Federal High Court ought not to have declined jurisdiction at the stage it did without further inquiry. Ouster of the jurisdiction of a court does not preclude it from exercising jurisdiction to interpret the ouster clause itself or to determine whether or not the action in question comes within the scope of power or authority conferred by the enabling statute."

Be that as it may, it is sufficient to dispose of this appeal on the ground that the instrument described as Decree No. 8 of 1994 being an instrument which is not an exercise of legislative power is not a Decree within the provisions of Decree No. 107 of 1994."

It is against this decision that the present appellants have now appealed to this court. Learned counsel on either side filed and exchanged

briefs of argument. Henceforth parties to this appeal will simply be referred to as the appellants and the respondents respectively in this judgment.

In the appellant's brief the following issues were formulated-

*"1. Whether the Court below was right in holding that Decrees B
No. 8 and 12 of 1994 are not Decrees within the meaning of decree No.
107 of 1993 and thus to declare the Decrees null and void. Put the other
way, can a Court of law declare void a Decree for whatever reason?"*

*2. If the answer to the above issue is in affirmative, which is C
denied, whether the Court of Appeal was right to apply the concept of
judicial legislation, ethics, morality and religion to hold that Decrees
No. 8 and 12 of 1994 are not Decree of the Federal Military Govern-
ment and thus to declare it null and void.*

*3. Whether the court below was right in holding that the ouster D
clause in Decree No. 8 of 1994, Decree No. 12 of 1994 and Decree No.
107 of 1993 did not operate to oust the jurisdiction of the Court to deter-
mine this suit."*

The respondents on their part, raised the following four issues for deter- E
mination -

(i) What are the powers of a Sovereign Government which are
exercisable by (a) the Federal Military Government and (b) the courts of
law pursuant to the provisions of the Constitution (Suspension and Modi- F
fication) Decree No. 107 of 1993.

(ii) Whether the doctrine and principle of the Rule of Law is
binding on the Federal Military Government in its operation of the Consti-
tution of the Federal Republic of Nigeria, 1979, as modified or amended G
by Decree No. 107 of 1993 and other Decrees of the said Government.

(iii) What is it that binds courts of law to acknowledge an in-
strument made by the Federal Military government as a Decree enacted
in the exercise of the legislative powers of that Government.

(iv) In the light of the answer to the foregoing, whether the H
judicial powers exercisable by the Federal High Court and other superior
courts established by the aforementioned Constitution includes the juris-
diction to determine whether or not an instrument to be a Decree is a

Decree and therefore binding as law.

In my view the issues formulated by both the appellants and the respondents can be summarized thus-

1. Are Decrees Nos. 8 and 12 of 1994 valid laws enacted by the Federal Military Government within the context of Decree No. 107 of 1993.

2. If so, can a court in Nigeria proceed to examine Decrees No. 8 and 12 of 1994 under the pretext that their provisions are in violation of the rule of law and declare them void and in-effective.

I shall bring my judgment with the statement made by this court in the case of Adejumo v. The Military Governor of Lagos State (1972) ALL NLR 164 at 173 wherein it remarked -

"The sum total of Chief Williams argument is that where an instrument sought to be challenged had been made in excess of jurisdiction, such an instrument would not enjoy the protection of any preclusive legislation forbidding judicial review of it.

It is of course not possible for us to accede to the arguments on behalf of the appellant. In Anisminic's case (supra), the House of Lords was concerned with the interpretation of a particular statutory provision peculiarly worded and probably equally peculiarly orientated. In the Anisminic's case the statute then construed was section 4(4) of the Foreign Compensation Act, 1950 and the provisions are set out in Lord Reid's judgment in the case (supra). Clearly this clause prescribes an ouster of the court's jurisdiction with respect to "the determination by the Commission of any application" leaving it equally clear that unless the matter concerns such determination the jurisdiction of the courts of law, a necessary adjunct to civilized living, must stay. That was in short the business of the House of Lords in that case and that was what they had apparently set out to do.

In the present appeal we are exactly in the same position and it is our duty to construe the words of our own statute and to give those words their appropriate meaning and effect."

Both parties are ad idem that where there is a successful take over of government by the military from the civilians followed by a sus-

pension of the constitution and substantial modification of its fundamental parts, such a government is a revolutionary government. When the military seized power from the interim government, it sacked the National Assembly, the State Houses. It also dissolved the civilian governments of the states and sacked their executives. It set aside the 1979 Constitution as modified and started governing the country by decrees and edicts. Decree No. 107 of 1993 titled "Constitution [suspension and modification] Decree 1993", was promulgated and enacted into law. It enacted under the following sections as follows:-

"1(2) The provisions of the Constitution of the Federal Republic of Nigeria, 1979 mentioned in the First Schedule of this Decree are hereby suspended."

1(3) Subject to this and any other Decree made before or after the commencement of this Decree the provisions of the said Constitution which are not suspended by sub-section (2) shall have effect subject to the modification specified in the Second Schedule to this Decree."

2(1) The federal Military Government shall have power to make laws for the peace, order and good Government of Nigeria or any part thereof with respect to any matter whatsoever."

Subsection one of section four stated when a decree is made. It provides thus-

"4(1) a Decree is made when it is signed by the Head of State, Commander-in-Chief of the Armed Forces whether or not it comes into force."

S.5 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 or of any Edict shall be entertained by any Court of law in Nigeria."

The provision of section 1(3) of this Decree is very clear. The unsuspended provisions of the Constitution as specified in the Second Schedule to the Decree is applicable only to the extent of its modifications by other Decree preceding it that are still in force or those to be made thereafter. Both Decrees No. 8 of 1994 and No. 12 of 1994 were enacted after Decree No. 107 of 1993 and so the unsuspended provi-

sions of the 1979 Constitution as specified in the Second Schedule to Decree No. 107 is applicable subject to their provisions.

Sections 1, 2 and 3 of the Guardian Newspapers and African guardian Weekly Magazine [Proscription and Prohibition From Circulation] Decree No. 8 of 1994 provide as follows:-

"1. *Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979 as amended or any other enactment or law, the Newspapers and Weekly Magazine listed in the Scheduled to this Decree, published by Guardian Newspapers Limited and Guardian Magazines Limited both with corporate Headquarters at Rutam House, Isolo Express Way, Oshodi, Lagos are hereby proscribed from being published and prohibited from circulation in Nigeria or any part thereof.*

2. *The premises where the Newspapers and the Magazine referred to in section 1 of this Decree are printed and published shall be sealed up by the Inspector-General of Police or any officer of the Nigeria Police Force authorized in that behalf during the duration of this Decree.*

3. *Any person who on the direction of the appropriate authority had at any time before the commencement of this Decree, dealt with or acted in compliance with this Decree or thereafter deals with any copy of the Newspapers or Weekly Magazine proscribed or prohibited from circulation pursuant to this Decree, shall stand indemnified in respect thereof and no suit or any other proceedings whatsoever shall lie at the instance of any person aggrieved in respect of any act, matter or thing done or purported to be done in respect of such direction or compliance and whether any such suit or other proceedings has been or is instituted in any court, it shall abate and be of no effect whatsoever."*

Decree No. 12 of 1994 is titled "Federal Military Government [Supremacy and Enforcement of Powers] Decree 1994. The Decree enacted as follows:-

"WHEREAS the military revolution which took place on 17th November, 1993 effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree No. 107 of 1993.

AND WHEREAS the military revolution aforesaid involved an abrupt political change which was not within the contemplation of the Constitution of the Federal Republic of Nigeria, 1979.

AND WHEREAS BY THE Constitution (Suspension and Modification) Decree No. 107 aforesaid there was established a new government known as the "Federal Military Government" with absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever and, in exercise of the said powers, the said Federal Military government permitted certain provisions of the Constitution of the Federal Republic of Nigeria, 1979 to remain in operation.

AND WHEREAS by section 5 of the said Constitution (Suspension and Modification) Decree , no question as to the validity of any Decree or any Edict (in so far as by section thereof the provisions of the Edict are not inconsistent with the provisions of a Decree) shall be entertained by any Court of law in Nigeria.

AND WHEREAS by section 1(3) of the said Constitution (Suspension and Modification) Decree the provisions of a Decree shall prevail over those of the unsuspended provisions of the said 1979 Constitution.

1-(1) the preamble hereto is hereby affirmed and declared as forming part of this Decree.

(2) It is hereby declared also that:

(a) for the efficacy and stability of the Government of the Federal Republic of Nigeria; and

(b) with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federal Republic of Nigeria:-

(i) 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, on or after the commencement of this Decree the proceedings shall abate, be discharged and made void;

(iii) the question whether any provision of chapter IV of the

Constitution of the Federal Republic of Nigeria 1979 has been, is being or would be contravened by anything done or purported to be done in pursuance of any Decree shall not be inquired into in any Court of law and accordingly, no provision of the Constitution shall apply in respect of any such question."

Section 1 of Decree No. 8 of 1994 clearly stated that the Decree shall prevail over "anything contained in the Constitution of the Federal of Nigeria or any other enactment or law." This includes the second schedule to Decree No. 107 of 1994 and section 6 which vests judicial powers in the court as well as the question of enforcement of fundamental rights granted under the 1979 Constitution which the respondents are seeking to enforce in this action.

I find no evidence in the respondents' affidavit evidence or in the submissions made by their learned counsel to show that Decrees No.8 and 12 are not Decrees validly promulgated. The Honourable Attorney-General of the Federation is not a member of the Provisional Ruling Council and what he said in his Press Conference is not evidence to support the contention that Decree No. 8 of 1994 was not validly made. This will also apply to Decree No.12 of 1994. For a Decree to be valid, it only has to comply with the provision of section 4(1) of Decree No. 107 of 1993. The two Decree, that is No. 8 of 1994 and No. 12 of 1994 were signed by the Head of State, Commander-in-Chief of the Armed Forces. Section 6 (1), (2), (3), 5 and (6) of Decree No.107 of 1994 vests the Executive authority of the Federal Republic of Nigeria in the Head of State, Commander-in-Chief of the Armed Forces and can exercise such powers whether directly or through persons or authorities subordinate to him and that the question whether or not he has consulted the Provisional Ruling Council with respect to any exercise of such executive powers shall not be enquired into in any Court of Law. See subsections 2 and 3 respectively of Decree No. 107 of 1993.

There was no suggestion that the two Decree under attack were not signed as provided for in section 4(1) of Decree No. 107 of 1993 *supra*.

As regards the ouster clauses precluding any court in Nigeria

from entertaining the complaints as contained in the Amended Originating Summons, section (5) of Decree 107 of 1993, section 2(b) (i) and (ii) of Decree No. 12 of 1994 and Section 3 of Decree No. 8 of 1994 provide to that effect. To mention a few of them see Adejumo construction Co. Ltd. v. Colonel Johnson (1974) ALL NLR 26; Agip [Nigeria] Ltd. v. A. G. Lagos State (1972) ALL NLR 297; Harriman Hope v. Johnson Mobolaji (1970) ALL NLR 503; Council of University of Ibadan v. Adamolekun (1969) ALL NLR 225; Adejumo Adebisi v. O. Johnson (1979) ALL NLR 164; Osita G. Nwosu v. Imo State Environmental Sanitation Authority & 4 Ors (1990) 2 NWLR [Pt. 135] 688; A. G. of the Federation & 2 Ors. v. C. O. Sode & 2 Ors. (1989) 1 NWLR (Pt. 128) 500; A. G. Midwestern Nigeria v. Chief Sam Warri Essi (1977) ALL NLR 56 and Nzonwanno & 4 Ors. v. Igwe & Ors. (1976) ALL NLR 64. Learned counsel for the respondent did not invite this Court to reconsider these decisions with a view to over-rule any or all of them.

The wordings of the ouster clauses in the present case are so clear and require no reference to extraneous matters in aid of their construction. See Ogunmade v. Fadaviro E. A. A. (1972) ALL NLR 670.

As I have earlier indicated at the beginning of this concurring judgment, Learned Senior Counsel for the Respondents proffered similar argument in adejumo v. The Military Governor of Lagos State (1972) ALL NLR 164 particularly at 173 as he did in this case, but was rejected by this court. This court does not need to refer to foreign cases in construing statutes peculiar to this country; its duty is to construe them in order to ascribe to the words therein their appropriate meaning and effect.

In the Schedule attached to Decree No. 8 of 1994 the following newspapers and magazines were listed as proscribed -

- "(i) *The Guardian.*
- (ii) *The Guardian on Sunday.*
- (iii) *The African guardian Weekly Magazine.*
- (iv) *The Guardian Express.*
- (v) *The Financial guardian.*
- (vi) *The Lagos Life.*

(vii) *Any other Newspaper or Magazine in any form under whatever name, printed and published by the Guardian Newspapers Limited and Guardian Magazines Limited or by any of their subsidiaries."*

In addition to the proscription of the Newspapers and Magazines listed above, the premises where they are being printed to wit their corporate Headquarters at Rutam House, Isolo Express Way Lagos, was ordered to be sealed up, and this order was executed by the Nigeria Police by sealing up Rutam House, hence the joinder of the Inspector General of Police to this action as the 2nd Defendant/Appellant.

As shown in the Summons, Rutam House, apart from housing the corporate Headquarters of Guardian Newspapers Ltd. and guardian Magazine Ltd. it also houses the following corporate bodies -

1. Rutam Crell On Computer Ltd.
2. Meleq - M
3. P. M. S. Ltd.
4. Express Printing & Packaging Ltd.
5. Guardian Services Ltd.

The five corporate bodies listed above are not included in the schedule. Rutam House may be a block of buildings to house all these bodies.

In Blacks Law Dictionary, Fifth Edition the word "premises" is, among other meanings, ascribed the following - "A distinct and definite locality, and may mean a room, shop, building or other definite area, or a distinct portion of real estate." In Shorter Oxford English Dictionary Vol. 11, 3rd Edition the word "premise" is explained to include the following meanings - "The subject of a conveyance or bequest, specified in the premises of the deed; = the houses, lands or tenements; a house or building with its grounds or other appurtenance."

From the meaning above ascribed to the word "premises", it is not impossible that Rutam House may contain different premises within the buildings which are being occupied by respondents 2 - 6. These respondents cannot be said to be affected by the orders in Decree No. 8 of 1994 either by the liberal or strict construction of its provisions. The trial court was therefore wrong to deny them a hearing on the merit of their compliant. The decision of the Court of Appeal in favour of 2nd to

6th respondents in my view right and I affirm it.

The appellants have not appealed against the decision of the Court of appeal where it declared the joinder of Inspector General of Police as 2nd defendant in the suit, by Auta J, null and void.

Where a party has raised a preliminary objection that a court has no jurisdiction to entertain a case, particularly of this nature, it will always be better to adjourn the hearing of such a preliminary objection to await the filing and settlement of pleadings, as it is only then that the case being presented by the parties will become clear and certain.

For these reasons and the fuller reasons in the lead judgment of my learned brother Uwaifo, JSC which I have been privileged to read before now. I hereby allow this appeal in part. I set aside the judgment of the Court of Appeal whereby it declared Decree No. 8 of 1994 and Decree No. 12 1994 void, and restore the decision of the trial Court by Kolo J as it affects Guardian Newspapers Ltd. and Guardian Magazines Ltd. and the other publications listed in the Schedule to Decree No. 8 of 1994 and the sealing of the 1st Respondent's Corporate Headquarters in Rutam House. I affirm the decision of the Court of Appeal in so far as it affects Respondents 2 - 6

Since the appeal succeeds in part, I make no order as to costs.

ONU JSC

This appeal is sequel to the unanimous judgment of the Court of Appeal, Lagos Division (hereinafter referred to as the court below) delivered on 13th June, 1995 which set aside the ruling of Kolo, J. of the federal high Court, holding in effect, that the Federal High Court has jurisdiction to hear the Suit in the face of Decree No. 8 and 12 of 1994.

Having before now been privileged to read in draft the leading judgment of my learned brother Uwaifo JSC, I agree with him that the appeal is allowed in part for the following reasons.

Before offering my comment in expatiation thereto, however, I wish to adopt as my guiding principle what this Court said in Barclays bank Ltd. v. Central Bank of Nigeria (1976) 1 ALL NLR (Part 1) 409 to

the affect that:-

"..... *there is a clear distinction between stating that the court has no jurisdiction to hear a case, and stating that the court has no jurisdiction to determine whether or not it has jurisdiction to hear the case. Thus, a court may by statute, lack jurisdiction to deal with a particular matter; but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matter.*"

And talking of jurisdiction, it is worth emphasizing firstly, that it cannot be disputed that in a Military regime, Decrees are the Supreme laws of the land and other laws, including the Constitution are regarded as inferior thereto (Decrees). See Attorney-General, Anambra State v. Attorney-General of the Federation (1993) 6 NWLR (Part 302) 692. It is also indisputable that the clear meaning of the provisions of a Decree or Statute must be applied and upheld so long as such provisions are plain, unequivocal and unambiguous. See Emmanuel Onyema & 5 Ors. v. Uweze Oputa & Anor. (1987) 3 NWLR (Part 60) 259 at 276. Thus, although the powers of the superior courts of record such as the High Court are, undoubtedly great, and, indeed, wide, they are certainly not unlimited. They can be and are indeed sometimes properly limited or circumscribed by ouster of jurisdiction clauses in some Decree or legislations. See Barclays Bank of Nigeria Ltd. V. Central Bank of Nigeria (supra); Olaniyi v. Aroyehun (1991) 5 NWLR (Part 194) 653 at 586; Attorney-General of the Federation v. Sode (1990) 1 NWLR (Part 128) 500 at 518 and Shodeinde v. Registered Trustees of Ahmadiya Movement in Islam (1980) 1-2 SC.225, to mention but a few. Although it has always been the practice of the courts to guard their jurisdiction jealously see Eastbourne Corporation v. Fortes Ice Cream Parlour (1955) Ltd. (1959) 2QB. 920) if in any given case that jurisdiction is expressly ousted by the provisions of a Decree, the path of justice dictates compliance with such an ouster clause, moreso that as under our present Constitution, Decrees are the supreme laws of the land. See Osadebay v. Attorney-General of Bendel State (1991) 1 NWLR (Part 169) 533 at 571. That there is lack of power in any court in the Federation to question the competence of the Government to promulgate a Decree or Edict is un-

doubted. See Mid-Western State v. Chief Warri Esi (1977) 4 SC.71 and Abayol v. The Civil Service Commission, Benue State & 3 Ors. (1991) 3 NWLR (Part 182) 693 at 695. Nor is any court competent to pronounce upon the competence of the Government to promulgate a Decree of Edict with regard to its superiority thereof. See Labiya v. Anertiola (1992) 8 B NWLR (Part 258) 139. It should be pointed out, however, in relation to ouster, that it is not the law that once an ouster of jurisdiction clause is raised in any proceeding, the court must automatically throw in the towel, decline jurisdiction and proceed to strike out the suit. Unlike what the C trial court did in the instant case on appeal, a court of competent jurisdiction where it is faced with an ouster clause, still has a duty to inquire into the issue to enable it to determine whether or not it has jurisdiction to entertain the action. For as explained by Iguh, JSC in Chukwuemeka Agwuna v. The Attorney-General of the Federation & Anor. (1995) 5 D NWLR (Part 396) 418 at 438:-

"While a person's right of access to the law courts may be taken away or restricted by statute, the legal position is that the language of such statute, must be carefully scrutinized by the courts and will not be E extended beyond its least onerous meaning unless clear words are used to justify such extension. See Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria (1976) 1 ALL NLR 326 at 334. But where, as I have observed, the ouster of court's jurisdiction clause in a Decree is plain, F clear and unambiguous, the judicial attitude has always been to decline jurisdiction. See Osadebay v. Attorney-General of Bendel State (supra). I agree that to do otherwise and to refuse to give way to an ouster clause in a Decree in an appropriate case after due inquiry will, no doubt, amount G to judicial lawlessness. See National Electoral Commission v. Chief F. A. Nzeribe (1991) 5 NWLR (Part 192) 458 at 472."

See also NEC v. NZERIBE (1991) 5 NWLR (Part 192) 458 at 472.

On further treatment of the issue of jurisdiction, it is trite that where such an issue is raised in an action, since it is capable of disposing of the whole H case, it is proper to have it tried first. For as Belgore, JSC put it in Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Part 135) 688 at page 726-727:

"The issue of jurisdiction is always fundamental and it is only prudent it be resolved first, otherwise the court that ignores that issue might finally find its going to the real trial of all issues a mere adventure. Jurisdiction is the power of the Court to adjudicate in the subject-matter and it is either given by the Constitution or a specific statute on the subject in issue. To avoid unnecessarily wasting time of the court, it is therefore desirable to ascertain first if there is jurisdiction by the Court to try the issue."

The learned Justice further held :-

"Similarly, as in military regimes, decrees of the Federal Military Government clearly oust the Court's jurisdiction, there is no dancing round the issue to found jurisdiction that has been taken away"

So much for the guiding cardinal principles for the interpretation of legislations under the military and in normal (civilian) times.

Now, the case brought by the Guardian Newspapers Limited and five others before the Federal High Court sitting in Lagos (Coram E Kolo: J.) by way of motion ex parte under the Fundamental Rights Procedure for declaratory reliefs, a mandatory injunction, damages of N200 Million on behalf of 1st respondent and N50 Million on behalf of each of the 2nd - 6th respondents, was as to -

"(1) Whether:

(a) *The Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No. 8 of 1994; and*

(b) *the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 - both published in the Federal Republic of Nigeria official Gazette No. 3 Vol. 81 dated 24th August, 1994 are Decrees of the Federal Military Government; and*

(c) *Whether or not as a result of the above publications of (a) and (b) the jurisdiction of this Court, in the substantive proceedings presently pending before it has been ousted."*

In the interval, a motion to join the Inspector-General of Police as one of the defendants (respondents) had been granted by Auta, J. while the

substantive case still remained with Kolo, J. In his considered Ruling dated 13th October, 1994 Kolo, J. ruled as follows:-

"1. *Decrees are superior, in our present day Nigeria, to even the 1979 Constitution and this fact makes cases such as the Liyanage case not quite relevant to the present Nigerian situation.*

2. *Decree 107 that suspended a good portion of the 1979 Constitution also provides that unsuspended portions of the said 1979 Constitution are subject or subordinate to any Decree on the same matter.*

3. *That Decrees 8 and 12 of 1994 were properly made and promulgated by the Federal Military Government of Nigeria.*

4. *That the said Decrees 8 and/or 12 of 1994 have ousted the jurisdiction of this Court in the present application as before it.*

3. As in Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Part 135) 688 per Belgore, JSC "..... there is no dancing round the issue to found jurisdiction that has been taken away."

The above Ruling was sequel to questions raised in the amended Summons filed on the respondents' behalf, the publication of Decrees No. 8 and 12 with retrospective effect and arguments proffered on the two said Decrees as to whether they are enactments properly so called to qualify as Decrees promulgated under powers to legislate and/or were legislative judgments meant to inflict punishment on individual.

It was because the Court of Appeal sitting in Lagos (Coram: Kalgo & Ayoola JJ.C.A. as they then were and Pats-Acholonu J.C.A) had no hesitation in firstly holding that the Inspector-General of Police was wrongly joined and secondly, proceeding unanimously and unequivocally to allow the respondents' appeal by stating that the trial court had jurisdiction to hear and determine the case that has led to the appeal herein. The three issues submitted at the instance of the appellant as arising for our determination are:-

"1. *Whether the court below was right in holding that Decrees No. 8 and 12 of 1994 are not Decrees within the meaning of Decree No. 107 of 1993 and thus to declare the Decrees null and void. Put the other way, can a court of law declare void a Decree for whatever reason?.*

2. *If the answer to the above issue is in affirmative, which is denied, whether the Court of Appeal was right to apply the concept of judicial legislation (sic) ethics, morality and religion to hold that Decrees No. 8 and 12 of 1994 are not Decrees of the Federal Military Government and thus to declare it (sic) null and void.*

3. *Whether the court below was right in holding that the ouster clause in Decree No. 8 of 1994, Decree No. 12 of 1994 and Decree No. 107 of 1993 did not operate to oust the jurisdiction of the court to determine this suit."*

The respondents for their part by their counsel, Chief Williams, SAN, proffered the following four questions for our consideration, to wit:

"(i) *What are the powers of a Sovereign Government which are exercisable by (a) the Federal Military Government and (b) the Courts of law pursuant to the provisions of the Constitution (Suspension and Modification) Decree No. 107 of 1993.*

(ii) *Whether the doctrine and principle of the Rule of Law is binding on the Federal Military Government in its operation of the Constitution of the Federal Republic of Nigeria, 1979, as modified or amended by Decree No. 107 of 1993 and other Decrees of the said Government.*

(iii) *What is it that binds the courts of law to acknowledge an instrument made by the Federal Military Government as a Decree enacted in the exercise of the legislative powers of that Government*

(iv) *In the light of the answer to the foregoing, whether the judicial powers exercisable by the Federal High Court and other superior courts established by the afore-mentioned Constitution includes the jurisdiction to determine whether or not an instrument proclaimed by the Federal Military Government to be a Decree is a Decree and therefore binding as law."*

It is well to begin by stating briefly how this action came about or originated. At about 12.10 am in the early hours of Monday 15th August, 1994, about 150 armed Policemen entered the premises in Lagos known as Rutam House, Isolo Expressway, and ordered all the employees of each of the respondents herein to leave the premises forthwith. The uncontradicted affidavit evidence in the court below discloses that

up till the 16th August, 1994 when the application for leave to enforce the Fundamental Rights of the respondents, then applicants, was filed, no executive or judicial warrant was produced to the respondents for the very strange action of the police. Since that time up till several months thereafter, all employees, licensees and invitees of the respondents and every other person had been denied the right to enter the premises i.e. Rutam House. Upon granting the application for leave, the trial court on 17th August, 1994 also ordered "that the status quo of the situation be maintained as it was before the encroachment on the premises by the Police." Further hearing of the case was then adjourned to another date while meanwhile, the police presence at the premises continued and the place remained shut until after the personal directive of the late Head of State to permit them to be re-opened.

For the time being, neither the respondents nor people in the vicinity of the premises knew of the existence of Decree No. 8 of 1994 until some time in September when the respondents upon seeing the appellant's gazette thereto filed a Summons (followed by an amended Summons dated 8th September, 1994) to enable the trial court to consider the effect of the Decree which had just then come to right. After all parties to this action had become aware of Decree 8 (and later Decree 12), it became obvious that the trial Federal High Court must face the question whether or not it had jurisdiction to continue the trial. This was the culmination of the arguments which resulted in the ruling of 14th October, 1994 in which Kolo, J. declined jurisdiction. The material portion of Decree 8 (Sections 1 and 2) reads as follows:-

"1. Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria, 1979 as amended or any other enactment, or law, the Newspapers and Weekly Magazine listed in the Schedule to this Decree published by the Guardian Newspapers Limited both with corporate Headquarter at Rutam House, Isolo Expressway, Oshodi Lagos are hereby proscribed from being published and prohibited from circulation in Nigeria or any part thereof.

2. The premises where the Newspapers and the Magazine referred to in Section 1 of this Decree are printed and published shall be

sealed up by the Inspector-General of Police or any officer of the Nigeria Police Force authorized in that behalf during the duration of this Decree."

It will be noted that there was a blanket application of the Decree to all the respondents without discrimination and as between the 1st respondent and 2nd - 6th respondents respectively who, except that they had offices under the same roof of Rutam House, had no business printing or publishing any purported publication. They were just not given a hearing. Furthermore, while Decree No. 8 mentions the 1st respondent, it says nothing about 2nd to 6th respondents. Hence, it can safely be said that Decree No. 8 had only 1st respondent and no others in contemplation for the invasion of 2nd - 6th respondents' rights.

In my consideration of this appeal I will stick to the three issues formulated by the appellant by considering them together as follows:-

In Nigeria today, and as submitted by Mr. Onwugbutor, learned Senior Advocate and Solicitor-General of the Federation, no court of law can declare a Decree a nullity for whatever reason. I agree with him that no court can question the validity of a decree nor declare a Decree void or unenforceable on grounds that it is an irrational assault on the citizen's psyche, in conflict with reason or offensive whatsoever. On the supremacy of a Decree, it is now settled that Decrees are superior to the Constitution and that once promulgated, their superiority to the exclusion of the Constitution is acknowledged. Thus, as Belgore, JSC put it in Attorney-General of the Federation v. Sode (supra) at page 518 -

"To the Military the Constitution is a veritable working document and no more, because once they promulgate a Decree and that Decree excludes the provisions of the Constitution, the Decree has the superiority to the exclusion of the constitution and any other enactment on the subject matter of the Decree This is the peculiarity of the Military regime which made the Constitution subject to their Decrees."

See also Obada v. Military Governor of Kwara State (1990) 6 NWLR (Part 157) 482 at 497 where Ogundere, J. C.A. pointed out thus:-

"The provision of any legislation including the Constitution afore-

said in conflict with a Decree is to the extent of such conflict or inconsistency null and void. As to procedure, no court of law has the competence to entertain any question as to the validity of any Edict or Decree, that is, no court has jurisdiction to entertain a question as to the legislative competence or capacity of a Governor to make an Edict or of the President to enact a Decree." (Underlining is for emphasis). B

On the acknowledged incompetence of the courts to pronounce on the question as to whether or not a Decree or an Edict has been validly made as well as to how organic Decrees are made, Decree No.1 of 1994 (in pari materia with Decree No. 107 of 1993) has set out to define the organic law or grundnorm of Nigeria with provisions giving unlimited legislative powers to the Armed Forces Ruling Council, thus enabling it even to amend the organic Decrees as decided in Labiya v. Anretiola (supra) (per Nnaemeka-Agu, JSC). C D

In his submission, Chief Williams has not asked this Court to overrule or depart from its former decisions in respect of the status of Decrees. See Order 6 Rule 5(4) Supreme Court Rules, 1985 as amended. It appears to me incontrovertible that Decree No. 8 of 1994 and a fortiori Decree No. 12 of 1994, the latter which was subsequent to the former-were later both duly signed by the Head of State as required by law, thus giving both enactments validity and efficacy. See Section 4(1) of Decree No. 107 of 1993 which provides as follows:- E

"A Decree is made when it is signed by the Head of State, Commander-in -Chief of the Armed Forces, whether or not it then comes into force." F

At the time the two Decrees under attack were promulgated the grund norm (Decree No. 107 of 1993) in Section 2(1) provided as follows:- G

"The Federal Military Government shall have the power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever." (Underlining supplied by me). H

As to what is a Decree, the same grund norm Decree No. 107 of 1993 defines it as -

"Decree' means an instrument made by the Federal Military

Government and expressed to be or made as, a Decree."

The sum total of the submissions of the learned Solicitor-General, Mr. Onwugbufo, SAN for the appellant, is that under no circumstances can a court challenge the validity of a Decree whether as being in conflict with the Constitution or with another Decree. In this regard, he cited in support Section 5 of Decree No. 107 1993 which provides that :-

"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 or an Edict shall be entertained by any court of law in Nigeria."

See the decision of this Court in Adejumo v. The Military Government of Lagos State (1972) All NLR 164 at 173 wherein it was held that:-

"The sum total of Chief William argument is that where an instrument sought to be challenged had been made in excess of jurisdiction, such an instrument would not enjoy the protection of any preclusive legislation forbidding judicial review of it. It is of course not possible for us to accede to the arguments on behalf of the appellant. In Anisminic's case (supra) the House of Lords was concerned with the interpretation of a particular statutory provision peculiarly oriented. In the Anisminic case the statute then construed was Section 4(4) of the Foreign Compensation Act, 1950 and the provisions are set out in Lord Reid's judgment in the case (supra). Clearly this clause prescribes an ouster of the court's jurisdiction with respect to "the determination by the Commission of any application" leaving it equally clear that unless the matter concerns such determination the jurisdiction of the courts of law, a necessary adjunct to civilized living, must stay. That was in short the business of the House of Lords in that case and that was what they had apparently set out to do. In the present appeal we are exactly in the same position and it is our duty to construe the words of our own statute and give those words their appropriate meaning and effect." See also Adejumo & Nigeria Construction Co. Ltd. v. Col. Mobolaji Johnson (1974) All NLR (2nd Edition, Vol. 1) 26 at 30.

In Nigeria, the Military have without the least doubt held their Decrees like their proverbial 'no go areas' of the Constituent Assembly

fame, as supreme and sacrosanct. The question therefore is whether Decree No.8 of 1994 is a Decree within the intendment of the grund norm - Decree No. 107 of 1993 and whether the two enactments described as Decree Nos.8 and 12 of 1994, are Acts of the Federal Military Government. In the instant case both parties are agreed that where there is a successful take-over by the Military of the civil government the suspension of the Constitution and substantial modification of its substantial parts, the Military take over of the reigns of government is a revolutionary government that set aside the Constitution and made laws by Decrees. If I accept as indeed I do, that Decree Nos.8 and 12 answer the name Decrees as defined in Decree No.107 of 1993 (the grund norm) then, my acceptance of Decree No.12 as ousting the jurisdiction of the trial court in so far as 1st respondent's action is concerned becomes a foregone conclusion. But not so, in my respectful opinion, with regard to 2nd, 3rd, 4th, 5th and 6th respondents who are neither mentioned in Decree No.8 nor are they strictly parties against whom the Decree was directed albeit that they occupied Rutam House and bore the appellant's brutal preventing their right of egress and ingress thereto. Once I have accepted Decree No.8 as being a Decree it becomes lame to argue as to whether or not it is for " peace, order and good government," Put in another way, whether or not one entertains doubts must the Decree thereby be declared null and void? My answers must be in the negative.

It is for these reasons that a cursory look at what Nnaemeka-Agu, JSC said in Labiya v. Anretiola (supra) becomes relevant. Said he:-

"The organic Decree, in this case No.1 of 1984 (also rater Decree No.107 of 1993), set out to define the organic law or grund norm of Nigeria. Subject to its provisions it gave unlimited legislative powers to the Armed Forces Ruling Council (later the Provisional Ruling Council) and so it has power even to amend the organic Decree by subsequent Decrees To give effect to the intendment of this legislative Scheme, the organic Decree left unsuspended Section 6(6) (b) of the 1979 Constitution which gives judicial powers to the courts"

(Parenthesis are mine). The Military over the years never pretended one day to usurp these judicial powers.

It needs to be emphasized that in this case where a preliminary objection has been raised that the trial court has no jurisdiction to entertain a case, it is always advisable to await the filling and settling of pleadings, as it is only by the exchange of such pleadings by the parties that Issues joined will be clarified and made manifest. Thus, regarding ouster of jurisdiction, I do not with due respect, see myself in of agreement with Ayoola, J.C.A. (as he then was) when in his contribution to the case of the Guardian Newspapers Limited v. Attorney-General of the Federation (1995) 5 NWLR (Part 398) 703 at 754 he said inter alia:-

"In this case even if the two instruments (Decrees Nos. 8 and 12 of 1994) are effective as Decrees the Federal High Court ought not to have declined jurisdiction at the stage it did without further inquiry. Ouster of the jurisdiction of a court does not preclude it from exercising jurisdiction to interpret the ouster clause itself or to determine whether or not the action in question comes within the scope of power or authority covered by enabling statute.

Be that as it may, it is sufficient to dispose of this appeal on the ground that the instrument which is not an exercise of legislative power is not a Decree within the provisions of Decree No.107 of 1993"

In the case in hand, the two Decrees (Nos.8 and 12 of 1994) having been shown to have been signed by the Head of State as required by law, (indeed the contrary has not been shown upon the preponderance of affidavit evidence) the talk about the Rule of law, the separation of powers among the three arms of government as well as the application of the Exclusive and Concurrent legislative lists etc. are of little avail here. Consequently, in the light of the foregoing, my answer to issues No.1 is rendered in the negative; that to issue No.2 is that it would no longer arise while the answer to issue No.3 would be answered in the positive and negative. Thus, I am of the firm view that Decree No.12 of 1994 effectively ousts the jurisdiction of the courts to entertain any action brought pursuant to the provisions of Decree No.8 (ibid). Nor are both Decrees in breach of Section 40(1) of 1979 Constitution which states as follows:-

40(1) "No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or inter-

est in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things -

(a) requires the prompt payment of compensation therefor; and

(b) gives to any person claiming such compensation a right of B access

for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria."

The Federal High Court, by virtue of section 230 of the 1979 Constitution as amended by Decree No.107 of 1993, is in my view conferred with the jurisdiction to entertain a suit such as the one under consideration herein.

It is for these reasons and those more elaborately contained in the leading judgment of my learned brother Uwaifo, JSC, a preview of which I have been privileged to have, that I too allow the appeal in respect of 1st respondents but dismiss it in respect of the 2nd - 6th respondents.

Since the appeal succeeds in part, I do not feel obliged to award costs. Accordingly, I too, make no order as to costs.

IGUHJSC

I have had the privilege of reading in draft, the judgment just delivered by my learned brother, Uwaifo, J.S.C. and I am in full agreement that this appeal should succeed in part. The facts of this case have been fully set out in the leading judgment. I need only emphasize that following the forcible entry into the premises known as and called Rutam House, Isolo Expressway, Oshodi, Lagos by a group of armed policemen in the early hours of the 15th August, 1994, the employees of all the six respondent companies which carried on their respective businesses therein were ordered out of the premises and denied the right of re-entry. No reasons were given for this inexplicable act of high-handedness on the part of the police.

Aggrieved by this invasion, the respondents applied for leave to enforce their fundamental rights which application was duly granted by Kolo, J. of the Federal High Court, Lagos. An originating summons was thereafter filed by the respondents against the appellant in which a number of reliefs were claimed.

Following this development, the Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No. 8 of 1994 and the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.12 of 1994 were promulgated by the Federal Military Government. These Decrees, as the Court of Appeal put it, sought "to give teeth" to the proscription or closure of the respondents' various businesses. Their tenor and intentment are that the jurisdiction of the courts was ousted in the matter of the adjudication of any issues relating to the proscription or closure of the businesses concerned.

Consequently the respondents applied for and obtained the leave of court to amend the originating summons they had filed in the cause. In the amended summons, the following issues were set out for determination, namely -

"(i) Whether the instruments published as Decrees in the Federal Republic of Nigeria Official Gazette No.3, Volume 81 dated 24th August 1994 are enactments or Decrees of the Federal Military Government.

(ii) Whether the proceedings herein or any portion thereof have abated and become of no effect whatsoever as a result of the Guardian Newspapers and Africa Guardian Weekly Magazine (Proscription and Prohibition From Circulation) Decree, 1994 No. 8 or as a result of the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1994 No. 12 or as a result of any other enactment or law relating to the jurisdiction and powers of courts of law in general or the Federal High Court in particular."

This was followed by a notice of preliminary objection filed by the appellant which, in effect, challenged the jurisdiction of the court to entertain the claims by virtue of the provisions of :-

(a) The Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No. 8 of 1994.

(b) S. 6(6) (b) of the Constitution of the Federal Republic of Nigeria, 1979.

(c) The Constitution (Suspension AND Modification) Decree No.107 of 1993.

(d) The Federal Military Government (Supremacy AND Enforcement of Powers) Decree No.12 of 1994.

At the conclusion of arguments, Kolo, J., in a considered ruling, held that Decrees No.8 and 12 of 1994 were properly promulgated by the Federal Military Government and, accordingly, that their provisions ousted the jurisdiction of the court to entertain the cause.

Dissatisfied with this decision of the Federal High Court, the respondents appealed to the Court of Appeal, Lagos, Division, which court in a unanimous judgment allowed the appeal, holding that Decrees No.8 and 12 of 1994 were not valid Laws enacted within the context of Decree No. 107 of 1993 and that their provisions did not therefore oust the jurisdiction of the court to entertain the action. The appellant has now appealed to his court.

From the brief of arguments filed by the parties and the oral arguments proffered by their learned counsel, it is clear that two main issues arise for resolution in this appeal. The first issue is whether the court below was right in holding that Decrees No. 8 and 12 of 1994 are not valid Decrees or Laws within the context of or as defined by the provisions of Decree No.107 of 1993 and that they are therefore null and void. The second issue is whether the court below was not in error when it held that the ouster clauses in the said Decrees No.8 and 12 of 1994 did not operate to oust the jurisdiction of the court to entertain the respondents' claims. I will now briefly consider these issues.

Turning now to the first issue, there can be no doubt that the court below, in allowing the appeal before it, held in the clearest possible terms that decrees No. 8 and 12 of 1994 are not valid Decrees or Laws within the meaning of Decree No. 107 of 1993 and that they were there-

fore null and void. It is equally clear that by the above pronouncement, the court below, in effect, directly challenged the validity of these Decrees which it pronounced as invalid and null and void. The question is whether the Court of Appeal or, indeed, any other court of law for that matter was or is competent to declare any Decree of the Federal Military Government as void, unenforceable and not coming within the context of Decree No. 107 of 1993 or any other Decree.

I think I ought to emphasize that the current basic law under which the Federal Military Government operates in Nigeria today is the Constitution (Suspension and Modification) Decree No.107 of 1993. That Decree suspended certain sections of the 1979 Constitution and made provisions vesting the executive and legislative powers of the Federal Republic of Nigeria in the Head of State, Commander-in-Chief of the Armed Forces and the Federal Military Government respectively. Thus by section 2(1) of Decree No. 107 of 1993, the Federal Military Government conferred power on itself to make laws for the peace, order and good Government of Nigerian or any part thereof with respect to any matter whatsoever. In view of the importance of this section of Decree No.107 of 1993, it will be desirable to reproduce its provision hereunder, that is to say -

"2(1) The Federal Military Government shall have power to make laws for the peace, order and good Government of Nigeria or any part thereof with respect to any matter whatsoever" (Underlining supplied for emphasis)

The provisions of the said section 2(1) of Decree No.107 of 1993 appear to me crystal clear. And where the words used or the provisions of any section of the law are clear and unambiguous, they must be given their ordinary meaning unless, of course, this would lead to absurdity or be in conflict with other provisions of that law. A court of law is not to ascribe meanings to the clear, plain and unambiguous provisions of a statute in order to make such provisions conform with the court's own views of their meaning or of what they ought to be in accordance with the tenets of sound social policy. See Attorney-General of the Federation v. Sode (1990) 1 N.W.L.R. (Part 128) 500, Adebowale

Att-Gen. Fed. v. Guardian News. (1999) 5 KLR Iguh JSC 1593
v. Military Governor of Oyo State (1995) 4 N.W.L.R. (Part 392) 733.
Chief D. O. Ifezue v. Livinus Mbadugha and Another (1984) 5 S.C. 79 at
101 etc.

Section 2(1) of Decree No.107 of 1993 has laid it down in as elementary and plain a language as possible that the Federal Military Government is vested with power to make laws for the peace, order and good Government of Nigeria or any part thereof with respect to any matter whatsoever. As extensive, abnormally wide and, perhaps, unfortunate as the contents of that power may be, the duty of this court is to give the same their plain meaning. In my view, therefore, the words "any matter whatsoever" regrettably covers any conceivable kind of matter and I have no alternative but to so hold.

Attention must also be drawn to the fact that the Federal Military Government rules by the enactment of Decrees. It is now settled law that Decrees are the highest form of law in Nigeria under the Military Government and that the provisions of a Decree are superior to those of the 1979 Constitution or the unsuspended sections thereof. Accordingly, once a Decree is duly promulgated, its provisions enjoy well settled superiority over those of the 1979 Constitution or any other enactment on the subject matter. Thus the unique but judicially recognized peculiarity of the Military regime is the subjection of the provisions of the Constitution and, indeed, any other Law whatever to those of a Decree. See Attorney-General of the Federation v. Sode (1990) 1 N.W.L.R. (Part 128) 500 at 518, Military Governor of Ondo State and Another v. Victor Adewunmi (1988) 3 N.W.L.R. (Part 82) 280, Chief Adebisi Adejumo v. Military-Governor of Lagos State (1972) 3 S.C. 45.

It is also trite law that the provisions of any legislation, inclusive of those of the unsuspended sections of the 1979 Constitution which are in conflict with those of any decree or edict are to the extent of such inconsistency or conflict of no effect and null and void. Although, therefore, the courts are vested with jurisdiction to determine whether the provision of an unsuspended section of the 1979 Constitution is inconsistent with a Decree with a view to invalidating such a provision of the Constitution if an inconsistency is established, courts possess neither the

jurisdiction nor the competence to challenge the validity of a Decree whether as being in conflict with the Constitution or with any other enactment. In other words, no question as to the validity of a Decree shall be entertained by any court of law in Nigeria whether as being in conflict with any section of the Constitution or, indeed, with any other Decree.

The above proposition of law is clearly set out by section 5 of Decree No.107 of 1993 wherein it is provided as follows -

"S.5 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 or of edict shall be entertained by any court of law in Nigeria".

See too Labiya v. Anretiola (1992) 8 N.W.L.R. (Part 258) 139 at 170 - 171, Adejumo v. Military Governor of Lagos State (1972) 1 ALL N.L.R. (Part 1) 159 at 169. It therefore seems to me that as at the present time, there does not appear to exist any recognized exceptions to the general rule that a court of law is without jurisdiction to challenge the validity of a Decree which has been enacted according to law, whether as being in conflict with the 1979 constitution or with any other statute,. I will now examine the contention of learned counsel for the respondents to the effect that Decrees No. 8 and 12 are not valid Decrees within the meaning of Decree No. 107 of 1993.

Section 4(1) of Decree No. 107 of 1993 made provision as to when a valid Decree comes into being. It provides -

"S. 4(1) A Decree is made when it is signed by the Head of State, Commander-in-Chief of the Armed Forces whether or not it then comes into force."

Decree No. 8 and 12 ex facie disclose that they were promulgated as Decrees of the Federal Military Government and were duly signed by the Head of State, Commander-in-Chief of the Armed Forces. It was not suggested that the two Decrees were not so signed as aforesaid and I find it difficult to accept, in the absence of any evidence, that the Decrees in issue were not validly enacted as defined by the provisions of Decree No. 107 of 1993. The court below was, therefore, in error when it declared Decrees No. 8 and 12 of 1994 invalid and null and void. It

seems to me that the posture of the court below in pronouncing the two Decrees a null and void is a clear challenge to their validity which exercise the provisions of section 5 of Decree No. 107 of 1993 forbid any court of law from entertaining. That declaration by the Court of Appeal was not borne out by any reliable evidence before the court and cannot, therefore, be allowed to stand. B

Before I conclude issue one, I think ought to draw attention to the fact that this court has consistently held in the past that no court of law in Nigeria has jurisdiction to entertain or question the validity of a Decree or to investigate its purview with a view to determining whether it is invalid, unlawful and/or unenforceable or otherwise null and void. See Adejumao v. Military Governor of Lagos State (1972) 1 All N.L.R. (Part 1) 159 at 189, Labiya v. Anretiola (1992) 8 N.W.L.R. (part 258) 139 at 170 - 171. Although an action lies to challenge an Edict on the ground that it is inconsistent with the provisions of a Decree, no action lies to challenge a Decree on the ground that it is inconsistent with the provisions of the 1979 Constitution or any other Law or Statute. See the Military Governor of Ondo State v. Victor Adewunmi, (supra) Onyiuke v. Eastern States Interim Assets and Liabilities Agency (1974) 1 All N.L.R. (Part 2) 151 etc. Although this court, with the greatest hesitation, has the power to depart from or to overrule its previous decision, the onus is on the party seeking to have a previous decision of this court overruled to satisfy the court that there is need to do so. The grounds upon which the Supreme Court will depart from and overrule its previous decisions are, inter alia, where - D

(i) it is shown that the previous decision is erroneous in law; or

(ii) the previous decision was given per incuriam; G

or

(iii) it is shown that the previous decision is contrary to public policy or occasioning miscarriage of justice or perpetuating injustice.

It is however recognized that each case must be decided on its own peculiar facts and circumstances so as, at any rate, to avoid the perpetuation of injustice as a result of the previous decision. See Odi v. Osafire (1985) 1 N.W.L.R. (part 1) 17 at 34 - 35, Cardoso v. Daniel (1986) 2 H

1596 Att-Gen. Fed. v. Guardian News. (1999) 5 KLR Iguh JSC
N.W.L.R. (Part 20) 1, Ifediorah v. Ume (1988) 2 N.W.L.R. (Part 74) 5,
Bronik Motors v. Wema Bank (1983) 1 S.C.N.L.R. 296, Rossek v. A.C.B.
Ltd. (1993) 8 N.W.L.R. (part 312) 382 at 431.

In the present case, no invitation was extended to this court to
B depart from its previous decisions with regard to the legal status of De-
crees of the Federal Military Government. In my judgment, both De-
crees No. 8 and 12 of 1994 are unquestionably valid decrees of the Fed-
eral Military Government and I so hold. I will now consider the second
C issue which is whether or not the court below was in error when it held
that the ouster clauses in the two Decrees did not operate to oust the
jurisdiction of the court to entertain the respondents' claims.

There is no doubt that it is the practice of the courts to guard
against their jurisdiction jealously and to frown at any attempt to curtail
D it. Where, however, in any given case, that jurisdiction is expressly ousted
by the provisions of the Constitution, a Statute or a Decree, then there
must be compliance with such as ouster clause. See Agwuna v. Attor-
ney-General of the Federation (1995) 5 N.W.L.R. (Part 418) 423 Osadebay
E v. Attorney-General of Bendel State (1991) 1 N.W.L.R. (Part 669) 525,
N.E.C. v. Nzeribe (1991) 5 N.W.L.R. (Part 192) 458 at 472.

Turning now to the Guardian Newspapers and African Guardian
Weekly Magazine (Proscription and Prohibition from Circulation) Decree
F No. 8 of 1994, section 3 thereof provides as follows -

*"No suit or any other proceedings whatsoever shall lie at the
instance of any person aggrieved in respect of any act, matter or thing
done or purported to be done in respect of such direction or compliance,
and whether any such suit or other proceeding has been or is instituted in
G any court, it shall abate and be of no effect whatsoever".*

There is next the Federal Military Government (Supremacy and
Enforcement of Powers) Decree No. 12 of 1994 as amended by the
Federal Military Government (Supremacy and Enforcement of Powers)
H (Amendment) (No. 2) Decree No. 16 of 1994 which provides thus -

*"No civil proceedings shall 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."

This Decree further adds -

"The question whether any provision of Chapter 4 of the Constitution of the Federal Republic of Nigeria has been is being or would be contravened by any thing done or purported to be done in pursuance of any Decree shall not be inquired into in any court of law and accordingly, no provision of the Constitution shall apply in respect of any such question."

It is plain to me that the combined effect of the above provisions of the two Decree in issue is to completely oust the jurisdiction of all courts of law to entertain all actions brought pursuant to any act done by virtue of the provisions of the said Decree No. 8 of 1994. As I have already observed, when an ouster clause is clear and unambiguous, effect must be given to it. See too Osadebay v. Attorney-General of Bendel State (supra) and Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 N.W.L.R. (part 135) 688 at 729.

In my view, the ouster clauses in Decree No.8 and 12 of 1994 are clear and totally unambiguous and effectively divested the Federal High Court of its jurisdiction to entertain the present suit in so far as it concerns all acts purportedly done within the purview of the provisions of Decree No.8 of 1994.

It is now necessary to set out the material portion of Decree No. 8 of 1994 with a view to determining the precise extent of its application. This provides as follows -

"1. Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979 as amended or any other enactment or law, the Newspapers and Weekly Magazines listed in the Schedule to this Decree, published by Guardian Newspapers Limited and Guardian Magazines Limited both with corporate Headquarters at Rutam House, Isolo Expressway, Oshodi, Lagos are hereby proscribed from being published and prohibited from circulation in Nigeria or any part thereof."

2. The Premises where the Newspapers and the Magazines referred to in section 1 of this Decree are printed and published shall be

sealed up by the Inspector-General of Police or any officer of the Nigeria Police Force authorized in that behalf during the duration of this Decree."

In the Schedule to the said Decree No. 8 of 1994, the following publications are listed as proscribed from being published and prohibited from circulation in Nigeria or any part thereof, namely -

- "(i) *The Guardian.*
- (ii) *The Guardian on Sunday.*
- C (iii) *The African Guardian Weekly Magazine.*
- (iv) *The Guardian Express.*
- (v) *The Financial Guardian.*
- (vi) *The Lagos Life.*
- (vii) *Any other Newspaper or Magazine in any form under*
- D *whatever name printed and published by the Guardian Newspapers Limited and Guardian Magazines Limited or by any of their subsidiaries".*

A close study of the above Schedule shows that the 2nd - 6th respondent in this action are therein named. They are totally unconnected with and do not, therefore, come within the purview of Decree No. 8 of 1994 which, in very clear terms, was aimed at and/or directed against the 1st respondent. I think the trial court was wrong to deny the 2nd - 6th respondents the right of their case to be heard on the merit when they did not come within the purview of the relevant Decree No. 8 in issue. In my view, the court below was right in holding that the ouster of jurisdiction clause in that Decree did not, on the special facts and circumstances of the case, cover their respective complaints against the appellant.

G It is the above reasons that I hereby allow this appeal in part. The judgment and orders of the court below in so far as they concern the 1st respondent are hereby allowed. The decision of the Court of Appeal in respect of the 2nd - 6th respondents is hereby affirmed and it is ordered that their claims be remitted to the trial court for hearing before another Judge, other than Auta or Kolo, JJ. It is further ordered that the pronouncement of the court below whereby Decrees No. 8 and 12 of 1994 were declared as null and void is hereby set aside. This appeal

having succeeded in part, I think that this is a proper case in which each party shall bear its own costs. I therefore make no order as to costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Uwaifo, JSC in this appeal. I agree with it.

On 15 August 1994 at about 12.30 a.m. some armed policemen entered the premises of the 1st Respondent Guardian Newspapers Limited known as Rutam House and ordered the employees of each of the Respondent to leave the premises forthwith. The premises were sealed up and the Respondents were, for several months, denied the right to enter the premises. The Appellant at no time disclosed by what authority the police committed this flagrant invasion of property and a contravention of the fundamental rights of the Respondents.

The respondents proceeded to the Federal High Court to seek to enforce their fundamental rights. Upon granting the application for leave to the court below, on 17 August 1994, also ordered "that the status quo of the situation be maintained as it was before the encroachment on the premises by the police." The police at no time obeyed the order of court and the premises of the respondents remained shut until after the personal directive of the late Head of State to permit them to be reopened.

By an amended summons, the Respondents at the court of trial sought the determination of the following questions:-

"Whether:

(a) *The Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from circulated Decree No. 8 of 1994;*

(b) *The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 - both published in the Federal Republic of Nigeria official Gazette No. 3 Vol. 81 dated 24th August 1994 are Decree of the Federal Military government and*
2. *Whether or not as a result of the above publication of (a) and the jurisdiction of this court, in the substantive proceedings presently pend-*

ing before it has been ousted."

Kolo J. before whom the matter came declined jurisdiction. He held *inter alia*:

tution also provides that unsuspended portions of the said 1979 Constitution are subordinate to any Decree on the same matter.

(2) That Decrees 8 and 12 of 1994 were properly made and promulgated by the Federal Military Government of Nigeria.

(3) That the said Decree 8 and /or 12 of 1994 have ousted the jurisdiction of this Court in the present application as before it."

The Court of Appeal allowed the appeal of Guardian Newspapers Ltd. and others against the ruling of Kolo J. and held that the Federal High Court had jurisdiction to entertain the action. The Attorney-General of Federation has appealed to this court.

The Appellant formulated three issues for determination which are as follows:

ISSUES FOR DETERMINATION

1. Whether the court below was right in holding that Decrees No. 8 and 12 of 1994 are not Decrees within the meaning of Decree No. 107 of 1993 and thus to declare the Decrees null and void. Put the other way, can a Court of Law declare void a Decree for whatever reason?

2. If the answer to the above issue is in affirmative, which is denied, whether the Court of Appeal was right to apply the concept of judicial legislation, ethics, morality and religion to hold that Decrees No. 8 and 12 of 1994 are not Decrees of the Federal Military Government and thus declare it null and void.

3. Whether the court below was right in holding that the ouster clause in Decree No. 8 of 1994, Decree No. 12 of 1994 and Decree No. 107 of 1993 did not operate to oust the jurisdiction of the court to determine this suit.

For their part, the Respondents raised four questions for determination.

They are:

(i) What are the powers of a sovereign Government which are exercisable by (a) the Federal Military Government and (b) the courts of law pursuant to the provisions of the Constitution (Suspension and Modi-

fication) Decree No. 107 of 1993.

(ii) Whether the doctrine and principle of the Rule of Law is binding on the Federal Military Government in its operation of the Constitution of the Republic of Nigeria, 1979, as modified or amended by Decree No.107 and other Decrees of the said Government. B

(iii) What is it that binds courts of law to acknowledge an instrument made by the Federal Military Government as a Decree enacted in the exercise of the legislative powers of that Government.

(iv) In the light of the answer to the foregoing, whether the judicial powers exercisable by the Federal High Court and other superior court established by the aforementioned Constitution includes the jurisdiction to determine whether or not an instrument proclaimed by the Federal Military Government to be a decree is a Decree and therefore binding as law. C D

The main question in this appeal is whether the court has jurisdiction to entertain this matter.

It was submitted on behalf of the Appellant that Decrees are superior to the Constitution. In other words if any provision of the Constitution is in conflict with a Decree, it is to the extent of such conflict or inconsistency null and void. For this submission the Appellant relied on the cases of Attorney-General of the Federation v. Sode (1990)1 NWLR (Pt. 128) 500 at 518; Obada v. Military Governor of Kwara State (1990)6 NWLR (Pt.157) 482 and Labiya v. Auretiola (1992) 8 NWLR (Pt. 258) 139. E F

It is not in dispute that Decrees of the Federal Military Government are superior to the unsuspended sections of the Constitution. This position was reasserted in the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970. In addition this Court has held that the Courts are not competent to declare a Decree null and void. G

In Attorney-General of the Federation v. Sode this Court per H Belgore JSC held at p.518 thus:

"..... to the Military the Constitution is a veritable working document and no more, because once they promulgate a Decree

and that Decree excludes the provisions of the Constitution, the Decree has the superiority to the exclusion of the Constitution and any other enactment on the subject matter of the Decree..... This is the peculiarity of the Military regime which made the Constitution subject to their Decrees."

B In Labiya v. Auretiola this Court said at pages 170-171 as follows:

"Although the Courts are vested with the jurisdiction to determine the issue where the provision of a Decree or an Edict is inconsistent with provisions of the Constitution, the Courts are not competent to pronounce on the question as to whether or not a Decree or an Edict has been validly made."

C The basic law under which the Federal Military Government governs the country is Decree No. 107 of 1993 titled "Constitution (Suspension and D Modification) Decree 1993." For the purpose of this appeal the material sections of the Decree are 1.2.4 and 5. These sections provide as follows:

"1(2) The provisions of the Constitution of the Federal Republic of Nigeria, 1979 mentioned in the Schedule of this Decree are hereby suspended."

1(3) Subject to this and any other Decree made before or after the commencement of this decree the provisions of the said Constitution which are not suspended by sub-section (2) shall have effect subject to the modification specified in the Second Schedule to this Decree."

2(1) The Federal Military Government shall have power to make laws for the peace, order and good Government of Nigeria or any part thereof with respect to any matter whatsoever."

G *4(1) A Decree is made when it is signed by the Head of State, Commander-in-Chief of the Armed Forces whether or not it comes into force."*

H By Section 5 of Decree No. 107 of 1993 the jurisdiction of the courts to question the validity of any Decree has been ousted. Section 5 reads:

"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 or of an Edict shall be

entertained by any Court of law in Nigeria."

What then is a Decree? When is it made? Section 4(1) of Decree No. 107 provides the answer. It states as follows:

"A Decree is made when it is signed by the head of State, Commander-in-Chief of the Armed forces whether or not it then comes into force,"

As I have stated, Section 5 of Decree No. 107 of 1993 ousts the jurisdiction of the Courts to question the validity of any Decree. Referring to a similar provision in Decree No.28 of 1970 this Court in the case of Adejumo v. Military Governor of Lagos State (1972)1 ALL NLR 159 had this to say:

"Clearly the result of all this exercise is that we cannot hear this appeal. The judgment of the High Court, Lagos was given before the promulgation of Decree No. 28 of 1970 and if it had pronounced against the validity or competence of the respondent's Order No. 13 of 1969 we entertain no doubt that it would by virtue of the second division of Decree No. 28 of 1970 be null and void. In fact the judgment did not so pronounce and indeed it held that the relief sought could not be granted by the Court. By virtue of the provisions of Decree No. 28 of 1970 one can only attack an Edict if it inconsistent with a Decree and as by virtue of Section 1(3) of Decree No. 28 of 1970 an instrument made by or under an Edict is given the same protection as the Edict under which the instrument is made, the same principle must apply to the instrument as would apply to the Edict itself. Once the instrument as here is stated to have been made under an Edict, it seems to us that by virtue of the provision of Decree No.28 of 1970 one cannot attack the Edict itself. Thus, if we should assume jurisdiction in this matter our judgment is so far as it possessed the tendencies described in Decree No. 28 of 1970 would be null and void. This Court and indeed any other Court, should not and would not exercise jurisdiction in these circumstances."

In the light of Section 5 of Decree No. 107 of 1993 and the decisions of this Court, the Court below was clearly in error to hold that Decree No. 8 of 1994 and Decree No. 12 of 1994 were not Decrees within the meaning of Decree No. 107 of 1993.

I now turn to the question of the ouster clauses contained in sections 3 of Decree No. 8 of 1994 and section 1(2) (b) (i) of Decree No. 12 of 1994. Section 3 of Decree No. 8 1994 in full as follows:

"Any person who on the direction of the appropriate authority
 B had or at any time before the commencement of this decree dealt with or
 acted in compliance with this decree or thereafter deals with any copy of
 the Daily or Weekly Newspaper proscribed or prohibited from circulation
 pursuant to this Decree, shall stand indemnified in respect thereof and no
 C suit or any other proceedings whatsoever shall be at the instance of any
 persons aggrieved in respect of any act, matter or thing done or pur-
 ported to be done in respect of such direction or compliance, and whether
 any such suit or other proceedings has been instituted in any court, it
 shall abate and be of no effect whatsoever....."

D Section 1(2) (B) (1) of Decree No. 12 of 1994 provides that:

"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 pur-
 ported to be done under or pursuant to any Decree or Edict and such
 E proceedings are instituted before, on or after the commencement of this
 Decree the proceedings shall abate, be discharged and made void."

The issue of jurisdiction of a court is most fundamental. Surely where a
 court lacks jurisdiction, it lacks the vires to decide any issue in the case.
 F In the present case, it will be seen clearly from the ouster clause of
 Decree No. 8 of 1994 and Decree No. 12 of 1994 that the jurisdiction of
 the court to entertain any complaint on account of or in respect of any
 act, matter or thing done or purported to be done under or pursuant to
 these Decree has been taken away. The learned trial judge rightly de-
 G clined jurisdiction.

I come now to the case of the 2nd to 6th Respondent. It has
 been revealed that Rutam House, apart from housing the corporate Head-
 quarters of the 1st Respondent also houses the 2nd to 6th Respondent.
 H These corporate bodies were not included in the Schedule to Decree No.
 8 of 1994. These respondents cannot therefore be said to be affected by
 the orders in Decree No. 8 of 1994. In my judgment therefore the learned
 trial judge was in grave error to deny them a hearing. Accordingly, I

affirm the decision of the Court of Appeal in favour of the 2nd to 6th Respondents.

In the result I too allow this appeal in part. I set aside the judgment of the Court of Appeal it declared Decree No. 8 of 1994 and Decree No. 12 of 1994 void and restore the decision of Kolo J as it affects the 1st Respondent. I affirm the decision of the Court of Appeal in favour of 2nd to 6th Respondents.

I also make no order as to costs.

C

EJIWUNMI JSC

I was privileged to have read before now the judgment just delivered by my learned brother Uwaifo JSC and I agree with his conclusion that the appeal be allowed in part. I will however now give my reasons for that decision.

This appeal which is against the unanimous judgment of the Court below has raised issues which again compel a revisit of the administration of justice under a decree oriented Government.

E

The events that led to the matter that resulted in this appeal may be briefly put thus:-

In the early hours of Monday 15th August, 1994 about 150 Armed policemen entered the premises known as Rutam House, Isolo Expressway, and ordered all the employees of each of the Appellants to leave the premises forthwith. The appellants with all their employees complied with the peremptory order of the police. After that event, the appellants through their counsel, Chief F.R.A. Williams SAN, brought a Motion Ex-Parte in the Federal High Court. On the 16th day of August, 1994 pursuant to Order 1 Rule 2(1) of the Fundamental Rights (Enforcement Procedure) Rules for the enforcement of their Fundamental rights. To this motion, was attached an affidavit in support sworn to by one Babatunde Kwame Ogala, who described himself as a Nigerian and the Legal Adviser to the Guardian Newspapers. The relevant paragraphs of the said affidavit are as follows:-

Paragraph -

G

H

"3. At about 12.10am in the early hours of Monday 15th August 1994 about 150 Armed Policemen entered the premises known as Rutam House, Isolo Express - way and ordered all the employees of each of the applicants to leave the premises forthwith.

B 4. Up till date no Judicial or Executive warrant has been produced ordering the sealing up of the premises at Rutam House, Isolo.

5. About 15 Armed Policemen have stayed behind and have prevented anyone from going into the building.

C 6. The Guardian Newspapers makes about N1.2 million daily and the enforced closure is therefore causing unconscionable losses.

7. About 900 workers are being prevented from going to their offices whilst a further 1,800 workers nationwide are unable to perform their duties as a result of this forceful closure.

D 8. At no time from the time of their arrival up to this date did the Nigeria Police inform the Applicants of the reason for taking the action which they took.

9. Now shown to me and marked Exhibit 1 is a true copy of the originating summons intended to be filed if leave of court is granted." Also filed along with this motion are the following documents:-

"(1) The Originating summons referred to in the above affidavit.

F (2) An affidavit of Urgency ; and

(3) Statement filed pursuant to Order 2 Rule 2(1) of the Fundamental Rights (Enforcement Procedure) Rules dated 16th August. 1994."

G It would appear that following the hearing of the Motion Ex-Parte, the Hon. Justice Kolo of the Federal High Court made an order on the 17th August, 1994. It reads:-

"(1) That each of the applicants is hereby granted leave to enforce their respective fundamental rights under our constitution.

H (2) That no member of the applicants, their officers and/or servants shall be harassed or arrested on this matter pending the determination of the originating summons on this matter.

(3) That this order, the originating summons, Motion on Notice and all the other relevant processes of this court in this matter be served

on the Honourable Attorney-general of the Federation to enable him or his representative appear before this court on the basis for the action now being complained of.

(4) *That by virtue of Order 1 Rule 6 of Fundamental Rights Enforcement Procedure Rules, this order is also for stay of any further action by the Law Enforcement Agencies in the direction of the present complaint.*

(5) *That the statute quo of the situation be maintained as it was before the encroachment on the premises by the police.*

(6) *And that the case is hereby adjourned to Monday the 22nd of August, 1994 for the Originating Summons and Motion on Notice to be heard and to enable the Attorney-General of the Federation or his representative to come and explain to this court accordingly."*

Pursuant to that Order of the 17th August, 1994, the appellants by their leading counsel, Chief F.R.A. Williams, counsel filed a Motion of Notice for an order of Interlocutory injunction before the Federal High Court on the 17th August, 1994, and was set down for hearing on the 22nd of August, 1994.

It does not appear that this motion was heard. In the meantime, an order of joinder making the Inspector-General of Police a party to the action was made by Auta J, of the Federal High Court, Lagos.

The Learned Senior Counsel acting for Respondents, upon receiving certain facts in connection with the action before the court, then decided to file an Amended Summons dated 8th September, 1994 wherein answers to the following questions were sought from the court. The questions read thus:-

"(1) *Whether the instruments published as Decrees in the Federal Republic of Nigeria Official Gazette No. 3 vol. 81 dated 24th August; 1994 are enactments or Decrees of the Federal Military Government.*

(ii) *Whether the proceedings herein or any portion thereof have abated and become of no effect whatsoever as a result of the Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from circulation) Decree 1994 No. 8 or as a result of the*

Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 No. 12 or a result of any other enactment or law relating to the jurisdiction and powers of course of law in general or the Federal High Court in particular.

B (iii) *If the proceedings herein or any portion thereof remain valid and subsisting, whether Mr. Dixy Oddiri can lawfully represent the Inspector-General of Police as a legal practitioner for the purpose of moving an application to join the said Inspector General of Police as a co-defendant to the suit."*

C I think, it is also pertinent to quote certain of the paragraphs filed in support of the Amended Summons. They should serve to show what motivated the appellants' counsel to file the amended summons. They are paragraphs 3, 4, and 5, and they read:-

D "3. *To the best of my knowledge information and belief, the Honourable Attorney-General of the Federation held a Press conference at his Office in Lagos on Wednesday September 7, a report of which was published in many of the national newspapers in Nigeria and in International Media such as the B.B.C.*

E 4. *Now such to me and marked Exhibit TEW 1 is a true copy of the full text of the written statement made by the Honourable Attorney General of the Federation at the Press Conference aforementioned.*

F 5. *I am informed by Chief Rotimi Williams and I verily believe him that in the light of the conversation between him (said Chief Williams) and the Honourable Attorney-General of the Federation which conversation was reflected in Exhibits B & 03 annexed to the Affidavit deposed to by MR. BABATUNDE KWAME OGALA in the case herein on*
G *5/8/94 it is not likely that the same Attorney-General would have authorized a private legal practitioner to contest this action on behalf of the Inspector - General of Police."*

H I must also refer to an Affidavit, headed "Third Affidavit, and deposed to by MR. TOKUNBOH ENIOLA WILLIAMS, a Legal Practitioner in Chief Rotimi Williams Chambers. In that affidavit he deposed in paragraphs 2, 3 & 4; thus:-

"2. I am aware that on Wednesday the 7th day of September,

1994 the Honourable Attorney-General of the Federation and Minister of Justice, Dr. Olu Onagoruwa, held a Press Conference and issued a Press Release concerning certain Decrees alleged to have been made by the Federal Military Government.

3. Now shown to me and marked Exhibit TEW 2 is one of the numerous counterparts of the Release signed by the Honourable Attorney-General of the Federation which he made available to Chief Rotimi Williams at the latter's request. B

4. I have seen the photocopy of the Federal Republic of Nigeria Official Gazette No. 3 volume 11 dated 24th August, 1994 containing the Decrees to which the Honourable Attorney-General of the Federation made reference in the Press Release aforementioned. Now shown to me and marked Exhibit TEW 3 is a true copy of the said Federal Republic of Nigeria Gazette." C D

The reaction of the Appellants to the several motions and originating summons filed by the Respondents was that the Appellant caused a Notice of Preliminary Objection to be filed in the Federal High Court. The Grounds relied upon are as follows; E

"That :-

(a) This Honourable Court lacks jurisdiction to determine this matter.

(b) Any decision of this Honourable Court granting the reliefs sought in this action by the Respondents hall be null and void and of no effect whatsoever in law. F

(c) That this Honourable Court lacks advisory jurisdiction.

And take Notice that the grounds are as follows:-

(1) That upon reading through the motion on Notice, originating summons, amended summons and the affidavit in support and all other documents filed by the Respondents, the reliefs sought would not avail him by virtue of the provisions of :- G

(a) The Guardian Newspapers and African Guardian Weekly Magazine (proscription and prohibition from circulation Decree No. 8 of 1994. H

(b) By virtue of the provisions of S. 6 (6) (b) of the Constitution

1610 Att-Gen. Fed. v. Guardian News. (1999) 5 KLR Ejiwunmi JSC
of the Federal Republic of Nigeria 1979.

(c) *By virtue of the provisions of the Constitution (Suspension and Modification) Decree 1993 (Decree No. 107 of 1993).*

(d) *By virtue of the Federal Military Government Supremacy and Enforcement of Powers) Decree 1994 (Decree No. 12 of 1994).*

(2) *That this Honourable Court has no jurisdiction to hear and/or determine this matter."*

In the Ruling delivered following the argument of Counsel on the preliminary objection to the questions raised by Chief F.R.A. Williams, SAN and learned counsel to the respondents, Kolo J. declined jurisdiction to hear the main suit for the following reasons:-

"(1) *Decrees are superior, in our present day Nigeria, to even the 1979 constitution and this facts makes such cases as the Liyanage case not quite relevant to the present Nigeria situation.*

(2) *Decree 107 that suspended a good portion of the 1979 Constitution also provides that unsuspended portions of the said 1979 constitution are subject or subordinate to any Decree on the same matter.*

(3) *That Decrees 8 and 12 of 1994 were properly made and promulgated by the Federal Military Government of Nigeria.*

(4) *That the said Decrees 8 and/or 12 of 1994 have ousted the jurisdiction of this court in the present application as before it.*

(5) *As in Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688 per Belgore JSC, " there is no dancing round the issue to found jurisdiction that has been taken away."*

As the appellants were dissatisfied with the above ruling of Kolo J. They appealed to the court below. In that court the ruling of Kolo j. was reversed, the court below took the view that the Federal High Court has the jurisdiction to hear and determine the action before it.

Through, by their judgments, they concluded as aforesaid, it must be noted that each of them arrived at that conclusion by different routes.

Being dissatisfied with the judgment of the court below, the appellant has appealed to this court. Pursuant thereto, five grounds of

appeal were filed.

They read thus:-

"Grounds One:

The learned Justices of the Court of Appeal erred in law when it was unanimously held:-

"We are concerned with the Legislative authority or powers of the Military Administration, not its executive. It is essential to separate the two for though the provisional Ruling Council is vested in Federal with legislative powers and the exercise of executive powers is vested in Federal Executive Council, care must be taken in distinguishing the functions of the two bodies. It is therefore grave error of law in my opinion to use provision of section 6(1) to answer a question relating to legislative matters."

PARTICULARS

The combined effect of section 3(1), 4(1), 6(1) and (2) of the constitution (Suspension and Modification) Decree No. 107 (1993) is to blur the distinction between the power of the Head of State. Commander in Chief of the Armed Forces to legislate and his actual exercise of his, executive authority as section 10 of the same Decree which defines functions of the Provisional Ruling Council does not expressly or by any implication whatsoever vest the Provisional Ruling Council with any legislative power or determine the procedure for the exercise of such legislative power.

GROUND TWO

The Learned Justices of the Court of Appeal erred in law when it was unanimously held that:-

"It is my view that a statute is inherently irrational and an assault to the psyche of the citizen when it is extra-ordinarily in conflict with reason, is offensive and utterly hostile to rationality and so emptied of substance that it should be rejected by the people whom it is directed (or made for) and to people of other nations who condemn it for its inhumaness. Such a law should not and ought not be enforced by the court. To hide under Austinian theory to enforce such a law is sheer timidity and abdication of the court of its responsibility.

PARTICULARS

1. *The Judicial duty imposed on the courts within the provisions of section 6 of the constitution of the Federal Republic of Nigeria (1979) as amended is to adjudicate over justiciable issues and not to enforce morals.*

2. *Principles of jurisprudential morality cannot be used to question the plenitude of powers vested in the Federal military government to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever' as stipulated under Section 2(1) of the Constitution (Suspension and Modification) Decree No. 107 of 1993.*

3. *The judicial power of a court of law is tied up with issues of jurisdiction and justiciability hence the learned Justices of the Court of Appeal erred in law in attacking the validity of "The Guardian Newspapers and African Guardian Weekly Magazine) proscription and Prohibition from circulation) Decree No. 8 of 1994 on moral and ethical grounds and contrary to the provisions of Section 5 of the constitution (Suspension and Modification) Decree No. 107 of 1994.*

GROUND THREE

The learned Justices of the Court of Appeal erred in law by unanimously holding that;

"the concept of the Rule of law presupposes that the court within the frame work on which it can still operate in this country can examine any decree with a view to finding whether an ouster clause embodied therein seeks to preserve something otiose in that the Military government would assume Judicial Powers. In that case the court would equally examine the nature of the legislation to determine whether if it is so, it cannot be imputed that the Military Government intends to contradict itself by delving into an area which is the special preserve of the Judiciary vide Decree 107 of 1993. This is the case here."

PARTICULARS

i. *The Constitution (Suspension and Modification) Decree No. 107 of 1993 is the groundnorm and other decrees like "The Guardian Newspapers and African Guardian Weekly Magazine (Proscription and*

Prohibition from Circulation) Decree 1994 and the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1993 are superior to the unsuspended provisions of the Constitution of the Federal Republic of Nigeria 1979."

ii. *Doctrines of judicial legislation has no relevance with respect to efficacy of Decrees as the power of Judge to deal with and decide a matter before him connotes the limits which are imposed upon the power of the court to hear and determine issues between parties seeking to avail themselves of its process by reference to the subject matter in issue, the parties before the court, the kind of relief sought or any combination of them.*

iii. *The judicial decision in LIYANAGE v. QUEEN (1967) 1 AC 259 which deal with legislation contrary in intention to an entrenched provision or in LAKANMI & Anor Vs. A.G. WEST & Ors (1970) vol. 143 NSCC on issues of Judicial Legislation are irrelevant under the provisions of the constitution (Suspension and Modification) Decree No. 107.*

iv. *The learned Justices of the Court of Appeal erred in law when it was held that 'the instrument described as Decree No. 8 of 1994 has all the attributes of legislative punishment and is not exercise of legislative power but of judicial power."*

GROUND FOUR

The learned Justice of the Court of Appeal unanimously erred in law when they held:-

"If the instrument described as Decree No. 8 of 1994 is not a Decree within the intendment of Decree 107 of 1994, it is evident that both ouster clauses are incapable of effecting the jurisdiction of court below. As regards Decree No. 8 of 1994, the whole instrument had failed as a legislative document, and as regards the ouster clause in Decree No. 12 of 1994, it being predicated on the existence of a Decree enabling the thing done to be done, the act done or purported under an instrument which is not a Decree would not attract the protection of that clause."

PARTICULARS

There is no jurisdiction in any court of law to question the valid-

ity of the provisions of any Decree promulgated by the Federal Military government under Section 5 of the constitution (Suspension and Modification) Decree No. 107 of 1993.

GROUND FIVE

B The learned Justices of the Court of Appeal unanimously erred in law when they held that the Federal High Court should assume jurisdiction over the suit.

PARTICULARS

C *There is no lis or any justiciable suit or dispute before the Federal High Court, Lagos under section 6 (6) (a) & (b) of the Constitution of the Federal Republic of Nigeria (1979) as amended; Section 3 of the guardian Newspapers and African Guardian Weekly Magazine (Proscription from Circulation) Decree No. 8 (1994) and section 1 (2) (b) (i) and*
D *(ii) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994."*

In this court, Briefs of Arguments were filed and exchanged. The Learned Solicitor-General of the federation, T. Onwugbufor Esq.,
E SAN, also filed a reply brief upon receiving the respondents' brief of argument filed on their behalf by Chief F.R.A. Williams, SAN. The learned Senior Advocate of Nigeria who appeared for the parties adopted and placed reliance upon their respective Briefs of argument. They also presented oral argument before the court.

F In the Appellant's brief, the following are the issues set down for the determination of the appeal.

"(1) *Whether the court below was right in upholding that Decrees No. 8 and 12 of 1994 are not decrees within the meaning of Decree*
G *No. 107 of 1993 and thus to declare the Decrees null and void. Put the other way, can a court of law declare void Decree for whatever reason.*

(2) *If the answer to the above issue is in affirmative, which is denied, whether the Court of Appeal was right to apply the concept of*
H *judicial legislation, ethics, morality and religion to hold that Decrees No. 8 and 12 of 1994 are not Decrees of the Federal Military Government and thus to declare it null and void.*

(3) *Whether the court below was right in upholding that the*

ouster clause in Decree No. 8 of 1994, Decree No. 12 of 1994 and Decree No. 107 of 1993 did not operate to oust the jurisdiction of the court to determine it."

For the Respondents, the issues identified in their Brief read thus:-

"(i) What are the powers of a Sovereign government which are exercisable by (a) the Federal Military Government; and (b) the court of law pursuant to the provisions of the constitution (Suspension and Modification) Decree No. 107 of 1993.

(ii) Whether the doctrine and principle of the Rule of law is binding on the Federal Military Government in its operation of the constitution of the Federal Republic of Nigeria, 1979 as modified or amended by Decree No. 107 of 1993 and other Decrees of the said Government.

(iii) What is it that binds courts of law to acknowledge an instrument made by the Federal Military Government as a Decree enacted in the exercise of the legislative powers of that Government.

(iv) In the light of the answer to the foregoing, whether the judicial powers exercisable by the Federal High Court and other superior courts established by the aforementioned constitution includes the jurisdiction to determine whether or not an instrument proclaimed by the Federal Military Government to be a Decree is a Decree and therefore binding as law."

I have before now set out the grounds of appeal filed by the only appellant in this appeal. Before considering the issues identified, it is settled that as only for the parties, it is necessary to observe that the issues that may fairly be said to have arisen from the grounds of appeal that fall for consideration in the determination of the appeal, the issues set out above will be considered on that principle, See Anaeze v Anyaso (1993) 5 NWLR 1 at 30. However, from a perusal of the two sets of issues reproduced above, it is manifest that the issues raised in both briefs could be identified with the grounds of appeal. The obvious difference is the manner in which they are framed in the respondent's brief. I will, however, consider this appeal primarily upon the issues identified in the appellant's brief.

Both in his oral argument and the brief filed for the appellant, the

position taken by the learned Solicitor-General of the Federation T. Onwugbufor Esq, SAN on issue 1 is that a Decree once promulgated is superior to the constitution. He then contended that the court below was wholly wrong to have held per Ayoola, JCA (as he then was ;-

B *"that the instrument described as Decree No. 8 of 1994 being and instrument which is not an exercise of legislative power is not a Decree within the meaning of Decree No. 107."*

C That statement of Ayoola JCA quoted above, in the view of the learned Solicitor-General, is in its effect, a challenge to the validity of Decree No. 8 of 1994. It is therefore his submission that the court cannot, having regard to the provisions of Decree No. 107 of 1993 challenge the validity of any Decree of the Federal Military Government or declare it void or unenforceable. He further submitted that no Decree of D the Federal Military Government can also be declared void or unenforceable on the ground that it is irrational or an assault to the citizens' syche and /or conflict with reason.

In support of this submission, the following cases are cited:-
E Attorney-General of the Federation v Sode (1990) 1 NWLR (pt. 128) 500 at 518; Labiya v. Anretiola (1992) 8 NWLR (Pt. 258) 139 at pages 170 - 171. Obada v. Military Governor of Kwara State (1990) 6 NWLR (Pt.157) 482 at 498; Adejumo v. Military Governor of Lagos State (1972) 1 ALL NLR (Pt. 1) 159 at 169, Lakanmi v. Attorney General (1970) F NSCC 143.

G The learned Solicitor-General submitted that even if it is held that the court below has the power to challenge a Decree or to hold that Decree No. 8 of 1994 is not a Decree within the meaning of Decree No. 107 of 1993, (though not conceded), the court below was in error to rely on Liyanage v. Queen 1967 1 AC 259. In support of that contention, the learned Solicitor-General argued that Liyanage v. Queen (supra) relates to the interpretation of the written constitution of Ceylon (now Srilanka) H where there is express separation of powers. He then advanced the argument that the events that led to the Liyanage's case are not the same as the situation that gave rise to Decree No. 8 of 1994 and the instant case. The legislation in Ceylon that led to the Liyanage case supra) was

clearly in breach of the constitution of Ceylon. But in the instant case, Decree No. 8 of 1994 was enacted within Decree No. 107 of 1993; which is a product of a revolution which had suspended the constitution of 1979. These events, in the view of learned solicitor-General have completely blurred the concept of separation of powers by vesting total B and complete power of law making in the Head of State without any limitation whatsoever. With the reply brief filed for the appellant argument was proffered by the learned Solicitor-General on this issue. There, it is contended that the learned Senior Advocate for the respondents either has a misconception of the issue and/or was unwilling to distinguish C between the separation of powers under the constitution qua constitution and the constitution under the Military. He then submitted that the separation of powers or independence of judicial power under the 1979 constitution; the cornerstone of constitutionalism, is abolished by virtue of D the vesting of the judicial power in the courts which is subject to section 1(3) of Decree No. 107 of 1993.

I must pause to set down the submissions made for the respondents by their learned counsel Chief Rotimi Williams SAN, both during E the oral hearing before the court and in the respondents' brief. His argument began with the recognition that the original provisions of the 1979 constitution have been amended by Decree No. 107. But he submits that the basic law operated by the Federal Military Government left judicial F powers exactly where they were under the 1979 constitution i.e. in the courts of Law established for the Federation and the States in accordance with section 6 of that constitution. For what he considered as the true position of the Judiciary in a Military Regime, operating under the 1979 constitution, reference was made to the lead judgment of Eso JSC G in Governor of Lagos State v. Ojukwu (1986) vol. 17 NSCC pt. p. 304 at pp 309 - 310; (1986) 1 NWLR 621 at 633. And also to the judgment of Obaseki JSC in Governor of Lagos State v. Ojukwu (supra) at p. 313 - H 314 and p. 638 respectively.

Next, Chief Williams contended that one of the vital consequences of the vesting of judicial powers in courts of law is that it is unconstitutional for any of the remaining arms of the Government to usurp judicial

functions. The Learned Senior Advocate then referred to the Privy Council case of Liyanage v. Queen 1967 1 AC 259 as clear authority for the proposition that if the legislature usurp or arrogates to itself judicial power by passing sentence or by adjudicating in a particular controversy it will be that it is not exercising legislative power and its purported exercise of judicial function or power is null and void. The next case that was cited to us and also referred to in the Respondents' brief is the case of Lakanmi and Anor v. Attorney General (West) & Ors. 1970) Vol. 6 NSCC, 143. The Liyanage case (supra) was, it is argued, relied upon by this court in arriving at its decision in the Lakanmi's case (supra). At the same time whilst Chief Williams, SAN conceded it that the Liyanage case (supra) was not concerned with a revolutionary government, yet, he submitted that it is a good guide in the interpretation of a constitutional instrument where governmental powers are divided among more than one organ. The case he further submitted is clear and cogent authority for the proposition that where distinct governmental powers are vested in one branch of a Sovereign Government, such an arrangement carries the necessary implication that another Branch of the Government which is vested with responsibility for another function cannot, as a general rule, be permitted to usurp or exercise the function of that other Branch of the Government.

On subsection 3 of section 1 of Decree 107 of 1993, Chief F.R.A. Williams SAN, at first conceded that it is possible to construe this subsection of the Decree as meaning that the legislative powers conferred on the Federal Military Government are intended to override constitutional limitations imposed expressly or by implication on the three organs of Government.

However, he has also submitted that such an interpretation will result in ascribing to the legislative arm of the Government the power to ignore the separation of powers and to ride roughshod over one of the most sacred principles of the Rule of Law. He observed that the Lakanmi's case (supra) and the Ojukwu's case (supra) were decided in the context of statutory provisions in identical terms with the subsection under consideration. Reference was also made to the case of the Garba v. Federal

Civil Commission (1988) Vol. 19 Pt. 1 NSCC 306 at 320 and to Uwaifo v. A.G. Bendel State (1993) 4 NCLR 1. The court is therefore invited to hold that the respondents' claim is based on the contention that the Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree 1994 No. 8 is a usurpation of judicial functions. It is the further submission of learned Senior Advocate that such a legislation is a travesty of the rule of law.

Chief F.R.A. Williams SAN in the Respondents' brief, then contended that the Respondents have never bases their case for the invalidity of Decree No. 8 on the sole ground that the Decree in question was legislation ad hominem. This contention was made in response to the argument offered for the appellant in the appellant's brief that from the Liyanage's (supra) , it is not all legislation ad hominem that will constitute an interference with the function of the judiciary. Each case depends on its own facts.

It is, I think patent from the argument of counsel that what was directly in issue was whether the Federal High Court had jurisdiction to determine the question whether Decree No. 8 of 1994 is or is not a legislative judgment? Or in the alternative, whether the jurisdiction of the court is ousted by virtue of the provisions of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994.

Before these questions are considered, in the light of the arguments that have been proffered by learned counsel, it is desirable that the various laws to which references have been made should be set down. These are:-

Section 1 (2) of Decree No. 107 provides as follows:-

"The provisions of the constitution of the Federal Republic of Nigeria 1979 mentioned in the first schedule to this Decree are hereby suspended."

Section 1 (3) of Decree No. 107 provides as follows:-

"Subject to this and any other Decree made before or after the commencement of this Decree the Provisions of the said constitution which are not suspended by subsection (2) of this section shall have effect sub-

ject to the modification specified in the second Schedule to this Decree."

Section 2 (1) of Decree No. 107 provides as follows:-

B *"The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any part thereof with respect to any matter, whatsoever."*

Section 4(1) of Decree No. 107 provides as follows:-

C *"A Decree is made when it is signed by the Head of State Commander-in-Chief of the Armed Forces whether or not it then comes into force."*

Section 5 of Decree No. 107 of 1993 which provides as follows:-

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

Section 1 & 2 of Decree No. 8 read thus:-

E *"1. Notwithstanding anything contained in the constitution of the Federal Republic of Nigeria 1979 as amended, or any other enactments or law the newspapers and Weekly Magazines listed in the Schedule of this Decree, published by Guardian Newspapers Limited both with corporate Headquarters at Rutam House, Isolo Expressway, Oshodi, are hereby proscribed and from being published and prohibited from circulation in Nigeria or any part thereof."*

G *2. The premises where the Newspapers and the Magazines referred to in Section 1 of this Decree are printed and published shall be sealed up by the Inspector-General of Police or any officer of the Nigerian Police Force authorized in that behalf during the duration of this Decree."*

Decree No. 12 of 1994 provides thus:-

H *"No civil proceedings shall lie or be instituted in any court for or an 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 on or after the commencement of this Decree the proceedings shall abate, be discharged and made void."*

The first observation that ought to be made at the onset is that with the promulgation of Decree No. 107 of 1993, the Federal Military Government gave birth to itself as the new Government of this country. It ought to be further observed that its action on this respect is not difference from what previous Governments of this kind had done since the incursion of the Military into the governance of this country in 1966. In the view of the learned counsel for the respondent, Chief F.R.A. Williams, SAN, the principle that the three arms of Government, namely the Legislature, the Executive, and the Judiciary, must be separate, and function separately as has always been recognized in the provisions of the Decree enacted by each of the previous Federal Military Government. Learned Solicitor-general took the view section 1 (3) of Decree No. 107 should not be so read. I think that view is right. Successive Military Governments have striven to faithfully follow the principles of separation of powers enshrined in the constitution which they suspended upon coming into power. I refer in this context to section 1(2) of Decree No. 1 of 1966; section 1(2) of Decree No. 1 of 1994. The Supreme Court had to consider the effect of section 1 (2) of Decree No. 1 of 1966 in Lakanmi & Anor v. Attorney-General (West) & Ors 1970 NSCC 143 at 160 where Ademola CJN said:-

"We must here revert again to the separation of powers, which the Attorney-General himself did not dispute is still the structure of our system of Government. In the absence of anything to the contrary it has to be admitted that the structure of our constitution is based on the separation of powers."

Also in the case of Military Governor of Lagos State v. Ojukwu & Anor. (1986) 17 NSCC 304; Eso JSC in his Judgment said inter alia, thus:-

"By virtue of the constitution (Suspension and Modification) Decree 1984 No. 1 a good number of the provisions of the constitution were suspended. Indeed, what was left was what had been permitted by the Federal Military Government to exist. All the relations relating to the judiciary were saved. Section 6 of the constitution, the most important provision, is so far as the institution known as the Judiciary is concerned, which vests in courts the judicial powers of the Federation was

left extent. The Military Government had the power and still has to put an end to the existence of that provision. It has not done so, and that must have been advisedly for it does intend that the rule of law should pervade."

B Obaseki JSC in the same case had this to say on what the Nigerian Constitution is founded upon. His Lordship at page 313 said:-

"The Nigerian Constitution is founded on the rule of law the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary power which Coke colourfully spoke of as 'golden and straight metwand of law as opposed to the uncertain and crooked cord of discretion' (See 4 Inst. 41). More relevant to the case in hand, the rule of law means that disputes as to the Legality of acts of Government are to be decided by Judges who are wholly independent of the Executive (See Wade on Administrative Law 5th Edition p. 22-27. That is the position in this Country where the Judiciary has been made independent of the Executive by the constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 1 of 1984 and No. 17 of 1985."

From the above pronouncements of their Lordships in this case and in others which have not been reproduced, it is clear that the point being made is that the rule of law has been honoured and preserved by the succeeding Military Governments that have had the privilege of governing this country. Hence, in recognition of that most cherished principle, each of the Government formed by the Military has always in the Decrees enacted on their assumption of power preserved the separation of powers, by the maintenance of the independence of the Judiciary from the other arms of government, namely, the Executive and the Legislative.

It has, however, been argued by the learned Solicitor - General for the appellant that the provisions of section 1(3) of Decree 107 of H 1993 mark a departure from the principle of the rule of law as I have noted above. It is his submission that this subsection should not be read to mean that the independence of the Judiciary could not be curtailed or interfered with should the Federal Military Government decide so to do.

That may well be. But I do think that the better view is that the present Federal Military Government intends to and would continue to respect and uphold the rule of law by the maintenance of the independence of the Judiciary.

But having said all that it seems clear that in the pursuit of its right to govern as they deemed fit, succeeding Federal Military Governments have also enacted laws ousting the jurisdiction of the courts from hearing or determining matters which were not set out in such enactments. This Court has had to consider the legal effect of such enactments in relation to the rule of law in terms of the judiciary. I refer in this connection to Uwaifo v. Attorney-General (1983) 4 NCLR 1; and Attorney-General of the Federation & Ors. v. Sode 7 Ors. (1990) 1 NWLR (Pt. 128) 500. In this case, this court was concerned with whether the court below was right to have upheld the decision of the trial Court in the face of section 6(3) and (4) of Public Officers (Special provisions) Decree No. 10 of 1976, ousting the jurisdiction of the court. The appeal was allowed by each of the Justices of the Supreme Court, CORAM (Mohammed Bello, JSC; Obaseki, JSC; Nnamani, JSC; Uwais, JSC; (as he then was), Karibi-Whyte, JSC, Belgore JSC & Wali JSC Belgore JSC at page 518 said thus:-

"Perhaps I shall make the point clearer by asserting even though courts are not happy with ouster clauses in Decrees and Edicts, it should be borne in mind that a Military regime will be an anomaly if it decides to govern by the entrenched rights as contained in chapter 111 of the 1963 constitution of the Federation or in Chapter IV of the Constitution of the Federal Republic of Nigeria 1979, in fact the Military came and suspended and modified those constitutions. To the Military, the constitution is a veritable working document and no more, because once they promulgate a Decree and that Decree excludes the provisions of the constitution (even as suspended and modified by them), the Decree has the superiority to the exclusion of the constitution and any other enactment on the subject matter of the decree

*.....
when courts are faced with such situation, it is for the courts to interpret*

the laws according that is to say, as words in Decrees prescribe. The courts must interpret the laws as they are, including the Decrees. The purpose of ouster provisions in Decrees is clear, that is, no court or tribunal should look into the matter the courts are so prevented from looking into. This is the peculiarity of the Military regime, which make the constitution subjected to their Decree. Attorney -General of Lagos State v. Hon. Justice Dosunmu (1989) 3 NWLR (Pt. 111) 552."

May I also refer to page 537 of the same case where Karibi-Whyte JSC in his Judgment said inter alia :-

"Now it seems to me that although High Courts exercised unlimited civil and criminal jurisdiction - See S. 236(1) Constitution, 1979, the amplitude of this jurisdiction can be and are sometimes limited by the provisions of particular statutes. Hence when the words of a statute suggest that the court shall not have jurisdiction, it is of critical importance for the court to construe the words of the provisions very carefully and together from the words used the nature of the ouster: See Barclays Bank v. Central Bank (1976) 6 SC. 175."

And at page 592, His Lordship Karibi-Whyte JSC held:-

"It was clear on the pleadings that the jurisdiction of the court was ousted by the provisions of the Decrees and Legal Notices relied upon by the 1st Defendant/now 1st Appellant. The Court of Appeal was in error to have ignored the provisions ousting the jurisdiction of the court. It is not necessary to go into the issues, which in my view is a futile exercise. Where there is no jurisdiction the exercise of jurisdiction will result in nullity - See Timitimi v. Amabebe 14 WACA 374."

I now revert to the instant case. The first question which has to be considered is whether Decree No. 8 of 1994 is a valid Decree or not. If it is a valid Decree then the next question is whether Decree No. 12 of 1994 ousts the jurisdiction of the courts?

I have before now set out the provisions of Decree No. 8 of 1994. The crux of the case against it is that as it is a legislative judgment, it is not a Decree within the provisions of section 3(1) of Decree 107 of 1993. In effect, the submission of the learned Senior Advocate for the Respondent is that Decree No. 8 is a usurpation of judicial power. The

cases which were canvassed in support of this submission are Liyanage v The Queen (1967) 1 AC 259 and Lakanmi and Anor v. Attorney-General (West) & Ors. (1970) Vol. 6 NSCC 144. These two cases fell for consideration in Uwaifo v. A.G. Bendel State (1983) 4 NCLR, Idigbe JSC in the course of his judgment said inter alia thus:-

B

".....

the cases of Lakanmi (supra) and Liyanage (supra) to which our attention has been drawn by learned counsel for the appellant cannot avail his client. These cases deal with the question whether the legislature can lawfully make laws or enactments which amounts to 'legislative judgments'; in other words, whether the legislature, under a constitution which clearly separates the functions of the three arms of government - the Executive, the Judiciary and the Legislature - can lawfully make a law which in effect trespasses into the field or area of jurisdiction of the Judiciary [when it clearly has no such constitutional power or authority to do so]? The best definition of 'legislative judgment' or as it is sometimes referred to, 'a bill of attainder' or a bill of Pains & Penalties to be found in the judgment of Frankfurter J. in United States v. Lovett 328 US 303 at 322 also 90 L. Ed. 1252 at 1263, where the learned judge cites with approval the statements in Farrar; Manual of the Constitution (1867) at 419:

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"A bill of attainder, by common Law, as our fathers imported it from England and practised it themselves, before the adoption of the constitution, was an act of sovereign power in the form of a special statute - by which a man was pronounced guilty or attained of some crime, and punished by deprivation of his vested rights without trial or judgment per legem terrac" [italics mine]

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To the above quotation, it is necessary to add that if the punishment prescribed in the special statute be less than death, the Act is termed a Bill of Pains and Penalties; in any case each of them - a Bill of Attainder or, a Bill of Pains and Penalties - constitute a "legislative judgment." Elaborating on this definition it is stated in the annotation to the case of Lovett (supra) at 90 L. Ed. at 1271, that: "Reduced to its elementary state, a bill of attainder was a law designed to punish without

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trial, or stated more comprehensively, a legislative enactment intended as and resulting in, the arbitrary punishment of an individual or a class without affording to the person or persons so penalized the protection of the courts" (again, *italics mine*). In short, a legislative judgment amounts to a legislative exercise of judicial power; but, in my view, there is no such exercise of judicial powers unless it can be shown that there was not the "safeguard of a trial" or inquiry by courts to which section 6 of the 1979 constitution applies (and this, by virtue of Section 6(5) of the constitution aforesaid could include Tribunals of Inquiry) with regard to events and proceedings on which the legislative exercise is based. With regard to the case of Lakanmi (*supra*) cited to us in the course of argument in this appeal, I, for my part would prefer to confine the decision in that case to the special facts of, and statutes - particularly, *The Forfeiture of Assets, etc. (Validation) Decree 1968 No. 45 of 1968* - concerned within that case as I do not consider an examination or comparative analysis of the facts in Lakanmi (*supra*) with the proceedings in hand necessary for any decision in this appeal. In Kariapper v. Wieshinha (1967) 3 ALL ER 485, the Privy Council declined to express an opinion as to the circumstances in which a confiscating enactment (i.e. an enactment providing for a forfeiture of the citizen's assets) may constitute a legislative exercise of judicial power since, according, to the Board (i.e. the Privy Council) it is unwise, when dealing with constitutional law, to go beyond what is necessary for the determination of the case in hand . (See - Sir Douglas Menzies in *Kariapper v. Wieshinha* (1967) 3 All ER at 489 F - G1".

It seems to me clear that for a Decree of Statute to qualify as a Legislative judgment, it therefore be deemed to be a statute that has encroached upon another branch of the Government, namely the Judiciary would required that this court be invited to revisit its several decisions in which it had endorsed the all pervading power of the Federal Military Government to Decree into existence such laws as its deemed fit for the governance of this country.

From what I have said above and in the context of the fact that at the relevant time, the governance of this country depends on Decree

enacted by the Federal Military Government, it is manifest that the Supremacy of the Decree so enacted supersedes the provisions of the unsuspended part of the 1979 constitution. It follows that the consideration that may apply where governance is by a written constitution or such conventions and Laws that do not owe their existence to a Military Government cannot be made to apply to a thorough going Military Government as is the lot of this country at the time. I also do not think that it is proper to examine this matter any further having regard to the stand already taken by this court in its several decisions that are pertinent to the instant case. I therefore must hold that Decrees No. 8 and 12 of 1994 are valid Decrees of the Federal Military Government of Nigeria.

And I also must come to the conclusion that the Court below was wrong to have that the ouster clause in Decree No.12 is of no effect. The appeal is therefore allowed in this regard against the 1st Respondent.

There is however another aspect of this appeal which deserves to be considered. In the amended Originating Summons and the Statement of interest filed in this matter, it is manifest that part from the Guardian Newspapers in the 1st respondent, there are five other respondents namely, Rutan Crellon Computers Ltd, Meleq-M, P. M. S. LIMITED; EXPRESS PRINTING AND PACKING LTD; GUARDIAN SERVICES LTD, were named in the suit. It is also their claim that they had their offices in Rutam House which was sealed up by virtue of Decree No. 8 of 1994. It is also alleged by them that as a result they suffered losses and damages. The provisions of Sections 1 and 2 of the Decree need be reproduced:-

"1. Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979 as amended, or any other enactments or law the Newspaper and Weekly Magazines listed in the Schedule of this Decree, published by Guardian Newspapers Limited and Guardian Magazine Limited both with corporate Headquarters at Rutam House, Isolo Expressway, Oshodi, are hereby proscribed and from being published and prohibited from circulation in Nigeria or any part thereof.

2. The premises where the Newspapers and the Magazine referred to in section 1 of this Decree are printed and published shall be sealed up by the Inspector -General of Police or any officer of the Nigeria Police

Force authorized in that behalf during the duration of this Decree."

It is clear from this Decree that the order of proscription and prohibition from circulation was directed against all the Newspapers and Weekly Magazines published by Guardian Newspapers Limited and Guardian Magazine only. There is of course no doubt that they have always occupied and used Rutam House as their corporate Offices. However, what has also happened is that when Rutam House was sealed up, while aiming at the Guardian Newspapers and Guardian Magazines, they also sealed up the innocent parties that I have mentioned above. These are the 2nd, 3rd, 4th, 5th and 6th Respondents in this appeal. It is my view that they cannot be within the provisions of Decree No. 8 of 1994. It must follow that their right of action against the appellant can be heard and determined by the trial court. It therefore follows that the appellant's appeal has failed against the 2nd, 3rd, 4th, 5th and 6th Respondents. The decision of the Court of Appeal in respect of the 2nd - 6th Respondents is hereby affirmed and it is ordered that their claims be remitted to the trial court for hearing before another Judge, other than Kolo or Auta, J. It is further ordered that the decision of the court below whereby Decrees No. 8 and 12 of 1994 were declared as null and void is hereby set aside.

This appeal having succeeded in part, I think the proper order that ought to be made is that each party shall bear its own costs, and it is hereby ordered accordingly.

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