

SUPREME COURT OF NIGERIA
THURSDAY 28TH MARCH, 2002. SC. 3/2002
CORAM:- M. L. UWAI S CJN, I. L KUTIGI,
M. E. OGUNDARE, O. OGWUEGBU, U. MOHAMMED,
U. A. KALGO, A. O. EJIWUNMI, JJSC

ATTORNEY-GENERAL OF
ABIA STATE AND 35 OTHERS PLAINTIFFS
AND
ATTORNEY-GENERAL
OF THE FEDERATION DEFENDANT

PLEADINGS - Evidence - Admitted facts - When parties have agreed about a particular matter - Such matter need not be proved - And court should accept same as established without proof (H1)

CONSTITUTIONAL LAW - Local Government officials - Tenure - The 3 year tenure prescribed by Decree 36 of 1998 is valid - Since by Interpretation Act s. 6(1)(c) - The repeal of the Decree did not affect right accrued thereunder (H2)

LEGISLATION - Local Government officials - Tenure - No law enacted by National Assembly can validly increase or alter - Tenure of the elected officials - Except in relation to the FCT alone (H3)

LEGISLATION - Election - Local Government council - Except in relation to FCT alone - NA has no power to make law with respect to conduct of LG elections - Save the power to make laws regarding registration of voters - And procedure regulating the elections (H4)

ELECTIONS - Legislation - Local Government wards - Division - NA has no power except in relation to FCT alone - To make law with respect to division of LGA into wards - For election into LG council (H5)

LEGISLATION - Election - Qualification - NA has no power except in relation to FCT alone - To make law with respect to qualification or disqualification of candidates - For LG council election (H6)

ELECTIONS - Legislation - Date of election - NA has no power except in relation to FCT alone - To make law with respect to the date of election into LG council (H7)

LEGISLATION - Local Government council - Dissolution - NA has no power except in relation to FCT alone - To make law with respect to prescribing of event - Upon the happening of which LG council stands dissolved (H8)

CONSTITUTIONAL LAW - General elections - Qualification - NA has no power to make law with respect to qualification or disqualification of candidates for the elections - Without complying with requirements of s. 9 of the Constitution (H9)

CONFLICT OF LAWS - Electoral Act - With the exception of ss. 16, 26 to 41, 43 to 73, 116, 117 and 118(1) to (7) - Ss. 15 to 73 and 110 to 122 are from date of commencement of the Act - Inoperative for being inconsistent with 1999 Constitution (H10)

FACTS

Plaintiffs commenced this action against defendant at the Supreme Court of Nigeria sitting in its original jurisdiction. Plaintiffs' contention is that the National Assembly enacted the Electoral Act 2001 to which the President of the Federal Republic of Nigeria gave his assent. The said Act is divided into seven parts dealing with register of voters, procedure at election, political parties, procedure for Local Government election, electoral offences, determination of election petitions and miscellaneous matters. Plaintiffs stated that the provisions of the aforesaid Act transgress the legislative competence of the Federal Government (defendant) and thereby made serious incursions into the legislative and executive functions of the States (i.e. plaintiffs) as contained in the 1999 Constitution.

Plaintiffs went on to say that the areas of the incursions by defendant are as reflected in the reliefs claimed in paragraph 12 of their amended statement of claim, wherein they claim inter alia, for a declaration that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or

Councilors of Local Government in Nigeria except in relation to the Federal Capital Territory alone. Plaintiffs further contend that the dispute did not depend on the existence or non-existence of the Act as an enactment of the National Assembly but rather as to the scope or limits of the legislative powers of the National Assembly itself. On the other hand, defendant in its statement of defence denied that any provisions of the Act contravenes the provisions of the 1999 Constitution and that the Act has not frozen or altered the powers specifically assigned to plaintiffs under the Constitution. In addition, defendant stated that the Act does not contain any provision that threatens the continued existence of the Federal Republic of Nigeria.

ISSUES FOR DETERMINATION

“(i) Whether or not the National Assembly has any power to increase or otherwise alter the tenure of any of the offices mentioned in claim (i) of this action.

(ii) Whether or not the National Assembly has any power to make laws with respect to the matters specified in claim (ii) of this action.

(iii) Whether or not the National Assembly has any power to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) What is the scope or limit of the legislative powers of the National Assembly with respect to Local Government elections under the 1999 Constitution?

(v) Whether or not the provisions of sections 15-73 and 110- 122 of the Electoral Act 2001 or of any of the said sections are constitutional, valid and operative.

(vi) In the light of the answers to questions (i) to (v) whether or not the Electoral Act, 2001 is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or constitutional, valid and operative (as the defendant contends).

(vii) Whether there is any merit in the defendant's contention that the proper and necessary parties are not before the court.”

HELD

(Unanimously allowing plaintiffs' claims in part per KUTIGI JSC)

Evidence - Admitted facts

1. It is thus clear that from the pleadings that the main facts in this case are not in dispute as they are all admitted. Clearly when both parties have agreed about a particular matter in their pleadings such matter need not be proved and the court should accept such an agreed fact as established without proof (see section 74 of the Evidence Act). Consequently, at the hearing of the case neither of the parties led any evidence in any form whatsoever. (p. 2552 C)

CONSTITUTIONAL LAW - Local Government officials - Tenure

2. It is evident that the defendant has no answers to the solid points of Constitutional law relied upon by the plaintiffs. I find all the submissions of learned senior counsel for the plaintiffs above correct and I accept them. The confusion of introducing spent Decree into the issue by the defendant's counsel is rather misguided. In fact, the court intimated counsel at the hearing that since the relevant Decree 36 of 1998 had been repealed, section 6(1)(c) of the Interpretation Act (an existing law by virtue of the provision of section 315 of the Constitution) provide that:

"6(1) The repeal of an enactment shall not

(c) affect any right, privilege, obligation or liability accrued or incurred under the enactment;"

This in effect means that the 3-year tenure prescribed by Decree 36 of 1998 for elected Local Government Officials remains intact. (p. 2557 B)

LEGISLATION - Local Government officials - Tenure

3. I therefore enter judgment for the plaintiff on their claim (i) and declare that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as councilors of Local Government Council except in relation to the Federal Capital Territory alone. (p. 2557 F)

Election - Local Government council

4. The National Assembly has no power, except in relation to the Federal Capital Territory alone, to make any law with respect to conduct of elections into the Office of Chairman, Vice-Chairman or Councilors of a Local Government Council except the power to make laws with respect to the registration of voters and the procedure regulating elections to a Local Government Council.

Save and except for laws for the Federation with respect to

(a) registration of voters and

(b) the procedure regulating elections to a local government council.

It is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice-Chairman of Local Government Council in that State or to the office of councilors therein.

(pp. 2558 B/2559 B)

Legislation - Local Government wards - Division

5. The National Assembly has no power except in relation to the Federal Capital Territory alone, to make any law with respect to the division of a Local Government Area into wards for purposes of election into a Local Government Council.

(p. 2558 D)

Election - Qualification

6. The National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the qualification or disqualification of a person as candidate for election as Chairman, Vice Chairman or Councilor of a Local Government Council. (p. 2558 E)

Legislation - Date of election

7. The National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the date of election into a Local Government Council. (p. 2558 F)

LEGISLATION - Local Government council - Dissolution

8. The National Assembly has no power except in relation to the

Federal Capital Territory alone to make any law with respect to the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councilor or member thereof vacates his seat in the Local Government Council.
B (p. 2558 G)

CONSTITUTIONAL LAW - General elections - Qualification

9. This issue relates to the power of the National Assembly to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution without complying with the requirements of section 9 of the Constitution. Plaintiffs contend that since the Constitution has made very clear provisions with respect to the qualification of a person who seeks election to the office of President (sec. 131), Governor (sec. 177), membership of the National Assembly (sec. 65) and membership of a State House of Assembly (sec. 106) and similarly very clear provisions with respect to the disqualification of candidates for the same offices, President (sec. 137), Governor (sec. 182), National Assembly members (sec. 66), and State Assembly members (sec. 107), the National Assembly cannot amend or alter any of the provisions for qualification or disqualification of candidates as stipulated in the Constitution except by complying with the requirements of Section 9 of the Constitution which relates to the mode of altering or amending the provisions thereof. It was submitted that the provisions contained in Section 25 of the Electoral Act has the effect of amending the Constitutional provisions relating to the qualification and disqualification of candidates for election when compared with the existing provisions under Section 106, 107, 177 and 182 of the Constitution.
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I accept the submissions of learned senior counsel for the plaintiffs and reject that of the defendant. Issue (iii) claim (iii) therefore succeeds. It is therefore hereby declared that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution without first of all complying with the requirements of Section 9 of the Constitution. (pp. 2559 D/2560 E)
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CONFLICT OF LAWS - Electoral Act - 1999 Constitution

10. As a result of this the Electoral Act as a whole is a mix-up, a confusion, because the National Assembly seemed to have treated its legislative powers with respect to Federal elections as if they were co-extensive with its powers over Local Government elections. They were wrong. I have shown above that a few provisions of the Act are good but quite a large number of them are bad and had been struck-out.
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For the foregoing reasons the plaintiffs' claim (v) succeeds in part only and I declare as follows -

The provisions contained in Sections 15 to 73 and 110 to 122 except sections 16, 26 to 41, 43 to 73, 116, 117 and 118(1)-(7), of the Electoral Act are from the date of the commencement of the Act inconsistent with the provisions of the 1999 Constitution and are accordingly null and void and inoperative. (p. 2564 D)
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D

NOTABLE POINT OF INTEREST

OGUNDARE JSC

1. Errors in Electoral Act 2001 – National Assembly to effect correction

Before I end this judgment I like to comment briefly on the errors of spelling and grammar that permeate throughout the Act. Section 25, now invalidated, is a glaring example of this lapse. I have no doubt that, if unamended, it will make the task of interpretation and construction difficult in future. I make this short remark in order to draw the attention of the Honourable Members of the National Assembly to this lapse with a view to their taking steps to have a second look at the legislation and correct, in an amending bill, these errors. I make no order as to costs. (p. 2636 F)
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REPRESENTATION

Chief F. R. A. Williams, CFR. SAN., (A. O. Mogboh, SAN, L. O. Fagbemi, SAN., Prof. I. Sagay, SAN, Jibola Olanipekun, SAN., I. E. Williams, Femi Falana, O. I. Olorundare, Rotimi Oguneso, Ha-keem Afolabi, Dr. Tunji Abayomi, K. O. Fagbemi, M. A. Adesola, O. Egwu, F. Gambari-Mohammed (Mrs.) with him) for the plaintiffs.
H
T. A. A. Osinuga (Mrs.) Solicitor-General of the Federation (O. Kumuyi - ADCL, B.A. Odugbesan - PLO, & E. O. Omonuowa - PLO with her) for the defendant.

CASES REFERRED TO

- A-G Ogun State v. A-G Federation [1982] 13 N.S.C.C. 1
 A-G Bendel State v. A-G Federation [1982] 3 N.C.L.R. 1
 Military Gov. Ondo State v. Adewumi [1998] 3 NWLR (pt. 82) 280
 B Balewa v. Doherty [1963] 1 WLR 949
 Abacha v. Fawehinmi [2000] 6 NWLR (pt. 660) 228
 A-G Ondo State v. A-G Ekiti State [2001] 9-10 SC 116
 Lakanmi v. A-G Western Nigeria [1971] 1 U.I.L.R 201
 C Unongo v. Aku (1983) 9 SC 186
 Director of SSS v. Agbakoba [1999] 3 NWLR (pt. 595) 314
 Ex parte McLean [1930] 43 C.L.R. 472
 The State of Victoria v. Commonwealth of Australia [1937] 58 C.L.R. 618
 Adegbenro v. A-G Federation [1962] ANLR (pt. 1) 428
 D Gallagher v. Lynn [1937] AC 863
 Akwule v. The Queen [1963] ANLR 191
 Russel v. The Queen [1881-1882] 7 AC 829

STATUTES REFERRED TO

- E Constitution of the Federal Republic of Nigeria 1999, ss. 4(7)(a), 7(1), 9, 65, 66, 106, 107, 131, 137, 177, 182, 197, 232(1), 312(2), 315
 Decree 36 of 1998
 F Electoral Act 2001, ss. 15 – 73 & 110 – 122
 Interpretation Act, s. 6(1)(c)
 Supreme Court Act Cap. 424, s. 20
 Evidence Act Cap. 112 LFN 1990, s. 74
 Penal Code of Northern Nigeria, ss. 311, 315

G BOOKS REFERRED TO

- Black's Law Dictionary 6th Ed. pp. 1202-1204
 Oxford Advanced Learners' Dictionary of Current English 5th Ed
 Funk and Magnalls Standard College Dictionary p. 1133

LEAD JUDGMENT BY KUTIGI JSC

- H In paragraph 12 of their Amended Statement of claim, the plaintiffs' claims against the defendant read as follows:-

“(i) A declaration that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as Councilors of Local Government in Nigeria except in relation to the Federal Capital Territory alone.

(ii) A declaration that the National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the following matters or any of them, to wit:- B

(a) the conduct of elections into the office of Chairman, Vice Chairman or Councilors of a Local Government Council in Nigeria.

(b) the division of Local Government Areas into wards for purposes of election into Local Government Councils in Nigeria. C

(c) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councilors of a Local Government Council in Nigeria.

(d) the date of election into a Local Government Council D and

(e) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councilor or member thereof vacates his seat in the Local Government Council. E

(iii) A declaration that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999. F

(iv) A declaration that save and except for laws for the Federation with respect to - G

(a) the registration of voters, and

(b) the procedure regulating elections to a local Government Council, it is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to the office of Councilors therein. H

(v) A declaration that the provisions contained in Sections 15 to 73 and 110 to 122 of the Electoral Act, 2001 are, from the date of

the commencement of the said Act inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and are accordingly null and void and inoperative.

(vi) A declaration that by reason of the provisions of the Electoral Act 2001 which are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, the said Electoral Act is rendered null and void and inoperative in its entirety.”

The claims are preceded by the following paragraphs of the Amended Statement of Claim which I consider relevant. I set them out thus -

“3. The plaintiffs state that the National Assembly, acting pursuant to its law making powers under section 4 of the Constitution of the Federal Republic of Nigeria, 1999, considered and passed the Electoral Bill 2001.

6. The plaintiffs shall at the hearing contend that the Electoral Bill 2001, assented to by the President of the Federal Republic of Nigeria (hereinafter referred to as “the President”) makes provisions for the following matters:-

- (i) National Register of Voters and Voters Registration (Part 1 thereof)
- (ii) Procedure at Election (Part II thereof)
- (iii) Political Parties (Part III thereof)
- (iv) Procedure for Election to Local Government (Part IV thereof)
- (v) Electoral Offences (Part V thereof)
- (vi) Determination of Election Petitions Arising from Elections (Part VI) and
- (vii) Miscellaneous (Part VII).

9. The plaintiffs state further that the Constitution in sections 4, 5 and 6 respectively, makes provisions for the distribution of Legislative, Executive and Judicial powers of the Federal Republic of Nigeria between the Federal Government and the Government of the States. Sections 7 and 8 of the Constitution similarly make provisions with regard to the establishment and continuance of Local Government Councils.

10. The plaintiffs shall demonstrate that the distribution, of the Legislative powers of the Federal Republic of Nigeria between the Federal Government and the Government of the 36 States of the

Federation has resulted in the enumeration of matters exclusively reserved for the Federal Government to legislate upon. Furthermore, the plaintiffs shall show that the Constitution enumerates in the Concurrent Legislative List matters upon which both the Federal Government (through the National Assembly) and the State Government (through the House of Assembly of the States) may legislate. Specifically, the plaintiffs shall contend as follows:-

(a) By virtue of the provisions of section 4(2) of the Constitution, the National Assembly shall have powers to make laws for the peace, order and good governance of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in part 11 of the Second Schedule to the Constitution.

(b) Subsection 3 of section 3 of the Constitution provides that the powers of the National Assembly to make laws for the peace, order and good governance of the Federation with respect to any matter included in the Exclusive Legislative List shall, except as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of the States.

(c) The Constitution further provides that the National Assembly shall have powers to make laws on any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the extent prescribed in the second column opposite thereto.

(d) The plaintiffs state that the power to make laws set out in the Concurrent Legislative List is in addition and without prejudice to the powers conferred by subsection 2 of section 4.

(e) Section 7(1) of the Constitution provides that the Government of every State shall ensure the existence of Local Government under a law, which provides for the establishment, structure, composition, finance and functions of such Councils.

(f) Item 22 of the Exclusive Legislative List of the Constitution, empowers the National Assembly to make laws on the Election to the offices of President and Vice President or Governor and Deputy Governor and any other office to which a person may be elected under the Constitution, excluding to a Local Government Council or any office in such Council.

(g) Item 32 of the Executive Legislative List of the Constitution empowers the National Assembly to make laws with regard to

the Incorporation, Regulation and winding up of Bodies corporate, other than Co-operative Societies, Local Government Councils and Bodies Corporate established directly by any law enacted by a House of Assembly of a State.

(h) Item 11 of the Concurrent Legislative List grants the National Assembly power to make laws for the Federation with respect to the registration of voters, and the procedure regulating elections to a Local Government Council.

(i) Section 197(1) of the Constitution established for each State of the Federation a State Independent Electoral Commission and the powers of the Commission are set out in Part II of the third Schedule to the said Constitution.

(j) The Constitution makes elaborate provisions with regard to qualifications and disqualifications to all elective offices established by the said Constitution. The plaintiffs shall show that the Electoral Bill assented to by the President has introduced fresh qualifications and disqualifying factors other than those provided for by the Constitution.”

The defendant in its statement of defence admitted amongst others paragraphs 3, 6, 9 & 10(a) - (i) of the Amended Statement of Claim above. Paragraphs 2, 3, 4, 6 & 7 of the statement of defence read as follows:-

“2. The defendant admits paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10(a), (b), (c), (d), (e), (f), (g), (h), (i) of the statement of claim.

3. The defendant admits paragraph 10(j) of the plaintiff’s statement of claim only to the extent that the Electoral Bill, 2001 assented to by the President has not contravened the 1999 Constitution with regard to qualifications and disqualifications to all elective offices established by the Constitution.

4. The defendant denies paragraph 11 of the statement of claim and states that the provisions of the Electoral Bill, 2001 assented to by the President has not altered or frozen the powers specifically assigned to the plaintiffs under the 1999 Constitution.

6. The defendant denies paragraphs 12 of the plaintiffs’ statement of claim, and avers as follows:-

(i) The Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998 has been expressly repealed by Decree No. 62 of 1999. Decree No. 36 of 1998 thus ceases to

have any effect whatsoever, any longer.

(ii) Election of Officers into Local Government Councils had taken place before the commencement of the 1999 Constitution. Accordingly, the election into the Local Government Councils was not done pursuant to the provisions of the 1999 Constitution.

(iii) The National Assembly has inherent constitutional powers to determine the tenure of elected officers in Local Government Councils.

(iv) Sections 110, 112, 113(8), 115(2) and 119 of the Electoral Bill, 2001 has not contravened the provisions of the 1999 Constitution, hence the failure of the plaintiffs to state the provisions of the 1999 Constitution that were violated by the aforementioned sections of the Electoral Bill, 2001.

(v) Part IV of the Electoral Bill, 2001 is consistent with the provisions of item 11, Part II, 2nd Schedule, of the 1999 Constitution. D

(vi) Sections 25(1) and 27 of the Electoral Bill, 2001 are clear, unambiguous and not inconsistent with each other.

(vii) The provisions of Parts, V, VI and VII of the Electoral Bill, 2001 accord with the Legislative functions of the National Assembly and do not in any way conflict with the Judicial powers of the Judiciary defined in Section 6 of the 1999 Constitution. E

(viii) The Independent National Electoral Commission shall have power to register political parties in accordance with the provisions of the Constitution and an Act of the National Assembly. F

(ix) The National Assembly has powers to make laws with respect to the procedure regulating elections to a Local Government Council, while the Independent National Electoral Commission shall carry out such other functions as may be conferred upon it by an Act of the National Assembly. G

7. WHEREOF the defendant urges the court to hold:-

(a) That the Electoral Bill, 2001 assented to by Mr. President is not inconsistent with the provisions of the 1999 Constitution.

(b) That proper and necessary parties to this action are not before the court. H

(c) That the plaintiffs’ action lacks merit and is accordingly vexatious and an abuse of the court’s process.

(d) That the plaintiffs’ action ought to and should be dismissed.”

It is thus clear that from the pleadings that the main facts in this case are not in dispute as they are all admitted. Clearly when both parties have agreed about a particular matter in their pleadings such matter need not be proved and the court should accept such an agreed fact as established without proof (see section 74 of the Evidence Act). Consequently, at the hearing of the case neither of the parties led any evidence in any form whatsoever.

Briefly stated the plaintiffs' case is simply that the National Assembly enacted the Electoral Act, 2001 (hereinafter referred to as the Act) to which the President of the Federal Republic of Nigeria gave his assent. The Act is divided into seven (7) parts as follows -

- (i) Part I - National Register of Voters and Voters Registration.
- (ii) Part II - Procedure at Election.
- (iii) Part III - Political Parties.
- (iv) Part IV - Procedure for Election to Local Government.
- (v) Part V - Electoral Offences.
- (vi) Part VI - Determination of Election Petitions Arising from Elections.
- (vii) Part VII -Miscellaneous.

The Federal Government claimed to have acted in the belief that all the provisions contained in the Act are on matters with respect to which the National Assembly is empowered to make laws for the peace, order and good government of the country. The plaintiffs said that a very careful perusal of the provisions of the Act will reveal that they transgress the legislative competence of the Federal Government and make serious incursions into the legislative and executive functions of the States/plaintiffs as contained in the 1999 Constitution. The plaintiffs said the areas of these incursions by the defendant are as reflected in the reliefs claimed in their Amended Statement of Claim. The plaintiffs stressed the point that the dispute or controversy herein did not depend on the existence or non-existence of the Act as an enactment of the National Assembly but rather as to the scope or limits of the legislative powers of the National Assembly itself.

On the other hand, the defendant in its statement of defence has denied vigorously that any provisions of the Act contravenes the provisions of the 1999 Constitution and that the Act has not frozen or altered the powers specifically assigned to the plaintiffs under the Constitution. In addition the Act does not contain any provision that

threatens the continued existence of the Federal Republic of Nigeria.

In compliance with the order of court, the parties filed and exchanged briefs of argument. These briefs were adopted at the hearing while additional oral submissions were made in amplification.

The plaintiffs in their brief of argument have identified the following issues as arising for determination in this action:

“(i) Whether or not the National Assembly has any power to increase or otherwise alter the tenure of any of the offices mentioned in claim (i) of this action.

(ii) Whether or not the National Assembly has any power to make laws with respect to the matters specified in claim (ii) of this action.

(iii) Whether or not the National Assemble has any power to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) What is the scope or limit of the legislative powers of the National Assembly with respect to Local Government elections under the 1999 Constitution?

(v) Whether or not the provisions of sections 15-73 and 110- 122 of the Electoral Act 2001 or of any of the said sections are constitutional, valid and operative.

(vi) In the light of the answers to questions (i) to (v) whether or not the Electoral Act, 2001 is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or constitutional, valid and operative (as the defendant contends).

(vii) Whether there is any merit in the defendant's contention that the proper and necessary parties are not before the court.”

I observe that issues (i) - (vi) above correspond with the claims or reliefs (i) - (iv) in the Amended Statement of Claim. The extra issue (vii) is clearly the making of the defendant, and not strictly part of the plaintiffs' claims.

Issue (1) Claim (i)

The plaintiffs contend that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as Councilors of Local Government Councils in

Nigeria except in relation to the Federal Capital Territory alone. They said section 7(1) of the Constitution directs Government of every State to ensure the existence of the system of Local Government by a democratically elected Government Councils under the law providing for the following in relation to Local Government Councils:

- B 1. Establishment.
2. Structure.
3. Composition.
4. Finance.
- C 5. Functions.

That the word “shall” used in the provision compels State Governments to make laws for the aforementioned purposes. That the provision clearly implies that it is the State which must be responsible for the tenure of members of such Councils. That Item 22 on the Exclusive Legislative List in the Second Schedule to the Constitution places within the exclusive competence of the National Assembly, the making of legislation for election into the offices of the President, Vice President, Governor, Deputy Governor and any other office to which a person may be elected under the Constitution. That it specifically excludes for this purpose, the making of legislation for “election to a Local Government Council or any office in such Council.” It was also submitted that Item 11 on the Concurrent Legislative List over which both the Federal and State Governments have concurrent legislative powers provides that -

F “That National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a Local Government Council.”

That Item 12 on the same Concurrent Legislative List makes it clear that the aforementioned Item 11 does not “preclude the State House of Assembly from making laws with respect to election to a Local Government Council in addition to but not inconsistent with any law made by the National Assembly for the registration of voters and the procedure regulating elections to a Local Government Council. It was stressed that the legislative powers conferred on the National Assembly by the aforementioned provisions of the Constitution are for the limited purpose of “registration of voters and the procedure regulating elections to a local Government Council.”

Our attention is also drawn to Section 197 of the Constitution

which establishes a State Independent Electoral Commission whose functions are spelt out in Part II of the Third Schedule, Section 4 of which reads –

“4. The Commission shall have power-

- (a) to organise, undertake and supervise elections to Local Government Councils within the State;
- (b) to render such advice as it may consider necessary to the Independent National Electoral Commission on the compilation of and the register of voters in so far as that register is applicable to Local Government elections in the State.”

The foregoing provisions emphasise the role of the State Independent Electoral Commissions in respect of elections to Local Government Councils within the State as well as highlight the limited role of the Independent National Electoral Commission. Again pursuant to Section 4(7)(a) of the Constitution a State House of Assembly is empowered to make laws with respect to “any matter not included in the Exclusive Legislative List,” therefore subject to the powers conferred on the National Assembly under the Concurrent Legislative List, all residual legislative powers with respect to Local Government Councils are subject to the Constitution vested in the House of Assembly. The court was urged to hold that it is the House of Assembly of a State and it alone that has the power to prescribe, increase or otherwise alter the tenure of the office of elected officers or Councilors of Local Government Councils other than those in the Federal Capital Territory, Abuja. We were accordingly urged to enter judgment for the plaintiffs on their claim (i).

The defendant in its brief of argument submitted that elections to offices in Local Government Councils were concluded under the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998 which made elaborate provisions on matters affecting Local Government system. That since the elections were not held under the 1999 Constitution, the Constitution did not provide for the tenure of elected officers of Local Government Councils and that there is no provision in the Constitution too which empowers a State Assembly to determine the tenure of elected officers of Local Government Councils. That Decree 36 of 1998 was itself repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999 and that by the virtue of

the provision of section 312(2) of the Constitution, elected council officials shall be deemed to have been duly elected under the Constitution. That Item 22 on the Exclusive Legislative List should be read together with items 11 & 12 on the Concurrent Legislative List and that the legislative power of the National Assembly to make laws on the procedure regulating elections includes the power to legislate on tenure and or when there will be an election. I reject this latter submission outright.

Now, Section 7(1) of the Constitution reads thus-

“7(1) The system of Local Government by democratically elected Local Government Councils is under the Constitution guaranteed, and accordingly, the Government of every State shall, subject to Section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such Councils.”

Item 22 in the Exclusive Legislative List also states-

“22. Election to the offices of President and Vice-President or Governor and Deputy Governor and any other office to which a person may be elected under the Constitution, excluding election to a Local Government Council or any office in such council.”

Items 11 and 12 in the Concurrent Legislative List again read -

“11. That National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a Local Government Council.”

“12. Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to local government council in addition to but not inconsistent with any law made by the National Assembly.”

All the above provisions are to me clear and unambiguous. They should therefore be read ordinarily and given their ordinary meaning. The plaintiff’s case appears to me to have been built on a very strong foundation unlike that of the defendant.

It is evident that the defendant has no answers to the solid points of Constitutional law relied upon by the plaintiffs. I find all the submissions of learned senior counsel for the plaintiffs above correct and I accept them. The confusion of introducing spent Decree into the issue by the defendant’s counsel is rather misguided. In fact, the

court intimated counsel at the hearing that since the relevant Decree 36 of 1998 had been repealed, section 6(1)(c) of the Interpretation Act (an existing law by virtue of the provision of section 315 of the Constitution) provide that:

“6(1) The repeal of an enactment shall not (c) affect any right, privilege, obligation or liability accrued or incurred under the enactment;”

This in effect means that the 3-year tenure prescribed by Decree 36 of 1998 for elected Local Government Officials remains intact.

I therefore enter judgment for the plaintiff on their claim (i) and declare that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as councilors of Local Government Council except in relation to the Federal Capital Territory alone.

Issue (ii) claim (ii)

The plaintiffs adopt their arguments in respect of issue (1) claim (i) above, and emphasized that the National Assembly has no power to enact laws with respect to the conduct of elections into the office of Chairman, Vice-Chairman or councilors of a Local Government Council except the power to make laws with respect to the registration of voters and the procedure regulating elections to local government council which is itself predicated on the existence of laws with respect to elections generally.

The defendant in fact argued or treated plaintiff’s claims (i), (ii), (iii) and (iv) together in its brief under Question one. So what was said in respect of claim (i) above will apply here. Plaintiffs’ claim (ii) however is in five parts (a) - (e). I will therefore answer them one after the other as follows:

(ii)(a) The National Assembly has no power, except in relation to the Federal Capital Territory alone, to make any law with respect to conduct of elections into the Office of Chairman, Vice-Chairman or Councilors of a Local Government Council except the power to make laws with respect to the registration of voters and the procedure regulating elections to a Local Government Council. This is refused as it seems to relate to procedure of elections.

(b) The National Assembly has no power except in relation to the Federal Capital Territory alone, to make any law with respect

to the division of a Local Government Area into wards for purposes of election into a Local Government Council.

(c) The National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the qualification or disqualification of a person as candidate for election as Chairman, Vice Chairman or Councilor of a Local Government Council.

(d) The National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the date of election into a Local Government Council.

(e) The National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councilor or member thereof vacates his seat in the Local Government Council.

(b) - (e) therefore succeed.

Issue (iv) Claim (iv)

I think having regard to the submissions by the plaintiffs' counsel on the issues above as well as the defendant's reply on them, it will be convenient to deal with plaintiff's claim (iv) here immediately since the claim relates to the scope or limit of the legislative powers of the National Assembly with respect to Local Government elections in the States under the Constitution. In the light of what I have said above, I believe this claim too must succeed. I accordingly hereby declare that -

Save and except for laws for the Federation with respect to

(a) registration of voters and

(b) the procedure regulating elections to a local government council.

It is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice-Chairman of Local Government Council in that State or to the office of councilors therein.

Issue (iii) claim (iii)

This issue relates to the power of the National Assembly to make laws with respect to the qualification or disqualification of

candidates for elections to be held pursuant to the provisions of the Constitution without complying with the requirements of section 9 of the Constitution. Plaintiffs contend that since the Constitution has made very clear provisions with respect to the qualification of a person who seeks election to the office of President (sec. 131), Governor (sec. 177), membership of the National Assembly (sec. 65) and membership of a State House of Assembly (sec. 106) and similarly very clear provisions with respect to the disqualification of candidates for the same offices, President (sec. 137), Governor (sec. 182), National Assembly members (sec. 66), and State Assembly members (sec. 107), the National Assembly cannot amend or alter any of the provisions for qualification or disqualification of candidates as stipulated in the Constitution except by complying with the requirements of Section 9 of the Constitution which relates to the mode of altering or amending the provisions thereof. It was submitted that the provisions contained in Section 25 of the Electoral Act has the effect of amending the Constitutional provisions relating to the qualification and disqualification of candidates for election when compared with the existing provisions under Section 106, 107, 177 and 182 of the Constitution.

The Court was urged to hold that the National Assembly cannot amend the provisions for qualification and disqualification of candidates as contained in the Constitution and that in accordance with the well established principles of constitutional law, if a legislature enacts a law in identical terms with what has already been enacted by another legislature whose enactments have superior legislative force, then the enactment of the subordinate legislature is void or at least inoperative. The case of Attorney-General of Ogun State v. Attorney-General of the Federation [1982] 13 N.S.C.C. 1 at 11 per Fatai-Williams, C.J.N., was cited in support.

The defendant said that because the National Assembly has the power to make law for peace, order and good government for the Federation, it is in the discharge of the constitutional duty imposed on it by Section 4 of the Constitution that Section 25 of the Act was enacted to ensure orderliness and peace at elections which are indispensable conditions precedent to the attainment of a good government and more and none of the provisions of the Constitution has been violated by the Act.

I accept the submissions of learned senior counsel for the plaintiffs and reject that of the defendant. Issue (iii) claim (iii) therefore succeeds. It is therefore hereby declared that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution without first of all complying with the requirements of Section 9 of the Constitution.

Issue (v) claim (v)

Here the court is required to declare that the provisions contained in Section 15 to 73 (Part II) and Sections 110 to 122 (Part IV) of the Electoral Act, 2001 are from the date of commencement of the said Act inconsistent with the provisions of the Constitution and are accordingly null and void and inoperative.

The plaintiffs contended that in enacting the Electoral Act, the Federal Government proceeded with that exercise as if the word “excluding” in Item 22 of the Exclusive Legislative List is replaced by the word “including,” and proceeded to treat the legislative powers of the National Assembly with respect to Presidential and Gubernatorial elections as if they were co-extensive with its powers over Local Government elections. For this reason therefore Parts II and IV of the Act must be treated as void on the ground of inconsistency with the Constitution. That even if some of the provisions are good in so far as they apply to Presidential and Gubernatorial elections, those provisions which purport to apply to Local Government Councils are bad and that this is not the type of situation to which the blue pencil rule can be applied for the simple reason that one cannot sever the bad from the good. The case of *Balewa v. Doherty* [1963] 1 W.L.R. 949 at 960 per Lord Devlin, was cited in support.

I have recorded elsewhere that the defendant is of the view that none of the provisions of the Act has contravened any of the provisions of the Constitution and that the National Assembly only acted in exercise of the powers conferred on it by the Constitution to make law for peace, order and good government of the country.

Part II of the Act (Sections 15 to 73) is made up of 59 sections while Part IV (Sections 110 to 122) is made up of 13 sections, excluding the various subsections and paragraphs contained in both parts. One will therefore, have to go through the various sections, subsections and paragraphs one by one (unless where they may con-

veniently be lumped together), in order to be able to determine exactly whether or not any of them has breached any of the provisions of the Constitution and therefore null and void and inoperative. To carry out this exercise, I will be guided by the following considerations -

1. Where the provision in the Act is within the legislative competence of the National Assembly as provided in the Constitution and it has not already been provided for in the Constitution, the provision will be regarded as valid.

2. Where the provision in the Act is within the legislative powers of the National Assembly but the Constitution is found to have already made same or similar provision, then the new provision will be regarded as invalid for duplication and or inconsistency and therefore inoperative. The same fate will befall any provision of the Act which seeks to enlarge, curtail or alter any existing provision of the Constitution. The provisions will be treated as unconstitutional and therefore null and void.

3. Where the provision in the Act relates to the election to the offices of Chairman, Vice Chairman, and Councilors of Local Governments, unless it is in respect of the registration of voters of the procedure regulating elections to a Local Government Council, the provision will be treated as unconstitutional and therefore null and void.

It is now time to commence the exercise.

PART II (SECTIONS 15 TO 73 OF THE ACT) Section 15

Many of its provisions are duplications of the Constitutional provisions relating to the election into the office of the President, members of the National Assembly, Governors and members of the Houses of Assembly. Many of its provisions also pertain to election to the office of Chairman, Vice Chairman and Councilors of Local Government Council which are inconsistent with Item 22 on the Exclusive Legislative List discussed earlier in this judgment. I have therefore no hesitation whatsoever in coming to the conclusion that the entire section is void for duplication, inconsistency and lack of legislative competence. The Section is accordingly struck out.

Section 16.

The section deals with the postponement of election. As far as the Local Government Councils are concerned this can be regarded as part of the procedure regulating elections. The plaintiffs

have not urged anything specifically against the section. The section is accordingly upheld as valid.

Sections 17, 18, 19, 20, 21 & 22

These sections are taken together simply because of inconsistency with the existing provisions of the Constitution. The National Assembly is incompetent to repeat in a law things like qualification and disqualification of candidates for elections already provided for in the Constitution. Many provisions pertaining to Local Government elections are also not matters of procedure. All the sections are clearly incompetent. They are all struck-out.

Sections 23, 24 & 25

Many of the existing provisions of the Constitution have been repeated. Matters pertaining to Designation of Public Buildings as Polling Station must be left to the Independent National Electoral Commission (INEC) to handle and not strictly a matter for legislation. Section 25 in particular which relates to submission of list of candidates and their affidavits by political parties to the Commission is clearly an amendment to the Constitution. It is unconstitutional. All these sections are hereby struck-out for duplication, inconsistency and want of legislative competence.

Sections 26, 27, 28, 29 & 30

These sections appear to deal only with procedure to regulate elections only. The plaintiffs have not urged anything seriously against these sections. They are accordingly upheld as valid.

Sections 31 to 73

These sections would appear largely to have concerned themselves with the procedure regulating elections at all levels including Local Government Councils as already discussed above. Anything outside that will be unconstitutional as far as Local Government Councils are concerned. I also believe that National Assembly can legislate for the entire country that a particular election must hold the same day throughout the country as stated in Section 42. All the provisions or sections are therefore upheld.

PART IV (Sections 110 to 122 of the Act)

This part of the Act is supposed to have dealt with procedure for election to Local Government Councils.

Section 110 purports to give the State Independent Electoral Commission powers already conferred on it by the Constitution. This

is clearly a duplication of the provisions of the Constitution and therefore inoperative. The proviso is unconstitutional while subsection 2 is not on a matter of procedure. The Section is therefore struck-out.

Sections 111, 112, 113, 114, 115(1) - (6)

These are again all not on procedural matters pertaining to elections. The National Assembly therefore lacks the necessary legislative power to have enacted those sections as explained earlier in this judgment. They are all null and void. They are struck-out.

Sections 116, 117, 118(1) - (8)

I have no difficulty in holding that these provisions pertain to procedure regulating elections to Local Government Council. They are therefore valid and I so hold. The provision of Section 118(8) cannot however be said to be procedural. It is therefore incompetent and is struck-out.

Sections 119, 120, 121 & 122

Clearly too these sections cannot be said to have dealt with the matters of procedure regulating elections to Local Government Councils. Some of the provisions in Section 121 are in fact already in the Constitution. The National Assembly lacks legislative power to enact these sections. They are unconstitutional, inoperative, null and void. They are hereby struck-out.

It is perhaps now time to state that the Electoral Act is supposed to have dealt with all elections both at the Federal, State and Local Government levels. But as I have demonstrated above, all provisions in respect of Federal elections unless already provided for in the Constitution or where it is sought to change, alter or amend the Constitutional provision or where there is no power at all, the provision will be treated as valid except those in respect of Local Government Councils which must not go beyond provision for registration of voters and or the procedure for regulating elections to the Local Government.

As a result of this the Electoral Act as a whole is a mix-up, a confusion, because the National Assembly seemed to have treated its legislative powers with respect to Federal elections as if they were co-extensive with its powers over Local Government elections. They were wrong. I have shown above that a few provisions of the Act are good but quite a large number of them are bad and had been struck-out.

For the foregoing reasons the plaintiffs' claim (v) succeeds in part only and I declare as follows -

The provisions contained in Sections 15 to 73 and 110 to 122 except sections 16, 26 to 41, 43 to 73, 116, 117 and 118(1)-(7), of the Electoral Act are from the date of the commencement of the Act inconsistent with the provisions of the 1999 Constitution and are accordingly null and void and inoperative.

Issue (vi) Claim (vi)

The plaintiffs contend that in the light of the answers to issues (i) to (v) above, the court should examine the remaining portions of the Act not affected by the decision which nullified parts of the Act on the ground that they are unconstitutional and void, to see whether the remaining portions still remain operative. It was submitted that what is left of the Act when all the portions attacked are expunged, cannot be allowed to stand and so the Act ought to be struck-out in its entirety.

The short answer to this is that the plaintiffs had only attacked two parts (Parts II and IV) out of a total of seven parts (Parts I - VII) of the Act. And even then not all sections of the two parts attacked were struck-out. Quite a number of the sections attacked have been upheld as Constitutional and therefore valid. That much is made clear in our declaration in respect of claim (v) above where the valid sections are excluded from the declaration made. Claim (vi) therefore fails and it is dismissed.

Plaintiffs' issue (vii) is whether there is any merit in the defendant's contention that the "proper and necessary" parties are not before the court. This is certainly not a claim by the plaintiffs. I note that the point was pleaded by the defendant in its pleadings only. It is not one of the issues raised by the defendant on pages 1 & 2 of its brief. It must be deemed to have been abandoned. It is accordingly struck-out.

Plaintiffs' claims (i), (iii) and (iv) therefore all succeed completely, while claims (ii) and (v) succeed in part only. Claim (vi) fails and it is hereby dismissed.

In summary and in conclusion it is declared as follows -

1. No law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as Chairmen and Councilors of Local Government Councils in Nigeria

except in relation to the Federal Capital Territory alone.

2. The National Assembly has no power except in relation to the Federal Capital territory alone to make any law with respect to the following matters or any of them, to wit:-

(b) The division of Local Government Areas into wards for purposes of election into Local Government Councils in Nigeria.

(c) The qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councilors of a Local Government Council in Nigeria.

(d) The date of election into a Local Government Council: and

(e) The prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councilor or member thereof vacates his seat in the Local Government Council.

3. The National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

4. Save and except for the laws for the Federation, with respect to:

a. the registration of voters and

b. the procedure regulating elections to a Local Government Council, it is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to the office of Councilors therein.

5. The provisions contained in Sections 15 to 73 and 110 to 122 except Sections 16, 26 to 41, 43 to 73, 116, 117 and 118(1)-(7) of the Electoral Act, 2001 are from the date of the commencement of the Act inconsistent with the provisions of the 1999 Constitution and are accordingly null and void and inoperative.

UWAIS CJN

This action is jointly brought by the Governments of all the thirty-six States of the Federal Republic of Nigeria, through their Attorneys-General, against the Attorney-General of the Federation representing the Government of the Federal Republic of Nigeria and the Federal Capital Territory.

The Plaintiffs, by their Amended Statement of Claim, aver that the National Assembly, pursuant to its power under section 4 of the Constitution of the Federal Republic of Nigeria, 1999, passed a bill titled "Electoral Bill 2001." That the Bill was presented to the President of the Federal Republic of Nigeria for his assent. This Bill was assented to by the President on the 6th day of December, 2001 (hereinafter referred to as "the Act")

The plaintiffs aver further that the Act makes provisions therein in respect of the following matters: -

- (i) National Register of Voters and Voters Registration in Part I thereof;
- (ii) Procedure at Election in Part II;
- (iii) Political Parties in Part III;
- (iv) Procedure for Election to Local Government in Part IV;
- (v) Determination of Election Petitions Arising from Elections in Part VI and
- (vi) Miscellaneous Matters."

It is stated in the Amended Statement of Claim that the plaintiffs have been damnified and they claim against the defendant as follows: -

- (i) A declaration that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as Councillors of Local Government in Nigeria except in relation to the Federal Capital Territory alone.
- (ii) A declaration that the National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the following matters or any of them, to wit: -
 - (a) The conduct of elections into the office of Chairman, Vice Chairman or Councillors of a Local Government Council in Nigeria.
 - (b) The division of Local Government Areas into wards for purposes of election into Local Government Councils in Nigeria.
 - (c) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councillors of a

Local Government Council in Nigeria.

- (d) the date of election into a Local Government Council and
- (e) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councillor or member thereof vacates his seat in the Local Government Council.

(iii) A declaration that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) A declaration that save and except for laws for the Federation with respect to -

- (a) the registration of voters, and
- (b) the procedure regulating elections to a local Government Council, it is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to the office of Councillors therein.

(v) A declaration that the provisions contained in Sections 15 to 73 and 110 to 122 of the Electoral Act, 2001 are, from the date of the commencement of the said Act inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and are accordingly null and void and inoperative.

(vi) A declaration that by reason of the provisions of the Electoral Act, 2001 which are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, the said Electoral Act is rendered null and void and inoperative in its entirety."

The defendant admits, in his Statement of Defence, all the averments in the Amended Statement of Claim except that he pleads that the Electoral Act, 2001 has not contravened the 1999 Constitution with regard to the qualification and disqualification to all elective offices as provided by the Constitution.

At the trial of the case applications were brought by thirty-seven Chairmen, representing all the chairmen of Local Governments

in Nigeria, and the National Assembly to be joined as co-defendants to the action. Both applications were refused. This was because in the case of the Local Government Councils the Supreme Court has no jurisdiction under section 232 subsection (1) of the 1999 Constitution to determine any dispute, at first instance, between the Local Governments and their respective State Governments. Section 231 (1) provides: -

“232. (1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.”

In the case of the National Assembly, it is one of the three arms of the Federal Government under the 1999 Constitution and section 20 of the Supreme Court Act, Cap. 424 provides: -

“20. Any proceedings before the Supreme Court arising out of a dispute referred to in section 231 (1) of the Constitution and brought by or against the Federation or a State shall

(a) in the case of the Federation be brought in the name of the Attorney-General of the Federation;

(b) in the case of a State be brought in the name of the Attorney-General of the State.”

Consequently, the National Assembly is already a party to the suit by virtue of the Attorney-General of the Federation being a defendant.”

Before the hearing of the suit we directed the parties to file briefs of argument and this was complied with. Both parties filed the briefs and rely on the argument therein. In the plaintiffs’ brief of argument it is submitted that the main facts pleaded in the Amended Statement of Claim have been admitted in the Statement of Defence and therefore no proof of the facts is required. It is contended by the plaintiffs that the provisions in the Electoral Act, 2001 transgress the legislative competence of the Federal Government and have purported to make very serious incursions into the legislative and executive functions of the States of the Federal Republic of Nigeria under the 1999 Constitution. The areas of the incursions are reflected in the reliefs sought in the Amended Statement of Claim as quoted above.

Arguing in respect of claim (i) it is canvassed that section

7 subsection (1) of the Constitution directs the government of the States to ensure the existence of the system of local government by a democratically elected local government councils under a Law which provides, in relation to local government councils, the following - establishment, structure, composition, finance and functions. Item 22 of the Exclusive Legislative List in the Second Schedule to the Constitution places within the exclusive legislative competence of the National Assembly, the making of legislation for election to the offices of the President and Vice President or Governor and Deputy Governor and any other office to which a person may be elected under the Constitution. The provisions therein specifically exclude for this purpose the making of legislation for election to a local government council or any office in such council.

Also item 11 on the Concurrent Legislative List, over which both the Federal and State Government have concurrent legislative powers, provides that the National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to local government council. Reference is made to item 12 on the Concurrent Legislative List which makes it clear that item 11 does not preclude State Houses of Assembly from making laws with respect to election to a local government council in addition to, but not inconsistent, with any law made by the National Assembly.

The plaintiffs argue that the legislative powers which are conferred on the National Assembly by the aforementioned provisions of the 1999 Constitution are for the limited purpose of registration of voters and the procedure regulating elections to local government councils. Our attention is being drawn to the provisions of section 197 of the Constitution, which establishes State Electoral Commissions, and functions of the Commissions, which are spelt out in Part II of the Third Schedule to the Constitution and in particular paragraph 4 thereof, which emphasises the role of the State Independent Electoral Commissions in respect of elections to local government council and in contrast highlights the limited role of the Independent National Electoral Commission.

It is submitted that pursuant to the provisions of section 4(7) (a) of the 1999 Constitution the House of Assembly of a State is empowered to make laws with respect to any matter not included in

the Exclusive Legislative List and argued that subject to the powers conferred on the National Assembly by the provisions contained in the Concurrent Legislative List, all remaining or residual powers with respect to Local Government Councils are, subject to the Constitution, vested in a House of Assembly alone. This implies that it is the State which must be responsible for the tenure of members of the local government councils.

Therefore, it is the House of Assembly alone that has the power to prescribe, increase or otherwise alter the tenure of the office of elected officers, or councillors of Local Governments other than those in the Federal Capital Territory for which only the National Assembly has the powers to legislate.

With regard to claims (ii) and (iv) in the Amended Statement of Claim it is contended that the power of the National Assembly to make laws, with respect to the procedure regulating elections to a local government council, is predicated on the existence of laws with respect to elections generally. Federal enactment is expected to do no more than to regulate the procedure for such elections. It is therefore, for the House of Assembly, to make laws with respect to elections other than provisions regulating registration of voters and the procedure for elections. It is submitted that the division of local government areas into wards is not a matter with respect to which the National Assembly is vested with power to make laws. Nor is it incidental or supplement to the exercise of the power for the registration of voters.

It is contended that the National Assembly has no power to legislate with respect to the qualification or disqualification of candidates for election as chairman, vice chairman or councillor of a local government, as provided under sections 113 and 114 of the Electoral Act, 2001, since local government elections do not fall within the scope of the limited powers of the National Assembly. The National Assembly does not also have the power to fix date for election into a Local Government Council as done under section 115 of the Act. Nor has it the power to prescribe the event upon the happening of which a Local Government Council stands dissolved as done in sections 119, 120 and 121 of the Act.

On claim (iii) it is canvassed that the 1999 Constitution has made clear provisions with regard to the qualifications of a person

to seek election to the office of President in section 131, Governor in section 117, membership of National Assembly in section 65 and membership of a House of Assembly in section 106. The Constitution has also made respective provisions in sections 137, 182, 66 and 107 thereof with regard to the qualification of candidates for these offices. It is submitted that the National Assembly cannot alter or amend any of the Constitutional provisions for qualification or disqualification of candidates except by complying with the provisions of section 9 of the Constitution. It is argued further that the provisions of section 25 of the Electoral Act has the effect of amending the constitutional provisions relating to the qualification and disqualification of candidates for election. In further illustration it is mentioned that section 25(2)(b)(e)(g)(h)(j)(n)(o) and (p) imposes qualifications and disqualifications outside those constitutionally imposed by sections 106 and 107 of the Constitution - for election to House of Assembly and section 117 and 182 - for election to the office of Governor and Deputy Governor. Section 25(2)(b) and (e) of the Act requires the sponsored candidate for election to be a registered voter and produce evidence of payment of tax as and when due or tax exemption for a period of 3 years preceding the election year. It is submitted that all these requirements are additional to the 1999 Constitution and, therefore, amount to alteration of the Constitution.

Section 25(2)(g)(h) and (j) of the Act, which provides for disqualification on the basis of lunacy, unsound mind, sentence of death or imprisonment and bankruptcy, is in pari materia with section 107(1)(b)(c) and (e) of the Constitution, for election to the House of Assembly a State and section 182(1)(c)(d) and (f) of the Constitution, for election to the office of Governor and Deputy Governor of a State.

The plaintiff submits that in accordance with the well established principles of Constitutional law if a legislature enacts a law in identical terms with what has already been enacted by another legislature whose enactments have superior legislative force, then the enactment of the subordinate legislature is void or at least inoperative. The decision in the Australian case of *Ex-Parte McLean*, 43 C.L.R. 472, which was approved by this Court in *A-G. of Ogun State v A-G. of the Federation*. [1982] 13 N.S.C.C. 1 at P.11, is cited in support. We are then urged to hold that the entire provisions of section of the Electoral Act, 2001 are unconstitutional and void or inoperative in

so far as they purport the effect of altering the requirements of the 1999 Constitution.

Claims (v) and (vi) in the Amended Statement of Claim deal with Part II and IV of the Electoral Act, 2001. The plaintiff submits that it is the House of Assembly of a State and not the National Assembly that has the power to make laws with respect to elections to the office of Chairman, Vice Chairman or member of a local government council in that State. Reference is made to items 11 and 12 of the Concurrent Legislative List and Section 4(7)(a) of the Constitution. It is argued in the alternative that the National Assembly has exclusive legislative powers to make laws with respect to election to the offices of President, and Vice-President, or Governor and Deputy Governor and any other office to which a person may be elected under the Constitution. Attention is drawn to item 22 of the Exclusive Legislative List in the Constitution. It is canvassed that the word “excluding” under the item appears to be treated, in the drafting of the Electoral Act, 2001, as “including.” Thus treating the legislative powers of the National Assembly with respect to Presidential and Gubernatorial elections as if they were co-extensive with powers over Local Government elections. It is submitted that it is for the foregoing reason that the provisions of Part II and IV of the Act must be treated as void on the ground of inconsistency with the Constitution. The plaintiffs argue that even if some of the provisions thereof are good in so far as they apply to the Presidential and Gubernatorial elections, the fact remains that those provisions are bad in so far as they purport to apply to elections to local government councils. That this is not the type of case to which the blue pencil rule can be of any help for the reason that you cannot sever the bad from the good. The case of *Balewa v. Doherty* [1963] 1 W.L.R. 949 at P. 960 is cited in support.

The plaintiffs argued in their brief of argument the principle of “blue pencil rule.” It is submitted that it is well-established in Nigeria and other common law jurisdictions operating a federal Constitution that where parts of a statute are nullified on the ground that they are unconstitutional and void, the court is entitled to examine whether the remaining portion of the enactment, not affected by the decisions of the court, remains operative. It is contended that when all the portions of the Electoral Act, 2001 are expunged, including those which are bad because they are inseparable from the good, what is

left cannot be allowed to stand and so it is argued that the whole of the Electoral Act ought to be struck out in its entirety.

In reply the defendant submits that the questions for determination in this suit are:-

“2.01. Whether the Constitutional powers of the National Assembly to make laws regulating the procedures for all elections in Nigeria does not cover the power to make law as to the time when there should be general elections in Nigeria.

2.02. Whether the National Assembly needs to amend the Constitution pursuant to section 9 of 1999 constitution before it can validly make law for peace and good governance in Nigeria.

2.03. Whether the provisions of Section 25(2)(b)(e)(g)(h)(j)(m)(n)(o) of Electoral Act, 2001 are for the peace, order and good governance of Nigeria or not.

2.04. In law, when can one say is the effective date of an Act of the National Assembly?

2.05. Where there seems to be conflict (if any) between the provisions of a Decree that has been repealed and the provisions of an existing Act of the National Assembly, which supersedes?”

It is contended that prior to the coming into force of the Constitution of the Federal Republic of Nigeria, 1999, the law applicable to elections to the offices of a local government council was the Local Government (Basic Constitutional and Transitional Provision) Decree No.36 of 1998. This Decree made elaborate provisions on matters affecting local government system, establishment of local government councils, offices of chairman, vice chairman, councilors, functions of local government councils and elections to the council. Reference is made to section 7 of the Decree which provided: -

“7. A Local Government Council or an area Council shall stand dissolved at the expiration of a period of 3 years commencing from the date of the first sitting of the Council.”

It is argued by the defendant that the 1999 Constitution does not provide for the tenure of elected officers of Local Government Councils nor does any provision of the Constitution empower the House of Assembly of a State to determine the tenure of the elected officers. Since Decree No. 36 of 1998 was repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999, it is submitted that the operation and law

applicable to offices of Local Government Council come under the 1999 Constitution. The provisions of section 31 subsection (2) of the Constitution are cited in support of the submission. The subsection provides: -

B “(2) Any person who before the coming into force of this Constitution was elected to any elective office mentioned in this Constitution in accordance with the provisions of any law in force immediately before the coming into force of this Constitution shall be deemed to have been duly elected to that office under this Constitution.”

C Section 18 subsections (3) and 24 of Decree No. 36 of 1998 were quoted in order to draw attention to the tenure of Local Government officers elected under the provisions of the Decree, Section 18(3) thereof stated:-

D “(3) Subject to the provisions of subsection (1) of the section, the Chairman shall vacate his office at the expiration of a period of 3 years commencing from the date when -

(a) in the case of a person first elected as Chairman under this Decree, he took the Oath of Allegiance and the Oath of Office; or

E (b) the person last elected to that office took the Oath of Allegiance and the Oath of Office or would but for his Death have taken those Oaths.”

While section 24 (1) provided: -

F “24. (1) A member of a Local Government Council or Area Council shall vacate his seat in the Council -

(a) if he becomes a member of a legislative house; or

(b) on the date when his letter of resignation takes effect; or

G (c) if he becomes President, Vice-President, Governor, Deputy Governor or a Minister of the Government of the Federation or a Commissioner of the Government of a State; or

(d) being a person whose election was sponsored by a political party, he resigns from that party or becomes a member of another political party before the expiration of the period for which the Local Government Council or Area Council was elected; or

H (e) if he becomes a member of a secret society or does any other thing disqualifying him from holding the office of Councillor under this Decree; or

(f) if the Chairman of the Local Government Council or Area Council receives a certificate under the hand of the Chairman of the Commission stating that the provisions of section 25 of this Decree have been complied with in respect of the recall of that member.”

B It is further argued that since Decrees No. 36 of 1998 and No. 63 of 1999 made provisions with regard to the elected offices of Local Government Councils, it is not only logical but also a good law that if the need arises to give life to any of the provisions of the repealed Federal enactments, it is the National Assembly and it alone that has the inherent constitutional power to enact the appropriate C legislation.

The defendant canvasses that the power to establish a local government council is not synonymous with the power to prescribe the tenure of the elected officers of local government council as the plaintiffs argued. It is submitted that nowhere in the 1999 Constitution D are States empowered to determine the tenure of Local Government Councils. While it is true that where the Exclusive and Concurrent Legislative Lists are silent as to certain matters, the House of Assembly of a State has the residual power to legislate on such matters, this does not apply where there are provisions in other enactments which E confer powers, to deal with such matters, on the National Assembly.

Reference is made to item 11 on the Concurrent Legislative List in Part 11 of the Second Schedule to the Constitution which provides: -

F “The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a Local Government Council.”

G And it submitted that the power of the National Assembly to make law, on the procedure regulating elections, include the powers to legislate on when there should be elections, and not merely on the conduct of the election only. The definitions of the word “procedure” in Black’s Law Dictionary, 6th Edition by Henry Campbell at pp. 1202-1204 and Oxford Advanced Learners Dictionary of Current English, 5th Edition and Funk and Magnalls Standard College Dictionary, at page 1133 where the word “procedure” is said to be H the same as “arrangement,” were cited. The cases of A-G of Bendel State v A-G. of the Federation & 22 Ors., [1982] 3 N.C.L.R. 1 at pp. 66, 71 and 74 and The Military Governor, Ondo State & Anor. V

Adewumi, [1998] 3 N.W.L.R. (Part 82) 280 at p. 283 were referred to. The defendant urges for liberal interpretation of the Constitution and refers to the doctrine of covering the field in the light of the provisions of item 12 of the Concurrent Legislative List. It is submitted that it will be absurd if each State is to unilaterally determine the tenure of its Local Government Councils - Abacha v. Fawehinmi, [2000] 6 N.W.L.R. (Part 660) 228 at page 326 A-B and A-G. of Ondo State v A-G of Ekiti State, [2001] 9-10 S.C. 116 at p. 179.

It is contended that the Electoral Act, 2001 was enacted by the National Assembly pursuant to section 4 of the Constitution and the purpose of section 25 of the Act is to ensure orderliness and peace at elections. It is stated that these are indispensable conditions precedent for the attainment of good government for the Federation. It is argued that the provisions of section 25 subsection (2)(b)(c)(g)(h)(n)(o)(p) of the Act do not constitute alteration of the provisions in question or violate the Constitution but rather re-enforces its provisions.

Now, section 7 subsection (1) of the 1999 Constitution provides as follows: -

“7. (1) The system of local government by democratically elected local government councils is under this Constitution guaranteed: and accordingly, the Government of every State shall, subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.”

It is clear from these provisions that the power to ensure the existence of Local Government Councils under a Law which provides for their establishment, structure, composition, finance and function rest with the State Government. By section 4 subsection (2) of the Constitution, the National Assembly has the power to make law with respect to any matter included in the Exclusive Legislative List- set out in Part II of the Second Schedule to the Constitution.

Similarly, the House of Assembly of a State has the power to make law with respect to any matter not included in the Exclusive Legislative List and any matter included in the Concurrent Legislative List. Both the National Assembly and House of Assembly of a State have the power to make law with respect to any matter to which they are empowered to make law in accordance with the provisions of the Constitution.

The exercise of all these powers to legislate are intended by the Constitution to be exercised for the peace, order and government of the Federation or the State as the case may be.

Item 22 on the Exclusive Legislative List provides: -

“22. Elections to the offices of President and Vice-President or Governor and Deputy Governor and any other office to which a person may be elected under this Constitution, excluding election to a local government council or any office in such council.”

“Items 11 and 12 of the Concurrent Legislative List provide as follows:-

“11. The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council.

12. Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to election to a local government council in addition to but not inconsistent with any law made by the National Assembly.”

It is purportedly in the exercise of the aforementioned powers that the Electoral Act, 2001 was enacted by the National Assembly. Our attention was drawn to the various paragraphs of section 25(2) of the Act which deals with the submission by political parties of list of candidates and their affidavits. Subsections (1) and (2) of the section read:

“25. (1) Every political party shall not later than 90 days before the date appointed for a general election under the provisions of this Act submit to the Commission in the prescribed forms the list of the candidates the Party proposes to sponsor at the election.

(2) The list shall be accompanied by an Affidavit sworn to by each of the candidates at the High Court of a State, indicating that he -

- (a) is a citizen of Nigeria and has attained the age of
 - (i) 35 years for election into the Senate; and
 - (ii) 30 years for election to the House of Representatives: and
- (b) is a registered voter;
- (c) has been educated up to at least School Certificate level or its equivalent;
- (d) is a member of a political party and is sponsored by that

party;

(e) has produced evidence of payment of tax as and when due or tax exemption for a period of three years preceding the year of the election;

B (f) has not voluntarily acquired the citizenship of a country other than Nigeria, and has not made a declaration of allegiance to such country;

C (g) Has not been adjudged to be a lunatic or otherwise declared to be of unsound mind under by law in force in any part of Nigeria;

D (h) Is not under a sentence of death imposed on him by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for an offence involving dishonesty or fraud (by whatever name called) or any other offence imposed on him by such a court or tribunal or submitted by a competent authority for any other sentence imposed on him by such a court;

(i) Within a period of less than ten years before the date of the election concerned, he has not been convicted or sentenced for an offence involving dishonesty or he has not been found guilty of contravention of the Code of Conduct;

E (j) Is not an undercharged bankrupt, and has not been adjudged or otherwise declared bankrupt under any law in force in any part of Nigeria;

F (k) Being a person employed in the public service of the Federation or of a State, he has resigned, withdrawn or retired from such employment 30 days before the date of the election;

(l) Is not a member of a secret society;

G (m) Has not been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, Tribunals of Inquiry Law, or any other Federal or State Government Law which indictment has been accepted by the Federal or State Government respectively; or

(n) Has not presented a forged certificate or a forged or false declaration to the Commission;

H (o) Has not within a period of ten years preceding the election been convicted of any drug related offence or money laundering;

(p) Has not within the preceding period of 10 years presented

a falsified document or given false information for the purposes of nomination."

The question is: are all the matters mentioned in subsection (2)(b), (e), (g), (h), (j), (m), (n) and (o) for the peace order and good government of the federation? There is no doubt that it cannot be denied that these matters go beyond "registration of voters and the procedure relating to elections to a local government council" as provided under item II of the Concurrent Legislative List. The provisions are therefore inconsistent with the provisions of the Constitution, I hold them to be void pursuant to the provisions of section 1 subsection (3) of the Constitution.

Now Chief Williams, learned Senior Advocate for the plaintiffs, has argued both in the plaintiffs brief of argument and orally, that by the "doctrine of covering the field" as enunciated in the Australian case of *Ex parte Me Lean*, [1930] 43 C.L.R. 472 by Dixon, J. at 483, D and approved by this court in the cases of *Lakanmi v A-G.*, *Western Nigeria* [1971] 1 U.I.L.R. 201 at p. 209, [1974] E.C.S.L.R. 713 at p. 722 and *A-G Ogun State & Ors. V A-G. of the Federation & Ors.*, [1982] 13 N.S.C.C. 1 at p. 11; the National Assembly cannot amend the provisions contained in the 1999 Constitution for qualification and disqualification of candidates as contained in section 25 subsection (2) of the Electoral Act.

The Australian stand point as observed by Dixon, J. on p. 483 thereof is as follows:-

F "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at G least when the sanctions they impose are diverse (*Hume v Palmer* (1)). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provides what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State H law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount

Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.”

B In the case of A-G. of Ogun State & Ors. (supra) Fatayi-Williams, C.J.N. was of the opinion that it would be more appropriate to invalidate the identical law, for he stated at p. 11 thereof:-

C I would only wish to add that, where identical legislations on the same subject matter are validly passed by virtue of their constitutional powers to make laws by the National Assembly and a State House of Assembly, it would be more appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter. To say that that law is ‘inconsistent’ in such a situation would not, in my view sufficiently portray clarity or precision of language.

D Idigbe, J.S.C., proffered on pp. 27 - 29 thereof that –

E “If no general intention to cover the entire field on the subject can be gathered from the Federal Law then the mere concurrence of the two laws (i.e. the Federal and State Laws) on the subject is not eo ipso an inconsistency although the detailed rules in the provisions of both laws may lead to different results on the same facts; and in the words of Colin Howard with which I respectfully agree ‘unless the two Rules actually contradict one another it is a question of Legislative context, whether the laws in question complement one another or are inconsistent (Italics mine). If there is an inconsistency it invalidates the State Law only so long as the Commonwealth Law remains in force. If the Commonwealth Law is repealed, and the State Law is not, the State Law becomes Operative.’ {see Colin Howard: Australian Federal Constitutional Law 2nd Edition at p. 45 (Italics mine)}.”

G Eso, J.S.C. took the following stand on p. 35 thereof: -
 H “Where a matter legislated upon is in the concurrent list and the Federal Government has enacted a legislation in respect thereof, where the legislation enacted by the State is inconsistent with the legislation of the Federal Government it is indeed void and of no effect for inconsistency. Where however, the legislation enacted by the State is the same as the one enacted by the Federal Government, where

the two legislation are in pari materia I respectfully take the view that the state Legislation is in abeyance and becomes inoperative for the period the Federal Legislation is in force. I will not say it is void. If for any reason the Federal Legislation is repealed, it is my humble view that the State legislation, which is in abeyance, is revived and becomes operative until there is another Federal legislation that covers the field.”

Aniagolu, J.S.C. agreed with the view expressed by Fatayi-Williams, C.J.N. by holding at p. 36 thereof: -

C “I agree with the criticism of the Chief Justice and would prefer to say that the law passed by the State House of Assembly must be declared irrelevant and, to that extent, unconstitutional, as not being compatible with, in the sense of its having no locus in the face of the law passed by the National Assembly. “

D I agree that where the doctrine of covering the field applies it is not necessary that there should be inconsistency between the Act of the National Assembly and the law passed by a House of Assembly. The fact that the National Assembly has enacted a law on the subject is enough for such law to prevail over the law passed by a State House of Assembly but where there is inconsistency, the State Law is void to the extent of the inconsistency. - See section 4 subsection (5) of the 1999 Constitution which provides: -

F “(5) If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void.”

G Chief Williams has submitted that the doctrine of covering the field applies also where the Constitution makes a provision and a Federal or State enactment repeats the same provisions. He refers to section 1 subsection (3) of the Constitution which provides: -

H “1(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other Law shall to the extent of the inconsistency be void.”

I agree that the doctrine of covering the field can conveniently be extended to apply to a situation where the Constitution has covered the field vis-a-vis a federal or state legislation, such legislation is not void simpliciter but will not be operative in view of the provisions of the Constitution. However, if the legislation is inconsistent with the

provisions of the Constitution, then the legislation is void to the extent of the inconsistency vide section 1 subsection (3) of the Constitution.

Applying the aforesaid position, I have no difficulty in holding that the provisions of section 25 subsection (2)(b), (e), (g), (h), (m), (n), (o), (p) of the Electoral Act are either void for being inconsistent with the provisions of the Constitution or inoperative for repeating what the Constitution has provided.

Part II of the Electoral Act

Chief Williams has submitted a table showing that the provisions of sections 15 subsections (1)(a), (b), (c), (2) and (3), (4), (5) and (6) (c); 19 subsections (1) (2), (4) (b)(c)(i)(ii) and (iii); 21 subsections (1); 23; 25 subsections (2)(b), (c), (g), (h), (j), (n) and (p), (6), (7), (8) and (10); 28; 29; 37-39 subsection (1) and (2); 41; 42: 48: 49 subsection (2); 51: 52; 58 subsection (1); 60; 65 - 69 and 73 of the Electoral Act are either duplication or identical to or inconsistent with or ultra vires or illegal amendment to or violation of the Constitution. In addition, some of the provisions are either usurpation of the powers of the State Independent Electoral Commission under section 197 of the Constitution, or the National Assembly lacks the power to make, the law or poor draftsmanship.

Now Part II of the Act deals with the procedure at elections. A subject which the National Assembly is vested with the power to legislate upon pursuant to the provisions of item 22 on the Exclusive Legislative List, which provides: -

“22. Elections to the offices of President and Vice-President or Governor and Deputy-Governor and any other office to which a person may be elected under this Constitution, excluding election to a local government council or any office in such council.

Part II of the Act consists of sections 15 to 73. Section 15 thereof provides: -

“15-(1) Elections-to-

(a) to the office of the President and Vice-President and to the Senate and House of Representatives,

(b) to the office of Governor and Deputy Governor and House of Assembly of a State; and

(c) the Chairman and Vice Chairman and members of a Local Government or Area Council, shall be held on the date appointed by the Commission.

(2) An election to the offices mentioned under subsection (1)(a) of this section shall be held on a date not earlier than 60 days not later than 30 days before the expiration of the term of office of the last holder of that office.

(3) The date mentioned in subsection (1) and (2) of this section shall not be earlier than 60 days before and not later than the date on which the House stands dissolved, or where the election is to fill a vacancy occurring more than three months before such date, not later than a month after the vacancy occurred.

(4) The dissolution of the Senate and the House of Representatives and the House of Assembly of a State shall be in accordance with the provisions of section 64 and 105 respectively of the Constitution and the dissolution of Local Government shall be in accordance with the provision of section 119 of this Act.

(5) The Commission shall not be later than 150 days before the dates appointed in subsections (1) and (2) of this section publish a notice stating the date of the election in each Constituency in respect of which an election is to be held;

(6) The elections to which this Act relate shall be held in the following order, namely -

(a) Federal Elections, that is to say, election to the office of President and Vice-President, Senate and House of Representatives:

(b) State Elections, that is to say, elections to the office of Governor and Deputy-Governor and House of Assembly of a State; and

(c) Local Government Elections, that is to say, Elections to the office of Chairman, Vice-Chairman and members of Local Government Council.

On a date to be appointed by the Commission in respect of (a) and (b), and by the State Commission in respect of (c) provided that a period of not less than 2 weeks shall elapse between the Federal Elections and the State Elections and between the State Elections and the Local Government Elections.”

Let me examine these provisions one by one vis-a-vis the Constitution, in the light of the doctrine of covering the field and inconsistency with the Constitution as considered above.

Section 15 subsection (1)(a) and (b) are inoperative because the Constitution has made the same provisions in sections 76(1),

116(1), 132(1) and 178(1) thereof.

Section 15 subsection (1)(c) is inconsistent with paragraph 4 Part II of the Third Schedule to the Constitution, in so far as it empowers the Independent National Electoral Commission to appoint a date for the holding of election to the offices of Chairman, Vice-Chairman, and members of a local government council in the States except with respect to the Federal Capital Territory.

Section 15 subsection (2) is in pari materia with sections 132(2) and 178(2) of the Constitution. It is therefore inoperative.

Section 15 subsection (3) is both in pari materia with sections 76(2) and 116(2) of the Constitution. It is both inoperative and void.

Section 15 subsection (4) is in pari materia with sections 64(1) and 105(1) of the Constitution. It is therefore, inoperative.

Section 15 subsection (5) repeats the provisions of section 64 and 105 and 119 of the Constitution. It is inoperative as it relates to the National Assembly and the House of Assembly of a State, and inconsistent with the Constitution as it relates to Local Government Councils and therefore void.

Section 15 subsection (6)(a) and (b) is a usurpation of the power of the Independent National Electoral Commission under paragraph 15 of part 1 of the Third Schedule to the Constitution and is inconsistent with the Constitution. Subsection (c) thereof is inconsistent with the Constitution and usurps the power of the State Independent Electoral Act, under paragraph 4 of Part II of the Third Schedule to the Constitution.

It follows that the whole of section 15 is found invalid and it is therefore void.

Section 19 of the Act deals with the function of the chairman of the Independent National Electoral Commission and Resident Electoral Commissions during elections. Of the subsections thereof only subsection (4) applies to the election of chairman and councillors (members) of local government council. The provision applies to the procedure of election. It is therefore within the power of the National Assembly under item 11 of the Concurrent Legislative List. I see nothing wrong with the other provisions of section 19. I accordingly hold that the section is valid and intra vires the powers of the National Assembly.

Section 20 subsection (1) and (4) of the Act which rests on

the provisions of section 15 of the Act cannot stand since the whole of the section has been invalidated.

Section 20 subsections (2) to (3) and (5) to (8) pertain to the procedure at elections. The National Assembly has the power to so provide. The subsections are therefore valid.

Section 21 subsection (1) of the Act is predicated on section 15 of the Act which has been invalidated. It therefore cannot stand. It also usurps the powers of the State Independent Electoral Commission. The subsection is void.

Section 21 subsection (2) applies to the procedure of election. It is within the powers of the National Assembly and therefore valid.

Section 23 subsections (1) and (2) appears to me to deal with the procedure for holding elections. I do not see anything wrong with it. I therefore hold it to be valid.

Section 25 subsections (1) to (10). I have already quoted D above subsections (1) and (2). The remaining subsections provide:

“(3) In the case of election to the office of the President and Vice-President of the Federal Republic of Nigeria or the Governor and Deputy Governor of a State, the Affidavit sworn to at the High Court of State shall in addition to the information required in subsection (2) above indicate that the candidate-

(a) Has attained the age of -

(i) 40 years for President and Vice-President; and

(ii) 35 years for Governor and Deputy Governor of a State and

(b) fulfilled all other constitutional requirements.

(4) The list of the candidates and Affidavits shall also be sent by the Political Party to the Commissioner of Police of the State where the election is to be held, and to the Attorney-General for the Federation.

(5) The Commission shall, within 7 days of the receipt of the personal particulars of the candidates, publish same in the constituency where the candidate intends to contest the election.

(6) Any person who has reasonable ground to believe that any information given by a candidate in the Affidavit is false, may submit a petition to the Commission, the State Commissioner of Police, and the Federal Attorney-General specifying the grounds for such petition, with evidence to support the allegations.

(7) If after appropriate investigations by the aforementioned bodies, it is discovered by the Commission that any of the information provided by the candidate is false, he shall be automatically disqualified from contesting the elections and if already elected, he shall automatically vacate the office concerned and the next candidate with highest number of votes and who meets the constitutional requirements for the position shall be declared elected provided that the aforementioned bodies shall state the reason or reasons for the disqualification.

(8) The Attorney-General of the Federation may in addition initiate criminal proceedings where appropriate against the candidate and if convicted he or she shall be sentenced to a fine of N200,000 or to imprisonment for two years or both.

(9) Any Political Party which knowingly or recklessly presents to the Commission the name of a candidate who does not meet the qualifications stipulated in this section, shall be guilty of an offence under this section, and on convictions shall be liable to a fine of N500,000; and be disqualified from participating in future elections for that particular office in the same Constituency for a period of five years.

(10) The decision of the Commission as to the qualification or disqualification of a candidate for an election may be challenged by a candidate. Any legal action challenging the decision of the Commission shall commence within five working days and disposed of not later than one week before the election."

I have already dealt with the validity of subsection (2) which I have held to be void by virtue of the provisions of section 1 subsection (3) of the Constitution.

Section 25 subsection (1) - this appears to me to deal with the procedure at elections. It is within the powers of the National Assembly. I hold it to be valid.

Section 25 subsection (3) - this section is dependent on subsection (2) which has been held void. It cannot therefore stand. I hold it too to be invalid.

Section 25 subsection (4) to (9) are based on the provisions of subsections (2) and (3) which have been invalidated. They cannot, therefore, stand on their own.

Section 25 subsection (10) seeks to limit the period within

which any judicial proceedings must be concluded. This infringes on the principle of separation of powers as entrenched in the Constitution. The National Assembly has no power to dictate to the Judiciary how to conduct its affairs, just as the Judiciary cannot fix a time limit for the proceedings in the National Assembly - see the case of Paul Unongo v. Aper Aku, (1983) 9 S.C. 186; [1983] 2 S.C.N.L.R. 332.

Section 28 of the Act deals with time for the display of the names of candidates nominated for election etc, by the Independent National Electoral Commission within 14 days of the elections. I think this applies to procedure at elections and is within the power of the National Assembly under the Constitution. It is valid.

Section 29 of the Act - deals with the procedure for withdrawal of a candidate from an election. This is a matter of procedure within the province of the National Assembly. It is valid.

Section 37 of the Act pertains to the establishment of polling stations at each ward and the allotment of voters to the polling stations by the Independent National Electoral Commission (hereinafter referred to as "INEC").

Section 38 provides that INEC shall provide suitable ballot boxes. Section 39 subsections (1) and (2) provide that INEC shall prescribe the format of the ballot boxes etc.

Nowhere is mention made, in these provisions, of local government council. It is within the power of the National Assembly to make the provisions. I therefore hold that sections 37, 38 and 39 of the Act are valid.

Section 41 deals with the publication by INEC of the day and hours fixed for the poll etc.

Section 42 provides that polling shall take place on the same day and same time throughout the Federation.

Section 48 deals with over-voting.

Section 49 provides about ballot papers not been marked or written on by voters and indelible ink should be used by INEC.

Section 51 provides the procedure of voting by blind persons and incapacitated voters.

Section 52 provides for personal attendance by voters.

Section 58 (1) deals with the counting of votes and entering votes on a form.

Section 60 provides for post-election procedure and collation

for election results.

Section 65 deals with the action to be taken by a Returning Officer in the event of candidates at a poll having equal votes.

Section 66 deals with the posting of results for election.

B Section 67 deals with the custody of all documents of election including ballot papers and statements of results.

Section 68 provides for step by step counting of votes.

Section 69 provides for the signing and countersigning of result form.

C Section 73 provides for the forms to be used at elections.

D All the provisions of sections 41, 42, 48, 49(2), 51, 52, 58(1), 60, 65 - 69 and 73 above pertain to the procedure of election. Even if they do not, there is no mention of local government council elections in any section therein. The matters the sections in question deal with are within the powers of the National Assembly. I, therefore, hold all the sections to be valid.

Part IV of the Electoral Act

E This Part deals with the procedure for election to Local Government Councils. In the table submitted by Chief Williams, the following sections of the Electoral Act, 2001, have been attacked, namely, proviso to section 110 subsection (1); section 111 subsections (1) and (2); section 112 subsections (1) and (4); section 113 (b) and (f); section 114 subsections (1)(a) to (k); (2) and (3); section 115 subsections (1) to (6); section 118 subsection (8); section 119; section F 120; section 121 and section 122. All the provisions of these sections are said to be ultra vires the National Assembly as it is not competent under the Constitution to legislate on them. Reliance is placed on sections 7(1) and (4); 8 (3) and (4); 107 (1); 197 (2); section 316, paragraphs 3 and 4 of Part II to the Third Schedule; item 22 of the Exclusive Legislative List and Item 11 of the Concurrent Legislative G List, all of the 1999 Constitution.

Section 110 provides: -

H “110. (1) The conduct of elections into the offices of Chairman, Vice-Chairman and a member of a Local Government Council and the recall of a Member of a Local government shall be under the direction and supervision of the State Independent Electoral Commission (hereinafter called the “State Commission”) in accordance with the provisions of this Act using the Register of voters compiled and

the polling units established by the Independent National Electoral Commission and any other enactment or law, regulations guidelines, rules or manuals issued or made by the State Commission not being inconsistent with the provisions of this Act;

B Provided that where election to any of these offices had been held before the coming into force of this Act for a Period of less than the four years prescribed under this Act, an election shall not be conducted into that office for the remaining period before the General Elections, and the holders of such offices shall continue in Office until the next General Elections.”

C Subsection (1) deals with the powers of State Independent Electoral Commission (hereinafter referred to as “SIEC”). Paragraph 4(a) of Part II of the Third Schedule to the Constitution provides: -

“4. The Commission shall have power:

D (a) to organise, undertake and supervise all elections to local government councils within the State.”

E The provisions of subsection (1) of section 110 of the Act is a repetition or at best amplification of the above provisions of the Constitution. To that extent the principle of the doctrine of covering the field apply to the subsection and therefore it is inoperative.

F The proviso to subsection (1) of section 110 has the effect of extending the tenure of office of the Chairman, Vice-Chairman and members of Local Government Councils. This does not pertain to procedure as provided under item 11 of the Concurrent Legislative List. The tenure of the officers of the Local Government Councils was prescribed by the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998: section 7 of which provided: -

G “7. A Local Government Council or an Area Council shall stand dissolved at the expiration of a period of 3 years commencing from the date of the first sitting of the Council.”

H Although the Decree was repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999, the repeal did not affect the tenure of the officers elected to the Local Government Councils because of the provisions of Section 6 of the Interpretation Act, cap. 192 which reads: -

“6. (1) The repeal of an enactment shall not -

(a) revive anything not in force or existing at the time when

the repeal takes effect;

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment;

(c) affect any right, privilege obligation or liability accrued or incurred under the enactment;

B (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the enactment;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

C and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed

D (2) When an enactment expires, lapses or otherwise ceases to have effect, the provisions of subsection (1) of this section shall apply as if the enactment had then been repealed.”

E Learned Solicitor-General of the Federation, Mrs. Osinuga, made reference to the provisions of section 312 subsection (2) of the Constitution, to argue that the elected officers of the Local Government Councils concerned owed their tenure to the 1999 Constitution and not the repealed Decree No. 36 of 1998. Section 312 subsection (2) deals with special provisions in respect of first election before the 1999 Constitution came into force. The subsection provides -

F “312. (2) Any person who before the coming into force of this Constitution was elected to any elective office mentioned in this Constitution in accordance with the provisions of any law in force immediately before the coming into force of this Constitution shall be deemed to have been duly elected to that office under this Constitution.”

G Ingenious as the submission of learned Solicitor-General is, section 312 subsection (2) merely validates under the Constitution the election of the elected officers of Local Government Councils but does not in any way affect their tenure, nor do the provisions therein state the duration of their tenure. The provisions of the subsection are of no assistance to the case of the defendant.

H I therefore hold that the proviso to section 110 subsection (1) of the Electoral Act, 2001 is ultra vires the powers of the National

Assembly. It is inconsistent with the provisions of the Constitution. The National Assembly has no power whatsoever under item 11 of the Concurrent Legislative List or indeed under any provision of the Constitution to increase or alter the tenure of the elected officers of the Local Government Councils. Only the House of Assembly of a State B has such power in view of the provisions of section 7 subsection(1) of the Constitution and item 12 of the Concurrent Legislative List in Part II of the Second Schedule to the Constitution.

Section 111 of the Electoral Act provides: -

111. (1) There shall be elected for each Local Government C in the Federation a Chairman and a Vice-Chairman.

(2) There shall be elected from every ward in a Local Government, a Councillor.

This is substantive provision. It has nothing to do with procedure. I hold that it is inconsistent with the Constitution and D therefore void.

Section 112 of the Act deals with the division of Local Government Area into wards. Clearly this has nothing to do with the procedure of election. The section is inconsistent with the Constitution. E It is therefore void.

Section 113 of the Act deals with the qualification of a candidate for Local Government election.

Section 114 deals with disqualification of a candidate.

Both the provisions under sections 113 and 114 do not apply F to procedure at election. They are provisions within the competence of State House of Assembly. As a result they are ultra vires the National Assembly and therefore unconstitutional and null and void.

Section 115 deals with the dates of elections and bye-elections. Only subsection (7) thereof deals with the method of voting. G By the provisions of section 7 (1) of the Constitution and item 12 of the Concurrent Legislative List it is State House of Assembly that has the power to prescribe the date of local government election. The provisions of subsections (1) to (6) of the section offend the provisions of sections 7 (1) and 197 (2) of the Constitution as well as item 12 H of the Concurrent Legislative List. Therefore section 115(1) to (6) is inconsistent with the Constitution and is null and void.

Section 119 provides for the dissolution of Local Government Council and extends the tenure of the Council to four years.

This is far from procedure and cannot pertain to procedure. Hence it offends the provisions of item 22 of the Exclusive Legislative List and items 11 and 12 of the Concurrent Legislative List. It is therefore inconsistent with the Constitution and null and void.

B Section 120 deals with the vacation of the seat of a member of local government council. It too offends the provisions of item 22 of the Exclusive Legislative List and items 11 and 12 of the Concurrent Legislative List. It is therefore inconsistent with the Constitution and null and void.

C Section 121 deals with the removal of the Chairman and Vice-Chairman of Local Government Council. For all I have stated above the section is ultra vires the National Assembly. It is null and void. Section 122 provides for the recall of a member of a Local Government Council. This too has nothing to do with procedure regulating election under item 11 of the Concurrent Legislative List.

D It is therefore inconsistent with the Constitution and null and void.

E It remains to deal with the issue whether the Electoral Act is on the whole bad. Chief Williams has submitted that the Electoral Act, 2001, is incurably bad. That it has provided a model of an Act which qualifies for but excels, in contravening the Constitution. It is full of inconsistencies with the Constitution. That it fosters an attempt to the creation of a naked usurpation of the powers of the State Legislature. Therefore there is no redeeming feature in the Act and that it should be jettisoned.

F These are too strong expression to apply to the Act. The principle as to the “blue Pencil rule” is found in the case of *Balewa v Doherty*, [1963] 1 W.L.R. 949 at p. 960 where Lord Devlin stated thus: -

G “There is no special provision in the Constitution giving to the court any power of interpretation greater than that which flows from the ordinary rule of construction. The question is, therefore, whether the good can be severed from the bad and so survive. Clearly, it cannot here be done under the “blue pencil rule “. There is no excess which can be struck out. Nor can their Lordships be confident that compulsive powers could not be validly given in section 64(3) subjects, it would still have wished to have given them in item 43 subjects. The object of the Act is to confer a blanket power on the Prime Minister to direct inquiries into any matters within Federal

competence respective instead of having to come to Parliament for specific authorization in each case. If Parliament had been told that it could give blanket power of inquiry only into some matters within Federal competence and not into others, it might very well have said that half a blanket was better than none and have amended the Bill accordingly. But it is impossible that it might have said that if the Prime Minister could not be given the complete power he wanted, it would be better that he should ask for specific powers as and when he wanted them. It may be that the former is much more likely to have happened than the latter. But where there is the slightest doubt about what Parliament would have intended, their Lordships cannot speculate. They have themselves no legislative power and they cannot re-write the Act.”

I quite agree. I am satisfied that if the sections of the Electoral Act that have been impugned and declared null and void are struck out, the good can be severed from the bad and the Act can survive. After all it is part of Part II and all of Part IV of the Act that are affected. The remaining Parts on National Register of Voters and Voter’s Registration, Political Parties, Electoral Offences, Determination of Election Petitions and Miscellaneous Provisions can stand on their own without the affected parts.

It is for these and the reasons contained in the judgment of my learned brother Kutigi. J.S.C, the draft of which I had the advantage of reading in advance that I too will hold that the action succeed in respect of claims (i), (ii) (b) to (e), (iii) and (iv). Claim (v) succeeds in part only. Claims (ii) (a) and (iv) fail.

CONCLUSION

In conclusion I adopt the summary at the end of the judgment of my learned brother Ogundare, J.S.C. as mine. I make no order as to costs. Each party shall bear its costs.

OGUNDARE JSC

The Electoral Bill 2001 enacted into law by the National Assembly was assented to by the President of the Federal Republic of Nigeria on 6th December, 2001 and thus became the Electoral Act. 2001 (hereinafter is referred to as the Act). As the States in the

Federation were of the view that some provisions of the Act offended against the provisions of the Federal Republic of Nigeria 1999 Constitution (hereinafter is referred to as the Constitution) relating to the powers of the State, they, through their respective Attorneys-General instituted this joint-action challenging the validity of the Act and in paragraph 12 of their amended statement of claim seek the following reliefs:

“(i) A declaration that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as Councillors of Local Government in Nigeria except in relation to the Federal Capital Territory alone.

(ii) A declaration that the National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the following matters or any of them, to wit:-

(a) the conduct of elections into the office of Chairman. Vice Chairman or Councillors of a Local Government Council in Nigeria.

(b) the division of Local Government Areas into wards for purposes of election into Local Government Councils in Nigeria.

(c) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councillors of a Local Government Council in Nigeria.

(d) the date of election into a Local Government Council and

(e) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councillor or member thereof vacates his seat in the Local Government Council.

(iii) A declaration that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) A declaration that save and except for laws for the Federation with respect to -

(a) the registration of voters, and

(b) the procedure regulating elections to a local Government

Council, it is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to the office of Councillors therein.

(v) A declaration that the provisions contained in Sections 15 to 73 and 110 to 122 of the Electoral Act, 2001 are, from the date of the commencement of the said Act inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and are accordingly null and void and inoperative.

(vi) A declaration that by reason of the provisions of the Electoral Act 2001 which are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, the said Electoral Act is rendered null and void and inoperative in its entirety.”

The action was originally instituted by Abia State and 33 other States of the Federation: Ondo and Plateau States later sought, and obtained, leave of this court to join as co-plaintiffs. The action was instituted against the Attorney-General of the Federation, pursuant to the original jurisdiction granted this court by section 232(1) of the Constitution. An application by the National Assembly to be joined as a defendant in the action was, however, refused by the court on the ground that the National Assembly is a part of the Government of the Federation which is already a party (defendant) in the action, through the Attorney-general of the Federation and no allegation of wrong doing has been laid against it as to require it to be joined as a party to defend itself against such allegation of wrongdoing. In the lead ruling of Uwais, Chief Justice of Nigeria, the case of Attorney-General of Bendel State v. Attorney-General of the Federation & Others [1982] 3 N.C.L.R. 1, where the National Assembly and its principal officers were joined, was distinguished from the facts of the present case. A similar application by the Local Governments in the Federation, through some Local Government chairmen, was equally refused.

Learned counsel for the plaintiffs and the defendant filed briefs of argument pursuant to the order of this court and addressed the court at the oral hearing of the case.

Chief Williams, S.A.N. learned leading counsel for the plaintiffs adopted his brief and reply brief. In his oral address he referred

to section 7 of the Constitution and submitted that the power of establishment, structure, composition, finance and functions of local governments in a State is vested in the Government of the State. Learned counsel also referred the court to item 22 on the Exclusive Legislative List in Second Schedule Part I to the Constitution and submitted that election to a local government council or any office in such council is excluded from the jurisdiction of the National Assembly. Learned Senior Advocate next drew the court's attention to items 11 and 12 on the Concurrent List in Part II of the Second Schedule, paragraph 15 of the Third Schedule (part I) (which deals with the power of the Independent National Electoral Commission) (INEC, for short), paragraph 4 of the Third Schedule (Part II) (which deals with the power of the State Independent Electoral Commission) (SIEC for short) and section 4(7) of the Constitution and submitted that all residual matters are within the competence of the State.

On the "doctrine of covering the field," Chief Williams submitted that where the Constitution has made a provision, any enactment even in identical terms is invalid. He added that the doctrine applied as between the Constitution and the law made by the National Assembly and relied on section 1(3) of the Constitution for this submission. Learned Senior Advocate further submitted that the "inconsistency rule" applies where a subordinate legislation re-enacts a paramount legislation and cited Attorney-General, Ogun State v. Attorney-General of the Federation (1983) 13 N.S.C.C. 1 at 11 in support. He submitted that repetition in a subordinate legislation of an enactment in a paramount legislation amounts to inconsistency and the subordinate legislation ought to be declared void to the extent of that inconsistency. Finally, learned Senior Advocate urged the court to find for the plaintiffs and enter judgment in terms of their claims.

Mrs. Osinuga, Solicitor-General of the Federation, learned leading counsel for the defendant, in her oral address, also adopted and relied on her brief. She submitted that item 22 on the Exclusive Legislative List should be read along with items 11 and 12 on the Concurrent List and added that the cumulative effect of all these provisions gave the National Assembly power to determine the tenure of office of chairmen and councilors of all Local Government Councils in the Federation. She further submitted that the power to legislate for procedure regulating election to Local Government includes the

power to determine the tenure of office of chairmen and councilors of such Local Government. Learned Solicitor-General submitted that repetition in a subordinate legislation of an enactment in a paramount legislation would not amount to inconsistency and cited, in support, Director of SSS v. Agbakoba [1999] 3 N.W.L.R. (pt. 595) 314 at 357. She urged the court to dismiss plaintiffs' claims.

Chief Williams, in reply, submitted that item 12 on the Concurrent List did not give any power to the National Assembly but only reaffirmed the power of the State House of Assembly to make law not inconsistent with a federal law validly enacted by the National Assembly. Learned Senior Advocate submitted that the repeal of the electoral Act, 2001 before judgment is given in this case would not affect plaintiffs' claim as formulated.

Mrs. Osinuga confirmed to the court that the Act is still extant.

Before I go into a consideration of the arguments advanced by learned counsel in this case I think it desirable to set out the various provisions of the Constitution relevant to a determination of the issues raised:

(a) Section 1(3) of the Constitution:

"1.(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."

(b) section 4(1)(9) of the Constitution:

"4(1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.

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

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

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

say -

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

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

(5) If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other
C law shall to the extent of the inconsistency be void.

(6) The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.

(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say –

D (a) any matter not included in the Exclusive Legislative List set out in Part I of the second Schedule to this Constitution.

(b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite
E thereto: and

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

(8) Save as otherwise provided by this Constitution, the ex-
F ercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

G (9) Notwithstanding the foregoing provisions of this section, the National Assembly or a House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective-effect.”

(c) Section 7(1), (4)-(6) of the Constitution:

H “7(1) The system of Local Government by democratically elected Local Government Councils is under the Constitution guaranteed, and accordingly, the Government of every State shall, subject

to Section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such Councils.”

(4) The Government of a State shall ensure that every person who is entitled to vote or be voted for at an election to a House of
B Assembly shall have the right to vote or be voted for at an election to a local government council.

(5) The functions to be conferred by Law upon local government councils shall include those set out in the Fourth Schedule to this Constitution.

(6) Subject to the provisions of this Constitution -

(a) the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation; and

(b) the House of Assembly of a State shall make provisions
D for statutory allocation of public revenue to local government councils within , the state.”

Section 197(1) and (2) of the Constitution:

“197(1) There shall be established for each State of the
E Federation the following bodies, namely –

(a) State Civil Service Commission;

(b) State Independent Electoral Commission: and

(c) State Judicial Service Commission.

(2) The composition and powers of each body established
F by subsection (1) of this section are as set out in Part II of the Third Schedule to this Constitution.”

(e) Item 22 in the Exclusive Legislative List also states -

“22. Election to the offices of President and Vice President or Governor and Deputy governor and any other office to which a
G person may be elected under the Constitution, excluding election to a Local Government council or any office in such Council.”

(f) Items 67 & 68 on the Exclusive Legislative List:

“67. Any other matter with respect to which the National
H Assembly has power to make laws in accordance with the provision of this Constitution.

68. Any matter incidental or supplementary to any matter mentioned elsewhere in this list.”

(g) Item 11 on the Concurrent Legislative List

“The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a Local Government Council.”

(h) Item 12 on the Concurrent Legislative List

B “Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to election to a local government council in addition to but not inconsistent (sic) with any law made by the National Assembly.”

(i) Paragraph 15(a)-(i) of the Third Schedule (part I)

C “15. The Commission shall have power to -

(a) organise, undertake and supervise all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a State, and to the membership of the Senate, the House of Representatives and the House of Assembly of each State of the Federation;

D (b) register political parties in accordance with the provisions of this Constitution and an Act of the National Assembly:

(c) monitor the organisation and operation of the political parties, including their finances;

E (d) arrange for the annual examination and auditing of the funds and accounts of political parties, and publish a report on such examination and audit for public information.

(e) Arrange and conduct the registration of persons qualified to vote and prepare, maintain and revise the register of voters for the purpose of any election under this Constitution;

F (f) monitor political campaigns and provide rules and regulations which shall govern the political parties;

(g) ensure that all Electoral Commissioners, Electoral and Returning Officers take and subscribe the oath of office prescribed by law;

G (h) delegate all of its powers to any Resident Electoral Commissioner; and

(i) carry out such other functions as may be conferred upon it by an Act of the National Assembly.”

(j) Paragraph 4(a) of the Third Schedule (part II):

H “4. The Commission shall have power-

(a) to organise, undertake and supervise elections to Local Government Councils within the State;

(b) to render such advice as it may consider necessary to the Independent National Electoral Commission on the compilation of and the register of voters in so far as that register is applicable to Local Government elections in the State.”

Although the jurisdiction of this court to entertain this action is not challenged by the defendant. I still consider it appropriate to comment, however be-it briefly, on it. Section 232(1) of the Constitution provides:

“Section 232(1) -

C The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.”

D It is the case of the plaintiffs that sections 15 to 73 and 110 to 122 of the Electoral Act, 2001 enacted into law by the National Assembly and assented to by the President of the Federal Republic of Nigeria transgress the legislative competence of the Federal Government and make or purport to make very serious incursions into the legislative and executive functions of the States in the Federation under the Constitution. The defendant denies the plaintiffs’ case. He avers in paragraph 6 of its statement of defence as follows:

“The defendant denies paragraphs 12 of the plaintiffs’ statement of claim, and avers as follows:-

F (iii) The National Assembly has inherent constitutional powers to determine the tenure of elected officers in Local Government Councils.

G (iv) Sections 110, 112, 113(8), 115(2) and 119 of the Electoral Bill 2001 have not contravened the provisions of the 1999 Constitution, hence the failure of the plaintiffs to state the provisions of the 1999 Constitution that were violated by the aforementioned sections of the Electoral Bill 2001.

H (v) Part IV of the Electoral Bill 2001 is consistent with the provisions of item 11, Part II, 2nd Schedule, of the 1999 Constitution.

(vi) Sections 25(1) and 27 of the Electoral Bill 2001 are clear, unambiguous and not inconsistent with each other.

(vii) The provisions of Parts V, VI and VII of the Electoral Bill 2001 accord with the Legislative functions of the National Assembly

and do not in any way conflict with the Judicial powers of the Judiciary defined in Section 6 of the 1999 Constitution.

(viii) The Independent National Electoral Commission shall have power to register political parties in accordance with the provisions of the Constitution and an Act of the National Assembly.

B (ix) The National Assembly has powers to make laws with respect to the procedure regulating elections to a Local Government Council, while the Independent National Electoral Commission shall carry out such other functions as may be conferred upon it by an Act of the National Assembly.”

C There is clearly a dispute here between the Federation and the States as to the extent of the legislative powers of the Federation to make laws for local governments in the states. This dispute, in my respectful view, involves questions of law on which the existence of a legal right depends, that is, the extent of the legal right under the D Constitution the States have to legislate for local governments in the States. This case, therefore, comes within the purview of section 232(1) of the Constitution.

E Plaintiffs’ major attack on the Act is in relation to the provisions of the Act affecting local government. I need mention at this stage that the plaintiffs do not question, the right of the National Assembly to legislate for local government councils in the Federal Capital Territory. It is with local government councils in the State that the plaintiffs have a grouse with the defendant. They contended that F the National Assembly has no constitutional power to legislate for their local government councils save as regards registration of voters and procedure for election to such councils. Chief Williams has argued in his brief:

G “In its statement of defence the Federal Government has vigorously denied that certain specific provisions of the Electoral Act contravene the 1999 Constitution and in paragraph 7(a) of the statement of defence it urged the Supreme Court to hold: ‘That the Electoral Bill 2001 assented to by the President is not inconsistent with the provisions of the 1999 Constitution.’”

H “In pinpointing the precise dispute or controversy between the Federal Government and the States in this action it is important to lay emphasis on the fact that dispute or controversy does not depend on the existence of the Electoral Act as an enactment of the National

Assembly. It goes beyond that in that the dispute or controversy is as to scope or limits of the legislative powers of the National Assembly. What the enactment of the Electoral Act by the National Assembly does is to bring the dispute or controversy between the parties to this action into the limelight. Strictly speaking therefore any repeal or re-enactment or alteration of the Electoral Act will not remove the B dispute or controversy between the parties to this action. In short, the States comprising the Nigerian Federation have brought this action so as to enable the Supreme Court to determine the real matter or matters in controversy between the parties. The Supreme Court C is accordingly invited to focus on the complaint of the States that under the 1999 Constitution the National Assembly does not have the legislative power to make laws with respect to the several matters indicated in the statement of claim of the plaintiffs in this action.”

This argument may hold good in respect of plaintiffs’ claims D (i)-(iv), it certainly cannot be the case with claims (v) and (vi) which are a direct attack on the Act. And if the Act is repealed, re-enacted or altered, those claims may be affected. As the Act, however, is still extant at the time of hearing this case I do not think it is necessary to say more on the submission of learned Senior Advocate. E

Chief Williams has formulated seven issues for determination. They are:

(i) Whether or not the National Assembly has any power to increase or otherwise alter the tenure of any of the offices mentioned F in claim (i) of this action.

(ii) Whether or not the National Assembly has any power to make laws with respect to the matters specified in claim (ii) of this action.

(iii) Whether or not the National Assembly has any power G to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria. 1999. H

(iv) What is the scope or limit of the legislative powers of the National Assembly with respect to Local Government elections under the 1999 Constitution?

(v) Whether or not the provisions of sections 15-73 and

110- 122 of the Electoral Act 2001 or of any of the said sections are constitutional, valid and operative.

(vi) In the light of the answers to questions (i) to (v) whether or not the Electoral Act, 2001 is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or constitutional, valid and operative (as the defendant contends).

(vii) Whether there is any merit in the defendant's contention that "the proper and necessary parties are not before the court."

For her part Mrs. Osinuga, learned Solicitor-General of the Federation, for the defendant formulated the following five issues, to wit:

"1. Whether the Constitutional powers of the National Assembly to make laws regulating the procedures for all elections in Nigeria does not cover the power to make law as to the time when there should be general elections in Nigeria.

2. Whether the National Assembly needs to amend the Constitution pursuant to section 9 of 1999 Constitution before it can validly make law for peace and good government in Nigeria.

3. Whether the provisions of section 25(2)(b), (e), (g), (h), (j), (m), (n), (o) of Electoral Act 2001 are for the peace, order and good government of Nigeria or not.

4. In law, when can one say is the effective date of an Act of the National Assembly?

5. Where there seems to be conflict (if any) between the provisions of a Decree that has been repealed and the provisions of an existing Act of the National Assembly, which supercedes?"

With profound respect to the learned Solicitor-General, I do not see how her Issues 4 and 5 arise for consideration in this case having regard to the claims before the court. It suffices to say that the Issues as formulated by Chief Williams are apt and I endorse them in my consideration of this case.

Issues (i), (ii) and (iv) in Chief Williams' formulation deal with the extent of the legislative power of the National Assembly over local governments in the States; I shall treat them together under the broad heading of Local Government. I shall treat the other Issues separately.

LOCAL GOVERNMENT

Chief Williams submits that-

(1) By the combined effect of sections 4(7)(a), 7(1) and 197 of the Constitution and item 22 in the Exclusive Legislative List and items 11 and 12 in the Concurrent Legislative List, it is the House of Assembly of a State and it alone that has the power to prescribe, increase or otherwise alter the tenure of the office of elected officers or Councilors of local Government councils in Nigeria other than those in the Federal Capital Territory.

(2) By the combined effect of the provisions of the Constitution mentioned in (1) above, the National Assembly has no power to enact laws with respect to the conduct of elections into elective offices in a local government. He concedes, however, that the Assembly has power to make laws with respect to the "registration of voters and the procedure regulating elections to a Local government Council." It is learned Senior Advocate's argument that the conduct of elections is not co-extensive with, nor does it overlap, the procedure for regulating elections.

(3) The term "ward" is used to denote the locality or territorial area which is to select a member from that locality or area in the local government council. Its establishment is incidental to the creation of the body of individuals (representing each ward) that constitutes the corporation aggregate known as a local government council. Learned counsel argues that division into wards is not a matter incidental or supplemental to the exercise of the registration of voters. He submitted that it is the House of Assembly of a State and not the National Assembly that has power to make laws with respect to the division of a local government area into wards.

(4) the qualification or disqualification of persons as a candidate for election as Chairman, vice chairman or councilor of a local government council does not come within the scope of the very limited powers conferred on the National Assembly under the Constitution pertaining to Local Government elections.

(5) The arguments in (1) - (4) apply also to the issue of the date of elections into a Local Government council. Learned Senior Advocate urges the court to hold that this is a function of the House of Assembly of a State and not that of the National Assembly.

(6) For the reasons given above, the National Assembly has no power to enact a law providing for dissolution of a local government council and vacation of office of the chairman or vice chairman or

members thereof.

Learned Senior Advocate urges the Court to invalidate all sections of the Act that offend against the Constitution in respect of local government and mentions in particular sections 112-121 of the Act.

B For the defendant, Mrs. Osinuga, Solicitor-General of the Federation refers in her brief to paragraph 6(iii) and (ix) of the statement of defence: I have earlier in this judgment set out the penultimate paragraphs of the statement of defence. She traces a recent history of C legislation relating to local government in Nigeria by referring to the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998 which made elaborate provisions on matters affecting Local Government system such as establishment of Local Governments councils, establishment of offices of chairman, vice chairman and councillors, functions of Local Government Councils and Election to Local Government Councils, she refers to section 7 D of the Decree which provides that -

“A Local Government Council or an Area Council shall stand dissolved at the expiration of 3 years commencing from the date of the first sitting of the Council.”

E Learned Solicitor-General says that the Decree was, however, repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999 which came into force on the same day that the Constitution took effect, that is, F 29th May 1999. She refers to sections 18 and 24 of Decree No. 36 of 1998 which provided for the tenure of the Chairman and members of a local government council and argues that -

“(i) It was the Federal law that provided for the tenure of the elected officers of the Local Government Council and not state law.

G (ii) It was the Federal law that repealed the Decree that stipulated the tenure of elected officers of Local Government.

(iii) It is not only logical but represents a good law that if the need arises to give life to any of the provisions of the repealed Federal laws, it is only the National Assembly and it alone, that has the inherent Constitutional power to enact the appropriate legislation.”

H She disagrees with the position of the law as submitted by Chief Williams in his brief to the effect that -

“...by section 7(1) of the Constitution it is expressly enacted

that the government of every State shall provide for the establishment of Local Government Councils. It is submitted that this provision clearly implies that it is the State which must be responsible for the tenure of members of such councils.”

The learned Solicitor-General argues thus:

“The defendant submits with respect that the plaintiffs miscon- B strued the position of the law when they construe “ESTABLISHMENT OF LOCAL GOVERNMENT COUNCIL” to be synonymous with TENURE OF ELECTED MEMBERS OF THE COUNCIL in their brief quoted above. Both the LOCAL GOVERNMENT (BASIC C CONSTITUTIONAL AND TRANSITIONAL PROVISIONS) Decree No. 36 of 1998 and the provisions of 1999 Constitution of Nigeria make it clear that there is a distinction between “ESTABLISHMENT” and “TENURE” with respect to the elective office recognised by those laws. Thus Decree No. 36 of 1998 recognised the “ESTAB- D LISHMENT” of Local Government Council in section 9 but creates “TENURE” under section 18 with different ingredients. Equally, the constitution creates different conditions and ingredients with respect to “ESTABLISHMENT” and “TENURE” of offices known E to the Constitution. Thus section 47 while section 64 deals with the “TENURE”. Furthermore, section 130 makes provision for the “ESTABLISHMENT” of the office of the President while section 135 of the same Constitution defines the “TENURE”, with respect to the “ESTABLISHMENT” and “TENURE” of the Government, sections F 176 and 180 respectively are very distinct on the matter. ‘

‘It is submitted on behalf of the defendant that nowhere in the Constitution are the States of the Federation empowered to determine the tenure of Local Government Councils. While it is true to say that where the Exclusive and concurrent Lists are silent G as to certain matters, the House of Assembly shall have powers to legislate on such matters. But this can only be true where there are no provisions in other laws conferring the powers on such matters on the National Assembly.’

H ‘Under section 7(1) of the 1999 Constitution, the State Governments are to provide for:

- (a) Establishment
- (b) Structure
- (c) Composition

(d) Finance, and

(e) Functions

of Local Government Councils. This provision, item 22 of the Exclusive Legislative List and items 11 and 12 of the Concurrent Legislative List, do not empower the State Governments to determine the tenure of Local Government Council.

‘It is further submitted, and reliance is placed on the case of Attorney-General Ogun State vs. Attorney-General of the Federation [1982] 3 N.C.L.R. 166 at 812, per Udo Udoma J.S.C.. that:

“The Constitution was declared by the people of Nigeria to have been made, enacted and given to themselves ‘for the purpose of promoting the good government and welfare of all persons in our country in the principles of Freedom, Equality and Justice, and for the purpose of consolidating the unity of our people. “

‘The above declaration stresses the importance of Preambles in the interpretation of the Constitution. The preamble to the 1999 Constitution emphasizes on the need to promote: Freedom, Equality and Justice.

‘In the light of the foregoing, the defendant humbly urges the court to hold that “ESTABLISHMENT” of an office and the “TENURE” of same are not the same. The defendant also urges the court to hold that, the powers of the State Assembly to “ESTABLISH” Local Government Council under section 7(1) of the Constitution, cannot, by any stretch of imagination be synonymous with the power to determine/decide the “TENURE” of the occupants as being claimed by the plaintiffs.’

‘On the other hand, the defendant submits that item 11 of Part II of the Second Schedule to the 1999 Constitution which deals with the “CONCURRENT LEGISLATIVE LIST” provides that:

The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a Local Government Council. “

‘The defendant submits that, the power of the National Assembly to make law on the procedure regulating elections include the powers to legislate on when there should be election and not on the conduct of the election itself. This position of the law becomes distinct when one examines the meaning of the word “PROCEDURE”.

After examining the dictionary meanings of the words “pro-

cedure”, “arrangement” and “regulate”, the learned Solicitor-General submitted:

“It can thus safely be submitted that the meanings of ‘procedure’ and ‘regulate’ used in item 11 of the Concurrent List can be extended to mean determination of the tenure or life of the thing established.

The interpretation and meaning posited above becomes appropriate viewed from the angle that in interpreting the provisions of the Constitution, a Constitutional provision should not be construed so as to defeat its evident purpose. See: Attorney General Bendel State v. Attorney-General of the Federation and 22 Ors. [1982] 3 N.C.L.R. 1 at 66, 71 and 74. Thus, while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning. Words of the Constitution are, therefore, not to be read with stultifying narrowness. “

She finally urges the court to hold that -

“(i) The power to make law regulating the procedure for elections for Nigeria include the power to legislate as to when there should be any of those elections.

(ii) The “PROCEDURE FOR ELECTION TO LOCAL GOVERNMENT” contained in Part IV of the ELECTORAL ACT 2001 was validly executed by the National Assembly in exercise of its Constitutional powers to make law for the “PROCEDURE REGULATING ELECTIONS TO A LOCAL GOVERNMENT COUNCIL” as enshrined in item 11 of the Concurrent Legislative List and to dismiss the plaintiffs case as canvassed on their claim 1.”

Chief Williams filed a reply brief. In that brief, he submits that contrary to the defendant’s averment that it was the Federal Law that provided for tenure of Local Government Council and not State Law, what the defendant is clothing the National Assembly with is ultra vires the National Assembly, having regard to constitutional provisions. He adds:

“Will utmost respect their submission in 3.09 (ii) and (iii) to inherent powers has no authority in law or under the Constitution.

It is also, with respect, elementary that whatsoever establishes the Local Government Council, in this case, constitutionally the States, would also have the power to prescribe the tenure.

Procedure will only follow when it has already been determined that there is to be an election. Procedure does not and cannot be determined when there will be that election. The Chairman, Vice-Chairman and Councilors have thus been elected for three years. That is not being denied. The Dictionary definitions supplied by the defendant are apt and correct and the application is against their stand on this issue.”

I have earlier in this judgment set out the provisions of the Constitution relevant to the issues under discussion. In my respectful views, by the combined effect of sections 7(1) and 197 and item 22 of the Second Schedule Part I, the Constitution intends that everything relating to local government be in the province of the State Government rather than in that of the Government of the Federation. The minor exception to this scheme is to be found in item 11 of the Concurrent Legislative List where power is given to the National Assembly with respect to the registration of voters and the procedure regulating elections to a local government council. There is also power given to the National Assembly, pursuant to section 7(6)(a) to make provisions for statutory allocation of public revenue to local government councils in the Federation. Other than these I can find no provision in the Constitution empowering the National Assembly to make laws affecting local government.

The learned Solicitor-General of the Federation has argued that the National Assembly has inherent power to make laws affecting local government. Regrettably, however, she has not referred us to any authority in support of this strange submission. The National Assembly as a creation of the Constitution derives its powers from that Constitution and can only exercise such powers as conferred upon it by the Constitution. It is only with respect to the courts that the Constitution recognizes inherent powers. For section 6(6)(a) provides:

“The judicial powers vested in accordance with the foregoing provisions of this section

(a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law.”

There is no provision in the Constitution similar to the above provision as respect the other branches of government, that is, the

legislature and the executive.

It is equally argued by the learned Solicitor-General that the National Assembly is empowered to make laws for the peace, order and good government of the Federation or any part thereof. But the learned Solicitor-General failed to point out that this power is only with respect to any matter included in the Exclusive Legislative List - see sub-section (2) of section 4. Local Government is not an item on the Exclusive Legislative List. Indeed item 22 of that List expressly excludes election to a local government council or any office in such council from the jurisdiction of the National Assembly. That being so, item 68 is of no avail. Where then does the National Assembly derive its power to legislate for the peace, order and good government with respect to local government, as submitted by the learned Solicitor-General? None that I can find. Certainly, not under subsection (2) of section 4 of the Constitution.

It must be remembered also that it is not only the National Assembly that has power to make laws for peace, order and good government. The House of Assembly of a State also has such power in respect of the State or any part thereof and with respect to matters listed in subsection 7(a)-(c) of section 4 of the Constitution. It would be preposterous for the House of Assembly of a State to contend that because it has power to make laws for the peace, order and good government of the state, it could enact a law for the State on a matter on the Exclusive Legislative List. Such a law would simply be invalid and of no effect whatsoever. Each of the National Assembly and the House of Assembly of a State can only operate within the parameter laid down by the Constitution. Ours is a written Constitution and the powers of each organ are to be discerned from the Constitution.

It is the further contention of the defendant that item 11 on the Concurrent Legislative List which empowers the National Assembly to make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council, empowers it also to make law for the tenure of elective offices in the local government council and the time for the holding of an election. I find myself unable to agree with this contention.

Mrs. Osinuga has submitted, and I agree with her, that there is a distinction between “establishment” and “tenure” with respect to elective offices recognized by the Constitution. Examples she gave

in the Constitution buttress this point. True enough, section 7(1) of the Constitution which empowers the State Government to provide for the establishment, structure, composition, finance and functions of local government councils in the State is silent on the tenure of elective offices in these councils. By this silence, the matter becomes residual as it is not on the Exclusive Legislative List. By virtue of section 4(7)(a) residual matters are for the State, not the Federal, to legislate upon. It follows that the tenure of elective offices in a local government council is a matter for the House of Assembly of a State, and not the National Assembly, to legislate on.

I have no hesitation in rejecting the submission of the learned Solicitor-General that because the National Assembly is empowered by item 11 on the Concurrent Legislative List to make laws for the procedure regulating elections to a local government council, it has thereby power to dissolve local government councils, determine the date of the election thereto and determine the tenure of elective offices therein. I adopt the definition of the word “procedure” in Black’s Law Dictionary, 6th edition to which our attention has been drawn by the learned Solicitor-General. Going by this definition and in line with her other submissions, tenure of elective officers of a local government council, dissolution of the council and date for elections thereto cannot be part of the procedure for an election. These are matters that must necessarily precede the holding of an election. They are necessarily matters of substantive law. Being so, therefore, they do not come within the scope of the power given by item 11 on the Concurrent Legislative List to the National Assembly. Under Item 11 all that the National Assembly is required to do is to lay down regulations for the conduct of an election to a local government council such as some of the provisions contained, for example, in Part VIII of Decree No. 36 of 1998 and Schedule 4 to the Decree. It must be remembered that the House of Assembly of a State is not precluded from making laws with respect to election to a local government council so long as such laws are not inconsistent with any law validly made by the National Assembly - see Item 12 on the Concurrent Legislative List.

Chief Williams has argued that the National Assembly has no power to enact laws with respect to the conduct of elections into the office of Chairman, etc. of a Local Government Council in Nigeria. If, as he conceded the National Assembly has power, by virtue of Item

11 on the Concurrent Legislative List, to make laws with respect to the procedure regulating elections to a local government council, I fail to see the logic in the argument that the National Assembly has no power to make laws with respect to the conduct of the elections. The conduct of an election is a procedural matter. The word “conduct” as defined in Black’s Law Dictionary means (as a verb) “to manage; direct; lead; have directions; carry on; regulate; do business.” And as a noun it means “personal behaviour, deportment; mode of action; any positive or negative act.” From the definitions relevant to the word as used in the context of this case, both conduct and procedure mean one and the same thing.

The last elections to all local government councils in the Federation were held under the provisions of the Local government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998, section 7 of which gave a 3 year tenure to all elective offices in the local government councils. The Decree was repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999 which came into force on 29th May, 1999. With the repeal of Decree No. 36 of 1998 what then is the tenure of all those officers of Local Government Councils elected in 1999? Section 6(1) of the Interpretation Act, Cap. 192 Laws of the Federation of Nigeria 1990 provides the answer. It reads:

“6(1) The repeal of an enactment shall not

(a) revive anything not in force or existing at the time when the repeal takes effect;

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment;

(c) affect any right, privilege, obligation or liability accrued or incurred under the enactment;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the enactment;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed.”

By virtue of the provisions of section 6(1)(c) of the Interpretation Act, the tenure of those officers remains 3 years unless increased by the State House of Assembly which has power so to do. The division of a local government council area into wards is a matter of the structure of the council and not one of election procedure. A ward is the geographical area from which a councillor is elected into the council; the ward is the councillor's constituency. The structure of a local government council is a matter for the State House of Assembly to legislate upon, and not for the National Assembly - see section 7(1) of the Constitution. A ward may also be for election purposes but having regard to the context in which the word is used here it relates more to the structure of the local government council - see section 111(2) of the Electoral Act, 2001.

Qualification or disqualification of persons as candidates for election as Chairman, vice-chairman or councilor of a local government council is a matter of substantive law for the State House of Assembly to determine and not a matter of election procedure for the National Assembly to legislate upon.

With the conclusions I have reached above. I now turn to plaintiffs' claims (i), (ii) and (iv). For the reasons given in this judgment claims (i), (ii)(b)-(e) and (iv) succeed and I grant the declarations sought in those claims. The declaration sought in claim (ii)(a) fails and it is refused by me.

Issues (iii), (v) & (vi)

(iii) Whether or not the National Assembly has any power to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999...

(v) Whether or not the provisions of sections 15 - 73 and 110 - 122 of the Electoral Act 2001 or of any of the said sections are constitutional, valid and operative.

(vi) In the light of the answers to questions (i) to (v) whether or not the Electoral Act, 2001, is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or constitutional, valid and operative (as the defendant contends).

The National Assembly provides in section 25 of the Act what

amounts to qualification and disqualification of candidates for elective offices under the Constitution. It is the case of the plaintiff that as the Constitution has made provisions for the qualification and disqualification of candidates for elective offices under the Constitution, it is ultra vires of the National Assembly to also make provisions in a law made by it, as it has done in the Electoral Act 2001, on similar terms, or, worse still, with more provisions than enacted in the Constitution. Chief Williams, for the plaintiffs, submits in his brief that -

"the National Assembly cannot amend provisions for qualification and disqualification of candidates as contained in the Constitution. The plaintiffs submit that in accordance with well established principles of Constitutional Law if a Legislature enacts a law in identical terms with what has already been enacted by another legislature whose enactments have superior legislative force, then the enactment of the subordinate Legislature is void or at least inoperative. See the decision of Mr. Justice Dixon of the Australian High Court in *Exp. Mclean* 43 CLR 472 which was approved by our Supreme Court in *Attorney-General of Ogun State v. Attorney-General of the Federation* [1982] 13 N.S.C.C. page 1."

The learned Senior Advocate further submits:

"The Supreme Court is accordingly urged to hold that the entire provisions contained in section 25 of the Electoral Act 2001 is unconstitutional and void or inoperative in so far as it purports to create the effect of altering the requirements of the Constitution regarding the qualification or disqualification of candidates as already stipulated under the Constitution and especially paragraphs (b), (e) (g), (h), (j), (m), (n), (o), (p), of the subsection (2) of section 25 of the Electoral Act 2001 which specifically either repeal or add to or take away from the express provisions of the Constitution."

He urges us to grant plaintiffs' claim (v) which is -

"A declaration that the provisions contained in Sections 15 to 73 and 110 to 122 of the Electoral Act, 2001 are, from the date of the commencement of the said Act inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and are accordingly null and void and inoperative."

Chief Williams, on Issue (v), submits that the provisions of Parts II and IV of the Act must be treated as void on the ground of inconsistency with the Constitution. He argues that:

“Even if some of the provisions are good in so far as they apply to Presidential or Gubernatorial elections. The facts remain that those provisions are bad in so far as they purport to apply to elections to Local Government Councils.”

B Learned Senior Advocate opines that the case here is not the type of case to which the blue-pencil rule can be of any help for the reason that one cannot sever the bad from the good. He relies on the dictum of Lord Devlin in *Balewa v. Doherty* [1963] 1 W.L.R. 949 at 960.

C Chief Williams, in extending the blue pencil rule to the whole Act submits that:

D “...It is well established in Nigeria and in other common law jurisdictions operating our type of Constitution that where parts of a statute are nullified on the ground that they are unconstitutional and void the court is entitled to examine whether the remaining portion of the enactment not affected by the decision of the court remains operative. In this case the plaintiffs intend to argue that when all the portions of the Electoral Act 2001 under attack are expunged (including those which are bad because they are inseparable from the good), what is left cannot be allowed to stand and so the whole of the Electoral Act 2001 ought to be struck out in its entirety.”

E Mrs. Osinuga, for defendant, submits that none of the provisions of section 25 violates any of the provisions of any law in force in any part of Nigeria. She adds:

F “On the contrary, the provisions of section 25 of the Electoral Act 2001 being challenged give deeper meaning to the provisions of the Constitution for the attainment of peace, orderliness and good government in Nigeria.

G It is trite law that Constitution of any Nation is not expected to contain all the minute details of a good government. It suffices that it prescribes brief and comprehensive outlines, leaving the details to be filled by those charged with the responsibility of working out requirements for a good government.”

H She relies on a passage in my judgment in *Director of SSS & Anor v. Agbakoba* [1999] 3 N. W.L.R. (pt. 595) page 314 at 357 D-F wherein I said:

“One does not expect to find in a Constitution minute details for it is necessarily brief and comprehensive. It prescribes outlines,

leaving the filling up to be deduced from the outlines. In setting up an enduring framework of government, the framers of our Constitution undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men and women, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative provisions which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of Government.”

C I pause here to observe that this passage is of no assistance to the learned Solicitor-General. For the Constitution has not left open the question of qualification or disqualification of persons seeking elective offices under the Constitution. On the contrary, the Constitution has provided adequately for such matters.

D The learned Solicitor-General of the Federation urges the court under section 74 of the Evidence Act, Cap. 112 Laws of the Federation 1990, to take judicial notice of:

“...the following facts which are of common knowledge in a decent democratic society:

E (a) That the provisions of section 25(2)(e)(g)(h)(j)(n) of Electoral Act 2001 which seek to prevent tax evaders, lunatics, criminals under the sentences of death, dubious and dishonest characters/ persons from interfering with the electoral process of the Federal Republic of Nigeria are in furtherance of attaining peace, order and good government for the Federation.

F (b) That the powers of the National Assembly to make law preventing drug barons and falsifiers of documents from hijacking the electoral process or from being presented for elections contained in section 25(2)(o)(p) is not a disqualification of candidate outside the purview of the Constitutional provisions on elections neither such enactment is outside the legislative powers of the National Assembly under the Constitution.

H (c) The defendant further urges this honourable court to hold that, those disqualifying provisions in section 25(2) of Electoral Act 2001 which constitutes substantive crimes under the criminal code, penal code or under any law in existence in any part of the country, remain valid and constitutional by virtue of section 315(4)(b) of 1999 Constitution, and to dismiss the plaintiffs case on this point.”

She further submits that:

“(a) All of the provisions of section 25 of the Electoral Act 2001 being challenged by the plaintiffs are meant to checkmate evils militating against peace, order and good government for the Federation.

(b) It is submitted that the provisions of section 25 of the Electoral Act complained of complement the provisions of the Constitution. The ‘additional’ requirements are not new but necessary for the overall promotion of good governance and democracy. A legislation that bars unregistered voters, tax evaders, lunatics and persons of unsound mind, convicted persons from contesting for an election should not be condemned but applauded as good law. What the plaintiff perhaps want is for the Constitution to contain all details and information, in formulating the framework for effective governance.

(c) That the National Assembly has the Constitutional powers to legislate on those ills in the course of enacting law on procedure regulating elections in Nigeria and to:

(d) Dismiss the plaintiffs’ case on this point.”

I have decided to consider Issues (iii) (v) and (vi) together as they dovetail into each other. In my consideration of these three -issues. I need to discuss two principles of construction of statutes that have been canvassed by the plaintiffs, that is, the doctrine of “covering the field” and the “blue pencil” rule.

The doctrine of “covering the field” is attributed to the Australian Courts - see *Ex parte McLean* [1930] 43 C.L.R. 472 at 483; *The State of Victoria & Ors v. Commonwealth of Australia & Ors* [1937] 58 C.L.R. 618 at 630 where Dixon explained the doctrine of inconsistency thus:

“Substantially, it amounts to this. When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was indeed a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a deduction from the full operation of the Commonwealth law and so as inconsistent.”

and *O’Sullivan v. Noarlunga Meat Ltd.* [1957] A.C. 1 at 24. The doctrine was adopted by this court in *Lakanmi v. Attorney-General Western State* [1971] 1 U1LR 201 at p. 209; [1974] E.C.L.R. 713 at 722 where Sir Ademola, C.J.N. said:

“We fail to see anything in the changes made by various Decrees in 1966 and 1967 which deprived the Federal Military Government of its right as the Supreme Legislative body to manifest within its powers its intention or to express by enactment a complete, exhaustive code, as to what shall be the law governing the Investigation of Assets of Public Officers, etc. In our view any other law made by any state on the same subject is void. This of course, is the doctrine of “covering the field” attributed to the Australian Courts and in accord with the cases:

(i) *Ex parte Mclean* 43 C.L.R. 472 at page 483:

(ii) *The State of Victoria and Others v. Commonwealth of Australia and others* 58 C.L.R. 618 at page 630 and

(iii) *O’Sullivan v. Noarlunga Meat. Limited etc.* [1956] 3 All E.R. 177; [1957] A.C. 1.

We therefore, reject the view of the judge of the High Court on the validity of Edict No. 5 of 1967. We have no hesitation in holding that the Edict ultra vires the decree of the Federal Military Government.

It was exhaustively discussed and again applied by this court in the *Attorney-General Ogun State & Ors. v. Attorney-General of the Federation & Ors.* [1982] 1-2 S.C. 13; [1982] 13N.S.C.C. 1; [1982] 3 N.C.L.R. 166. The doctrine is usually applied between a law enacted by the federal legislature and that enacted by a State legislature on the same subject. The doctrine was expounded by Fatayi- Williams, C.J.N. at p. 11 of the 2nd report as follows;

“..... where identical legislations on the same subject matter are validly passed by virtue of their constitutional powers to make laws by the National Assembly and a State House of Assembly, it would be more appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter.”

The learned Chief Justice had earlier quoted, with approval, the dictum of Dixon J in the Australian case of *Ex parte Mclean*

(supra) where at page 483 the learned judge had observed:

“When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled at least when the sanctions they impose are diverse (*Hume v Palmer* (1)). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.”

This dictum was approved by the Privy Council in the case of *O’Sullivan v. Noarlunga Meat Liz.* (supra) at p. 24 per Lord Somervell. According to Dixon J.

“The ‘inconsistency’ does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.”

Fatayi-Williams, C. J.N. even though he agreed with Dixon J.’s exposition of the doctrine of “covering the field” was not happy with the use of the word “inconsistent”. For the learned Chief Justice at p. 11 said:

“To say that the law is “inconsistent” in such a situation would not, in my view, sufficiently portray clarity or precision of language.” Idigbe J.S.C. was, however, comfortable with the use of the

word “inconsistent”. The learned and noble Justice of the Supreme Court explained at pages 27-28:

“Now, although by virtue of the provisions of section 11 of the 1979 Constitution both the National Assembly and a State House of Assembly may legislate on the subject of public order and maintenance of public security there is no doubt that the Federal Military Government evinced a clear intention in the said Act of 1979 (the 1979 Public Order Act) to deal exhaustively and exclusively, by that enactment, with the aspect of public order and maintenance of security relating to ‘assemblies’, public meetings and processions” throughout the entire federation; in other words, as my Lord the Chief Justice pointed out in the judgment just read by him, it was the intention of that government to cover the entire field on the subject by that enactment. In the circumstances the said Act will prevail over any other enactment by a State House of Assembly under the subject; this is because where, under a Federal set up, both the Federal and State Legislatures each, being empowered by the Constitution so to do legislate on the same subject then (1) if it appears from the provisions of the Federal law on the subject that the Federal legislature intends to cover the entire field of the subject matter and thus provided what the law on the subject should be for the entire Federation, the State Law on the subject is inconsistent with the Federal Law and the latter must prevail and the State Law on the subject is valid. (See also *Exparte Mclean* [1930] C.L.R. 472 at 483 per Dixon J (as he then was); *Lakanmi v. Attorney-general for Western Nigeria* (1974] E. C. L. R. 713 at 722 per Ademola, C.J.N. If no general Intention to cover the entire field on the subject can be gathered from the Federal Law, then the mere concurrence of the two laws (i.e. the Federal and State Laws) on the subject is not eo ipso an inconsistency although the detailed rules in the provisions of both laws may lead to different results on the same facts; and in the words of Colin Howard with which I respectfully agree ‘unless the two Rules actually contradict one another it is a question of legislative intention....to be inferred from the legislative context, whether the laws in question complement one another or are inconsistent. If there is an inconsistency it invalidates the State Law only so long as the Commonwealth Law remains in force. If the Commonwealth Law is repealed, and the State Law is not, the State Law becomes Operative.’ (see Colin Howard: Australian

Federal Constitutional Law 2nd Edition at p. 45.”

Eso, J.S.C. at p. 35 commented thus:

“The last point I would like to comment upon in this case is the doctrine of covering the field. The learned Chief Justice has in his judgment referred to the authorities which I accept are applicable. However I take the view that when one considers this doctrine, the phrase ‘covering the field’ means precisely what it says. Where a matter legislated upon is in the concurrent list and the Federal Government has enacted a legislation in respect thereof, where the legislation enacted by the State is inconsistent with the legislation of the Federal Government it is indeed void and of no effect for inconsistency. Where however, the legislation enacted by the State is the same as the one enacted by the Federal Government, where the two legislation are in *pari materia* I respectfully take the view that the state Legislation is in abeyance and becomes inoperative for the period the Federal Legislation is in force. I will not say it is void. If for any reason the Federal Legislation is repealed, it is my humble view that the State legislation, which is in abeyance, is revived and becomes operative until there is another Federal legislation that covers the field.”

In my respectful view, where the doctrine of covering the field applies there is no inconsistency in the strict sense of that word. To be inconsistent, the two legislations, that is the federal legislation and that of the State must be mutually repugnant or contradictory of each other so that both cannot stand. The acceptance or establishment of the one implies the abrogation or abandonment of the other - see Black’s Law Dictionary, 6th edition. The doctrine, however, renders the paramount legislation predominant and the subordinate legislation goes into abeyance and remains inoperative so long as the paramount legislation remains operative. Where, of course, there is obvious inconsistency, the subordinate legislation is void.

Chief Williams has referred us to section 1(3) of the Constitution which lays down the inconsistency rule as between the Constitution and any other legislation and submits that the doctrine of covering the field applies equally as between the Constitution and any other legislation, be it Federal or State. I think he is right. The fact that the doctrine has hitherto been applied between Federal and State legislations where both Federal and State legislatures have power to

make laws - usually on matters on the concurrent legislative list - is no reason to exclude it from a situation where the Constitution has completely, exhaustively or exclusively stated what should be the law governing a particular conduct or matter; any law enacted by any legislature that is in *pari materia* with it is inoperative. And if the latter law is inconsistent, then, of course, it is void - see section 1(3) of the Constitution.

“The “blue pencil” rule is applied to sever a part of a legislation that is good in the sense that it is valid, from the part that is bad, in that it is invalid. That is, the blue pencil is run over the part that is bad. If what remains of the impugned legislation, that is the part that is good, can stand, then it applied. But if what remains cannot stand on its own, the impugned legislation is declared invalid.

A classic example of the application of this rule is the case of *T.A. Doherty v. Sir Abubakar Tafawa Balewa & Ors.* [1961] A.N.L.R. D 630 where the Federal Supreme Court, as this court was then known, declared valid some parts of the Commissions and Tribunals of Enquiry Act, 1961 and declared invalid some other parts. On appeal to the Privy Council (sub nom. *Balewa v. Doherty* [1963] 1 W.L.R. 949). Lord Devlin who read the judgment of the Council declared at p. 960:

“There is no special provision in the Constitution giving to the court any power of interpretation greater than that which flows from the ordinary rule of construction. The question is, therefore, whether the good can be severed from the bad and so survive. Clearly it cannot here be done under the ‘blue pencil rule. There is no excess which can be struck out. Nor can their Lordships be confident that compulsive powers??? could not be validly given in section 64(3) subjects, it would still have wished to have given them in item, 43 subjects. The object of the Act is to confer a blanket power on the Prime Minister to direct inquiries into any matters within Federal competence instead of having to come to Parliament for specific authorization in each case. If Parliament had been told that it could give blanket power of inquiry only into some matters within Federal competence and not into others, it might very well have said that half a blanket was better than none and have amended the Bill accordingly. But it is impossible that it might have said that if the Prime Minister could not be given the complete power he wanted, it would be better that he

should ask for specific powers as and when he wanted them. It may be that the former is much more likely to have happened than the latter. But where there is the slightest doubt about what Parliament would have intended, their Lordships cannot speculate. They have themselves no legislative power and they cannot re-write the Act. “

B Chief Williams has urged us to invalidate the whole of Part II (headed Procedure At Election) covering sections 15-73 of the Act and Part IV (headed Procedure for Election To Local Government) covering sections 110-122 of the Act on the ground that some sections C thereat are ultra vires the Constitution and if such sections are struck out, what remains of those Parts cannot equally stand. He has also urged us to apply the ‘blue pencil’ rule to the whole Act and submits that if Parts II and IV are invalidated, what remains of the Act would make no sense and the whole Act should, therefore, be invalidated too.

D I will now examine Parts II and IV of the Act, beginning with Part IV which is shorter. From all I have said in this judgment, except for the proviso to sub-section (1) of section 110, that section is within the competence of the National Assembly to enact. The proviso in E so far as it affects the tenure of elective offices in local government councils in the States, it is ultra vires the Constitution and it is, therefore, invalid. It would have been valid in respect of local government councils in the Federal Capital Territory but as the proviso as worded cannot be severed and as it is not for the court to legislate, I find the F proviso to subsection (1) of section 110 invalid. What remains of section 110 is, however, valid.

G For the reasons I have given in this judgment Sections 111, 112, 113, 114, 115(l)-(6), 119, 120, 121 and 122 are clearly incompetent of the National Assembly to enact; they are matters for the State House of Assembly to provide for. These sections do not relate H to matters of procedure regulating elections into local government councils. They are all declared invalid by me. As subsection (7) of section 115, sections 116, 117 and 118 relate to procedure regulating election into local government councils they are validly enacted by the National Assembly by virtue of Item 11 on the Concurrent Legislative List. And as these provisions can stand without the invalidated sections, I do not find that the “blue pencil” rule applies to invalidate them.

In sum, I find sections 111, 112, 113, 114, 115(l)-(6), 119, 120, 121 and 122 of Part IV of the Act to be invalid. I, however, find sections 110 (except the proviso to sub-section (1) thereof which I find to be void), 115(7), 116, 117 and 118 are competent and are, therefore, valid.

B Part II of the Act deals with procedure at elections which, by virtue of Item 22 on the Exclusive Legislative List the National Assembly has power to legislate on. Section 15 in Part II provides: “15-(1) Elections-to-

(d)to the office of the President and Vice-President and to C the Senate and House of Representatives,

(e) to the office of Governor and Deputy Governor and House of Assembly of a State: and

(f) the Chairman and Vice Chairman and members of a Local Government or Area Council, shall be held on the date appointed D by the Commission.

(2) An election to the offices mentioned under subsection (1) (a)of this section shall be held on a date not earlier than 60 days not later than 30 days before the expiration of the term of office of the E last holder of that office.

(3) The date mentioned in subsection (1) and (2) of this section shall not be earlier than 60 days before and not later than the date on which the House-stands dissolved, or where the election is to fill a vacancy occurring, more than three months before such F date, not later than a month after the vacancy occurred.

(4) The dissolution of the Senate and the House of Representatives and the House of Assembly of a State shall be in accordance with the provisions of section 64 and 105 respectively of the Constitution and the dissolution of Local Government shall be in G accordance with the provision of section 119 of this Act.

(5) The Commission shall not ???later than 150 days before the dates appointed in subsections (1) and (2) of this section publish a notice stating the date of the election in each Constituency in respect H of which an election is to be held;

(6) The elections to which this Act relate shall be held in the following order, namely-

(a) Federal Elections, that is to say, election to the office of President and Vice-President, Senate and House of Representatives;

(b) State Elections, that is to say, elections to the office of Governor and Deputy-Governor and House of Assembly of a State; and

(c) Local Government Elections, that is to say, Elections to the office of Chairman, Vice-Chairman and members of Local Government Council.
 on a date to be appointed by the Commission in respect of (a) and (b), and by the State Commission in respect of (c) provided that a period of not less than 2 weeks shall elapse between the Federal Elections and the State Elections and between the State Elections and the Local Government Elections.”

Subsection (1)(c) in so far as it empowers the Independent National Electoral Commission (INEC) to appoint a date for the holding of election to the offices of Chairman, Vice Chairman and members of a Local Government Council, it is inconsistent with paragraph 4 of Part II of the Third Schedule to the Constitution. The power given to the National Assembly in paragraph 15(2)(i) of Part I of the Third Schedule to the Constitution to confer upon the Commission other functions cannot be exercised in derogation of other provisions of the Constitution. As I have pointed out earlier in this judgment it is not in dispute that the National Assembly can legislate for local government councils in the Federal Capital Territory- see section 299(a) of the Constitution. Hence sub-section (1)(c) of section 15 would be valid in so far as it relates to the election to the office of the chairman, vice chairman and members of an Area Council but invalid as respect the election to the office of chairman, vice chairman and member of a Local Government Council; unless for the other reason which I will state presently, the invalidity of part of subsection (1)(c) is not enough to declare the whole of sub-section (1) invalid - see *Alhaji D.S. Adegbenro v. Attorney-General of the Federation & Ors.* [1962] A.N.L.R. (pt. 1) 428 at 435.

The provisions of sub-section (1)(a) and (b) of section 15 are in pari materia with sections 76(1), 116(1), 132(1) and 178(1) of the Constitution relating to the members of the National Assembly and House of Assembly of a State, the President and Vice President and the Governor and Deputy Governor of a State respectively. That being so, therefore, subsection (1)(a) and (b) are inoperative. And as what remains of that subsection cannot stand, the whole subsection

(1) of section 15 is hereby invalidated.

Subsection (2) of section 15, is in part, in pari materia with sections 132(2) and 178(2) of the Constitution and, in part, inconsistent with sections 76(2) and 116(2) of the Constitution. The subsection is, therefore, invalidated as the part that is good cannot be severed from the part that is bad without rewriting the sub-section, a function that is not that of the court but of the legislature.

Subsection (3) is either inconsistent with sections 132(2) and 178(2) or in pari materia with sections 76(2) and 116(2). That subsection too is invalidated.

Subsection (4) is in pari materia with section 64(1) and 105(1) of the Constitution. It is inoperative and I, therefore, invalidate it. Subsection (5) is predicated on subsections (1) and (2) which have been invalidated; it too, therefore, stands invalidated.

The Constitution gives to the INEC the power to fix dates for election to the various offices of President and Vice President, Governor and Deputy Governor and members of the National Assembly and House of Assembly of a State. Subsection (6)(a) and (b) usurp or, at best, interferes with the exercise of this power and are consequently void as being inconsistent with the Constitution. As regards subsection 6(c) it is the State Independent Electoral Commission (SIEC) that is given power under paragraph 4 of Part II of the Third Schedule to the Constitution, “to organise, undertake and supervise” all elections to local government councils within the State, and not the INEC. Subsection 6(c), is, therefore, inconsistent with the Constitution and it is consequently void.

All the sub-sections of section 15 having been found invalid, the section 15 itself is accordingly declared null and void.

Chief Williams has in a table submitted to us attacked section 19 of the Act. I have carefully examined the provisions of this section in the light of the reasons given in the table for the attack. I find no reason to invalidate any provision of the said section. Subsection (4) has to do with procedure regulating election to a local government council. This is within the province of the National Assembly.

As section 15 has now been invalidated, subsections (1) & (4) of section 20 must fail; it is hereby invalidated. In my respectful view, the rest of the section is however valid, they relate to matters of procedure at election, For the reasons (1) that subsection (1) of section

21 is predicated on the void section 15 and (2) that it constitutes a usurpation of the power of the SIEC. it is void. I hold that section 21(2) is, however, valid as it relates to procedure at elections.

Another section of the Electoral Act attacked specifically by Chief Williams is section 23 which reads:

B “23.(1) Not less than 90 days before the date appointed for holding of an election under this Act, the Commission shall publish a notice in each of the Federation and the Federal Capital Territory –

C (a) stating the date of the elections; and appointing the place at which nomination papers are delivered.

(2) The notice shall be published in each constituency in respect of which an election is to be held

Provided that in the case of a bye-election, the Commissioner shall, not later than 14 days before the date appointed for the election, publish a notice stating the date of the election.”

D I cannot see anything in this section that offends the provisions of the Constitution. My view is that the section is valid and I so hold.

Another major section attacked by Chief Williams is section 25. Section 25 reads:

E “25. (1) Every political party shall not later than 90 days before the date appointed for a general election under the provisions of this Act, submit to the Commission in the prescribed forms the list of the candidates the Party proposes to sponsor at the election.

F (2) The list shall be accompanied by an Affidavit sworn to by each of the candidates at the High Court of a State, indicating that he –

(a) is a citizen of Nigeria and has attained the age of

(i) 35 years for election in to the Senate; and

(ii) 30 years for election to the House of Representatives; and

House of Assembly of a State:

G (b) is a registered voter;

(c) has been educated up to at least School Certificate level or its equivalent;

(d) is a member of a political party and is sponsored by that party:

H (e) has produced evidence of payment of tax as and when due or tax exemption for a period of three years preceding the year of the election;

(f) has not voluntarily acquired the citizenship of a country other than Nigeria, and has not made a declaration of allegiance to such country;

(g) has not been adjudged to be a lunatic or otherwise declared to be of unsound mind under by law in force in any part of Nigeria;

(h) is not under a sentence of death imposed on him by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for an offence involving dishonesty or fraud (by whatever name called) or any other offence imposed on him by such a court or tribunal or submitted by a competent authority for any other sentence imposed on him by such court;

(i) within a period of less than ten years before the date of the election concerned, he has not been convicted or sentenced for an offence involving dishonesty or he has not been found guilty of contravention of the Code of Conduct;

(j) is not an undercharged bankrupt, and has not been adjudged or otherwise declared bankrupt under any law in force in any part of Nigeria;

(k) being a person employed in the public service of the Federation or of a State, he has resigned, withdrawn or retired from such employment 30 days before the date of the election;

(l) is not a member of a secret society;

(m) has not been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law, or any other Federal or State Government Law which indictment has been accepted by the Federal or State Government respectively; or

(n) has not presented a forged certificate or a forged or false declaration to the Commission;

(o) has not within a period of ten years preceding the election been convicted of any drug related offence or money laundering;

(p) has not within the preceding period of 10 years presented a falsified document or given false information for the purposes of nomination.

(3) In the case of election to the office of the President and Vice-President of the Federal Republic of Nigeria or the Governor and

Deputy Governor of a State, the affidavit sworn to at the High Court of a State shall in addition to the information required in subsection (2) above indicate that the candidate –

(a) has attained the age of-

(i) 40 years for President and Vice-President; and

(ii) 35 years for Governor and Deputy Governor of a State;

and

(b) fulfilled all other Constitutional requirements.

(4) The list of the candidates and the affidavits shall also be sent by the Political Party to the Commissioner of Police of the State where the election is to be held, and to the Attorney-General of the Federation.

(5) The Commission shall, within 7 days of the receipt of the personal particulars of the candidates, publish same in the constituency where the candidate intends to contest the election.

(6) Any person who has reasonable ground to believe that any information given by a candidate in the Affidavit is false, may submit a petition to the Commission, the State Commissioner of Police, and the Federal Attorney-General specifying the grounds for such petition, with evidence to support the allegations.

(7) If after appropriate investigations by the aforementioned bodies, it is discovered by the Commission that any of the information provided by the candidate is false, he shall be automatically disqualified from contesting the elections and if already elected, he shall automatically vacate the office concerned and the next candidate with highest number of votes and who meets the constitutional requirements for the position shall be declared elected provided that the aforementioned bodies shall state the reason or reasons for the disqualification.

(8) The Attorney-General of the federation may in addition initiate criminal proceedings where appropriate against the candidate and if convicted he or she shall be sentenced to a fine of N200,000 or to imprisonment for two years or both.

(9) Any Political Party which knowingly or recklessly presents to the Commission the name of a candidate who does not meet the qualifications stipulated in this section, shall be guilty of an offence under this section, and on conviction shall be liable to a fine of N500,000: and be disqualified from participating in future elections

for that particular office in the same Constituency for a period of five years.

(10) The decision of the Commissioner as to the qualification or disqualification of a candidate for an election may be challenged by a candidate. Any legal action challenging the decision of the Commission shall commence within five working days and disposed of not later than one week before the election.”

I have no hesitation whatsoever in holding, for reason I shall presently give, that the section is totally void being ultra vires the Constitution. Subsection (1) appears inoffensive but because of the provisions of the other subsections which are attached to it, it is caught with the invalidity attached to those subsections, as under the ‘blue pencil’ rule it cannot be severed from the other sub-sections and stand alone.

Subsection (2) contains a long list of the provisions that are either in pari materia with the provisions of the Constitution relating to qualification and disqualification of candidates for the various elective offices or alter, add to or modify those provisions. For the reasons I have stated earlier in this judgment the National Assembly is not competent to do either. The same consideration applies to subsection (3). Subsections (4), (5), (6), (7), (8) and (9) are predicated on subsections (2) and (3); and as these two subsections are found to be invalid, those subsections too must be invalidated as they cannot stand alone. Subsection (1) is a usurpation of the Judicial power and this is beyond the competence of the National Assembly -see Paul Unongo v. Aper Aku [1983] 2 S.C.N.L.R. 332; [1983] 9 S.C. 126.

Chief Williams also contends that section 28 and 29 are invalid in that in so far as Local Government elections are concerned, the function of the SIEC are usurped. With respect to the learned senior Advocate I do not share his view. Part II in my respectful view relates to elections to the offices of the President and Vice-President, Governor and Deputy Governor and membership of the National Assembly and Houses of Assembly of the States. With respect to the members of the National Assembly, it is only in their exuberance or over caution that they have included in some part of Part II of the Act matters relating to election to local government councils. That Part II relates to these other elections is borne out by the fact that Part IV is headed “Procedure for Election to Local Government.” It would

have been more appropriate if in section under Part II the National Assembly had used the phrase “in this Part” in the place of “in this Act”. The function of the court in a situation like this is to save as best as possible the provisions of the legislation that is under attack. With this in mind, therefore, I do not think sections 28 and 29 offend against the Constitution. In any event, even if it can be argued that those provisions cover Local Government elections as well, in my view they are matters of procedure regulating election and this is a matter over which the National Assembly has constitutional power to legislate.

Chief Williams has also singled out sections 37 to 39(1) and (2), 41, 42, 48, 49(2), 51, 52, 58(1), 60, 65, 66, 67, 68, 69 and 73 on the ground that these sections must be deemed to refer to local government elections in respect of which the National Assembly has no power to legislate, nor could they legislate for local government election to take place on the same day and at the same time.

The attitude of the court is to discover what is the pith and substance of the legislation that is under attack. “If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field” per Lord Atkin in *Gallagher v. Lynn* [1937] A.C. 863 at 870 adopted by the Federal Supreme Court in *Akwule & Ors. v. The Queen* [1963] A.N.L.R. 191 at p. 197. In the latter case sections 311 and 315 of the Penal Code of Northern Nigeria had been attacked on the ground that it was a usurpation of the exclusive powers of the Federal Parliament to make laws with respect to banks and banking. The court held that the pith and character of sections 311 and 315 is penal legislation for the peace, order and good government of the region and, therefore, within the competence of its legislative and section 315 is not legislation in respect of banks and banking but merely an incidental provision in such penal legislation. Sir Ademola, C.J.F. as he then was, after quoting a passage from Lord Atkin’s judgment in *Gallagher v. Lynn* said at p. 197:

“Adopting those views for our guidance, it is clear that the legislature of Northern Nigeria has power ‘to make laws for the peace, order and good government of the Region.’ Section 4 of the Constitution of Northern Nigeria. There is no suggestion that in including

bankers in section 315 of its Penal Code, that legislature was using its power to legislate on an offence such as criminal breach of trust as a cloak for encroaching on the field of banks and banking. The offence is created and defined in section 311; and any person guilty of it may be punished under section 312: the true nature of section 313, 314 and 315 is that certain categories of persons (including bankers in section 315) should be liable to heavier punishment. An example of this mode of penal legislation is found in the Criminal Code of the Federation and of the other Regions. Section 390 of that Code provides a general punishment for stealing and goes on to provide heavier punishment for graver cases of the offence. That is arranged in subsections. In the Penal Code of Northern Nigeria, sections 312 to 315 could have been made or arranged as subsections in a single section dealing with punishments.

We are of the opinion that section 315 of the Penal Code is constitutionally valid in so far as it included bankers in the category of persons liable to heavier punishment for criminal breach of trust. We are of the view that this is not legislation in respect of banks and banking but merely an incidental provision in penal legislation enacted for the peace and good government of Northern Nigeria. We therefore, reject the submission of counsel that this legislation is invalid in respect of bankers and that it is null and void. “
See also: *Russell v. The Queen* [1881-1882] 7 App. Cas 829 at 839.

I have read sections 37 to 39(1) and (2), 41, 48, 49(2), 51, 52, 58(1), 60, 65, 66, 67, 68 and 73; I find that all these sections relate, in pith and substance, to matters of procedure regulating elections. This is a matter within the competence of the National Assembly to legislate on and as I have observed earlier, all these sections of Part II do not necessarily relate to local government elections which are covered by the provisions in Part IV relating to procedure for election to local government. I do not, therefore, hold the view that these sections are meant to cover local government elections. In my respectful view, therefore, all these sections are valid.
Section 42 which reads:

“For a particular election voting shall take place on the same day and at the same time throughout the Federation.” must be taken as relating also to the elections to the offices of the President and Vice President, Governor and Deputy Governor and members of

the National Assembly and Houses of Assembly of the States. That being so, therefore, the section is equally valid.

Subject as herein before decided Part II of the Electoral Act is valid being within the competence of the National Assembly.

In the light of the answers I have given above to the validity B or otherwise of Parts II and IV and having regard to the scope of the “blue pencil” rule, I do not find that those sections that have been invalidated, if severed from the Act would leave the Act meaningless. On the contrary I find that the Act can stand notwithstanding the C invalid sections. Consequently I have no hesitation in resolving issue (vi) against the plaintiffs. I dismiss their claim (vi).

Issue (vii):

Issue (vii) arose out of the pleadings of the defendant but it was never pursued in their brief of argument. The defendant has pleaded in paragraph 7 of his statement of defence thus:

D “WHEREOF the defendant urges the court to hold:

(b) that proper and necessary parties to this action are not before the court.”

No argument was advanced in defendants’ brief in support of this contention; it must be taken as abandoned.

E SUMMARY

In summary, I grant plaintiffs’ claims (i), (ii)(b)-(e), (iii) and (iv). I dismiss claims (ii)(a) and (vi). I find SECTIONS 15, 20(1) & (4), 21(1) and 25, the PROVISIO to section 110(1), sections F 111,112,113,114,115(1)-(6), 119, 120, 121 and 122, of the Electoral Act 2001 invalid. Consequently I declare as follows:

1. I declare that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected offices or as councilors of Local Government Councils in Nigeria except in relation to the Federal Capital Territory alone.

G 2. I further declare that the National Assembly has no power except in relation to the Federal Capital Territory, Abuja to make any law with respect to the following matters or any of them, to wit:

H (i) the division of Local Government Areas into wards for purposes of election into Local Government Council in Nigeria; (ii) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councilor of a Local Government Council in Nigeria;

(iii) the date of election into a Local Government Council; and

(iv) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office.

3. I declare that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999. B

4. I declare that save and except for laws for the Federation with respect to – C

a. the registration of voters and

b. the proceedings regulating elections to a Local Government Council.

It is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters D relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to the office of Councilors therein.

5. I declare that the provisions contained in sections 15, 20(1), 20(4), 21(1), 25, the proviso to 110(1), 111, 112,113, 114, 115(1)-(6), 119, 120, 121 and 122 of the Electoral Act, 2001 are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 and are accordingly null and void and inoperative. E

Before I end this judgment I like to comment briefly on the errors of spelling and grammar that permeate throughout the Act. Section 25, now invalidated, is a glaring example of this lapse. I have no doubt that, if unamended, it will make the task of interpretation and construction difficult in future. I make this short remark in order G to draw the attention of the Honourable Members of the National Assembly to this lapse with a view to their taking steps to have a second look at the legislation and correct, in an amending bill, these errors. I make no order as to costs. H

OGWUEGBU JSC

The plaintiffs are the Attorneys-General of the thirty-six States of the Federation of Nigeria and bring this action as the representatives

of their Governments. The defendant is the Attorney-General of the Federation. He is sued as the representative of the Government of the Federal Republic of Nigeria.

The case of the plaintiffs is that the National Assembly, acting pursuant to its law making power under section 4 of the Constitution of Nigeria, 1999 (hereinafter referred to as the Constitution) considered and passed the Electoral Bill, 2001 which was assented to by the President of the Federal Republic of Nigeria on 6th December, 2001.

It is their case that this Bill which was assented to by the President made some provisions which are inconsistent with the Constitution in relation to the powers conferred on the States by the Constitution. They have therefore jointly instituted this action praying the court to invalidate the Bill as assented to by the President.

In paragraph 12 of the Amended Statement of claim, the plaintiffs claimed the following reliefs:-

“(i) A declaration that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as Councilors of Local Government in Nigeria except in relation to the Federal Capital Territory alone.

(ii) A declaration that the National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the following matters or any of them, to wit:-

(a) the conduct of elections into the office of Chairman, Vice Chairman or Councilors of a Local Government Council in Nigeria.

(b) the division of Local Government Areas into wards for purposes of election into Local Government Councils in Nigeria.

(c) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councilors of a Local Government Council in Nigeria.

(d) the date of election into a Local Government Council and

(e) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councilor or member thereof vacates his seat in the Local Government Council.

(iii) A declaration that the National Assembly has no power

to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) A declaration that save and except for laws for the Federation with respect to -

(a) the registration of voters, and

(b) the procedure regulating elections to a Local Government Council it is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman or Councilors of a Local Government Council in that State or to the office of Councilors therein.

(v) A declaration that the provisions contained in Sections 15 to 73 and 110 to 122 of the Electoral Act, 2001 are, from the date of the commencement of the said Act inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and are accordingly null and void and inoperative.

(vi) A declaration that by reason of the provisions of the Electoral Act, 2001 which are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, the said Electoral Act is rendered null and void and inoperative in its entirety.”

In paragraph 7(a) of the Statement of Defence the defendant denied that certain provisions of the Electoral Act contravened the Constitution.

It averred as follows:-

“7(a) That the Electoral Bill 2001 assented to by the President is not inconsistent with the provisions of the 1999 Constitution.”

We were urged to so hold.

On 25/2/2002 when the matter came up for hearing applications were made by (1) 37 Chairmen of Local Government Councils in representing all the Chairmen of Local Government Councils in Nigeria and (2) by the National Assembly to be joined as co-defendants. Both applications were dismissed in the leading Rulings of the learned Chief Justice of Nigeria. The applications involved section 232(1) of the Constitution as to who can invoke the original jurisdiction of this court and section 20 of the Supreme Court Act Cap. 424 Laws of

the Federation of Nigeria. 1990 in the case of the National Assembly which is part and parcel of the Federal Government represented by the sole defendant - the Attorney-General of the Federation.

Briefs of argument were filed by both parties. At the hearing, Chief Williams, SAN., for the plaintiffs adopted the plaintiffs' brief filed on 4-2-2002 and the reply to the defendant's brief filed on 21/2/2002. Mrs. Osinuga, learned Solicitor-General of the Federation also adopted the defendant's brief filed on 18/2/2002.

Chief Williams, SAN., in opening his submissions stated that the dispute or controversy between the Federal Government and the States does not depend on the existence or non-existence of the Electoral Act as an enactment of the National Assembly. He submitted that a careful reading of provisions contained in the Electoral Act will reveal that those provisions transgress the legislative competence of the Federal Government and made or purport to make very serious incursions into the legislative and executive functions of the States in the Federal Republic of Nigeria under the 1999 Constitution.

The plaintiffs submitted the following questions for determination in the action:

(i) Whether or not the National Assembly has any power to increase or otherwise alter the tenure of any of the offices mentioned in claim (i) of this action.

(ii) Whether or not the National Assembly has any power to make laws with respect to the matters specified in claim (ii) of this action.

(iii) Whether or not the National Assembly has any power to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) What is the scope or limit of the legislative powers of the National Assembly with respect to Local Government elections under the 1999 Constitution?

(v) Whether or not the provisions of sections 15 - 73 and 110-122 of the Electoral Act, 2001 or of any of the said sections are constitutional, valid and operative.

(vi) In the light of the answers to questions (i) to (v) whether

or not the Electoral Act, 2001 is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or constitutional, valid and operative (as the defendant contends).

(vii) Whether there is any merit in the defendant's contention that "the proper and necessary parties are not before the court."

The defendant formulated five issues at page 2 of its brief as arising for determination in the action:-

"1. Whether the Constitutional powers of the National Assembly to make laws regulating the procedures for all elections in Nigeria does not cover the power to make law as to the time when there should be general elections in Nigeria.

2. Whether the National Assembly needs to amend the Constitution pursuant to section 9 of the 1999 Constitution before it can validly make law for peace and good government in Nigeria.

3. Whether the provisions of section 25(2)(b)(e)(g)(h)(j)(m) (n)(o) of the Electoral Act, 2001 are for peace, order and good governance of Nigeria or not.

4. In law, when can one say is the effective date of an Act of the National Assembly?

5. Where there seems to be conflict (if any) between the provisions of a Decree that has been repealed and the provisions of an existing Act of the National Assembly, which supercedes?"

I should quickly point out that the last two issues identified in the defendant's brief (Issues 4 and 5) have no relevance to the claims of the plaintiffs. Defendant's Issues (1) to (3) are subsumed in the issues raised in the plaintiffs' brief and I prefer those issues and will consider them in this judgment.

The following provisions of the Constitution were referred to by learned counsel in the course of their written and oral submissions and I will consider them at appropriate stages. Sections 1(3), 4(1)-(9), 7(1), (4)-(6), 197(1) and (2), Item 22 on the Exclusive Legislative List (pt. 1 of the Second Schedule to the Constitution, Items 67 and 68 on the said Exclusive Legislative List, Items 11 and 12 on the Concurrent Legislative List (Pt. II of the Second Schedule), paragraph 15(a)-(i) of Part I of the Third Schedule, paragraph 4(a)-(b) of Pt. II of the Third Schedule.

In dealing with the issues formulated by the plaintiffs. I will consider related issues together in this judgment. On tenure of hold-

ers of elective offices in Local Government, Chief Williams, S.A.N., referred the court to claim (i) endorsed in the Amended Statement of Claim which reads:-

“A declaration that no law enacted by the National Assembly can Validly increase or otherwise alter the tenure of office of elected officers or Councilors of Local Government Councils in Nigeria except in relation to the Federal Capital Territory alone.”

Chief Williams, S.A.N., submitted that section 7(1) of the Constitution directs the government of every State to ensure the existence of the system of local government by a democratically elected local government councils under a law which provides for the establishment, structure, composition, finance and functions of such councils and that the word ‘shall’ used in the provision compels the State Government to make laws for the aforementioned purposes. That Item 22 on the Exclusive Legislative List in the Second Schedule to the Constitution places within the exclusive legislative competence of the National Assembly, the making of laws for election to the offices of the President and the Vice-President or Governor and Deputy Governor and any other office to which a person may be elected under the Constitution. That it specifically excludes for this purpose, the making of legislation for “election to a local government council or any office in such council.” He referred to Item II on the Government Legislative List over which both the Federal and State Government have concurrent powers and that even there, the power of the National Assembly is circumscribed and that Item 12 on the same Concurrent Legislative List makes it clear that the aforementioned Item 11 does not preclude the House of Assembly of a State from making laws with respect to election to a local government council in addition to but not inconsistent with any law made by the National Assembly.

He further submitted that the powers of the National Assembly under Item II of the Concurrent List is limited to the registration of voters and the procedure regulating elections to a local government council. The attention of the court was drawn to section 197 of the Constitution which establishes a State Independent Electoral Commission whose functions are spelt out in paragraph 4 of Part II of the Third Schedule to the Constitution. Reference was also made to section 4(7)(a) of the Constitution which empowers a State House of Assembly to make laws with respect to any matter not included in

the Exclusive Legislative List.

On Issue (1), Chief Williams, S.A.N., submitted that this court ought to hold that it is the House of Assembly of a State and it alone that has the power to prescribe, increase or otherwise alter the tenure of the office of elected officers or Councilors of Local Government Councils in Nigeria other than those of the Federal Capital Territory, Abuja.

Mrs. Osinuga, learned Solicitor-General for the defendant referred the court to paragraphs 6(iii) and (ix) of the Statement of defence which read:-

“(iii) The National Assembly has inherent constitutional powers to 10 determine the tenure of elected officers in Local Government Councils.

(ix) The National Assembly has powers to make laws with respect to the procedure regulating elections to a Local Government Council, while the Independent National Electoral Commission shall carry out such other functions as may be conferred upon it by an Act of the National Assembly.”

The learned defendant’s counsel submitted as follows:

“Prior to the commencement of the Constitution of the Federal Republic of Nigeria, 1999, elections to the offices in Local Government Councils were conducted under the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998 ... Decree No. 36 of 1998 made elaborate provisions on matters affecting Local Government System and Establishment of Local Government Councils, establishment of Offices of Chairman, Vice-Chairman, functions of Local Government Councils and Elections to Local Government Councils. ... The defendant submits that the 1999 Constitution does not provide for tenure of elected officers in Local Government Council: neither does any provision of the said Constitution empower the State Assembly to determine the tenure of elected officers of Local Government Council.”

She referred the court to sections 7, 18(3) and 24 of Decree No. 36 of 1998 and section 312(2) of the Constitution. She made reference to section 6 of the Interpretation Act which relates to the effect of repeals, expiration and lapse of enactments. She further submitted that:-

“(i) It was the Federal law that provided for the tenure of the

elected officers of the Local Government and not State law.

(ii) It was the Federal law that repealed the Decree that stipulated the tenure of elected officers of the Local Government.

(iii) It is not only logical but represent a good law that if the need arises to give life to any of the provisions of the repealed Federal laws, it is only the National Assembly and it alone, that has the inherent Constitutional power to enact the appropriate legislation. “

It was contended that section 7(1) of the Constitution, Item 22 in the Exclusive Legislative List and Items 11 and 12 in the Concurrent Legislative List do not empower State Governments to determine the tenure of Local Government Council. We were urged to hold that Establishment of an office and the Tenure of same are not the same. The learned Solicitor-General of the Federation referred to the Black’s Law Dictionary 6th ed. Pages 1203 - 1204 and Oxford Advanced Learners Dictionary of Current English, 5th ed. for the definition of the words Procedure, and regulate appearing in Item 11 on the Concurrent Legislative List. She also referred to the case of Attorney-General of Bendel State v. Attorney-General of the Federation & Ors. [1982] 3 N.C.L.R. 61 at 71 and 74.

Chief Williams, S.A.N., in his reply brief agreed with the submissions of the learned defendant’s counsel that Decree No. 36 of 1998 which made elaborate provisions on matters pertaining to Local Government has been repealed by Decree No. 63 of 1999 and that prior to the commencement of the 1999 Constitution, the local government elections had been conducted under Decree No. 36 of 1998. That under the Interpretation Act, Decree No. 36 of 1998 must be deemed to have been a State Legislation and by sections 4(7) and 7 of the Constitution, the power to make laws in respect of local government with regard to establishment, structure and composition is specifically assigned to the State Government.

I will now consider the various enactments relied upon by both learned counsel. Before my consideration of the enactments on local government system in Nigeria, I must first dispel the erroneous submission of Mrs. Osinuga, learned counsel for the defendant that since it was a Federal law that repealed the Decree which stipulated the tenure of elected officers of the Local Government, it is only logical that if the need arises to give life to any of the repealed provisions of the Federal law, the National Assembly alone has the inherent power

to enact the appropriate legislation. This argument with respect has no basis in law or under the Constitution. Both the National Assembly and the House of Assembly of a State are creatures of the Constitution. The National Assembly is granted exclusive legislative powers in Part I of the Second Schedule (68 items in number) and certain concurrent powers in Part II of the Second Schedule under the Concurrent Legislative List. The legislative power of the defendant to make laws is derived from section 4(2), (3) and (4) of the Constitution and the said power is circumscribed by those subsections of section 4 as set out in those items on the Exclusive and Concurrent Legislative Lists. Outside those Items, the National Assembly has no other power let alone an inherent one to determine the tenure of elected officers of Local Government.

In further consideration of the plaintiffs’ Issue (i), section 7(1) is the starting point and it reads:-

“7(1) The system of Local Government by democratically elected Local Government Councils is under this Constitution guaranteed, and accordingly, the Government of every State shall, subject to Section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and function of such councils”.

Item 22 on the Exclusive Legislative List in the Second Schedule to the Constitution provides:-

“22. Election to the offices of President and Vice-President or Governor and Deputy Governor and any other office to which a person may be elected under the Constitution, excluding election to a Local Government Council or any office of such council.”

Section 7(1) of the Constitution makes it mandatory for the State Government to make laws for the establishment, structure, composition, finance and function of democratically elected local government councils and Item 22 on the Exclusive Legislative List specifically excludes the making of any legislation by the National Assembly for election to a local government council or any office in such council.

Item 11 on the Concurrent Legislative List limits the power of the National Assembly to make laws for the Federation with respect to registration of voters and procedure regulating elections to a local government council. The power conferred on the National

Assembly in Item 11 is not co-extensive. It does not extend to such powers conferred in section 7(1) of the Constitution to the House of Assembly of the State. The power under Item 11 is limited to making laws for the Federation with respect to the registration of voters and procedure regulating elections to a local government council. It does not extend to the power to make laws for the tenure of elected officers of the local government council or the time when elections to those councils should be held.

Section 4(7) of the Constitution confers power on the House of Assembly of a State to make laws for the peace, order and good government of the State or any part thereof with respect to the following:-

“7(a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

(b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule of this Constitution to the extent prescribed in the second column opposite thereto, and

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

The interpretation I give to section 4(7)(a) above is that a State House of Assembly can legislate on matters on the Concurrent List as well as on all other matters which are not on either of those two lists except where the matter is “incidental” or “supplementary” to matters on the Exclusive Legislative List. The question of the silence of the Constitution on the tenure of local government council does not therefore arise in view of the provision of section 4(7)(a) of the Constitution. In the circumstance, there is no power in the National Assembly to make law for the tenure of elective officers of local government councils or for that matter on any of the powers assigned to a House of Assembly of a State in section 7(1) of the Constitution and the Fourth Schedule to the Constitution.

It is not in dispute that the National Assembly has the power to make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council. Item 11 does not confer power on the National Assembly to make laws on tenure of elective offices of a local government council, dissolution of council and date of elections to those offices. These are

not matters of procedure but of substantive law. Procedure cannot determine when there will be an election.

The last elections under which the present local government Councilors and Chairmen throughout the Federation were elected were under the provisions of the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998. It prescribed three years tenure for all elected officers thereto. Decree No. 63 of 1999 came into force on 29th May, 1999. The tenure of the elected officers under the said Decree has to be sought in the Interpretation Act, Cap. 192, Laws of the Federation of Nigeria, 1990 and its section 6(1) provides:-

“6(1) The repeal of an enactment shall not -

(a) revive anything not in force or existing at the time when the repeal takes effect;

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment;

(c) affect any right, privilege, obligation or liability accrued or incurred under the enactment;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the enactment;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed.”

In view of the above, it is beyond any argument that the tenure of the current elected officer of local government councils throughout the Federation is fixed at 3 years and it is only the House of Assembly of a State which has the power to extend or alter it. It is not a matter of procedure regulating elections to local government elections or registration of voters.

Similarly, qualification and disqualification of candidates for the offices of Chairman, Vice-Chairman and Councilors of a local government council are matters within the exclusive legislative domain of a State House of Assembly. The National Assembly also exceeded its legislative power when it purported to enact in section 11(2) of Electoral Act, 2001 that every ward in a Local Government Council

shall elect a Councilor. This again is not a matter of procedure. The wards for the purposes of local government council elections are not co-extensive with wards for Presidential, National Assembly or State House of Assembly elections. They may overlap but they cannot be regarded as the same with those of the local government councils.

B For the reasons set out above, I have no difficulty in finding for the plaintiff in respect of reliefs (i)(ii)(b),(c),(d) and (e) and (iv). As to claim (ii)(a) the word “regulate” is defined in Black’s Law Dictionary (supra) at p. 1286 to mean - “To fix, establish, or control, to adjust by rule, method, or established mode, to direct by rule or restriction, subject to governing principles or laws. “

The word “procedure” in Webster’s New Twentieth Century Dictionary (unabridged 2nd ed. Revised by Jean L. McKechnie p. 1434) is defined as:

D “(1) the act, method or manner or proceeding in some process or course of action;

(2) a particular course of action or way of doing something;

(3) the established way of carrying on the business of a legislature...”

E The word “conduct” is also defined in Black’s Law Dictionary (supra) at page 259 as a verb which means “manage; direct; lead; have direction; carry on; regulate; do business”. From the above definitions, I do not see any difference between the words “conduct” and “procedure” and since the power to make laws as to procedure regulating elections to local government councils is given to the National Assembly in Item 11 of the Concurrent Legislative List, claim (ii)(a) of the plaintiff must fail and I hereby dismiss it.

The submissions of the learned Solicitor-General of the Federation that the court should hold that:-

G “(i) The power to make law regulating the procedure of elections for Nigeria include the power to legislate as to when there should be any of those elections.

H (ii) The ‘PROCEDURE FOR ELECTION TO LOCAL GOVERNMENT’ contained in part IV of the ELECTORAL ACT 2001 was validly enacted by the National Assembly in exercise of its constitutional powers to make law for the ‘PROCEDURE REGULATING ELECTIONS TO ALL LOCAL GOVERNMENT COUNCILS’ as enshrined in item 11 of the concurrent legislative list, and to dismiss

the plaintiffs” case as canvassed in their claim 1,” are not supported by law, logic or any of the provisions of the Constitution and apart from the power conferred in Item 11 of the Concurrent Legislative List and section 7(6)(a) of the Constitution (power to make provision for statutory allocation of public revenue to local government councils in the Federation), the National Assembly does not possess any other power to enact laws affecting local government councils.

Questions (iii), (v) and (vi) will now be considered.

(Question (iii)

C Whether or not the National Assembly has any power to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) Whether or not the provisions of sections 15-73 and 110- 124 of the Electoral Act, 2001 or of any of the said sections are constitutional, valid and operative.

E (vi) In the light of the answers to questions (i) to (v) whether or not the Electoral Act, 2001 is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or constitutional, valid and operative (as the defendant contends).”

F In Issue (iii) which covers the plaintiffs’ claim (iii), it was contended in the plaintiffs’ brief that there is nowhere in the Constitution where the National Assembly is empowered to make laws in respect of qualification and disqualification of candidates for elections to be held under the Constitution without complying with the requirements of section 9 of the Constitution and since the Constitution has made adequate provisions with respect to the matter under consideration, it is beyond its powers to make similar provisions in the Electoral Act, 2001. It was further submitted that the National Assembly has no power to make laws with respect to:

H “(e) the qualification or disqualification of persons as candidate for election as Chairman, Vice Chairman or Councilor of a Local Government Council in Nigeria.”

Chief Williams, S.A.N., in the plaintiffs’ brief contended that the Constitution made very clear provisions with respect to the

qualification of a person who seeks election to the office of President (section 131), Governor (section 177), membership of the National Assembly (section 65 and membership of a State House of Assembly (section 106). That the Constitution also made similar clear provisions with respect to disqualification of candidates for the same offices in sections 137 (President), section 182 (Governor) section 66 (National Assembly) and section 107 (State House of Assembly) and that the National Assembly cannot amend or alter any provisions for qualification or disqualification of candidates as stipulated in the Constitution except by complying with the requirements of section 9 of the Constitution which relate to the mode of attaining the provisions thereof.

Section 25 of the Electoral Act, 2001 illustrates the point and section 25(2)(b), (e), (g), (h), (j), (n), (o) and (p) impose qualifications and disqualifications outside the Constitutional qualifications and disqualifications imposed by sections 106 – 107, 177 and 182 of the Constitution. It was further submitted that in accordance with well established principles of Constitutional Law, where a Legislature enacts a law in identical terms with what has already been enacted by another Legislature whose enactments have superior legislative force, then the enactment of the subordinate Legislature is void or at least inoperative. The court was referred to the decision of Mr. Justice Dixon of the Australian High Court in *Exp. Mclean* 43 at 472 which this court approved in *Attorney-General of Ogun State v. Attorney-General of the Federation* [1982] 13 N.S.C.C. 1.

We were urged to hold that the entire provisions contained in section 25 of the Electoral Act, 2001 is unconstitutional and void or inoperative in so far as it purports to create the effect of altering the requirements of the Constitution regarding qualification and disqualification of candidates in the manner set out in section 25(2)(b), (e), (g), (h), (m), (n), (o), (p) of the Electoral Act, 2001 which adds or takes away from the express provisions of the Constitution.

It was part of the plaintiffs' argument that the National Assembly in enacting the Electoral Act, 2001, proceeded with the exercise as if the word "excluding" in Item 22 of the Exclusive Legislative List is replaced by the word "including" and as if the powers of the National Assembly with respect to Presidential and Gubernatorial elections are co-extensive with its powers over Local Government Council in Item

II. We were urged to treat Part II and IV of the Electoral Act as void on the ground of inconsistency with the Constitution. That assuming some provisions of the Act are good as far as they apply to Presidential and Gubernatorial elections, those provisions that purport to apply to Local Government Councils are bad and that the blue pencil rule cannot help. The case of *Balewa V. Doherty* [1963] 1 W.L.R. 949 at 960 was cited.

It was finally submitted in the plaintiffs' brief that the court should enter judgment for plaintiffs on their claim (v) which reads:-

"A declaration that the provisions contained in Sections 15-73 and 110 to 122 of the Act, 2001 are, from the date of the commencement of the said Act inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and are accordingly null and void and inoperative."

The defendant's reply to the above is that because the National Assembly has power to make laws for peace, order and good government for the Federation pursuant to section 4 of the Constitution and as a result of the Constitutional duty imposed on the National Assembly by the said section 4, that section 25 of the Electoral Act, 2001 was enacted to ensure orderliness and peace at elections. The defendant's learned counsel further contended that Item 11 in the Concurrent Legislative List gives the National Assembly power to make law with respect to registration of voters. We were urged to dismiss the plaintiffs' claim.

The plaintiffs in their brief of argument discussed the application of the doctrine of covering the field and the blue pencil rule in relation to the Electoral Act, 2001. The doctrine of covering the field arises where the issue is whether a State law on a concurrent subject matter can co-exist with a federal law on the same subject matter where the latter expressly or impliedly evinces an intention to cover the whole field, or to provide a complete statement of the law governing the matter. In such a situation, can the State law co-exist with the federal one in those circumstances? If the State law was enacted before the federal law, will its continued existence be inconsistent with the federal law so as to render it void? If the federal law was enacted first, does its existence preclude or prohibit the enactment of a further State law on the subject through the sanction of invalidity for inconsistency? Various criteria had been employed for determining

inconsistency between Federal and State legislation. The question arose as far back as 1820 in the case of *Houston v. Moore*, 5 Wheat. 1 [1820] before the United States Supreme Court. In that case, the court rejected the contention that after Congress had legislated on a concurrent matter in a manner that evinced an intention to cover the entire ground, a State Legislature could still legislate on it as its legislation was not in direct contradiction to that of Congress. Mr. Justice Washington delivering the opinion of the court said:-

“I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they differ, they must, in the nature of things, oppose each other, so far as they do differ... This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the State governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms or in their operation contradictory and repugnant to each other.”

The above decision was unequivocally affirmed twenty two years after in the case of *Priggs v. Pennsylvania*, 16 Pet. [1842] at 617-618 where Story, J. held as follows-

“If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislature has a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.” See also *Davis v. Season* 133 U.S. 333[1889]. *Houston v. Moore*, 5 Wheat. 1[1820]

The courts of the Commonwealth of Australia spoke the same language as the American courts in *Exparte Mclean* [1930] 434 C.L.R. 472 and the *State of Victoria & Ors. v. Commonwealth Australia & Ors.* [1937] 58 C.L.R. 618. A classic exposition of the

doctrine can be found in the judgment of Dixon, J. in the case of *Exparte Mclean* (supra) at p. 483 where he said:-

“When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent notwithstanding that the rule of conduct is identical which each prescribes The reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be... The inconsistency... Depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.”

At home in Nigeria, our courts are not left behind. In *Lakanmi & Ors. v. Attorney-General (West) & Ors.* [1974] 4 E.C.S.L.R. 713, this court held that since the Federal Military Government as the supreme legislative body had by Decree No. 51 of 1966 enacted what was the law covering the investigation of assets of public officers which was operative throughout the country, any State law such as Edict No. 5 of 1967 (Western State) on the same subject matter was ultra vires and void under the doctrine of covering the field. The cases of *Attorney-General of Ogun State v. Attorney-General of the Federation* [1982] 13 N.S.C.C. and *Giremabe v. Bornu -N.A.* [1961] All N.L.R. 489 are also in point.

Going by the decisions of the Australian Courts on section 109 of the Australian Constitution where the expression invalid was used instead of the word void as contained in section 1 (3) of the 1999 Constitution, invalid in the context of the provision is construed to mean that the State law remains formally in existence, but is merely rendered “inoperative”. Its operation and effect is merely “suspended” but the law itself is not nullified.

I agree with Chief Williams, S.A.N., that the doctrine of covering the field should apply equally between the Constitution and any other law whether Federal or State where the Constitution has completely exhaustively or exclusively stated the law governing a particular matter or set of rights and duties.

On Issue (vi), Chief Williams, SAN., submitted as follows:

“The plaintiffs submit that it is well established in Nigeria and in other common law jurisdiction operating our type of Constitution that where parts of a statute are nullified on the ground that they are unconstitutional and void the court is entitled to examine whether the remaining portions of the enactment not affected by the decision of the court remains operative. In this case the plaintiffs intend to argue that when all the portions of the Electoral Act, 2001 under attack are expunged (including those which are bad because they are inseparable from the good), what is left cannot be allowed to stand and so, the whole of the Electoral Act, 2001 ought to be struck-out in its entirety.”

The portions of the Electoral Act, 2001 which we are urged to nullify are sections 15-73 (Pt. II) and sections 110 - 122 (Pt. IV) on the ground that they are unconstitutional and void and what remains of the said Parts (II) and (IV) will be meaningless. It is arguable whether the inconsistency is demonstrated by comparison of detailed provisions as we are urged to do or by the mere existence of the two sets of provisions.

However, I will go through the sections of the Act attacked by the plaintiffs and apply the doctrine of covering the field and blue pencil rule. I have gone through the various sections of Parts (II) and (IV) of the Electoral Act and I have come to the following conclusions:-

Part II of the Act:

This part deals with procedure at elections. It falls within Item 11 of the Concurrent Legislative List which empowers the National Assembly to make laws for the Federation with respect to registration of voters and the procedure regulating elections to a local government council. Section 15(1)(c) of the Electoral Act is invalid to the extent that it empowers the National Independent Electoral Commission (INEC for short) to appoint a date for the holding of election to the offices of Chairman, Vice Chairman and Councillors of a Local Government Council.

It is inconsistent with paragraph 4, Part IIB on the Third Schedule to the Constitution which confers power on the State Independent Electoral Commission (SIEC) to organise, undertake and supervise all elections to local government councils within the State.

This is without prejudice to the power of the National As-

sembly to make laws for the Federal Capital Territory. Section 15(1)(c) of the Act therefore is valid in so far as it applies to the Federal Capital Territory. Section 15(1)(a) and (b) is inoperative in so far as it tries to repeat the provisions of sections 76(1), 116(1), 132(1) and 178(1) of the Constitution. Applying the blue pencil rule, section 15(1)(a) and (b) is invalid. Section 15(2) is a repetition of the provisions of sections 132(2) and 178(2) of the Constitution. It is therefore invalid. The same goes with section 15(3). Section 15(4) is in pari-materia with sections 64(1) and 105(1) of the Constitution and ventures into the dissolution of local government councils which it has no power to legislate upon. It is invalid. Section 15(5) has its basis on section 15(1) and (2) which are invalid and it is tainted with the same invalidity. Section 15(6) is an attempt to usurp the function which the Constitution assigned to INEC in paragraph 1 5 Part IF of the Third Schedule to the Constitution and that of State Independent Electoral Commission (SIEC) alluded to before now in this judgment. The net result is that the whole of section 15 of the Act is invalid. It is declared null and void.

Section 19(1) to (3) is valid but section 19(4) is an encroachment on the powers of the SIEC and it is therefore declared invalid. In this section, the good can be separated from the bad. Section 20(1) and (4) is invalid as a result of the invalidity of section 15. The other sub-sections are valid in so far as they do not apply to local government council elections. Section 21(1) is void. It is an infringement on the power of the SIEC enshrined in the Constitution and discussed above. Section 21(2) is invalid as paragraph 15(g) of Part IF of the Third Schedule to the Constitution has made identical provision. The whole of section 21 is therefore invalid. Section 23 is valid. I see nothing wrong with it. As to section 25, the entire section is clearly ultra vires the Constitution. Sections 26 - 30 are also under attack by Chief Williams, SAN. They are in order. Their contents are in the main procedures for elections and I declare them valid.

Sections 31 - 41 and 43 - 73: These provisions are substantially dealing with procedure regulating elections which are matters within the legislative competence of the National Assembly. I declare them valid in so far as their operation does not extend to local government council elections. Section 42 is clearly unconstitutional. The National Assembly has no power to fix a date for local government

council polls.

Part IV (Sections 110 - 122 of the Act.)

Section 110(1) is without doubt re-enactment of the provisions of the Constitution. The Constitution having made adequate provisions for the organisation of elections into local government councils, section 110(1) is inconsistent with it and therefore void. Section 110(2) is valid. The proviso to the sub-section which affects the tenure of office of elected officers of local government councils in the Federation is ultra vires the Constitution and void. Sections 111, 112, 113, 114, 115, 119, 120, 121 and 122 of the Act are enacted in excess of the powers of the National Assembly under the Constitution. The reasons are as stated earlier in this judgment. In conclusion, the plaintiffs' claims (I), (ii)(b)-(e), (iii), (iv) and (v) succeed. Claims (ii)(a) and (vi) are dismissed. Sections 110, 111, 112, 113, 114, 115, 119, 120, 121 and 123 of the Electoral Act are invalid. As a result I make the following declarations:-

1. The National Assembly cannot pass any law increasing or otherwise altering the tenure of office of elected officers of local government councils that is to say, the offices of Chairman, Vice-Chairman and Councillors of such councils in the Federation, except with regards to the Federal Capital Territory, Abuja.

2. The National Assembly has no power to enact any law with respect to qualification or disqualification of candidates under the 1999 Constitution.

3. Except for the Federal Capital Territory, Abuja, the National Assembly has no power to make any law with respect to

(a) The division of Local, Government Areas into wards for purposes of election into Local Government Councils in the Federation;

(b) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councillors of a Local Government Council in the Federation;

(c) the date of election into a Local Government Council;

(d) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman or Councillors of a Local Government Council vacates his office or a Councillor or member thereof vacates his seat in the Local Government Council.

4. Except for making laws for the registration of voters and procedure regulating elections to local government councils, it is the House of Assembly of a State and not the National Assembly which has the power to make laws relating to elective officers in the Local Government Council in that State.

5. The provisions of sections 15, 19(4), 20(1), 21, 25, 110(1), 111, 112, 113, 114, 115, 119, 120, 121 and 123 of the Electoral Act are inconsistent with the provisions of the Constitution. They are accordingly null and void and inoperative.

I make no order as to costs.

MOHAMMED JSC

I have had the advantage of reading the judgment which has just been delivered by my learned brother, Kutigi, J.S.C., and I agree both with his reasons and conclusions. In view of the importance of the issues considered in this suit, I desire to add some observations of my own on the issue of tenure of Local Government Councils only.

The issue in dispute between the plaintiffs and the defendant is the promulgation of the Electoral Act, 2001. The plaintiffs who are the Attorneys-General of the 36 States, representing their respective State Governments, are contesting, in this suit, the legislative competence of the National Assembly to enact a law increasing or altering the tenure of office of elected officers of Local Government Councils in Nigeria except in relation to the Federal Capital Territory alone. In addition, the plaintiffs sought for the following declarations:

“(ii) A declaration that the National Assembly has no Power except in relation to the Federal Capital Territory alone to make any law with respect to the following matters or any of them, to wit: -

(a) The conduct of elections into the office of Chairman, Vice Chairman or Councilors of Local Government Council in Nigeria.

(b) The division of Local, Government Areas into wards for purpose of election into Local Government Councils in Nigeria.

(c) The qualification or disqualification of persons as a candidate for election as Chairman or Vice Chairman or Councilor or Local Government Council in Nigeria.

(d) The date of election into a Local Government Council.

(e) The prescribing of the event upon the happening of which Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Council or member thereof vacates his seat in the local Government Council.

B (iii) A declaration that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without
C complying with the requirements of Section 9 of the constitution of the Federal Republic of Nigeria.

(iv) A declaration that save and except for laws for the Federation with respect to-

(a) the registration of voters and

(b) the procedure regulating elections to Local Government
D Council.

It is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to
E the office of Councilors therein.

(v) A declaration that the provisions contained in Section 15 to 73 and 110 to 122 of the Electoral Act, 2001 are, from the date of the commencement of the said Act inconsistent with the provisions of
F the Constitution of the Federal Republic of Nigeria 1999 and accordingly null and void and inoperative.

(vi) A declaration that by reason of the provisions of the Electoral Act 2001 which are inconsistent with the provision of the Constitution of the Federal Republic of Nigeria, 1999, the said Electoral Act is rendered null and void and inoperative in its entirety".

G My learned brothers in their respective judgments have given a brief account of the facts, which gave rise to this claim. I therefore do not intend to repeat what has been adequately considered in my judgment.

H In claim (1) the plaintiffs sought for a declaration that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or Councilors of Local Government Councils in Nigeria except in relation to the Federal

Capital Territory alone. Against this claim the defendant pleaded that the National Assembly has inherent constitutional powers to determine the tenure of elected officers in Local Government Councils. The question is: where has the National Assembly got such inherent powers? The learned Solicitor-General of the Federation who appeared for the defendant argued that the Local Government (Basic
B Constitutional and Transitional Provisions) Decree No. 36 of 1998 made elaborate provisions on matters affecting Local Government system and establishment of Local Government Councils. It also established offices of Chairman, Vice Chairman, Councilors, functions
C of Local Government Councils and elections to Local Government Councils. Section 7 of Decree 36 of 1998 provided that the Local Government Council and Area Council shall stand dissolved at the expiration of a period of 3 years commencing from the date of the first sitting of the council. The Solicitor-General further submitted that
D 1999 Constitution did not provide for the tenure of elected officers in Local Government Council and that there was no provision in the Constitution empowering the State Assembly to determine the tenure of elected officers of Local Government. Mrs. Osinuga, learned
E Solicitor-General, affirmed that Decree No. 36 of 1998 was repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999.

After going through the provisions of Decree 36 of 1998 with respect to tenure of office of members of Local Government Councils the learned Solicitor-General urged this court to accept that the
F National Assembly has power to enact a law increasing or otherwise altering the tenure of Local Government Councils and went further and said:

"(i) It was the Federal law that provided for the tenure of the
G elected officers of the Local Government and not State law.

(ii) It was the Federal law that repealed the Decree that stipulated the tenure of elected officers of the Local Government.

(iii) It is not only logical but represents a good law that if the need arises to give life to any of the provisions of the repealed
H Federal laws, it is only the National Assembly and it alone, that has the inherent Constitutional power to enact the appropriate legislation."

Learned Solicitor-General ought to know that those Decrees she is referring to were enacted by the Military Regime which in most

cases administered this Federation as a Unitary government. In any event, when Decree No. 36 of 1998 which prescribed the tenure of 3 years for the current local government councils was repealed by Decree No. 63 of 1999 the three years tenure was not affected by the repeal - see Section 6(1)(c) of the Interpretation Act. Cap. 192.

^B Laws of the Federation. I need not emphasize the obvious fact that all the actions of the governments in this Federation are governed by the provisions of the Constitution.

^C Learned Solicitor-General argued that item 11 of Part II of the Second Schedule to the 1999 Constitution has given power to the National Assembly to make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a Local Government Council. Learned counsel submitted that “procedure regulating” can be extended to mean determination of the tenure or life of the thing established. But this submission is not supported by any convincing reasoning when the wordings of the provision of the Constitution are analysed in their ordinary meaning. Chief Williams, S.A.N., leading a number of lawyers for the plaintiffs, in his submission, referred to section 7(1) of the Constitution which expressly enacted that the Government of every state shall provide for the establishment of Local Government Councils. Section 7(1) provides as follows:-

^D “The system of Local Government by democratically elected Local Government Councils is under this Constitution guaranteed, and accordingly, the Government of every State shall, subject to Section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and function of such councils”.

^E The above provision of the Constitution has given power to the State Government to establish Local Governments and draw up their structure, composition, finance and function. It is not difficult therefore to construe the intendment of the Constitution in regards to this power when the provisions of Section 4(7) and Section 7 of the Constitution are considered. In *Hinds and others v. R* [1975] 24 W.L.R. 326 at 330 Lord Diplock held:-

^F “A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference

to which it was made.”

I have carefully looked into the provisions of item II in the Concurrent List and, with respect, it has not given the National Assembly any power beyond the registration of voters and regulating of elections of Local Government Councils. Registration of voters is a national issue. So also is the law regulating elections which may include the setting up of a single day to hold the general election for the Local Government Councils throughout the country and the franchise of the electorate. In item 22 of the Exclusive Legislative List the Constitution specifically excluded the National Assembly from the making of legislation for ‘election to a local government council or any office in such council’. Chief Williams referred to section 197 of the Constitution which established a State Independent Electoral Commission. The functions of that Commission are spelt out in Part II of the Third Schedule to the Constitution, Section 4 of which reads D as follows:-

“4. The Commission shall have power:

(a) to organize, undertake and supervise all elections to Local Government Councils within the States:

(b) to render such advice as it may consider necessary to the Independent National Electoral Commission on the compilation of and the register of voters in so far as that register is applicable to local government elections in the State “.

The election which the State Independent Electoral Commission organizes is either a general Local Government election in the State after the declaration of a fixed day for such election to hold or a by-election following the resignation or death of a former officer before the expiration of the full term for which the incumbent was elected. It is a notorious fact that the President, the Governors, members of National Assembly, the State Assemblies and Local Government Councilors are elected for a term of years. The Constitution is specific as to the terms in which the President, the Governors, the members of the National Assembly and the State Assemblies will serve. But it is silent in regard to the Councilors of the Local Government. The silence is understandable because the State Governments, under Section 7 of the Constitution, have been given a mandate to establish the Local Government Councils and draw up the structure, composition, finance and functions of such councils. It is, in my view,

during this exercise that the term of years during which members are to serve shall be specified. Failure to specifically mention the tenure makes the power a residual power which only the State Houses of Assembly can legislate over it.

In the Black's Law Dictionary 6th Edition, General Election has been described as an election which is held throughout the entire state or territory for the choice of a national, State judicial district, municipal, county or township official required by law to be held regularly at a designated time, to fill a new office or a vacancy in an office at the expiration of the full term thereof.

It is plain that whoever has the power to organize, undertake and supervise any election for the offices I mentioned above shall have the power to declare the term for which the members will serve. Such term for which the members will serve when elected is the Tenure of their office. It is axiomatic therefore that the power to prescribe, increase or otherwise alter the tenure of the office of elected officers or Councillors of Local Government Councils other than those in the Federal Capital Territory, Abuja, lies with the State House of Assembly.

Learned Solicitor-General referred to the submission of Chief Williams, S.A.N., on the doctrine of "covering the field" wherein the Senior Advocate observed that if a legislature enacts a law in identical terms with what has already been enacted by another legislature whose enactments have superior legislative force, then the enactment of the subordinate legislature is void or at least inoperative. This was decided by Mr. Justice Dixon of the Australian High Court in *Ex Parte Mclean* [1930] 43 C.L.R. 472 at-483 and approved by the Supreme Court in *Attorney-General of Ogun State v. Attorney-General of the Federation* [1982] 13 N.S.C.C. page 1. At page 11 in the Nigerian Case (*A/G Ogun v. A/G Federation*) Fatayi Williams, C.J.N., opined thus:-

"I would only wish to add that, where identical legislations on the same subject matter are validly passed by virtue of their constitutional powers to make laws by the National Assembly, it would be more appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter. To say that the law is "inconsistent: in such a situation would not, in

my view, sufficiently portray clarity or precision of language".

Identical legislations on the same subject matter could be by both the National Assembly and the State House of Assembly where both houses have jurisdiction, in the concurrent Legislative List to enact a law. However, where one of the Legislative Houses has no power under the Constitution to enact a law the issue of having identical legislations would not arise. There is no provision in the 1999 Constitution giving power to the National Assembly to promulgate a law prescribing, increasing or otherwise altering the tenure of the office of elected officers or Councillors of Local Government Councils in Nigeria, other than those in the Federal Capital Territory Abuja. Thus the doctrine of making a law "covering the field" does not arise at all in this case.

For these and fuller reasons in the judgment of my learned brother, Kutigi, J.S.C., I entirely agree that it is the House of Assembly of a State alone that has the power to prescribe, increase or otherwise alter the tenure of the office of elected officers or Councillors of Local Government Councils in Nigeria other than those in the Federal Capital Territory, Abuja.

I have nothing more to add in respect of the remaining claims of the plaintiffs which have been adequately considered in the lead judgment.

Consequently, plaintiffs' claims (i), (ii), (b)-(e) (iii) and (iv) succeed. Claim (V) succeeds in part only. Claim (vi) fails and it is hereby dismissed. I make no order as to costs.

KALGO JSC

I have had the opportunity of reading before now the judgment of my learned brother Kutigi J.S.C., just delivered in this action and I find myself in full agreement with his reasoning, findings and conclusions.

In this action the 36 States of the Federal Republic of Nigeria, sued the Attorney-General of the Federation over the enactment by the National Assembly of the Electoral Act 2001 which was assented to by the President of the Federal Republic of Nigeria on the 6th of December, 2001, and by paragraph 12 of their amended statement of claim seek the following reliefs:-

“(i) A declaration that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or Councilors of Local Government in Nigeria except in relation to the Federal Capital Territory alone.

B except in relation to the Federal Capital Territory alone to make any law with respect to the following matters or any of them, to wit:-

(a) the conduct of elections into the office of Chairman, Vice Chairman or Councilors of a Local Government Council in Nigeria.

C (b) the division of Local Government Areas into wards for purposes of election into Local Government Councils in Nigeria.

(c) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councilors of a Local Government Council in Nigeria.

D and (d) the date of election into a Local Government Council

(e) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councilor or member thereof vacates his seat in the Local Government Council.

F (iii) A declaration that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

G (iv) A declaration that save and except for laws for the Federation with respect to -

(a) the registration of voters and

(b) the procedure regulating elections to a Local Government Council it is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to the office of Councilors therein.

(v) A declaration that the provisions contained in Sections 15

to 73 and 110 to 122 of the Electoral Act, 2001 are, from the date of the commencement of the said Act inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and are accordingly null and void and inoperative.

(vi) A declaration that by reason of the provisions of the Electoral Act, 2001 which are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, the said Electoral Act is rendered null and void and inoperative in its entirety.”

The defendant in a 7 paragraph statement of defence admitted paragraph 1 of the statement of claim in part but admitted fully the averments in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, and 10(a) to (i) of the said statement of claim. It however maintained throughout its statement of defence that the Electoral Act 2001 as promulgated by the National Assembly and assented to by the President “has not altered or frozen the powers” of the plaintiffs under the 1999 Constitution and that everything contained therein was enacted within the powers granted to the National Assembly under the said Constitution. The defendant finally in paragraph 7 of the statement of defence asked this court to hold:

“(a) That the Electoral Bill, 2001 assented to by Mr. President is not inconsistent with the provisions of the 1999 Constitution.

(b) That proper and necessary parties to this action are not before the court.

(c) That the plaintiffs’ action lacks merit and is accordingly vexatious and an abuse of the court’s process.

(d) That the plaintiffs’ action ought to and should be dismissed.”

Both parties filed their respective briefs of argument and exchanged them in this action. The plaintiffs filed a joint brief and in it, they raised the following issues for the determination of this court:-

“(i) Whether or not the National Assembly has any power to increase or otherwise alter the tenure of any of the offices mentioned in claim (i) of this action.

(ii) Whether or not the National Assembly has any power to make laws with respect to the matters specified in claim (ii) of this action.

(iii) Whether or not the National Assembly has any power to make laws with respect to the qualification or disqualification of

candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) What is the scope or limit of the legislative powers of the National Assembly with respect to Local Government elections under the 1999 Constitution?

(v) Whether or not the provisions of sections 15-73 and 110 - 122 of the Electoral Act 2001 or of any of the said sections are constitutional, valid and operative.

(vi) In the light of the answers to questions (i) to (v) whether or not the Electoral Act, 2001 is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or constitutional, valid and operative (as the defendant contends).

(vii) Whether there is any merit in the defendant's contention that "the proper and necessary parties are not before the court."

The defendant also formulated 5 issues for determination in his brief. I have carefully read these issues and as against the issues set out by the plaintiffs, I find the issues of the latter more germane to the dispute or controversy between the parties. I prefer them to those of the defendant and I adopt them for consideration in this action.

Before I start to consider the issues raised by the plaintiffs in this action, I think it is worth-while to look at some of the general provisions of the 1999 Constitution (hereinafter referred to as the Constitution) which are relevant and important in the consideration of those issues. Section 1(1) provides:-

"This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria".

This section deals with the supremacy of the Constitution and has made it abundantly clear and in no uncertain terms that the provisions of the Constitution are superior to every provision made in any Act or Law and are binding and must be observed and respected by all persons and authorities in Nigeria. The National Assembly must also observe full compliance with the provisions of this section. Section 1(2) also provides:-

"If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and the other Law shall

to the extent of the inconsistency be void".

By this subsection, if any law from any source other than the Constitution itself, contradicts any provisions of the Constitution, that law is to the extent of that contradiction or conflict, void and of no effect. The Constitution is what is called the grundnorm and the fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the Constitution. By the provisions of the Constitution, the laws made by the National Assembly come next to the Constitution; followed by those made by the House of Assembly of a State. By virtue of section 1(1) of the Constitution, the provisions of the Constitution take precedence over any law enacted by the National Assembly even though the National Assembly has the power to amend the Constitution itself.

The legislative powers of the Federal and State legislative Houses have been specifically set out under section 4 of the Constitution. It provides thus:-

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

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

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

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

a. any matter in the concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

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

(5) If any law enacted by the House of Assembly of a State

is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void.

(6) The Legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.

B (7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say-

C (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution;

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

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

E (8) Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

F (9) Notwithstanding the foregoing provisions of this section, the National Assembly or a House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect". Subsection (1) - (4) of section 4 above sets out all the powers of the National Assembly to legislate for the peace, order and good government of the Federation of Nigeria. The legislative powers set out therein do not cover every thing or every G topic under the sun which affects the whole Nigeria Nation. Therefore the use of the words "for the peace, order and good government of the Federation of Nigeria", did not and was not intended to give the National Assembly a blanket power to legislate on every topic affecting the Federation particularly under the presidential system of government articulated by the Constitution.

H By subsection (2) of section 4 above, the National Assembly which comprises of the Senate and the House of Representatives has

the power to legislate on "any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to" the Constitution. And in addition to this, it has also power to legislate by subsection (4) on any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution, to the extent prescribed in the second column thereto. In the like manner, B the House of Assembly of a State has the power to legislate for the peace, order and good government of the State concerned or any part thereof with respect to any matter in the Concurrent Legislative List set out in Part 1 of the Second Schedule to the Constitution to C the extent prescribed in the second column thereto. It has also the power to legislate on matters not included in the Exclusive Legislative List referred to above. These are matters normally referred to as "Residual" matters not set out in any legislative list. Subsection (5) of section 4 makes it abundantly clear that if any law made by the D State House of Assembly is inconsistent with the law validly made by the National Assembly, the State law shall, to the extent of the inconsistency be void.

E Subsection (8) of section 4 of the Constitution also makes the powers of both the National Assembly and the State House of Assembly to legislate even where they have powers to do so, subject to the jurisdiction of courts of law and judicial tribunals established by law and specifically prohibits them from making any law that ousts or purport to oust the jurisdiction of a court or judicial tribu- F nal established by law. And by subsection (9), neither the National Assembly nor the State House of Assembly has power to make any law creating a criminal offence with retrospective effect.

G The cumulative effect of the provisions of subsections (3) and (5) of section 4 of the Constitution, is to affirm the legislative supremacy of the National Assembly but that is clearly subject to the enumerated exceptions within the Constitution itself. There is therefore no question for the National Assembly or indeed any State Assembly having any inherent power to legislate on any topic or H matter. Both can legislate only as provided by the Constitution and the State Assembly alone can legislate on concurrent matters subject of course to the supremacy principles.

I now come to consider issue (i) of the plaintiffs. This issue relates to claim (i) of the Amended Statement of Claim. The issue

questions the powers of the National Assembly to increase or otherwise alter the tenure of any of the offices mentioned in claim (i) i.e. elected officers or Councilors of Local Government Councils in Nigeria except in relation to the Federal Capital Territory. Chief Williams S.A.N., for the plaintiffs adopted 10 his brief for the plaintiffs and proceeded to elucidate orally in court certain points raised in the brief. Learned counsel referred the court to Item 22 on the Exclusive Legislative List and Item 11 of the Concurrent Legislative List in the 2nd Schedule to the Constitution and submitted that the powers of the National Assembly to legislate under those items, did not extend to making laws on the tenure of Local Government Councils. He pointed out that under item 11, the State Assemblies are not precluded from making law on election on Local Government Council in addition to the powers of the National Assembly to make such laws. In his brief (p. 6) he said:-

“Item 22 on the Exclusive Legislative List in the Second Schedule to the Constitution places within the exclusive legislative competence of a National Assembly, the making of legislation for election to the offices of the President and Vice President or Governor and Deputy Governor and any other office to which a person may be elected under the 1999 Constitution. It specifically excludes for this purpose, the making of legislation for election to a Local Government Council or any office in such council”.

Item 22 of the Exclusive Legislative List in Part I of 2nd schedule to the Constitution provides:-

“Election to the offices of President and Vice President or Governor and Deputy Governor and any other office to which a person may be elected under this Constitution, excluding election to a Local Government Council or any office in such council”. (underlining mine)

I entirely agree with the learned S.A.N., that in the Exclusive Legislative List (68 items) none of the items listed therein gives the National Assembly the power to legislate in respect of elections to a Local Government Council or any office in the council.

With respect to the Concurrent Legislative List where the National Assembly and the State Assembly have power to legislate, learned S.A.N., submitted that the National Assembly can only legislate with respect to “the registration of voters and the procedure

regulating elections to a Local Government Council”. Counsel further pointed out that in addition to item 11, the State House of Assembly by item 12 is also empowered to legislate on election to a Local Government Council provided that the law is not inconsistent with any law made by the National Assembly.

In the Concurrent Legislative List, item 11 says:-

“The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council”. And item 12 also provides that:-

“Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to election to a local government council in addition to but not inconsistent with any law made by the National Assembly”. (underlining mine)

I also agree with the learned S.A.N., that the powers of the National Assembly to legislate in item 11 above is restricted to “registration of voters and the procedure regulating elections to a local government council.” This could not be extended to cover tenure of office of such council.

Chief Williams then referred the court to the provisions of section 7 of the Constitution and submitted that the system of Local Government is guaranteed under the Constitution and every State Government is compelled to ensure the existence of Local Government Councils under a law which provides for the establishment, structure, composition, finance and functions of such Local Government Councils. Learned counsel submitted further that this section empowers every State House of Assembly to legislate on Local Government Councils which are guaranteed under the Constitution and that the setting up of the structure of the Local Governments as provided under section 7(1) of the Constitution as well as the enlargement of the tenure of the Local Government Councils is part of that guarantee. He further submitted that “the registration of voters and the procedure regulating elections to the Local Government Council”, upon which the National Assembly has power to legislate has no bearing on the establishment of the Local Government Councils themselves much less of extending or enlarging the tenure of the said councils. He finally submitted on this issue in his brief that only the House of Assembly of a State and it alone, has the power to prescribe,

increase or otherwise alter the tenure of the office of elected officers or councillors of Local Government Councils in Nigeria other than those in the Federal Capital Territory Abuja.

For the defence, the learned Solicitor-General of the Federation submitted orally and in her brief that the National Assembly being charged with the responsibility under the Constitution of making laws for the peace, order and good government of the Federation of Nigeria, has inherent constitutional powers to determine the tenure of elected officers of the Local Government Council and that the power to make laws with respect to the procedure regulating elections to local government council referred on it by the constitution, includes the power to legislate on the tenure of Local Governments. Learned Solicitor-General cited no legal authorities to support these submissions and has not been able to show any section of the Constitution which empowers the National Assembly to extend the tenure of Local Government Councils in Nigeria.

Section 7(1) of the Constitution provides:-

“The system of local government by democratically elected local government councils is under this Constitution guaranteed and accordingly, the Government of every State shall, subject to section 8 of this Constitution ensure their existence under a law which provides for the establishments, structure, composition, finance and function of such councils”. (underlining mine)

By this section, the system of Local Governments is guaranteed and that every State Government shall ensure their existence by a law which provides for their establishment, structure, composition, finance and functions. It is very clear, from the provisions of the section without any iota of doubt, that every State Government must establish Local Government Councils in the State and this is to be done by a Law of the State setting out the structure, composition, finance and functions of the councils. Although the section does not speak of the tenure of the Local Government Council specifically, it is my view that the power to establish a body implies the power to be responsible for the tenure of such body, particularly in this case where no mention of tenure was made in the Constitution. This is also correct when one looks at the liberal interpretation to the provisions of the Constitution in this country since the inception of the 1979 Constitution from which the present Constitution originated.

In the case of Nafiu Rabi v. The State [1980] 8-9 S.C. 130, Sir Udo Udoma J.S.C., reminded this court of what this court should bear in mind constantly when interpreting the provisions of the Constitution. On page 148 - 149 of the report he said:-

“...that the functions of the Constitution is to establish a framework and principles of government, broad and “general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution. And where the question is whether the Constitution has used an expression in the wider or in the narrower sense, in my view, this court should whenever possible, and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution.

My Lords, it is my view that the approach of this court to the construction of the Constitution should be, and so it has been one of liberalism, probably a variation on the theme of the general maxim ut res magis valeat quam pereat. I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends “. (underlining mine)

See also Aqua Ltd. v. Ondo State Sports Council [1985] 4 N.W.L.R. (pt. 91) 622; Tukur v. Govt. of Gongola State [1989] 4 N.W.L.R. (pt. 117) 517; Ishola v. Ajiboye [1994] 6 N.W.L.R. (pt. 352) 506, and the cases of A.G. for Province of Ontario & Ors. v. A.G. for the Dominion of Canada [1912] A.C. 571 at pages 583-584; A.G. for New South Wales v. Brewery Employees Union of South Wales [1908] 6 C.L. 469 at pages 611-612; and Bank of New South Wales v. The Commonwealth [1947 - 1948] 76C.L.R. 1 at page 332. I would respectfully adopt the principles enunciated above for the purpose of the issue under consideration.

In the end, I hold that since section 7(1) (which has not been amended) provided expressly that the Government of every

State shall establish Local Government Councils, and provide for their structures, composition, finance and functions, the provision clearly implies that only the State Assembly must be responsible for the tenure of members of such Councils. The National Assembly has the corresponding powers only in respect of the Local Government Councils in the Federal Capital Territory, Abuja, (see section 299 of the Constitution) and where the National Assembly has the power under the Constitution to legislate on a matter, it can only do so within the provisions and in full compliance with the provisions of the Constitution. Any legislation which is inconsistent with those provisions is null and void and inoperative. (Section 1 (3) of the Constitution). Claim (1) therefore succeeds and is hereby granted.

On claims (ii) to (vi) of the plaintiffs' Amended Statement of Claim and issues for determination (ii) to (vi) in the plaintiffs' brief, I fully endorse the reasoning, findings and conclusions reached thereon by my learned brother Kutigi J.S.C., in the leading judgment and I adopt them as mine.

In the final analysis, I grant claims, (i) (ii) (b) to (e), (iii) and (iv) and dismiss claims (ii) (a) and (vi) of the plaintiffs. In respect of claim (v) which challenged the validity of sections 15-73 of Part II and sections 110 - 122 of Part IV of the Electoral Act 2001, I hereby declare that sections 15, 19(b) 20(1), 21 (1), 23, 25(b), (e), (g), (m), (n), (o) and (p) in Part II and section 110(1) (proviso only), section 111, section 112, section 113, section 114, section 115 (1)-(6), section 119, section 120, section 121 and section 122 as null and void and inoperative, I order accordingly, and make no order as to costs.

EJIWUNMI JSC

I was privileged to have read in advance the draft judgment just delivered by my learned brother, Kutigi. J.S.C. Though, I agree with him with regard to his conclusion and the reasoning leading thereto. I consider that I should add a few words of my own.

The genesis of this action was the passing into law a bill entitled the Electoral Act 2001 by the National Assembly to which the President of the Federal Republic of Nigeria gave his assent on 6th December, 2001. The said enactment made provisions classified under the following headings:-

- (i) National Register of Voters and Voters Registration (Part 1 thereof)
- (ii) Procedure at Election' (Part II thereof)
- (iii) Political Parties (Part III thereof)
- (iv) Procedure for Election to Local Government (Part IV thereof)
- (v) Determination of Election Petitions Arising from Elections (Part VI thereof)

Being of the view that the Electoral Act as promulgated by the Federal Government transgresses the powers granted to the National Assembly to enact laws for the peace, order and good government by the 1999 Constitution in furtherance, thereof, the plaintiffs who were originally 34 of the Federating States commenced this action against the Attorney-General of the Federation. They were however joined by the two remaining States, namely (Ondo and Plateau) with the leave of this court.

As the question raised by the plaintiffs was deemed as a dispute between the States and the Federation, and which is, whether the Federal Government has not impinged the 1999 Constitution, by reason of the promulgation of the Electoral Act, they commenced this action in this court by virtue of the provisions of section 232(1) of the 1999 Constitution, which reads:-

“Section 232(1)-

The Supreme Court shall, to the exclusion of any other court have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.”

Therefore, by their Amended Statement of Claim, the plaintiffs plead thus:-

“(7) The plaintiffs as Chief Law Officers of the various States, which they represent, are concerned with peace, order and good government in the entire Federation. The plaintiffs are similarly interested in ensuring the continuance of the Federal Republic of Nigeria.

(8) The plaintiffs shall also show that Electoral Bill, 2001 as assented to by the President purportedly repealed the Electoral Act, 1982. The plaintiffs shall contend that the Electoral Act, 1982 had prior to the enactment of the Electoral Bill, 2001 become spent and/

or otiose.

(9) The plaintiffs state further that the Constitution in sections 4, 5 and 6 respectively, makes provisions for the distribution of Legislative, Executive and Judicial powers of the Federal Republic of Nigeria between the Federal Government and the Government of the States. Sections 7 and 8 of the Constitution similarly make provisions with regard to the establishment and continuance of Local Government Councils.

(10) The plaintiffs shall demonstrate that the distribution of the Legislative powers of the Federal Republic of Nigeria between the Federal Government and the Government of the 36 States of the Federation has resulted in the enumeration of matters exclusively reserved for the Federal Government to legislate upon. Furthermore, the plaintiffs shall show that the Constitution enumerates in the Concurrent Legislative List matters upon which both the Federal Government (through the National Assembly) and the State Government (through the Houses of Assembly of the States) may legislate. Specifically, the plaintiffs shall contend as follows:-

‘(a) By virtue of the provisions of section 4(2) of the Constitution, the National Assembly shall have powers to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in part 1 of the Second Schedule to the Constitution.

(b) Subsection 3 of section 4 of the Constitution provides that the powers of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, except as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of the States.

(c) The Constitution further provides that the National Assembly shall have powers to make laws on any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the extent prescribed in the second column opposite thereto.

(d) The plaintiffs state that the power to make laws set out in the Concurrent Legislative List is in addition and without prejudice to the powers conferred by subsection 2 of section 4.

(e) Section 7(1) of the Constitution provides that the Govern-

ment of every State shall ensure the existence of Local Government under a law, which provides for the establishment, structure, composition, finance and functions of such Councils.

(f) Item 22 of the Exclusive Legislative List of the Constitution, empowers the National Assembly to make laws on the Election to the offices of President and Vice President or Governor and Deputy Governor and any other office to which a person may be elected under the Constitution, excluding to a Local Government Council or any office in such Council.

(g) Item 32 of the Executive Legislative List of the Constitution empowers the National Assembly to make laws with regard to the Incorporation, Regulation and winding up of Bodies corporate, other than Co-operative Societies, Local Government Councils and Bodies Corporate established directly by any law enacted by a House of Assembly of a State.

(h) Item 11 of the Concurrent Legislative List grants the National Assembly power to make laws for the Federation with respect to the registration of voters, and the procedure regulating elections to a Local Government Council.

(i) Section 197(1) of the Constitution established for each State of the Federation a State Independent Electoral Commission and the powers of the Commission are set out in Part II of the third Schedule to the said Constitution.

(j) The Constitution makes elaborate provisions relating to qualifications and disqualifications to all elective offices established by the said Constitution. The plaintiffs shall show that the Electoral Bill assented to by the President has introduced fresh qualifications and disqualifying factors other than those provided for by the Constitution.”

12. Whereof the plaintiffs have been damnified and claim against the defendant as follows:-

“(i) A declaration that no law enacted by the National Assembly can validly increase or otherwise alter the tenure of office of elected officers or as Councillors of Local Government in Nigeria except in relation to the Federal Capital Territory alone.

(ii) A declaration that the National Assembly has no power except in relation to the Federal Capital Territory alone to make any law with respect to the following matters or any of them, to wit:-

(a) the conduct of elections into the office of Chairman. Vice Chairman or Councillors of a Local Government Council in Nigeria.

(b) the division of Local Government Areas into wards for purposes of election into Local Government Councils in Nigeria.

B (c) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councillors of a Local Government Council in Nigeria.

(d) the date of election into a Local Government Council and

C (e) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office or a Councillor or member thereof vacates his seat in the Local Government Council.

D (iii) A declaration that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

E (iv) A declaration that save and except for laws for the Federation with respect to -

(a) the registration of voters, and

F (b) the procedure regulating elections to a local Government Council.

It is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to the office of Councilors therein.

G (v) A declaration that the provisions contained in Sections 15 to 73 and 110 to 122 of the Electoral Act, 2001 are, from the date of the commencement of the said Act inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and are accordingly null and void and inoperative.

H (vi) A declaration that by reason of the provisions of the Electoral Act 2001 which are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, the said Elec-

toral Act is rendered null and void and inoperative in its entirety.”

The defendant in response to the plaintiffs’ Amended Statement of Claim also filed a Statement of Defence. By the pleadings in the said statement of Defence, the defendant admits paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10(a),(b), (c), (d), (e), (f), (g), (h), (i) of the plaintiffs’ Statement of Claim. The defendants also admits paragraph B 10(j) of the plaintiffs’ Statement of Claim only to the extent that the Electoral Bill 2001 assented to by the President has not contravened the 1999 Constitution with regard to ‘qualifications and disqualification to all elective offices’ established by the Constitution. C

The defendant however in paragraph 6 (i), (ii), (iii), (iv), (v), (vi), (vii), (viii),(ix) avers as follows:-

(i) The Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998 has been expressly repealed by Decree No. 62 of 1999. Decree No. 36 of 1998 thus ceases to D have any effect whatsoever, any longer.

(ii) Election of Officers into Local Government Councils had taken place before the commencement of the 1999 Constitution. Accordingly, the election into the Local Government Councils was not done pursuant to the provisions of the 1999 Constitution. E

(iii) The National Assembly has inherent constitutional powers to determine the tenure of elected officers in Local Government Councils.

(iv) Sections 110,112,113(8), 115(2) and 119 of the Electoral Bill, 2001 has (sic) not contravened the provisions of the 1999 F Constitution, hence the failure of the plaintiffs to state the provisions of the 1999 Constitution that, were violated by the aforementioned sections of the Electoral Bill 2001.

(v) Part IV of the Electoral Bill 2001 is consistent with the G provisions of item 11, Part II, 2nd Schedule, of the 1999 Constitution.

(vi) Sections 25(1) and 27 of the Electoral Bill 2001 are clear, unambiguous and not inconsistent with each other.

(vii) The provisions of Parts, V, VI and VII of the Electoral Bill 2001 accord with the Legislative functions of the National Assembly H and do not in any way conflict with the Judicial powers of the Judiciary defined in Section 6 of the 1999 Constitution.

(viii) The Independent National Electoral Commission shall have power to register political parties in accordance with the provi-

sions of the Constitution and an Act of the National Assembly.

(ix) The National Assembly has powers to make laws with respect to the procedure regulating elections to a Local Government Council, while the Independent National Electoral Commission shall carry out such other functions as may be conferred upon it by an Act of the National Assembly.

7. WHEREOF the defendant urges the court to hold:-

“(a) That the Electoral Bill 2001 assented to by Mr. President is not inconsistent with the provisions of the 1999 Constitution.

(b) That proper and necessary parties to this action are not before the court.

(c) That the plaintiffs’ action lacks merit and is accordingly vexatious and an abuse of the court’s process.

(d) That the plaintiffs’ action ought to and should be dismissed.”

Pursuant to the hearing of the matter, the plaintiffs filed a joint brief by their counsel, Chief Rotimi Williams S.A.N. who also filed a reply brief to the defendant’s brief. At the hearing of the matter, two separate applications were heard. The first application brought on behalf of the Chairmen of Local Government Councils throughout the Federation by Chief Gani Fawehinmi S.A.N., sought for leave to be joined as defendants to the action all the Chairmen of Local Government Councils, as aforesaid. The application was unanimously refused and struck out accordingly. The other application, which was also heard and determined immediately in the court, is moved by Chief Michael Ozekhome. The application was for leave to join the National Assembly as a defendant to this action. After hearing counsel, the application was unanimously refused as it lacks merit and dismissed accordingly.

When the hearing of the case began, Chief Williams, S.A.N., appearing for the plaintiffs adopted and placed reliance on plaintiffs’ brief and the reply brief filed in support of the case for the plaintiffs. In addition, the learned Senior Advocate also addressed the court orally in amplification of his arguments in the briefs filed for plaintiffs.

Mrs. T.A. Osinuga, learned Solicitor-General for the Federation appeared for the defendant. She adopted and placed reliance also on the defendant’s brief and addressed the court further in amplification of her argument in the said brief.

For the plaintiffs, the questions raised for the determination of the action are as follows:-

“(i) Whether or not the National Assembly has any power to increase or otherwise alter the tenure of any of the offices mentioned in claim (i) of this action.

(ii) Whether or not the National Assembly has any power to make laws with respect to the matters specified in claim (ii) of this action.

(iii) Whether or not the National Assembly has any power to make laws with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(iv) What is the scope or limit of the legislative powers of the National Assembly with respect to Local Government elections under the 1999 Constitution?

(v) Whether or not the provisions of sections 15 - 73 and 110 - 122 of the Electoral Act 2001 or of any of the said sections are constitutional, valid and operative.

(vi) In the light of the answers to questions (i) to (v) whether or not the Electoral Act, 2001 is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or constitutional, valid and operative (as the defendant contends).

(vii) Whether there is any merit in the defendant’s contention that “the proper and necessary parties are not before the court.”

The defendant also submitted the following as questions fit for the determination of the action:-

“(i) Whether the Constitutional powers of the National Assembly to make laws regulating the procedures for all elections in Nigeria does not cover the power to make law as to the time when there should be general elections in Nigeria.

(ii) Whether the National Assembly needs to amend the Constitution pursuant to section 9 of 1999 Constitution before it can validly make law for peace and good government in Nigeria.

(iii) Whether the provisions of section 25(2)(b), (e), (g), (h), (j)(m)(n)(o) of Electoral Act 2001 are for the peace, order and good government of Nigeria or not.

(iv) In law, when can one say is the effective date of an Act of the National Assembly?

(v) Where there seems to be conflict (if any) between the provisions of a Decree that has been repealed and the provisions of an existing Act of the National Assembly, which supersedes?"

B After a careful perusal of the questions that were set out above by the parties, the questions posed for the plaintiffs are in my respectful view more germane for the determination of this action. Moreso, where in the case under consideration, the plaintiffs are the ones who are really the complainants against the defendant and had for that reason set down very clearly where by the provisions made in the Electoral Act, the National Assembly transgressed the powers granted to that august body by the 1999 Constitution.

D On this point, it is, I think, profitable to refer to the brief filed for the plaintiffs, where the learned Senior Advocate, Chief F.R.A. Williams at pages 2 and 3 put their dispute with the defendant as follows:-

E "Its is submitted that a very careful perusal of the provisions contained in the Electoral Act will reveal that those provisions transgress the legislative competence of the federal Government and made or purport to make very serious incursions into the legislative and executive functions of the States in the Federal Republic of Nigeria under the 1999 Constitution. The areas of these incursions are reflected in the reliefs claimed in the Amended Statement of Claim."

F "In its statement of defence the Federal Government has vigorously denied that certain specific provisions of the Electoral Act contravene the 1999 Constitution and in paragraph 7(a) of the Statement of Defence it urged the Supreme Court to hold:

'That the Electoral Bill 2001 assented to by the President is not inconsistent with the provisions of the 1999 Constitution.'

G "In pinpointing the precise dispute or controversy between the Federal Government and the States in this action it is important to lay emphasis on the fact that dispute or controversy does not depend on the existence of the Electoral Act as an enactment of the National Assembly. It goes beyond that in that the dispute or controversy is as to scope or limits of the legislative powers of the National Assembly. H What the enactment of the Electoral Act by the National Assembly does is to bring the dispute or controversy between the parties to

this action into the limelight. Strictly speaking therefore any repeal or re-enactment or alteration of the Electoral Act will not remove the dispute or controversy between the parties to this action. In short, the States comprising the Nigerian Federation have brought this action so as to enable the Supreme Court to determine the real matter or matters in controversy between the parties. The Supreme Court is accordingly invited to focus on the complaint of the States that under the 1999 Constitution the National Assembly does not have the legislative power to make laws with respect to the several matters indicated in the statement of claim of the plaintiffs in this action."

C While most of what has been stated above may require the pronouncement of this court, it must be borne in mind that the direct question this court is called upon to consider in this action is, whether the National Assembly has the power to legislate with regard to certain aspect of Local Government Councils to bind all the Federating States. Bearing this in mind I will now consider together questions (i), (ii) and (iv), as these questions relate directly to the powers of the National Assembly with regard to Local Government Councils. On these three questions, it is the contention of Chief Williams that by virtue of s. 7(1) of the 1999 Constitution, the governments of every State is directed to ensure the existence of the system of local government by democratically elected local government councils under a law providing for the following, namely; (i) Establishment; (ii) Structure; (iii) Composition; (iv) Finance and (v) Functions.

F It is also contended for the plaintiffs that though item 22 on the Exclusive Legislative List in the Second Schedule to the Constitution places within the exclusive legislative competence of the National Assembly, the making of legislation for election to the offices of the President and Vice President or Governor and Deputy Governor G and any office to which a person may be elected under the 1999 Constitution; it specifically excludes for this purpose the making of legislation for "election to a local government council or any office in such council."

H Reference was also made to items 11 & 12 on the Concurrent List. It is argued for the plaintiffs that when the two provisions are read together, it is clear that by items 12 on the same Concurrent Legislative List that item 11 does not preclude the State House of Assembly from making laws not inconsistent with respect to election

to a local government council in addition to but not inconsistent with any law made by the National Assembly.

The next argument for the plaintiffs is that by virtue of section 4(7)(a) of the 1999 Constitution, the House of Assembly of a State is empowered to make laws with respect to any matter not included in the Exclusive Legislative List. It is therefore the submission of Learned Senior Advocate that the National Assembly has no power to enact laws with respect to the conduct of elections into the office of Chairman, Vice Chairman or Councillor of a Local Government Council in Nigeria. It is not disputed however that the National Assembly has power to make laws with respect to "the registration of voters and the procedure regulating elections to a Local Government Council". It is the further submission for the plaintiffs that the power of the National Assembly to make laws with respect to the procedure regulating elections to a Local Government Council is predicated on the existence of laws with respect to elections generally. Hence, it is argued that the conduct of elections is not co-extensive with nor does it overlap the procedure for regulating elections.

With regard to the question as to whether the National Assembly has power to make laws with respect to the division of Local Government into wards for purposes of election into Local Governments in Nigeria, the case of the plaintiffs is that the National Assembly has no power to make laws thereon. It is therefore submitted for the plaintiffs that it is the House of Assembly of a State that has power to make laws with respect to the division of Local Government Areas into wards for the purposes of elections into Local Government Councils. The premise of this argument would appear to be based on the earlier contention that it is the House of Assembly of a State that should legislate with regard to the establishment of Local Government Councils. On that basis, it is argued that the division into wards of a locality or area in the Local Government should be seen as incidental to the creation of the body of individuals (representing each ward) who will contribute the aggregate known as a Local Government Council. On the qualification or disqualification of persons as candidates for election as Chairman, Vice Chairman or Councillor of a Local Government Council in Nigeria, the contention made for the plaintiffs is that the qualification or disqualification of voters for purposes stated above does not fall within the scope of the

very limited powers conferred on the National Assembly under the Constitution pertaining to Local Government elections.

The Learned Solicitor-General in the brief filed in support of the defendant's Statement of Defence in what was referred to as Question 1 with claims (i), (ii), (iii) & (iv) of the plaintiff's Amended Statement of Claim. In opening her argument reference was made to paragraphs 6(iii) and 6(ix) of the pleadings of the defendant's statement of defence. The Learned Solicitor-General of the Federation then went on to point out that prior to the commencement of the 1999 Constitution, elections to offices in Local Government Councils were conducted under the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998. Further reference to s. 7 of Decree No. 36 of 1998, which reads:-

"A Local Government Council or an Area Council shall stand dissolved at the expiration of the period of 3 years commencing from the date of the first sitting of the Council."

Then she made the submission that as the 1999 Constitution does not provide for the tenure of elected officers and as there are no provisions in the said Constitution which empowers the State Assembly to determine the tenure of Local Government Councils, it is the 1999 Constitution that governs the tenure of Council officials who were elected under Decree No. 36 of 1998. In support of that proposition, she referred to s. 312 (2) of the 1999 Constitution. To appreciate the meaning and effect of the further statement of the learned Solicitor-General, I consider it necessary to reproduce part of her statement from pages 5 to 8 of her brief which provoked the reply brief filed by the plaintiffs. From the foregoing, three issues are clear namely:

"(i) It was the Federal law that provided for the tenure of the elected officers of the Local Government Council and not State law.

(ii) It was the Federal law that repealed the Decree that stipulated the tenure of elected officers of the Local Government.

(iii) It is not only logical but represents a good law that if the need arises to give life to any of the provisions of the repealed Federal laws, it is only the National Assembly and it alone, that has the inherent Constitutional power to enact the appropriate legislation."

'The plaintiffs disagree with the position of the law and held on page 8 lines 9-14 of their brief that:'

“...by section 7(1) of the Constitution it is expressly enacted that the Government of every state shall provide for the establishment of Local Government Councils. It is submitted that this provision clearly implies that it is the State which must be responsible for the tenure of members of such Councils. “

B “The defendant submits with respect that the plaintiffs misconstrued the position of the law when they construe “ESTABLISHMENT OF LOCAL GOVERNMENT COUNCIL” to be synonymous with
C TENURE OF ELECTED MEMBERS OF THE COUNCIL in their brief quoted above. BOTH THE LOCAL GOVERNMENT (BASIC CONSTITUTIONAL AND TRANSITIONAL PROVISIONS) Decree No. 36 of 1998 and the provisions of 1999 Constitution of Nigeria make it clear that there is a distinction between “ESTABLISHMENT” and “TENURE” with respect to the elective office recognised by those laws. Thus, Decree No. 36 of 1998 recognised the “ESTAB-
D LISHMENT” of Local Government Council in section 9 but creates “TENURE” under section 18 with different ingredients. Equally, the constitution creates different conditions and ingredients with respect to “ESTABLISHMENT” and “TENURE” of offices known to the Con-
E stitution. Thus section 47 provides for the “ESTABLISHMENT” of the National Assembly while section 64 deals with the “TENURE”. Fur-
F thermore, section 130 makes provision for the “ESTABLISHMENT” of the office of the President while section 135 of the same Constitu-
G tion defines the “TENURE”, with respect to the “ESTABLISHMENT” and “TENURE” of the Governor, sections 176 and 180 respectively are very distinct on the matter as submitted on behalf of the defen-
dant that nowhere in the Constitution are the States of the Federation empowered to determine the tenure of Local Government Councils. While it is true to say that where the Exclusive and concurrent Lists are silent as to certain matters, the House of Assembly shall have
G powers to legislate on such matters. But this can only be true where there are no provisions in other laws conferring the powers on such matters on the National Assembly.’

‘Under section 7(1) of the 1999 Constitution, the State Governments are to provide for:

- H (f) Establishment
(g) Structure
(h) Composition

- (i) Finance, and
(j) Functions

of Local Government Councils. This provision, item 22 of the Ex-
clusive Legislative List and items 11 and 12 of the Concurrent Leg-
islative List, do not empower the State Governments to determine
the tenure of Local Government Council. ‘

‘It is further submitted, and reliance is placed on the case of Attorney-General Ogun State vs. Attorney-General of the Federation [1982] 3 N.C.L.R. 166 at 812. per Udo Udoma J.S.C.. that:

“The Constitution was declared by the people of Nigeria to
C have been made, enacted and given to themselves ‘for the purpose of promoting the good government and welfare of all persons in our country in the principles of Freedom, Equality and Justice, and for the purpose of consolidating the unity of our people. “

‘The above declaration stresses the importance of Preambles D
in the interpretation of the Constitution. The preamble to the 1999 Constitution emphasizes on the need to promote: Freedom, Equality and Justice, ‘

‘In the light of the foregoing, the defendant humbly urges the
E court to hold that “ESTABLISHMENT” of an office and the “TEN-
URE” of same are not the same. The defendant also urges the court to hold that, the powers of the State Assembly to “ESTABLISH” Local Government Council hinder section 7(1) of the Constitution, cannot, by any stretch of imagination be synonymous with the power to de-
F termine/ decide the “TENURE” of the occupants as being claimed by the plaintiffs. ‘

‘On the other hand, the defendant submits that item 11 of Part II of the Second Schedule to the 1999 Constitution which deals with the “CONCURRENT LEGISLATIVE LIST” provides that: G

“The National Assembly may make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a Local Government Council.”

‘The defendant submits that, the power of the National As-
H sembly to make law on the procedure regulating elections include the powers to legislate on when there should be election and not on the conduct of the election itself. This position of the law becomes distinct when one examines the meaning of the word “PROCEDURE”. The Black’s Law Dictionary 6th Edition by Henry Campbell at pages

1203-1204 define??? "PROCEDURE" thus:

"The mode of proceeding by which a legal right is enforced as distinguished from the substantive law which gives or defines the right; the machinery as distinguished from its product ... the arrangement by which actions are carried out. "

B "The oxford Advanced Learners Dictionary of Current English, 5th Edition by Jonathan Crowther concurs with the definition given by the Black's Law Dictionary when it defines "ARRANGEMENT" to include "PROCEDURE".

C It thus provides:

"Arrangement is the action of putting something in order; a plan, procedure, a method of doing something..."

'and to 'regulate' means:

1. To direct, manage or control according to certain rules, principles etc.

D 2. to adjust according to standard, degree. See 1. FUNK AND MAGNALLS STANDARD COLLEGE DICTIONARY at page 1133.'

E 'It can thus safely be submitted that the meanings of 'procedure' and 'regulate' used in item 11 of the Concurrent List can be extended to mean determination of the tenure or life of the thing established.'

F 'The interpretation and meaning posited above becomes appropriate, viewed from the angle that in interpreting the provisions of the Constitution, a Constitutional provision should not be construed so as to defeat its evident purpose. See: Attorney-General Bendel State vs. Attorney-General of the Federation & 22 ORS. [1982] 3 N.C.L.R. J at 66, 71 and 74.'

G 'Thus, while the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning. Words of the Constitution are therefore not to be read with stultifying narrowness."

H 'For the avoidance of doubt on the purview of the powers of the National Assembly to make law on procedure regulating elections to a local government council, the power of the House of Assembly to make law in respect to elections to a Local Government Council provided in item 12 of Part II on the Concurrent Legislative List was defined, limited and made subject to the powers of the National Assembly in items 11. '

'The said item 12 of the Concurrent Legislative List provides:

"Nothing in paragraph 11 hereof shall preclude a House of Assembly from making laws with respect to election to a Local Government Council IN ADDITION TO BUT NOT INCONSISTENT (sic) with any law made by the National Assembly."

B 'The underlined section of item 12 of the Concurrent Legislative List reproduced above epitomizes the principle of "covering the field" when it comes to conflict between the Federal Legislation and the State Law on issues not specifically provided for in the constitution. The Supreme Court of Nigeria upheld this position of the law in the case of The Military Governor, Ondo State & Another vs. Victor Adegoke Adewumi [1988] 3 N.W.L.R. pt. 82 page 280 at page 283 ratio 11 where this Honourable Court opined,

D 'By the doctrine of 'covering the field' in Nigeria's Federalism, where the Federal Government has validly legislated on matter any State Legislation on the same matter which is inconsistent with the Federal Legislation will be void to the extent of inconsistency.'"

Having regard to all her submissions above, the learned Solicitor General therefore urges the court to hold that:

E "(i) The power to make law regulating the procedure for elections for Nigeria include the power to legislate as to when there should be any of those elections.

F (ii) The "PROCEDURE FOR ELECTION TO LOCAL GOVERNMENT" contained in Part IV of the ELECTORAL ACT 2001 was validly executed by the National Assembly in exercise of its Constitutional powers to make law for the "PROCEDURE REGULATING ELECTIONS TO A LOCAL GOVERNMENT COUNCIL" as enshrined in item 11 of the Concurrent Legislative List and to dismiss the plaintiffs case as canvassed on their claim 1."

G As aforesaid, Chief F.R.A, Williams, S.A.N., for the plaintiffs filed a reply brief. The thrust of his submission taken from the reply brief reads thus:-

H "It is submitted that contrary to their averment that it was the Federal Law that provided for tenure of Local Government Council and not State Law what they are clothing the National Assembly with is ultra vires the National Assembly, having regard to constitutional provisions. With utmost respect their submission in 3.09(ii) and (iii) to inherent powers has no authority in Law or under the Constitution.

It is also with respect, elementary that whosoever establishes the Local Government Council, in this case, constitutionally the States, would also have the power to prescribe the tenure. Procedure will only follow when it has already been determined that there is to be an election. Procedure does not and cannot determine when there will be that election - The Chairman, Vice Chairman and Councilors have thus been elected for three years. That is not being denied. The Dictionary definitions supplied by the defendants are apt and correct and the application is against their stand on this issue. “

Now the first question is, whether it is the National Assembly that has the power to make laws on the procedure regulating elections, and to legislate on when there would be an election. The argument proffered for the defendant in the brief filed on its behalf has been referred to above. However, it suffices to say that the thrust of the argument on this question is that it must be recognised that the “Establishment” of an office and the tenure of same are not the same. Hence the defendant argues that the court should hold that the powers of the State Assembly to “Establish” Local Government Council under section 7(1) of the Constitution cannot by any stretch of imagination be synonymous with the power to determine/ decide the “Tenure” of the occupants. It is also part of the submission made for the defendant that it can safely be stated that the meanings of ‘procedure’ and ‘regulate’ used in item 11 of the Concurrent Legislative List can be extended to mean determination of the tenure or life of the thing established, i.e. the Local Government Council.

From the stand taken by the defendant, there is no doubt that it is conceded that by section 7(1) of the Constitution which says that:-

“The system of local government by democratically elected local government councils is under the Constitution guaranteed, and accordingly the Government of every State shall subject to section 8 of this Constitution ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils, “ the State Assembly of each State of the Federation is vested with the power to establish local government councils within its jurisdiction. But, it is the contention of the learned Solicitor General that the State Assembly of a State cannot upon that section, grant tenure to Local Government Council. It is also further argued

that by virtue of item 11 on the Concurrent Legislative List, which states that the National Assembly shall make laws with respect to the registration of voters and the procedure regulating elections to a local government council, should be read to include the power to grant tenure to Local Government Councils. In the argument leading to this stand by the Learned Solicitor General, we were referred to the meaning of Procedure as given in Black’s Law Dictionary 6th Edition by Henry Campbell at pages 1203 - 1204 thus:-

“The mode of proceeding by which a legal right is enforced as distinguished from the substantive law which gives or defines the right, the machinery as distinguished from its product ... the arrangement by which actions are carried out.”

And in the Oxford Advanced Learners Dictionary, ‘Arrangement’ is defined as “the action of putting something in order; a plan procedure, a method of doing something...” and “regulate” is defined to mean:-

(1) To direct, manage or control according to certain rules, principles etc,

(2) To adjust according to a standard, degree”

In my respectful view, it is indeed very difficult to understand how the Learned Solicitor General could, with the definition of the words “procedure” and “regulate” given as above submit that those words in item 11 of the Concurrent List can be extended to mean “determination of the tenure or life of the thing established”. I do not think that in the plain language of the provision, item 11 could be extended such that the words ‘procedure’ and ‘regulate’ therein could be extended for me to hold that the National Assembly is empowered to determine the tenure of life of any Local Government Council. The plain meaning of the words as explained above certainly suggests that the National Assembly has the power to make laws for the Federation with respect to the registration of voters and the procedure regulating elections to a local government council. That is the extent of the powers of the National Assembly and I so hold. I must also reject the contention that the power of the National Assembly could be extended under item 11 to include the grant of tenure to Local Government Councils.

The question still remains as to who between the National Assembly and the House of Assembly of a State is empowered by the Constitution to determine the tenure of Local Government Council,

and holders of elective offices in the Council. I think it is fair to say that at page 6 of the defendant's brief that it was acknowledged therein, that item 22 of Exclusive List and items 11 and 12 of the Concurrent Legislative List, do not empower the State Governments to determine the tenure of Local Government Council. It is also clear that section 7(1) of the Constitution is also silent on the tenure of Local Government Councils and those holding elective offices in them.

It seems to me therefore that this matter becomes residual, not being on the Exclusive List by virtue of s. 4 (7(a) of the Constitution. The provisions of s. 4 (7(a) read thus:-

"The House of Assembly of a State shall have power to make laws for the peace order and good government of the State or any part thereof with respect to the following matters, that is to say:-

(a) any matter not included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution."

The argument for the defendant by the learned Solicitor General of the Federation that the provision of item 11 of the Exclusive Legislative List be stretched so as to vest in the National Assembly the power to legislate on the tenure of Local Government Councils is simply untenable having regard to the above provisions of the Constitution. By not vesting power under the Exclusive Legislative List to do so, the makers of the Constitution intended that the power to legislate on Local Government Councils should not be exercised by the National Assembly but by the House of Assembly of a State. I therefore hold that it is for the House of Assembly of a State to legislate on the tenure of elective offices in a Local Government. I have earlier in this judgment referred to the submission of Mrs. Osinuga for the defendant with, regard to the repeal of Decree No. 36 of 1998, section 7 of which gave a 3-year tenure to all elective offices in the local government councils. The Decree was repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 36 of 1999. In the view of learned counsel for the defendant, with the repeal of Decree No. 36 of 1998, the tenure of those elected into various offices in the Local Government Councils would now be determined by Decree No. 63 of 1999. That submission is untenable, as the National Assembly has been shown to have no power to enact laws in that regard for Local Government Councils.

However, it does appear that the key to this question is section

6(1) of the Interpretation Act. Cap 192 Laws of the Federation of Nigeria 1990. It reads:-

"6(1) The repeal of an enactment shall not

(a) revive anything not in force or existing at the time when the repeal takes effect:

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment;

(c) affect any right, privilege, obligation or liability accrued or incurred under the enactment;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the enactment;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment. And any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed."

It is manifest, having regard to the provisions of section 6(i) of the Interpretation Act, that the tenure of those elected officials remains 3 years, unless increased by the State House of Assembly which has the power to do so.

Having arrived at this conclusion with respect to the tenure of Local Government Councils that it is the State House Assembly of a State that is empowered to make laws on such matters by reasons of the 1999 Constitution, it is necessary to observe that as the National Assembly and the state Houses of Assembly are creations of the Constitution, the lower they exercise are derivable only from the Constitution. It is therefore incorrect for the learned Solicitor General to argue that these bodies possess an inherent jurisdiction to enable them enact laws for the Federation or the States of the Federation outside the powers given them in the Constitution.

In the course of this judgment I had reviewed the argument for the plaintiffs that the National Assembly has no power with respect to the conduct of elections into the Office of Chairman, etc of a Local Government Council in Nigeria. It does seem that that argument is not sustain-able. The conduct of elections to such offices is in my respectful view within the purview of the National Assembly who by virtue of item on the Concurrent Legislative List is empowered to make laws

with respect to the conduct of elections. With respect however to the qualification or disqualification of persons as candidates for election as Chairman, Vice Chairman or Councillor of a local government council, it is my view that this is a matter of substantive law for the State House of Assembly to determine. It is not a matter concerning election procedure for the National Assembly to enact laws upon.

In respect of the division of a local government council area into wards, it seems to me that the House of Assembly of a State has the power to make laws thereon. I am guided in this view by s. 7(1) of the Constitution, which provides for the establishment, structure, composition, finance and functions of such councils.

For all the reasons given above I would grant the declarations sought by the plaintiffs in claims (i), (ii), (b)-(e) and (iv) as they have succeeded.

The declaration sought in claim (ii)(a) fails and it is refused by me. The remaining questions for consideration are (iii), (v) and (vi). They read thus:-

“(iii) Whether the National Assembly has power to make laws with respect to the qualification or disqualification of candidates to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 without complying with the requirements of section 9 of the Constitution of the Federal Republic of Nigeria, 1999.

(v) Whether or not the provisions of sections 15-73 and 110-122 of the Electoral Act 2001 or any of the said sections are constitutional, valid and operative.

(vi) In the light of answers to Questions (i) to (v), whether or not the Electoral Act, 2001 is unconstitutional, null and void and inoperative in its entirety (as the plaintiffs contend) or unconstitutional, valid and operative (as the defendant contends).

As I was privileged to have read in advance the draft judgment of my learned brother Ogundare J.S.C., and as I agree entirely with his reasoning and conclusion reached thereon, I do not consider it necessary to make any further contribution to the above issues in this judgment. I therefore adopt fully this part of his judgment as my own. I also make the same orders and declarations that he has made in the said judgment. Before doing so, may I note that issue 7, which arose out of the pleadings of the defendant, was not argued

in the defendant's brief in support of the contention that the proper and necessary parties to this action are not before this court. It must therefore be taken as abandoned.

To conclude, and for the avoidance of doubt, I hereby grant plaintiffs' claims (i),(ii)(b)-(e), (iii) and (iv) and part of (v). I dismiss claims (ii)(a) and (iv). I find sections 15, 20(1) and (4), 21 (1) and 25, the PROVISO to section 110(1), sections 111, 112, 113, 114, 115(1)-(6), 119, 120, 121 and 122 of the Electoral Act 2001 invalid. Consequently, I make the following declarations:-

1. I declare that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federation Republic of Nigeria, 1999.

2. I further declare that the National Assembly has no power except in relation to the Federal Capital Territory, Abuja to make any law with respect to the following matter or any of them, to wit:-

(i) the division of Local Government Areas into wards for purposes of election into Local Government Council in Nigeria;

(ii) the qualification or disqualification of persons as a candidate for election as Chairman, Vice Chairman or Councillor of a Local Government Council in Nigeria;

(iii) the date of election into a Local Government Council; and

(iv) the prescribing of the event upon the happening of which a Local Government Council stands dissolved or the Chairman or Vice Chairman of a Local Government Council vacates his office. I declare that the National Assembly has no power to make any law with respect to the qualification or disqualification of candidates for elections to be held pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999.

4. I declare that save and except for laws for the Federation with respect to -

a. the registration of voters and

b. the proceedings regulating elections to a Local Government Council. It is the House of Assembly of a State and not the National Assembly which has the power to make laws with respect to matters relating to or connected with elections to the office of Chairman or Vice Chairman of a Local Government Council in that State or to

the office of Councilors therein.

5. I declare that the provisions contained in sections 15, 20(1), 20(4), 21(1), 25, the proviso to 110(1), 111, 112, 113, 114, 115, 116, 119, 120, 121 and 122 of the Electoral Act, 2001 are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 and are accordingly null and void and inoperative.

B

I therefore grant as stated above the claims of the plaintiffs for the reasons given and the fuller reasons given in the judgment of my learned brother, Kutigi, J.S.C. I make no order as to costs.

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