

**SUPREME COURT OF NIGERIA**  
FRIDAY 31ST JANUARY, 2003. SC. 360/2001  
**CORAM:- M. L. UWAI S C J N , I. L. KUTIGI ,**  
**U. MOHAMMED, S. U. ONU, A. I. KATSINA-ALU,**  
**S. O. UWAIFO A. O. EJIWUNMI, JJSC**

1. CHIEF GANI FAWEHINMI  
2. HON. MR. JUSTICE  
CHUKWUDIFU OPUTA (RTD) ..... APPELLANTS  
3. HUMAN RIGHTS VIOLATIONS  
INVESTIGATION COMMISSION  
AND  
1. GENERAL IBRAHIM  
BABANGIDA (RTD)  
2. BRIGADIER-GENERAL  
A. K. TOGUN (RTD) ..... RESPONDENTS  
3. BRIGADIER-GENERAL  
HALILU AKILU (RTD)

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CONSTITUTIONAL LAW - Constitution - Supremacy of - Without Constitutional provision - No valid law can be made - As to apply throughout the Federation of Nigeria (H1)

LEGISLATURE - National Assembly - Powers - As F.C.T. Abuja is under Federal Government - National Assembly can validly legislate on - Constitution of Tribunals of Inquiry for the territory (H2)

LEGISLATURE - National Assembly - Legislative power - Under 1999 Constitution - National Assembly cannot enact general law on tribunals of inquiry - To have effect throughout Nigeria (H3)

***FACTS***

The President of the Federal Republic of Nigeria constituted a Judicial Commission of Inquiry to investigate human rights violation in Nigeria. It was by a Statutory Instrument No.8 of 1999 which states that it was made by Mr. President in exercise of the powers conferred on him by section 1 of the Tribunals of Inquiry Act, 1966 (now Cap. 447 LFN 1990). The Commission was given mandate to

inter alia, ascertain the causes, nature and extent of human rights violations with particular reference to all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria between the 1<sup>st</sup> of January 1984 and 28<sup>th</sup> of May 1999.

Two actions were filed in the Federal High Court Abuja, contesting the validity of the aforementioned Act and certain actions of the Commission. The first suit No. FHC/L/CS/1158/2000 was brought by originating summons by Rtd. Brig-Gen A. K. Togun (plaintiff/2<sup>nd</sup> respondent) against 2<sup>nd</sup> and 3<sup>rd</sup> appellants. The second suit No. FHC/L/CS/1163/2000 was also commenced by originating summons jointly by 1<sup>st</sup> and 3<sup>rd</sup> respondents against same appellants in the 1<sup>st</sup> suit. 1<sup>st</sup> appellant (Gani Fawehinmi) pursuant to an application in the court was joined as a 3<sup>rd</sup> defendant in each case. The trial court, being satisfied that though the two suits were filed separately, the claims and the reliefs sought were identical, therefore ordered that the same be consolidated and heard as one. Subsequently, the matter came before the Court of Appeal as a result of the reference made to it by the Chief Judge of the Federal High Court Lagos. The court held inter alia, that certain sections of the Act are in excess of legislative competence of the National Assembly, for contravening sections 35 and 36 of the 1999 Constitution. Being dissatisfied, 1<sup>st</sup> appellant filed appeal in Supreme Court, while 2<sup>nd</sup> and 3<sup>rd</sup> appellants jointly filed another appeal in the same court.

### **ISSUES FOR DETERMINATION**

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

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

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

# **HELD** (Unanimously allowing the appeals in part per

## **UWAIFO JSC)**

### *Constitution - Supremacy of*

**1. The power given to Parliament to make laws in regard to Tribunals of inquiry as reflected in the Legislative Lists contained in the relevant provisions of the Schedule to the 1963 constitution [Item 39 of the Exclusive Legislative List and Item 25 of the concurrent Legislative List] was, for whatever reason, denied the National Assembly in both the 1979 and 1999 Constitutions of the Federal Republic of Nigeria. Without such constitutional provisions, no valid law can be made, or can exist, standing on its own and of a general nature, to apply throughout the Federation of Nigeria on the strength of which the President may set up a tribunal or commission of inquiry. This is because no law not specifically authorised or backed up in our Constitution can be lawfully passed for the Federation of Nigeria by the Federal legislature. It is the limits set under relevant provisions of the Constitution that define and determine the frontiers of the laws that can be enacted. That is the hallmark of constitutional democratic governance which is seen as a reflection of the power granted by the people to meet their aspirations, and none else. In essence, that means that the National Assembly cannot enact a general Law for the establishment of tribunals of inquiry for, and applicable in, the Federation of Nigeria. (p. 277 G)**

### *National Assembly - Power*

**2. As the Federal Capital Territory (FCT) Abuja is under the jurisdiction of the Federal Government, the constitution of tribunals of inquiry for the territory has accordingly become a residual matter over which the National Assembly can legislate as if the FCT Abuja were a State by virtue of sections 4(4)(b) and 299 of the 1999 Constitution, (p. 278 E)**

### *National Assembly - Legislative power*

**3. The Tribunals of Inquiry Act, 1966 promulgated by the Fed-**

*eral Military Government for the entire Federation under the enabling laws is an existing law pursuant to section 315 of the 1999 Constitution and is deemed to be an Act enacted by the National Assembly for the Federal Capital Territory Abuja only and a Law enacted by a State House of Assembly under the residual powers of both legislatures. This is because the National Assembly has no power under the 1999 Constitution to enact a general law on tribunals of inquiry in the form of the said Act to have effect throughout the Federation of Nigeria.*  
 B (p. 283 G)  
 C

### **REPRESENTATION**

Tayo Oyetibo with G. Ogokeh, Esq., M.I.N. Duru, Esq. (Director of Public Prosecutions), for the Appellants  
 D Chief Chris Uche with C.A.C. Nnadi, Esq., A. Dimonye, Esq. and G. M. Obey, Esq., for the Respondents

### **CASES REFERRED TO**

Doherty v. Balewa (1961) 2 SCNLR 256  
 E Balewa v. Doherty (1963) 2 SCNLR 155  
 Bamaiyi v. A-G Federation (2001) 12 NWLR (Pt. 727)  
 A-G Lagos State v. Dosunmu (1989) 3 NWLR (Pt.111) 552  
 Adisa v. Oyinwola (2000) 10 NWLR (Pt. 674) 116  
 F Ikine v. Edjerode (2001) 18 NWLR (Pt. 745) 446  
 Kaduna State v. Kagoma (1982) 3 NCLR 1092  
 A-G Benue State v. Ogwu (1983) 4 NCLR 213

### **STATUTES REFERRED TO**

G Constitution of the Federal Republic of Nigeria 1999, ss. 6(6)(d), 35, 36, 295(2), 315  
 Tribunals of Inquiry Decree No. 41 of 1966, ss. 3(4), 5(c)(d), 8(d), 10, 11(1)(b), 11(3), 11(4), 12, 15(a) and 18(1)(b)

### **LEAD JUDGMENT BY UWAIFO JSC**

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

lows:

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

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

The answers given by the Court of Appeal provoked the two appeals with which I shall deal in this judgment. Before I come to those answers, I state some relevant facts of the case. The President of the Federal Republic of Nigeria constituted a Judicial Commission of Inquiry (the Commission) for the investigation of human rights violation in Nigeria. It was by a Statutory Instrument No.8 of 1999 (later amended by a Statutory Instrument No. 13 of 1999) which states that it was made by Mr. President in exercise of the powers conferred on him by section 1 of the Tribunals of Inquiry Act, 1966, now to be found in Cap. 447, Laws of the Federation of Nigeria 1990, (the Act) and of “all other powers” enabling him in that behalf. The Commission was composed of eight members under the Chairmanship of the Honourable Justice Chukwudifu Oputa, JSC (Rtd.) who was made the 1st defendant to the two actions brought to contest the validity of the Act and certain actions taken by the Commission. The appellant in one of the appeals - Chief Gani Fawehinmi - was, upon application by him, joined as the 3rd defendant in the actions.

The Commission was given terms of reference which were that it shall-

“(a) ascertain or establish the causes, nature and extent of human rights violations or abuses with particular reference to all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria between the 1st day of January 1984 and the 28th of May, 1999;

(b) Identify the person or persons, authorities, institutions or organizations which may be held accountable for such mysterious deaths, assassinations or attempted assassinations or other violations or abuses of human rights and determine the motives of the viola-

tions or abuses, the victims and circumstances thereof and the effect on such victims or the society generally of the atrocities;

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

(d) Recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress the injustices of the past and prevent or forestall future violations or abuses of human rights;

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

In the course of the inquiry, the Commission issued summons for service on persons to testify as witnesses, among whom were the plaintiffs. The plaintiffs resisted being compelled to attend as witnesses. They proceeded to court instead. In the originating summons by one of them - Brig. General A.K. Togun (Rtd) - he stated his claim as follows:-

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

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

(iii) An order of prohibition prohibiting the 1st and 2nd defendants, their servants and agents whosoever or howsoever from

(a) sitting as a body empowered to exercise powers or functions claimed to be conferred upon it pursuant to the Tribunal of Inquiries Act, Cap. 447, Laws of the Federation of Nigeria or exercising any of the aforementioned powers.

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

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

*“Answer to Question 1*

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

*Question No.2*

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

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

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

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

*Federal High Court.*

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

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

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

D “1. Whether or not the Court of Appeal was right in holding that the Tribunals of Inquiry Act, Cap. 447 is an existing law and that sections 5(c), 10, 11(1)(b), 11(3), 11(4) and 12 of the same Act were invalid for not having been brought into conformity with section 15 of the 1999 Constitution of the Federal Republic of Nigeria? (Note: section 5(d) was inadvertently omitted.)

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

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

G “35.-(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law -

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

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



partiality.

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

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

(2) *The appropriate authority may at any time by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.* C *"The relevant sections of the Act provide thus:*

*"5. Subject to the provisions of this Act, a tribunal shall have and may exercise any of the following powers, that is to say-* D

(c) *The power to summon any person in Nigeria to attend any meeting of the tribunal to give evidence or produce any document or other thing in his possession and to examine him as a witness or require him to produce any document or other thing in his possession, subject to all just exceptions. Summons issued under this paragraph may be in Form A in the Schedule to this Act, and shall be served by the police or by such person as the members may direct,* E

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

*10. Any person who, after service on him of a summons to attend as a witness or to produce a book, document or any other thing and, notwithstanding any duty of secrecy however imposed,*

*fails or refuses or neglects to do so or to answer any question put to him by or with the concurrence of the tribunal shall be guilty of an offence, and liable on summary conviction to a fine of two hundred naira or to imprisonment for a term of six months:*

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

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

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

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

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

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

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

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

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

*2. No punishment for contempt shall be imposed by tribunal B until the member shall have heard the offender in his defence.*

Similar provisions were considered by both the Federal Supreme Court. See *Doherty v. Balewa* (1961) 2 SCNLR 256, and the Privy Council. See *Balewa v. Doherty* (1963) 2 SCNLR 155. In that case, the sections which empowered the Commission of Inquiry to impose a sentence of fine or imprisonment were declared void being in contravention of section 20(1) of the 1960 Constitution which forbade a deprivation of personal liberty by any order save one made by a court of justice. A similar situation has arisen in the present case C as regards violation of sections 35(1) (a) and 36(1) of the 1999 Constitution. D

Mr. Oyetibo, learned counsel for the 3rd defendant/appellant, contends with particular reference to the answer to question No.1 given by the court below, as already quoted in this judgment, that it was not only rigmarole but also a contradiction in itself, and was wrong. He submits that the Court of Appeal did not answer the questions referred to it. It did not say, according to him, whether or not the Act took effect as an Act passed by the National Assembly but that from an erroneous and inadequate approach went to what could be no part of the answer, namely, that Mr. President had failed and/or neglected to make modification in the text of the Act. He contends F that the court should simply have answered the questions and had no jurisdiction to rehear the case, citing by analogy *Bamaiyi v. Attorney-General of The Federation* (2001) 12 NWLR (Pt. 727) 468. He says while the first two sentences of the first answer were direct enough, the remaining part of the answer went astray and introduced a confusion to the earlier part. His further submission as contained in the brief of argument is that H

*“No question was referred to the Court of Appeal as to who was the appropriate authority in respect of Decree No. 41 of 1966 and whether or not the appropriate authority has made necessary textual modification to the said Cap. 447 as would bring it in confor-*

*mity with the 1999 Constitution as provided in section 315 of the Constitution. It must be noted that the question whether or not textual modification has been made to a particular law by the appropriate authority is one of fact or at best mixed law and fact. A party who wishes to prove such a fact would necessarily have to tender the relevant gazette in proof of that fact or the court would, by virtue of section 74(1)(b) of the Evidence Act, have to take judicial notice of (the) same.”*

Learned counsel for the plaintiffs/respondents, Chief Uche, has argued that it was not expected and it would not have been enough that the Court of Appeal should give an answer to question No. 1 and stop short of answering whether or not the Act is also “*a law with respect to any matter on which the National Assembly is empowered by the Constitution to make laws.*”

He then concluded that  
*“the Court of Appeal was correcting deciding that in the absence of necessary modification or textual amendment of the Tribunals of Inquiry Decree by the President, the Decree did not take effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the 1999 Constitution.”*

The learned Director of Public Prosecutions, Mr. Duru, who is counsel for the 1st and 2nd defendants/appellants, put up as his main argument that the court has no jurisdiction to question the validity of the Act which was as promulgated by the Federal Military Government as a Decree i.e. Decree No. 41 of 1966, citing such cases as *Uwaifo v. Attorney-General, Bendel State* (1982) 7 SC 124; *Attorney-General, Imo State v. Attorney-General, Rivers State* (1983) 2 SCNLR 108; (1983) 8 SC 108; *Din v. Attorney-General, Federation* (1988) 4 NWLR (Pt. 87) 147; *Attorney-General, Lagos State v. Dosunmu* (1989) 3 NWLR (Pt.111) 552; (1989) ANLR (Reprint) 504. I think I should dispose of this misconceived submission off-hand which Chief Uche adequately replied to on behalf of the 1st and 2nd defendants/appellants. The cases cited do not fit into the facts of the present case. Section 6(6)(d) of the 1979 Constitution [then relevant and applicable but repeated still as s. 6(6)(d) of the 1999 Constitution] was meant to protect the de jure authority and the integrity of the competence which the Military Government assumed to make laws for the country between 15 January, 1966 and

30 September, 1979 from being questioned in court. It has nothing to do with whether such laws, if still existing, cannot be considered by the court as to their consistency with the 1979 Constitution or any other law and therefore as to their validity. That was provided under section 274(3) of that Constitution thus:

*“274(3) Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say*

*(a) Any other existing law;*

*(b) A Law of a House of Assembly;*

*(c) An Act of the National Assembly; or (d) any provision of this Constitution.”*

This provision is repeated in section 315(3) of the 1999 Constitution. Chief Uche cited Adisa v. Oyinwola (2000) 10 NWLR (Pt. 674) 116 at 173 and Ikine v. Edjerode (2001) 18 NWLR (Pt. 745) 446 at 475-476 to support his argument that the court's jurisdiction is accordingly preserved in that regard although, upon a perusal, I was unable to see the relevance of the former case cited. Chief Uche in further argument of the respondents' case submits that the Court of Appeal was expected to give a decision to resolve the questions referred to it and not simply to restrict itself to a yes or no format in answering them as Mr. Oyetibo had argued. He also says that for the Act to be valid as an existing law, it must qualify as one which the National Assembly is capable of enacting under the 1999 Constitution, citing Governor of Kaduna State v. Kagoma (1982) 3 NCLR 1092; Attorney-General, Benue State v. Ogwu (1983) 4 NCLR 213. His contention is that the Act is not an enactment within the competence of the National Assembly because there is no item concerning tribunal of inquiry in either the Exclusive or concurrent Legislative List of the 1999 Constitution, and he relies on Attorney-General, Abia State v. Attorney-General, Federation (2002) 6 NWLR (Pt. 763) 263 at 457-458. It is important to examine this contention closely because of its fundamental consequences to these appeals, and I certainly intend to do so. As to the constitutionality of some of the sections of the Act, he submits that those which confer compulsive powers on the tribunal of inquiry are inconsistent with sections 35 and 36 of the 1999 Constitution being an interference with the personal lib-

erty of persons and therefore invalid, relying on *Balewa v. Doherty* (1963) 2 SCNLR 155.

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

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

*"44. Any matter that is incidental or supplementary -*

*(a) To Whom It May Concern: any matter referred to elsewhere in this list; or*

*(b) To the discharge by the Government of the Federation or any officer, court or authority of the Federation of any function conferred by this Constitution.”*

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

*“1. In this Schedule references to incidental and supplementary matters include, without prejudice to their generality -*

*(a) Offences;*

*(b) The jurisdiction, powers, practice and procedure of courts of law;*

*(c) The compulsory acquisition and tenure of land;*

*(d) The establishment and regulation of tribunals of enquiry.”*

As can be seen, the power to set up tribunals of inquiry was given under the 1960 Constitution both on the Exclusive List and Concurrent List. It was, however, not made a subject item but an incidental or supplementary matter on both Lists. It was in that state of the Constitution that the Commissions and Tribunals of Inquiry Act, 1961 was enacted. That Act purported to confer a general power on the Prime Minister to authorise the establishment of tribunals of inquiry into any matter within Federal competence. When a tribunal of inquiry was set up by the Prime Minister to inquire into the affairs of the National Bank of Nigeria, it led to litigation which ended in the Privy Council in the case reported as *Balewa v. Doherty* (1963) 1 WLR 949; (1963) 2 SCNLR 15 5.

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

*"It would indeed be quite natural for the Constitution to give to Parliament the power to establish a tribunal of inquiry into any matter about which it could legislate. But the simple and obvious way of doing that would be to add to the end of each legislative list an item such as 'the establishment and regulation of tribunals of inquiry into any of the above matters. If there were an item in that form, a general Act authorising the establishment of tribunals of inquiry into any matter on the list might well be valid.'"* See (1963) 1 WLR at p. 960; (1963) 2 SCNLR at p. 168.

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

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

*"3(1) The Prime Minister may, whenever he shall deem it desirable, issue a Commission appointing one or more Commissioners, or any quorum of them that may therein be mentioned, to hold a*



*Commission of Inquiry into any matter or thing within or affecting the general welfare of the Federal Territory of Lagos, or into any matter or thing within Federal competence anywhere within the Federation, in respect of which in his opinion, an inquiry would be for the public welfare, or into the conduct of any chief or the management of any department of the public service, The Prime Minister may also appoint a secretary to the Commission who shall perform such duties, as the Commissioners shall prescribe."*

There was no dispute as to the power under the Act relating to the Federal territory of Lagos which was then the sole responsibility of the Federal Government which, if I may say, was exercised under its residual powers over Lagos. The problematic issue was whether the incidental or supplementary powers in Item 44 were wide enough to enable Parliament to enact a legislation for the whole Federation in terms of the Act, including the giving of compulsive powers to the Commissioners to take evidence on oath, to compel the attendance of witnesses and the production of documents. The initial approach of the Privy Council to that problem was stated by Lord Devlin when he observed inter alia thus:

*"Since banking is a subject within Item 43 of the Exclusive List, it must be beyond doubt that Parliament has power to provide for an inquiry in some form into banking, But their Lordships do not have to decide whether if Parliament had authorised directly an inquiry on the same terms as the Prime Minister did on July 21, 1961, by Government Notice No. 1446, the legislation would have been good or bad... But their Lordships are not considering any specific legislation. They are concerned with a statute which confers upon the appellant, the Prime Minister of the Federation, wide powers to set up commissions or tribunals of inquiry generally. It is upon the validity of that statute that the appellant's action in ordering an inquiry into the affairs of the Bank of Nigeria (sic) depends. That is why their Lordships have not been content simply to note that banking is a Federal subject but have had to study the general law-making powers which the Constitution gives to Parliament."* See Balewa v. Doherty (1963) 1 WLR at p. 949; (1961) 2 SCNLR at p.256.

The Privy Council in that case in the answers they gave to the questions finally decided -

(1) That the Act of 1961 was not within the competence of the

legislative power of the Federal Parliament in so far as section 8(a), (b), (c) and (d) purported to have effect in relation to matters and things within Federal competence anywhere within the Federation. [Note: The section cited is similar to section 5(a), (b), (c) and (d) of the Act of 1966 in question in these appeals].

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

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

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

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

H *"1(1) The President (hereinafter in this Act referred to as 'the proper authority' may, whenever he deems it desirable, by instrument under his hand (hereafter in this Act referred to as 'the instrument') constitute one or more persons (hereafter in this Act referred to as 'member' or 'members') a tribunal to inquire into any matter or thing or into the conduct or affairs of any person in respect of*

*which in his opinion all inquiry would before the public welfare; and the proper authority may by the same instrument or by an order appoint a secretary to the tribunal who shall perform such duties as the members shall prescribe.*”

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

***The power given to Parliament to make laws in regard to Tribunals of inquiry as reflected in the Legislative Lists contained in the relevant provisions of the Schedule to the 1963 H constitution [Item 39 of the Exclusive Legislative List and Item 25 of the concurrent Legislative List] was, for whatever reason, denied the National Assembly in both the 1979 and 1999 Constitutions of the Federal Republic of Nigeria. Without such***

**constitutional provisions, no valid law can be made, or can exist, standing on its own and of a general nature, to apply throughout the Federation of Nigeria on the strength of which the President may set up a tribunal or commission of inquiry. This is because no law not specifically authorised or backed up in our Constitution can be lawfully passed for the Federation of Nigeria by the Federal legislature. It is the limits set under relevant provisions of the Constitution that define and determine the frontiers of the laws that can be enacted. That is the hallmark of constitutional democratic governance which is seen as a reflection of the power granted by the people to meet their aspirations, and none else. In essence, that means that the National Assembly cannot enact a general Law for the establishment of tribunals of inquiry for, and applicable in, the Federation of Nigeria.** The power to enact such a Law has become a residual matter for the States in respect of which the Houses of Assembly can legislate for their respective States by virtue of section 4(7)(a) of the 1999 Constitution which provides that-

*“4 (7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say -*  
*(a) Any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.”*

**As the Federal Capital Territory (FCT) Abuja is under the jurisdiction of the Federal Government, the constitution of tribunals of inquiry for the territory has accordingly become a residual matter over which the National Assembly can legislate as if the FCT Abuja were a State by virtue of sections 4(4)(b) and 299 of the 1999 Constitution,** the provisions of which are as follows:

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

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

*299. The provisions of this Constitution shall apply to the Federal Capital Territory, Abuja as if it were one of the States of the*

*Federation; and accordingly.*

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

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

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

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

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

there ought to be an Item in itself on the Exclusive List or Concurrent List or both. That was not quite available in the 1960 Constitution because what was provided in the Lists was under incidental or supplementary matter. This inadequacy was corrected in the 1963 Constitution. I believe I have already given full consideration to this earlier  
 B in this judgment. I am satisfied that Balewa's case is a correct guide which this court is bound to follow.

The second submission of learned counsel for the 3rd defendant/appellant which I wish to discuss is that the Commission in question was properly set up under "Human Rights" and according to  
 C him, this is one of the matters on which the National Assembly is empowered to legislate. He drew attention to the power of the National Assembly under section 4 subsection (2) of the 1999 Constitution to make laws and then referred in particular to subsection 4(b)  
 D which provides that in addition the National Assembly shall have power to legislate on "*any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.*" Relying thereafter on Item 67 of the Exclusive Legislative List which provides for "*Any other matter with respect to which the Na-*  
 E *tional Assembly has power to make laws in accordance with the provisions of this Constitution*", the argument continued that one of such matters is "Human Rights" for which the Constitution makes provision in section 12(2). I think it will make for better understanding to reproduce section 12(1) and (2) as follows:  
 F

*"12(1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.*

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

Learned counsel argued that the African Charter on Human and Peoples' Rights is a treaty which this country has enacted into law now in Cap.10 Laws of the Federation of Nigeria 1990. He relied on  
 H Articles 1 and 62 of the Charter which, inter alia, require member/party States to adopt legislative or other measures to give effect to the rights and freedoms recognized and guaranteed in the Charter, and to submit a report every two years on this. All this argument was intended to support the position taken by the 3rd defendant/appel-

lant that the Commission being in essence an aspect and in furtherance of human rights obligation of Nigeria, it was constitutionally empowered under the Tribunals of Inquiry Act, 1966, or under “*other measures to give effect to the rights and freedoms*” enshrined in the Charter.

I do not think the argument has carried the matter any further. B It has not been shown that the 1966 Act is wholly valid under the 1999 Constitution in the sense that the National Assembly can validly enact it as it is to operate throughout the Federation of Nigeria. Unless that was shown, the Commission cannot be said to be constitutionally empowered for the assignment it was given purportedly under that Act. Even assuming that “Human Rights” was an Item or a C matter on which the National Assembly can legislate for the Federation, the position would still remain that there would need to be an Act enacted by the National Assembly to authorise an inquiry into D Human Rights of the nature the Commission in question was meant to accomplish. But if, as learned counsel seemed to have placed emphasis in his oral submission, the Commission could as well be set up through “other measures” to give effect to human rights, I can E only say that that might be a possibility except that such a Commission, without an appropriate legislation backing it, would have no inquisitorial powers but would be a powerless body set up by ordinary ministerial act to seek and receive information from anyone F willing to offer it. See *Balewa v. Doherty* (1963) 2 SCNLR at p.256.

The other submission by learned counsel, Mr. Oyetibo, is that F the Commission was endowed with compulsive powers to obtain evidence from witnesses because “Evidence” is among the Items on which the National Assembly has legislative powers and that “sections G 10, 11 and 12 of the 1966 Act are matters incidental to matters of ‘evidence’ and therefore are covered by section 4(2) and item 68 of the Exclusive Legislative List of the Constitution.” I do not find this contention tenable. It is true that “Evidence” is under the Exclusive H Legislative List (Item 23) so that it is only the National Assembly that the Constitution gives authority to look into all matters concerning “evidence” as a subject and to enact a law establishing the nature of evidence that can apply throughout the Federation in any competent court of law bound by the strict rule of evidence, and be able to amend it as it considers fit. Such evidence is applicable and enforce-

able in such court or other body which, under the Constitution may be empowered to impose an obligation on any person to testify before it. But it must first be shown that a body (such as a tribunal of inquiry wishing to exercise authority to receive evidence) which wishes to compel evidence to be given before it was set up under a law that  
B was validly enacted and which law entitles it to do so.

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

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

In view of what I have said above, this submission is completely flawed as a red herring. It is not in dispute that the National Assembly has power to legislate on ‘evidence’ as a subject. That is not in issue here, nor is the law of Evidence. What is in dispute in the said  
H section 5 of the 1966 Act is whether the Commission is properly empowered there under to compel witnesses to testify and produce documents. That has nothing to do with the power of the National Assembly to legislate on ‘evidence’. It has to do with whether the National Assembly has power at all under the 1999 Constitution to



enact a law of the type of the 1966 Act which confers certain compulsive powers on commissions of inquiry. To resolve the dispute depends principally to what extent the said Act is valid vis-à-vis the 1999 Constitution. It is that which must decide the power Mr. President can exercise under it and the jurisdiction of the Commission both operationally in regard to the subject matter and territorially in regard to areas outside the Federal Capital Territory, Abuja. B

When it is remembered that the 1999 Constitution has made no provision for tribunals of inquiry as did the 1963 Constitution in Item 39 of the Exclusive List and Item 25 of the Concurrent List, it follows that, to repeat myself on the point, the power to make a general law for the establishment and regulation of tribunals of inquiry in the form of the Tribunals of Inquiry Act 1966 is now a residual power under the 1999 Constitution belonging to the States. C However, in regard to the Federal Capital Territory Abuja, the Power resides in the National Assembly. The failure of the Court of Appeal to appreciate the absence of that constitutional provision from the 1999 Constitution and to reach these conclusions, led it to give answers to the questions referred to it by the Federal High Court in a manner not entirely satisfactory, in particular by introducing the question of Mr. President not having brought the Act in conformity with the Constitution. Having regard to what I have discussed above, the issues which have arisen in the two appeals will now have to be resolved. I start with the issues raised by the 3rd defendant/appellant for determination. D E F

#### Issue No.1

The Court of Appeal went beyond the answer required for the first question referred to it by the Federal High Court. I would give the answer to the question from what I have considered above as follows: G

***The Tribunals of Inquiry Act, 1966 promulgated by the Federal Military Government for the entire Federation under the enabling laws is an existing law pursuant to section 315 of the 1999 Constitution and is deemed to be an Act enacted by the National Assembly for the Federal Capital Territory Abuja only and a Law enacted by a State House of Assembly under the residual powers of both legislatures. This is because the National Assembly has no power under the 1999 Constitu-*** H

***tion to enact a general law on tribunals of inquiry in the form of the said Act to have effect throughout the Federation of Nigeria.***

Issue No.2

B Having regard to the above-stated answer, this issue has been rendered unnecessary.

Issue No.3

C The Court of Appeal was right that sections 5(d), 11(1)(b), 11(4) and 12(2) of the Act are unconstitutional and invalid in so far as they purport to empower a tribunal of inquiry to impose a sentence of fine or imprisonment in contravention of sections 35(1)(a) and 36(1) of the 1999 Constitution. But the court was wrong to declare sections 5(c), 10 and 11(3) of the Act unconstitutional and invalid.

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

E In effect therefore the two appeals can only be said to have succeeded in part. In the event, I make no order for costs. Each party shall bear its own costs.

### **UWAIS CJN**

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

The reliefs sought in each case were the same. They read as follows:

*“(i) A declaration that the Tribunals of Inquiry Act, 1966 No. 41 is not an enactment on any matter with respect to which the Na-*

*tional Assembly is empowered to make laws under the Constitution of the Federal Republic of Nigeria, 1999 and it accordingly took effect as a law enacted by the House of Assembly of a state.*

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

*(iii) An order of prohibition prohibiting the 1st and 2nd defendants, their servants and agents whomsoever or howsoever from -*

*a) Sitting as a body empowered to exercise powers or functions claimed to be conferred upon it pursuant to the Tribunal of Inquiries Act, Cap. 447, Laws of the Federation of Nigeria or exercising any of the aforementioned powers*

*(b) Using the powers conferred or purported to be conferred on him or them by the Tribunals of Inquiry Act, 1966, to compel the plaintiff to attend a sitting of the 2nd defendant body to answer questions or to produce documents."*

The grounds upon which the reliefs were sought read thus:

(i) By the provisions contained in the Constitution of the Federal Republic of Nigeria, 1999 the National Assembly are conferred with power to make laws with respect to matters specifically mentioned in section 4(2) and (4) of the said Constitution.

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

(iii) The aforementioned Tribunals of Inquiry Decree, 1966 No. 41 was republished as Tribunals of Inquiry Act, Cap. 447, Laws of the Federation.

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

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

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

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

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

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

Section 295 subsection (2) provides:

*“(2) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Federal High Court or a High Court, and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Court of Appeal; and where any question is referred in pursuance of this subsection, the court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.”*

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

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

The Court of Appeal (Oguntade, Nzeako and Galadima, JJCA)

answered the questions (per Oguntade, JCA) thus:

*“Answer to Question 1*

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

*Question No. 2*

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

Not satisfied with the decision, the 1st appellant appealed against it to this court. Similarly the 2nd and 3rd appellants jointly appealed also to this court. The 1st appellant formulated in his brief of argument three questions for us to determine. These are:

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

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

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

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

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

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

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

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

H With regard to the second question sections 35 and 36 of the 1999 Constitution deal with the fundamental rights to personal liberty and the right to fair hearing respectively. Sections 5 (c), (d), 10, 11 (1) (b), (3) and (4) and 12 of the Tribunals of Inquiry Act provide as follows:

*"5(c) the power to summon any person in Nigeria to attend any meeting of the tribunal to give evidence or produce any docu-*

*ment or other thing in his possession and to examine him as a witness or require him to produce any document or other thing in his possession, subject to all just exceptions. Summonses issued under this paragraph may be in Form A in the Schedule to this Act, and shall be served by the police or by such person as the members may direct;*

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

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

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

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

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

*"(3) Where an act of contempt is alleged to have been committed but not in the presence of the members sitting in an inquiry,*

*the tribunal may by summons in Form or to the like effect in the Schedule to this Act require the offender to appear before the tribunal, at a time and place specified in the summons, to show cause why he should not be judged to have committed an act of contempt and be dealt with accordingly. Summonses issued under this subsection shall be served by the police or by such other person as the tribunal may direct."*

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

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

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

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

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

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

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



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

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

Section 299 of the Constitution provides

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

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

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

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

It follows that the National Assembly has the power to enact the Tribunals of Inquiry Act, Cap. 447 in so far as it operates in the Federal Capital Territory only. To this limited extent, the Act is an “existing law”, under the provisions of section 315 of the Constitution. However, this does not make the Act operative throughout Nigeria as implied by the 2nd and 3rd appellants by issuing summons to be served outside the Federal Capital Territory, for witnesses to appear before it in Abuja.

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

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

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

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

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

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

### **KUTIGI JSC**

This is an appeal against the judgment of the Court of Appeal  
G Holden at Lagos in respect of a constitutional reference of two questions made to it by the Federal High Court, Lagos under section 295(2) of the 1999 Constitution as follows -

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

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

or 36 of the Constitution of the Federal Republic of Nigeria, 1999.”

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

Question 1:

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

Question 2:

Sections 5(c), 10, 11 (1)(b), 11 (3), 11(4) and 12 of the Act (collectively referred to as the compulsive powers under Cap. 447) are unconstitutional, invalid and contravene section 35 or 36 of the Constitution as the said provisions were made in excess of the legislative competence of the National Assembly. Being dissatisfied with the judgment of the Court of Appeal, the 3rd defendant has appealed to this Court. He raised three issues

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

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

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

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

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

*b. Whether or not the Court of Appeal was right in holding*

*that sections 5(c), 5(d), 10, 11 (1)(b), 11(3), 11(4) and 12 altogether collectively referred to as the compulsive powers under Cap. 447 are unconstitutional, invalid and contravene sections 35 and 36 of the Constitution of the Federal Republic of Nigeria, 1999.”*

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

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

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

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

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**MOHAMMED JSC**

I agree with the judgment delivered by my learned brother,

Uwaifo, JSC. I have had the advantage of reading the judgment in draft before now. The two questions posed by the Federal High Court for the determination of the Court of Appeal under section 295(2) of 1999 Constitution were couched in the following words:

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

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

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

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

*"2. Arising from my observations above in the answer to question 1, the inevitable conclusion to be arrived at in relation to question No.2 is that sections 5(1), 10, 11 (1) (b), 11(3), 11(4) and 12 altogether collectively referred to as "the compulsive powers under Cap. 447 are unconstitutional, invalid and contravene sections 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999. It only remains for me to add that the invalidity and or unconstitutionality of sections 5(c), 10, 11(1) (b), 11(3), 11(4) and 12 of Cap. 447"* H

*arises from the fact that as the said provisions were made in excess of the legislative competence of the National Assembly, they could not be relied upon as a basis to supplant or infract the rights enshrined in section 35 or 36 of the 1999 Constitution of the Federal Republic of Nigeria”.*

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

C In determining this appeal reference has been made to the Privy Council decision in *Balewa v. Doherty* (1963) 1 WLR 949. The case arose when the Federal Parliament passed into law The Commissions of Inquiry Act, 1961. By section 3 of the Act the Prime Minister was given power to appoint a Commission of inquiry into any matter or thing within Federal competence anywhere within the Federation. In pursuance of that power, the Prime Minister appointed a tribunal to inquire into the affairs of the National Bank. Chief Adebayo Doherty, a Director of the National Bank, applied to the High Court for injunction to restrain the tribunal from proceeding with the inquiry and the High Court referred to the Federal Supreme Court a number of questions raising issues as to the constitutionality of the Act of 1961. The three questions referred to the Federal Supreme Court are as follows:

“1. *Whether or not the Commissions and Tribunals of Inquiry Act, 1961, is within the competence of the legislative powers of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal Competence anywhere within the Federation.*

2. *Whether or not section 3(4) of the said Act is constitutional and valid or contravenes sections 21, 31 and 108 of the Constitution of Nigeria.*

H 3. *Whether or not sections 8(c), 8(d), 15(a) and 18(1)(b) of the Commissions and Tribunals of Inquiry Act, 1961 (or any of them), are constitutional and valid, or contravene sections 20 or 21 of the Constitution of the Federation of Nigeria”.*

The Federal Supreme Court answered the questions referred

to them as follows:

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

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

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

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

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

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

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

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

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

Power which only the States can promulgate. The National Assembly can only pass such law in regard to the Federal Capital Territory, Abuja. The Commission of Inquiry Act, Cap. 447 is therefore an existing law but it has no general application. It is only applicable to the Federal Capital Territory.

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

Question 1

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

Question 2

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

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

F

### ONU JSC

G Having had the advantage of reading in draft the judgment of my learned brother Uwaifo, JSC just delivered I agree with his reasoning and conclusion. Acting pursuant to section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999, two questions by way of reference were posed to the Court of Appeal (hereinafter in this judgment referred to as the court below) as follows:

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

2. *Whether or not sections 5(c), 5(d), 10, 11(b), 11(3), 11 (4)*



*and 12 of the Tribunals of Inquiry Decree, 1966 No. 41 (or any of them) are constitutional and valid or contravene section 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999."*

Oguntade, JCA writing the leading judgment and concurred in by Nzeako and Galadima, JJCA, answered the questions to the following effect:

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

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

Aggrieved by this decision, the 1st appellant of the one part and 2nd and 3rd appellants of the other part, respectively filed appeals to this court. The three issues 1st appellant formulated in his brief for our determination are as follows:

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

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

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

The 2nd and 3rd appellants, on the other hand, submitted two issues as arising for determination, to wit:

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

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

Having been privileged to read before now the judgment of my learned brother Uwaifo, JSC, I am in entire agreement with him that the court below exceeded the answer required for the first question referred to it by the Federal High Court (per Belgore, CJ).

In determining the appeal in hand reference has been made to the Privy Council decision in *Balewa v. Doherty* (1963) 1 WLR 949. The case was sequel to the Federal Parliament enacting into law, by virtue of some provisions in the Nigerian Constitution 1960, the Commission of Inquiry Act, 1961 and section 3 thereof which empowered the Prime Minister to appoint a Commission of Inquiry into any matter or thing within Federal competence anywhere within the Federation. Pursuant to powers conferred by that Act, the Prime Minister (Sir Abubakar Tafawa Balewa) appointed a tribunal to enquire into the affairs of the National Bank. Chief Adebayo Doherty, a Director of that Bank, applied to the High Court for injunction to re-

strain the tribunal from proceeding with the inquiry and the High Court referred to the Federal Supreme Court the following three questions as to its constitutionality, viz:-

*"1. Whether or not the Commissions and Tribunals of Inquiry Act, 1961, is within the competence of the legislative powers of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal competence anywhere within the Federation.*

*2. Whether or not section 3(4) of the said Act is constitutional and valid or contravenes sections 21, 31 and 108 of the Constitution of Nigeria.*

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

The Federal Supreme Court's answers to these questions were as follows:

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

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

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

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

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

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

*3. Section 8(c) is valid, in so far as it purports to have effect in*

*relation to matters or things within or affecting the general welfare of the Federal territory. Section 8(d), 15(a), 18(1)(b) are void to the extent that they empower the commissioners to impose a sentence of fine or imprisonment. Except so far as it is required to effect these variations, their Lordships will humbly advise Her Majesty to dismiss this appeal."*

It is worthy of note that the 1999 Constitution has made no provision for Tribunals of Inquiry as was very clear in Item 39 of the Exclusive List and Item 25 of the Concurrent List in the 1963 Constitution. Be it, however, noted that the decision in *Balewa v. Doherty* based on the 1960 Constitution is a guidance to the fact that the Regional (now State) legislature could legislate on matters not directly specified as an item in either the Exclusive or Concurrent Legislative List. Also, it shows that there can be no giving of compulsive powers to the Commissions of Inquiries, for instance, to impose a sentence of fine or imprisonment in conflict with a constitutional provision which gives such powers to the Courts, as such will be invalid. Returning to the case in hand, the power to make a law under the 1999 Constitution for the establishment of a Tribunal of Inquiry is now a residual power, which only the States can exercise. The National Assembly can only pass such a law in regard to the Federal Capital Territory, Abuja. Thus, while the Commission of Inquiry Act, Cap. 447 is an existing law, it has no general application to Nigeria. It is only applicable to the Federal Capital Territory a law deemed enacted by each House of Assembly for the respective States.

In the result, my answer to the two questions posed by the High Court to the Court of Appeal are as follows:

#### Question 1

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

#### Question 2

Sections 5(c), 10 and 11(3) do not offend sections 35 and 36 of the 1999 Constitution and are therefore valid. Sections 5(d), 11(1)(b), 11(4) and 12(2) are unconstitutional and invalid in so far as they purport to empower the Tribunal of Inquiry to impose a sen-

tence of fine or imprisonment which is a power in contravention of, or is not in conformity with section 35(1)(a) and section 36(1) of the 1999 Constitution. Having found merit in some aspects of the two appeals, I agree with my learned brother Uwaifo, JSC's views, that they succeed in part. I too make no order as to costs.

B

### KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Uwaifo, JSC in this appeal. I entirely agree with it. The Federal High Court posed two questions for the determination of the Court of Appeal under section 295(2) of the 1999 Constitution. The two questions were couched thus:

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

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

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

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

*"2. Arising from my observations above in the answer to ques-*

*tion 1, the inevitable conclusion to be arrived at in relation to question No.2 is that sections 5(1), 10, 11(1)(b), 11(3), 11(4) and 12 altogether collectively referred to as ‘the compulsive powers’ under Cap. 447 are unconstitutional, invalid and contravene sections 35 or 36 of the Constitution of the Federal Republic of Nigeria, 1999.”*

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

These answers did not satisfy the 1st, 2nd and 3rd defendants who consequently appealed to this court. The 1st and 2nd defendants filled a joint brief of argument.

In their brief of argument, the 1st and 2nd appellants raised the following issues for determination:

E *“1. Whether the Courts - High Court, Court of Appeal and*  
*this court have jurisdiction to question the validity of the Tribunals of*  
 E *Inquiry Act, Cap. 447, Laws of Nigeria, 1990 - being an existing law*  
*made by the military between 15th January, 1966 and 29th May,*  
 E *1999.*

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

*(3) Whether by its own provisions the Constitution of the Fed-*  
*eral Republic 1999 does not recognize the Power of having the Tri-*  
*bunals of Inquiry Act, or Tribunals of Inquiry Laws by the Federal*  
*and States Governments respectively.*

H *(4) Whether the provisions of sections 5(c) 5(d) 10, 11(1) (b),*  
 H *11(3), 11(3) and 12 of the Tribunals of Inquiry Act, contravene sec-*  
 H *tions 35 and 36 of the Constitution.*

*(5) Assuming but not conceding that Tribunals of Inquiry are*  
*state matters only, whether, having regard to the nature of the sub-*

*ject of inquiry in Oputa Commission EVIDENCE AND HUMAN RIGHTS - the action of the President is not within Federal Competence."*

The 3rd appellant, for his part, has raised three issues -

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

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

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

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

#### Question 1

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

#### Question 2

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

In the result, I also agree that the appeals succeed in part. I too make no order as to costs.

**EJIWUNMI JSC**

I have had the privilege of reading before now the judgment of my learned brother, Uwaifo, JSC that has just been read. And I agree with him for the reasons given as to the outcome of this appeal. But I need to add a few words of my own.

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

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

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

*(iii) An order of prohibition prohibiting the 1st and 2nd defendants, their servants and agents whomsoever from*

*(a) Sitting as a body empowered to exercise powers or functions claimed to be conferred upon it pursuant to the Tribunal of Inquiries Act, Cap. 447, Laws of the Federation of Nigeria or exercising any of the aforementioned powers.*

*(b) Using the powers conferred or purported to be conferred*



*on him or them by the Tribunals of Inquiry Act, 1966, to compel the plaintiff to attend a sitting of the 2nd defendant body to answer questions or to produce documents."*

The grounds upon which the reliefs were sought read thus:

*"(i) By the provisions contained in the Constitution of the Federal Republic of Nigeria, 1999 the National Assembly are conferred with power to make laws with respect to matters specifically mentioned in section 4(2) and (4) of said Constitution.*

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

*(iii) The aforementioned Tribunals of Inquiry Decree, 1966 No. 41 was republished as Tribunals of Inquiry Act, Cap. 447, Laws of the Federation.*

*(iv) In the premises, at the end of the military regime in Nigeria in May 1999, the aforementioned Tribunals of Inquiry Act was an "existing law" within the meaning of that expression in section 315 of the Constitution.*

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

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

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

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

In the course of the hearing before the trial court, the parties agreed that some constitutional questions should, pursuant to the

provisions of section 295 subsection (2) of the Constitution of the Federal Republic of Nigeria, be referred to the Court of Appeal to answer. The Federal High Court (per Belgore, C.J.) granted their request accordingly. Now, section 295 subsection (2) reads thus:

“(2) *Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Federal High Court or a High Court and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Court of Appeal; and where any question is referred in pursuance of this subsection, the trial court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.*”

The questions referred to the Court of Appeal are as follows:

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

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

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

“*Answer to Question No.1*  
Cap. 447 was promulgated as Decree No. 41 of 1966 by the Federal Military Government in 1966. Being an enactment of the Federal Military Government, it took effect on 28-5-99 as an existing law pursuant to section 315 of the 1999 Constitution. As such existing law, it needed to be brought into conformity with the 1999 Constitution of Nigeria by the appropriate authority, who is Mr. President. Appropriate authority has failed and or neglected to make textual modification in the said Cap. 447 as would bring it in conformity with the 1999 Constitution as provided under section 315 of the same Constitution. Only the President, as the appropriate authority can make such textual modification. Even if this court is aware of what needs to be done, the best efforts of this court would amount to no

*more than mere speculation. In any case, the court is without the jurisdiction to exercise a power reserved in the Constitution for only Mr. President as the appropriate authority.*

*Answer to Question No.2*

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

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

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

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

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

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

*“1. Whether or not the Court of Appeal was right in holding that the Tribunals of Inquiry Act, Cap. 447 is an existing law and*

*sections 5(c), 10, 11 (1)(b), 11 (3), 11(4) and 12 of the same Act were invalid for not having been brought into conformity with section 315 of the 1999 Constitution of the Federal Republic of Nigeria?*

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

Issue 1 raised by the 1st appellant will be considered first. In respect of this issue, the 1st appellant asked pointedly, whether the court below did not by its judgment go beyond the answer required of it by the Federal High Court. I think that the question raised by the 1st appellant was proper. The question was limited to whether or not the Tribunals of Inquiry took effect as a law enacted by the National Assembly pursuant to the provisions of section 315 of the Constitution of the Federal Republic of Nigeria, 1999. It is clear that in the first part of its answer, the court below rightly held that Cap. 447 was promulgated as Decree No. 41 of 1966. Secondly, it is also rightly held that as it was an enactment of the Federal Military Government, it took effect on 28-5-99 as an existing law pursuant to section 315 of the 1999 Constitution. The court below fell into error when it went to hold in the latter portion of this answer concerning what the President should have done to bring the Decree No. 41 of 1966 (Cap. 447) in conformity with the 1999 Constitution pursuant to section 315 of the 1999 Constitution. As it is totally unnecessary and should not have been part of the answer to the question referred to it by the trial court, that part of the answer is therefore struck down. It follows that the appeal succeeds in part and so also the appeal by the 2nd and 3rd appellants.

Next would be considered the question as to whether or not the Court of Appeal was right in holding that sections 5(c), 5(d), 10, 11(1)(b), 11(3), 11(4) and 12 altogether collectively referred to as the compulsive powers under Cap. 447 are unconstitutional, invalid and contravene sections 35 and 36. The sections of the Tribunals of Inquiry Act are those referred to as compulsive powers vested in the Human Rights Violations Investigation Commission, the 3rd appellant, by virtue of the fact that the 3rd appellant was set up under the Tribunals of Inquiry Act of the said power. The question that falls for

determination in this appeal is therefore, whether they are unconstitutional, invalid and contravene sections 35 and 36 of the Constitution of 1999. My approach to this question is to consider first the constitutional portion of the Act in relation to the 1999 Constitution. Upon a perusal of the briefs filed by learned counsel for the parties, it is manifest that their argument for and against this question revolve round the case of Doherty v. Balewa (1961) 1 All NLR 604, (1961) 2 SCNLR 256, which went on appeal to the Privy Council as Balewa v. Doherty (1963) 1 WLR; (1963) 2 SCNLR 155. B

In order to answer this question, it is in my view, apposite to give briefly the history of legislation on this point and the constitutional changes that had occurred in our country in recent times. For this purpose, may I refer to Balewa v. Doherty (1963) SCNLR 155; (1963) 1 WLR 949 where Lord Devlin at pages 951,953 delivering the judgment of the court, said thus: C

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

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ernment.”

In the 1954 Constitution “Commissions of Inquiry” was a subject specified in the Concurrent List. The result of this would appear to be that either the Federal or a Regional legislature could set up a commission to inquire into any subject, even one that was within the  
B exclusive competence of the other legislature.

The 1960 Constitution by section 64 retains with some alterations the Exclusive and Concurrent Lists and the division of legislative powers initiated by section 51 of the 1954 Constitution. But the  
C 1960 Constitution also gives power directly to Parliament, that is, the Federal legislature, to make laws on a number of matters specified in separate and independent sections.

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

E *’44. Any matter that is incidental or supplementary -*  
*(a) to any matter referred to elsewhere in this list; or*  
*(b) to the discharge by the Government of the Federation ... of any function conferred by this Constitution.*

F *Article 1 of Part III (Interpretation) is in the following terms:*  
*1. In this Schedule references to incidental and supplementary matters include, without prejudice to their generality-*

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

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

It is manifest from the narration given above that up to 1960, there was a clear provision in the Constitution for the enactment of legislation for the establishment and regulations of tribunals of inquiry. However, "Item D" in the 1960 Constitution was clearly omitted from the corresponding provision of the 1979 Constitution. And also in the 1999 Constitution, this omission was retained. B

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

*"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. D*

*(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 I of the Second Schedule to this Constitution. E*

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

*(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 G*

*(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 H*

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

It is clear from a perusal of the above provisions, that the National Assembly in its exercise of its legislative powers is limited by the

provisions granted to it by the Constitution as the Constitution of 1999 did not make provision for the Tribunals of Inquiry as clearly shown in Item 39 of the Exclusive List. In the absence of such a provision, the National Assembly cannot pass a general law on Tribunals of Inquiry to affect the entire Federation. However the National Assembly can pass such a law with regard to the Federal Capital Territory. It remains to be said that under the 1999 Constitution, the establishment of Tribunals of Inquiry is now a residual matter which only the States can promulgate. It is pertinent to refer in this regard to the aforementioned case of *Balewa v. Doherty* (supra). In that case, by section 3(1) of the Commissions of Tribunals of Inquiry Act, 1961 of the Federation of Nigeria, the Prime Minister may appoint a commission to inquire into “...any matter or thing” within Federal competence anywhere within the Federation. The appellant’s power to appoint Commission was challenged by the respondent. The matter was first referred to the Federal Supreme Court and ended on appeal in the Privy Council, where it was held that “the Act of 1961 was valid in so far as it authorised tribunals or commissions of inquiry of any sort within the Federal territory and tribunals or commissions of inquiry without compulsive powers into Federal matters, but it was not within the competence of the legislative power of the Federal Parliament in so far as section Sea) to (d) - which included the giving of compulsive powers to the commissioners to take evidence on oath, to compel the attendance of witnesses and the production of documents - purport to have effect in relation to matters and things within Federal ‘competence anywhere within the Federation’ as defined by section 3 (1) of the Act, and the power to direct any inquiry into banking fell into that category.”

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



fully set out in the Constitution.

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

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

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

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

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

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