

SUPREME COURT OF NIGERIA
FRIDAY 23RD MAY, 2003. SC. 115/2002
CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, S. O. UWAIFO,
E. O. AYOOLA, N. TOBI, D. MUSDAPHER,
D. O. EDOZIE, JJSC

1. THE FEDERAL REPUBLIC OF NIGERIA
2. THE ATTORNEY GENERAL OF THE APPELLANTS
FEDERATION & MINISTER OF JUSTICE
AND
LORD CHIEF UDENSI IFEGWU RESPONDENT

STATUTES - Retroactive application - Decrees 25 of 1991 & 18 of 1994 - Neither is made retroactive - As both uphold that a person is not to be punished - For act which was not a crime at the time it was done (H1)

JURISDICTION - Federal High Court - Basis - If the cause of action comes within the enforcement of fundamental rights in chapter IV of the Constitution - Then the court is conferred with jurisdiction (H2)

COURTS - Ouster clauses - Intendment - Decree 18 of 1994 s.1(5) - It is meant to deny High Court of its supervisory jurisdiction - With regard to Failed Banks Tribunal proceedings (H3)

FUNDAMENTAL RIGHTS - Enforcement - Procedure - Manner in which such matter is brought to court is hardly objectionable - Once it is clear that originating process seeks redress - For infringement of right (H4)

JURISDICTION - Federal High Court - 1999 Constitution s. 251(1) - Jurisdiction conferred on the court covers matters concerning inter alia banking - Foreign exchange - And criminal causes arising therefrom (H5)

TRIBUNALS - Jurisdiction - Issue of - Foreclosure - The fact that statute setting up a tribunal - Makes its decision final - Does not foreclose jurisdictional issues (H6)

STATUTES - Ouster clauses - Limitation - Such provisions do not apply where there was absence of jurisdiction - As to hold otherwise will lead to judicial anarchy (H7)

ESTOPPEL - Res judicata - Application - Decision arrived at by court without jurisdiction - Can neither constitute res judicata nor issue estoppel (H8)

COURTS - References - Making of - Conditions - 1999 Constitution s. 295(2) - Court is not bound to make reference when it raises question suo motu - But must make reference where party requests for same (H9)

CHARGES - Framing - Correctness of - Use of the word fraudulently - Does not invalidate the charge - As respondent was not misled by the word (H10)

FACTS

Plaintiff/respondent sued defendants/respondents, in an action for fundamental right enforcement, challenging the arraignment, trial and conviction of respondent by the failed Banks Tribunal and the Special Appeal Tribunal, for acts which did not constitute any offence at the time they were done. The basis of respondent's case was that section 33(8) of the 1979 Constitution then applicable forbade that a person should be made to suffer criminal penalties for acts which did not constitute any offence at the time they were done. Accordingly, respondent contended that both the failed Banks Tribunal and the Special Appeal Tribunal acted without jurisdiction having acted in breach of the constitution. The two questions arising for determination before the trial High Court was referred to the Court of Appeal upon application of respondent made under section 295(2) of the 1999 Constitution.

Though the application to this effect was by a motion on notice, appellants were absent and unrepresented on the day it was moved. Court of appeal answered the referred questions to the effect that the tribunals indeed acted in breach of the provisions of section 33(8) of the 1979 constitution as it held that there was no

crime known to Nigeria law as “fraudulently granting credit facilities” which was what respondent was charged with before the tribunals. Dissatisfied, appellants have brought this appeal at Supreme Court against the decision of Court of Appeal in respect of the referred questions. Among other things, appellants contend that the reference was not properly made in that they were not given a fair hearing before the reference order was made.

ISSUE FOR DETERMINATION

“(1) Were the learned Justices of the Court of Appeal right in not striking out this case stated when ex facie the trial Federal High Court lacked jurisdiction to make the reference?”

(2) Whether the Court of Appeal was right in entertaining the reference when the condition precedent to the exercise of jurisdiction to refer by way of case stated by the Federal High Court had to the finding of the Court of Appeal not been fully established? (sic)

(3) Was the Court of Appeal right in holding that the provisions of Section 33(8) and (12) of the 1979 Constitution took precedence over the Failed Bank and BOFID Decrees in the face of the Supreme Court restatement of the hierarchy of our laws during a military inter regnum?

(4) Was the Court of Appeal right in not dismissing the case stated when ex facie it is statute barred and also caught by issue estoppel?

(5) Was the Court of Appeal right in its application of the Supreme Court decision in 7-Up Bottling Co. Ltd. v. Abiola & Sons Ltd. (1995) 3 NWLR (Pt. 383) 257 to the facts of this case and in its justification of the hearing ex parte of the motion on notice praying for the reference?

(6) Whether the misuse of the word ‘fraudulently’ in the description of the offence for which the Respondent was convicted was material enough to vitiate the conviction when the Respondent was not deceived or misled by the description?”

HELD

(Dismissing the appeal by a majority decision per **UWAIFO JSC**)

STATUTES - Application - Decrees 25 of 1991 & 18 of 1994

- 1. It is, I think, important at the outset to point out by saying that, as I see it, the problem was not so much with the Decrees (Decree No. 25 of 1991 and Decree No. 18 of 1994) relied on for bringing charges to the Failed Banks Tribunal. It was more, and indeed squarely, with the perception of those who framed and prosecuted the charges and of their misapprehension of the relevant provisions of the said Decrees. It must be realised that neither Decree No. 25 of 1991 nor Decree No. 18 of 1994 is made retroactive.**
- Section 33(8) of the 1979 Constitution which was un-suspended and was then applicable, also forbade retroactivity of criminality. It follows that Decree No. 25 of 1994 and Section 33(8) of the 1979 Constitution were in harmony. There was no conflict. That circumstance clearly upheld a fundamental principle of constitutional liberty based on the notion that a person is not to be punished for an act which was not a crime at the time it was done. (p. 1283 C / 1284 G / 1285 A)**

JURISDICTION - Federal High Court - Basis

- 2. The jurisdiction of the Federal High Court to entertain the action does not depend on whether it was empowered, at the relevant time, to try the offences with which the respondent was charged. What is important is the cause of action which he claims to have. If that cause of action comes within the ambit of the enforcement of any fundamental right contained in Chapter IV in the sense that the respondent alleges that any of the provisions of that Chapter has been, is being or likely to be contravened in relation to him, then the Federal High Court is eminently conferred with jurisdiction to entertain the action. The respondent has made it abundantly clear from the nature of his claim, and the questions he asked the Federal High Court to refer to the Court of Appeal, that his allegation is that his fundamental right has been contravened.**
- With due respect, I do not think that the argument of the learned Senior Advocate for the appellants that it is not within the competence of the Federal High Court to entertain an action of this type which is brought to protect a fundamental right is tenable. (p. 1285 E)**

COURTS - Ouster clauses - Intendment

3. Section 1(5) of Decree No. 18 of 1994 relied on by the appellants does not affect that right. The said provision was meant to deny a High Court the exercise of its supervisory jurisdiction or powers of judicial review in regard to Failed Banks Tribunal proceedings. ^B

But the jurisdiction conferred on a High Court under Section 46 of the 1999 Constitution is neither a supervisory jurisdiction nor the powers of judicial review. It is far beyond and outside of that. It is a special jurisdiction conferred under Chapter IV provisions mainly for the purpose of enforcing or securing the enforcement of fundamental rights. ^C

It is not in doubt that declaratory and other reliefs can be sought and obtained to enforce and protect fundamental rights by filing action in a High Court. (p. 1286 A/ C/ G) ^D

FUNDAMENTAL RIGHTS - Enforcement - Procedure

4. The manner in which the court is approached for the enforcement of a fundamental right is hardly objectionable once it is clear that the originating court process seeks redress for the infringement of the right so guaranteed under the Constitution. The court process could come by the Fundamental Rights (Enforcement Procedure) Rules or by originating summons or indeed by writ of summons. ^E ^F

That seems to underline the concerns in regard to redressing a contravention of a fundamental right by liberalizing the type of originating process without the person affected being inhibited by the form of action he adopts. It is enough if his complaint is understood and deserves to be entertained. ^G
(p. 1286 H)

JURISDICTION - Federal High Court - 1999 Constitution s.251(1)

5. It has been contended by Mr. Fagbemi, SAN that the Federal High Court does not have the jurisdiction to adjudicate over the “matters contained in the originating summons”, and therefore lacked the jurisdiction to entertain the motion by which the respondent sought a reference to the Court of Ap- ^H

peal. It was specifically argued that “the jurisdiction of the Federal High Court to inquire into causes and matters were as prescribed in Section 7 of the Federal High Court Act and Section 230(1) of the 1979 Constitution as amended by Decree No. 107 of 1993.” Although the learned Senior Advocate cited no decided case in support of this submission, I believe the decision of this court in *Tukur v. Government of Gongola State* (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 117) 517 is the nearest to it. But it is enough to say that that decision came before the copious amendment made to Section 230(1) of the 1979 Constitution (now Section 251(1) of the 1999 Constitution by Decree No. 107 of 1993).

The jurisdiction conferred on the Federal High Court by the above provisions covers matters concerning banking, foreign exchange and criminal causes arising therefrom, and the interpretation of the Constitution as it affects the action of the Federal Government against the present respondent.

(p. 1287 B / 1288 B)

E Jurisdiction - Issue of - Foreclosure

6. The learned Senior Advocate for the respondent in his submission contends that where the jurisdiction of a Tribunal is being challenged, the fact that the statute which set up the said Tribunal says that its decision shall be final does not foreclose the jurisdictional issue.

I find myself in agreement with this submission. It should be remembered that the action brought by the respondent in the Federal High Court is not to further appeal from the decision of the Special Appeal Tribunal.

I am fully aware that the decision of that Tribunal or of the Appeal Tribunal is said to be final. I do accept that fact. But it is only final in regard to the proceedings which gave rise to the appeal. The appeal finally terminated those proceedings. But that did not terminate the respondent’s entitlement to seek appropriate redress for the alleged breach of his fundamental right arising from those proceedings in a competent court.

(p. 1289 A/ D)

STATUTES - Ouster clauses - Limitation

7. No ouster clause is ever intended, or have that monstrous effect, to confer powers on an inferior tribunal to be able to flout and transcend the very purpose of the law it seeks to enforce by precluding a competent court from intervening in any event, no matter to what extent that tribunal exceeds its jurisdiction. That will simply lead to judicial anarchy permitted to be caused by inferior tribunals. For as said by Mellor, J., in Ex parte Bradlaugh (1878) 3 QBD 509 at p. 513:

“It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question.” (p. 1291 C)

ESTOPPEL - Res judicata - Application

8. Mr. Fagbemi, SAN, has argued that it was too late for the respondent to rely on that provision. He bases this on what he regards as issue estoppel.

It is elementary but basic principle of law that jurisdiction is fundamental to any decision. It is therefore a condition for relying on res judicata or issue estoppel to establish that the decision was reached by a court competent to do so having regard to the subject-matter. A decision arrived at by a court without jurisdiction, or by a court on a subject-matter which the Constitution or statute forbids it from entertaining, can neither constitute res judicata nor issue estoppel:

And it is also the law that since proceedings conducted without jurisdiction are null and void.

No act of waiver, or act that may be seen to have that effect, can confer jurisdiction to validate such proceedings:

(pp. 1293 D / 1295 H)

COURTS - References - Making of - Conditions

9. It cannot be disputed that Section 295(2) envisages two independent situations in which a court makes a reference. After satisfying itself that a serious question of constitution arising from the case before it exists, the court may suo motu

decide to make a reference. I expect that it will under normal circumstances make this known to the parties in court. But at this stage it is not bounden on it to make the reference. It may for one reason or another consider that there is no need to do so. However, if in those circumstances which might have engaged it, on its own, to make a reference or not, any of the parties were to request for a reference, then it would be left with no choice but to do so. It would be a bounden duty made so by the mandatory language of the provision.

Therefore it is plain that when the proper conditions for making a reference are present, the court to which the request is made has no discretion. It is bound to make the reference. When all the parties involved make a request there is certainly nothing more to expect from the court in order to make the reference. But when only one of the parties makes the request, still the provision says that it is mandatory on the Court to make the reference. (p. 1300 H)

CHARGES - Framing - Correctness of

10. In this particular case, the assumed intention is to punish based on the mental element of an accused in granting irregular facilities etc. Not to follow the ejusdem generis rule to accept that “fraudulently” comes within that mental element of “knowingly, recklessly, negligently, willfully” used in Section 19(1)(a) is to create an absurd result if the evidence actually shows fraud. If it does not show fraud but any of the other elements, there is no reason why an amendment to the charge made at the appropriate time cannot be allowed. I am satisfied that the respondent was not misled and that the charge as framed is not defective.

The use of the word “fraudulently” in the charge does not, it would appear to me, make the offence unknown to law. All that might need to be done would be an appropriate amendment followed by compliance with due procedure.

I think the court below erred in its view that the charge as framed contravened Section 33(12) of the 1979 Constitution in that it was in respect of an offence not defined under the law. (pp. 1303 H & 1304 C/F)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. Fundamental Right Actions - Principal relief must be on fundamental right

For a claim to qualify as falling under fundamental rights, it must be clear that the principal relief is for the enforcement or for securing the enforcement of a fundamental right and not, from the nature of the claim, to redress a grievance that is ancillary to the principal relief which itself is not ipso facto a claim of a fundamental right. In other words, where the alleged breach of a fundamental right is ancillary or incidental to the substantive claim of the ordinary civil or common law nature, it is incompetent to constitute the claim as one for the enforcement of a fundamental right. (p. 1288 D)

2. Public Officers Protection Act is inapplicable

It would be argument carried too far to say that the Public Officers Protection Act applied to bar a relief sought in connection with an error committed in purely judicial capacity. It does not. The remedy sought is to enforce a constitutional right contravened by a court acting judicially. The time within which to seek that remedy is not subject to the time limit prescribed by the Public Officers Protection Act. There is no reason why it should. If it did, it would likely conflict with court rules. (p. 1296 D)

KUTIGI JSC - Dissenting

3. There should be no resort to external aid in interpretation of unambiguous statutory provision

I repeat here again that the provisions of Section 33(8) and Section 33(12) are clear and unambiguous. And they are not subject to more than one interpretation, which is that no person shall be guilty of an offence which was not such an offence at the time it was committed, nor of an offence which was not defined in a written law and penalty provided thereof. It is a cardinal principle of interpretation that where in their ordinary meaning the provisions of an enactment are clear and unambiguous effect should be given to them without resorting to external aid. (p. 1316 B)

AYOOLA JSC

4. The question of breach of fundamental right by court is not always jurisdictional

Where contravention of Section 33(8) is alleged, the question is not at all about the jurisdiction of the tribunal which occasioned the contravention but whether the guaranteed right had been contravened. A tribunal may determine a matter without jurisdiction without contravening the fundamental rights provisions. It may, as well, determine a matter within its jurisdiction and yet contravene the provisions. The essence of constitutionally guaranteed rights is that, barring exceptions expressly provided by the Constitution in privative clauses, the State cannot authorize the contravention of or confer jurisdiction to contravene the fundamental rights provisions of the Constitution. The question, therefore, whether there has been a contravention of a citizen's human right cannot properly be answered at all times as a jurisdictional question. I hold that, in this case, the argument on issue estoppel is misconceived and it fails. The question whether a right of the respondent had been contravened for the purpose of a redress pursuant to sub-section (1) of Section 46 of the Constitution was not one on which the Special Appeal Tribunal could have pronounced. (p. 1320 A)

5. Courts should afford parties opportunity to be heard before forming material opinions

Before a High Court refers a question of law under sub-section (2) of Section 295, it must be of the opinion that the question involves a substantial question of law. Ideally, where a court is empowered to form an opinion which may affect the direction of a proceeding, it is a matter of prudence, if not of common fairness, to give all parties an opportunity of being heard. However, the question that is material to the present case in which what was involved at that stage was not a determination of a civil right or obligation, is whether a failure to afford such hearing vitiates the entire step taken pursuant to the opinion to make a reference to the court below. Does the failure to hear the appellants before the reference was made vitiate the reference? I think not. No miscarriage of justice had been occasioned since it is not doubted that a substantial question of law concerning the ap-

plication of the Constitution had arisen in the proceedings and in terms of sub-section (2) of Section 295, it was a matter of obligation in such circumstances for the Judge to refer the question at the request of at least one of the parties. (p. 1320 F)

TOBI JSC

B

6. Estoppel cannot apply to validate an illegal act

I now take the issue of estoppel. Prince Fagbemi submitted that the action presented by the respondent and upon which the motion for reference was predicated was statute barred and caught by the doctrine of issue estoppel. C

Professor Adesanya submitted that an estoppel cannot apply to validate an illegal act or to give jurisdiction where it is alleged to be lacking by preventing a party from raising the issue of lack of jurisdiction or the illegality of the act, and that the incompetence of a court cannot be covered up by estoppel or by waiver. D

I think Professor Adesanya is right. Because of the paramount importance of jurisdiction in the judicial process, estoppel, an equitable remedy cannot drown the lack of jurisdiction of a court of law. Where a court or tribunal lacks jurisdiction and the issue is raised, the adverse party cannot succeed in pleading that the action is caught by estoppel. This is because estoppel lacks the legal capacity to revive an act which is a nullity ab initio. A court which holds that the issue of jurisdiction cannot be raised because the party is estopped from doing so, will not be doing equity to the adverse party. The moment an act of a court or tribunal is a nullity, estoppel cannot resuscitate it. F
(p. 1330 H)

7. Section 166 of the CPA is inapplicable

G

Learned Senior Advocate for the appellants relied on Section 166 of the Criminal Procedure Act. The section is in the following terms;

“No error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission.” H

I do not think the section is applicable. The section, in my humble view, presupposes a situation where an offence known to law is preferred. Where no offence known to law is preferred, the

section cannot be invoked to cure any error or omission arising from the “offence” in inverted commas, indicating that there is no offence. (p. 1334 B)

EDOZIE JSC

B 8. *An ouster clause does not protect a nullity*

With due deference to the learned Senior Advocate of Nigeria, I am unable to agree with the above submission. The fact that a Decree which established a Tribunal provides that its decision is final and not subject to appeal or review will not shield such a decision from the scrutiny of a court of competent jurisdiction where an aggrieved party challenges the jurisdiction of the tribunal, for it has long been recognised that where a Tribunal or a court of law has no jurisdiction to adjudicate on a matter, the proceedings of that tribunal or court including its decision thereon is a nullity, no matter how well conducted and decided it may have been.

An ouster clause in a statute does not protect a nullity. (p. 1340 B)

REPRESENTATION

E L. O. Fagbemi, SAN, with Dr. S.E. Mosugu, Soji Olowolafe, Esq., S. O. Ajayi, Esq., and A. O. Popoola, Esq., for the Appellants
Professor S. A. Adesanya, SAN with Waheed Kasali, Esq., for the Respondent

F CASES REFERRED TO

- Atake v. Afejuku (1994) 9 NWLR (Pt. 368) 379
- R. v. Nat Bell Liquors Ltd. (1922) 2 AC 128
- Ogbomor v. The State (1985) 1 NWLR (Pt. 2) 283
- G Josiah Cornelius Ltd. v. Ezenwa (1996) 4 NWLR (Pt. 443) 391
- Cooney v. Covell (1901) 21 NZLR 106
- Bamaiyi v. A-G Federation (2001) 7 SC (Pt. II) 62
- Onamade v. African Continental Bank Ltd. (1997) 1 NWLR (Pt. 480) 123
- H Kenon v. Tekam (2001) 7 SC (Pt. III) 49
- Scales v. Pickering (1828) 4 Bing 448
- Rossek v. African Continental Bank Ltd (1993) 8 NWLR (Pt. 312) 382
- Scales v. Pickering (1828) 4 Bing 448

Nwosu v. Imo State environmental Sanitation Authority (1990) 2 NWLR (Pt. 138) 688

Fawehinmi v. I.G.P. (2002) 5 SC (Pt. I) 63

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, s.33(8) B

Constitution of the Federal Republic of Nigeria 1999, s.251(1)

Recovery of Public Property (Special Military Tribunal) Decree 1984

Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Decree 1994

Banks & Other Financial Institutes Decree 1991 C

Public Officers Protection Act Cap 379 L.FN 1990, s.2

LEAD JUDGMENT BY UWAIFO JSC

The respondent was one of six accused persons arraigned and D
tried before the Failed Banks Tribunal, Lagos. The charge contained
ten counts although he was involved in only counts 1 and 10. On 19
March, 1996, the Tribunal presided over by Ope-Agbe, J., as Chair-
man convicted the respondent on the two counts and sentenced him
to 5 years in prison in respect of count 1 and N100,000. 00 fine or 3 E
years in prison in respect of count 10. He appealed to the Special
Appeal Tribunal (coram : Hon. Justice D.O. Coker (Chairman) and
Chief (Mrs.) P.C. Ajayi-Obe, SAN, (member).

On 29 May, 1997, the Special Appeal Tribunal allowed the F
appeal on sentence by substituting for each of counts 1 and 10,
N100,000.00 fine or 2 years in prison. Thus the respondent came to
the end of the road as far as the appellate process was concerned
since under Section 5 of the Failed Banks (Recovery of Debts) and
Financial Malpractices in Banks Decree No. 18 of 1994 which gave G
him a right of appeal to the Special Appeal Tribunal, it was provided
thus:

*“5(1) A person convicted or against whom a judgment is given
under this Decree may, within 21 days of the conviction or judg- H
ment, appeal to the Special Appeal Tribunal established under the
Recovery of Public Property (Special Military Tribunal) Decree, 1984,
as amended, in accordance with the provisions of that Decree.*

*(2) The decision of the Special Appeal Tribunal shall be final
and, where there is no appeal, the decision of the Tribunal shall be*

final.”

It was obvious that the right of appeal was no longer available to the respondent. But he did not give up nor did his counsel, Professor Adesanya, SAN. The learned Senior Advocate filed an originating summons in the Federal High Court, Lagos in June, 1999. He came under Fundamental Rights Protection. The sum total of the complaint was that the Failed Banks Tribunal and the Special Appeal Tribunal which heard the case acted in breach of the fundamental rights of the respondent guaranteed under Section 33 of the 1979 Constitution then applicable, being without jurisdiction to try, convict and sentence him in respect of the counts laid against him. Put in another way, that he could not be made to suffer criminal penalties for acts which did not constitute any offence at the time they were done.

The originating summons sought three reliefs upon the determination of two questions. The three reliefs were:

“(1) *A Declaration that the Failed Banks Tribunal, Zone II, Lagos as well as the Special Appeals Tribunal lacked the jurisdiction to try, convict and sentence the Plaintiff under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree, 1994 of Count 1 in the Charge No. FBFMT/LZII/IC/95 and Appeal No. SAT/FBT/273/96 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended being the law in force at the relevant date.*

“(2) *A Declaration that the Failed Banks Tribunal, Zone II, Lagos as well as The Special Appeals Tribunal lacked the jurisdiction to try, convict and sentence the Plaintiff under the Banks and Other Financial Institutions Decree, 1991 of Count 10 in the charge No. FBFMT/LZII/IC/95 and Appeal No. SAT/FBT/273/96 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 (as amended), being the law in force at the relevant date.*

“(3) *An Order setting aside the conviction and sentence.*”

It is relevant to also reproduce the two questions for determination because they were the very questions referred by the Federal High Court presided over by Odunowo, J., under Section 295(2) of the 1999 Constitution to the Court of Appeal. They read as follows:

“(1) *Whether the Failed Banks Tribunal, as well as the Special Appeal Tribunal had the jurisdiction to try, convict and sentence the Plaintiff on count 1 in the Charge No. FBFMT/LZII/IC/95 under the*

Failed Banks (Recovery of Debts) and Financial Malpractices in Bank Decree, 1994 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.

(2) *Whether the Failed Banks Tribunal as well as the Special Appeal Tribunal had the jurisdiction to try, convict and sentence the Plaintiff on count 10 in Charge No. FBFMT/LZII/IC/95 under the Banks and Other Financial Institutions Decree, 1991 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.”*

The respondent was a director of Alpha Merchant Bank Plc. from 2 June, 1988 till sometime in 1993. He claimed that he was made a director “by virtue of the investments made by my associates and me in the equity” of the bank. The said bank’s licence was revoked by the Central Bank of Nigeria by a publication in the Official Gazette of the Federal Republic of Nigeria No. 9, Vol. 21 of 8 September, 1994. The bank had been an authorised dealer in foreign exchange. The respondent maintained accounts with the bank through his companies known as Dubic Industries Ltd., D.U. Chemicals Ltd., African Pulp and Paper Mills Ltd. He was alleged to have “over-utilised foreign exchange for which he did not provide equivalent naira cover for the amount.” It was for this reason that two counts on which he was convicted out of the ten filed before the Failed Banks Tribunal were laid against him as follows:

Count 1:

That you, Lord Chief Udensi Ifegwu (now at large), Jimi Adebisi Lawal (now at large), Tony Nnachetta, Jeff Fayomi while being Directors and or Managers of Alpha Merchant Bank Plc (now in liquidation) at Lagos, between 30th June, 1988, and 1st October, 1993, conspired to commit a felony, to wit, fraudulently granting credit facilities to Dubic Industries Limited without lawful authority in contravention of rules and regulations of the said Alpha Merchant Bank Plc and the regulatory authorities (CBN/NDIC) and thereby committed an offence punishable under Section 516 of the Criminal Code Act, Cap. 77 Laws of the Federation 1990 to be read with Section 3(1)(b)(c) and (d) of the Failed Banks (Recovery of Debts) and Financial Malpractices Decree, 1994 as Amended.

Count 10:

That you, Lord Chief Udensi Ifegwu (now at large), between

30th June, 1988, and 1st October, 1993, at Lagos while being a Director of Alpha Merchant Bank, Plc (now in liquidation) and also a Director of Dubic Industries Limited was connected with the granting of credit facilities totaling US\$2,962,062.89 (Two Million, Nine Hundred and Sixty-Two Thousand Dollars, Eighty-Nine Cents) (sic) now
 B equivalent of N242,889,156.98 (Two Hundred and Forty-Two Million, Eight Hundred and Eighty-Nine Thousand, One Hundred and Fifty-Six Naira, Ninety-Eight Kobo only) (sic) to Dubic Industries Limited without declaring your personal interest in the said facility to the
 C then Board of Directors as required by Section 18(3) of the Banks and Other Financial Institutions Decree, 1990 and thereby committed an offence punishable under Section 18(9) of the same Decree.”

As already indicated, the two questions set down by the respondent in the originating summons were referred to the Court of
 D Appeal, Lagos Division. The reference was made upon the request of the respondent as indicated in a motion on notice. The Enrolment of Order in this regard shows that the motion on notice was filed on 12 July, 1999, and was heard on 27 October, 1999. It was moved by Professor Adesanya, SAN, on behalf of the respondent as plaintiff/
 E applicant. The appellants as defendants were absent and unrepresented. Whether the reference was properly made without giving the appellant a hearing has been made an issue in this appeal just as it was raised in the court below.

F The court below constituted a full court and proceeded to consider the matter on the basis of four issues raised by the plaintiff and three issues by the defendants in their respective briefs of arguments. It will be recalled that the reference made to the Court of Appeal put
 G two specific questions for the decision of the court. The issues raised by the parties were intended to assist the court to reach a decision on the two questions referred to it. On the 25th June, 2001, the court below rendered its decision unanimously but the decision did not as much contain answers specifically to the two questions, except by
 H implication that they were given in the negative. The leading judgment of Aderemi, JCA., with which the other four learned Justices concurred, concluded as follows:

“In the final result and for all I have said above, it is my judgment that the plaintiff’s suit is meritorious. If the matter were on an appeal before us I would have, for the reasons that there is no crime

styled as 'fraudulently granting credit facilities' and the conviction for that crime being in violation of the provisions of Section 33(12) of the 1979 Constitution and the law on which the charge was laid was given retrospective application, allowed the appeal, set aside the conviction and sentences. But, since the matter came to us, by reference (Case Stated), I return the following answers:

(1) *There is no crime known to Nigerian Law as 'fraudulently granting credit facilities'.*

(2) *Conviction on a crime which is unknown to law is unconstitutional and must not be allowed to stand.*

(3) *It is unconstitutional, indeed it is a violation of all known principles of law to convict the plaintiff of conspiracy to commit a felony in the circumstances of this case where the facts alleged as amounting to felony occurred in 1991 while the Failed Bank Decree under which the felony was charged commenced on the 9th of November, 1994.*

(4) *It is improper in law to convict the plaintiff for (sic) Counts 1 and 10 under the BOFID as a whole without drawing any distinction, when the facts on which the crime was predicated occurred in part before the commencement of the BOFID and partly after the commencement of the BOFID."*

The defendants/appellants in their appeal against the judgment have raised six issues for determination. With profound respect to the learned Senior Advocate for them, Mr. Fagbemi, who I note for his industry, I think most of the issues were raised largely upon some misconception. In fairness to him, he may have been misled to some extent to take all manner of issues with the judgment essentially because of the approach adopted by the court below in attending to the reference made to it. The issues read as follows:

"(1) *Were the learned Justices of the Court of Appeal right in not striking out this case stated when ex facie the trial Federal High Court lacked jurisdiction to make the reference? - Grounds 1, 3 and 7.*

(2) *Whether the Court of Appeal was right in entertaining the reference when the condition precedent to the exercise of jurisdiction to refer by way of case stated by the Federal High Court had to the finding of the Court of Appeal not been fully established? (sic) - Ground 9.*

(3) *Was the Court of Appeal right in holding that the provisions of Section 33(8) and (12) of the 1979 Constitution took precedence over the Failed Bank and BOFID Decrees in the face of the Supreme Court restatement of the hierarchy of our laws during a military inter regnum? - Ground 2.*

B (4) *Was the Court of Appeal right in not dismissing the case stated when ex facie it is statute barred and also caught by issue estoppel? - Grounds 4 and 6.*

C (5) *Was the Court of Appeal right in its application of the Supreme Court decision in 7-Up Bottling Co. Ltd. v. Abiola & Sons Ltd. (1995) 3 NWLR (Pt. 383) 257 to the facts of this case and in its justification of the hearing ex parte of the motion on notice praying for the reference? - Ground 5.*

D (6) *Whether the misuse of the word 'fraudulently' in the description of the offence for which the Respondent was convicted was material enough to vitiate the conviction when the Respondent was not deceived or misled by the description? - Ground 6."*

E Issues 1, 2, 4 and 5 were argued together by the appellants in their brief of argument. The argument on them covers, naturally I would say, a major part of the brief.

Issues 1, 4 and 5

F I intend to consider and resolve issues 1, 4 and 5 together before I deal with issues 2, 6 and 3 in that order. Part of the submission of Mr. Fagbemi, SAN, is that the Tribunal had exclusive jurisdiction to hear the charge against the respondent in respect of the two counts which were endorsed in the originating summons filed in the Federal High Court. It was on the basis of that endorsement that a motion on notice seeking that a reference be made to the Court of Appeal was filed. The argument goes that the nature of a claim has to be examined to ascertain whether a matter comes within the jurisdiction which a statute confers on a court. The learned Senior Advocate thereafter further submitted in the terms I shall paraphrase but closely using his words (a) that the Federal High Court does not have the jurisdiction to adjudicate over the matters stated in the originating summons and therefore has no power to hear the motion seeking to make a reference to the Court of Appeal; (b) that the Court of Appeal consequently lacks the competence to make any determination of the questions so referred to it; (c) that Section 1(5) of the Failed

Banks Decree No. 18 of 1994 excluded the exercise by the High Court of “the usual ‘supervisory jurisdiction’ or ‘power of judicial review’ irrespective of the provisions of any un-suspended section of the 1979 Constitution”; (d) that Section 5(2) of the Decree No. 18 of 1994 made the decision of the Special Appeal Tribunal final; (e) that as the jurisdiction of the Federal High Court is as prescribed in Section 7 of the Federal High Court Act and Section 230(1) of the 1979 Constitution as amended by Decree No. 107 of 1993, that court cannot exercise supervisory jurisdiction over causes and matters arising from decisions taken by the Failed Banks Tribunal or the Special Appeal Tribunal.

It is, I think, important at the outset to point out by saying that, as I see it, the problem was not so much with the Decrees (Decree No. 25 of 1991 and Decree No. 18 of 1994) relied on for bringing charges to the Failed Banks Tribunal. It was more, and indeed squarely, with the perception of those who framed and prosecuted the charges and of their misapprehension of the relevant provisions of the said Decrees. It must be realised that neither Decree No. 25 of 1991 nor Decree No. 18 of 1994 is made retroactive. The 1991 Decree was made on 20 June, 1991, with the same commencement date. So also the 1994 Decree which was made on 9 November, 1994 had its commencement from that date. The respondent was charged with count 1 under the 1994 Decree, Section 19 created offences. Sub-section (1) of Section 19 which is relevant to the said count 1 used words in no way suggestive that the offences relate or could relate to past acts of anyone sought to be charged thereunder. This tendency to the prospectivity of the provision is, in my view, reinforced by the commencement date of the Decree. I feel compelled at this point to reproduce Section 19(1) in full as follows:

19(1) Any director, manager, officer or employee of a bank who

(a) knowingly, recklessly, negligently, wilfully or otherwise grants, approves the grant, or is otherwise connected with the grant of approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person

(i) without adequate security or collateral, contrary to the accepted practice or the bank’s regulations, or

(ii) *with no security or collateral where such security or collateral is normally required in accordance with the bank's regulations, or*

(iii) *with a defective security or collateral, or*

(iv) *without perfecting, through his negligence or otherwise, a security or collateral obtained; or*

(b) *grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility which is above his limit as laid down by law or any regulatory authority or the bank's regulations; or*

(c) *grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility to any person in contravention of any law for the time being in force, any regulation, circular, or procedure as laid down, from time to time, by the regulatory authorities or by the bank; or*

(d) *receives or participates in sharing, for personal gratification, any money, profit, property or pecuniary benefit towards or after the procurement of a loan, an advance, a guarantee or any other credit facility from any person whether or not that person is a customer of the bank; or*

(e) *recklessly grants or approves a loan or an interest waiver where the borrower is known to have the ability to repay the loan and interest, is guilty of an offence under this Decree"*

It is plain that each paragraph of subsection (1) looks to the present and future by talking only of what the culprit engages in doing but does not include even impliedly what he had done before the commencement date of the Decree. This appears to me to be in consonance with an intention to punish for an offence that was committed as from 9 November, 1994, the commencement date of the Decree. In other words, the Decree did not envisage retroactive effect. **Section 33(8) of the 1979 Constitution which was unsuspended and was then applicable, also forbade retroactivity of criminality** as follows:

"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed."

It follows that Decree No. 25 of 1994 and Section 33(8) of the 1979 Constitution were in harmony. There was no conflict. That circumstance clearly upheld a fundamental principle of constitutional liberty based on the notion that a person is not to be punished for an act which was not a crime at the time it was done: see Aoko v. Fagbemi (1961) 1 All NLR 400. See also Ogbomor v. The State (1985) 1 NWLR (Pt. 2) 283 at 233 where this court said that as a result of the immunity from trial and conviction of a person with respect to an act or omission which at the time of its commission or omission did not constitute any offence under the law, no person can be so tried and convicted on it.

The appellants argue that the Federal High Court does not have jurisdiction over matters contained in the originating summons and therefore could not entertain the action to make a reference in respect of them to the Court of Appeal. The matters in question are the declaratory reliefs sought and the order to set aside the conviction and sentence of the respondent. As submitted by Professor Adesanya, learned Senior Advocate for the respondent, the right to seek these reliefs is predicated on the protection conferred by Section 33(8) of the 1979 Constitution which the respondent alleges has been contravened. The said protection falls under Fundamental Rights, Chapter IV, of the 1979 Constitution.

The jurisdiction of the Federal High Court to entertain the action does not depend on whether it was empowered, at the relevant time, to try the offences with which the respondent was charged. What is important is the cause of action which he claims to have. If that cause of action comes within the ambit of the enforcement of any fundamental right contained in Chapter IV in the sense that the respondent alleges that any of the provisions of that Chapter has been, is being or likely to be contravened in relation to him, then the Federal High Court is eminently conferred with jurisdiction to entertain the action. The respondent has made it abundantly clear from the nature of his claim, and the questions he asked the Federal High Court to refer to the Court of Appeal, that his allegation is that his fundamental right has been contravened.

With due respect, I do not think that the argument of the learned Senior Advocate for the appellants that it is not within

the competence of the Federal High Court to entertain an action of this type which is brought to protect a fundamental right is tenable. Section 1(5) of Decree No. 18 of 1994 relied on by the appellants does not affect that right. The said provision was meant to deny a High Court the exercise of its supervisory jurisdiction or powers of judicial review in regard to Failed Banks Tribunal proceedings. It reads thus:

“Notwithstanding the provisions of the constitution of the Federal Republic of Nigeria, 1979, as amended, or any enactment to the contrary, the supervisory jurisdiction or power of judicial review of a High Court shall not extend to any matter or proceeding before the Tribunal duly constituted under this Decree.” (Emphasis mine)

But the jurisdiction conferred on a High Court under Section 46 of the 1999 Constitution is neither a supervisory jurisdiction nor the powers of judicial review. It is far beyond and outside of that. It is a special jurisdiction conferred under Chapter IV provisions mainly for the purpose of enforcing or securing the enforcement of fundamental rights. Subsections (1) and (2) of the section read:

“46(1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this Chapter.”

It is not in doubt that declaratory and other reliefs can be sought and obtained to enforce and protect fundamental rights by filing action in a High Court: see *Director, S.S.S. v. Agbakoba* (1999) 3 S.C. 59; (1999) 3 NWLR (Pt. 595)314. **The manner in which the court is approached for the enforcement of a fundamental right is hardly objectionable once it is clear that the originating court process seeks redress for the infringement of the right so guaranteed under the Constitution.**

The court process could come by the Fundamental Rights (Enforcement Procedure) Rules or by originating summons or indeed by writ of summons: see Saude v. Abdullahi (1989) 7 S.C. (Pt. II) 116; (1989) 4 NWLR (Pt. 116) 387. That seems to underline the concerns in regard to redressing a contravention of a fundamental right by liberalizing the type of originating process without the person affected being inhibited by the form of action he adopts. It is enough if his complaint is understood and deserves to be entertained.

It has been contended by Mr. Fagbemi, SAN, as expressed in the submissions in a paragraph of the appellants' brief of argument earlier paraphrased that the Federal High Court does not have the jurisdiction to adjudicate over the "matters contained in the originating summons", and therefore lacked the jurisdiction to entertain the motion by which the respondent sought a reference to the Court of Appeal. It was specifically argued that "the jurisdiction of the Federal High Court to inquire into causes and matters were as prescribed in Section 7 of the Federal High Court Act and Section 230(1) of the 1979 Constitution as amended by Decree No. 107 of 1993." Although the learned Senior Advocate cited no decided case in support of this submission, I believe the decision of this court in Tukur v. Government of Gongola State (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 117) 517 is the nearest to it. It is unnecessary for me to discuss that decision here since it would appear inapplicable to the circumstances of this case and more so, of course, that neither of the parties has placed reliance on it. There may be an appropriate occasion for that. But it is enough to say that that decision came before the copious amendment made to Section 230(1) of the 1979 Constitution (now Section 251(1) of the 1999 Constitution by Decree No. 107 of 1993).

Under that provision of the 1999 Constitution, the Federal High Court, among other things, has jurisdiction in civil causes and matters –

- connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange,

letters of credit, promissory notes and other fiscal matters: see S. 251(d).

- subject to the said provision, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies: see S. 251(1)(q).

B The Federal High Court shall also have and exercise jurisdiction and powers

- in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of Section 251: see S. 251(3).

C ***The jurisdiction conferred on the Federal High Court by the above provisions covers matters concerning banking, foreign exchange and criminal causes arising therefrom, and the interpretation of the Constitution as it affects the action of the Federal Government against the present respondent.*** The

D claim as it stands raises no doubt that the Federal High Court must be seen to have jurisdiction to entertain it for the purpose of enforcing the fundamental right involved. However, for a claim to qualify as falling under fundamental rights, it must be clear that the principal relief is for the enforcement or for securing the enforcement of a
E fundamental right and not, from the nature of the claim, to redress a grievance that is ancillary to the principal relief which itself is not ipso facto a claim of a fundamental right. In other words, where the alleged breach of a fundamental right is ancillary or incidental to the
F substantive claim of the ordinary civil or common law nature, it is incompetent to constitute the claim as one for the enforcement of a fundamental right: see *Tukur v. Government of Taraba* (1997) 6 NWLR (Pt. 510) 549; *Sea Trucks Nig. Ltd. v. Anigboro* (2001) 1 S.C. (Pt. I) 45. The reliefs sought by the respondent in this case are entirely to enforce a fundamental right.
G

Argument has been canvassed by the learned Senior Advocate for the appellants that Section 5 of Decree No. 18 of 1994 created a right of appeal from the decision of the Failed Banks Tribunal. It is contended that the respondent duly exercised his right of appeal
H to the Special Appeal Tribunal which arrived at a decision on 29 May, 1997 and that by virtue of the said Section 5, that decision shall be final. It is submitted on that basis by him that the matter of the conviction of the respondent and sentence is regarded closed and the Federal High Court lacked the jurisdiction to entertain this claim as

stated in the originating summons. That argument may sound attractive but, with due respect, it is without merit.

The learned Senior Advocate for the respondent in his submission contends that where the jurisdiction of a Tribunal is being challenged, the fact that the statute which set up the said Tribunal says that its decision shall be final does not fore- B
close the jurisdictional issue. He cited *Nigerian Ports Authority v. Panalpina World Transport (Nig.) Ltd.* (1974) 1 NMLR 82 at 95; *Udosen v. National Electoral Commission* (1997) 5 NWLR (Pt. 506) 570. ***I find myself in agreement with this submission. It should*** C
be remembered that the action brought by the respondent in the Federal High Court is not to further appeal from the deci-
sion of the Special Appeal Tribunal. It is an action brought under the Fundamental Rights procedure to show that the prosecution was done in violation of the right guaranteed to the respondent under D
 Section 33(8) of the 1979 Constitution. In other words, that his fundamental right under that section had been contravened by the Tribunal sitting in Lagos State when it convicted him of acts not constituting any offence at the time they were done. ***I am fully aware that***
the decision of that Tribunal or of the Appeal Tribunal is said E
to be final. I do accept that fact. But it is only final in regard to the proceedings which gave rise to the appeal. The appeal
finally terminated those proceedings. But that did not termi-
nate the respondent's entitlement to seek appropriate redress F
for the alleged breach of his fundamental right arising from those proceedings in a competent court. This is not unusual. In *R. v. Medical Appeal Tribunal Ex parte Gilmore* (1957) 1 Q.B. 574 at p. 589, a case where certiorari was sought, Parker, L.J., in considering the situation vis-à-vis application for certiorari where statute provides G
 that the decision of a Tribunal shall be final, put it thus:

"Sometimes, as here, the statute provides that subject to a specific right of appeal the decision shall be final. In such a case it may be said that the expression 'shall be final' is merely a pointer to the fact that there is no further appeal, and the remedy by way of certiorari is not by way of appeal... In other cases the expression is used in the statutes when no rights of appeal are provided. In such a case it could be said that the expression was of no effect unless it was intended to oust the remedy by way of certiorari. Be that as it may, I am satisfied H

that such an expression is not sufficient to oust this important and well-established jurisdiction of the courts.”

Again, in *R. v. Nat Bell Liquors Ltd.* (1922) 2 AC 128 at 159-160, Lord Sumner observed:

B *“Long before Jervis’s Acts, statutes had been passed which created an inferior court, and declared its decisions to be ‘final’ and ‘without appeal,’ and again and again the Court of King’s Bench had held that language of this kind did not restrict or take away the right of the court to bring proceedings before itself by certiorari.”*

C I have already said that a High Court has jurisdiction to entertain an application for a declaration brought under Section 46 of the 1999 Constitution. That jurisdiction is directly and specially conferred by the Constitution and, as I have further said, it is rooted in the concept of the preservation and enforcement of entrenched fundamental principles of liberty. It is certainly wider in scope and effect than what the prerogative writ of certiorari can achieve; and is quite apart from the usual remedy by declaration which the High Court has power from time to time to make - that is to say, the remedy described in *Taylor v. National Assistance Board* (1957) 1 All ER 183
D
E at 185 by Denning, LJ., thus:

“The remedy by declaration is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determinations in accordance with the law; and this is so, no matter whether the determinations are judicial or disciplinary.....
F *The remedy is not excluded by the fact that the determination of the board is by statute made ‘final’. Parliament gives the impress of finality to the decisions of the board only on the condition that they are reached in accordance with the law; and the Queen’s courts can issue*
G *a declaration to see that this condition is fulfilled.”*

This Court in *Nigerian Ports Authority v. Panalpina World Transport Nig. Ltd.* (supra) at p. 95 per Coker, JSC., said thus:-

“Concerning the effect of Section 1 of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970, the learned trial Judge observed in the course of his judgment as follows:

‘While I think that these provisions of the Supremacy and Enforcement of Powers Decree No. 28 of 1970 completely oust the jurisdiction of the court in matters within the contemplation of a De-

cree, I do not consider that matters which are not in contemplation of the Decree in question can enjoy the protection which the Supremacy and Enforcement of Powers Decree gives. In other words, I am saying that if by a decree a tribunal is set up to be final; and the tribunal proceeds to take a decision completely outside or in excess of its jurisdiction, it is my view that this court is in cases properly within its territorial jurisdiction, competent to make a declaration on it.'

We are in agreement with the statement of the law as expressed by the learned trial Judge on this point."

I have no doubt that this confirms the logic that ***no ouster clause is ever intended, or have that monstrous effect, to confer powers on an inferior tribunal to be able to flout and transcend the very purpose of the law it seeks to enforce by precluding a competent court from intervening in any event, no matter to what extent that tribunal exceeds its jurisdiction. That will simply lead to judicial anarchy permitted to be caused by inferior tribunals. For as said by Mellor, J., in Ex parte Bradlaugh (1878) 3 QBD 509 at p. 513:***

"It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."

See also R. v. His Honour Judge Sir Donald Hurst (1960) 2 All ER 385 at 389 per Lord Parker, CJ.

I have earlier reproduced the provision of Section 33 (8) of the 1979 Constitution. It is a provision which prohibits retroactive penal laws as well as retroactive construction of penal laws to punish any person. It is a constitutional right which cannot be taken away retrospectively by any subterfuge as long as that provision remains active. It is the Constitution which, as the organic law of a country, declares in formal, emphatic and binding principles the rights, liberties, powers and responsibilities of the people, both the government and the governed. It is the duty of the authorities, including the judiciary, to ensure its observance. The position of the courts is quite crucial in this regard for the purpose of safeguarding the constitutional rights of persons through effective intervention whenever, in

an appropriate case, it is shown that such rights have been violated. In such a situation, the matter should be examined with close and anxious scrutiny to make sure that what is arrived at is objectively in conformity with the spirit of the constitutional guarantee. If I may say so, as far as this court is concerned (and happily this is the trend),
 B whenever an aspect of personal liberty is properly raised in any proceeding, the focus on the constitutional question is intent and intensive, and a solution which projects the essence of the constitutional guarantee is proffered. That is the way the constitutional question in
 C the present case must be attended to.

It is plain to me, and I express the respectful view, that the final decision of the Special Appeal Tribunal, an inferior court, cannot foreclose the enforcement of the constitutionally entrenched right of the respondent not to be convicted of an act which did not constitute an
 D offence at the time it was committed. No court or tribunal has any jurisdiction to so convict; and cannot, by ruling otherwise that it has jurisdiction, or by keeping quiet about it, confer jurisdiction on itself. That is what Section 33(8) of the 1979 Constitution has guaranteed and it must have its full impact on the proceedings before the Failed
 E Banks Tribunal. Sections 1(1) and 13 of the 1979 Constitution (same as in the 1999 Constitution) are to ensure that there is no infraction of the Constitution (unless specifically overridden by a Decree during the unconstitutional military regime). Section 1(1) states that the
 F Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. Section 13 which comes under the Fundamental Objectives and Directive Principles of State Policy, Chapter II, provides thus:

"It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution."
 G

Fundamental rights are regarded as part of human rights. The trend in every modern society where the rule of law operates is to
 H protect them for the enhancement of human dignity and liberty. Retroactive or Ex Post Facto laws which impose criminal penalties are regarded as inhuman and an affront on liberty. In *Marks v. United States* 97 S. Ct. 990 (1977), the defendants were convicted in the United States District Court for the Eastern District of Kentucky of

transporting obscene materials in violation of a federal statute. They petitioned for certiorari to quash the conviction on the basis that their conduct did not constitute an offence before the statute was enacted and that their conviction violated the protection given under the due process clause of the Fifth Amendment against ex post facto laws. Mr. Justice Powell, delivering the opinion of the United States Supreme Court, said at pp. 992-993:

“The Ex Post Facto clause is a limitation upon the powers of the Legislature...”

Continuing, he stated the principle warranting this when he observed thus:

“The principle on which the clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.”

That Due Process Clause is similar to the provision of Section 33(8) of the 1979 Constitution. **Mr. Fagbemi, SAN, has argued that it was too late for the respondent to rely on that provision. He bases this on what he regards as issue estoppel.** He says that arguments having been raised in respect of jurisdiction before the Special Appeal Tribunal, as admitted by the respondent, that *“on the 29th May, 1997, the Special Appeal Tribunal delivered its judgment and surprisingly it did not deliver any formal written ruling on the issue of jurisdiction in view of Section 33(8) of the Constitution, it merely held that it had considered the matter and that it has jurisdiction and the Appeal Tribunal then proceeded to affirm the judgment of the lower Tribunal but at the same time reduced considerably the sentences...”*; this court ought not to allow this action to proceed further on the ground of res judicata since that decision on jurisdiction stands as issue estoppel. He has placed reliance on *F.C.D.A. v. Sule* (1994) 4 NWLR (Pt. 332) 257; *Military Adm. of Benue State v. Ulegede* (2001) 9-10 S.C. 180; *Ebba v. Ogodu* (2000) 6 S.C. (Pt. I) 133; (2000) 10 NWLR (Pt. 675) 387; *Shanu v. Afribank Plc.* (2002) 6 S.C. (Pt. II) 135.

But Professor Adesanya, SAN's submission on the point is that estoppel cannot apply to validate an illegal act or to give jurisdiction where it is alleged to be lacking by precluding an aggrieved party

from raising the issue of lack of jurisdiction or the illegality of the act. He cited *Onamade v. African Continental Bank Ltd.* (1997) 1 NWLR (Pt. 480) 123 and *Josiah Cornelius Ltd. v. Ezenwa* (1996) 4 NWLR (Pt. 443) 391. I think there is a grave misunderstanding here. What is in issue in this case is not whether the question of jurisdiction had been decided by the Special Appeal Tribunal. Apart from my view on reading those authorities cited, that I do not find them quite applicable here, what must prevail is whether there was lack of jurisdiction to try charges framed with retroactive effect. The fact that the Special Appeal Tribunal gave an interpretation which enabled it to assume jurisdiction does not close the matter as it relates to the contravention of a fundamental right. The position of the law, as I understand it, is that when an inferior tribunal or court acts in complete disregard of ex post facto clause (similar to Section 33(8) of the 1979 Constitution), either through inadvertence or misconception, the person affected has a remedy under Section 46 of the 1999 Constitution. In that regard, it becomes irrelevant in the present action whether or not the issue of jurisdiction was pursued by the respondent or ruled upon by the tribunals. If indeed the Failed Banks Tribunal had no jurisdiction to try and convict the respondent of that offence, that status of the tribunal remains a fundamental question, and a High Court which is approached on that basis under the Fundamental Rights procedure to enforce the protection given under Section 33(8) has an obligation to do so. In *Bonnie v. City of Columbia* 84 S. Ct. 1697 (1964), Mr. Justice Brennan, delivering the opinion of the Court in regard to a misconceived construction of Ex Post Facto Clause, which I consider has a defining effect on Mr. Fagbemi, SAN's submission on the point, observed inter alia at pages 1702-1703:

"There can be no doubt that a deprivation of a right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language... Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law such as Art. I, Section 10, of the Constitution forbids. An ex post facto law has been defined by this court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or , makes it greater than it was when

committed.' 'If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the *Due Process* Clause from achieving precisely the same result by judicial construction... The fundamental principle that 'the required law must have existed when the conduct in issue occurred,'...must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue', it must not be given retroactive effect. The basic due process concept involved is the same as that which the court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this court's review of a federal question.... The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether" a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him... When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of fair warning that his contemplated conduct constitutes a crime."

As can be seen from the facts of this case, the respondent was in the circumstances convicted on count 1 of an act which did not constitute an offence at the time it was done when, as must be admitted, it was not within the jurisdiction of the Failed Banks Tribunal to so convict by virtue of the prohibition contained in Section 33(8) of the 1979 Constitution. The fact that the Special Appeal Tribunal arrived at an unforeseeable and indefensible decision in which it took a retroactive view of Decree No. 18 of 1994 cannot preclude the High Court from giving appropriate relief under Fundamental Rights guaranteed by the Constitution.

Moreover, **it is elementary but basic principle of law that jurisdiction is fundamental to any decision. It is therefore a condition for relying on *res judicata* or *issue estoppel* to establish that the decision was reached by a court competent to do so having regard to the subject-matter. A decision arrived**

at by a court without jurisdiction, or by a court on a subject-matter which the Constitution or statute forbids it from entertaining, can neither constitute res judicata nor issue estoppel: see *Fadiora v. Gbadebo* (1978) 3 S.C. 219, *Bamishebi v. Faleye* (1987) 2 NWLR (Pt. 54) 51; *Iyowuawi v. Iyowuawi* (1987) 4 NWLR (Pt. 63) 61. **And it is also the law that since proceedings conducted without jurisdiction are null and void** (*Odutola v. Kayode* (1994) 2 NWLR (Pt. 324) 1) **no act of waiver, or act that may be seen to have that effect, can confer jurisdiction to validate such proceedings:** see *Ishola v. Ajiboye* (1994) 6 NWLR (Pt. 352) 506. It seems to me that under no point of view can Mr. Fagbemi's submission on res judicata or issue estoppel applying against the respondent be tenable.

At this stage, I think I can briefly dispose of the argument in respect of Section 2 of the Public Officers Protection Act (Cap. 379) Laws of the Federation of Nigeria relied on by learned Senior Advocate that the respondent's action was statute barred. It would be argument carried too far to say that the Public Officers Protection Act applied to bar a relief sought in connection with an error committed in purely judicial capacity. It does not. The remedy sought is to enforce a constitutional right contravened by a court acting judicially. The time within which to seek that remedy is not subject to the time limit prescribed by the Public Officers Protection Act. There is no reason why it should. If it did, it would likely conflict with court rules.

Issue 2

There is the issue of the reference made by the Federal High Court to the Court of Appeal after hearing only counsel for the respondent. The appellants had argued in the court below that it was improper for the Federal High Court to have made the reference to the Court of Appeal after hearing only the respondent's counsel upon what was filed as a motion on notice. The appellants were not in court and were unrepresented on that occasion. The court below, however, saw no injustice suffered by the appellants. The learned Justice of Appeal, Aderemi, JCA., in his leading judgment, regarded the application for a reference as an ex parte application. He observed inter alia:

"It is true that there is no satisfactory evidence that copies of the motion were served on the defendants. In effect, that application

was in the form of an *Ex-Parte* one when it was granted. An *ex-parte* application by its very nature is one in which the other party is not put on notice before the application is heard and determined by the court... In my respectful view, this type of application is one that is necessary to be taken before the commencement of a substantive matter. It cannot be said to be a negation of fair hearing. I find support for this pronouncement in the case of *7-up Bottling Co. Ltd. v. Abiola & Sons Ltd.* (1995) 3 NWLR (Pt. 383) 257 where the Supreme Court at page 280 held:

‘There is no doubt that the right to fair hearing under the Constitution is synonymous with the common law rules of natural justice. However, because of the nature of certain preliminary steps that have to be taken before the commencement of substantive matters, the rules of court have made provisions for *ex-parte* applications and there is nothing unconstitutional in such rules.’

As I have said above, the sole purpose of bringing that application before the court below is to get that court to transfer, in its entire package the suit that was before it which, in the view of the applicant, involves a substantial question as to the interpretation of the provision of the Constitution. Whether such an application is granted or not the material facts that ground the suit will not be diminished from.”

It was based on the above-stated passage in the judgment of the court below that the appellants raised the said issue 2,

“Was the Court of Appeal right in its application of the Supreme Court decision in *7-Up Bottling Co. Ltd. v. Abiola & Sons Ltd.* (1995) 3 NWLR (Pt. 383) 257 to the facts of this case and in its justification of the hearing *ex parte* of the motion on notice praying for the reference? – ground 5.”

Mr. Fagbemi, SAN, has argued that there was no parallel between the facts of this case and those of *7-Up Bottling* case and the purposes the two were meant to serve. His contention is that this case is about making a reference by order on a constitutional issue to the Court of Appeal whereas the other case was about granting an *ex parte* order of injunction. While the latter has rules of court regulating and permitting such an order, the former has no known court rules as such. I think there is merit in this argument and on that basis I am unable to resist saying that the court below was wrong in its reliance on the case of *7-Up Bottling* (supra).

The matter does not, in my opinion, end there. In his submission that the appellants were not given a fair hearing, Mr. Fagbemi relied on the provision of Section 36(1) of the 1999 Constitution which says:

B *“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 manner as to secure its independence and impartiality.”*

C Professor Adesanya has on the other hand argued that in a situation like this where what was done by the court was just a step towards coming to determining the civil rights and obligations of a party in any proceedings, such as what Uwais, JSC., (now CJN), referred to as “certain steps to be taken, which are incidental or preliminary to the substantive case”, including “motions for directions”, but not really going to determine the civil rights and obligations’,
D there may not be much about a denial of fair hearing if done ex-parte- see 7-Up Bottling (supra) at pp. 280-281. But I must say that the observation was made in relation to the rules of court which allow such procedure. It does not settle the question whether a reference could be made after listening to only one of the parties to an
E action upon his request for a reference.

Let me first state in what circumstances a reference may be made to the Court of Appeal by a High Court. The relevant provision of the 1999 Constitution is Section 295(2) in the present case
F where the reference was made by the Federal High Court. It reads:

G *“295(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 proceeding so request, 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 of with that decision.”*
H

This provision and similar ones have received judicial consideration in many cases.

It is clear from those cases that there are conditions which must

exist before a reference can be made under this provision. First, the question must be as to the interpretation or application of the Constitution. It is the foundation for even contemplating making a reference: see *Gamioba v. Ezezi II* (1961) 2 SCNLR 237; *Atake v. Afejuku* (1994) 9 NWLR (Pt. 368) 379. Second, such a question must arise in the proceedings in connection with an issue before the court making the reference: see *Olawoyin v. Commissioner of Police No. 2* (1961) 1 All NLR 622; *Bamaiyi v. Attorney-General of the Federation* (2001) 7 S.C. (Pt. II) 62. Third, the matter for reference must involve a substantial question of law. The court making the reference must decide the substantiality of the question: See *African Newspapers of Nigeria Ltd. v. The Federal Republic of Nigeria* (1985) 2 NWLR (Pt. 6) 137. There might be instances where the question presents no difficulty in ascertaining whether it is substantial or not. But it is useful to take as a guide what was said by the Federal Supreme Court in *Gamioba v. Ezezi II* (supra) at p. 588 per Brett, F.J., that the question “*must clearly be one on which arguments in favour of more than one interpretation might reasonably be adduced.*” Fourth, the court making the reference to the higher court is not required to, and must not, give an opinion of law on the question: See *Adesanya v. The President of the Federal Republic of Nigeria* (1981) 5 S.C. 112; (1981) 2 NCLR 358.

In the present case, after Odunowo, J., had listened to Professor Adesanya, SAN, requesting that a reference be made to the Court of Appeal under Section 295(2) along the line of the two questions he formulated, the learned trial Judge said:

“Having perused the papers filed herein, I am of the opinion that the question raised by the present application raises a substantial question of law which requires the attention of the Court of Appeal. Consequently the application is hereby granted and the case shall be referred to the C/A by way of case stated in terms of Section 295(2) of the 1999 Constitution.”

I do not think it can be disputed that the reference was in compliance with the terms of S. 295(2) in regard to the four conditions I have stated above. In particular, let me say by way of emphasis that the reference was as to the application of a section of the Constitution which itself raises substantial question of law arising in the proceeding before the Federal High Court and necessary for de-

ciding the claim before it. The appellants have not made any issue of this.

What is in contention is the substance of the complaint by the appellants as expressed in their brief of argument that “*the non service of the motion for reference on the appellants as found by their Lordships of the Court of Appeal ought to have made their Lordships to return a verdict that the appellants’ constitutional right to fair hearing had been breached.*” In the African Newspapers of Nigeria Ltd. case (supra), while considering Section 259(3) of the 1979 Constitution (same as Section 295(3) of the 1999 Constitution), Obaseki, JSC, observed at page 156:

“*To invoke the aid of the section, there must be a substantial question of law involved as to the application and interpretation of the Constitution. It is only after a decision on this question has been taken that the Court of Appeal may suo motu decide to make a reference of the question to the Supreme Court. This is when none of the parties requests a reference of the question. If however, the parties or any of the parties request or requests such a reference, the Court of Appeal is under a duty to refer the question to the Supreme Court for its decision and directions as the provisions are couched in mandatory terms.*”

He added that reference must be made so long as the Supreme Court has made no pronouncement on the question in any matter it has disposed of. In *Rossek v. African Continental Bank Ltd.* (1993) 8 NWLR (Pt. 312) 382 at p. 474 per Bello, JSC., (later CJN.), and at p. 463 per Onu, JSC, the same view as to the mandatory nature when a party makes a request for a reference was expressed. Recently, Karibi-Whyte, JSC., said in *Bamaiyi v. Attorney-General of the Federation* (2001) 7 S.C. (Pt. II) 62 at 76:

“*The section has also prescribed when and by whom the provision can be invoked. The court is vested with discretion to invoke the provision suo motu and also if the parties to the proceedings so request. Thus the court may suo motu and must make the reference on the parties’ request.*”

It cannot be disputed that Section 295(2) envisages two independent situations in which a court makes a reference. After satisfying itself that a serious question of constitution arising from the case before it exists, the court may suo motu

decide to make a reference. I expect that it will under normal circumstances make this known to the parties in court. But at this stage it is not bounden on it to make the reference. It may for one reason or another consider that there is no need to do so. However, if in those circumstances which might have engaged it, on its own, to make a reference or not, any of the parties were to request for a reference, then it would be left with no choice but to do so. It would be a bounden duty made so by the mandatory language of the provision.

Therefore it is plain that when the proper conditions for making a reference are present, the court to which the request is made has no discretion. It is bound to make the reference. When all the parties involved make a request there is certainly nothing more to expect from the court in order to make the reference. But when only one of the parties makes the request, still the provision says that it is mandatory on the Court to make the reference. Now, the appellants argue that not to ask the view of the other party or parties before the reference is made in that circumstance is tantamount to a denial of a fair hearing. To my mind, the insistence by such a party on the observance to the letter of Section 36(1) of the Constitution in this scenario (i.e. the scenario where all the conditions for making a reference are admittedly present and court cannot exercise any discretion no matter what the other party may say in opposition to a request) is perhaps, to say the least, problematic. Is a reference in those circumstances as it pertains to that party something “*in the determination of his civil rights and obligations*” such as to warrant his entitlement to “a fair hearing within a reasonable time”, going by the actuality of what a reference connotes, and having regard to the spirit of Section 36(1)?

I must confess I have no intention of playing down the general principle of audi alteram partem. However, I do not think this court was sufficiently addressed on this knotty point. Even so, I find it difficult to understand that the reference simpliciter was a determination which was likely to affect the civil rights and obligations of the appellants. I think a party who alleges a denial of a fair hearing in reliance on the provision of Section 36(1) ought at least to show how that alleged denial fits into the essence of that provision, and the unfair or likely unfair consequence of the infraction of that provision. See the

Judgment of this court in *Kenon v. Tekam* (2001) 7S.C. (Pt. III) 49, (2001) 14 NWLR (Pt. 732) 12 at 34. At the moment I do not see how it may be said that what happened in this case can fit into Section 36(1) in the circumstances of the application of Section 295(2) of the 1999 Constitution, and what unfair or likely unfair consequence B would follow.

Issue 6

The charge in count 1 says that the respondent “conspired to commit a felony, to wit, fraudulently granting credit facilities to Dubic C Industries Limited without lawful authority ...” The offence in question as stated in Section 19(1)(a) of Decree No. 18 of 1994 does not use the word “fraudulently” but says, any director etc., of a bank who “knowingly, recklessly, negligently, willfully or otherwise grants” In considering whether there was an offence envisaged under D that section of “fraudulently granting”, the court below said:

“The crucial issue is whether there was the offence charged, to wit, ‘fraudulently granting credit facilities’ is (sic) contained in an existing law. I have said supra that the offence charged as couched in the charge is unknown to any law. ...A conviction for ‘fraudulently E granting credit facilities’ as was passed in the court below (sic) is a violation of the provisions of Section 33(12) of the Constitution as that offence is not defined under the law on which the count was laid.”

F Mr. Fagbemi has argued that the above reasoning was a misdirection since looking at the entire proceedings and the circumstances of the charge, whatever defect there was in using the word “fraudulently”, the word described the manner in which the accused granted credit facilities to Dubic Industries Limited, (a company owned by G him), and that he was in no way misled by the use of that word. Professor Adesanya in reply has submitted that the use of the word “fraudulent” created an additional mental element known as mens rea to the offence created under Section 19(1)(a), and that the case of *Ogbomor v. The State* (1985) 1 NWLR (Pt. 2) 223 relied on by H Mr. Fagbemi was distinguishable and clearly inapplicable.

I think *Ogbomor v. The State* (supra) is applicable to the extent only that it cited and applied the provision of Section 166 of Cap. 80, Laws of the Federation (The Criminal Procedure Act), which says:

“No error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any time of the case material unless the accused was in fact misled by such error or omission.”

I need to add that Sections 167 and 168 make further provisions in regard to how and when such error should be pointed out. B They read:

“167. Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later.”

168. No judgment shall be stayed or reversed on the ground C of any objection which if stated after the charge was read over to the accused or during the progress of the trial might have been amended by the court.”

Besides, the use of the word “fraudulently” can, in my view, be D accommodated under the ejusdem generis rule to stand in for the word “otherwise” as used in Section 19(1)(a) of Decree No. 18 of 1994. In effect, ejusdem generis (or sometimes noscitur a sociis) rule helps to confine the construction of general words within the genus of special words which they follow in a statutory provision or in a E document: see *Fawehinmi v. Inspector-General of Police* (2002) 5 S.C. (Pt. I) 63; (2002) 7 NWLR (Pt. 767) 606 at 683. It means that where there are general words following particular and specific words, the general words must be confined to things of the same kind as F those specified. It is said to be a question of the assumed intention of the statute: see *Scales v. Pickering* (1828) 4 Bing 448 at 452-453; (1828) 130 ER 840 at 841-842. In a New Zealand case of *Cooney v. Covell* (1901) 21 NZLR 106 at 108, Williams, J., stated thus:

“There is a very well known rule of construction that if a general word follows a particular and specific word of the same nature as G itself, it takes its meaning from that word, and is presumed to be restricted to the same genus as that word. No doubt that rule is one which has to be followed with care; but if not to follow it leads to absurd results, then I am of opinion that it ought to be followed.” H

In this particular case, the assumed intention is to punish based on the mental element of an accused in granting irregular facilities etc. Not to follow the ejusdem generis rule to accept that “fraudulently” comes within that mental ele-

ment of “**knowingly, recklessly, negligently, willfully**” used in Section 19(1)(a) is to create an absurd result if the evidence actually shows fraud. If it does not show fraud but any of the other elements, there is no reason why an amendment to the charge made at the appropriate time cannot be allowed. I am

B **satisfied that the respondent was not misled and that the charge as framed is not defective.** As a matter of fact, the burden on the appellants somehow initially became higher on the face of the charge to prove that particular aspect of the charge beyond mere know-

C **ingly, recklessly, negligently or willfully but that the act of the respondent was fraudulent although proof of any of those other elements would ultimately suffice, in my view. The use of the word “fraudulently” in the charge does not, it would appear to me, make the offence unknown to law. All that might need to be done**

D **would be an appropriate amendment followed by compliance with due procedure.** That leads me to say that what I have discussed under this issue would be relevant in an appeal proceeding from the decision of the Failed Banks Tribunal or on further appeal from the Special Appeal Tribunal if it were available. But that is not

E the focus in the present case as it completely misses the constitutional point in issue. What this court is concerned with is whether there had been an infraction of the relevant provisions of Section 33 of the 1979 Constitution. I can hardly see how the use of the word “fraudulently” in the charge in question could have brought that about. The

F elements that constituted a contravention of the respondent’s fundamental right have already been discussed in this judgment and I hope the issue is reasonably clear. **I think the court below erred in its view that the charge as framed contravened Section 33(12) of the 1979 Constitution in that it was in respect of an offence not defined under the law.**

G

Issue 3

This issue was formulated from ground 2 of the grounds of appeal. The said ground of appeal reads:

H “(2) *The Court of Appeal erred in law in holding that the conviction of the respondent was contrary to Section 33(12) of the 1979 Constitution, and, therefore, void, when that law was not relevant at all material times material to this case.*” (sic)

Particulars

(a) *By Section 28 of Decree No. 18 of 1994, the provisions of Section 33 of the 1979 Constitution is inferior to Decree No. 18 of 1994.*

(b) *It was wrong to declare acts taken under Decree No. 18 of 1994 void, when the Decree is superior to the Constitution.”*

Now, the issue distilled from the above is as reproduced earlier^B on. I shall recite it here again for proper effect. It reads:

“Was the Court of Appeal right in holding that the provisions of Section 33(8) and (12) of the 1979 Constitution took precedence over the Failed Banks and BOFID Decrees in the face of the Supreme Court restatement of the hierarchy of our laws during a military interregnum.”^C

The argument in support of this issue in the main is that the court below wrongly placed, to use the words of learned Senior Advocate for the appellants, *“pre-eminence in hierarchy of laws on the 1979 Constitution without cognisance of the fact that at all material times relevant to the accrual of the cause of action, military regime and their Decrees held sway.”* The argument went further to say that what the Court of Appeal was invited to do and which it did by the reference made to it was to pronounce on the superiority of certain sections particularly Sections 33(8) and 33(12) of the 1979 Constitution over the Failed Banks Decree No. 18 of 1994 and the Banks and other Financial Institutions Decree of 1991. He cited *Osadebey v. Attorney-General of Bendel State* (1991) 1 NWLR (Pt. 169) 525; *Olaniyi v. Aroyehun* (1991) 5 NWLR (Pt. 194) 653; *Attorney-General Bendel State v. Agbofodoh* (1999) 2 S.C. 94; (1999) 2 NWLR (Pt. 592) 476; *Attorney-General of Ondo State v. Attorney-General Ekiti State* (2001) 9-10 S.C. 116; (2001) 17 NWLR (Pt. 743) 706. These authorities establish that by the hierarchy of our laws, Decrees^E attained the highest position during the military dictatorship.^F

With due respect to the learned Senior Advocate, this is completely beside the point in this case. As I earlier showed, neither Decree No. 25 of 1991 nor Decree No. 18 of 1994 constituted any problem. They were not enacted with retrospective effect. So there was no conflict between them and Section 33 of the 1979 Constitution. They were in consonance. Therefore the hierarchy of the laws in this country as they stood at that time was at no time called into question. The need simply did not arise. The undue problem was^H

created by those who framed and prosecuted the charges in question. I am of the view that issue 3 has served no purpose in this appeal.

Having regard to what I have discussed in this judgment, I hold that this appeal wholly lacks merit and accordingly I answer the two questions referred by the Federal High Court as follows:

Question (1): The answer is no

Question (2): The answer is no

I order that the case be resumed at the Federal High Court and direct that it should be dealt with in the light of this decision and the answers given to the two questions. I dismiss the appeal and make no order for costs. Each party to bear its own costs.

D **KUTIGI JSC** (Dissenting)

In the Failed Bank Tribunal, Lagos Zone II, the accused/respondent was arraigned on a two-count charge as follows –

“COUNT 1

That you, Lord Chief Udensi Ifegwu (now at large), Jimi Adebisi Lawal (now at large), Tony Nnachetta, Jeff Fayomi, while being Directors and or Managers of Alpha Merchant Bank Plc. (now in liquidation) at Lagos, between 30th June, 1988 and 1st October, 1993 conspired to commit a felony, to wit fraudulently granting credit facilities to Dubic Industries Limited without lawful authority in contravention of rules and regulations of the said Alpha Merchant Bank Plc and the regulatory authorities (CBN/NDIC) and thereby committed an offence punishable under Section 516 of the Criminal Code Act, (Cap. 77 Laws of the Federation, 1990 to be read with Section 39(1)(b)(c) and (d) of the Failed Banks (Recovery of Debts) and Financial Malpractices Decree, 1994 as Amended.

COUNT 10

That you, Lord Chief Udensi Ifegwu (now at large between 30th June, 1988 and 1st October, 1993 at Lagos while being a Director of Alpha Merchant Bank Plc., (now in liquidation) and also a Director of Dubic Industries Limited was connected with the granting of credit facilities totaling US\$2,962,062.89 (Two Million, Nine Hundred and Sixty-Two Thousand Dollars, Eighty-Nine Cents) (sic) now equivalent of N242,889,156.98 (Two Hundred and Forty Two Mil-

lion, Eight Hundred and Eighty Nine Thousand, One Hundred and Fifty - Six Naira, Ninety Eight Kobo Only) to Dubic Industries Limited without declaring your personal interest in the said facility to the Board of Directors as required by Section 18(3) of the Banks and other Financial Institutions Decree, 1991 and thereby committed an offence punishable under Section 18(9) of the same Decree.” B

After the conclusion of evidence and addresses of counsel on both sides, the Respondent was duly convicted of two counts and sentenced on page 90 of the record as follows:

“For the 1st accused (now Respondent) I impose the following sentence.” Count 1, 5 years Count 10, N 100,000 or 3 years” C

The judgment was delivered on 19th March, 1996.

The Respondent aggrieved by the decision of the Tribunal exercised his right of appeal in accordance with the provisions of the Failed Banks Decree No. 18 of 1994 to the Special Appeal Tribunal. D The Special Appeal Tribunal duly considered the appeal. It confirmed the convictions but allowed the appeal on sentences only. The judgment is dated 29th May, 1997. The record reads in part on page 116 thus-

“We therefore allow the appeal on sentence. The sentences are quashed. We substitute as follows: 1st Appellant (now Respondent) Count 1, N100,000.00 fine or 2 years imprisonment. Count 10, N100,000.00 or 2 years imprisonment.” E

Prof. Adesanya, SAN, learned counsel for the Respondent stated F on page 10 of his brief that the Respondent had since paid the fines. He told the Court of Appeal the same thing.

After waiting for a period of two years, the Respondent approached the Federal High Court, Lagos by an Originating Summons dated 31st. May, 1999, praying for a declaration that the Failed G Banks Tribunal as well as the Special Appeal Tribunal lacked the jurisdiction to have tried, convicted and sentenced him on the two counts of charge preferred against him in view of the provisions of Section 33(8) and Section 33(12) of the 1979 Constitution applicable at all material times relevant to the trial. The reliefs sought read as follows- H

“1. A declaration that the Failed Banks Tribunals, Zone II, Lagos as well as The Special Appeals Tribunal, lacked the jurisdiction to try, convict and sentence the plaintiff under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree, 1994 of Count

1 in the Charge No. FBFMT/LZII/IC795 and Appeal No. SAT/FBT/273/96 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended being the Law in force at the relevant date.

B *2. A Declaration that the Failed Banks Tribunal, Zone II, Lagos as well as The Special Appeals Tribunal lacked the jurisdiction to try, convict and sentence the Plaintiff under the Banks and Other Financial Institutions Decree, 1991 of Count 10 in the Charge No. FBFMT/LZII/IC/ 95 and Appeal No. SAT/FBYT/273/96 in view of Section*
C *33(8) of the Constitution of the Federal Republic of Nigeria, 1976 as amended being the law in force at the relevant date.*

3. An Order setting aside the conviction and sentence.”

Meanwhile, the Respondent prayed the Federal High Court to transfer the suit to the Court of appeal holden in Lagos by way of D case stated pursuant to Section 295(2) of the 1999 constitution (Section 259(2) of the 1979 Constitution).

The Grounds for the Application were stated to be –

“(1)The suit involves an interpretation of the Constitution with a view to determining whether the charges against the Plaintiff (now
E *Respondent) and the conviction thereafter violates Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979, (the then applicable law).*

(2) The suit further involves the determination whether count
F *1 of the two count charge violates Section 33(12) of the Constitution of the Federal Republic of Nigeria, 1979 (the then applicable law).*

(3) There has been pronouncements on the issue challenging the jurisdiction of the Tribunal in regard to ground 1 and the pronouncement of the Special Appeal Tribunal is unclear and does not
G *appear to have addressed the issue.*

(4) It is firmly believed that a pronouncement by the Court of Appeal would assist in crystallizing the issue and law.”

The questions which the respondent wanted the Federal High Court to refer to the Court of Appeal for its answers as demanded by H Section 295(2) of the Constitution and which the learned trial Judge (Oduowo, J.), granted may be reproduced thus

“1. Whether the Failed Banks Tribunal, as well as the Special Appeal Tribunal had the jurisdiction to try, convict and sentence the Plaintiff of Count 1 in the Charge of FBFMT/LZII/IC/95 under the

Failed Banks (Recovery of Debts) and Financial Malpractices in Bank Decree, 1994 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.

2. *Whether the Failed Banks Tribunal as well as The Special Appeal Tribunal had the jurisdiction to try, convict and sentence the Plaintiff in Count 10 in Charge No. FBFMT/LZII/IC/95 under the Banks and Other Financial Institutions Decree, 1991 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.”* B

It should be observed here at once that Prof. Adesanya on page 152A of the record moved his application for “transfer of the suit to the Court of Appeal by way of case stated” as prayed for in the Motion on Notice on page 122 of the record. He never suggested or made mention of any question or questions for reference. To that extent the order of Odunowo J., above was at variance with the prayer sought. I should probably say here now that section 295(2) of the Constitution (see below) does not confer upon the Federal High Court, the power to transfer a suit to the Court of Appeal for hearing and determination (see *Gamioba & Ors. v. Ezezi II & Ors.* (1961) All NSLR 608) (Reprint). The motion before the Federal High Court therefore ought to have been struck out and or dismissed. It never was. It should also be noted that the Appellants were never represented in the Federal High Court throughout the proceedings. C

The two questions above clearly challenge the jurisdiction of the Tribunal and Appeal Tribunal. It is settled law that the issue of jurisdiction can be raised at any stage of the proceedings up to the final determination of an appeal by the Supreme Court. The trial Judge can himself raise it suo motu at any stage (see for example *Pan Asian Co. Ltd, v. NICON* (1982) 9 S.C. 1, *Tukur v. Gongola State* (1989) 9 SC 1, (1989) 4 NWLR (Pt. 117) 517. “At any stage of the proceedings up to the Supreme Court” means what it says. You may not raise it after the Supreme Court. Where and in which court will you raise it after the Supreme Court? The answer is clearly none! So in this case as you will see later in the judgment, the matter ended or terminated in the appeal to the Appeal Tribunal. So this matter now cannot be said as “being raised at any stage of the proceedings.” The proceedings ended on 29/5/97 when the Appeal Tribunal delivered its judgment. D
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Now, Section 295 (2) of the 1999 Constitution which is applicable to this reads-

“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 the 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 the question is referred in pursuance of this sub-section, 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.” (Emphasis mine)

It is obvious that under these provisions, it is the court that refers the question or questions to the Court of Appeal, which I believe must be under its hand or authority only as shown on page 3 of the record. However, in the Court of Appeal the parties filed briefs of argument as required by the Rules of the court. In the Plaintiff/Respondent’s brief, (pages 154-170 of the record), Prof. Adesanya, SAN, learned counsel for the Plaintiff/Respondent submitted four (4) issues for determination (pages 158 - 159) by the Court of Appeal. Thus abandoning the two (2) reference questions completely. From where did these issues come? There were no Grounds of Appeal. So they could not have been distilled from any Ground(s) of Appeal. Counsel is also without power to substitute his own “issues” for the reference questions of the Federal High Court. The two reference questions ought to have been struck out by the court. I hereby strike them out. The four (4) new issues read thus –

“Issues for Determination

1. Whether there is a crime known to Nigerian law as fraudulently granting credit facilities?

2. If there is such a crime, whether a conviction for fraudulently granting credit facilities violated Section 33(12) of the Constitution of the Federal Republic of Nigeria, 1979 as amended (herein after referred to as the Constitution)?

3. Whether it was constitutional to convict the Plaintiff of conspiracy to commit a felony where the facts alleged as amounting to felony occurred in 1991 while the Failed Banks Decree under which the felony was charged commenced on the 9th November, 1994?

4. Whether it was proper to convict the plaintiff for counts 1

and 10 under the BOFID as a whole without drawing any line or distinction, when the facts as constituting the crime occurred in part before the commencement of the BOFID and partly after the commencement of the BOFID. In other words is a bullet conviction in such a case unconstitutional”

These same issues were reproduced on pages 245-246 and answered on pages 264-265 in the lead judgment of Aderemi, JCA., (with which the other Justices agreed). The Court of Appeal by this action also abandoned the two reference questions.

The Court of Appeal answered the four (4) issues thus-

“(1) *There is no crime known to Nigerian Law as “fraudulently granting credit facilities.”*

(2) *Conviction on a crime which is unknown to law is unconstitutional and must not be allowed to stand.*

(3) *It is unconstitutional, indeed it is a violation of all known principles of law to convict the plaintiff of conspiracy to commit a felony in the circumstances of this case where the facts alleged as amounting to felony occurred in 1991 while the Failed Banks Decree under which the felony was charged commenced on the 9th of November, 1994.*

4. *It is improper in law to convict the Plaintiff for Counts 1 and 10 under BOFID as a whole without drawing any distinction, when the facts on which the crime was predicated occurred in part before the commencement of the BOFID and partly after the commencement of the BOFID.”*

The Appellants have now appealed against the decision of this court. They have in their brief raised six (6) issues for determination. I will only set out issues No. 1 and No. 2 which I consider decisive in this appeal as follows:

“1. *Were the learned Justices of the Court of Appeal right in not striking out this case stated when ex facie the trial Federal High Court lacked jurisdiction to make the reference? - grounds 1, 3 and 7.*

2. *Whether the Court of Appeal was right in entertaining the reference when the condition precedent to the exercise of jurisdiction to refer by way of case stated by the Federal High Court had to the finding of the Court of Appeal not been fully established? - ground 9.”*

These issues will be taken together and answered together.

It would now have been clear to everyone that what Prof. Adesanya was doing in the Court of Appeal, was to argue an appeal based on the judgments of the Failed Banks Tribunal and the Special Appeal Tribunal, being the only materials available and nothing else, without filing any Ground of Appeal. The Court of Appeal in its judgment chose to toe the line of Prof. Adesanya, SAN, and treated the four issues as if they were questions referred to it by the Federal High Court which they were not! The suit was also not an appeal from the Appeal Tribunal. This procedure is wrong and unacceptable. The four issues submitted to the Court of Appeal by Prof. Adesanya in his brief for resolution, were personal to him based on his understanding of the judgments of the Tribunals. These issues are not from the Federal High Court as stipulated under Section 295(2) of the Constitution above. The issues are therefore incompetent and ought to have been struck out. The two reference questions too having been abandoned by Prof. Adesanya, ought to have been struck out as well as explained earlier. For the avoidance of doubt the two reference questions as well as the four (4) new issues are hereby struck out.

Matters of reference are not matters of appeal to be considered under the appellate jurisdiction of the Court of appeal, but are matters of special jurisdiction. That apart, Section 5 of Decree No. 18 of 1994 provides- “5(1) *A person convicted or against whom a judgment is given under this Decree may, within 21 days of the conviction or judgment appeal to the Special Appeal Tribunal established under Recovery of Public Property (Special Military Tribunal) Decree, 1994, as amended in accordance with the provisions of that Decree.*

(2) *The decision of the Special Appeal Tribunal shall be final and where there is no appeal, the decision of the Tribunal shall be final.*” (Emphasis are mine)

The Respondent having thus fully exercised his right of appeal under the Decree to the Special Appeal Tribunal, has no further right of appeal to either the Federal High Court or the Court of Appeal. It is clear to me that the suit before the Federal High Court was an indirect and ingenious way of reopening a matter which the Special Appeal Tribunal had finally settled and closed under the guise of “enforcement of fundamental rights.” This practice ought to be resisted

forcefully. There ought to be an end to litigation at a stage. The Special Appeal Tribunal was at that stage in this case. Did I hear you say that “Supreme Court judgments will soon be subjected to similar treatment?” I say only the future can tell. But the tendency is there and all that is needed is to claim that “enforcement of fundamental right” is involved. B

As noted earlier in this judgment, the Grounds for the Application before the Federal High Court were stated to be violations of Section 33(8) and Section 33(12) of the 1979 Constitution vis-à-vis the charges preferred against the Respondent in the tribunal. These sections read – C

“33(8.) *No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.*” D

33(12.) “*Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection a written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of a law.*” (Emphasis are mine) E

There is no doubt that by virtue of these provisions, which are clear and unambiguous, the Respondent shall not be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place constitute such an offence, nor of an offence that is not defined in a written law and the penalty provided thereof. F

My short answer to these so called violations, which they are not, is that the provisions in Section 33(8) and Section 33(12) are in my view defences open or available to the accused/respondent at his trial and or the appeal. Section 33(8) and Section 33(12) are by no means “fundamental rights” to commit offences. They are also no immunity from being charged. But you may not be convicted only if any of the defences is raised. If therefore one commits an offence and is being prosecuted (like the respondent herein), then the accused can raise as a defence that the act or omission for which he is being tried, did not at the time it took place constitute such offence, or that it was not an offence defined in a written law with a penalty H

provided thereof. The Respondent was therefore required to have raised these defences at the trial and not by filing a fresh suit some two years later after the disposal of his final appeal. In fact that much was realised by the Respondent who is shown from the record, to have unsuccessfully raised these defences at the Special Appeal Tribunal. Ground 3 in the Respondent's Grounds for the Application in the Federal High Court again reads –

“(3.) *There has been a pronouncement on the issue challenging the jurisdiction of the Tribunal in regard to Count 1 and the pronouncement of the Special Appeal Tribunal is unclear and does not appear to have addressed the issue.*”

And in the Respondent's brief before this court, Prof. Adesanya, SAN, had this to say in paragraph 2.10 on page 7 thereof-

“2.10 *On appeal to the Special Appeal Tribunal, the constitutionality of the conviction was raised for the first time during arguments. The Special Appeal Tribunal appeared to be receptive to the arguments on the unconstitutionality of the conviction. But after adjourning for a few weeks, the Appeal Tribunal for reasons which are obscure, held that it had jurisdiction but reduced the sentences to N100,000 or 2 years imprisonment on Count 1 and N100,000 or 2 years on Count 10.*”

What can be clearer than this? All coming as they did, from learned counsel as well as the Respondent himself? Is this not an appeal through the back door when in fact there is no door? The judgment of the Special Appeal Tribunal was final as stipulated in Section 5 of Decree 18 of 1994 above.

It must be stressed that the provisions (or defences) entrenched in Section 33(8) and Section 33(12) above have always been known and recognised in the criminal justice system of this country long before they were entrenched in the Constitution. You will find the same or similar provisions under Section 22(7) and Section 22(10) of the 1963 Constitution of the Federation under the same Fundamental Rights Chapter. What in effect I am saying is that these provisions (or defences) are not new to our criminal justice system. They have always been with us.

Furthermore, a court is said to be competent when-

(a) it is properly constituted with respect to the number and qualification of its members;

(b) the subject matter of the action is within its jurisdiction;
 (c) the action is initiated by due process of law; and
 (d) any condition precedent to the exercise of its jurisdiction has been fulfilled. (see *Madukolu & Ors. v. Nkemdilim* (1962) All NLR (Pt. 2) 581 (Reprint))

All these conditions must be satisfied together. Condition (b) is my concern here now. The subject matter of the suit which is the decision of the Special Appeal Tribunal, which decision was final, was outside the jurisdiction of the Federal High Court as well as the Court of Appeal. The Federal High Court therefore again lacked jurisdiction in the matter before it. The questions or issues before it were in fact raised at the Tribunal but without success. In my view, the Respondent had exhausted all avenues of appeal available to him. The matter ended at the Special Appeal Tribunal.

Before I conclude, I wish to ask one final vital question and that is - What is the scope of Section 295(2) of the 1999 Constitution? This court, sitting as a full court, in the case of *Atake v. Afejuku* (1994) 4 NWLR (Pt. 368) 379 held inter alia, that the provision of Section 259 (3) of the 1979 Constitution (which is on all fours with Section 295 (2) of the 1999 Constitution above except that Section 259(3) related to reference from the Court of Appeal to the Supreme Court), is clear and unambiguous and that a question as to the interpretation or application of the Constitution is the foundation for making reference by the Court of Appeal to the Supreme Court under the subsection. It was also held that any question of law however substantial it may be, which does not involve the interpretation or application of any of the provisions of the Constitution is outside the ambit of the subsection and is therefore not referable. The court further held that a question of the interpretation or application of Section 340 of the Criminal Procedure Law of Lagos State, is incompetent for reference under Section 259(3) of the 1979 Constitution (see also *Gamioba & Ors. v. Ezezi II & Ors.* (supra); *African newspapers of Nigeria & Anor v. Federal Republic of Nigeria* (1985) 2 NWLR (Pt. 6) 137, *Bamaiyi v. Attorney General of the Federation & Ors.* (2001) 7 S.C. (Pt. II) 62; (2001) FWLR (Pt. 1) 34.

Also in *Gamioba & Ors. v. Ezezi II & Ors.* (supra) Brett, FJ., delivering the lead judgment said on page 613 as follows:-

"We shall not attempt a complete definition of what amounts

to a substantial question of law, but it must clearly be one on which arguments in favour of more than one interpretation might reasonably be adduced. It must also be one which is capable of being formulated with precision, and before a question is referred to this court it should be so formulated as to enable this court to deal with all points which fairly arise, and at the same time to confine itself to those points.” (Emphasis mine)

I agree completely. I repeat here again that the provisions of Section 33(8) and Section 33(12) are clear and unambiguous. And they are not subject to more than one interpretation, which is that no person shall be guilty of an offence which was not such an offence at the time it was committed, nor of an offence which was not defined in a written law and penalty provided thereof. It is a cardinal principle of interpretation that where in their ordinary meaning the provisions of an enactment are clear and unambiguous effect should be given to them without resorting to external aid (see for example Attorney General of Bendel State v. A-G of the Federation (1981) 10 S.C. 1.

Guided by these authorities, I have no hesitation in coming to the conclusion that even if the 4 issues formulated by Professor Adesanya, SAN, were actually the questions referred by the Federal High Court to the Court of Appeal, which they were not, issue (1) in my view is clearly academic and is therefore not referable. It is not a question for the interpretation or application of any provision of the Constitution. Rather the issue is about an uncertain or unknown criminal law.

Issue (2) is also academic. It is based on the supposition that the answer to issue (1) is positive and it is not. It is also not referable.

Issue (3) relates to the interpretation or application of the Failed Banks Decree No. 18 of 1994 and not to the interpretation or application of any of the provisions of the Constitution. It is therefore not referable.

Issue (4) also relates to the interpretation or application of Banks and Other Financial Institutions Decree No. 25 of 1991 (BOFID) and not to interpretation or application of a provision of the Constitution. It is equally not referable. All the 4 issues must accordingly be struck-out as incompetent.

It must also be added that neither the two (2) reference questions nor the four (4) issues raised by the Respondent qualified as a

substantial question of law as none of them is subject to more than one interpretation just as none of them is concerned with the interpretation or application of the Constitution. They are clearly incompetent and I strike them out accordingly.

From all that I have been saying above, it is clear that Appellants' issues (1) & (2) have succeeded. The Court of Appeal ought to have struck out the case when *ex facie* the trial Federal High Court lacked jurisdiction to make the reference. The Court of Appeal too should not have entertained the reference or issues when the conditions precedent to the exercise of the jurisdiction have not been fulfilled as explained above. The appeal is accordingly allowed.

CONCLUSION

My conclusion therefore is that the appeal succeeds and it is hereby allowed. It is hereby ordered as follows-

1. The suit No. FHC/L/CS/646/99 instituted by the Respondent in the Federal High Court, Lagos, is hereby struck out for want of jurisdiction, the subject matter of the suit, that is, the decision or judgment of the Special Appeal Tribunal, is outside the jurisdiction of the Federal High Court.

2. If there was jurisdiction, which is denied, the Respondent's motion to transfer the suit from the Federal High Court to the Court of Appeal being incompetent is also struck out. Section 295 (2) of the Constitution does not confer upon the Federal High Court, the power to transfer a suit to the Court of Appeal for hearing and determination.

3. If there was jurisdiction, which is not conceded, the two (2) reference questions which were abandoned and therefore never answered by the Court of Appeal are hereby struck out.

4. If there was jurisdiction and this is denied, the four (4) issues submitted to the Court of Appeal by the Respondent, as distinct from questions referred to the Court of Appeal by the Federal High Court pursuant to Section 295 (2) of the Constitution, not being issues about the interpretation or application of the Constitution, as well as not being the reference questions, are incompetent and are hereby struck out.

5. The judgment delivered by the Court of Appeal on 25/6/2001 which is a nullity is also struck out.

KATSINA-ALU JSC

I read in advance the judgment of my learned brother, Uwaifo, JSC., in this appeal. I entirely agree with it and, for the reasons he gives, I also dismiss the appeal. I abide by all the consequential orders.

B

AYOOLA JSC

I have read in draft the judgment delivered by my learned brother, Uwaifo, JSC. I agree with him that this appeal should be dismissed and with the reasons he gives; I make some comments without the need to rehash the facts, the questions referred by the Federal High Court to the court below and the arguments of counsel before us beyond what may be necessary to put my comments in context. Repeating in extenso what had admirably been done in the leading judgment in this context adds no value to my brief comments which take the form of concise answers to some of the questions raised by the submission for the appellants' counsel.

Did the Federal High Court have jurisdiction to entertain the matter before it and, consequently, jurisdiction to make a reference to the Court of Appeal? Learned counsel for the appellants answered in the negative and urged us to do the same. What appeared to be the logic of the appellant's counsel's reasoning is that if the Federal High Court had no jurisdiction to entertain the matter before it, it would lack jurisdiction to refer questions of law in the proceedings to the Court of Appeal pursuant to Section 295(2) of the Constitution. The two main grounds of this submission are: first, that the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended) had provided that the decision of the Special Appeal Tribunal set up under it shall be final; and, second, that Section 1(5) of that Decree had provided that the supervisory jurisdiction or power of judicial review of a High Court shall not extend to any matter or proceeding before the Tribunal duly constituted under the Decree. Furthermore, it was argued, the finality clause in sub-section 2 of Section 5 of the Decree excluded the judicial review of the Federal High Court.

Where the jurisdiction of the High Court is invoked under sub-section (1) of Section 46 of the 1999 Constitution, (which is in the

same terms as sub-section (1) of Section 42(1) of the 1979 Constitution), for redress for alleged contravention or likely contravention of the Fundamental Human Rights provision of the Constitution, the jurisdiction that the High Court exercises is a special jurisdiction and not a general supervisory jurisdiction or a general power of judicial review. When an agency of State by its act or omission contravenes the fundamental right of a citizen, the right of the citizen to seek redress is not excluded merely because the act is manifested by a decision of a tribunal, whether declared final or otherwise. That the agency of State that had occasioned alleged contravention is a tribunal that had done so in the course of a proceeding would not make the exercise of the special jurisdiction of the High Court one of judicial review. In this case the declaration of finality of the decision of the Special Appeal Tribunal would not make the decision of the Tribunal less of a contravention of the fundamental right of the respondent if it were in reality and otherwise a contravention. It is because the Special Appeal Tribunal had given a decision which the respondent alleged amounted to a contravention of his fundamental right that the respondent had invoked the special Jurisdiction of the Federal High Court pursuant to subsection (1) of Section 46 of the 1999 Constitution in the first place. For these reasons I hold that the Federal High Court had jurisdiction, not affected by the exclusion of power of judicial review, to entertain the matter and, therefore, to make a reference to the court below.

Was the respondent estopped by issue estoppel from raising the question of the jurisdiction of the Tribunal which tried and convicted him? Although counsel for the parties had argued as if what was in issue was the jurisdiction of the Tribunal, I see the matter in a somewhat different light if the use of the term jurisdiction is not to be used too broadly. It may, of course, be permissible to reason as a matter of common language, that a tribunal has no "jurisdiction" to try matters in contravention of the fundamental rights provisions of the Constitution. However, in specific language, the power of the tribunal to try offenders brought before it pursuant to the Decree must be distinguished from the exercise of that power in contravention of the fundamental right of the respondent. The right guaranteed to the respondent by Section 33(8) of the 1979 Constitution is not a right not to be tried for a criminal offence, but a right "*not to be*

held guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence.”

Where contravention of Section 33(8) is alleged, the question is not at all about the jurisdiction of the tribunal which occasioned the contravention but whether the guaranteed right had been contravened. A tribunal may determine a matter without jurisdiction without contravening the fundamental rights provisions. It may, as well, determine a matter within its jurisdiction and yet contravene the provisions. The essence of constitutionally guaranteed rights is that, barring exceptions expressly provided by the Constitution in privative clauses, the State cannot authorize the contravention of or confer jurisdiction to contravene the fundamental rights provisions of the Constitution. The question, therefore, whether there has been a contravention of a citizen’s human right cannot properly be answered at all times as a jurisdictional question. I hold that, in this case, the argument on issue estoppel is misconceived and it fails. The question whether a right of the respondent had been contravened for the purpose of a redress pursuant to sub-section (1) of Section 46 of the Constitution was not one on which the Special Appeal Tribunal could have pronounced.

The last question I comment on is whether the Federal High Court should have made a reference under sub-section (2) of Section 295 of the 1999 Constitution on the application of the respondent without hearing the appellants. It was argued that upon a proper construction of that sub-section, both parties should have been invited to address the court on the desirability or otherwise of making a reference under Section 295(2) notwithstanding the discretion the High Court had in the matter. Before a High Court refers a question of law under sub-section (2) of Section 295, it must be of the opinion that the question involves a substantial question of law. Ideally, where a court is empowered to form an opinion which may affect the direction of a proceeding, it is a matter of prudence, if not of common fairness, to give all parties an opportunity of being heard. However, the question that is material to the present case in which what was involved at that stage was not a determination of a civil right or obligation, is whether a failure to afford such hearing vitiates the entire step taken pursuant to the opinion to make a reference to the court below. Does the failure to hear the appellants before the reference

was made vitiate the reference? I think not. No miscarriage of justice had been occasioned since it is not doubted that a substantial question of law concerning the application of the Constitution had arisen in the proceedings and in terms of sub-section (2) of Section 295, it was a matter of obligation in such circumstances for the Judge to refer the question at the request of at least one of the parties. B

There being no doubt that there had been a contravention of subsections (8) and (12) of Section 33 of the 1979 Constitution, I find no merit in this appeal for the reasons which I have stated and for the more detailed reasons given by my learned brother, Uwaifo, JSC., I too would dismiss the appeal and adopt the orders made by my learned brother, Uwaifo, JSC., in their entirety. C

TOBI JSC

I have read in draft the judgment of my learned brother, Uwaifo, JSC., and I entirely agree with him that this appeal should be dismissed. He has narrated the facts of the case in some detail and I do not intend to repeat the exercise, unless it is absolutely necessary to do so in the course of my conclusion. D E

In view of the fact that jurisdiction is the life-blood of the administration of justice, I will first take the issue of jurisdiction of the Federal High Court, as it relates specifically to the originating summons which reads:

“(1) *A Declaration that the Failed Banks Tribunal, Zone II, Lagos as well as the Special Appeals Tribunal lacked the jurisdiction to try, convict and sentence the Plaintiff under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree, 1994 of Count 1 in the Charge No. FBFMT/LZII/IC/95 and Appeal No. SAT/FBT/273/96 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979, as amended being the law in force at the relevant date.* F G

(2) *A Declaration that the Failed Banks Tribunal Zone II, Lagos as well as the Special Appeals Tribunal lacked the jurisdiction to try, convict and sentence the Plaintiff under the Banks and Other Financial Institutions Decree, 1991 of Count 10 in the charge No. FBFMT/LZII/IC/95 and Appeal No. SAT/FBT/273/96 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979, (as H*

amended), being the law in force at the relevant time.

(3) An Order setting aside the conviction and sentence.”

I should mention that the two declarations sought by the respondent, which are generally similar to the reference, are based on fundamental rights and specifically Section 33(8) of the 1979 Constitution.

Learned Senior Advocate for the appellants, Prince Fagbemi, submitted that the Federal High Court does not have the jurisdiction to adjudicate over the matters contained in the originating summons and therefore lacked the requisite power to adjudicate over the motion seeking to refer the matter to the Court of Appeal. Counsel took pains to deal with the finality of jurisdiction vested in the Special Appeal Tribunal. He referred the court to Section 5 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 88 of 1994 as amended by Decree No. 18 of 1995. He cited quite a number of cases on the interpretation of statutes. Learned Senior Advocate for the respondent, Professor Adesanya, did not agree with Prince Fagbemi. He submitted that the Federal High Court had jurisdiction on the matter.

In view of the fact that both the originating summons and the questions for reference deal subsequently with fundamental rights, Section 42 of the Constitution of the Federal Republic of Nigeria, 1979, the Constitution which was in force at the material time is, apposite. Section 42 of the 1979 Constitution in its original content provided as follows:

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

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this Chapter.”

The section was subsequently amended by the Constitution (Suspension and Modification) Decree No. 1 of 1984. The Decree culture only affected Section 42(1) by the following opening words:

“Subject to the provisions of this Constitution as amended, modified or otherwise affected by the Decree No. 1 of 1984 or any other Decree...”

By Section 277 of the 1979 Constitution, High Court is interpreted to include the Federal High Court. Although the case law on the interpretation of Section 42 of the 1979 Constitution was fairly contradictory (see *Senate of the National Assembly v. Momoh* (1983) 4 NCLR 269; *Lt. Col. Gombe v. Lt. Col. Madaki* (1984) 5 NCLR 435; *Ogugu v. The State* (1994) 9 NWLR (Pt. 366) 1 ; *Nwokorie v. Opara* (1999) 1 NWLR (Pt. 587) 389; *Alhaji Tukur v. Government of Gongola State* (1989) 9 S.C. 1, (1989) 4 NWLR (Pt. 117); *Aka-Bashorun v. Wing Commander Mohammed* (1991) 1 NWLR (Pt. 168) 512), the position of the law is that the Federal High Court has jurisdiction in respect of matters on fundamental rights as entrenched in Sections 30 to 40 of the 1979 Constitution.

It is good law that the Federal High Court has jurisdiction to enforce fundamental rights in matters which the Constitution has vested it with jurisdiction. In *Alhaji Tukur v. Government of Gongola State* (supra), this court held that rather than expand the jurisdiction of the Federal High Court, Section 42(2) of the 1979 Constitution has by the opening phrase, ‘subject to the provisions of the Constitution’, limited the jurisdiction of the Federal High Court to enforce the fundamental rights provisions to matters in respect of which the Constitution has granted or invested it with jurisdiction. Obaseki, JSC., said at page 547:

“Since the jurisdiction conferred by Section 42(2) of the Constitution is a special jurisdiction and made subject to the provisions of the Constitution, the enforcement of the fundamental rights in matters outside the jurisdiction of the Federal High Court is not within and cannot be in the contemplation of the section.”

By the originating summons and the reference, the respondent has relied on Section 33(8) of the 1979 Constitution. The subsection provides:

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the material time the offence was committed.”

The above apart, the respondent urged the court to invoke the provision of Section 33(12) of the Constitution as the subsection related to count 1 on which the respondent was convicted. The subsection as amended by Decree No. 1 of 1984 provides:

“Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Decree or a Law of a State, an Edict or any subsidiary legislation or instrument under the provisions of a law.”

In view of the fact that Section 33(8) and (12) deal with fundamental rights of the individual, there is no gainsaying the fact that the Federal High Court had jurisdiction in the matter.

I should pause here to produce the ipsissima verba of the submission of learned counsel for the appellant at page 7 of his brief when he dealt with the position of the law in the United States, United Kingdom and Nigeria. He said in paragraph 5.7:

“In the United States of America, an appeal could be made to the “due process” guaranteed of the fifth and fourteenth amendments to the Constitution, by virtue of which provisions deprivations of citizens’ rights of access to the court in federal and state statutes may be declared void...”

The powers in the courts of the United Kingdom and ours in Nigeria are more limited, and the executive has in some cases been able to achieve at least partial exclusion through devices of legislation steered through the parliament.”

What constitutes America’s “due process” rights in Nigeria, in my humble view, generally was Section 33 of the 1979 Constitution, which is now Section 36 of the 1999 Constitution. If counsel could concede that much in respect of the position of the law in American jurisprudence, I expected that he would concede same in the Nigerian position. That apart, in dealing with the Nigerian position, learned counsel submitted that the executive “has in some cases been able to achieve at least partial exclusion through devices of legislation steered through the parliament.” The word partial as an adjective, etymologically means “of or forming a part, not complete”. My interest is the expression “not complete.” Since learned Senior Advocate has conceded that the achievement of the executive through legislation is

partial, the respondents are urging this court to invoke the incomplete aspect of the matter in their favour.

And that takes me to the issue of finality. He relied heavily on Section 5 of Decree No. 18 of 1994 as amended by Decree No. 18 of 1995. The section provides:

“(1) *A person convicted or against whom a judgment is given under this Decree may, within 21 days of the conviction or judgment, appeal to the Special Appeal Tribunal established under the Recovery of Public Property (Special Military Tribunal) Decree 1984, as amended in accordance with the provisions of that Decree.* B

(2) *The Decision of the Special Appeal Tribunal shall be final and where there is no appeal the decision of the Tribunal shall be final.*” Professor Adesanya submitted that where jurisdiction is being challenged as lacking and that the decision therefore is a nullity, the question of finality cannot and does not arise even where the finality provision is contained in a Decree. He cited *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 168 and *N.P.A. v. Panalpina World Transport (Nig.) Ltd.* (1974) 1 NMLR 95. I entirely agree with him. He is correct. C

In *N.P.A. v. Panalpina World Transport (Nig.) Ltd.* (supra), E Coker, JSC., said:

“*I do not consider that matters, which are not in contemplation of the decree in question, can enjoy the protection, which the Supremacy and Enforcement of Powers Decree gives. In other words I am saying that if by a decree a Tribunal is set up the decisions of which are stated under the decree setting it up to be final and Tribunal proceeds to take a decision completely outside or in excess of its jurisdiction, it is my view that this court is, in cases properly within its territorial jurisdiction, competent to make a declaration on it.*” F

In the case of *Udosen v. National Electoral Commission of Nigeria* (supra) cited by learned Senior Advocate for the respondent, I said at 584: G

“*In my humble view, finality of a decision of a court of law (other than the Supreme Court) will only be regarded as really final if it complies with the enabling statute or law. Where a decision goes outside the enabling statute or law to the extent that it impugns the jurisdiction of the court or is in direct altercation with the jurisdiction of the court, the garb or image of finality is gone; and forever too.*” H

And that is the whole essence of the appellate system in our adversary system of jurisprudence and it really underscores it.”

Dealing specifically with Section 36(5) of the Local Government Election Decree No. 6 of 1966, which like Section 5(2) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks
B Decree No. 18 of 1994 as amended, provided that the decision of the Appeal Tribunal shall be final, I said at pages 586 and 586:

“The finality of the decision of the Supreme Court as adum-
brated by Eso, JSC., in Adigun is quite different from the provision of
C Section 36(5) of Decree No. 6 of 1966 which provides that the decision of the Appeal Tribunal shall be final. In the former situation, finality arises because the Supreme Court is the apex court in the sense that there is no other superior court beyond or after it. It is the last court in the hierarchy of the court system in Nigeria. This means
D that any decision of the court cannot be questioned by any other court. The Section 36(5) finality clause cannot be so construed, without doing violence to the well recognised appellate system in terms of decisions arrived at by court without jurisdiction. And that takes me once again to the main stream of the argument, which I shelved to
E take Adigun. I want to pose a few questions here. Did the Lawmaker intend Section 36(5) of Decree No. 6 of 1996 to operate even when the Appeal Tribunal gives a decision outside its jurisdiction? Did the lawmaker intend the subsection to operate even when the Appeal
F Tribunal went in excess of its powers as provided for in the Decree?

In *NEC v. Nzeribe* (1991) 5 NWLR (Pt. 192) 458, Awogu, JCA., held that there can be no question of ousting the jurisdiction of a superior court of record by merely declaring that the decision of a tribunal was final and unappealable. Although both *Udosen v. National electoral Commission of Nigeria* (supra) and *NEC v. Nzeribe* (supra) are of persuasive authority, being decisions of the Court of Appeal, I am persuaded by the decisions and I endorse them here as stating the correct position of the law. This is because the two decisions are relevant in terms of the legal position in this appeal. See also
H *Rex v. Commissioner for Special Purposes of the Income Tax* (1888) 21 QBD 313; *Rex v. Northumberland Compensation Appeal Tribunal*, Ex parte Shaw (1952) 1 KB 338; *Anisminic v. Foreign Compensation Commission* (1969) 2 AC 147; *Pearlman v. Governors of Harrow School* (1978) 3 WLR 736.

And that takes me to the issue of reference to the Court of Appeal. Prince Fagbemi, SAN, submitted that since the Federal High Court does not have the jurisdiction to adjudicate over the matters contained in the originating summons, it definitely lacked the requisite power to adjudicate over the motion seeking to refer the matter to the Court of Appeal. Since I have dealt with the first arm of the issue as it relates to jurisdiction of the Federal High Court to adjudicate over the matter, I shall now take the argument of learned Senior Advocate that the court lacked the requisite power to adjudicate over the motion seeking to refer the matter to the Court of Appeal. The questions for reference to the High Court are on page 7 of the Record. (See also page 11). They read:

“(1) Whether the Failed Banks Tribunal, as well as the Special Appeal Tribunal had the jurisdiction to try, convict and sentence the Plaintiff of count 1 in the Charge No. FBFMT/LZII/1C/95 under the Failed Banks (Recovery of Debts) and Financial Malpractice, in Banks Decree, 1994 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.

(2) Whether the Failed Banks Tribunal as well as the Special Appeal Tribunal had the jurisdiction to try, convict and sentence the Plaintiff on Count 10 in Charge No FBFMT/LZII/1C/95 under the Banks and Other Financial Institutions Decree, 1991 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.”

In view of the fact that the content of the originating summons is similar to the questions for reference, I shall not deal any further with the questions as they relate to the jurisdiction of the Federal High Court. What I should do is to examine Section 295(2) of the Constitution. The subsection provides as follows:

“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 and the court in which the question arose shall dispose of the case in accordance with that decision.”

As it is, the subsection is in two limbs. The first is that the Fed-

eral High Court can raise the reference to the Court of Appeal suo motu. That is the essence of the permissive “may” in the subsection. The second is that a party to the proceedings may request the court to make the reference to the Court of Appeal. In this situation, the Federal High Court has no discretion, unlike the first limb. The court must make the reference if a party to the proceedings so requests.

It is the requirement of the subsection that the question should involve a substantial question of law. What constitutes a substantial question of law is a matter of strict law. A substantial question of law is a material, important or essential point of law. It is a point of law which will materially determine the fortunes of the matter in the High Court one way or the other. A point of law which is peripheral cannot form the basis of the reference under Section 295(2).

In compliance with the subsection, the learned trial Judge, Odunowo, J., made the following order:

“IT IS HEREBY ORDERED that the cause shall be referred to the Court of Appeal by way of case stated in terms of Section 295(2) of the 1999 Constitution for determination of the following questions.”

The learned trial Judge thereafter stated the two questions enumerated above for consideration by the Court of Appeal.

I have not the slightest doubt in my mind that the learned trial Judge had the jurisdiction to do what he did. Subsection (2) empowered him to do what he did and he was perfectly in order when he referred the two questions to the Court of Appeal. I cannot fault him.

A related issue is whether the Court of Appeal is competent to make any determination of the questions referred to it. It is the submission of learned Senior Advocate for the appellants that the Court of Appeal lacked the competence to make any determination of the questions referred other than the power to strike out the entire proceedings before the Federal High Court. With respect, I do not agree with learned counsel. In my humble view, the Court of Appeal was competent to determine the two questions referred to it by the Federal High Court. The power of the Court of Appeal stems from Section 295(2) which provides in part that where a substantial question of law is referred to the court, “the court shall give its decision upon the question”. Although the final orders made by the Court of Appeal did not comply strictly with the questions referred to the court,

the body of the judgment clearly and unequivocally examined the content of the two questions. I do not see any miscarriage of justice. And what is more, the appellants have not complained of the orders made by the Court of Appeal. They only complained that the court had no competence to determine the questions sent to it by the Federal High Court. B

Did the questions referred to the Court of Appeal involve the interpretation or application of the Constitution as required by Section 295(1)? In my view, the questions involved the interpretation of the Constitution as well as the application of the Constitution. And here, I should mention that the Court of Appeal in its judgment of 25th June, 2001, dealt exhaustively with the interpretation and application of Section 33(8) and (12) of the Constitution in the case, particularly in respect of the reference. C

In the leading judgment, Aderemi, JCA., said at pages 258 D and 259 after citing the case of Aoko v. Fagbemi (1961) 1 All NLR 400 in respect of Section 33(12) of the 1979 Constitution:

“In interpreting the combined provisions of Section 33(8) and (12) of the Constitution which I have reproduced above the Supreme Court in Ogbomor v. The State (1985) 1 NWLR (Pt. 2) 223 E per the judgment of Karibi-Whyte, JSC., said at page 233:

A combined reading of the provisions of Section 33(8) and subsection 12 of the Constitution 1979 suggests that whereas no person can be tried and convicted of an offence which did not exist at the time of its commission or which is not contained in an existing law, there is constitutional or other prohibition against trial and conviction of a person for an offence, which is known to the law and is in existence at the time of its commission but the relevant statute of which has been incorrectly stated...” F

Aderemi, JCA., said at page 264 of the Record: G

“In the final result and for all I have said above, it is my judgment that the plaintiff’s suit is meritorious. If the matter were on an appeal before us I would have, for the reasons that there is no crime being in violation of the provisions of Section 33(12) of the 1979 H Constitution and the law on which the charge was laid was given retrospective application, allowed the appeal, set aside the convictions and sentences. But, since the matter came to us, by reference (case stated) I return the following answers...”

Oguntade, JCA., after reproducing the provision of Section 33(8) of the 1979 Constitution, said at pages 267 and 268 of the Record:

“It is trite law that nobody may be convicted of any offence except that created under a written law. See *Aoko v. Fagbemi & Ors.* (1961) 1 All NLR 400. It follows in my view that since the 1st count brought against the plaintiff was unknown to law, the Failed Banks Tribunal had no jurisdiction to have tried it. The 10th count against the plaintiff alleged that the plaintiff committed some offences at a time when BOFID had not come into existence. Acts which had been done before BOFID came into existence were lumped with those said to have been done after BOFID came into existence. The Failed Banks Tribunal recorded a conviction on the two counts thus creating a situation which gave BOFID a retroactive effect. It is my view that the Failed Banks Tribunal had no such jurisdiction by force of Section 33 of the 1979 Constitution.”

It is my view that by the above, the Court of Appeal interpreted and applied the provisions of Section 33(8) and (12) of the 1979 Constitution.

Issue No. 3 in the appellants’ brief is whether the Court of Appeal was right in holding that the provisions of Section 33(8) and (12) of the 1979 Constitution took precedence over the Failed Banks and BOFID Decrees? With respect, I cannot place my hands on any portion of the judgment of the Court of Appeal where the court held that the provisions of Section 33(8) and (12) took precedence over the Failed Banks and BOFID Decrees. Although the dictum quoted on page 21 of the appellant’s brief could give rise to such an interpretation, I hold that no such specific position was taken by the learned Justice of the Court of Appeal, Aderemi, JCA., or any other Justice of the court in the judgment.

What the learned Justice said and is quoted on page 21 of the appellant’s brief is an obiter and has nothing whatsoever to do with the live issues in the reference. An obiter dictum of the Court of Appeal, in my view, should not give rise to an appeal. After all, it is not binding on the parties and an appeal on it is tantamount to flogging a dead horse. I will not say more.

I now take the issue of estoppel. Prince Fagbemi submitted that the action presented by the respondent and upon which the

motion for reference was predicated was statute barred and caught by the doctrine of issue estoppel. Learned Senior Advocate pointed out that since the respondent waited for two years before he approached the Federal High Court by an originating summons, the action was caught by Section 2 of the Public Officers Protection Act, Cap. 379 Laws of the Federation of Nigeria. He submitted that the Special Appeal Tribunal is a public officer within the meaning of the Act. Counsel cited *Ibrahim v. Judicial Service Committee Kaduna State* (1998) 12 S.C. 20; (1998) 14 NWLR (Pt. 584) 1; *Permanent Secretary, Ministry of Works, Kwara State v. Balogun* (1975) NMLR 911; *Obiefuna v. Okoye* (1961) 1 SCNLR 144; and *Fadare v. A-G Oyo State* (1982) 4 SC 1. B
C

Professor Adesanya submitted that an estoppel cannot apply to validate an illegal act or to give jurisdiction where it is alleged to be lacking by preventing a party from raising the issue of lack of jurisdiction or the illegality of the act, and that the incompetence of a court cannot be covered up by estoppel or by waiver. He cited *Onamade v. African Continental Bank Limited* (1997) 1 SCNJ 65; (1997) 1 NWLR (Pt. 480) 123; *Achiakpa v. Nduka* (2001) 7 S.C. (Pt. III) 125; (2001) 7 SCNJ 585; *Ejike v. Ifeadi* (1998) 6 SC 57; (1998) 6 SCNJ 87; *Menakaya v. Menakaya* (2001) 9-10 S.C. 1; (2001) 9 SCNJ 1, and *Josiah Cornelius Limited v. Ezenwa* (1996) 4 NWLR (Pt. 443) 391. D
E

I think Professor Adesanya is right. Because of the paramount importance of jurisdiction in the judicial process, estoppel, an equitable remedy cannot drown the lack of jurisdiction of a court of law. Where a court or tribunal lacks jurisdiction and the issue is raised, the adverse party cannot succeed in pleading that the action is caught by estoppel. This is because estoppel lacks the legal capacity to revive an act which is a nullity *ab initio*. A court which holds that the issue of jurisdiction cannot be raised because the party is estopped from doing so, will not be doing equity to the adverse party. The moment an act of a court or tribunal is a nullity, estoppel cannot resuscitate it. F
G

Prince Fagbemi submitted that the Court of Appeal was wrong in applying the case of *7-Up Bottling Co. Ltd. v. Abiola and Sons Ltd.* (1995) 3 NWLR (Pt. 383) 257 to the facts of the case in its justification of the hearing *ex parte* of the motion on notice praying for the reference. The pith of counsel's submission is that it is against the H

rights of the appellant to fair hearing as entrenched in Section 33 of the Constitution by hearing the motion *ex parte*.

That submission may be overlooking the provision of Section 295(2) of the Constitution. The constitutional provision does not require that the parties must be heard on the question for reference.

B While hearing of the parties could be inferred from the words “and the court is of opinion that the question involves a substantial question of law,” in the sense that the court may be addressed by the parties before forming the opinion, the subsection does not specifically say that. By the subsection, once the court forms the opinion C that the question involves a substantial question of law, it does not matter whether one of the parties thinks differently. The court is bound to make the reference on its own showing of the position of the law. And so the issue of fair hearing, in my view, does not arise from the D invocation of Section 295 (2) of the Constitution. In the light of my conclusion, I do not see the need to deal with the case of 7-Up Bottling Co. Ltd. v. Abiola and Sons Ltd. (*supra*).

Let me now go to the two counts as they relate or affect the constitutional provisions of Section 33(8) and (12). It is the submission of Prince Fagbemi, SAN, that the use of the word fraudulently in E the counts of the charge did not mislead the respondent as the count, which centred on conspiracy, was clear. Counsel relied on Section 166 of the Criminal Procedure Act.

F Professor Adesanya, on the other hand, submitted that since the first count charged the respondent of “fraudulently granting credit facilities”, an offence not known to law, the Tribunal was wrong in convicting the respondent. Learned Senior Advocate called in aid the definition of felony in Section 2 of the Criminal Procedure Act G and submitted that the Banks and Other Financial Institutions Decree, 1991 did not give any specific name to the offence created in Section 18(1)(b). To learned Senior Advocate, the word “fraud” or “fraudulent” presupposes a particular *mens rea* which cannot be glossed over. While Prince Fagbemi relied on the case of *Ogbomor v. H The State* (1985) 2 NWLR (Pt. 2) 223, Professor Adesanya submitted that the case is inapplicable as the offence with which the accused was charged was well known to the law as against this case which is one of an addition of a mental element *mens rea* not known to Nigerian law.

Dealing with the issue, the Court of Appeal said at page 258:

“The crime said to have been committed, going by the framing of the two counts is ‘fraudulently granting credit facilities.’ A felony or a crime must be seen to have been committed within the framework of the provisions of the law under which it is charged. I have had a careful study of the Failed Banks Decree No. 18 of 1994 and the BOFID nowhere is the offence of fraudulently granting credit facilities described. That offence, in my respectful view is non-existent as far as our criminal law is concerned. It is sacrosanct that no person shall be liable to be tried or punished in any court of the land except under the clear and unambiguous provisions of a written law. I think that is the import of the decision in Aoko v. Fagbemi (1961) 1 All NLR 400 - though a decision of the High Court of the Western Region of Nigeria, the law expounded therein remains immutable.”

I entirely agree with the above. An accused person can only be charged with an offence created by a penal statute. This can either be in the Criminal Code, the Penal Code or any other penal statute such as BOFID. In this case, the relevant law is BOFID as the charges were preferred under that Decree. A count which is an indictment on the conduct of an accused must be specific and precise. It must be tied to the offending section of the penal statute in order to enable the court deal with the specific criminal conduct.

In the instant case, the respondent was charged with “fraudulently granting credit facilities... punishable under Section 516 of the Criminal Code Act Cap. 77 Laws of the Federation, 1990 to be read with Section 3(1)(b), (c) and (d) of the Failed Banks (Recovery of Debts) and Financial Malpractices Decree, 1994 as amended.”

Section 516 of the Criminal Code Act provides as follows:

“Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Nigeria would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser punishment.

There is no ingredient of “fraudulently granting credit facilities” in the above section under which the respondent was charged. While

I entirely agree with learned Senior Advocate for the appellants that the main element of the offence is conspiracy, I equally agree with learned Senior Advocate for the respondent that the additional ingredient which is not in Section 516 of the Criminal Code Act introduces an additional mens rea. The position taken by Professor B Adesanya is more fundamental and I agree with him.

Learned Senior Advocate for the appellants relied on Section 166 of the Criminal Procedure Act. The section is in the following terms;

C “No error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission.”

I do not think the section is applicable. The section, in my D humble view, presupposes a situation where an offence known to law is preferred. Where no offence known to law is preferred, the section cannot be invoked to cure any error or omission arising from the “offence” in inverted commas, indicating that there is no offence.

On the violation of Section 33 (8) and (12) of the 1979 Constitution, Professor Adesanya painted the following picture: (1) The E 1991 Decree was promulgated on 20th June, 1991. (2) The 1994 Decree was promulgated on 9th November, 1994. (3) The respondent was charged in Count 1 under the 1994 Decree. (4) The F respondent was charged in Count 10 under the 1991 Decree. (5) The cause of action in the matter arose between 27th March, 1991 and 14th September, 1991.

Relying on the above scenario, Professor Adesanya submitted that at the date when cause of action arose in 1991, the 1994 Decree G was not in place, as it came three years after and the law in place in 1991 was the 1979 Constitution. He placed reliance on *Uwaifo v. Attorney-General of Bendel State* (1982) 7 S.C. 124 and submitted that since the applicable law in 1991 is the 1979 Constitution, when the court’s jurisdiction was not ousted, it is of no moment, absolutely H irrelevant and of no legal consequence that the 1994 Decree which came three years later could oust the jurisdiction of the court. Counsel also relied on *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377 and a number of other cases.

These are very powerful arguments which learned Senior Ad-

vocate for the appellants seems to have no answers in his brief. He did not even see the necessity of filing a Reply Brief if the appellants had answers. It is in the light of the above factual situation painted by Professor Adesanya that yearns for the invocation of Section 33(8) and (12) of the 1979 Constitution.

In my humble view, Professor Adesanya is right in urging this court to invoke the provision of Section 33(8) and (12) of the 1979 Constitution. In the often cited case of *Aoko v. Fagbemi* (supra) a decision of the High Court which has acquired so much celebrity and reputation in Nigerian Jurisprudence, Fatayi-Williams, J., (as he then was), quashed the conviction of an accused person by a customary court of the customary offence of adultery on the ground that it was not a written offence. In other words, a court of law only has jurisdiction to punish for an offence provided for in a statute. See also *Tofi v. Uba* (1987) 3 NWLR (Pt. 62) 707.

The fundamental rights entrenched in the Constitution are very important, so much so that an individual whose rights have been infringed or contravened has the right to seek redress in a competent court of law. In the context of the 1979 Constitution, Section 42 thereof and the Fundamental Rights (Enforcement Procedure) Rules, 1979 vest in an individual who alleges that any of the provisions of Chapter 4 has been, is being or likely to be contravened or infringed in any State in relation to him may apply to a High Court in that State for redress.

As it is, the enforcement procedure is in three limbs. The first limb is that the fundamental right in Chapter 4 has been physically contravened or infringed. In other words, the act of contravention or infringement is completed and the plaintiff goes to court to seek for a redress. The second limb is that the fundamental right is being contravened or infringed. Here, the act of contravention or infringement may or may not be completed. But in the case of the latter, there is sufficient overt act on the part of the respondent that the process of contravention or infringement is physically on the hands of the respondent and that the act of contravention or infringement is in existence substantially. In the third limb, there is likelihood that the respondent will contravene or infringe the fundamental right or rights of the plaintiff. While the first and second limbs may ripen together in certain situations, the third limb of the subsection is entirely different.

By the third limb, a plaintiff or applicant need not wait for the completion or last act of contravention or infringement. In the instant case, the respondent invoked the first limb of the enforcement section or order, and that is, the provision of Section 33(8) and (12) has been contravened or infringed by the Tribunals.

B Fundamental rights inhere in man because they are part of man. If a hierarchical order of our laws is drawn, fundamental rights will not only take a pride of place but the first place. Accordingly, neither the courts of law nor tribunals have the right to encroach on the rights of the individual in the judicial process. This is exactly what C the Tribunals did. Such power is not available to them.

It is in the light of the above and the more detailed reasons given by my learned brother, Uwaifo, JSC., in his judgment that I too dismiss the appeal. I also answer the two questions referred by the D Federal High Court as follows:

Question (1): The answer is no.

Question (2): The answer is no

I also order that the case be resumed at the Federal High Court and direct that it should be dealt with in the light of this decision and E answers given to the two questions herein.

MUSDAPHER JSC

F I have read before now the judgment of my learned brother, Uwaifo JSC., just delivered and respectfully agree with the reasoning and the conclusion arrived at. For the same reasons, which I adopt as mine, I too dismiss the appeal and I also abide by the Orders made including the order as to costs.

G _____

EDOZIE JSC

The Respondent, Lord Chief Udensi Ifegwu and six others were tried before the Zone II Lagos Division of the defunct Failed Banks H Tribunal upon a ten count charge in respect to which counts 1 and 10 relate to the Respondent and are particularised thus:

COUNT 1: That you, Lord Chief Udensi Ifegwu (now at large), Jimi Adebisi Lawal (now at large), Tony Nnachetta, Jeff Fayomi while being Directors and or Managers of Alpha Merchant Bank Plc. (now

in liquidation) at Lagos, between 30th June, 1988, and 1st October, 1993, conspired to commit a felony, to wit, fraudulently granting credit facilities to Dubic Industries Limited without lawful authority in contravention of rules and regulations of the said Alpha Merchant Bank Plc and the regulatory authorities (CBN/NDIC) and thereby committed an offence punishable under Section 516 of the Criminal Code Act, Cap. 77 Laws of the Federation 1990 to be read with Section 3(1)(b)(c) and (d) of the Failed Banks (Recovery of Debts) and Financial Malpractices Decree, 1994. ^B

COUNT 10: That you, Lord Chief Udensi Ifegwu (now at large), between 30th June, 1988, and 1st October, 1993, at Lagos while being a Director of Alpha Merchant Bank Plc. (now in liquidation) and also a Director of Dubic Industries Limited was connected with the granting of credit facilities totaling US\$2,962,062.89 (Two Million, Nine Hundred and Sixty-Two Thousand Dollars, Eighty-Nine D Cents) (sic) now equivalent of N242,889, 156.98 (Two Hundred and Forty-Two Million, Eight Hundred and Eighty-Nine Thousand, One Hundred and Fifty-Six Naira, Ninety-Eight Kobo only) to Dubic Industries Limited without declaring your personal interest in the said facility to the then Board of Directors as required by Section 18(3) of the Banks and Other Financial Institutions Decree, 1991 and thereby committed an offence punishable under Section 18(9) of the same Decree.” ^E

After due trial, on the above counts, the Respondent was convicted and sentenced to terms of imprisonment with option of fines. ^F His appeal to the Special Appeal Tribunal was unsuccessful with respect to conviction though the sentences were varied according to the judgment of the appellate Tribunal delivered on 29th May, 1997. Still undaunted, the Respondent approached the regular courts to ^G challenge his conviction. In this connection, he filed before the High Court, Lagos, an originating summons dated 31st May, 1999, for declarations that the Failed Banks Tribunal Zone II Lagos as well as the Special Appeal Tribunal had no jurisdiction to try, convict and sentence him on the two counts of offences alleged against him in ^H view of the provisions of Section 33(8) of the 1979 Constitution being the applicable law at the material time. Subsequent thereto, the Respondent by his counsel filed in the said Federal High Court a motion on notice praying that the suit be transferred to the Court of

Appeal, Lagos Division, by way of case stated pursuant to Section 259(2) of the 1979 Constitution. The Federal High Court granted the prayer and ordered that the case be referred to the Court of Appeal for the determination of the following two questions:-

“(1) *Whether the Failed Banks Tribunal, as well as the Special Appeal Tribunal had the jurisdiction to try, convict and sentence the Plaintiff on count 1 in the Charge No. FBFMT/LZII/IC/95 under the Failed Banks (Recovery of Debts) and Financial Malpractices in Bank Decree, 1994 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.*

“(2) *Whether the Failed Banks Tribunal as well as the Special Appeal Tribunal had the jurisdiction to try, convict and sentence the Plaintiff on count 10 in Charge No. FBFMT/LZII/IC/95 under the Banks and Other Financial Institutions Decree, 1991 in view of Section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.*”

In the proceedings before the Court of Appeal, parties by their counsel filed and exchanged briefs of argument wherein they formulated issues for the determination of the two questions referred to the Court. After hearing arguments of counsel, the court found in favour of the Respondent and by implication answered the two issues referred to it in the negative.

Being dissatisfied with the decision, the Appellants have lodged the instant appeal formulating in their brief of argument six issues for determination of the appeal. The dominant issue that I desire to express an opinion on by way of supporting the leading judgment is the one that challenges the jurisdiction of the two lower courts to entertain the subject-matter of the originating summons. In this regard, the contention of the Appellants’ counsel is two-pronged.

Firstly, the Learned Senior Advocate for the Appellants, at page 9 of his brief postulated thus:-

“*The jurisdiction of the Federal High Court to enquire into causes and matters, were as prescribed in Section 7 of the Federal High Court Act, and Section 230 (1) of the 1979 Constitution as amended by Decree No. 107 of 1993.*

Submit that none of the sections or sub-section of the above cited enactments conferred on the Federal High Court supervisory jurisdiction over causes and matters arising from the exercise of the

powers conferred on the Failed Banks Tribunal or the Special Appeals Tribunal.”

With respect to the learned Senior Advocate of Nigeria, this argument appears to have lost sight of the fact that the Respondent’s action was in relation to a violation or breach of his fundamental right under Section 33(8) of the 1979 Constitution and that a claim in respect of such a breach as a principal relief as in the instant case is cognisable in the Federal High Court in respect to matters falling within the jurisdiction of that court. This appears to be the outcome of the decision of this court in the case of *Alhaji Tukur v. Government of Gongola State* (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 117) 513 at p. 547 in which Obaseki, JSC., summed up the matter thus:-

“Since the jurisdiction conferred by Section 42(2) of the Constitution is a special jurisdiction and made subject of the provisions of the Constitution, the enforcement of the fundamental rights in matters outside the jurisdiction of the Federal High Court is not within and cannot be in the contemplation of the section.

By Section 230 (1) of the 1979 Constitution as amended by Decree No. 107 of 1993, the jurisdiction conferred on the Federal High Court extends to matters pertaining to banking, foreign exchange and criminal causes arising therefrom and the interpretation of the Constitution in so far as it affects the Federal Government. From the foregoing, it is crystal clear that since Respondent’s principal relief in the originating summons was for the enforcement of his fundamental right in respect of his conviction concerning a banking transaction for which Federal High Court is invested with jurisdiction, the contention by the learned Senior Advocate of Nigeria that Federal High Court lacked jurisdiction over the matter cannot be right.

The second prong of the argument of the learned Senior Advocate of Nigeria is in relation to ouster clause in the Decree No. 18 of 1994 as amended by Decree No. 18 of 1995. At page 9 of his brief, he forcefully submitted thus:-

“Submit that in view of the clear provisions of Section 1 (5) of the Failed Banks Decree No. 18 of 1994 as amended by Decree No. 18 of 1995 which sub-section clearly excluded the exercise by any High Court of the usual “supervisory jurisdiction” or power of judicial review irrespective of the provisions of any unsuspended sections of the 1979 Constitution, on the one hand and the clear provi-

sions of Section 5(2) of the same Decree, which makes the decision of the Special Appeals Tribunal to be the final arbiter on the issue, the Federal High Court clearly lacked the jurisdiction to enquire into the substance of the two point declaratory reliefs upon which the motion to refer (sic) adjudicated upon by the court below was anchored.”

B With due deference to the learned Senior Advocate of Nigeria, I am unable to agree with the above submission. The fact that a Decree which established a Tribunal provides that its decision is final and not subject to appeal or review will not shield such a decision from the scrutiny of a court of competent jurisdiction where an ag-
C grievied party challenges the jurisdiction of the tribunal, for it has long been recognised that where a Tribunal or a court of law has no jurisdiction to adjudicate on a matter, the proceedings of that tribunal or court including its decision thereon is a nullity, no matter how well
D conducted and decided it may have been. *Madukolu v. Nkemdilim* (1962) 2 SCNLR 34; *Western Steel Works Ltd. v. Iron and Steel Workers Union* (1986) 2 NWLR (Pt. 30) 617. An ouster clause in a statute does not protect a nullity. In the case of *Anisminic v. Foreign Compensation* (1969) 1 All ER 208 at 213, the House of Lords per
E Lord Reid, observed:

“Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has
F been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the
G bald statement that a determination shall not be called in question in any court of law. Undoubtedly, such a determination protects every determination which is not a nullity. But I do not think it is necessary or even reasonable to construe the word “determination” as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There
H are a number of reasons why the law will hold a purported decision a nullity. I do not see how it could be said that such a provision protects some kind of nullity but not other; if that were intended it would be easy to say so.”

In a similar vein, in the case of *Nwosu v. Imo State environ-*

mental Sanitation Authority (1990) 2 NWLR (Pt. 138) 688 at p. 732, this court, per Agbaje, JSC., referred to a passage in the judgment of Coker, JSC., in *Nigerian Ports Authority v. Panalpina World Transport Nig. Ltd. & Ors.* (1974) 1 NMLR 82 at 95 dealing with a statute ousting the jurisdiction of the court. It reads:-

“Concerning the effect of Section 1 of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970, the learned trial Judge observed in the course of his judgment as follows:-

‘While I think that these provisions of the Supremacy and enforcement of Powers Decree No. 28 of 1970 completely ousts the jurisdiction of the Court in matters within the contemplation of a decree, I do not consider that matters which are not in contemplation of the decree in question can enjoy the protection which the Supremacy and Enforcement of Powers Decree gives. In other words, I am saying that if by a decree a tribunal is set up the decisions of which are stated under the decree setting it up to be final; and the tribunal proceeds to take a decision completely outside or in excess of its jurisdiction, it is my view that this court is in cases properly within its territorial jurisdiction, competent to make a declaration on it.’

We are in agreement with the statement of the law as expressed by the learned trial Judge on the point.”

With the weighty pronouncements in the cases referred to above, I am persuaded to hold that the ouster clause in Section 1(5) and 5(2) of the Failed Banks Decree did not rob the two lower courts of the jurisdiction to adjudicate over the subject matter of the Respondent’s originating summons.

In the light of the foregoing, in addition to the detailed and fuller reasons given in the lead judgment of my learned brother, Uwaifo JSC., on all the various issues agitated in the appeal, which I adopt as mine, I, too, dismiss the appeal with all the consequential orders made in the lead judgment.