

SUPREME COURT OF NIGERIA

10TH DECEMBER, 2004. SC. 70/2004

**CORAM:- M. L. UWAI S CJN, I. L. KUTIGI, A. I. IGUH, S. O.
UWAIFO, N. TOBI, D. O. EDOZIE, S. A. AKINTAN, JJSC**

ATTORNEY-GENERAL OF LAGOS STATE PLAINTIFF
AND
ATTORNEY-GENERAL OF THE FEDERATION DEFENDANT

CONSTITUTIONAL LAW - Creation of Local government areas - The words 'area' or 'council' - Are used interchangeably within the 1999 Constitution - In a manner different from their use - In the 1979 Constitution (H1)

CONSTITUTIONAL LAW - Courts - Technicalities - Should be avoided in interpreting the Constitution - Unto determining the real controversy (H2)

CONSTITUTIONAL LAW - Creation of local government areas - Need to read and interpret together - All the relevant sections of the Constitution (H3)

CONSTITUTIONAL LAW - Creation of local government areas - Passing of a bill by a State Legislature - Without the National Assembly passing the appropriate Act - Under ss. 8 (3) & (5) and 3 (6) of the 1999 Constitution - Makes the bill inchoate and lifeless (H4)

CONSTITUTIONAL LAW - Jurisdiction - Counterclaim - Extent of parties' legal rights - Being the dispute here - The Supreme Court has jurisdiction (H5)

CONSTITUTIONAL LAW - Creation of new local government areas - Power to pass a bill lies with the State Assembly - Which shall make a return to the National Assembly - Section 8 (3) & (5) of the 1999 Constitution

tution (H6)

CONSTITUTIONAL LAW - Local government areas - Federation account s. 162 (3) & (5) 1999 Constitution - Qualification to receive funds - Lagos State laws on local government creation - Though valid cannot yet be operative - Without implementation of s. 8 (5) of the Constitution (H7)

CONSTITUTIONAL LAW - Federation account - For a state to receive funds - Under s. 162 (3) & (5) of the 1999 Constitution - There must be local government councils - That are legal and constitutional (H7)

CONSTITUTIONAL LAW - Separation of powers - Federation account - Powers of the President - Can only be those granted by the Constitution - And any dispute should be brought before the courts (H8)

FACTS

On the 19th day of April, 2004, the plaintiff took out an originating summons on behalf of the Lagos State Government against defendant as representative of the Federal Government. The suit was necessitated by the letter which the President of the federation caused the Minister in the Federal Ministry of Finance to forward to all State Governors and local government chairmen. By the said letter, allocation of funds from the federation account to some local government councils were suspended. The States affected are those that created new local government areas pursuant to s. 8 (3) of the 1999 Constitution, and conducted the last local government elections within them, when the National Assembly has not promulgated the consequential Act under s. 8 (5) that will give the new local government areas constitutional recognition. Lagos State being one of the affected States filed this action challenging the suspension of their statutory allocation due under s. 162 (5) of the 1999 Constitution as unconstitutional.

Defendant entered appearance and filed a counterclaim against the plaintiff. It sought inter alia, a declaration that the plaintiff/defendant has

no power to create new local government areas without recourse to the National Assembly under the 1999 Constitution, and that the created ones are illegal, unconstitutional, null and void. Defendant to the counterclaim raised a preliminary object against it on the ground that plaintiff has no legal right to enforce under the counterclaim. Various issues were raised for the Supreme Court's determination.

ISSUES FOR DETERMINATION

Whether or not a local government area created by a State to replace the ones recognized under the Constitution can automatically come into being and enjoy benefits accruing to local governments under the Constitution without the input of the National Assembly as provided by Sections 8(5), (6) and 3(6) of the 1999 Constitution."

Whether or not the decision of the President to suspend statutory allocation to Lagos State for the benefit of Local Government Councils within the State is lawful, valid and constitutional."

1. Whether or not there is any evidence/basis before the court upon which the amended reliefs of the plaintiff can be founded?

Etc. see p. 2327 G

HELD (Unanimously granting the plaintiff's claim conditionally and granting part of the counterclaim, with some conflicting reasonings, per **UWAIS CJN**)

The words 'area' or 'council'

1. It is significant that in both subsections (3) and (5) thereof reference is made to "Local Government Areas". The phrase "local government councils" has not been defined as such by the Constitution. However Section 318 of the Constitution provides that both the phrases "local government area" and "local government council" include an area council. In other words both the phrases "local government area" and "local government council" are interchangeable with regard to the meaning of "area council"

Let me now return to the provisions of Section 162 subsections (3) and (5) of the Constitution. I have already held that the phrase "local government council" is synonymous with "local government area" as shown in the Constitution. I am aware that Prof. Ben Nwabueze, SAN., holds a

different view; for he stated as follows in his book *Federalism in Nigeria* under the Presidential Constitution at pp. 131 to 132 -

"It is contended on the other hand that a State government has no power at all to create local government areas. The reasoning behind this contention is that since the area of each State is defined in the Constitution by reference to named local areas which happen to be the same as the existing local government areas, the creation of local government areas will necessarily involve a constitutional amendment by means of legislation enacted by the National Assembly, with the approving resolution of the Houses of Assembly of not less than two-thirds of all the States. The argument is untenable. The first point to notice is that the areas named in the Constitution as forming the area of each State are not explicitly stated to be local government areas. Nowhere in the Constitution are they referred to as local government areas. It just happens that they correspond to the names of existing local government areas.....But whether they are regarded as local communities or as local government areas, the important point is that their designation in the Constitution carries no implication as to the number of local government councils that may exist within each of them. The area of a State, as defined by reference to the named localities, would not have been increased or decreased by the establishment of two or more local government councils within each of the named area.

Furthermore, the boundaries of each named area are not defined in the Constitution so as to identify its territorial extent and thereby to preclude the transfer of any part of it to another area by a law made by the State legislature. So long as all the named areas remain in existence, the extent of the land area comprised in each of them has no constitutional significance; the Constitution is not amended or violated in any way by the transfer of any part of the territory of one area to another."

With due respect this argument though admittedly applicable to the provisions of the 1979 Constitution of the Federal Republic of Nigeria are not true with regard to the 1999 Constitution, which in both Section 3 and Part I of the First Schedule to the Constitution, specifically refers to the areas as Local Government Areas. (p. 2284 F / 2289 E)

Technicalities - Should be avoided in interpreting the Constitution

2. If we are to go by technicality it will be seen that the controversy between the plaintiff and the defendant is not exactly over the directive given by the President to the Minister of Finance, as the directive relates to local government areas, local government councils, and local government area councils while the plaintiff's claim is shown to concern Lagos State Government. Be that as it may, it should be borne in mind that we are in this case concerned with the interpretation of the Constitution. The inconsistency and confusion notwithstanding, this court has since laid down that in interpreting the Constitution we should avoid technicalities - see the case of Nafiu Rabi v. Kano State. (1980) 8-11 S.C. 130; (1980) 8-11 S.C. (Reprint) 85, where Sir Udo Udoma stated on pp. 148-149 thus (see also (1981) 2 NCLR 293 at p.326):-

“.....the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution.”

Notwithstanding the references made in the letter in question by the President to “local government areas” or “local government councils” or “local government area councils”, it is clear to me that the dispute between the parties relates to the payment of funds from the Federation Account to the credit of local government councils in Lagos State. I shall therefore consider the case on that basis. (p. 2285 E)

Need to read and interpret sections of the Constitution together

3. Now for the purpose of creating new local government it is necessary to read together and interpret all the provisions of the Constitution mentioned above, namely Section 3 subsections (1), (2) and (6) together with Part I of the First Schedule; Section 8 subsections (3), (5) and (6) of the Constitution. This is the canon of interpretation of Constitution as laid down in Ifezue v. Mbadugha, (1984) 5 S.C. 79 at p.101. (p. 2288 F)

Passing of a bill by a State Legislature

4. When those sections are read together what emerges is that the passing of a bill by a House of Assembly creating a local government area or local government council in accordance with Section 8 subsection (3) of the Constitution is not enough, the State will have to go a step further by submitting returns to the National Assembly which in turn will have to amend Section 3 (6) of the Constitution for the new local government area to be accommodated by the Constitution. In other words, the exercise by the State House of Assembly in passing the necessary bill creating a new local government or local government area is inchoate as submitted by Chief Afe Babalola, SAN. I therefore come to the conclusion that the passing of the Local Government Areas Law, No.5 of 2002 by the Lagos State House of Assembly was not sufficient to give life to the new Local Government Areas until the National Assembly passes the consequential Act amending the Section (3) subsection (6) and Part I of the First Schedule to the Constitution. Similarly, the enactment of New Local Government Areas (Amendment) Law, 2004 by the Lagos State House of Assembly, which was assented by the Governor of Lagos State on the 6th day of October, 2004, when this case was pending before us, is of no effect and cannot be operative until the National Assembly passes the appropriate Act under Section 8 subsection (5) of the Constitution appropriately amending Part I of the First Schedule to the Constitution to accommodate the new local government areas. (p. 2288 H)

Counterclaim - Extent of parties' legal rights

5. The dispute between the parties, in my opinion, involves question of law on which the extent of the constitutional (i.e. legal) rights of both the plaintiff and the defendant depend. I, therefore, hold that there is a proper dispute under Section 232 subsection (1) of the 1999 Constitution between the parties and this court has the jurisdiction to determine the dispute. Besides, it is a general principle of law that the court will not readily deny itself jurisdiction unless the jurisdiction is expressly ousted by legislation. Again a counter-claim can properly be raised by a defendant when the counter-claim is directly related to the principal claim. (p. 2300 B)

New local governments - Power to pass a bill lies with the State

6. For a new local government area (and therefore new local government council) to be created the provisions of Section 8 subsection (3) must be complied with by the House of Assembly of the State where the local government areas or councils are to be created. Section 4 subsections (6) and (7) give the House of Assembly the powers to legislate for the State for the peace, order and good government of the State. Section 7 subsection (1) guarantees the existence of democratically elected local government councils and every State is directed to ensure that they exist under a State Law which provides for their establishment, structure, composition, finance and functions. Section 8 subsection (3) specifically vests the State House of Assembly with the power to pass a bill creating a new local government area. When this is done, a return is to be made by the House of Assembly to the National Assembly for the purpose of enabling the latter to exercise its powers under Section 8 subsection (5) of the Constitution. This power entails the making of consequential provisions with respect to the names and headquarters of the local government areas provided in Section 3 and Part I of the First Schedule to the Constitution. The procedure for passing the Act is different from the procedure for passing other Acts for the purpose of amending the Constitution, as it is not necessary for the other House of Assembly to approve the amendment to the Constitution. (p. 2300 G)

Federation account - Qualification to receive funds

7. It is clear, therefore, that the provision of 768 local government areas in Section 3 subsection (6) could be altered to either a higher number or even a lower number. Having read all the provisions of the Constitution aforementioned, I am satisfied that the House of Assembly of Lagos State has the right to pass the Creation of Local Government Areas Law No. 5 of 2002 and to amend it by passing the Creation of Local Government Areas (Amendment) Law, 2004. It is very clear to me, however, that for the plaintiff to receive funds from the Federation Account under Section 162(3) and (5) there must be local government councils which have legally or constitutionally come into existence. It seems to me for this to happen the remaining or consequential

action must be taken by the National Assembly to amend Section 3 subsection (6) and Part I of the First Schedule to the Constitution. This is so, because the references made in Section 162 to local government councils must be with a view to the local government areas specified in Section 3(6), which I have earlier held to be equal to or synonymous with local government councils.

What follows from this is that the Laws enacted by Lagos State that is Law No.5 of 2002 and the 2004 Law are both valid Laws since the House of Assembly of Lagos State has the power under Sections 4 subsections (6) and (7), 7 subsection (1) and 8 subsection (3) of the Constitution to legislate in respect of the creation of new local government areas and local government councils which are one and the same for the purpose of Section 162 subsections (3) and (5) of the Constitution. However, in the context of Section 8 subsection (5) and Section 3 subsection (6) such Laws cannot be operative or have full effect until the National Assembly makes the necessary amendment to Section 3 subsection (6) and Part I of the First Schedule to the Constitution. The effect of this is that the Laws are valid but inchoate until the necessary steps as provided by the Constitution are taken by the National Assembly. (p. 2301 D)

CONSTITUTIONAL LAW - Separation of powers

8. It has been argued that the President by virtue of the “*Oath of Office*,” which he took in assumption of office, he is bound “*to protect and defend the Constitution*”. In addition, the “*executive powers of the Federation*”, is vested in the President by Section 5 subsection (1)(a) of the Constitution and such powers extend to the execution and maintenance of the Constitution. This is certainly so, but the question is does such power extend to the President committing an illegality? Certainly the Constitution does not and could not have intended that. As I have already shown, the creation of new local government areas or councils is supported by the provisions of the Constitution. In other words the taking of such a step or act by Lagos State is not unconstitutional as thought by the President. The Constitution fully recognizes the step taken except that there is still one more step or hurdle to be taken or crossed by the national Assembly for the plaintiff to actualize the creation of the new local government areas. Our attention has not been drawn

to any other provision of the Constitution which empowers the President to exercise the power of withholding or suspending any payment of allocation from the Federation Account to Local Government Councils or to State Government on behalf of the Local Government Councils as provided by Section 168 subsections (3) and (5) of the Constitution. B

With respect, when ever there is any disagreement or dispute between the Federation and the States, the avenue provided by the Constitution for the settlement are, according to Section 6 of the Constitution the superior courts of record created by the Constitution. (p. 2302 D) C

NOTABLE POINTS OF INTEREST

KUTIGIJS

1. State is to hold funds in trust for its local governments s. 162 (5)

Dealing with the plaintiff's claims, I believe the right and title of a State D Government to amount payable pursuant to Section 162(5) of the Constitution is indisputable. The subsection expressly and unequivocally stipulates that such amount -

"shall also be allocated to the States for the benefit of their Local E Government Councils."

The words above plainly confer legal title to the amount in question on the States subject to a trust in favour of their Local Government Councils. Section 162(8) also confers on the Lagos State House of Assembly the duty F to distribute the amount mentioned in Section 162(5) *"on such terms and in such manner"* as it may prescribe. So the pertinent question is whether or not the decision of the President to suspend Statutory Allocation to Lagos State for the benefit of Local Government Councils within the State is lawful, valid and constitutional. It appears to me that nowhere in the Constitution is the G President expressly or impliedly authorized to suspend or withhold the Statutory Allocation payable to Lagos State pursuant to Section 168(5) of the Constitution on the ground of the complaints made against Lagos State by the Federal Government in this action or any ground at all. If the President H has any grievance against any tier of Government, he should go to court. He cannot kill them by withholding their Statutory Allocations. That will be brutal indeed! (p. 2309 C)

UWAIFO JSC

2. *National Assembly - Bound to pass a consequential Act under s. 8 (5)*

It must be noted that it is “*after the creation of more local government areas*”
 B that a House of Assembly shall make adequate returns to each House of the
 National Assembly. In other words, the creation has been concluded and the
 relevant local government areas have been brought into being by the action
 taken by a House of Assembly through its bill before returns thereof are made
 to each House of the National Assembly. In relation to local government
 C areas affected or involved, the National Assembly shall then pass an Act,
 based on the returns so furnished to it, to make consequential provisions with
 respect to the names and headquarters of the said local government area.
 I strongly hold the view that the only purpose of the consequential
 D provisions is to update the local government areas “*as provided in Section 3*
of this Constitution and in Parts I and II of the First Schedule to this
Constitution.” It is like birth registration under the provision of an Act. The
 delay in the formality of registration of any particular birth cannot ignore the
 E fact that there has been a child born who is living. To my mind, it does not
 confer any supervisory authority on the National Assembly which it may
 use to delay, direct, control or frustrate the effect of a law duly enacted by
 a State. It is a simple process for a simple formal consequence; it is a process
 different from that of passing an Act for the alteration or amendment of a
 F provision of the Constitution as laid down in Section 9 of the Constitution. In
 my opinion, there is nothing, therefore, special about it that ought to
 postpone the coming into force of the law constitutionally passed by a State
 to create local government areas in its domain.

G As long as the conditions stated in subsection (3) of Section 8 are
 fulfilled and returns made under subsection (6), the National Assembly shall
 “*exercise the powers conferred upon it by subsection (5) of this Constitution*”
 to pass an Act which shall make consequential provisions with respect to the
 H names and headquarters of local government areas. Obviously, the names and
 headquarters of the local government areas will be provided in the returns
 made pursuant to subsection (b) and it is for the National Assembly to pass
 an Act in regard to those returns. It is a duty imposed on the National

Assembly and a corresponding right conferred on the House of Assembly to have the new local government areas recorded. The duty can be compelled by mandamus, being a duty allowing for no discretion. (p. 2317 G)

3. Presidential powers and the rule of law

I do not think it is appropriate to brand the Federal Government or Mr. President as a trustee in relation to the constitutional powers conferred on and exercisable by them; and thereby introduce the element of personal judgment or discretion over a justiciable dispute that may arise between them and the States. The President exercises executive powers under the Constitution. They are, without dispute, awesome powers but even so they have known limits. The exercise of the powers is kept within bounds by the intervention of the rule of law. In *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (1931) AC 662 at 670, the Privy Council said: D

“The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a court. As the executive he can only act in pursuance of the powers given to him by law.”

In the case of *Military Governor of Lagos State v. Ojukwu* (1986) 1 NSCC (Vol. 17) 304 at 313, Obaseki, JSC, made the following relevant observation inter alia: E

“The Nigerian Constitution is founded on the rule of law the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the frame-work of recognized rules and principles which restrict discretionary power..... [T]he rule of law means that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive.” F
(p. 2320 A) G

4. Proper Basis for allocation of funds s. 162 (2)

It does not appear to me that there is any power conferred on the President to decide to withhold any allocation on the basis of a conceived breach of the Constitution by any of the three tiers. It seems to me also that the allocation principle of funds to local government councils in each State is such that the amount payable does not increase simply because a House of Assembly has H

created more local government areas in the State. To take that into account will simply encourage the proliferation of local government areas for the main aim of earning more revenue. That cannot be right or equitable.

Section 162(2) makes it clear what the National Assembly will take into account in the allocation principles especially those of population, equality of states, internal revenue generation, land mass, terrain as well as population density. Since that is the position, the circumstances of the creation of more local government areas by a State ought not to lead to withholding of the normal funds to which a State Government is entitled to receive on behalf of the local government councils in the State. The usual allocation to which a State was entitled before the creation of more local government areas ought not to be a point of dispute. It must continue to receive that allocation on behalf of the local government areas until there is a new general allocation formula approved by the National Assembly in its collective wisdom.
(p. 2321 D)

TOBI JSC

5. Definition of a legal right to commence court action

What is a legal right? A legal right, in my view, is a right cognisable in law. It means a right recognized by law and capable of being enforced by the plaintiff. It is a right of a party recognized and protected by a rule of law, the violation of which would be a legal wrong done to the interest of the plaintiff, even though no action is taken. The determination of the existence of legal right is not whether the action will succeed at the trial but whether the action donates such a right by reference to the enabling law in respect of the commencement of the action.

The defendant, in the counter-claim, has asked for nine reliefs. With the greatest respect to the plaintiff, I do not agree that the defendant has no legal right to enforce under Section 232 of the Constitution. I think the defendant got it properly when his counsel submitted that the President who is the custodian and trustee of Federation Account and who is constitutionally charged with the distribution has interest in the subject matter. If I may add, therefore, the President has the legal right to commence the counter-claim. Accordingly, I dismiss the preliminary objection of the plaintiff. (p. 2337 B)

6. Self-help is not available to any arm of government

If the Federal Government felt aggrieved by Lagos State creating more Local Governments, the best solution is to seek redress in a court of law, without resorting to self-help. In a society where the rule of law prevails, self-help is not available to the Executive or any arm of government. In view of the fact that such a conduct could breed anarchy and totalitarianism, and since anarchy and totalitarianism are antitheses to democracy, courts operating the rule of law, the life-blood of democracy, are under a constitutional duty to stand against such action. The courts are available to accommodate all sorts of grievances that are Justiciable in law and Section 6 of the Constitution gives the courts power to adjudicate on matters between two or more competing parties. In our democracy all the Governments of this country as well as organizations and individuals must kowtow to the due process of the law and this they can vindicate by resorting to the courts for redress in the event of any grievance. (p. 2338 B)

7. Need for adequacy of returns to National Assembly s. 8 (6)

In other words, the National Assembly can only invoke its powers under Section 8(5) when the House of Assembly of a State has complied with Section 8(6). The subsection reads:

“For the purposes of enabling the National Assembly to exercise the powers conferred upon it by subsection (5) of this section, each House of Assembly shall, after the creation of more local government areas pursuant to subsection (3) of this section, make adequate returns to each House of the National Assembly.”

Unless Section 8(6) is complied with by the State House of Assembly, the National Assembly cannot enact the Act within Section 8(5). The enactment of the Act under Section 8(5) is not automatic. The House of Assembly has to make adequate returns to the National Assembly. Putting it in another language, Section 8(6) is a precondition for Section 8(5) to come into being.

Is there any evidence that such returns were made to the National

Assembly? I have searched the case file in vain and I cannot place my hands on any affidavit that Section 8(6) of the Constitution was complied with. In the absence of any affidavit evidence, it will be dangerous for this court to come to the conclusion that the Lagos State House of Assembly complied
B with Section 8(6), a precursor to Section 8(5).

The above apart, Section 8(6) uses the adjective “adequate” to qualify the plural noun “returns”. This means that the returns made by Lagos State Government to the National Assembly must not only be returns qua official information or account in respect of the Local Government Councils but the
C returns must be adequate. Negatively, where the returns are inadequate, the opposite of adequate, the National Assembly cannot invoke its law making power under Sections 4 and 8(5) of the Constitution.

It is my opinion that Law No. 5 of 2002 can only become constitutional
D if the National Assembly enacts the Act under Section 8(5). (p. 2341 E)

*8. National Assembly is not bound to enact an Act under s. 8 (5) as a
E matter of routine*

I am also in grave difficulty to accept the argument that the National Assembly must, as a matter of course or routine, enact the Act under Section 8(5) of the Constitution, willy-nilly. That makes the National Assembly a rubber
F stamp in respect of decisions of the House of Assembly of a State. It is not my understanding of the subsection that the National Assembly is only a clearing house for the House of Assembly of a State. The submission of plaintiff and Alhaji Ibrahim, in my view, reduces the National Assembly to an errand boy or a conduit pipe or a conveyor belt, to do the bidding of Lagos
G State House of Assembly which metamorphosises as the “master.” The National Assembly is not any of the above either placed separately or put together. The National Assembly is one vibrant and articulate lawmaking body, senior (if I may use that expression unguardedly) to all other Legislative
H Houses of this country. See Section 4(5) of the Constitution of the Federal Republic of Nigeria, 1999 which in my view, depicts the element of seniority. And it will be a misplacement of constitutional provisions to assign to it the role of chorusing the decisions of a State House of Assembly. I shudder to

think or say that such is the role the National Assembly is given to play in Section 8(5). No. Not at all. (p. 2343 H)

9. SS. 8 (5) & 7 (6) (a) *grant controlling power to National Assembly*

I should like to say that but for Section 8(5), States would have the freedom of the air to create any number of Local Government Councils, probably when they know that financial allocations are in most cases made according to the number of Local Government Councils. While I do not say that the plaintiff has such an aim, that seems to be the practice now, if I may so naively restrict myself. Let me venture an example, and it is hypothetical. If a State House of Assembly decides to create every village in the State a Local Government Council, by the interpretation of the plaintiff, the National Assembly must pass the necessary Act without ado.

Oh, I now remember Section 7(6)(a) of the Constitution. By the subsection, the National Assembly is enjoined to make provisions for statutory allocation of public revenue to Local Government Councils in the Federation. Think of a situation where the National Assembly provides money for Local Government Councils without having a word on their creation within the meaning of Section 8(5) of the Constitution! Such a situation should better be imagined than happening. Let it not happen at all because such a provision will be devoid of all known senses and sensibilities of equity, fairplay and fairness. (p. 2344 G)

AKINTANJSC

10. *Definition of consequential - Role of National Assembly - Is not part of local government creation*

The word "*Consequential*" is defined in The New Webster's Dictionary of the English Language, International Edition, 1997 Printing, page 207 thus: "*Following as a consequence or corollary*". Also the word "*consequence*" is defined on the same page of the same dictionary as: "*That which follows something and arises from it*". The same word- "*consequence*" is also defined in Black's Law Dictionary. 6th Edition, 1990, page 306 thus: "*The result following in natural sequence from an event which is adapted to produce, or to aid in producing such result; the correlative of cause*". Also in The

Concise Oxford Dictionary of Current English, 5th Edition, 1964 reprint, page 258, the word “*Consequential*” is defined as: following as a result; following logically; logically consistent. I have no doubt that none of the definitions of the word “*consequential*” or “*consequence*” given above could lead to the inference that the role which the National Assembly has to play in Section 8 (5) of the Constitution is part of the process of creation of new local government councils. I believe that the process of creating the new local government councils has been completed before the National Assembly is called upon to perform its own role under Section 8 (5) of the Constitution. It is therefore not correct to say that the process of creating the new local government councils by the Lagos State was incomplete or inchoate until the National Assembly carries out its role under Section 8(5) of the Constitution. Similarly, I also hold that, in the absence of any Act of the National Assembly passed under Section 162 (5) and 162 (7) restricting or prohibiting the newly created local government councils from benefiting from the revenue accruing from the Federation Account, it will be totally unconstitutional to withhold such fund from the newly created local government councils. (p. 2356 C)

REPRESENTATION

Alhaji Femi Okunnu, SAN, Prof. O. Osinbajo, SAN, Kola Awodein, SAN, Rickey Tarfa, SAN, Taiwo Osipitan, SAN, Babatunde Fashola, SAN, Lawal Pedro HDCL, Ade Ipaye, Esq., Oduyebo Olajide, Esq., Adebayo Haroun, SC, Mohammed Salau, Esq., Idowu Mafimisebi, Esq., O. Ojolaawo Esq., M. Afikuyomi (Mrs.) Esq., P. Tarfa (Miss) Esq., K. Olowookere Esq., O. Obiajulu (Miss), A. Nwogbe Esq., Waheed Gbadamosi Esq., and O. Yusufu, for the Plaintiff.

Chief Afe Babalola, SAN, Tayo Oyetibo, SAN, Seeni Okunloye, SAN., Obong Akaw Esq., B. J. Akomolafe, Esq., A. Adegoke, Wole Alade Doye, Esq., Dotun Sowemimo Esq., for the Defendant.

H Alhaji Abdullahi Ibrahim, SAN, A. Oyeyipo, SAN, Mrs. O. Soyebos Esq., R. Ogunesi Esq., as Amici Curiae.

CASES REFERRED TO

Nafiu Rabi v. Kano State. (1980) 8-11 S.C. 130; (1980) 8-11 S.C. (Reprint) 85 pp. 148-149 (see also (1981) 2 NCLR 293 at p.326
A-G. of Ogun State v. Aberuagba, (1985) 1 NWLR (Pt.3) 395 at p.414
Senate of National Assembly v. Momoh. (1983) 4 NCLR 269 at p.282. B
Eshugbayi Eleko v. Officer Administering the Government of Nigeria (1931) AC 662 at 670
Military Governor of Lagos State v. Ojukwu (1986) 1 NSCC (Vol. 17) 304 at 313
A-G Federation v. A-G Abia State (2002) 4 S.C. (Pt. I) 1; (2002) 6 NWLR C
(Pt. 764) 524
Holme v. Guy, (1877) 5 Ch.D. 901 at p. 905
Ifezue v. Mbadugha, (1984) 5 S.C. 79 at p. 101
Senate of National Assembly v. Momoh, (1983) 4 NCLR 269 AT p. 282 D
Shomade v. Ogunbiyi (1936) 3 WACA 48

STATUTES REFERRED TO

Constitution of Nigeria 1979 s. 212 E
Constitution of Nigeria 1999 ss. 3, 4, 5(a), 7, 8, 9, 162, 232, and 318
Lagos State Local Government Areas Law No. 5 of 2002 ss. 1, 2 and 3
Lagos State New Local Government Areas (Amendment) Law 2004

LEAD JUDGMENT BY UWAIS CJN

The dispute between the parties in this suit arose from a circular letter addressed to all the Governors of the States and all the Local Government Chairmen in the States by the Minister of State in the Federal Ministry of Finance. The circular letter reads as follows:- G

“CIRCULAR

Ref. No. F. 12090/IV/T2/322

*Office of the Honourable Minister H
of State for Finance, Ahmadu Bello Way,
Abuja.*

19th April, 2004

All State Governors,

All Local Government Chairmen

RE: LOCAL GOVERNMENT ELECTIONS AND

ALLOCATION OF FUNDS FROM THE

B FEDERATION ACCOUNT TO LGAs

I wish to draw your attention to the attached letter from Mr. President in which he raised some constitutional issues concerning the allocation to Local Government Councils from the Federation Account.

C *Kindly ensure compliance, please.*

Sgd.

Mrs. Nenadi E. Usman

Honourable Minister of State”

D The letter in question so attached, which was addressed to the Minister of Finance by the President of the Federal Republic of Nigeria, Chief Olusegun Obasanjo, reads:-

“PRESIDENT,

FEDERAL REPUBLIC OF NIGERIA

E *PRES/87*

April 8,2004

The Hon. Minister,

Federal Ministry of Finance,

F *Headquarters, Abuja.*

Dear Hon. Minister,

LOCAL GOVERNMENT ELECTIONS AND

ALLOCATION OF FUNDS FROM THE

G FEDERATION ACCOUNT TO LGAs

Available information indicates that some States namely Ebonyi, Katsina, Lagos, Nasarawa and Niger conducted the last Local Government election in the new Local Government Areas created by their respective State Assemblies.

H *While State Houses of Assembly are empowered by the 1999 Constitution to create new Local Government Areas, the National Assembly is, however, required under Section 8(5) of the Constitution, to make consequential provisions by an Act with respect to the names and*

headquarters of the new Local Government Areas for any such new Local Governments to have constitutional recognition.

As the National Assembly is yet to make the necessary consequential provisions in respect of any of the newly created Local Government Areas in the country, conducting election into or funding any of them from the Federation Account would clearly be a violation of the Constitution. Consequently, no allocation from the Federation Account should henceforth be released to the Local Government Councils of the above-mentioned States and any other State that may fall into that category, until they revert to their constituent Local Government Areas specified in Part I of the First Schedule to the Constitution.

In addition, you are aware that under Section 162(6) of the Constitution, each State is required to maintain a special account to be called "State Joint Local Government Account" into which shall be paid all allocations to the Local Government Councils of the State from the Federation Account and from the Government of the State. Likewise, each State is required under Section 162(7) of the Constitution to pay to Local Government Councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly. This notwithstanding, reports have indicated that some States are yet to comply with these constitutional requirements.

In view of the above, all States should be requested to submit evidence that they have established State Joint Local Government Account in compliance with Section 162(6) of the Constitution and also determine the basis for sharing allocations from the Federation Account due to their constituent Local Government Councils. In addition, they should also submit evidence of payment of State allocation into the State Joint Local Government Account, to enable payment of allocations to the Local Government Area Councils of each State from the Federation Account to the Joint Account.

You are to bring the contents of this letter to the attention of all States and Local Government Area Councils listed in the Constitution.

*Yours sincerely
Sgd.*

OLUSEGUN OBASANJO

On the 19th day of April, 2004, the plaintiff took out an originating summons on behalf of the Government of Lagos State in which he asked for reliefs against the defendant, as representative of the Federal Government.

B The reliefs sought, as were later amended, and further amended read as follows:-

“ 1. A determination of the question whether or not there is power vested in the President of the Federal Republic of Nigeria (by executive or administrative action) to suspend or withhold for any period whatsoever the
C Statutory Allocation due and payable to Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria, 1999.

D 2. A declaration that the present intention or proposal of the Federal Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999 will, if carried out be unlawful and contrary to the provisions
E of the said Constitution.

3. A consequential order of this Honourable Court compelling the defendant to pay immediately all outstanding arrears of statutory allocation due and payable to the Lagos State Government pursuant to the
F provisions of Section 165(5) of the Constitution of the Federal Republic of Nigeria 1999.

G 4. An order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive Branch of the Federal Government from doing anything whatsoever to suspend, withhold, for any period whatsoever or calculated to suspend or so to withhold any monies due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria.”

H The defendant after entering appearance, filed a counterclaim, which was later amended and further amended following the enactment of the Creation of New Local Government Areas (Amendment) Law, 2004, early in the month of October, 2004, that is, during the pendency of this case. The

further amended counterclaim reads:-

“1. A DECLARATION that the plaintiff/defendant to the counterclaim has no power or right under the 1999 Constitution to abolish Local Government Areas created under the 1999 Constitution by altering their names, adjusting their boundaries and dividing them into smaller units until the National Assembly has acted pursuant to the Provisions of Section 8(5) of the 1999 Constitution. B

2. A DECLARATION that the plaintiff/defendant to the counter claim has no power or right under the 1999 Constitution to create new Local Governments without recourse to the National Assembly as provided for under the Constitution. C

3. A DECLARATION that the alteration of the names of Local Governments, the alteration of the boundaries of the Local Governments and the creation of new Local Governments done by the Lagos State Government and the operation of the new Local Governments before and or without an Act of National Assembly to that effect, is illegal unconstitutional, null and void. D

4. A DECLARATION that the following Local Governments are the only Local Governments established under the 1999 Constitution in Lagos State, Agege, Ajeromi-Ifelodun, Alimosho, Amuwo-Odofin, Apapa, Badagry, Epe, Eti-Osa, Ibeju/Lekki, Ifako-Ijaiye, Ikeja, Ikorodu, Kosofe, Lagos Island, Lagos Mainland, Mushin, Ojo, Oshodi-Isolo, Shomolu, Surulere. E F

5. A DECLARATION that Sections 1, 2 and 3 of the Local Government Areas Law No.5 of 2002 of Lagos State are in contravention of Section 3(6) and Part 1 of the first schedule to the Constitution of the Federal Republic of Nigeria, 1999, and therefore are unconstitutional, null and void in so far as they purport to alter the provisions of the said Section 3(6) and Part 1 of the First Schedule to the 1999 Constitution with respect to Lagos State of Nigeria. G

6. A DECLARATION that the 57 Local Government Areas established by the Local Government Area Law No.5 of Lagos State are not entitled to benefit from the Federation Account. H

7. A DECLARATION that the elections conducted by the Lagos State Government on Saturday, 27th March, 2004, into the 57 Local Government

Areas created by the Local Government Areas Law No.5 of 2002 of Lagos State are inchoate and cannot take effect as presently established in that the 57 Local Government areas are not known to the Constitution.

8. AN ORDER nullifying and setting aside the elections conducted by the Lagos State Government on Saturday, 27th March, 2004, into the 57 Local Government Councils established by the Local Government Areas Law No.5 of 2002 of Lagos State.

9. AN ORDER OF INJUNCTION restraining the Lagos State Governor, the Lagos State House of Assembly or any functionaries or agencies of the Lagos State Government from maintaining, financing and recognizing any Local Government in Lagos State apart from the ones created under Schedule 1 of the 1999 Constitution.”

Briefs of argument have been exchanged by the parties on both the main claim by the plaintiff and the counter-claim by the defendant. The plaintiff also filed defence to the defendant’s counter-claim. A brief of argument was also filed by the amicus curiae.

Plaintiffs Claim

Arguing the plaintiff’s case, Professor Osinbajo, SAN., learned Attorney-General of Lagos State, adopted the plaintiff’s brief of argument and contended that the President of the Federal Republic of Nigeria has no right to withhold the payment of fund due to the Local Government Councils from the Federation Account under Section 162 subsection (5) of the 1999 Constitution of the Federal Republic of Nigeria. He submitted that the powers exercisable by the President under Section 162 of the Constitution are purely executive in nature and are neither legislative nor judicial. He referred to Section 162 subsection (4) of the Constitution and argued that the provisions thereof did not give the President any discretion. He argued further that the word “shall” in Section 162 subsections (4), (5) and (9) of the 1999 Constitution, qualifies the action to be taken by the President as mandatory and not discretionary. He emphasized that nowhere in the 1999 Constitution is the President given the power to withhold funds due to States or Local Government Councils or even the National Judicial Council by virtue of the provision of Section 162 subsection (9) thereof. He submitted, in other words, that the President has no supervisory power over the States, the

Local Government Councils or the National Judicial Council. Nor can the President be a Judge in his own cause. He cited in support the cases of *Esugbayi Eleko v. Officer Administering the Government of Nigeria*. (1931) AC 662 at p.670 and *Military Governor of Lagos v. Ojukwu*. (1986) 1 NSCC Vol. 17,304 at p.309 line 52 - p.310 line 9, per Eso, JSC, and p.313 lines 43 B - 51, per Obaseki, JSC.

On the question whether the President was a constitutional trustee of the Federation Account, learned Attorney-General argued that neither the Federal Government nor the President is a trustee of the funds due to Local Government Councils; but on the contrary, it is the State Governments, by virtue of the provisions of Section 162 subsection (5) of the Constitution, that are trustees to the funds allocated to the Local Government Councils from the Federation Account. Relying on the provisions of Section 162 subsections (5) to (8) of the Constitution, he submitted that a State Government is not merely a channel for passing funds allocated to Local Governments. He referred to pp.231 - 232 of the book *Injunctions and Enforcement of Orders* by Afe Babalola in support of the plaintiff's claim for perpetual injunction.

Alhaji Abdullahi Ibrahim, SAN., as amicus curiae, adopted his brief of argument. He referred to the provisions of Section 162 subsections (1), (3) and (5) of the 1999 Constitution and submitted that State Governments and Local Government Councils are entitled to share in the Federation Account and that the right cannot be tampered with by any authority. He submitted that the word "*shall*" in Section 162 subsection (3) is mandatory and that there was no way in which the President can suspend or withhold amount due to Local Government Councils.

On the creation of Local Government Councils, learned Senior Advocate referred to Section 8 subsections (5) and (6) of the Constitution and contended that the power of the National Assembly to amend Parts I and II of the First Schedule to the Constitution is merely consequential. He submitted that it was the State House of Assembly that has the power to create new Local Government Councils and that once this is done the creation stands. He argued that the President could not take it upon himself to withhold the funds due to the Local Governments and where the President is in doubt

as to what action to take he must ask the courts for interpretation of the provisions of the Constitution in doubt. In support of the argument, he cited the case of A-G. of the Federation v. A-G. of Abia State & 35 Ors. (2002) 4 S.C. (Pt.I) 1; (2002) 6 NWLR (Pt.764) 524.

B Replying, Chief Afe Babalola, SAN., adopted the brief of argument which he filed opposing the plaintiff's claim. In the brief Section 3 subsection (6) of the Constitution is referred to. It is argued that the Local Governments referred to in Section 162 of the Constitution are those created under Section 3 subsection (6) and Part I of the First Schedule to the Constitution. It is
C contended that statutory allocation of funds to Local Government is not intended to be the property of State Governments. Therefore, no State Government has proprietary right over the statutory allocation meant for Local Government Areas. It is argued that where a Local Government
D Council, as recognized under the Constitution ceases to exist, it would be irregular, wrongful and unconstitutional for the Federal Government to pay statutory allocation meant for Local Governments created under the Constitution to entities that are not recognized by the Constitution. He
E emphasized that the plaintiff had conceded that the 20 Local Government Councils provided for by the Constitution had been replaced with 57 Local Government Councils created by the plaintiff. It is argued that the effect of creating 57 new Local Government Councils out of the 20 is the same as
F creating new States out of old States which is the situation dealt with by this court in the case of A-G. of Ondo State v. A-G. of Ekiti State. (2001) 9-10 S.C. 116; (2001) 17 NWLR (Pt.743) 786 at p.787G; pp.787-788 C-D. Thus by creating 57 Local Government Councils, the plaintiff abolished the 20 that
G had been established by the Constitution. It is canvassed that the Constitution made provision for the allocation of funds from the Federation Account to 20 Local Government Councils in Lagos State and not the 57 created by the plaintiff. Therefore the defendant had no obligation to the 57 Local Government Councils. It is submitted that since the 20 Local Government
H Councils have been brought into extinction, the defendant has no obligation under the Constitution to pay the statutory allocation to the plaintiff. The defendant's brief of argument contends that by the Oath of Allegiance in the Schedule to the Constitution, to which the President subscribed, he is

obliged to “*preserve, protect and defend the Constitution of the Federal Republic of Nigeria.*” By Section 5(a) of the Constitution the executive powers of the Federal Republic of Nigeria are vested in the President, and by Section 5(6) of the Constitution “*the executive powers extend to the execution and maintenance of the Constitution.*” It is, therefore, argued that the claim by the plaintiff against the defendant is an invitation to the defendant to commit a breach of the provisions of the Constitution which the latter had sworn to uphold.

On the interpretation to be placed on Section 162 subsection (5) it is submitted that the interpretation placed on the subsection by the plaintiff is too restrictive and does not take into consideration other relevant provisions of the Constitution. It is, therefore, submitted that the cardinal principle of interpreting the Constitution is that the provisions of the Constitution must be read together and not disjointedly. To support the submission the decisions in the cases of Ifezue v. Mbadugha. (1984) 5 S.C. 79 at p.101 and A-G. of Ogun State v. Aberuagba. (2002) 2 WRN 52 at p.88 were cited. So also the cases of Kalu v. State. (1998) 11 - 12 S.C. 4; (1998) 13 NWLR (Pt.583) 531 at pp. 586 -587 and Mohammed v. Olawumi. (1990) 2 NWLR (Pt.133) 458 at p.484.

On the argument that State Governments are trustees for the Local Governments in their States vis-a-vis allocations from the Federation Account to the Local Governments, the defendant contends that on the contrary, it is the Federal Government that is the trustee to the Local Governments as well as the State Governments. It is argued that the State Governments are not trustees to the Local Governments but serve only as conduit pipes as they acquire no interest in funds allocated for the benefit of the Local Governments. Reference is made to the cases of A-G. of the Federation v. A-G of Abia State & Ors.. (2002) 4 S.C. (Pt.I) 1; (2002) WRN 1 at pp.96-97 and A-G. of Bendel State v. A-G. of the Federation. & Ors.. (1982) 1-2 S.C. 13 at p. 220 and it is stressed that funds allocated to Local Governments is the property of the Local Governments and not a joint property of the State Government and the Local Governments. That in the circumstances of this case, if the plaintiff were to be held to be a trustee such a trust will be invalid for uncertainty of the object of the trust because the

20 Local Government Areas known to the 1999 Constitution have been “*eliminated, obliterated or subsumed*” by the creation of 57 new Local Governments by the plaintiff. The case of Knight v. Knight. (1840) Beau 148 on the certainties of trust and the Source Book on the Law of Trust by Ramjohn at page 72 are referred to.

Now, Section 162 subsections (1), (3) and (5) of the 1999 Constitution provides as follows:-

“162(1) *The Federation shall maintain a special account to be called “the Federation Account” into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the Armed Forces of the Federation, the Nigeria Police Force, the Ministry or Department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.*

(3) *Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government councils in each State on such terms and in such manner as may be prescribed by the National Assembly.*

(5) *The amount standing to the credit of local government councils in the Federation Account shall also be allocated to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.”*

It is significant that in both subsections (3) and (5) thereof reference is made to “Local Government Areas”. The phrase “local government councils” has not been defined as such by the Constitution. However Section 318 of the Constitution provides that both the phrases “local government area” and “local government council” include an area council. In other words both the phrases “local government area” and “local government council” are interchangeable with regard to the meaning of “area council”

The letter by the President of the Federal Republic of Nigeria to the Minister of Finance, which is quoted above, makes references to “Local Government Areas”, “Local Government Councils” and “Local Government Area Councils”. This is somewhat confusing. The letter states that funding

of any “*new Local Government Area from the Federation Account would clearly be a violation of the Constitution.*” However, subsections (3) and (5) of Section 162 of the Constitution have not made any reference to payment to Local Government Areas but “*local government councils.*”. In the third paragraph of the letter, the President directs that “*no allocation from the Federation Account should henceforth be released to the Local Government Councils.....until they revert to their constituent Local Government Areas specified in Part I of the First Schedule to the Constitution*”. Again in the last paragraph of the letter, the President directs the Minister “*to bring the contents of this letter to the attention of all the States and Local Government Area Councils listed in the Constitution*”.

In his originating summons, the plaintiff ingenuously avoided mentioning either “*local government areas*” or “*local government councils*” or “*local government area councils*”, but premised his claim on the payment of “*statutory allocation due and payable to the Lagos State Government pursuant to Section 162(5) of the Constitution of the Federal Republic of Nigeria*”. This simply means the amount standing to the credit of the local government councils of Lagos State in the Federation Account as provided in Section 162(5) of the Constitution.

If we are to go by technicality it will be seen that the controversy between the plaintiff and the defendant is not exactly over the directive given by the President to the Minister of Finance, as the directive relates to local government areas, local government councils, and local government area councils while the plaintiff’s claim is shown to concern Lagos State Government. Be that as it may, it should be borne in mind that we are in this case concerned with the interpretation of the Constitution. The inconsistency and confusion notwithstanding, this court has since laid down that in interpreting the Constitution we should avoid technicalities - see the case of Nafiu Rabi v. Kano State. (1980) 8-11 S.C. 130; (1980) 8-11 S.C. (Reprint) 85, where Sir Udo Udoma stated on pp. 148-149 thus (see also (1981) H 2 NCLR 293 at p.326):-

“.....the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended

to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution.”

Also in the case of A-G. of Bendel State v. A-G. of the Federation & Ors. (1981) 12 NSCC 314 at p.395; (1981) 10 S.C. (Reprint) 1, lines 4 -22 Eso, JSC., observed as follows:-

“It is the primary aim of this court to do substantial justice, and this should, indeed, be more pronounced in Constitutional matters.....The jurisdiction conferred upon the Supreme Court in regard to the interpretation and adjudication on the Constitution is a special jurisdiction. The court cannot justify its usefulness in regard to this peculiar jurisdiction, by being inhibited with technicalities. Such inhibition will only serve to destroy the entire constitutional purpose of the court.”

Notwithstanding the references made in the letter in question by the President to “local government areas” or “local government councils” or “local government area councils”, it is clear to me that the dispute between the parties relates to the payment of funds from the Federation Account to the credit of local government councils in Lagos State. I shall therefore consider the case on that basis.

Section 3 subsections (1), (2) and (6) of the 1999 Constitution provides as follows:

“3(1) There shall be thirty-six States in Nigeria, that is to say, Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara.

(2) Each State of Nigeria named in the first column of Part I of the First Schedule to this Constitution shall consist of the area shown opposite thereto in the second column of that schedule.

(6) There shall be Seven Hundred and Sixty-eight local government areas in Nigeria as shown in the second column of Part I of the First Schedule to this Constitution and six area councils as shown in Part II of that

Schedule.”

Subsection (6) thereof clearly shows that there are 768 local government areas in Nigeria. It seems to me, as a matter of common sense, that a local government area is supposed to represent the area of a given local government council, for I cannot imagine how there can be two local government councils in one local government area. That will certainly lead to confusion. I am not aware of any local government area that consists of two or more local government councils. At the inception of the 1999 Constitution, it was a matter of judicial notice that there were 768 local government councils throughout the country which corresponded with the 768 local government areas mentioned in Section 3(6). So that the councils were equated or synonymous with the areas. This was the position before some States of the Federation, including the plaintiff, decided to follow the provisions of Section 8 of the 1999 Constitution in an attempt to create new or additional local government areas and councils. Subsection (3) of Section 8 provides:-

“(3) A bill for a Law of a House of Assembly for the purpose of creating a new local government area shall only be passed if -

(a) a request supported by a least two-thirds majority of members (representing the area demanding the creation of the new local government area) in each of the following, namely -

(i) the House of Assembly in respect of the area, and

(ii) the local government councils in respect of the area, is received by the House of Assembly;

(b) a proposal for the creation of the local government area is thereafter approved in a referendum by at least two-thirds majority of the people of the local government area where the demand for the proposed local government area originated;

(c) the result of the referendum is then approved by a simple majority of the members in each local government council in a majority of all the local government councils in State; and

(d) the result of the referendum is approved by a resolution passed by two-thirds majority of members of the House of Assembly.”

The import of these provisions is that a new local government area

and therefore a new local government council, could only be created by a State after the steps enumerated therein have been complied with before a bill to that effect could validly be passed by the House of Assembly of the State. In the present case, it is not in dispute that those steps had been taken by the B plaintiff.

Subsection (6) of 'Section 8 provides: -

C *"(6) For the purpose of enabling the National Assembly to exercise the powers conferred upon it by subsection (5) of this section, each House of Assembly shall, after the creation of more local government areas pursuant to subsection (3) of this section, make adequate returns to each House of the National Assembly."*

D These provisions show that after the Law mentioned in subsection (3) of Section 8 is passed by the House of Assembly returns must be submitted by the State concerned to the National Assembly to enable the National Assembly pass an Act which will amend Section 3 of the Constitution and Parts I of the First Schedule thereof to accommodate the new local government area created by the State. The subsection reads:-

E *"(5) An Act of the National Assembly passed in accordance with this section shall make consequential provisions with respect to the names and headquarters of States or Local Government areas as provided in Section 3 of this Constitution and in Parts I and II of the first Schedule to this F Constitution."*

Now for the purpose of creating new local government it is necessary to read together and interpret all the provisions of the Constitution mentioned above, namely Section 3 subsections (1), (2) and (6) together with Part I of the First Schedule; Section 8 subsections G (3), (5) and (6) of the Constitution. This is the canon of interpretation of Constitution as laid down in Ifezue v. Mbadugha, (1984) 5 S.C. 79 at p.101, A-G. of Ogun State v. Aberuagba, (1985) 1 NWLR (Pt.3) 395 at p.414 and Senate of National Assembly v. Momoh. (1983) 4 NCLR 269 at H p.282. When those sections are read together what emerges is that the passing of a bill by a House of Assembly creating a local government area or local government council in accordance with Section 8 subsection (3) of the Constitution is not enough, the State will have to go a step

further by submitting returns to the National Assembly which in turn will have to amend Section 3 (6) of the Constitution for the new local government area to be accommodated by the Constitution. In other words, the exercise by the State House of Assembly in passing the necessary bill creating a new local government or local government B area is inchoate as submitted by Chief Afe Babalola, SAN. I therefore come to the conclusion that the passing of the Local Government Areas Law, No.5 of 2002 by the Lagos State House of Assembly was not sufficient to give life to the new Local Government Areas until the C National Assembly passes the consequential Act amending the Section (3) subsection (6) and Part I of the First Schedule to the Constitution. Similarly, the enactment of New Local Government Areas (Amendment) Law, 2004 by the Lagos State House of Assembly, D which was assented by the Governor of Lagos State on the 6th day of October, 2004, when this case was pending before us, is of no effect and cannot be operative until the National Assembly passes the appropriate E Act under Section 8 subsection (5) of the Constitution appropriately amending Part I of the First Schedule to the Constitution to accommodate the new local government areas.

Let me now return to the provisions of Section 162 subsections (3) and (5) of the Constitution. I have already held that the phrase “local government council” is synonymous with “local government area” F as shown in the Constitution. I am aware that Prof. Ben Nwabueze, SAN., holds a different view; for he stated as follows in his book *Federalism in Nigeria under the Presidential Constitution* at pp. 131 to 132 -

“It is contended on the other hand that a State government has no G power at all to create local government areas. The reasoning behind this contention is that since the area of each State is defined in the Constitution by reference to named local areas which happen to be the same as the existing local government areas, the creation of local government areas H will necessarily involve a constitutional amendment by means of legislation enacted by the National Assembly, with the approving resolution of the Houses of Assembly of not less than two-thirds of all the States. The

argument is untenable. The first point to notice is that the areas named in the Constitution as forming the area of each State are not explicitly stated to be local government areas. Nowhere in the Constitution are they referred to as local government areas. It just happens that they correspond to the names of existing local government areas.....But whether they are regarded as local communities or as local government areas, the important point is that their designation in the Constitution carries no implication as to the number of local government councils that may exist within each of them. The area of a State, as defined by reference to the named localities, would not have been increased or decreased by the establishment of two or more local government councils within each of the named area.

Furthermore, the boundaries of each named area are not defined in the Constitution so as to identify its territorial extent and thereby to preclude the transfer of any part of it to another area by a law made by the State legislature. So long as all the named areas remain in existence, the extent of the land area comprised in each of them has no constitutional significance; the Constitution is not amended or violated in any way by the transfer of any part of the territory of one area to another.”

With due respect this argument though admittedly applicable to the provisions of the 1979 Constitution of the Federal Republic of Nigeria are not true with regard to the 1999 Constitution, which in both Section 3 and Part I of the First Schedule to the Constitution, specifically refers to the areas as Local Government Areas.

Defendant’s Counter-Claim

Learned counsel for the defendant, Chief Afe Babalola, SAN., contends, in the brief of argument filed for the defendant, that the facts which were deposed to in the affidavit sworn to in support of the counterclaim had been admitted by the plaintiff since the latter failed to file a counter-affidavit contradicting the former affidavit. He submits that facts in support of the counter-claim to the originating summons are, as a result, conclusive and not in dispute. He argues that what is left to the defendant is simply to show how the provisions of the Constitution apply to the undisputed facts.

In doing so, it is submitted in the brief of argument, that in 1999 when

the Constitution came into force 20 Local Government Areas constituted Lagos State by virtue of the provisions of Section 3 subsection (6) thereof. That the statutory allocation from the Federation Account due to the Local Government Council in the State were paid to them through the Lagos State Government. That on 24th June, 2004, the Lagos State Government by B enacting the Local Government Areas Law, No.5 of 2002 created 57 new Local Government Areas. That the National Assembly has not yet passed any Act pursuant to Section 8 subsection (5) of the Constitution to amend the names of the Local Government Areas and their headquarters as provided C under Section 3 subsection (6) of the Constitution. That by enacting Law No.5 of 2002, Lagos State Government had “*altered, subsumed, eliminated or otherwise transformed its constituent Local Government Areas beyond the purview of those specifically named in Section 3(6) of the 1999 Constitution.*” That under the Constitution the Federal Government maintains the D Federation Account and any amount standing to the credit of the State governments and Local Governments, established under the Constitution, is to be distributed amongst them on the terms and in the manner prescribed by the National Assembly. That Lagos State Government wants to apply the E statutory allocation meant for the 20 Local Government Areas to the new 57 Local Governments. That Lagos State Government conducted elections on Saturday, 27th March, 2004, into the 57 Local Government Areas it created and that the elected chairmen of the 57 Local Governments were F sworn-in on Monday, 29th March, 2004.

Learned Senior Advocate stated in the brief of argument that the issue, upon which the determination of the relief sought in the counter-claim rests, is :-

“*Whether or not a local government area created by a State to G replace the ones recognized under the Constitution can automatically come into being and enjoy benefits accruing to local governments under the Constitution without the input of the National Assembly as provided by Sections 8(5), (6) and 3(6) of the 1999 Constitution.*” H

He canvassed that the Constitution provides two-tier approach to the creation of Local Government Areas, both of which must occur for any creation of new local government to have full legal effect. These are what he

calls “*First or State tier procedure*” and the “*Second or Federal tier procedure*”. He concedes that the “*First or “State tier procedure*” had been followed by the plaintiff to the letter. However, he contends that the “*Second or Federal tier*” procedure which is provided by Section 8 subsections (5) and (6) of the 1999 Constitution has not been followed. This plaintiff, he argues, admits by the averment in the defendant’s affidavit in support of the counter-claim. That is that the National Assembly has not passed any Act in accordance with Section 8 subsection (5) of the Constitution to make consequential amendment to the names and headquarters of the Local Government provided for in Section 3 subsection (6) thereof.

It is further argued that there is no provision of the Constitution which suggests that the passage of a bill of a House of Assembly creating new local governments brings such local governments into existence under the 1999 Constitution. This is because the Constitution expressly imposes a duty to report the result of its activities towards the creation of the new local governments to both Houses of the National Assembly. Secondly, it also imposes an additional responsibility on the National Assembly to amend Section 3 and Part I of the First Schedule to the Constitution. Thirdly, the Constitution expressly makes the number of Local Governments in the country in each State and the Federation respectively as part of the Constitution by virtue of Section 3 subsection (6) thereof.

It is then submitted that as a result of all the foregoing the only meaningful conclusion derivable is that the creation of even one additional or new Local Government must of necessity be the product of or involve express amendment to Section 3 subsection (6) and Part I of the First Schedule to the Constitution. It is argued that Section 8 subsection (5) of the Constitution vests the National Assembly with a power which it could exercise as it deems fit in accordance with the Constitution.

It is contended further that until the National Assembly passes an Act pursuant to Section 8(5) of the Constitution the process of creating a Local Government by a State is at best inchoate. It is, therefore, submitted that Sections 1, 2 and 3 of Local Government Areas Law, No.5 of 2002 having created 57 new Local Governments is in conflict with the provisions under Section 8 subsections (5) and (6), Section 9 subsections (1) and (2),

Sections 3 and 6 and Part I of the First Schedule to the 1999 Constitution. Consequently, the 57 Local Governments are illegal since the plaintiff sought to alter the provisions of Section 3 subsection (6) of the Constitution. Thus the Law is null and void.

Reference was made to the provisions of Section 162 subsections B (1), (3) and (5) and it is argued that the plaintiff in the bid to present the new 57 Local Government Areas as conclusive in fact, but not in law, obliterated the 20 Local Government Areas recognized by the Constitution. The effect of this, it is argued on the authority of *A-G. of Ondo State v. A-G. of Ekiti State*. (2001) 17 NWLR (Pt.743) 786 at p.787G and 787C - 788D, is that the 20 Local Government Areas had been extinguished and are no more in existence. C

With regard to the elections held, into the new 57 Local Governments, by the Lagos State Independent Electoral Commission on 27th March, 2004, D and the swearing-in on 29th March, 2004, of the elected chairmen, it is argued that all these events did not comply with the provisions of the 1999 Constitution. Therefore, the elections should be declared null and void and be set aside. The cases of *Bendel State v. The Federation*. (1981) 10 S.C. I E at pp.35 and 37; (1981) 10 S.C. (Reprint) 1, *N.E.M.G.I.A. Ltd. v. Uchay*. (1973) 4 S.C. 1 at p. 10 and *Mohammed v. Olawumi*. (1990) 2 NWLR (Pt. 133) 458 at p.484 are cited.

In reply, it is contended in the plaintiff's brief of argument that three F questions for determination are identifiable from the counter-claims. These are -

“(i) Whether Law No.5 of 2002 of Lagos State is valid without or before the enactment of an Act of the National Assembly enacted pursuant G to Section 8(5) of the 1999 Constitution.

(ii) Whether or not the Creation of Local Government Areas Law (No.5 of 2002) has become part of the Laws of Lagos State, (as the Lagos State Government contends) or whether the said Instrument never became H law or if it purported to have become law it is void for inconsistency with the Constitution (as the Federal Government contends).

(iii) Whether or not the alleged delay or neglect of the National Assembly to pass an Act pursuant to the mandatory requirement of Section

8(5) of the 1999 Constitution invalidates or renders void or inoperative the aforementioned Creation of Local Government Areas Law (No.5 of 2002) on ground of inconsistency with the Constitution.”

In arguing the first issue, it is submitted that it is a misconception of the provisions of Section 8 subsection (5) of the Constitution to suppose that a State Law for the creation of new local government areas require the passing of an Act of the National Assembly without which it cannot be valid or constitutional. Reference is made to Section 8 subsections (1) and (2) of the Constitution which regulate the legislative powers of the National Assembly with respect to the creation of new States and adjustment of the boundaries of the existing States; and Section 8 subsections (3) and (4) of the Constitution which regulates the legislative powers of the House of Assembly with respect to the creation of new local government areas and the boundary adjustment of local governments areas. Reference is then made to the provisions of Section 8 subsections (5) and (6) of the Constitution. It is submitted that its provisions are unquestionably dealing with “*an Act of the National Assembly passed in accordance with this section.*” It is then argued that only subsections (1) and (2) of Section 8 of the Constitution confer power on the National Assembly to make laws with respect to creation of new States and adjustment of boundaries. It follows, it is submitted, that it is only in respect of an Act of the National Assembly passed pursuant to Section 8(1) and (2) that the Constitution imposes on the National Assembly the duty to make consequential provisions with respect to the names and headquarters of States or Local Government areas provided in Section 3 of the Constitution and in Parts I and II of the First Schedule to the Constitution. It is argued that Section 8(5) of the Constitution does not impose any duty on the National Assembly arising from the exercise by a House of Assembly of its legislative power pursuant to Section 8 subsections (3) and (4).

On the provisions of Section 8 subsection (6) of the Constitution, it is submitted that the first important point to note is that the requirement that a House of Assembly shall after creation of more local government areas pursuant to subsection (3) thereof is to make adequate return to each House of the National Assembly is for the purpose of enabling the National Assembly to exercise the powers conferred upon it by Section 8 subsection (5) of the

Constitution. It is contended that the effect of sub-section (6) of the Constitution is that the filing of a return by a House of Assembly to each House of the National Assembly in this context does not necessitate the passing of an Act of the National Assembly under Section 8 subsection (5). It is submitted that it is only where the National Assembly is exercising its powers pursuant to Section 8(1) and (2) of the Constitution that the return may, if necessary, be used for the purpose of making consequential provisions in respect to the names and headquarters of States or local government areas as provided in Section 3 and Parts I and II of the First Schedule to the Constitution. We are therefore invited to hold that Law No.5 of Lagos State is valid and constitutional and is not invalidated by the fact that the National Assembly has not passed an Act pursuant to Section 8 subsection (5) of the Constitution.

In arguing the second question for determination, reference is made to the opening words of Section 8 subsection (3) of the Constitution and it is submitted that having regard to the plain words of the subsection there can be no doubt whatsoever that the power to pass a bill for a Law for the purpose of creating a new local government area within a State, is subject to certain clearly specific conditions, vested in the House of Assembly of that State. Therefore, Law No.5 of 2002 is unquestionably constitutional and valid. It is argued that the creation of a new local government area must be distinguished from the constitutional validity of the State Law. It is thus clear that the issue is not as to the constitutional validity of Law No.5 of 2002 but rather whether an unquestionably valid State Law enacted “*for the purpose of creating a new local government area*” requires a Federal law enacted pursuant to Section 8(5) to give effect to the creation of the new local government. We are urged to hold that the Creation of Local Governments Law, No.5 of 2002 has become part of the Laws of Lagos State having been assented to by the Governor of Lagos State pursuant to Section 100 of the Constitution.

With regard to the third question for determination, it is stated that both the argument to be presented and the preceding argument in respect of the second question for determination are in the alternative to the argument in respect of the first question for determination. It is submitted that the

intention of the Constitution on the creation of local government areas is to do two things, namely - to regulate the legislative power of the House of Assembly of a State to create local government areas in the State and to describe the territorial extent of each State. It is therefore argued that it is apparent that a State Assembly is to have the power to pass a bill for a law for the purpose of creating new local government areas in the State. Once it exercises this power the number of local government areas in the country ceases to be the number mentioned in the Constitution, that is 768. It is submitted that it cannot truly be said that a law duly enacted pursuant to Section 8(3) is inconsistent with the Constitution, since it is a Law duly enacted in accordance with the provisions of the Constitution itself. It is, however, obvious that Section 3 subsection (6) of the Constitution, which provides that there shall be 768 local government areas in Nigeria must be reconciled with the provision contained in Section 8(3) which permits the creation of new local government areas by the House of Assembly of a State. It is contended that in interpreting the meaning of Section 3 (6) of the Constitution we should do so in its historical context and should not extend its meaning beyond the purpose it was intended to serve, which is to describe the territorial extent of Lagos State and not to limit the number of local government areas in Lagos State. The case of *Holme v. Guy.* (1877) 5 Ch.D. 901 at p. 905 was cited to buttress the point.

It is argued, in conclusion, that it is not the intention of the Constitution, by the provisions contained in Section 3(6) thereof to limit the number of local government areas in Nigeria but rather to, make use of the names of the local government areas in use at the time the Constitution was written. In the alternative, if we think otherwise, that is that Section 3(6) must be treated as laying down that the number of local government areas in Nigeria must be limited to 768, then there arises a need for harmonization and reconciliation of the various provisions contained in Sections 3(6) and 8(3). It is further urged that we should resolve the conflict by treating the provision of Section 8(3) as a qualification of Section 3(6) as this is the only way, it is submitted, in which both provisions can be made to stand and give effect to the obvious intention of the Constitution. The case of *R. v. Zik's Press*, 12 WACA 202 at pp.205 -206 is cited in support of the contention. It is also urged that we

should accordingly concluded that the failure or delay of the National Assembly to pass an Act pursuant to Section 8(5) of the Constitution is of no legal consequence to the legality or constitutionality of Law No.5 of 2002.

With regard to the remedies sought by the defendant in his counter-claim, it is submitted that the counter-claim in its entirety is not cognisable under Section 232 of the 1999 Constitution since Section 232 subsection (1) limits the jurisdiction of this court to a dispute between the Federation and a State or between States in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. It is canvassed that none of the reliefs in the counter-claim, even if there is any dispute properly so called between the Federal Government and the Lagos State (which is not conceded) involves the existence or extent of any legal right of the Federal Government. It is submitted that there is no legal right of the Federal Government in controversy in the counter-claim as none of the claims raises any question as to any legal right of the defendant let alone showing that such right is being violated or threatened. The case of A-G. of Bendel State v. A-G. of the Federation. (1981) 12 NSCC 314 at p.406 lines 13-30 and p.407 lines 27-31 per Eso, JSC, and p.352 lines 21-25 per Idigbe, JSC., were cited. It is, therefore, urged that we should in the circumstances hold that the counter claim fails for lack of jurisdiction and strike it out.

Alhaji Abdullahi Ibrahim, learned Senior Advocate of Nigeria, for his part as amicus curiae argues in his brief of argument that the constitutional provisions applicable to local government areas or councils are found in Sections 3(1), 7,8(3) and (6), (7) and (8), Parts I and II of the Third Schedule and the Fourth Schedule to the 1999 Constitution. It is argued that a close examination of all the provisions in question shows that the supervision of Local Government Councils is the responsibility of the State Governments. The Federal Government and the National Assembly have very minimal interaction With Local Government Councils. Reference is made to Section 8(3) and it is submitted that there are dissimilarities in the provisions of the Constitution relating to the creation of new States and those relating to the creation of new Local Government Areas. It is explained that to create a new State an Act of the National Assembly is necessary while to create a new Local Government Area a Law of the House of Assembly of a State is what is

needed. It therefore follows that the House of Assembly is the overriding authority for the creation of a new local government area in a State. The National Assembly has no role to play in that regard and the power to pass an Act conferred on it by Section 8 subsection (5) is not for the purpose of giving constitutional recognition to the new local government area.

Reference is made to Sections 7(1) and 8(5) of the Constitution and it is argued that what is required of the National Assembly is a mere formality to update Parts I and II of the First Schedule to the Constitution to reflect the changes that have been made to the number and names of the local government areas existing in the State. It is stated that this is why Section 9 subsection (2) of the Constitution clearly exempts the making of consequential provisions (stated in Section 8) from the rigours of a normal constitutional amendment.

It is argued that the words “*after the creation of more local government areas*” in Section 8(6) of the Constitution presuppose that the Constitution recognizes and acknowledges that upon the passage of the bill into Law by the House of Assembly in accordance with the provisions of Section 8(3), the local government area so created comes into existence. It is, therefore, futile to argue that even though the new local government area has been created, an Act of the National Assembly is required to give it constitutional recognition. The case of *A-G. of Abia State & Ors. v. A-G of the Federation*. (2002) 3 S.C. 106; (2002) 6 NWLR (Pt.763) 264 and *Hunds & Ors. v. R.* (1975) 24 WLR 326 are cited. Consequently, we are called upon to hold that the newly created Local Government Areas of Lagos State having been created in accordance with the provisions of Section 8(3) of the Constitution, are constitutionally created and therefore do not need an Act of the National Assembly to give them constitutional recognition. The National Assembly has no role whatsoever to play in the creation of new Local Government Areas under the Constitution. The only role assigned to the National Assembly is that of up-dating the Constitution to reflect the newly created Local Government Areas. This role, it is stated, is played by the National Assembly after the creation of the new Local Government Areas by the State Government.

It is argued, in conclusion, that the President of the Federal Republic

of Nigeria has no power to suspend, withhold or direct the suspension or withholding (whether by way of administrative action or executive fiat) for any period, the statutory allocations due and payable to the Local Government Councils in accordance with the provisions of the Constitution. This argument is based on the ground that the States have a constitutional right to the funds standing to the credit of the Local Government Councils in the Federation Account for the benefit of the Local Government Councils in their States and this constitutional right cannot be taken away except by the express provision of the Constitution.

It is important to mention that the defendant had filed a reply brief on 5th July, 2004, to the plaintiff's brief on the counter-claim. However, at the hearing of the case on 7th October, 2004, they abandoned the reply brief. Consequently, the reply brief is hereby struck out.

Now, it is necessary to deal first with the issue of jurisdiction raised by the plaintiff, for if it succeeds that will be the end of the counterclaim raised by the defendant.

As I stated earlier the basis of the dispute in this case is the directive given by the President that funds from the Federation Account due to Local Government Councils of a State where new Local Government Areas have been created but no step has yet been taken by the National Assembly to consequentially amend Section 3(6) of the Constitution to accommodate such new Local Government Councils should be withheld. The letter makes reference to not only the creation of new Local Government Areas but also the holding of elections into the Local Government Councils of the new Local Government Areas as well as the opening of State Joint Local Government Account by the States concerned. It follows therefore that the area of the dispute between the parties is not limited only to payment of funds from the Federation Account to the Local Government Councils through the State Governments.

In the light of the foregoing, on close examination of the reliefs sought in the counterclaim, it will be seen that reliefs Nos. 1, 2, 3,4, 5 and 6 are all akin to the payment of funds by the defendant from the Federation Account to the new local government councils created by Law No.5 of 2002. For which there is real controversy between the parties since the plaintiff's

originating summons is also based on the payment of funds due to the local government councils in Lagos State. Similarly, reliefs Nos.7 and 8 concern the elections held into the new Local Government Councils created by Law No.5 of 2002 which has been mentioned in the letter by the President to the Minister of Finance which is the source of the controversy in this case. Relief No.9 touches on the creation of the new Local Government Areas created by Act No.5 of 2002. On the whole I am of the view that all the reliefs sought in the counter claim touch on the constitutional responsibility of the defendant as perceived by the President. Therefore, **the dispute between the parties, in my opinion, involves question of law on which the extent of the constitutional (i.e. legal) rights of both the plaintiff and the defendant depend. I, therefore, hold that there is a proper dispute under Section 232 subsection (1) of the 1999 Constitution between the parties and this court has the jurisdiction to determine the dispute.** Besides, it is a general principle of law that the court will not readily deny itself jurisdiction unless the jurisdiction is expressly ousted by legislation. Again a counter-claim can properly be raised by a defendant when the counter-claim is directly related to the principal claim - see *Nigerian Ports Authority v. Construzioni Generali Farsura Cogefar SpA & Anor .*, (1972) 12 S.C. 81 at pp.94-98.

The provisions of the Constitution pertaining to Local Government will be found in Sections 3 subsection (6), 4 subsections (6) and (7), 7, 8 subsections (3), (5) and (6), 9 and 162(3), (5), (6) - (8) of the 1999 Constitution. All these provisions must be read together in order to interpret the provisions of Section 162(3) and (5) - see the cases of *Ifezue, A-G. of Ogun State*, and *Senate of National Assembly (supra)*. If this is done, what emerges is that **for a new local government area (and therefore new local government council) to be created the provisions of Section 8 subsection (3) must be complied with by the House of Assembly of the State where the local government areas or councils are to be created.** Section 4 subsections (6) and (7) give the House of Assembly the powers to legislate for the State for the peace, order and good government of the State. Section 7 subsection (1) guarantees the existence of democratically elected local government councils and every State is

directed to ensure that they exist under a State Law which provides for their establishment, structure, composition, finance and functions. Section 8 subsection (3) specifically vests the State House of Assembly with the power to pass a bill creating a new local government area. When this is done, a return is to be made by the House of Assembly to the National Assembly for the purpose of enabling the latter to exercise its powers under Section 8 subsection (5) of the Constitution. This power entails the making of consequential provisions with respect to the names and headquarters of the local government areas provided in Section 3 and Part I of the First Schedule to the Constitution. The procedure for passing the Act is different from the procedure for passing other Acts for the purpose of amending the Constitution, as it is not necessary for the other House of Assembly to approve the amendment to the Constitution.

It is clear, therefore, that the provision of 768 local government areas in Section 3 subsection (6) could be altered to either a higher number or even a lower number. Having read all the provisions of the Constitution aforementioned, I am satisfied that the House of Assembly of Lagos State has the right to pass the Creation of Local Government Areas Law No. 5 of 2002 and to amend it by passing the Creation of Local Government Areas (Amendment) Law, 2004. It is very clear to me, however, that for the plaintiff to receive funds from the Federation Account under Section 162(3) and (5) there must be local government councils which have legally or constitutionally come into existence. It seems to me for this to happen the remaining or consequential action must be taken by the National Assembly to amend Section 3 subsection (6) and Part I of the First Schedule to the Constitution. This is so, because the references made in Section 162 to local government councils must be with a view to the local government areas specified in Section 3(6), which I have earlier held to be equal to or synonymous with local government councils.

What follows from this is that the Laws enacted by Lagos State that is Law No.5 of 2002 and the 2004 Law are both valid Laws since the House of Assembly of Lagos State has the power under Sections 4

subsections (6) and (7), 7 subsection (1) and 8 subsection (3) of the Constitution to legislate in respect of the creation of new local government areas and local government councils which are one and the same for the purpose of Section 162 subsections (3) and (5) of the Constitution. However, in the context of Section 8 subsection (5) and Section 3 subsection (6) such Laws cannot be operative or have full effect until the National Assembly makes the necessary amendment to Section 3 subsection (6) and Part I of the First Schedule to the Constitution. The effect of this is that the Laws are valid but inchoate until the necessary steps as provided by the Constitution are taken by the National Assembly.

Next is the question whether the President of the Federal Republic of Nigeria was right to direct the Minister of Finance not to release statutory allocations from the Federation Account to the States which created new local government areas or held elections into the new local government councils or failed to maintain a special account called “*State Joint Local Government Account*” as provided by Section 169 subsection (6) of the Constitution. It has been argued that the President by virtue of the “Oath of Office,” which he took in assumption of office, he is bound “to protect and defend the Constitution”. In addition, the “*executive powers of the Federation*”, is vested in the President by Section 5 subsection (1)(a) of the Constitution and such powers extend to the execution and maintenance of the Constitution. This is certainly so, but the question is does such power extend to the President committing an illegality? Certainly the Constitution does not and could not have intended that. As I have already shown, the creation of new local government areas or councils is supported by the provisions of the Constitution. In other words the taking of such a step or act by Lagos State is not unconstitutional as thought by the President. The Constitution fully recognizes the step taken except that there is still one more step or hurdle to be taken or crossed by the national Assembly for the plaintiff to actualize the creation of the new local government areas. Our attention has not been drawn to any other provision of the Constitution which empowers the President to exercise the power of withholding or

suspending any payment of allocation from the Federation Account to Local Government Councils or to State Government on behalf of the Local Government Councils as provided by Section 168 subsections (3) and (5) of the Constitution.

With respect, whenever there is any disagreement or dispute between the Federation and the States, the avenue provided by the Constitution for the settlement are, according to Section 6 of the Constitution the superior courts of record created by the Constitution whose judicial powers in the words of subsection (6)(b) thereof-

“shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.”

In other words the obligation of the President which is said to protect and defend the Constitution can be exercised through the courts as provided by the Constitution itself.

Conclusion

It now remains to determine which reliefs claimed by the plaintiff and the defendant could be granted in the light of the foregoing. In the claim by the plaintiff -

Relief No. 1 - The President has no power vested in him by executive or administrative action to suspend or withhold for any period whatsoever the statutory allocation due and payable to Lagos State Government pursuant to the provision of Section 162(5) of the 1999 Constitution but in respect of the 20 Local Government Areas for the time being provided by Section 3 subsection (6) of the Constitution and not the new Local Government Areas created which are not yet operative.

Relief No.2 - The *“declaration that the intention or proposal of the Federal Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Federal Republic of Nigeria 1999 will if carried out be unlawful and contrary to the provisions of the said Constitution”* is granted subject to the statutory allocation relating to the 20 Local Government Councils for the time being recognized by Section

3 subsection (6) and Part I of the First Schedule to the Constitution.

Relief No.3 - “A consequential order of this Honourable Court compelling the defendant to pay immediately all outstanding statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria, 1999.” This is granted in so far as it relates to the 20 Local Government Councils for the time being recognized by Section 3 subsection (6) and Part I of the First Schedule to the Constitution.

Relief No.4 - “An order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive Branch of the Federal Government from doing anything whatsoever to suspend, withhold, for any period whatsoever or calculated to suspend or withhold any monies due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria”. This is granted in so far as it applies to the 20 Local Government Councils for the time being recognized by Section 3 subsection (6) and Part I of the First Schedule to the Constitution.

In the counter-claim by the defendant:-

Relief No. 1 - The plaintiff has the power under Sections 7(1) and 8(3) of the Constitution to create new Local Government areas as done in Law No.5 and the 2004 Law. The declaration sought is therefore refused.

Relief No.2 - The plaintiff has the power under the Constitution to create new Local Government Areas but the new Local Government so created will not take effect or come into operation until the National Assembly passes an Act to amend Section 3(6) and Part I of the First Schedule to the Constitution. The declaration sought is therefore refused.

Relief No. 3 - The plaintiff has the power under the Constitution to enact Law No.5 of 2002 and the 2004 Law but the new Local Government Areas so created cannot take effect or come into operation until the National Assembly accordingly amends Section 3(6) and Part I of the First Schedule to the Constitution. Therefore, the declaration sought can only be granted in part. That is to the extent that the new Local Government Areas cannot take effect until the National Assembly passes the consequential Act under

Section 8 subsection (5) of the Constitution.

Relief No.4 - So far the Local Government Areas recognized by the Constitution are those contained in Part I of the First Schedule to the Constitution. The declaration sought is therefore granted.

Relief No.5 - Sections 1, 2 and 3 of the New Local Government Areas Law No.5 of 2002 in fact constitute the Law which was enacted by the plaintiff in accordance with the provisions of Sections 7(1) and 8(3) of the Constitution. The Law is therefore valid even though it is not yet operative. Consequently, the declaration sought cannot be granted and is hereby refused.

Relief No.6 - The 57 Local Government Areas established by Law No.5 are inchoate until the National Assembly passes the Act necessary under Section 8(3) of the Constitution. Therefore the new 57 Local Government Councils are not entitled to receive fund from the Federation Account. Accordingly the declaration sought is granted.

Relief No. 7 - The declaration being sought to the effect that the elections conducted by the plaintiff on 27th March, 2004 cannot take effect since they are inchoate cannot be granted because not all the parties interested in the elections, namely the chairmen-elect as well as the Lagos State Independent Electoral Commission have been joined in this case - see - *Oloriode v. Oyebi*. (1984) 1 SCNLR 390 at pp.400 and 407.

Relief No. 8 - The order required to nullify the elections held on 27th March, 2004, into the councils of the 57 new Local Governments cannot be granted for the same reason given under relief No.7.

Relief No.9 - The order to restrain the Lagos State Government, the Lagos State House of Assembly or any functionaries or agencies of the plaintiff not to maintain, finance and recognize any Local Government in Lagos State apart from those created under Part I of the First Schedule of the 1999 Constitution is vague since the National Assembly could at any time it deems fit exercise its power under Section 8(5) of the Constitution to amend Section 3(6) and Part I of the First Schedule to the Constitution. Therefore order cannot be granted and it is hereby refused.

To sum up, the plaintiff's action succeeds, all the reliefs sought are granted but applicable only to the 20 Local Government Areas specified in Part

I of the First Schedule to the Constitution. The counter-claim by the defendant succeeds in part. Reliefs Nos.3 (as modified), 4 and 6 are granted while reliefs Nos. 1, 2, 5, 7, 8 and 9 are refused.

There is no order as to costs. Each party is to bear its costs.

B I wish to express our profound gratitude to all the counsel in the case for the tremendous assistance given to us in reaching this decision.

KUTIGIJC

C I have had the privilege of reading in advance the judgment just rendered by my learned brother, Uwais, CJN. I agree with his reasoning and conclusions. I would however briefly add a few comments of my own thus

D The facts which led the Lagos State Government to issue the Originating Summons herein against the Federal Government are not in dispute. The cause of action in this matter is the decision of the President to suspend the statutory allocation payable to Lagos State for the benefit of Local
E Government Councils within the State. The claims in the Originating Summons read as follows -

*“1. A determination of the question whether or not there is power vested in the President of the Federal Republic of Nigeria (by executive or
F administrative action) to suspend or withhold for any period whatsoever the Statutory Allocation due and payable to Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999.*

*2. A declaration that the present intention or proposal of the Federal
G Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria. 1999 will, if carried out be unlawful and contrary to the provisions
H of the said Constitution.*

3. A consequential order of this Honourable Court compelling the defendant to pay immediately all outstanding arrears of statutory allocation due and payable to the Lagos State Government pursuant to the

provision of Section 165(5) of the Constitution of the Federal Republic of Nigeria 1999.

4. An order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive Branch of the Federal Government from doing anything whatsoever to suspend, withhold, for any period whatsoever or calculated to suspend or to withhold any monies due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria.”

It is clear that the reason for the decision of the President to suspend payment of the Statutory Allocation to Lagos State as aforementioned was the fact that the Lagos State enacted a Law whereunder the number of Local Government Councils within the State was increased from 20 (twenty) to 57 (fifty seven). The Federal Government also complains that the increase in the number of Local Government Councils was affected by altering the boundaries and changing the name of the Local Government Councils which were listed in the First Schedule of the 1999 Constitution. It is also the Federal Government's case that Lagos State conducted elections into the Local Government Councils when the National Assembly is yet to make the necessary consequential amendments to the Constitution pursuant to Section 8(5) thereof. The defendant therefore filed its own Counter-Claim against the plaintiffs thus -

“(i) A DECLARATION that the plaintiff/defendant to the Counter-Claim has no power or right under the 1999 Constitution to abolish Local Government Areas created under the 1999 Constitution by altering their names, adjusting their boundaries and dividing them into smaller units until the National Assembly has acted pursuant to provisions of Section 8(5) of the 1999 Constitution.

(ii) A DECLARATION that the plaintiff/defendant to the counter-claim has no power or right under the 1999 Constitution to create and operate new Local Governments without recourse to the National Assembly as provided for under the Constitution.

(iii) A DECLARATION that the alteration of the names of Local Governments, the alteration of the boundaries of the Local Governments and

the creation of new Local Governments done by the Lagos State Government and the operation of the new Local Governments before and or without an act of National Assembly to that effect, is illegal, unconstitutional, null and void.

B (iv) A DECLARATION that the following Local Governments are the only Local Governments established under the 1999 Constitution in Lagos State, Agege, Ajeromi-Ifelodun, Alimosho, Amuwo-Odofin, Apapa, Badagry, Epe, Eti-Osa, Ibeju/Lekki, Ifako-Ijaye, Ikeja, Ikorodu, Kosofe, Lagos Island, Lagos Mainland, Mushin, Ojo, Oshodi-Isolo, Shomolu, Surulere.

C (v) A DECLARATION that Sections 1, 2 and 3 of the Local Government Areas Law No. 5 of 2002 of Lagos State are in contravention of Section 3(6) and Part 1 of the First Schedule to the Constitution of the Federal Republic of Nigeria 1999 and therefore are inchoate and unenforceable in so far as they purport to alter the provisions of the said Section 3(6) and Part 1 of the First Schedule to the 1999 Constitution with respect to Lagos State of Nigeria before and or without an Act of the National Assembly to that effect.

D (vi) A DECLARATION that the 57 Local Government Areas established by the Local Government Areas Law No. 5 of Lagos State are not entitled to benefit from the Federation Account.

E (vii) A DECLARATION that the elections conducted by the Lagos State Government on Saturday, 27th March, 2004 into the 57 Local Government Areas created by the Local Government Areas Law No. 5 of 2002 of Lagos State are inchoate and cannot take effect as presently established in that the 57 Local Government Areas are not known to the Constitution.

F (viii) AN ORDER nullifying and setting aside the elections conducted by the Lagos State Government on Saturday, 27th March, 2004, into the 57 Local Government Councils established by the Local Government Areas Law No. 5 of 2002 of Lagos State.

G (ix) AN ORDER OF INJUNCTION restraining the Lagos State Governor, the Lagos State House of Assembly or any functionaries or agencies of the Lagos State Government from maintaining, financing and recognizing any Local Government in Lagos State apart from the ones created

under Schedule 1 of the 1999 Constitution.

AND TAKE NOTICE that the questions arising from this counter-claim are as follows, to wit:

1. Whether or not the plaintiff/defendant to the counterclaim has power under the 1999 Constitution to abolish Local Government Areas under the 1999 Constitution by altering their names, adjusting their boundaries and dividing them into smaller units.

2. Whether or not the plaintiff/defendant to the counterclaim has power under the 1999 Constitution to create new Local Governments without recourse to the National Assembly as provided for under the Constitution.”

Dealing with the plaintiff’s claims, I believe the right and title of a State Government to amount payable pursuant to Section 162(5) of the Constitution is indisputable. The subsection expressly and unequivocally stipulates that such amount -

“shall also be allocated to the States for the benefit of their Local Government Councils.”

The words above plainly confer legal title to the amount in question on the States subject to a trust in favour of their Local Government Councils. Section 162(8) also confers on the Lagos State House of Assembly the duty to distribute the amount mentioned in Section 162(5) “*on such terms and in such manner*” as it may prescribe. So the pertinent question is whether or not the decision of the President to suspend Statutory Allocation to Lagos State for the benefit of Local Government Councils within the States is lawful, valid and constitutional. It appears to me that nowhere in the Constitution is the President expressly or impliedly authorized to suspend or withhold the Statutory Allocation payable to Lagos State pursuant to Section 168(5) of the Constitution on the ground of the complaints made against Lagos State by the Federal Government in this action or any ground at all. If the President has any grievance against any tier of Government, he should go to court. He cannot kill them by withholding their Statutory Allocations. That will be brutal indeed! In the premises therefore all the 4 (four) reliefs claimed by the plaintiffs against the defendant succeed and are granted. The question in claim (1) is answered in the negative. The question in claim (2) is answered in the

positive. Claims (3) & (4) which are consequential following the success of claim (1), are granted as prayed.

As for the defendant's counter-claims, it is sufficient to say here now that the dispute relates to the creation of 57 Local Government Councils by
 B Lagos State in place of 20 stipulated in the Constitution, and the holding of elections in the new councils before the National Assembly makes consequential amendment pursuant to Section 8(5) of the Constitution.

I think Chief Afe Babalola, SAN., learned counsel for the defendant
 C was right when he said that the 1999 Constitution provides for a two-tier approach to the creation of new Local Government Areas, to wit, the First or State tier procedure and the Second or Federal tier procedure. He conceded that the First or State tier procedure has been wholly complied with by the Plaintiff, Lagos State. He however contends that the Second or Federal tier
 D procedure as set out in Section 8(5) & (6) and Section 3(6) of the Constitution have not been complied with. I think he is right. I agree with him. The satisfaction of the First or State tier procedure is not sufficient in my view to confer or vest legality or validity in the new Local Government Areas. The
 E Second or Federal tier procedure must also be satisfied before the exercise can be taken as having been completed. I have therefore no difficulty whatsoever in coming to the conclusion that the Lagos State Government's Law No.5 of 2002 is unquestionably constitutional and valid having complied
 F with the provision of Sections 7(1) & 8(3) of the Constitution. The only reservation is that the newly created Local Government Areas are in abeyance until after the completion of the second or Federal tier procedure by the National Assembly as stated above. In other words the State law cannot take
 G effect without or before a Federal law enacted pursuant to Section 8(5). This must be so because we cannot afford to wake up one morning to discover that a State Government with its House of Assembly have converted every village or hamlet in their State into a Local Government. The National Assembly must be and is part of the exercise. Bearing this principle in mind,
 H it is obvious that most of the counter-claims fail and are refused including claims (i), (ii), (iii), (v) & (ix). Claim (iv) relating to the 20 Local Government Areas established under the 1999 Constitution is granted. Claim (vi) to the effect that the 57 new Local Government Areas are not entitled to benefit

from the Federation Account is also granted. Claims (vii) & (viii) pertaining to elections conducted in the Local Government Areas are incompetent as this court is not an Election Petition Tribunal. They are accordingly struck-out.

I endorse the order for costs.

B

IGUHJSC

I have had the privilege of reading in draft the judgment just delivered by the Hon. Chief Justice of Nigeria and I am in complete agreement with the reasoning and conclusions therein reached. C

Accordingly, the plaintiff's action succeeds and all the reliefs sought are granted but applicable only to the 20 Local Government Areas specified in Part 1 of the First Schedule to the Constitution.

The defendant's counter-claim also succeeds but only in part. Reliefs D
Numbers 3 (as modified), 4 and 6 are granted but reliefs Numbers 1, 2, 5, 7 and 8 are refused.

I subscribe to the order as to costs made in the leading judgment.

E

UWAIFO JSC

I read in advance the judgment of my learned brother, Uwais, CJN. I completely agree with him that the plaintiff's action succeeds. I also agree F
that reliefs 1,2,5,7,8 and 9 sought in the counterclaim be refused. Reliefs 3,4 and 6 as granted in the leading judgment would be largely because of the interpretation given to the effect of subsections (5) and (6) of Section 8 and Section 162(2), (3) and (5) of the Constitution. I have viewed their effect G
rather differently and have endeavoured to explain why, hence I consider that those reliefs should be refused as well. However, other than the stand I have taken now being solely for the record, I acknowledge that the entire thrust of the leading judgment has put the constitutional position of the President H
in these matters in proper perspective.

When the Constitution of the Federal Republic of Nigeria, 1999, came into force on 29th May, 1999, Lagos State was shown in Part I of the First Schedule thereto as having twenty Local Government Areas. The number of

Local Government areas in each of the other thirty states was also shown, while in Part II, the number of Area Councils in the Federal Capital Territory, Abuja was similarly indicated. Under Section 3(b) of the Constitution it is provided that

B *“There shall be seven hundred and sixty-eight Local Government Areas in Nigeria as shown in the second column of Part I of the First Schedule to this Constitution and six area councils as shown in Part II of that schedule.”*

C However, under Section 8(3) of the Constitution, the House of Assembly of a State is empowered to pass a bill for the creation of new local government areas. It may also under Section 8(4) pass a bill to adjust the boundary of any existing local government area. It follows that in the process of creating new or additional local government areas which will of necessity
D lead to the adjustment of the boundaries of some or all of the existing ones, a State House of Assembly is adequately enabled by subsections (3) and (4) of Section 8 to alter the boundaries of the existing local government areas and define the boundaries of all the relevant local government areas that
E consequently come into being.

The Lagos State Government, acting under Section 8 of the Constitution created fifty-seven Local Government areas in place of the existing twenty in June, 2002. The State later in 2004 conducted election into
F all the Local Government Councils. By a letter dated 8th April, 2004, addressed to the Minister of Finance, Mr. President drew attention to Section 8(5) of the Constitution and said that as the National Assembly was yet to make the necessary consequential provisions in respect of the newly created local Government areas, *“conducting election into or funding any of them*
G *from the Federation Account would clearly be a violation of the Constitution.”* He ordered that no allocation from the Federation Account should thenceforth be released to the Local Government Councils of Lagos State and other States which similarly created new local government areas until they
H reverted to the local government areas specified in Part I of the First Schedule to the Constitution.

This led the plaintiff to file an originating summons to invoke the original jurisdiction of this court under Section 232(1) of the Constitution

seeking three reliefs (as amended) as follows:

“1. A determination of the question whether or not there is power vested in the President of the Federal Republic of Nigeria (by executive or administrative action) to suspend or withhold for any period whatsoever the Statutory Allocation due and payable to Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria, 1999.

2. A declaration that the present intention or proposal of the Federal Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Sections 162(5) of the Constitution of the Federal Republic of Nigeria 1999, will, if carried out, be unlawful and contrary to the provisions of the said Constitution.

3. A consequent order of this Honourable Court compelling the defendant to pay immediately all outstanding arrears of statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria, 1999.

4. An order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive Branch of the Federal Government from doing anything whatsoever to suspend or withhold, for any period whatsoever or calculated to suspend or so to withhold any monies due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria.”

The learned Attorney-General of Lagos State, Professor Osinbajo, SAN., has argued that nowhere in the Constitution is the President authorized to suspend or withhold the statutory allocation payable to Lagos State pursuant to Section 162(5) of the Constitution based upon the complaints in the President’s letter to the Minister of Finance. He contends that the orders made in the said letter are erroneous in law. As to the fact that the National Assembly was yet to pass an Act to make consequential provisions with respect to the names and headquarters of the local government areas so created, he argues that that could not invalidate the actions taken by the

Lagos State Government.

The learned Attorney-General in reference to Section 8(5) and (6) of the 1999 Constitution submits that the effect of subsection (6) is that the filing of a return by the House of Assembly to each of the Houses of the National Assembly after the creation of more local government areas by virtue of Section 8(3) does not necessitate the passing of an Act of the National Assembly under Section 8(5); and that it is only where the National Assembly is exercising its power pursuant to Section 8(1) and (2) that the required return may be used for making consequential provisions therein envisaged. I think I should immediately say here that, as will be seen later in this judgment, subsection (6) of Section 8 specifically makes reference to local government areas created pursuant to subsection (3). This obviously imposes a duty upon the National Assembly which necessitates the passing of an Act by it under subsection (5). I am unable to accept any submission to the contrary.

The main thrust of the argument of Chief Babalola, SAN., for the defendant, may be put thus: (1) that the plaintiff having deliberately abolished the 20 local governments established and created by the Constitution, and in their place carved out 57, has extinguished the said 20 local governments; (2) that the defendant owes no obligation to the said 57 local governments and that the Constitution has made no provision for allocation of funds to them from the Federation Account; (3) that the local governments referred to in Section 162 of the Constitution are those created under Section 3(6) and Part I of the First Schedule to the 1999 Constitution; (4) that the statutory allocation meant for local governments does not belong to the State and therefore where the beneficiaries of the funds no longer exist, it would be irregular, wrongful and unconstitutional for the Federal Government to pay statutory allocation meant for them to the State.

To deal with these submissions for the purpose of deciding the merit of the three reliefs sought by the plaintiff, it is important to consider Section 3(6), 8(3), (4), (5) and (6), as well as 162(2), (3), (5), (7) and (8) of the Constitution. Section 3(6), which is hereby reproduced, provides that:

“There shall be seven hundred and sixty-eight local government areas in Nigeria as shown in the second column of Part I of the First Schedule to this Constitution and six area councils as shown in Part II of that Schedule.”

The phrase “*there shall be*” does not, in my view, make the number of local government areas in Nigeria immutable. That phrase appears misleading because the provisions of Section 8(3) and (4) allow for the creation of more local government areas and the adjustment of the boundaries of existing ones. Those provisions recognize that the number of local government areas can be increased. It seems to me, therefore, that Section 3(6) must be read with a view that the number therein stated can be adjusted as appropriate. The adjustment is by a simple process upon a true understanding and interpretation of subsections (5) and (6) of Section 8, after more local government areas have been duly created as discussed hereafter.

Subsection (3) of Section 8 deals with a bill for a Law of a House of Assembly for the purpose of creating a new local government area while subsection (4) talks of a bill for a law for the purpose of boundary adjustment of any existing local government area. The two subsections will normally interrelate when there is the exercise of the creation of more local government areas in a State. The two subsections read in full as follows:

“(3) A bill for a Law of a House of Assembly for the purpose of creating a new local government area shall only be passed if -

(a) a request supported by at least two-thirds majority of members (representing the area demanding the creation of the new local government area) in each of the following namely -

(i) the House of Assembly in respect of the area, and

(ii) the local government councils in respect of the area; is received by the House of Assembly;

(b) a proposal for the creation of the local government area is thereafter approved in a referendum by at least two-thirds majority of the people of the local government area where the demand for the proposed local government area originated;

(c) the result of the referendum is then approved by a simple majority of the members in each local government council in a majority of all the local government councils in the State; and

(d) the result of the referendum is approved by a resolution passed by two-thirds majority of members of the House of Assembly.

(4) *A bill for a law of a House of Assembly for the purpose of boundary adjustment of any existing local government area shall only be passed if-*

B *(a) a request for the boundary adjustment is supported by two thirds majority of members (representing the area demanding and the area affected by the boundary adjustment) in each of the following, namely -*

(i) the House of Assembly in respect of the area, and

C *(ii) the local government council in respect of the area, is received by the House of Assembly; and*

(b) a proposal for the boundary adjustment is approved by a simple majority of members of the House of Assembly in respect of the area concerned.”

D Referring to the above-stated provisions, learned Senior Advocate for the defendant submits that the plaintiff has no absolute powers to create local government areas by itself under the Constitution. He however argues, only by way of concession, that a State House of Assembly plays a substantial role in the creation of local government areas but cannot create them exclusively in view of the provisions of Section 8(5) and (6) of the Constitution. There is also the submission that by the creation of 57 new local government areas, the 20 stated in the Constitution for Lagos State no longer existed. But after stating that the Lagos State Government has no power to abolish those local government areas in the Constitution, the conclusion was reached in the brief of argument thus:

G *“(1) The Lagos State Government has not validly abolished the extant Local Government enumerated under Section 3(6) and the second column, item 24, Part I, First Schedule to the 1999 Constitution and illegally created 57 new Local Government Areas not cognisable under, and not in compliance with, the Nigerian Constitution of 1999.*

(2) By reason of the matters aforesaid the 57 illegal new Local Governments cannot

H *(a) benefit from statutory allocations due to the obliterated Local Government Areas under Section 162(5) of the 1999 Constitution;*

(b) validly conduct election and swear in winners of such exercise which was done in violation of the 1999 Constitution;

(c) gain or receive any form of constitutional or official recognition whatsoever"

With due respect, there appear to be some inconsistencies in those submissions, but notwithstanding, it seems to me that the main support relied on for these submissions is the interpretation the learned Senior Advocate B gave to the provisions of Section 8(5) and (6) of the Constitution. It is, therefore, important to examine what those provisions actually mean. But I must say here, and I doubt if it can be reasonably disputed, that so long as all the processes and procedures laid down in subsections (3) and (4) of Section C 8 of the Constitution are complied with, a State House of Assembly has full powers to create new local government areas, and indeed adjust boundaries, as may be necessary. It must be emphasized and constantly kept in mind that it has not been suggested that there has been non-compliance with the said subsections (3) and (4). D

The implication of subsections (5) and (6) of Section 8 and to what extent they interplay with the clear powers conferred on a State House of Assembly, will now be considered. The subsections read thus:

"(5) An Act of the National Assembly passed in accordance with this E sections shall make consequential provisions with respect to the names and headquarters of States or local government areas as provided in Section 3 of this Constitution and in Parts I and II of the First Schedule to this Constitution.

(6) For the purpose of enabling the National Assembly to exercise the F powers conferred upon it by subsection (5) of this section, a House of Assembly shall, after the creation of more local government areas pursuant to subsection (3) of this section, make adequate returns to each House of the G National Assembly."

I think it is helpful to read subsection (6) before subsection (5). It must be noted that it is "*after the creation of more local government areas*" that a House of Assembly shall make adequate returns to each House of the H National Assembly. In other words, the creation has been concluded and the relevant local government areas have been brought into being by the action taken by a House of Assembly through its bill before returns thereof are made to each House of the National Assembly. In relation to local government

areas affected or involved, the National Assembly shall then pass an Act, based on the returns so furnished to it, to make consequential provisions with respect to the names and headquarters of the said local government area. I strongly hold the view that the only purpose of the consequential provisions is to update the local government areas *“as provided in Section 3 of this Constitution and in Parts I and II of the First Schedule to this Constitution.”* It is like birth registration under the provision of an Act. The delay in the formality of registration of any particular birth cannot ignore the fact that there has been a child born who is living. To my mind, it does not confer any supervisory authority on the National Assembly which it may use to delay, direct, control or frustrate the effect of a law duly enacted by a State. It is a simple process for a simple formal consequence; it is a process different from that of passing an Act for the alteration or amendment of a provision of the Constitution as laid down in Section 9 of the Constitution. In my opinion, there is nothing, therefore, special about it that ought to postpone the coming into force of the law constitutionally passed by a State to create local government areas in its domain.

As long as the conditions stated in subsection (3) of Section 8 are fulfilled and returns made under subsection (6), the National Assembly shall *“exercise the powers conferred upon it by subsection (5) of this Constitution”* to pass an Act which shall make consequential provisions with respect to the names and headquarters of local government areas. Obviously, the names and headquarters of the local government areas will be provided in the returns made pursuant to subsection (b) and it is for the National Assembly to pass an Act in regard to those returns. It is a duty imposed on the National Assembly and a corresponding right conferred on the House of Assembly to have the new local government areas recorded. The duty can be compelled by mandamus, being a duty allowing for no discretion. According to AXEL HAGERSTROM:

“A ‘right’ means that he who possesses it either (i) will obtain from the party who is under the corresponding ‘obligation the advantage to which he is ‘entitled’, or (ii) will acquire from the courts a power of compulsion, provided that he fulfils their requirements, particularly in the matter of proving the facts which the law explicitly states or which custom tacitly

implies as conferring the 'right'. It is then dear that there is nothing whatever left of 'rights' or 'duties', if neither of the two alternatives is fulfilled." (Emphasis mine)

See Introduction to Jurisprudence 4th Edn by Lord Lloyd, page 588.

It means that when the conditions in subsections (3) and (6) of Section 8 are fulfilled, the obligation imposed under subsection (5) will follow. If not, it renders the expected rights of no consequence and that will be tantamount to a subversion of the Constitution by the Legislature. In other words, the provisions of subsections (5) and (6) of Section 8 do not in any way confer any power on the National Assembly to constitute itself either into a supervisory role or hindrance in regard to the power of a State to create more local government areas.

There is also the argument that the provisions of subsections (3) and (5) of Section 162 of the Constitution are relevant considerations as to the allocations payable from the Federation Account to the States for the benefit of their local government councils. In arguing under those subsections, the learned Senior Advocate put his position on which local government areas are entitled to allocation thus:

"The 20 Local Government Areas in question (in Lagos State) can only mean those set out in column, item 24, Part I of the first schedule to the 1999 Constitution, and they are the only reason why the statutory allocation for the third tier of government comes into contact with the Lagos State Government."

The learned Senior Advocate went further to argue that by carving out 57 Local Government Areas out of the 20, the plaintiff has as a matter of fact extinguished the 20 Local Government Areas stated in the 1999 Constitution; but that the 57 are not recognized under the said Constitution. He ended the argument thus:

"The conclusion that flows from the above is that the 20 Local Governments recognized by the Constitution are no more in existence. As a Trustee the Federal Government therefore is entitled to withhold the money due to the Local Governments to prevent a situation where the money will go to wrong hands. As a trustee, the President can be sanctioned for unconstitutionally paying the funds to Local Governments that are not recognized

under the Constitution.”

I do not think it is appropriate to brand the Federal Government or Mr. President as a trustee in relation to the constitutional powers conferred on and exercisable by them; and thereby introduce the element of personal judgment or discretion over a justiciable dispute that may arise between them and the States. The President exercises executive powers under the Constitution. They are, without dispute, awesome powers but even so they have known limits. The exercise of the powers is kept within bounds by the intervention of the rule of law. In *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (1931) AC 662 at 670, the Privy Council said:

“The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a court. As the executive he can only act in pursuance of the powers given to him by law.”

In the case of *Military Governor of Lagos State v. Ojukwu* (1986) 1 NSCC (Vol. 17) 304 at 313, Obaseki, JSC, made the following relevant observation inter alia:

“The Nigerian Constitution is founded on the rule of law the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the frame-work of recognized rules and principles which restrict discretionary power..... [T]he rule of law means that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive.”

In order that the Federal Government as against States, and States as against States may resolve their disputes in line with the rule of law, Section 232 of the 1999 Constitution provides for the venue. As I have already indicated, the President has enormous executive powers. As they relate to the Federation Account to be distributed to the three tiers of government, the President relies initially on the advice of the Revenue Mobilization Allocation and Fiscal Commission (RMAFC) to make proposals to the National Assembly as provided in Section 162(2) of the Constitution thus:

“162 - (2) The President, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposals from revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take

population, equality of States, internal revenue generation, land mass, terrain as well as population density:

Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the Federation Account directly from any natural resources.” B

It is on that basis and those parameters that subsections (3) and (5) are to be complied with. They provide as follows:

“(3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the local government councils in each State on such terms and in such manner as may be prescribed by the National Assembly.” C

(5) The amount standing to the credit of Local Government councils in the Federation Account shall also be allocated to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.” D

It does not appear to me that there is any power conferred on the President to decide to withhold any allocation on the basis of a conceived breach of the Constitution by any of the three tiers. It seems to me also that the allocation principle of funds to local government councils in each State is such that the amount payable does not increase simply because a House of Assembly has created more local government areas in the State. To take that into account will simply encourage the proliferation of local government areas for the main aim of earning more revenue. That cannot be right or equitable. F

Section 162(2) makes it clear what the National Assembly will take into account in the allocation principles especially those of population, equality of states, internal revenue generation, land mass, terrain as well as population density. Since that is the position, the circumstances of the creation of more local government areas by a State ought not to lead to withholding of the normal funds to which a State Government is entitled to receive on behalf of the local government councils in the State. The usual allocation to which a State was entitled before the creation of more local government areas ought not to be a point of dispute. It must continue to receive that allocation on behalf of the local government areas until there is a new general allocation formula approved by the National Assembly in its collective wisdom. I G

therefore conclude on the reliefs by the plaintiff as follows:

1. The President is not vested with power to suspend or withhold for any period whatsoever the statutory allocation due and payable to Lagos State Government pursuant to the provisions of Section 162(5) of the B Constitution of the Federal Republic of Nigeria 1999.

2. I declare that the suspension or withholding by the Federal Government for any period whatsoever of the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section C 162(5) of the Constitution of the Federal Republic of Nigeria 1999 is unlawful and contrary to the provisions of the said Constitution.

3. I make a consequential order that the defendant do pay immediately all outstanding arrears of statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of D the Constitution of the Federal Republic of Nigeria 1999.

4. I make an order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of the Executive Branch of the Federal Government from doing anything what- E soever to suspend or withhold for any period whatsoever or calculated to suspend or so to withhold any monies due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria.

F I now briefly consider the counterclaim as amended. They are stated as follows:

G “(i) A DECLARATION that the plaintiff/defendant to the counter-claim has no power or right under the 1999 Constitution to abolish Local Government Areas created under the 1999 Constitution by altering their names, adjusting their boundaries and dividing them into smaller units until the National Assembly has acted pursuant to provisions of Section 8(5) of the 1999 Constitution.

H (ii) A DECLARATION that the plaintiff/defendant to the counter claim has no power or right under the 1999 Constitution to create and operate new Local Governments without recourse to the National Assembly as provided for under the Constitution.

(iii) A DECLARATION that the alteration of the names of Local

Government, the alteration of the boundaries of the Local Governments and the creation of new Local Governments done by the Lagos State Government and the operation of the new Local Government before and or without an Act of National Assembly to that effect, is illegal, unconstitutional, null and void.

B

(iv) A DECLARATION that the following Local Governments are the only Local Governments established under the 1999 Constitution in Lagos State: Agege, Ajeromi-Ifelodun, Alimosho, Amuwo-Odofin, Apapa, Badagry, Epe, Eti-Osa, Ibeju/Lekki, Ifako-Ijaye, Ikeja, Ikorodu, Kosofe, Lagos Island, Lagos Mainland, Mushin, Ojo, Oshodi-Isolo, Shomolu, Surulere.

C

(v) A DECLARATION that Sections 1, 2 and 3 of the Local Government Areas Law No. 5 of 2002 of Lagos State are in contravention of Section 3(6) and Part I of the First Schedule to the Constitution of the Federal Republic of Nigeria, 1999 and therefore are inchoate and unenforceable in so far as they purport to alter the provisions of the said Section 3(6) and Part I of the First Schedule to the 1999 Constitution with respect to Lagos State of Nigeria before and or without an Act of the National Assembly to that effect.

D

E

(vi) A DECLARATION that the 57 Local Government areas established by the Local Government Areas Law No. 5 of Lagos State are not entitled to benefit from the Federal Account.

F

(vii) A DECLARATION that the elections conducted by the Lagos State Government on Saturday, 27th March, 2004, into the 57 Local Government Areas created by the Local Government Areas Law No. 5 of 2002 of Lagos State are inchoate and cannot take effect as presently established in that the 57 Local Government Areas are not known to the Constitution.

G

(viii) AN ORDER nullifying and setting aside the elections conducted by the Lagos State Government on Saturday, 27th March, 2004, into the 57 Local Government Councils established by the Local Government Areas Law No. 5 of 2002 of Lagos State.

H

(ix) AN ORDER OF INJUNCTION restraining the Lagos State Governor, the Lagos State House of Assembly or any functionaries or agencies of the Lagos State Government from maintaining, financing and

recognizing any Local Government in Lagos State apart from the ones created under Schedule 1 of the 1999 Constitution.”

In view of the view I have taken of the effect of subsections (5) and (6) of Section 8 of the Constitution, I have no difficulty in concluding that the plaintiff has not done any act unconstitutional by creating more local government areas as provided under subsection (3) of Section 8. I therefore refuse reliefs 1, 2, 3, 4, 5, 6 and 7 of the counterclaim. I will emphasize in respect of relief 6 that it is a misconception that allocation from the Federation Account necessarily depends on the number of Local Government Areas created. It does not. It is the calculation and computation made by the RMAFC upon the parameters already referred to in the course of this judgment that the President bases his proposals for due allocation formula to the National Assembly. At the moment allocation must be continued on the formula relevant to the 20 local government areas of Lagos State until a new formula may be proposed. There was clearly no basis for withholding the current allocation.

As for relief 8, it is necessary to bear in mind the provisions of subsections (1) and (4) of Section 7 of the Constitution. They provide thus:

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

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

I think by conducting elections in the local government councils so established by law, the plaintiff was acting in furtherance of the above-quoted provisions. It has given life to democratic principles of representative local government councils. Besides, third party interests of those who stood and won elections to the councils are involved. They are not before this court and it will be a nullity to make any order affecting them. Similarly, in regard to relief

9 of the counterclaim, the provisions of paragraph (b) of subsection (6) of Section 7 must be borne in mind. They read:

“(6) Subject to the provisions of this Constitution -

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

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

That is what the plaintiff has done in order that the local government councils within Lagos State may thrive and be able to carry out their functions under the Fourth Schedule to the Constitution. I therefore also refuse reliefs 8 and 9.1 make no order for costs.

TOBI JSC

I have read the judgment of my learned brother, Uwais, CJN., and I entirely agree with him. I want to add this bit of mine.

On April 8, 2004, the President of the Federal Republic of Nigeria; Chief Olusegun Obasanjo wrote a letter No. PRES/87 to the Hon. Minister of Finance in respect of Local Government Elections and Allocation of Funds from the Federation Account to Local Government Areas. In the letter, Mr. President informed the Minister that some States, namely, Ebonyi, Katsina, Lagos, Nasarawa and Niger “conducted the last Local Government Election in the new Local Government Areas created by their respective States Assemblies”. He called the attention of the Minister to Sections 8(5) and 162(6) and (7) of the Constitution of the Federal Republic of Nigeria, and instructed in paragraph 3 of the letter as follows:

“As the National Assembly is yet to make the necessary consequential provisions in respect of any of the newly created Local Government Areas in the country, conducting election into or funding any of them from the Federation Account would clearly be a violation of the Constitution. Consequently, no allocation from the Federation Account should henceforth be released to the Local Government Councils of the above-mentioned States and any other State that may fall into that category until they revert to their

constituent Local Government Areas specified in Part I of the First Schedule to the Constitution.”

By letter No. FI 2090/1WT2/322 of April 19, 2004, the Hon. Minister of State for Finance complied with the President’s instruction by writing to
B all State Governors and Local Government Chairmen. The letter reads:

“I wish to draw your attention to the attached letter from Mr. President in which he raised some constitutional issues concerning the allocations to Local Government Councils from the Federation Account.

C 2. Kindly ensure compliance, please.

This letter sparked the ‘flame’, as it was not acceptable to some the States. Lagos State was one of them. It kicked against the decision as this was by filing an action against the defendant. And so by the 2nd Amend Originating Summons dated 3rd November, 2004, and filed on the same date, the plaintiff
D asked for four reliefs:

“1. A determination of the question whether or not there is power vested in the President of the Federal Republic of Nigeria (by executive or administrative action) to suspend or withhold for any period whatsoever the
E Statutory Allocation due and payable to Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999,

2. A declaration that the present intention or proposal of the Federal
F Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999 will, if carried out be unlawful and contrary to the provisions of the said Constitution.

G 3. A consequential order of this Honourable Court compelling the defendant to pay immediately all outstanding arrears of statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 165(5) of the Constitution of the Federal Republic of Nigeria
H 1999.

4. An order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive Branch of the Federal Government from doing anything whatsoever to

suspend, withhold, for any period whatsoever or calculated to suspend or so to withhold any monies due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria.”

The defendant counter-claimed. He has in his amended counter-claim B sought seven declarations in respect of 57 new Local Government Areas created by the plaintiff, as illegal, unconstitutional, null and void and that only the Local Government established under the 1999 Constitution for Lagos State are constitutional. Also included in the seven declarations are that C Sections 1, 2, and 3 of the Local Government Area Law No. 5 of 2002 of Lagos State are in contravention of Section 3(6) and Part 1 of the First Schedule to the Constitution of the 1999 Constitution and therefore are inchoate and unenforceable in so far as they purport to alter the provisions of said Section 3(6) and Part 1 of the First Schedule to the Constitution. In D addition, the defendant has also sought for a nullification order of the elections conducted by the Lagos State Government on 27th March, 2004, into the 57 new Local Government Councils and an order of injunction restraining the Lagos State Government, the Lagos State House of Assembly or any E functionaries or agencies of the State Government from maintaining, financing and recognizing any Local Government in the State apart from the ones created under Schedule 1 to the Constitution.

Both the plaintiff and the defendant relied on affidavit evidence in F support of their originating summons and counter-claim respectively.

As is the practice, parties filed and exchanged briefs. Alhaji Abdullahi Ibrahim, SAN, appeared as amicus curiae. He also filed a brief. Plaintiff formulated the following issue for determination:

“Whether or not the decision of the President to suspend statutory G allocation to Lagos State for the benefit of Local Government Councils within the State is lawful, valid and constitutional.”

The defendant, in his brief opposing the plaintiff’s claim formulated the following three issues for determination: H

“ 1. Whether or not there is any evidence/basis before the court upon which the amended reliefs of the plaintiff can be founded?

2. Whether or not the plaintiff has by the case presented by it disclosed

a dispute between it (the plaintiff) and the defendant, and/or whether the locus standi to ventilate the dispute between the defendant and other persons?

3. Assuming without conceding that the plaintiff's case can be related
 B to the question of the right and title of Lagos State Government to money standing to the credit of Local Government Councils, whether the defendant should allocate funds to Lagos State for the benefit of local governments not known to or recognized under the Constitution."

C Alhaji Abdullahi Ibrahim, SAN., in his brief as amicus formulated the following issue for determination:

"Whether the President of the Federal Republic of Nigeria has any power to stop or withhold an allocation to the plaintiff of funds standing to the credit of the Local Government Councils in the Federation Account
 D being an allocation of funds for the benefit of the Local Government Councils."

The defendant, as plaintiff in the counter-claim, has formulated the following two issues for determination in his brief:

E "1. Whether or not the plaintiff/defendant to the counterclaim has power under the 1999 Constitution to abolish Local Government Areas created under the 1999 Constitution by altering their names, adjusting their boundaries and dividing them into smaller units.

F 2. Whether or not the plaintiff/defendant to the counterclaim has power under the 1999 Constitution to create new Local Governments without recourse to the National Assembly as provided for under the Constitution."

G The plaintiff, as defendant to the counter-claim, has formulated the following three issues for determination:

"(i) Whether Law No. 5 of 2002 of Lagos State is invalid without or before the enactment of an Act of the National Assembly enacted pursuant to Section 8(5) of the 1999 Constitution.

H (ii) Whether or not the Creation of Local Government Areas Law (No.5 of 2002). has become part of the Laws of Lagos State, (as the Lagos State Government contends), or whether the said Instrument never became law or if it purported to have become law it is void for inconsistency with the

Constitution (as the Federal Government contends).

(iii) Whether or not the alleged delay or neglect of the National Assembly to pass an Act pursuant to the mandatory requirement of Section 8(5) of the 1999 Constitution invalidates or renders void or inoperative, the aforementioned Creation of Local Government Areas Law (No.5 of 2002) on the ground of inconsistency with the Constitution.” B

Professor Yemi Osinbajo, SAN., appearing in person, submitted on Issue No. 1 of his brief filed on 2nd June, 2004, that his court should adopt the position it took in Attorney-General of Bendel State v. Attorney-General of the Federation (1981) 12 NSCC 314, in the interpretation of the Constitution, as it relates to the amended originating summons. C

Examining Section 162(5) of the 1999 Constitution, the plaintiff submitted that the provision confers legal title to the amount in question on the States subject to a trust in favour of their Local Government Councils. D This view, plaintiff contended, is reinforced by Section 162(8) of the Constitution which confers on the Lagos State House of Assembly the duty to distribute the amount mentioned in Section 162(5) “*on such terms and in such manner*” as it may prescribe. Plaintiff urged the court to hold that the right E and title of the State Government to the amount in question derives from the provisions of Section 162(5) and (8) of the Constitution and is therefore indisputable.

Plaintiff pointed out that nowhere in the Constitution is the President F authorized to suspend or withhold the statutory allocation payable to Lagos State pursuant to Section 162(5) of the Constitution on the ground of the complaint made against the Lagos State by the Federal Government in this action.

Chief Afe Babalola, SAN., in his brief opposing plaintiff’s claim on G originating summons, submitted on Issue No.1 that the only evidence in support of the originating summons is that statutory allocation due to Lagos State Government is withheld or has been interfered with, but the plaintiff did not say or contend that the allocation due to any Local Government Area H of Lagos State had been interfered with.

It was the submission of learned Senior Advocate that since the plaintiff failed to provide any affidavit evidence in support of the amendments

sought in the originating summons, this court should not grant the relief. He cited Magnusson v. Koiki (1993) 9 NWLR (Pt. 317) 287 at 296 and 297. He pointed out that on the state of the pleadings before the court, the relief relates to Local Government Areas whereas the affidavit evidence relates to allocation due to State Governments. Calling in aid Oyegoke v. Hamman (1990) 4 NWLR (Pt. 143) 197 at 208 and Shomade v. Ogunbiyi (1936) 3 WACA 48, learned counsel urged the court to dismiss the case on the ground that the plaintiff's pleadings violently conflicts with the plaintiff's evidence already given, establishes nothing for the plaintiff.

Learned Senior Advocate submitted on Issue No. 2 that the plaintiff did not disclose any dispute with the defendant and accordingly the claim should be struck out. He cited Akibu v. Oduntan (2000) 13 NWLR (Pt. 685)446 at 465.

Taking Issue No. 3 in the alternative, learned Senior Advocate examined the provisions of Sections 163(3), 3(6), 5(a) and (b) and the following cases: AG Ondo State v. AG Ekiti State (2001) 9-10 S.C. 116; (2001) 17 NWLR (Pt. 743) 786; AG Ogun State v. Aberuagba (2002) 2 WRN 52 at 88; Ifezue v. Mbadugha (1984) 5 SC 79 at 101; Kalu v. State (1988) 11-12 S.C. 4; (1998) 13 NWLR (Pt. 583) 531 at 586 and 587; AG Federation v. AG Abia State (2002) 4 S.C. (Pt. 1) 1; (2002) WRN at 96-97 and Knight v. Knight (1940) Beav. 148.

He submitted that by the Oath of Allegiance taken by the President on assumption of office, the President had a duty placed on him to "*preserve, protect and defend the Constitution of the Federal Republic of Nigeria*". The core of the submission of learned Senior Advocate is that, as the President is under a duty to preserve, protect and defend the Constitution, he is right in withholding allocation of fund to States that create Local Governments outside the constitutional arrangement. To learned Senior Advocate, the defendant is not under any obligation to allocate funds to the constitutionally established Local Governments to Lagos State Government in order to pay Local Governments unknown to the Constitution. He drew some analogy with a situation where a beneficiary of a trust is uncertain.

The plaintiff argued his brief in answer to the defendant's brief opposing claims on originating summons. In his brief in answer to the

defendant's brief opposing claims on originating summons, learned plaintiff drew a distinction between Local Government Areas and Local Government Councils or Local Governments. He pointed out that only reliefs (i), (v), (vi) and (vii) of the reliefs sought in the counter-claim refer to Local Government Areas while the rest of the claims refer to Local Governments. B

Drawing a distinction between Local Government Areas and Local Government Councils, plaintiff submitted that the establishment of Local Government Councils or Local Governments belongs to the State Governments as an exclusive residual power under Sections 4(7)(a) and 7(1) of the 1999 Constitution. He referred to Professor B. O. Nwabueze: Federalism in Nigeria (1983) pages 125-130. It was the submission of plaintiff that the Lagos State Government has power under Section 7(1) and the residual power under Section 4(7)(a) to create Local Government Councils and that there is nothing in Sections 3(6) and 8(5) or any other section of the Constitution to prevent it from creating additional Local Government Areas named in the Second Column of Part 1 of the First Schedule to the Constitution. He referred to Sections 3 and 4 of the Local Government (Administration) Law, Cap. 173 Laws of Lagos State, 2002. He urged the court to discountenance the argument that the amount standing to the credit of Local Government Councils in each State, vide Section 162(3) is not the property of the State Government and that it is for the benefit of the Local Government Councils recognized under Section 3 of the Constitution. This argument, plaintiff contended, overlooks the fact that what is referred to in the First Schedule to the Constitution are Local Government Areas and not Local Government Councils or Local Governments. C D E F

Plaintiff submitted at pages 6 to 11 of his answer to the defendant's brief opposing claims on originating summons that the arguments contained therein are irrelevant. He took the arguments one after the other and cited *Eleko v. Officer Administering the Government of Nigeria* (1931) AC 662 at 670 and *Military Governor of Lagos State v. Ojukwu* (1986) 1 NSCC Vol. 17,304 at 309. G H

Chief Babalola in his brief supporting the defendant's counter-claim submitted that what follows Section 8(3) of the Constitution are the conditions precedent to the passage of a bill creating new Local Government

Areas, in any State House of Assembly, including that of Lagos State. Nowhere in the 1999 Constitution does it appear directly or indirectly that the passage of Local Governments Creation Bill has brought new Local Governments set out therein into existence under the Constitution, counsel argued.

B Counsel gave three reasons for the above conclusion, viz: (1) The Constitution imposes an express additional duty on the State House of Assembly to report the results of its activities in the field to the National Assembly. (2) The Constitution imposes an additional responsibility on the National Assembly to, in the express words of the Constitution, in effect, amend Section 3 and Part 1, First Schedule to the 1999 Constitution. (3) The Constitution expressly made the number of Local Governments in each State and in the entire Federation a part and parcel of the Constitution in Section 3(6).

D Learned Senior Advocate submitted that the only meaningful possible conclusion derivable from the circumstances is that the creation of even one additional or new Local Government must be the product of, or involve, of necessity, an express amendment of Section 3(6) and Part 1, Schedule 1 to the 1999 Constitution. Counsel took time to demonstrate the submission E in his brief.

Learned Senior Advocate made far reaching submissions in his brief on the need not to read the Constitution in such a manner that creates, excites or aggravates conflict within its provisions internally, inevitable results F of Lagos State failure to implement or ensure the completion of the procedure in creating new Local Government Areas, and consequences of the invalidity of the action of Lagos State. He also examined the constitutional provisions governing revenue allocation and distribution to Local Governments, application, of Section 162 of the Constitution to Lagos State, and the validity G of election into the new 57 Local Government Areas of the State. Counsel cited the following cases on the interpretation of the Constitution and statutes: A-G Ogun State v. Aberuagaba (2002) 2 WRN 52 at 88; Ifeazu v. Mbadugha (1984) 5 SC 79 at 101; Bendel State v. The Federation (1981) 10 S.C. I at 35 H and 37; NEMGIA Ltd, v. Uchay (1973) 4 S.C. 1 at 10 and Mohammed v. Olawumi (1990) 2 NWLR (Pt. 133) 458 at 458.

Counsel urged the court to grant the nine reliefs claimed by the defendant in the counter-claim to originating summons. He also urged the

court to dismiss the claim of the plaintiff.

Let me now take the arguments of Alhaji Abdullahi Ibrahim, SAN., who filed an amicus brief. He submitted that by Section 162 of the Constitution, it is a constitutional right for each tier of government, specifically State Governments and Local Government Councils, to be entitled to the amount standing to their respective credit in the Federation Account. He contended that the States are therefore, like trustees of their funds for the benefit of the Local Government Councils and like trustees they have a legal right to the funds and they can take action to enforce such rights. He cited *Re Brodgen. Billing v. Brodgen* (1888) 38 CH.D. 546; *Millar's Trustees v. Polson* (1897) 34 SCLR 798; *Fenwick v. Greenwell* (1847) 10 Beav. 412; *Grove v. Price* (1858) 26 Beav. 103; *Brigh v. North* (1847) 2 PH 216 at 220; *Ward v. Ward* (1843) 2 HL Cas. 777; *Boues v. East London Water Co.* (1821) JAC 324 and *Underbills Law Relating to Trusts and Trustees* edited by R. T. Oeton (12th Ed.) (1970) p.222 at 370. B C D

Learned Senior Advocate submitted that since the plaintiff has a constitutional right to be allocated the amount standing to the credit of Local Government Councils composed in Lagos State, the act of withholding, E suspension or non-release of the amount to it is illegal, unconstitutional, null and void. In the absence of an express provision in the Constitution giving the President or any agency of the Federal Government the right or power to take away, derogate from or tamper with the constitutional right is unconstitutional and void, learned Senior Advocate argued. He cited *Adisa v. Oyinwola* (2000) 6 S.C. (Pt.II) 47; (2000) 10 NWLR (Pt. 674) 166 at 191 and 204; *Aqua Ltd, v. Ondo State Sports Council* (1988) 10-11 S.C. 31; (1988) 4 NWLR (Pt. 91) 622 at 656 and 657; *Tukur v. Government of Gongola State* (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 171) 517; *Olaba v. Akereja* (1988) 3 NWLR (Pt. 84) 508; *Amusan v. Olawuni* (2002) 12 NWLR (Pt. 780) 30 and *A-G Osun State v. Int'l Breweries Plc* (2001) 7 NWLR (Pt. 713) 647. F G

Learned Senior Advocate also submitted that the constitutional provisions in Section 162(3) to (8) embrace the classic doctrine of mutual H non-interference or intergovernmental immunities in a Federation as enunciated in the Australian case of *D'emden v. Pedder* (1904) 1 CLR 91 at 111. He also cited *A-G Federation v. A-G Abia State* (200) 4 S.C. (Pt. 1) 1;

(2002) 6 NWLR (Pt. 764) 524; A-G Ogun State v. AG Federation (2001) 7 S.C. (2003) 10 NWLR (Pt. 798) 232 at 267 and 268; Bamaïyi v. A-G Federation (2001) 12 NWLR (Pt. 727) 468 at 467 and Achineku v. Ishaga (1988) 4 NWLR (Pt. 89) 411.

B Dealing with the newly created Local Government Councils of Lagos State, learned-Senior Advocate submitted that the President does not have the power id decide that they are unconstitutional, rather the power resides in the Judiciary in accordance with the doctrine of separation of powers. He called in aid Section 232(1) of the Constitution. He further submitted that the constitutional duty vested upon the President by Section 5(1) (b) to execute and maintain the provisions of the Constitution has at its corollary a duty not to derogate from or do anything that is inconsistent with the provisions or intendment of the Constitution.

D On the defendant's counter-claim, learned Senior Advocate submitted that the National Assembly has no role to play in the creation of new Local Government Areas and the Act of the National Assembly prescribed by Section 8(5) of the Constitution is not for the purpose of conferring constitutional recognition on the newly created Local Government Areas. Calling in aid Section 7 of the Constitution, learned Senior Advocate submitted that the State Governments are responsible for all matters relating to Local Governments. He cited AG Abia State v. AG Federation (2002) 4 S.C. (Pt. 1)1; (2002) 6 NWLR (Pt. 763) 264.

F Examining further the provision of Section 8(5), learned Senior Advocate submitted that the Act of the National Assembly to make consequential provision in Parts I and II of the First Schedule is a mere formality. In his view, there is nothing the National Assembly can do to extinguish the newly created Local Government Areas; neither can the National Assembly ignore them as would appear to be the case here. He urged the court to hold that the President has no power to suspend, withhold or direct the suspension or withholding for any period the statutory allocations due and payable to the Local Government Councils in accordance with the provisions of the Constitution of the Federal Republic of Nigeria.

Dealing with the brief in answer to the defendant's counter-claim, plaintiff submitted on Issue No. 1 that on a true and correct interpretation of

Section 8 of the Constitution, it is a misconception of the provisions of the section to suppose that a State Law for the creation of Local Government Area requires the passing of an Act of the National Assembly pursuant to Section 8(5) of the Constitution without which it cannot be valid or constitutional. It was the submission of plaintiff that it is only in respect of an Act of the National Assembly passed pursuant to Section 8(1) and (2) of the Constitution that the Constitution imposes on the National Assembly the duty contained in Section 8(5). To him, Section 8(5) does not impose any duty on the National Assembly arising from the exercise by a House of Assembly of its legislative power pursuant to Section 8(3) or 8(4). He submitted that the effect of Section 8(6) of the Constitution is that the filing of a return by a House of Assembly to each of the Houses of the National Assembly after the creation of more Local Government Areas under Section 8(3) does not necessitate the passing of an Act of the Nation Assembly under Section 8(5). In the circumstance, plaintiff urged the court to hold that Law No. 5 of Lagos State is valid and constitutional and is not invalid by the fact that the National Assembly has not passed an Act pursuant to Section 8(5) of the Constitution.

Plaintiff submitted that Law No. 5 of 2002 is unquestionably constitutional and valid. He urged the court to hold that the creation of Local Governments Law No. 5 of 2002 has become a part of the Laws of Lagos State.

Dealing with any possible legal consequence of failure or neglect on the part of the National Assembly to carry out the obligations imposed on it by Section 8(5) of the Constitution, plaintiff submitted in the alternative that such a failure or neglect has no legal consequence to the validity of Law No. 5 of 2002. He cited *Holme v. Guy* (1877) 5 CH.D. 901 at 905, *R. v. Zik's Press Ltd.* 12 WACA 202 at 205; *River Wear Commissioners v. Adamson* (1877) 2 AC 743; *Wigram v. Fryer* (1887) 36 CH.D. 87 and *Ebbs v. Boulnois* without the citation, on the interpretation of statutes, with particular reference to the provision of Section 3(6) of the Constitution.

On the remedies claimed by the Federal Government, plaintiff submitted that the defendant's counter-claim in its entirety is not cognisable under Section 232 of the 1999 'Constitution as Section 232(1) limits the jurisdiction of the Supreme Court to a dispute between the Federation and a

State or between States in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. To plaintiff, mine of the reliefs in the counter-claim involves the existence or extent of any legal right of the Federal Government in controversy in the counter-claim. He cited AG Bendel State v. AG of the Federation (1981) 12 NSCC 314 and urged the court to hold that the counterclaim must fail for want of jurisdiction and that it should be struck out. Plaintiff took each of the reliefs in the counter-claim in turn and submitted that they must be dismissed.

Let me first take the preliminary objection of the plaintiff on jurisdiction. The plaintiff's objection, if I may repeat it, for ease of reference, is that the defendant has not shown any legal right cognisable under Section 232 of the 1999 Constitution. Section 838(1) of the Constitution provides as follows,:

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

In Attorney-General of the federation v. Attorney-General of Into State (1983) 4 NCLR 178, it was held that before the original jurisdiction of the Supreme Court can be invoked under Section 212 of the 1979 Constitution, the following criteria must be satisfied: (1) There must be a justiciable dispute involving any question of law or fact. (2) The dispute must be (a) between the Federation and a State in its capacity as one of the constituent units of the Federation; or (b) between the Federation and more States than are in their capacities as members of the constituent units of the Federation; or (c) between States in their aforesaid capacities, and the dispute must be one on which the existence or extent of a legal right in the aforesaid capacity is involved.

In Governor of Ondo State v. President of the Federation (1985)6 NCLR 681, it was held that it is only the Supreme Court that has exclusive jurisdiction by virtue of Section 212(1) of the 1979 Constitution to hear and determine a dispute between the Federation on the one hand and the State on the other. See also The Governor of Kaduna State v. The President of the Federal Republic of Nigeria (1981) 2 NCLR 786; Obioha v. President of the

Federal Republic of Nigeria (1981) 2 NCLR 701; Governor of Ogun State v. President of the Federal Republic of Nigeria (1982) 3 NCLR 538; President of the Federal Republic of Nigeria v. Governor of Kano State (1982) 3 NCLR 819. And if I may say Section 212 of the 1979 Constitution is in pari materia with the original Section 838 of the 1999 Constitution. B

What is a legal right? A legal right, in my view, is a right cognisable in law. It means a right recognized by law and capable of being enforced by the plaintiff. It is a right of a party recognized and protected by a rule of law, the violation of which would be a legal wrong done to the interest of the plaintiff, even though no action is taken. The determination of the existence of legal right is not whether the action will succeed at the trial but whether the action donates such a right by reference to the enabling law in respect of the commencement of the action. C

The defendant, in the counter-claim, has asked for nine reliefs. With the greatest respect to the plaintiff, I do not agree that the defendant has no legal right to enforce under Section 232 of the Constitution. I think the defendant got it properly when his counsel submitted that the President who is the custodian and trustee of Federation Account and who is constitutionally charged with the distribution has interest in the subject matter. If I may add, therefore, the President has the legal right to commence the counter-claim. Accordingly, I dismiss the preliminary objection of the plaintiff. D E

And that clears the coast for me to take the merits of the case. Let me take first the main claim and it is the claim of the plaintiff The fulcrum or cynosure of the claim of the plaintiff is on Section 162(5) of the Constitution. The subsection reads: F

“The ambunt standing to the credit of Local Government Councils in the Federation Account shall also be allocated to the States for the benefit or their Local Government Councils on such terms and in such manner as may be prescribed by the National Assembly.” G

It is my view that the Local Government Councils in Section 162(5) are those enumerated in Part 1 of the First Schedule to the Constitution. And relevantly for Lagos State they are Agege, Ajeromi-Ifelodun, Alimosho, Amuwo-Odofin, Apapa, Badagry, Epe, Eti-Osa, Ibeju/Lekki, Ifako-Ijaye, Ikeja, Ikorodu, Kosofe, Lagos Island, Lagos Mainland, Mushin, Ojo, Oshodi- H

Isolo, Shomolu and Surulere.

Has the President of the Federal Republic of Nigeria the legal right to stop the release of the statutory allocation to the Local Government Councils named above in Lagos State? I think not. Section 163(5) of the Constitution or any other section for that matter does not provide for the stoppage of allocation from the Federation Account to the Local Government Councils of Lagos State or any other State.

If the Federal Government felt aggrieved by Lagos State creating more Local Governments, the best solution is to seek redress in a court of law, without resorting to self-help. In a society where the rule of law prevails, self-help is not available to the Executive or any arm of government. In view of the fact that such a conduct could breed anarchy and totalitarianism, and since anarchy and totalitarianism are antitheses to democracy, courts operating the rule of law, the life-blood of democracy, are under a constitutional duty to stand against such action. The courts are available to accommodate all sorts of grievances that are Justiciable in law and Section 6 of the Constitution gives the courts power to adjudicate on matters between two or more competing parties. In our democracy all the Governments of this country as well as organizations and individuals must kowtow to the due process of the law and this they can vindicate by resorting to the courts for redress in the event of any grievance.

In *The Military Governor of Lagos State v. Chief Ojukwu* (1980) 1 NWLR (Pt. 18) 621, this court condemned self-help on the part of the Military Governor of Lagos State. The court held that it was not for the Governor to take a unilateral action against the respondent in respect of his father's property when the matter was pending in the court. The court held that no one (including Governors) is entitled to take the law into his own hands. If this court went the whole hog of protecting the rule of law in a military regime which is a dictatorship, there cannot be any valid or justifiable reason to take a less position in a civilian regime where access to court is a desideratum.

And that takes me to the counter-claim. It mainly and essentially attacks the creation of the 57 Local Governments in Lagos State. The matter has to do with the legislative powers of the Legislatures. Section 4 provides

for the legislative powers of the National Assembly and the House of Assembly of a State. While Section 4(1) to (4) provides for the legislative powers of the National Assembly, Section 4(6) and (7) provides for the legislative powers of the House of Assembly of a State. Section 4(5) appears to be a hybrid provision, providing that in the event of a law enacted by the House of Assembly of a State being inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void. I should state from the onset that section 4(5) is not relevant for our purpose. I only mentioned it for completeness of the legislative powers in the section. See generally *A-G Abia State v. A-G of the Federation* (2002) 4 S.C. (Pt. I) 1; (2002) 6 NWLR (Pt. 763) 264.

In a federal system, the division of powers in Section 4 is zealously and jealously guided and guarded. The National Assembly has no legislative power to interfere or stray into the legislative powers of the House of Assembly of a State. So too the House of Assembly of a State as it relates to the legislative powers of the National Assembly.

Section 3(6) of the Constitution provides for the number of Local Government Areas in Nigeria. The subsection reads:

“There shall be Seven Hundred and Sixty-Eight Local Government Areas in Nigeria as shown in the second column of Part 1 of the First Schedule in this Constitution and six Area Council as shown in Part 11 of that Schedule.”

And so by Section 3(6) the Local Government Areas in Nigeria must not exceed Seven Hundred and Sixty-Eight, unless the Constitution is amended in accordance with its provisions. To sound more relevant, the Local Government Areas of Lagos State within the meaning of Section 3(6) shall be twenty. And they must remain twenty as provided for in the First Schedule to the Constitution until the Constitution is duly amended.

Section 7 of the Constitution provides for Local Government System. By the section, the system of Local Government by democratically elected Local Government Councils is guaranteed under the Constitution. The Government of every State is empowered to ensure the existence of Local Government Councils under a law which provides for the establishment,

structure, composition, finance and functions of such councils. It must be mentioned that Section 7(1) is not open ended in the sense that the procedure of creating Local Government Councils starts and ends with each State. The power, as it is, is subject to the provision of Section 8 of the Constitution.

B The Constitution uses the expressions “*Local Government Areas*” and
 “*Local Government Councils*” indiscriminately. One clear example of this is
 Section 8 of the Constitution. The indiscriminate use of the expression can
 be found in subsection 3 of Section 8. Thus, while Section 8 (3)(a) and (b)
 C provides for the expression “*Local Government Areas*”, Section 8 (3)(c)
 provides for “*Local Government Councils*”. Section 8(4) struggles to
 separate the two expressions as they relate to boundary adjustment, without
 success. I do not intend to go there. It appears to me that Local Government
 Areas and Local Government Councils are identical, particularly in their
 D geographical spread. A Local Government Council, in my understanding shall
 be created from a Local Government Area. In view of the fact that there
 is no constitutional provision that two Local Government Councils could be
 created from one Local Government Area, an exercise in dichotomizing the
 E two is largely academic, if not totally so. The Constitution does not define
 Local Government Area and Local Government Council but the definition
 clause in Section 318 of the Constitution separates the two expressions by
 the disjunctive conjunction “or”. In the circumstances, I do not, with the
 F greatest respect, see much practical strength in the dichotomy or cleavage
 drawn by the plaintiff when he resorted to Professor Nwabueze’s book on
 Federalism in Nigeria (1983) at page 132. In the event that there exists any
 constitutional difference between the two expressions, which then means
 that I am wrong, I must say that it does not make any difference to the live
 G issues before this court as we are concerned with a clear situation here. After
 all, the Local Government Areas enumerated in Part I of the First Schedule
 to the Constitution are the Local Government Councils in the States.
 Relevantly there are 20 Local Government Areas provided for in the
 H Constitution for Lagos State and these are the 20 Local Government
 Councils in Lagos State. And so I do not see any practical utilitarian value in
 the distinction, if one exists at all.

I now move to Section 8. The section provides for the procedure for

creating new States, new Local Government Areas and boundary adjustment. Our concern in this matter is the creation of new Local Government Councils. The relevant provision is Section 8(4). It states the procedure for the creation of new Local Government Areas. In view of the fact that there is no argument in respect of the procedure adopted within Section 8(4), I shall not deal with the subsection. B

The quarrel is centered on Section 8(5). It provides as follows:

“An Act of the National Assembly passed in accordance with this section shall make consequential provisions with respect to the names and headquarters of States or Local Government Areas as provided in Section 3 of this Constitution and in Parts 1 and 11 of the First Schedule to this Constitution.” C

By the subsection, the National Assembly is enjoined or empowered to invoke its legislative powers under Section 4 of the Constitution to enact an Act *“to make consequential provisions with respect to the names and headquarters of States or local government areas...”* Following the compliance with Section 8(3) of the Constitution by the State House of Assembly, the National Assembly will invoke its law making powers by enacting the Act, upon further compliance with Section 8(6) by the House of Assembly of a State. D E

In other words, the National Assembly can only invoke its powers under Section 8(5) when the House of Assembly of a State has complied with Section 8(6). The subsection reads: F

“For the purposes of enabling the National Assembly to exercise the powers conferred upon it by subsection (5) of this section, each House of Assembly shall, after the creation of more local government areas pursuant to subsection (3) of this section, make adequate returns to each House of the National Assembly.” G

Unless Section 8(6) is complied with by the State House of Assembly, the National Assembly cannot enact the Act within Section 8(5). The enactment of the Act under Section 8(5) is not automatic. The House of Assembly has to make adequate returns to the National Assembly. Putting it in another language, Section 8(6) is a precondition for Section 8(5) to come into being. H

Is there any evidence that such returns were made to the National Assembly? I have searched the case file in vain and I cannot place my hands on any affidavit that Section 8(6) of the Constitution was complied with. In the absence of any affidavit evidence, it will be dangerous for this court to come to the conclusion that the Lagos State House of Assembly complied with Section 8(6), a precursor to Section 8(5).

The above apart, Section 8(6) uses the adjective “adequate” to qualify the plural noun “returns”. This means that the returns made by Lagos State Government to the National Assembly must not only be returns qua official information or account in respect of the Local Government Councils but the returns must be adequate. Negatively, where the returns are inadequate, the opposite of adequate, the National Assembly cannot invoke its law making power under Sections 4 and 8(5) of the Constitution.

I ask, what Legislative Body has the right to determine the adequacy or otherwise of the returns? Is it the National Assembly or the Lagos State House of Assembly? In my humble view, it is the National Assembly and not the Lagos State House of Assembly. In view of the fact that the National Assembly has a discretionary power to exercise under Section 8(6) in the light of the expression “adequate returns”, It is my view that the word “shall” in Section 8(5) is not mandatory but directory and permissive. Unless so construed, Section 8(6) will not make any meaning, and it should be so read to make the meaning contemplated by the lawmakers.

It is my opinion that Law No. 5 of 2002 can only become constitutional if the National Assembly enacts the Act under Section 8(5). And until that event happens, Law No. 5 of 2002 is inchoate and unenforceable. I think Chief Babalola, SAN, got the point correct or right when he submitted that the claim against the law is that it is inchoate and therefore not enforceable in its present form. I entirely agree with that submission. In order to be enforceable, Law No. 5 of 2002 ought to have passed through the procedure laid down in Section 8(6) of the Constitution.

Plaintiff submitted that the failure or neglect of the National Assembly to comply with Section 8(5) should not be used against the Lagos State Government by invalidating Law No. 5 of 2002. In view of the fact that there is no evidence that Section 8(6) was complied with, the argument of

failure or neglect on the part of the National Assembly is, with respect, not available to the plaintiff. The conduct of failure or negligence in this context can only arise if the Lagos State House of Assembly duly complied with Section 8(6). Unfortunately for the plaintiff, there is no such compliance.

It is a well established and accepted parliamentary practice the world over that before a Legislature enacts an Act or a law, it has to conduct research to existing Acts or laws and whether the Act or law will not or will be in conflict with the Constitution, the fons et origo of the legal system. Where the Constitution provides for a procedure for the enactment of an Act or Law, the Legislature, whether at the national or State level, must comply with the procedure set down in the Constitution. In the event of non-compliance, the constitutional provision relied upon will not avail the party in default.

Plaintiff submitted that Section 8(5) of the Constitution is only relevant in respect of Section 8(1) and (2), and not relevant in respect of Section 8(3) and (4). Why does plaintiff come to such interpretation or construction? It is a canon of statutory interpretation, and this includes the Constitution, that courts have no jurisdiction to interpret the clear and unambiguous words of a statute beyond their clear and unambiguous meaning or place onerous weight or burden on the otherwise clear and unambiguous provision; a burden that the provision cannot carry. In view of the fact that the provision of Section 8(5) is clear and unambiguous, I shall apply the canon of ordinary or grammatical interpretation of the subsection. With the greatest respect, I do not agree with the submission of the plaintiff because it is not borne out from the clear wording of Section 8(5). Section 8(5) applies to States and Local Government Areas. As a matter of drafting the word “or” separates “States” and “Local Government Areas”. Why should such a construction be placed in a subsection that covers names and headquarters of States or Local Government Areas? That argument, with respect, is of no moment and I reject it.

I am also in grave difficulty to accept the argument that the National Assembly must, as a matter of course or routine, enact the Act under Section 8(5) of the Constitution, willy-nilly. That makes the National Assembly a rubber stamp in respect of decisions of the House of Assembly of a State. It

is not my understanding of the subsection that the National Assembly is only a clearing house for the House of Assembly of a State. The submission of plaintiff and Alhaji Ibrahim, in my view, reduces the National Assembly to an errand boy or a conduit pipe or a conveyor belt, to do the bidding of Lagos State House of Assembly which metamorphosises as the “master.” The National Assembly is not any of the above either placed separately or put together. The National Assembly is one vibrant and articulate lawmaking body, senior (if I may use that expression unguardedly) to all other Legislative Houses of this country. See Section 4(5) of the Constitution of the Federal Republic of Nigeria, 1999 which in my view, depicts the element of seniority. And it will be a misplacement of constitutional provisions to assign to it the role of chorusing the decisions of a State House of Assembly. I shudder to think or say that such is the role the National Assembly is given to play in Section 8(5). No. Not at all.

Certainly a constitutional provision which requires the National Assembly to enact an Act cannot be a playing matter and this court cannot joke or play down or play over it. This is because it is a solemn legislative matter which comes within Section 4 of the Constitution. After all, law making is the major function of the National Assembly.

There is still another aspect of the matter. Section 8(5) or its prototype or equivalent was not in the 1979 Constitution and it was put in the 1999 Constitution for good reason. The Constitution makers must have a purpose for it and the purpose is likely to be a policing weapon on the entire exercise of creation of States or Local Government Areas. Let us not think for a moment that Section 8(5) is in the Constitution for the fun of it or as an ornament or decoration. Constitutions are most serious and sacred documents and do not have any place for ornaments or decorations.

I should like to say that but for Section 8(5), States would have the freedom of the air to create any number of Local Government Councils, probably when they know that financial allocations are in most cases made according to the number of Local Government Councils. While I do not say that the plaintiff has such an aim, that seems to be the practice now, if I may so naively restrict myself. Let me venture an example, and it is hypothetical. If a State House of Assembly decides to create every village in the State a Local

Government Council, by the interpretation of the plaintiff, the National Assembly must pass the necessary Act without ado.

Oh, I now remember Section 7(6)(a) of the Constitution. By the subsection, the National Assembly is enjoined to make provisions for statutory allocation of public revenue to Local Government Councils in the Federation. Think of a situation where the National Assembly provides money for Local Government Councils without having a word on their creation within the meaning of Section 8(5) of the Constitution! Such a situation should better be imagined than happening. Let it not happen at all because such a provision will be devoid of all known senses and sensibilities of equity, fairplay and fairness.

Alhaji Ibrahim relied heavily on the decision of this court in the case of A-G Federation v. A-G Abia State (2002) 4 S.C. (Pt.I) 1; (2002) 6 NWLR (Pt. 764) 524. The issue before this court in that case was in respect of whether the National Assembly has power to enact laws affecting Local Government Councils. This court had no difficulty to come to the conclusion that the National Assembly has no such power. That case cannot be authority in this matter which is quite different. The issue before this court is not whether the National Assembly can enact laws affecting Local Government Councils, rather the issue is whether the National Assembly is empowered to enact an Act under Section 8(5) of the Constitution in respect of Law No. 5 of 2002.

In the light of the above and in the circumstances of the case, I have no difficulty in granting all the four reliefs in the 2nd Amended Originating Summons. For the avoidance of doubt I make the following orders in respect of the four reliefs:

Relief No. 1: I declare that the President has no power vested in him (by executive or administrative action) to suspend or withhold for any period whatsoever the statutory allocation due and payable to Lagos State Government pursuant to the provision of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999 in respect of the 20 Local Government Areas for the time being provided by Section 3(6) of the Constitution and not in respect of the new Local Government Areas created which are not yet operative.

Relief No. 2: I declare that the intention or proposal of the Federal Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999 will if carried out be unlawful and contrary to the provisions of the said Constitution, in respect of the 20 Local Government Councils for the time being recognized by Section 3(6) and Part 1 of the First Schedule to the Constitution.

Relief No. 3: I make an order compelling the defendant to pay immediately all outstanding statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 165(5) of the Constitution of the Federal Republic of Nigeria, 1999 in respect of the 20 Local Government Councils for the time being recognized by Section 3(6) and Part 1 of the First Schedule to the Constitution.

Relief No. 4: I hereby order perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive Branch of the Federal Government from doing anything whatsoever to suspend, withhold, for any period whatsoever or calculated to suspend or withhold any monies due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria, 1999 in respect of the 20 Local Government Councils for the time being recognized by Section 3(6) and Part 1 of the First Schedule to the Constitution.

In summary, I decide the reliefs in the counter-claim as follows:

Relief No. 1: The plaintiff has the power under sections 7(1) and 8(3) of the Constitution to create new Local Government Areas as done in Law No. 5 and the 2004 Law. The declaration sought is therefore refused.

Relief No. 2: The defendant has the power under the Constitution to create new Local Government Areas but the new Local Government so created will not take effect or come into operation until the National Assembly passes an Act to amend Section 3(6) and Part 1 of the First Schedule to the Constitution. The declaration sought is therefore refused.

Relief No. 3: The defendant has the power under the Constitution to enact Law No. 5 of 2002 and 2004 Law but the new Local Government

Areas so created cannot take effect or come into operation until the National Assembly accordingly amends Section 3(6) and Part 1 of the First Schedule to the Constitution. Therefore, the declaration sought can only be granted in part. That is to the extent that the new Local Government Areas cannot take effect until the National Assembly passes the consequential Act B under Section 8 subsection (5) of the Constitution.

Relief No. 4: So far the Local Government Areas recognized by the Constitution are those contained in Part 1 of the First Schedule to the Constitution. The declaration sought is therefore granted. C

Relief No. 5 Sections 1, 2 and 3 of the New Local Government Areas Law No. 5 of 2002 in fact constitute the Law which was enacted by the plaintiff in accordance with the provisions of Section 7(1) and 8(3) of the Constitution. The Law is therefore valid even though it is not yet operative. Consequently, the declaration sought cannot be granted and is hereby D refused.

Relief No. 6: The 57 Local Government Areas established by Law No. 5 are inchoate until the National Assembly passes the Act necessary under Section 8(5) of the Constitution. Therefore the new 57 Local Government E Councils are not entitled to receive fund from the Federation Account. Accordingly the declaration sought is granted.

Relief No. 7: The declaration being sought to the effect that the elections conducted by the plaintiff on 27th March, 2004, cannot take effect F since they are inchoate cannot be granted because not all the parties interested in the elections, namely the chairmen-elect as well as the Lagos State Independent Electoral Commission have been joined in this case.

Relief No. 8: The order required to nullify the elections held on 27th G March, 2004, into the Councils of the 57 new Local Governments cannot be granted for the same reason given under relief No. 7

Relief No. 9: The order to restrain the Lagos State Government, the Lagos State Houses of Assembly or any functionaries or agencies of the plaintiff not to maintain, finance and recognize any Local Government in H Lagos State apart from those created under Part 1 of the First Schedule of the 1999 Constitution is vague since the National Assembly could at any time it deems fit exercise its powers under Section 8(5) of the Constitution to

amend Section 3(6) and Part 1 of the First Schedule to the Constitution. Therefore the order cannot be granted and it is hereby refused.

In sum, the plaintiff's action succeeds. I grant all the reliefs sought but applicable only to the 20 Local Government Areas specified in Part 1 of the First Schedule to the Constitution. The counter-claim by the defendant succeeds in part. Reliefs Nos. 3 (as modified), 4 and 6 are granted while Reliefs Nos. 1, 2, 5, 7, 8 and 9 are refused.

I make no order as to costs.

C

EDOZIEJSC

The main constitutional issues raised in this case border on the proper interpretation of Section 162(5) of the 1999 Constitution with respect to the Plaintiff's claims and Section 8(5) of the said Constitution with respect to the Plaintiff's claims and section 8(5) of the said Constitution in relation to the Defendant's counter-claim. In regard to the former provision which is clear and unambiguous, a State Government is entitled to the amount standing to the credit and for the benefit of its local government from the Federation Account. Consequently the President has no power under any circumstance to suspend or withhold the statutory allocation from the Federation account due to the Lagos State for the benefit of its local government councils. As regards the latter provisions, it is my view that although by virtue of Sections 7(1) and 8(3) of the Constitution, a state government is vested with the power to create new local government areas within its domain, that power is not absolute but subject to an Act of National Assembly amending Section 3 and Part 1 of the First Schedule to the Constitution and until such an Act is enacted any new local government area purportedly created by any State government is inchoative and not properly constituted. With profound respect, I am unable to agree with the Defendant's view that Section 8(5) of the Constitution is irrelevant in the process of the creation of new local government areas. To adopt that reasoning will render redundant subsection (6) of Section 8 of the Constitution and inconsistent with the settled principle of construction of statute to the effect that the legislature does not use any word in vain: see *U.T.C. (Nig) Ltd. v. Pamotei* (1989) 3 S.C. (Pt. 1) 79; (1989) 2 NWLR (Pt.

103) 244 at 303, Tukur v. Government of Gongola State (1989) 9 S.C. I; (1989) 4 NWLR (Pt. 177) 507 at 579. It is, therefore, my view that although Law No. 5 of 2002 of Lagos State having been enacted as provided by law is valid and a subsisting law of Lagos State, the 57 local government areas purportedly created thereby do not enjoy the status of local government areas under the Constitution. B

In the light of the foregoing, the Plaintiff's claims succeed in their entirety but the Defendant's counter-claim succeeds partially. I am entirely in agreement with the detailed analysis of the constitutional issues as admirably set out in the leading judgment of my learned and noble brother, Uwais, CJN. I subscribe to the consequential orders made in the said judgment. C

D

AKINTANJSC

I had the privilege of reading the leading judgment just delivered by my learned brother, Uwais, CJN. He has painstakingly set out in full the claim, and the counter-claim, the facts of the case as presented by the parties, and the submissions made by all the learned counsel in the case. I therefore do not intend to repeat them. I entirely agree with his reasoning and conclusions, I will however like to proceed to express my following opinion on both the plaintiff's claim and the defendant's counter claim. E

Plaintiff's claim is for: F

“(1) A declaration of the question whether or not there is power vested in the President of the Federal Republic of Nigeria (by executive or administrative action) to suspend or withhold for any period whatsoever the statutory allocation due and payable to Lagos State Government pursuant to the provisions of Section 162 (5) of the Constitution of the Federal Republic of Nigeria 1999. G

2. A declaration that the present intention or proposal of the Federal Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section. 162 (5) of the Constitution of the Federal Republic of Nigeria 1999 will, if carried out be unlawful and contrary to the provisions H

of the said Constitution.

3. *A consequential order of this Honourable court compelling the defendant to pay immediately all outstanding statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 165 (5) of the Constitution of the Republic of Nigeria. 1999*

4. *An order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive Branch of the Federal Government from doing anything whatsoever to suspend, withhold, for any period whatsoever or calculated to suspend or so to withhold any monie due and payable to the Lagos State Government pursuant to the provisions of Section 162 (5) of the Constitution of the Federal Republic of Nigeria.”*

It is not in doubt that this claim arose as reaction of the plaintiff to the action taken by the Federal Minister of Finance on the directive of the President contained in his letter dated April 8, 2004 and titled: Local Government Elections and Allocation of Funds from the Federation Account to LGAs. The Minister had withheld the funds meant for Lagos State Local Governments under Section 162 (2) of the 1999 Constitution.

The main point for consideration is the constitutional role or power of the President to control funds from distributable pool account created in Section 162 (1) of the 1999 Constitution. The relevant sub-sections of Section 162 which call for interpretation in this regard are Section 162 (1), (2), (3), (4), (5), & (6). The said sub-sections of Section 162 read as follows:

“(1) The Federation shall maintain a special account to be called “the Federation Account” into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation. Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the Residents of the Federal Capital Territory. Abuja.

(2) The President, upon the receipt of advice from the Revenues Mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take

into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density. Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.

(3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the local government councils in each State on such terms and in such manner as may be prescribed by the National Assembly.

(4) Any amount standing to the credit of the States in the Federation Account shall be distributed among the States on such terms and in such manner as may be prescribed by the National Assembly.

(5) The amount standing to the credit of local government councils in the Federation Account shall also be allocated to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.

(6) Each State shall maintain a special account to be called State Joint Local Government Account into which shall be paid all allocations to the local government councils of the State from the Federation Account and from the Government of the State.”

The provisions dealing with Public Revenue is under Part C of the Constitution. The bulk of the revenue accruing to the Federation are collected by the various Federal Government Departments such as: the Federal Inland Revenue Department and the Custom and Excise Department. All the funds so collected, except those expressly excluded in Section 162 (1), are paid into the Federation Account. Disbursements from that account are as prescribed also in the Constitution. The procedure laid down is that the President would first seek for and receive advice from the Revenue Mobilisation Allocation and Fiscal Commission. He would then table before the National Assembly proposals for revenue allocation from the Federation Account. The National Assembly is required to set out the modalities for the disbursement of the fund from the said account. Under the Constitution, the three tiers of government, that is, the Federal, the State and the Local Governments are to share the funds

in the said Federation Account in line with the guidelines laid down by the National Assembly.

The Federal Government would receive its own allocation from the Account. So also are each of the States in the Federation. But in the case of
 B the Local Governments, their allocations do not go to them directly. They are required in Section 162 (5) of the Constitution to be paid “*to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly*” (Emphasis supplied) by me.
 C It is clear from the above provision of Section 162 (5) that the National Assembly is constitutionally empowered to prescribe the terms and manner governing the disbursement of the funds due to the Local Government and paid “*to the States for the benefit of their local government councils.*” In other words, the National Assembly has the constitutional power
 D to enact an Act setting out the terms and manner governing the funds so disbursed and meant for the local government council.

In addition to whatever conditions the National Assembly may prescribe in any Act passed for that purpose, Section 162 (6) also provides
 E that each State “*shall maintain a special account to be called ‘State Joint Local Government Account’ into which shall be paid all allocations to the local government councils of the State from the Federation Account and from the Government of the State.*” It is clear from the above provisions of Section
 F 162 (6) that the States are not to keep the allocation received on behalf of their local government councils as its own money. Rather, such funds are required to be paid direct into the special account known as the State Joint Local Government Account and into which each State is also required in Section
 G 162 to add its own contribution to the Local Councils in the State on such terms and in such manner as may be prescribed by the House of Assembly of the State - as per Section 162 (8).

Failure of the State Government to, for example, open and maintain the State Joint Local Government Account, or not to pay a percentage of its
 H income into the said account or to divert the money in the said account for use other than for what they are meant, would constitute a breach of the relevant provisions of the Constitution. Any such breach would, in my view, be actionable in a court of law and cannot be enforced by executive sanction

unless such is provided for in any Act passed by the National Assembly under Section 162 (5) and 162 (7) of the Constitution. As it appears that the National Assembly is yet to pass any such laws, it will be unconstitutional for the President or any arm of the Executive to assume the role not specifically conferred on him under the Constitution.

Nigeria is a federation and operates a federal constitution. An important attribute of a federal constitution is that there is a division of power between the centre or the Federal Government, and the States. The powers and roles given to each of the governments are as defined and set out in the Constitution. None of the governments is allowed to step out of its assigned field. If it does, whatever it does outside its assigned field will be unconstitutional and will be declared null and void by the court. This constitutional position is aptly stated by Professor M.P. Jain in his book: M.P. Jain. Indian Constitutional Law. 3rd Edition; 1978, (N.M. Tripathi), page 241 as follows:

“According to a famous aphorism, federalism connotes a legalistic government. There being a division of powers between the Centre and the States, none of the governments can step out of its assigned field: if it does so, the law passed by it becomes unconstitutional. Questions constantly arise whether a particular matter falls within the ambit of one or the other government. It is for the courts to decide such matters for it is their function to see that no government exceeds its powers.”

This therefore brings to fore the important responsibility which the courts have to shoulder when interpreting the provisions of the Constitution. Well established rules of interpretation require that the meaning and intention of the framers of a constitution must be ascertained from the language of that constitution itself: (see *In re The C. R and Berar Act 1938* (1939) F.C.R. 18 at 36; *Keshavan Madhava Menon v. Bombay* (1951) S.C.R. 228 at 232 ('51) ASC. 128; and *A. K. Gopalan v. The State* (1950) SCR 88 at 120 ('50) ASC 27 per Kania, C.J.). The position is well stated by H.M. Seervai *Constitutional Law of India, A Critical Commentary*, Vol. 1, page 19, (1975, N.M. Tripathi Bombay) as follows:

“A court of law gather the spirit of the Constitution from the language used, and what one may believe to be the spirit of the Constitution cannot prevail if not supported by the language, which therefore must be construed

according to well-established rules of interpretation uninfluenced by an assumed spirit of the Constitution. Where the Constitution has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, the court cannot limit them upon any notion of the spirit of the Constitution.”

B Applying the principles of interpretation enunciated above to the present case, nowhere in the Constitution is the President of the federal Republic expressly conferred with the power to withhold the statutory allocation due and payable to Lagos State Government or any State, for the benefit of the local government councils in Lagos State or of any State, pursuant to the provisions of Section 162(5) of the 1999 Constitution. I am strengthened in this respect by the fact that there are provisions in Section 162(3), 162 (5) and 162(7) of the Constitution conferring power on the National Assembly to make laws which could prescribe the terms and manner in which the provisions of each of the sub-section should be carried out. The fact that the National Assembly has not enacted such laws could not confer the power on the President the power to take the action he ordered in his
E aforementioned letter to the Minister of Finance.

The other question raised in the President’s letter and in the plaintiff’s claim is whether the action taken by the President could be justified by the fact that Lagos State Government created new Local Government Councils and conducted elections into them when the National Assembly was yet to pass an Act under Section 8 (5) of the 1999 Constitution making “*consequential provisions with respect to the name and headquarters of states of local government areas as provided in Section 3 of this Constitution and Parts I and II of the First Schedule to this Constitution.*”

G The affidavit evidence supplied is, inter alia, to the effect that the Lagos State Government passed a law creating additional local government councils by which the number of Local Government Councils in the State were increased from 20 to 57. It is contended by the defence that the action of the
H State Government was unconstitutional and as such the President was right in withholding the allocations due from the Federation Account to the State meant for the benefit of the Local Government Councils in the State. The step taken by the Lagos State Government was under Section 8 (3) of the 1999

Constitution. The said Section 8 (3) provides as follows:

“8- (3) A bill for a law of a House of Assembly for the purpose of creating a new local government area shall only be passed if -

(a) a request supported by at least two-thirds majority of members (representing the area demanding the creation of the new local government area) in each of the following; namely -

(i) the House of Assembly in respect of the area, and

(ii) the local government councils in respect of the area.

is received by the House of Assembly:

(b) a proposal for the creation of the local government area is therefore approved in a referendum by at least two-thirds majority of the people of the local government area where the demand for the proposed local government area originated:

(c) the result of the referendum is then approved by a simple majority of the members in each local government council in a majority of the local governments councils in the States: and

(d) the result of the referendum is approved by a resolution passed by two-thirds majority of member of the House of Assembly”.

The National Assembly is required in Section 8(5) of the Constitutions to pass a law making *“constitutional provisions with respect to the names and headquarters of a State or local government areas as provided in Section 3 of this Constitution and in Parts I and II of the First Schedule to this Constitution”*. Part I of the First Schedule sets out the names of the local government areas in each State of the Federation while in Part II of the same schedule similar provisions are made in respect of the Area Councils in the Capital Territory, Abuja.

Section 8 (5) & (6) of the Constitution provides as follows:-

“8(5) An Act of the National Assembly passed in accordance with this section shall make consequential provisions with respect to the names and headquarters of State or local government area as provided in Section 3 of this Constitution and in Parts I and II of the First Schedule to this Constitution.

(6) For the purpose of enabling the National Assembly exercise the powers conferred upon it by subsection (5) of this section, each house of

Assembly shall, after the creation of more local government areas pursuant to subsection 3 of this section, make adequate returns to each House of the National Assembly.” (Emphasis supplied by me).

The above constitutional provisions clearly show that the process of creation of new local government councils is entirely a State affair. This is why it is provided in Section 8 (5) that the National Assembly is only required to make “*consequential provisions*” with respect to the names and headquarters councils as provided in Section 3 and Parts I and II of the First Schedule. Also in Section 8 (6), the House of Assembly is required to make adequate returns to the National Assembly “*after the creation of more local government areas*” to enable the National Assembly make the said “*consequential provisions*” under Section 8(5).

The word “Consequential” is defined in The New Webster’s Dictionary of the English Language, International Edition, 1997 Printing, page 207 thus: “*Following as a consequence or corollary*”. Also the word “*consequence*” is defined on the same page of the same dictionary as: “*That which follows something and arises from it*”. The same word- “*consequence*” is also defined in Black’s Law Dictionary, 6th Edition, 1990, page 306 thus: “*The result following in natural sequence from an event which is adapted to produce, or to aid in producing such result; the correlative of cause*”. Also in The Concise Oxford Dictionary of Current English, 5th Edition, 1964 reprint, page 258, the word “*Consequential*” is defined as: following as a result; following logically; logically consistent. I have no doubt that none of the definitions of the word “*consequential*” or “*consequence*” given above could lead to the inference that the role which the National Assembly has to play in Section 8 (5) of the Constitution is part of the process of creation of new local government councils. I believe that the process of creating the new local government councils has been completed before the National Assembly is called upon to perform its own role under Section 8 (5) of the Constitution. It is therefore not correct to say that the process overeating the new local government councils by the Lagos State was incomplete or inchoate until the National Assembly carries out its role under Section 8(5) of the Constitution. Similarly, I also hold that, in the absence of any Act of the National Assembly passed under Section 162 (5) and 162 (7) restricting

or prohibiting the newly created local government councils from benefiting from the revenue accruing from the Federation Account, it will be totally unconstitutional to withhold such fund from the newly created local government councils. I therefore, for the reasons given hereof, hold that there is merit in the four legs of the plaintiff's claim and I accordingly grant them. B

I will now proceed to deal with the defendant's counter-claim. The defendant's further amended counter-claim reads as follows:-

"1. A DECLARATION that the plaintiff/defendant to the counter-claim has no power or right under the 1999 Constitution to abolish Local Government Areas created under 1999 Constitution by altering their names, C adjusting their boundaries and dividing them into smaller units until the National Assembly has acted pursuant to the Provision of Section 8(5) of the 1999 Constitution.

2. A DECLARATION that the plaintiff/defendant to the counter-claim has no power or right under the 1999 Constitution to create new Local Governments without resource to the National Assembly as provided for under the Constitution.

3. A DECLARATION that the alteration of the names of Local Governments, the alteration of the boundaries of the Local Governments and the creation of new Local Governments done by the Lagos State Government and the operation of the new Local Governments before and or without an Act of National Assembly to that effect, is illegal, unconstitutional, null F and void.

4. A DECLARATION that the following Local Governments are the only Local Governments established under the 1999 Constitution in Lagos State: Agege. Ajeromi-Ifelodun. Alimosho. Amuwo-Odofin. Apapa. Badagry. Epe. Eti-Osa. Ibeju/Lekki. Ifako-Ijaye. Ikeja. Ikorodu. Kosofe. Lagos Island. Lagos Mainland. Mushin. Ojo. Oshodi-Isolo. Shomolu. Surulere.

5. A DECLARATION that Sections 1. 2 and 3 of the Local Government Areas Law No. 5 of 2002 of Lagos State are in contravention of Section 3 (6) and Part I of the First Schedule to the Constitution of the Federal Republic of Nigeria. 1999 and therefore are unconstitutional, null and void in so far as they purported to alter the provisions of the said Section 3 (6) and Part I of the First Schedule to the 1999 Constitution with respect to Lagos State H

6. A DECLARATION that the 57 Local Government Areas established by the Local Government Area Law No. 5 of Lagos State are not entitled to benefit from the Federation Account.

B 7. A DECLARATION that the elections conducted by the Lagos State Government on Saturday, 27th March, 2004 into the 57 Local Government Areas created by the Local Government Areas Law No. 57 of 2003 of Lagos State are inchoate and cannot take effect as presently established in that the 57 Local Government Areas are not known to the Constitution.

C 8. AN ORDER nullifying and setting aside the elections conducted by the Lagos State Government on Saturday, 27th March, 2004 into the 57 Local Government Councils established by the Local Government Areas Law No. 57 of 2003 of Lagos State.

D 9. AN ORDER OF INJUNCTION restraining the Lagos State Governor, the Lagos State House of Assembly or any functionaries or agencies of the Lagos State Government from maintaining, financing and recognizing any Local Government in Lagos State apart from the ones created
E under Schedule 1 of 1999 Constitution.”

As I have earlier above held that the newly created local government councils were properly created and that it was improper to even withhold the allocation of funds from the Federation Account from them and for the other reasons legs 1,2,3,4,5, and 6 of the counter-claim cannot be granted. I
F therefore refuse those legs of the counter-claim and I dismiss the counter-claim as it relates to those legs.

In legs 7, 8 and 9 of the counter-claim the defendant is praying this court, inter alia, for a declaration that the election conducted by the Lagos
G State Government on 27th March, 2004 into the 57 Local Government Areas as inchoate and cannot take effect; for an order nullifying and setting aside the said elections and for injunction restraining the Lagos State Governor, the State House of Assembly or any functionaries or agencies of Lagos State
H from recognizing the newly created Local Government Councils. The present defendant is definitely not the only party to the conduct of the said elections. There are the various contestants in the elections such as the State Independent Electoral Commission who conducted the elections among

others. All these people are not joined in the present case. So also is the State House of Assembly. It follows therefore that all the parties necessary in the case in respect of legs 7, 8 and 9 of the counter-claim are not before this court, an important condition that must be present before this court could rightly assume jurisdiction in respect of those legs of the counterclaim were missing. The court is therefore not competent to assume jurisdiction in respect of legs 7, 8 and 9 of the counter-claim. Those three legs are therefore struck out: see *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341. B

In conclusion and for the reasons I have given above, and the fuller reasons given in the lead judgment just delivered by my learned brother, Uwais, CJN., which I was privileged to have read and which I entirely endorse, I also grant the plaintiff's claim, dismiss legs 1 to 6 of the counterclaim and strike out legs 7, 8 and 9. I make no order on costs. C

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