

SUPREME COURT OF NIGERIA
23RD JANUARY, 2004. SC. 316/2001
CORAM:- S. M. A. BELGORE, U. MOHAMMED,
A. I. IGUH, A. I. KATSINA-ALU, S. O. UWAIFO,
A. O. EJIWUNMI, N. TOBI, JJSC

FEDERAL REPUBLIC OF NIGERIA COMPLAINANT
VS.

1. ALHAJI MIKA ANACHE (M)
2. CHIEF ASEBIYI OLAFISOYE (M) ACCUSED
3. MR. ADEYEMI OMOWUNMI (M)
4. MR. MILTON PAUL OHWOVORIOLE (SAN) (M)

AND

IN RE: CHIEF ADEBIYI OLAFISOYE (M) APPELLANT

CONSTITUTIONAL LAW - Chapter II 1999 Constitution - Justiciability -
By a joint reading of s. 15 (5) and item 60 (a) of the exclusive legislative list
- Chapter 2 becomes clearly and obviously justiciable (H6)

CONSTITUTIONAL LAW - Federalism - Australian Constitution - The
interpretation of the Australian federal system - Cannot be the basis for
the interpretation of the Nigerian Constitution (H13)

CONSTITUTIONAL LAW - Federalism - Concurrent legislative power -
Power to legislate in order to prohibit corrupt practices and Abuse of
power - Is concurrent and can be exercised by the federal and state
governments (H10)

CONSTITUTIONAL LAW - Federalism - Legislative powers of the
National Assembly - By virtue of item 60(a) - Are extended beyond the
federation - To cover “any part thereof” (H7)

CONSTITUTIONAL LAW - Interpretation - A dead Constitution cannot
be resuscitated - For the purpose of interpreting a current Constitution -
To give birth to an implied term (H3)

CONSTITUTIONAL LAW - Interpretation - Judicial precedents - Courts
- The judge is bound to interpret the provisions as laid down - Whether they agree with ideal principles of federalism or not - As was done in A-G Ondo State v. A-G Federation (H1)

CONSTITUTIONAL LAW - Legislative power of the National Assembly
- ICPC Act 2000 - By virtue of item 60(a) of the Exclusive legislative list
- The National Assembly has the power to enact the ICPC Act 2000 (H8)

CONSTITUTIONAL LAW - Legislative Powers of the National Assembly
- It has no power to enact s. 26 (3) of the Corrupt Practices and Related Offences Act 2000 - As it is ultra vires its powers (H17)

CONSTITUTIONAL LAW - Legislative Powers of the National Assembly
- It has power to enact ss. 9 (1) (a), 9 (1) and 26 (1) (c) - Of the Corrupt Practices and Related Offences Act 2000 (H16)

CONSTITUTIONAL LAW - Legislative Powers of the National Assembly
- The Constitution confers powers on the National Assembly - To make laws with respect to offences arising from - Connected with or pertaining to corrupt practices and abuse of power (H15)

CONSTITUTIONAL LAW - S. 15 (5) 1999 Constitution - Interpretation
- It is the Federal Republic of Nigeria as a state - That is looked upon to take steps to abolish all corrupt practices and abuse of power (H12)

CONSTITUTIONAL LAW - Statutes - Interpretation - Where a constitutional provision is clear and unambiguous - The court cannot read into the provision an implied term (H2)

COURTS - Hypothetical points - Courts do not decide hypothetical cases
- Which have no bearing with the case the court is called upon to decide (H4)

JUDICIAL PRECEDENTS - Distinguishing - The case of A-G Ondo State v. A-G Federation - Is not relevant to this matter - As the ICPC Act does not impose any legal duty on the state governor (H5)

JUDICIAL PRECEDENTS - Stare decisis - Decisions of foreign countries - Are merely of persuasive authority in Nigeria (H14)

STATUTES - ICPC Act 2000 - Contents - The Act does not legislate with respect to the entire wide field of fraud (H9)

WORDS & PHRASES - “State“ - Meaning of - Varies in international and municipal law (H11)

FACTS

The appellant herein was charged along with three other persons before the high court of the Federal Capital Territory on two counts under the Corrupt Practices and Other Related Offences Act, 2000. The counts charged the appellant and others with conspiring to give a gratification of N3,500,000.00 to the 1st accused a member of the Judicial Commission of Inquiry for the investigation of the management of Nigeria Airways Limited. They were also charged with giving the said gratification. The appellant objected to the Jurisdiction of the high court on the ground that the Corrupt Practices and other Related Offences Act 2000 is unconstitutional and void.

The court overruled the objection in its ruling and relying on the earlier case of Federal Republic of Nigeria v. Andrew Tyem & Others, suit No. CR/2/2001, the court came to the conclusion that the National Assembly validly enacted the said Act. The appellant appealed to the Court of Appeal against the ruling of the high court. The lower court by way of case stated has now referred two questions to the Supreme Court.

QUESTIONS REFERRED TO THE SUPREME COURT

"1. Whether the combined effect of the provisions of sections 4(2), 15(5), items 60(a), 67 and section 68 in Part I of the Second Schedule

and Section 2(a) of Part III of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, confer powers on the National Assembly to make laws for the peace, order and good government of the Federal Republic of Nigeria with respect to offences arising from, connected with or pertaining to corrupt practices and abuse of power.

(ii) In the light of the answer to Question (i), whether the National Assembly has power to enact sections 9(1)(a), 9(1), 26(1)(c) and 26(3) of the Corrupt Practices and Related Offences Act, 2000.”

ISSUES FOR DETERMINATION

“(i) Whether the National Assembly has the requisite power to enact the Corrupt Practices and Other Related Offences Act, 2000.

(ii) Whether the creation of offences in the Corrupt Practices and Other Related Offences Act, 2000 does not amount to a usurpation by the National Assembly of the powers of the State to create offences in criminal law thus rendering the Act unconstitutional and invalid.

(iii) Whether the Supreme Court can depart from its decision in Attorney-General of Ondo State V. Attorney-General of the Federation in determining this case.”

HELD (Unanimously answering the questions raised per lead judgment of **TOBI JSC**)

Interpretation - Judicial precedents

1. What did Uwais, CJN, say? He said clearly that if there is a breach of the principles of Federalism, it is the constitution, which has facilitated the breach and not him or any Judge for that matter. He went further to say that no counsel could be heard to argue on illegality when an aberration is supported by the provisions of the Constitution. In other words, it is not available to counsel to say that a constitutional provision is illegal. Uwais, CJN’s argument in the way I understand it is basically this: where a Constitution has provided for a situation, the courts are bound to interpret the provisions as laid down in the Constitution, I think Uwais, CJN, is right, the judge that he is (or can this be a mistake for Justice?) In effect, Uwais, CJN, was saying that his duty as a judge is to interpret the provisions of the Constitution whether they agree with the principles of

ideal federalism or not. His hire as a judge is to interpret the Constitution and that is what he did. It is difficult to fault him for a constitutional interpretation which, in my view, is correct in law. I think Uwais, CJN, got the point properly when he mentioned “*best ideals*” in the statement above. There are ideals of federalism propounded and developed by constitutional law scholars and political scientists the world over. These ideals and ideas (if I may so add) are goals set out to achieve true federalism. I do not think any Constitution can really achieve such goals, which are largely utopia. Such goals are ideals but by and large, and at the end of the day, Judges must interpret the provisions of the Constitution and not what Uwais, CJN, correctly called “*best ideals*”. I think that is the essence of what he said in the above statement which should not be lost to us. I do not see anything wrong with what Uwais, CJN, said in the above statement. (p. 291 A/ F)

Statutes - Interpretation

2. Where a constitutional provision is clear and unambiguous, the courts cannot read into the provision an implied term because by the clear and unambiguous provision, an implied term is impliedly forbidden to be part of the Constitution. After all, a Constitution is not a transient agreement, like contract where implied terms could be read into the wordings in the interest of the commercial transaction of the parties. This court will not accept the invitation of learned Senior Advocate to read implied terms into the 1999 Constitution just for the asking *qua* contention. Where a constitutional provision is clear and unambiguous and the courts read into them so-called implied terms, the courts will be going outside their interpretative jurisdiction and will be branded as making the law in a bad way. Let that day not come in the history of our legal system. (p. 294 A)

Use of a dead Constitution to interpret a current one

3. I do not know of any canon of statutory interpretation which vests in a court of law the power to use a Constitution which is no more in existence to interpret a current Constitution to achieve the purpose of a party in a litigation. Has this court jurisdiction to resuscitate a Constitu-

tion which is dead for the purposes of interpreting a current Constitution to give birth to a so-called implied term? How can this court do it? Where is the authority for doing that? Unfortunately, learned Senior Advocate did not cite any authority on the issue. This is quite a new learning to me and I am not prepared to learn it. (p. 294 F)

Hypothetical points

4. I do not think this court has the competence to go into the above hypothetical point. Courts of law, as most serious and scared institutions, do not build upon hypothesis, which is an idea suggested as a possible way of explaining facts or providing an argument. The adjective “hypothetical” really means that which has not been proved or shown to be real. It also connotes imaginary. Can this court rely on imaginaries to give judgement? Hypothesis by their very nature generally have no limitation and courts of law by their judgments have limitations. And the limitations are the pleadings and the briefs in trial and appellate courts respectively. A theoretical hypothetical point is not for this court or any other Nigerian Court for that matter.

In Adewumi v. The Attorney-General of Ekiti State (2002) 2 NWLR (Pt. 751) 474, the Supreme Court held that it is not given to making moot decisions or to decide hypothetical cases which have no bearing with the case the court is called upon to decide. (p. 295 B)

Distinguishing - The case of A-G Ondo State v. A-G Federation

5. I do not think the case of Attorney-General of Ogun State is relevant or apposite to this matter. In that case, this court held that neither the National Assembly nor the President has the constitutional power to regulate or interfere with the exercise by a state Governor of his executive functions. In that case, a duty was imposed on the State Governors in virtue of the Constitution of the Federal Republic of Nigeria (Adaptation of Public Order Act) Order 1981. In other words, in that case the Act imposed legal obligation on the State Governors. The ICPC Act does not impose any such legal obligation on the State Governors. I do not see any duty imposed on the Governor of a State by the ICPC Act, 2000. In the

circumstances, I do not find the decision relevant in determining the issue in this appeal.(p. 296 G)

Chapter II 1999 Constitution - Justiciability

6. In my humble view, the non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words “except as otherwise provided by this Constitution”. This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter 11 justiciable, it will be so interpreted by the courts. A community reading of Item 60 (a) and section 15 (5) results in quite a different package, a package which no more leaves Chapter 2 a toothless dog Which could only bark but cannot bite. In my view, by The joint reading of the two Provisions, Chapter 2 becomes clearly and obviously justiciable. And if I may fall Back on section 6(6)(c) of the Constitution which provided for an exception clause. It is my view that section 6(6)(c) anticipates amongst other possible provisions, the Provision of Item 60(a).

“ It is clear, therefore, that although section 15(5) of constitution is , in general, not justiciable, as soon as the National Assembly exercises its power under section 4 of the constitution with respect to item 60(a) of the Exclusive Legislative List, the provisions of section 15(5) of the Constitution becomes justiciable”. (See Contemporary Issues in the Administration of Justice: Essays in Honour of Justice Atinuke Ige, Page 127).

In the light of the above, I reject the argument of learned senior advocate for the appellant that the provisions of chapter 2 are not justiciable in virtue of section 6(6) of the constitution. I accept the argument of learned Assistant Director for the respondent that the provisions could be justiciable. (p. 300 C/ 302 E/ 305 G)

Federalism - Legislative powers of the National Assembly

7. What is the purport of Item 60 (a)? It talks of establishment and regulation of Authorities for the Federation or any part thereof. By the provision, the National Assembly’s legislative powers are extended beyond the Federation, as they cover “any Part thereof”. This provision

vindicates the law making power of the National Assembly in section 4(2)(3)(4) and (5) of the Constitution. (p. 302 G)

ICPC Act 2000 - Exclusive legislative list

B 8. It is clear to me from the above that the National Assembly has the Constitutional legislative power to enact the ICPC Act, 2000, vide Item 60 (a) of the Exclusive Legislative List as the item relates to section 15 (5) of the Constitution. This is because the ICPC qualifies as an authority within the meaning of Item 60 (a). A further search for legislative power of the National Assembly to enact the ICPC Act, 2000 takes me to the omnibus provisions of items 67 and 68 of the Exclusive legislative List. They provide:

D “67. Any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this constitution.

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

E In my view, a joint reading of the legislative powers of the National Assembly under section 4 and the above two items, vests in the National Assembly the power to make laws for the peace, order and good government of the Federation with respect to matters the National Assembly is vested with such law making powers, including any matter F incidental or supplementary thereto. (p. 303 C/ 304 B)

ICPC Act 2000 - Contents

G 9. The impression is created at pages 30 and 31 of the appellant’s brief that the ICPC Act punishes the offences of fraud simpliciter. With respect, I do not agree with that contention because it is not borne out from the Act. The Act does not “legislate with respect to the entire wide field of fraud” as claimed by learned senior Advocate. I seem to see only H two fraud related offences in the Act. Section 12 is one. Section 13 is another. While section 12 provides for the offences of fraudulent acquisition of property, section 13 provides for fraudulent receipt of property. Where lies the claim that the Act legislates on the “entire wide field of

fraud “? I do not see it. (p. 307 H)

Federalism - Concurrent legislative power

10. The above is the correct position of the law of concurrent legislative power, if I may so put it. And the position taken by Uwais, CJN, is consistent with the above definition when he said that the power to legislate in order to prohibit corrupt practices and abuse of power is concurrent and can be exercised by the Federal and State Governments. In my view, The words “*and can be exercised by the Federal and State Governments,*” are definitive of concurrent powers and I so hold. It was in the light of the concurrent nature of the legislative powers that Uwais, CJN, by implication, invoked the doctrine of covering the field in the statement above in Attorney-General of Ondo State case. C

Is there any meaningful difference between the expression “*con-* D
current” and “*division of powers*”, as they relate to the federal and state governments legislating on the concurrent legislative list? Division of powers, which is one of the greatest attributes or one of the brides of federalism, involves the division of legislative powers between the fed- E
eral and state governments. Again, let me fall back on Professor Nwabueze who said:

“*The federal arrangement under the presidential Constitution assigns to the federal government power over enumerated matters, leaving to the state governments, the residue of matters not so enumerated, called re-* F
sidual matters. The enumeration of matters within the competence of the federal government is done partly by enumeration under two lists sched-
uled to the Constitution (2nd Schedule).”

In the context of the constitutional arrangement in the 1999 Con- G
stitution and particularly on the provisions on corruption I have examined above, the distinction drawn between concurrent and division of powers is not sacrosanct. This is because at the end of the day, we must agree with Uwais, CJN’s conclusion that corrupt practices and abuse of power H
is concurrent to both the Federal and State Governments. (p. 310 C)

Meaning of "state"

11. That takes me to the meaning of "State" under section 15(5) of the Constitution. The word "State" conveys different meanings in different circumstances. In international law, it means a nation with full status of statehood, as a sovereign entity. In this context, it is regarded as a person in international law with power to sue and be sued in the State name. It must go beyond *status nascendi*. In municipal law, our focus, it also conveys the above meaning. That apart, in municipal law it could also mean component parts of the nation. That is one meaning of the expression as in Section 4(6) of the Constitution. (p. 311 B)

S. 15 (5) 1999 Constitution - Interpretation

12. I think this court dealt with the issue in Attorney-General of Ondo State v. Attorney-General of the Federation (supra). Uwaifo, JSC, appropriately dealt with the issue when he said at page 392:

"That takes me straight to section 14(1) which provides that 'the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice'. It is plain that it is the Federal Republic of Nigeria, as a State, that is looked upon under the Constitution to take steps, or perhaps to spearhead the policy, to abolish all corrupt practices and abuse of power".

I entirely agree with the above construction. It cannot be otherwise. I can move a bit further. Section 14(1), which defines a State in terms of the Federal Republic of Nigeria, is a sub-section in Chapter II of the Constitution on Fundamental objectives and Directives Principles of State Policy. The word "State" in section 15(5) immediately after section 14 in the same Chapter II cannot bear any other meaning. The Federal Republic of Nigeria as a State, is wider in operational scope than the definition of government in sections 318 (1) of the Constitution, as it conveys the meaning in section 1 of the constitution. After all, words used in proximate sections will be presumed to have the same meaning and will be so construed unless it is clear from the particular section that the word is used in a completely different sense and therefore conveys a completely different meaning. I think this is a correct canon of statutory interpretation.

From whichever side one looks at the coin, the construction placed on section 15(5) by Uwaifo, JSC, is correct. (p. 311 H)

Federalism - Australian Constitution

13. Learned Senior Advocate cited some Australian authorities on federalism and the doctrine of state autonomy. He urged the court to follow the decisions, which were given on the Australian Constitution. The Australian Constitution was enacted under different economic, political, social and cultural background and circumstances. The Nigerian Constitution was enacted under different economic, political, social and cultural background and circumstances. B
C

The above apart, the Australian Constitution is not the best example in terms of exactness or nearness to the Nigerian Constitution. I would like to think that although Australia operates a federal Constitution, it should be one of the last places that counsel should rely on the decisions of that country's High Court, which is the equivalent of Nigeria's Supreme Court. The interpretation of the federal system of government in Australia cannot be basis for the interpretation of the Nigerian Constitution for the following reasons: Firstly, the constitutional arrangement in Australia is quite different from ours. There are State Constitutions in Australia as provided in section 106 and 121 of the constitution. The constitutional implication of state autonomy is clearer than a federal Constitution such as ours, which has no provision for State Constitutions. D
E
F

Secondly, Australia operates a parliamentary system of government while Nigeria operates a presidential system of government.

Thirdly, the Australian Constitution does not contain fundamental objectives and directive principles of state policy, and therefore has not the provisions of section 15, items 60, 67 and 68 of the Exclusive Legislative list that have been interpreted in this reference. And this is most material. G

Fourthly, the Australian constitution, which provides for powers of Parliament, contains 39 matters in the Legislative List under section 51. The Nigerian Constitution provides for 68 items in the Exclusive Legislative List. A court of law cannot follow the bandwagon and interpret the Constitution to suit popular ideas. Rather a court of law must interpret the H

provisions of the Constitution and nothing more and nothing less.
(p. 313 E)

Stare decisis - Decisions of foreign countries

B 14. Decisions of foreign countries are merely of persuasive authority. This court will certainly allow itself to be persuaded in appropriate cases but this court will not stray away from its course of interpreting the Nigerian Constitution by resorting to foreign decisions which were decided strictly in the context of their Constitutions and which are not similar to ours. (p. 316 C)

National Assembly & offences on corrupt practices

D 15. I think what is left now is to take the two questions and answer them for the Court of Appeal. My answer to question 1 is “YES”. (p. 317 B)

National Assembly has power to enact ss. 9(1)(a), 9(1) & 26(1)(c)

E 16. My answer to Question 2 is also “YES”, as the answer relates to and affects sections 9(1)(a), 9(1) and 26(1)(c). (p. 317 B)

National Assembly - No power to enact s. 26(3) of Corrupt Practices Act

F 17. My answer to Question 2 as it relates to and affects section 26(3) is “NO” because the subsection is unconstitutional, and it is ultra vires the law making powers of the National Assembly. The subsection was struck out in Attorney-General, Ondo State v. Attorney-General of the Federation (supra). I reject the submission of learned Assistant Director on the subsection. (p. 317 B)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. The status of a repealed law

H Let me pause here and deal briefly with learned Senior Advocate’s reference to the repealed Corrupt Practices Decree, 1975. It is wrong in law to refer to a repealed law in the way learned Senior Advocate did. A repealed law no more has legal life as it does not exist any longer; it

cannot be cited as if it still exists. If it must be cited at all, it must be cited as a repealed law, which has no life to influence an argument. A repealed law cannot be basis for any comparison with existing law. It cannot be quoted side by side with existing law as learned Senior Advocate did. I shall not deal with the Corrupt Practices Decree, 1975 in this judgement. B I have enough in the ICPC Act to determine the fortunes of the reference before this court. (p. 274 G)

2. Formulation of issue *suo motu* by the Supreme Court

Although order 6 of the Supreme Court Rules does not provide that the court can *suo motu* formulate issues for determination, there could be compelling situations when there will be need for such an exercise. If such situations arise, there may be need to get the reaction of counsel, which could be brought to their notice during the hearing of the appeal. D That will go in a big way to comply with the fair hearing principles in our law. (p. 281 G)

3. Definition and purpose of a supplementary brief

That takes me to the supplementary brief. The Rules of this court do not provide for supplementary brief. In Okpara v. Ibeme (1989) 2 NWLR (Pt. 102) 208, the Supreme Court held that apart from the fact that there does not appear to be any authority for filing a supplementary brief, there is no provision in the rules for filing a supplementary brief without leave of court. The implication of this decision is that a supplementary brief could be filed with leave of this court. In Chief Okenwa v. Military Governor, Imo State (1996) 6 NWLR (Pt. 455) 394, this court accepted a supplementary brief “*in support of the new issue*”. G

A supplement is an addition. A supplementary brief is therefore an additional brief. It adds to or complements an existing brief, which is the main brief. In human life and human conduct, an addition usually comes by way of new knowledge which the person acquired after the original work or thing; or an improvement of existing knowledge. It is also an extra information.

A supplementary brief should therefore show additional knowl-

edge by way of additional law dovetailed with new facts or factual situation in the brief. It should contain new “discoveries”. It is not a repetition of existing law or existing fact in the original brief. Supplementary brief should be an improvement on the original brief and not a repetition of it. The so-called supplementary brief is essentially a repetition of the original brief. The old stuff of sections 4, 15(5), Items 60(a), 67 and 68 is re-echoed in the brief almost to an annoying point; but I will not be annoyed. (p. 283 C)

C 4. *When a reply brief should be filed*

And finally on the briefs. I take the reply brief. The main purpose of a reply brief is to answer any new points arising from the respondent’s brief. See Okpala v. Ibeme (supra). A reply brief is filed when an issue of law or argument raised in the respondent’s brief calls for a reply. See Nwali v. The State. Where a reply brief is necessary, it should be limited to answering any new points arising from the respondent’s brief. A new point is a fresh point, which was raised by the respondent in his brief. A reply brief cannot be used to strengthen the appellant’s brief by way of repeating the arguments made in the appellant’s brief. A reply brief is not a recitation of the appellant’s brief. Where there are no new points in a respondent’s brief, a reply brief is otiose. (p. 284 A)

F 5. *"Federalism" conveys different meanings in different constitutions*

It is clear from the above that it is wrong to sound dogmatic and final when dealing with the meaning, concept or constituents of federalism or federal government as there is in law no finality in the meaning, concept or constituents in the sense of total agreement of theorists on the word. Although the word ‘federalism’ may be knit in theories of political science, it conveys different meanings in different Constitutions, as the constitutional arrangements show, particularly in the legislative lists.

H (p. 288 G)

6. *Briefs - Aim of the last paragraph*

With respect, that is rather untidy. The aim of the last paragraph of a

brief is to give an apt summary of the brief including the relief sought. In brief writing, a very important aspect is the summary of the relief sought and that is the last important word the party wants to leave with the court. But reliefs are not presented or summarised to the court from the blues. Reliefs are presented or summarised to the court from the arguments on the body of the brief. In other words, the summary of the brief must be based on the arguments in the brief. Where the body of a brief does not contain arguments on law, it is not proper to suddenly expose the court to a summary of the position of the law, which is not available in the body of the brief. It is like removing fish from a river or aquarium. In view of the fact that the appellant has not made a case on the body of the brief, it might be difficult for me to deal with the issue at this stage. I will take it later mainly in the interest of justice. (p. 289 F)

7. *Courts are to interpret the existing law not a critique of it*

Section 4(5) of the Constitution is one clear provision on the doctrine of covering the field. The subsection reads:

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

The above provision is consistent with the doctrine of covering the field, a doctrine which has been applied by this court in a number of cases. Professor Nwabueze referred to it in the above quotation but with a critique. An academic or scholarly criticism of the greatest learning of an existing law does not wipe out the existing law. And the courts are bound to interpret the existing law and not a critique of it. (p. 298 A)

REPRESENTATION

Chief F. R. A. Williams (SAN); Professor B. O. Nwabueze (SAN); Chief Ladi Williams (SAN); T. E. Williams (SAN), M. T. Egbe (Miss), K. T. H Adediji (Miss), for appellant.

CASES REFERRED TO

Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 3 NCLR 166

McCulloch v. Maryland 4 Wheat 31 (1891)

D'Emden v. Pedder (1904) 1 CLR 91 at 111

B West v. Commissioner of Taxation (1937) 56 CLR 657 at 681

R. v. Commonwealth Court of Conciliation and Arbitration, Ex Parte Victoria (1942) 66 CLR 488

Melbourne Corporation v. Commonwealth (1947) 74 CLR 31 at 82-83.

C Okulate v. Awosanya (2000) 2 NWLR (Pt. 646) 530 at 537, (2000) 1KLR (pt 94) 119

Adisa v. Oyinwola (2000) 10 NWLR (Pt. 674) 116, (2000) 6 KLR (106) 1915

D Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt. 622) 290, (1999) 6 KLR (86) 1993

Anyankpele v. Nigerian Army (2000) 13 NWLR (Pt. 684) 209

Moriki v. Adamu (2001) 15 NWLR (Pt. 737) 666

E **STATUTES REFERRED TO**

Constitution of Nigeria 1999

Corrupt Practices and Related Offences Act 2000

ICPC Act 2000

F **BOOKS REFERRED TO**

Federalism in Nigeria (1983) at page 3, Professor B. O. Nwabueze

Justice in the Judicial Process (Essays in Honour of Honourable Justice Eugene Ubaezonu. JCA, Chapter 5)), Nweze C.C. (ed)

G

LEAD JUDGMENT BY TOBI JSC

Chief Adebisi Olafisoye is the appellant. He was charged along with three other persons before the High Court of the Federal Capital Territory on two counts under the Corrupt practices and Other Related Offences Act, 2000 I read the counts:

COUNT 1

“That you Mr. Adeyemi Omowunmi, Chief Adebisi Olafisoye and

Mr. Milton Paul Ohwovoriole (SAN), on or about the 16th day of November, 2000 at Abuja in the Abuja Judicial Division, conspired with one another to give as gratification the sum of N3,500,000.00 (Three million, five hundred thousand naira only) to Alhaji Mika Anache a member of the Judicial Commission of Inquiry for the investigation of the Management of Nigeria Airways Limited and other members of the said Commission in order to induce the members of the Commission to show favour to Chief Adebisi Olafisoye and his company. Fidelity Bond of Nigeria Limited in the discharge of the official duties of members of the Commission and thereby committed an offence contrary to section 26(1)(c) and punishable under section 9(1) of the Corrupt Practices and Other Related Offences Act 2000.

COUNT II

That you Mr. Adeyemi Omowunmi, Chief Adebisi Olafisoye and Mr. Milton Paul Ohwovoriole (SAN) on or about 16th day of November, 2000 at Abuja in the Abuja Judicial Division, gave as gratification the sum of N3,500,000.00 (Three Million, five hundred thousand naira only) to Alhaji Mika Anache a member of the Judicial Commission of inquiry for the investigation of the Management of Nigeria Airways Limited and other members of the said commission, in order to induce members of the commission to show favour to Chief Adebisi Olafisoye and his Company, Fidelity Bond of Nigeria Limited in the discharge of the official duties of the members of the Commission and thereby committed an offence contrary to section 9(1)(a) and punishable under section 9(1) of the Corrupt Practices and Other Related Offences Act, 2000."

The appellant objected to the jurisdiction of the High Court on the ground that the Corrupt Practices and Other Related Offences Act 2000 is unconstitutional and void. The objection was overruled in a ruling delivered on 24th June 2000. Basing its decision on the earlier case of Federal Republic of Nigeria V. Andrew Tyem and others, Suit No. CR/2/2001 delivered on 13th June, 2001, the court came to the conclusion that the National Assembly validly enacted the Corrupt Practices and Other Related Offences Act. The court based its decision on the combined effect of sections 4(2), 15(5), items 60(a) and 67 in part I of the Second

Schedule and section 2(a) of part III of the Second Schedule to the constitution of the Federal Republic of Nigeria, 1999. The court accordingly dismissed the objection of the appellant.

The appellant appealed to the Court of Appeal against the Ruling of the High Court of the Federal Capital Territory. The Court of Appeal referred the following questions for reference to the Supreme Court:

"1. *Whether the combined effect of the provisions of sections 4(2), 15(5), items 60(a), 67 and section 68 in Part I of the Second Schedule and Section 2(a) of Part III of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, confer powers on the National Assembly to make laws for the peace, order and good government of the Federal Republic of Nigeria with respect to offences arising from, connected with or pertaining to corrupt practices and abuse of power.*

(ii) *In the light of the answer to Question (i), whether the National Assembly has power to enact sections 9(1)(a), 9(1), 26(1)(c) and 26(3) of the Corrupt Practices and Related Offences Act, 2000."*

The Court of Appeal accordingly referred the above two questions by way of case stated in accordance with the provisions of section 295(3) of the Constitution to the Supreme Court.

As usual, parties filed and exchange briefs. Appellant formulated the following issues on the two questions for reference to this court:

Issue 1: *The Act as an exercise of power by the Federal Government.*
Issue 2: *Principles governing constitutional validity of governmental Acts in a federal system.*

Issue 3: *Whether the Act impedes or interferes with a state Government's management of its affairs.*

Issue 4: *Whether the entire Chapter 2 on Fundamental Objectives and Directive Principles of State Policy (particularly section 15(5) thereof) are a Legislative, Executive or Judicial power.*

Issue 5: *Whether the Acts is intra vires or ultra vires the National Assembly under section 4 of the 1999 Constitution.*

Issue 6: *Whether the Act is unconstitutional for uncertainty.*

Issue 7: *Whether the bad provisions of the Act can be severed."*

The Complainant, the Federal Republic of Nigeria, also filed a brief

titled “*Complainant/Appellant’s Brief of Argument*”. The Complainant/Appellant would appear to have adopted the questions of reference to this court as its issues for determination as follows:

“(1) *Whether the combined effect of the provisions of Sections 4(2), 15(5), items 60(a), and 67 and 68 in Part I of the Second Schedule and Section 2(a) of Part III of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, confer powers on the National Assembly to make laws for peace, order and good government of the Federal Republic of Nigeria with respect to offences arising from, connected with or pertaining to corrupt practices and abuse of power.*”

(2) *Whether the National Assembly has the power to enact Section 9(1)(a), 9(1), 26(1)(c) and 26(3) of the Corrupt Practices And Other Related Offences Act, 2000”.*

The “Complainant/Appellant” also filed a supplementary brief of argument with the following three issues for determination:

“(i) *Whether the National Assembly has the requisite power to enact the Corrupt Practices and Other Related Offences Act, 2000.*”

(ii) *Whether the creation of offences in the Corrupt Practices and Other Related Offences Act, 2000 does not amount to a usurpation by the National Assembly of the powers of the State to create offences in criminal law thus rendering the Act unconstitutional and invalid.*

(iii) *Whether the Supreme Court can depart from its decision in Attorney-General of Ondo State V. Attorney-General of the Federation in determining this case.”*

The appellant also filed a reply brief.

Learned Senior Advocate for the appellant, Chief F. R. A. Williams examined on issue No. 1 some of the provisions of the Corrupt Practices and Other Related Offences Act, 2000, including the powers conferred on the Director of Public Prosecutions, and the Attorney-General of Federation.

The reference in section 61(1) to the Attorney-General and to the Director of Public Prosecutions, in section 5(2) of the Act must be read as a reference to the Attorney-General of the Federation and to the Fed-

eral Director of Public Prosecutions, since the Federal Government cannot, by its law, confer functions or impose duties on State Government functionaries, learned Senior Advocate submitted. He cited Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 3 NCLR 166. He pointed out that the 1979 and 1999 constitutions contain no such provisions for the inter-delegation of functions as did the 1960 and 1963 constitutions. On issue no. 2, learned Senior Advocate contended that the constitutional validity of a governmental Act in a federal system is governed by two principles, via: (1) the *ultra vires* doctrine and (2) the doctrine of mutual non-interference.

Learned Senior Advocate submitted that the *ultra vires* doctrine is a trite principle of constitutional validity with undisputed acceptability and force, and may be stated by saying that a government Act which is beyond or in excess of powers granted by the constitution is null and void. To learned Senior Advocate, the only question arising in this case concerns the application of the doctrine, i.e. whether the Corrupt Practices and Other Related Offences Act, 2000 is *intra vires* or *ultra vires* the National Assembly under section 4 of the Constitution.

On the doctrine of mutual non-interference, learned Senior Advocate submitted that the Supreme Court misconceived the nature, basis and effect of the doctrine in Attorney-General of Ondo State v. Attorney General of the Federation which he cited as SC. 200/2001. The case has been reported in (2002) 9 NWLR (Pt. 772) 222. He criticised the statement of Uwais, CJN, in respect of a possible breach of the principles of federalism and submitted that the doctrine is the basis, the foundation of every true federal system without which no such system can exist. It lies, not outside the Constitution, but within it, operating by way of an implied prohibition against the exercise of a constitutional grant of power in a manner that in its practical effect impedes, frustrates, stultifies or otherwise unduly interferes with another government's management of its affairs or its continued meaningful existence as a government, learned Senior Advocate reasoned. He called in aid Professor B. O. Nwabueze: Federalism in Nigeria (1983) at page 3; McCulloch v. Maryland 4 Wheat 31 (1891); D'Emden v. Pedder (1904) 1 CLR 91 at 111; West v. Commis-

sioner of Taxation (1937) 56 CLR 657 at 681 and Sir Robert Garran's article titled "Development of the Australian Constitution" (1924) 40 LQR 202 at 215.

Still on the doctrine, learned Senior Advocate submitted that the doctrine rests on the pre-supposition that a government act in a federal system is within powers granted by the Constitution and that its concern is rather with the practical effect which the exercise of the power has on another government. He cited R. v. Commonwealth Court of Conciliation and Arbitration, Ex Parte Victoria (1942) 66 CLR 488; Melbourne Corporation v. Commonwealth (1947) 74 CLR 31 at 82-83.

On the principle of autonomy in a federal system, learned Senior Advocate argued that the principle implies further that neither the central government nor the regional ones can confer functions or impose duties, obligations, restrictions and liabilities on the functionaries of the other. He pointed out that this particular implication of the principle was expressly enacted in the 1963 Constitution in the provision forbidding the President as well as the federal legislature from conferring functions or imposing duties on the Governor or other functions of the State Governments without the consent of the State Governor and vice versa. He cited sections 99 and 100 of that Constitution. While these provisions are not repeated in the 1979 and 1999 Constitutions, the prohibition remains still applicable as a necessary implication of the autonomy of the federal and state governments in relation to each other, learned Senior Advocate argued. He cited Attorney-General of Ogun State v. Attorney-General of the Federation (supra).

On issue No. 3, learned Senior Advocate pointed out that the Supreme Court decision in Ondo State case is right when it said that it "is true" that "the provisions of the Act impinge on the cardinal principles of federalism, namely; the requirement of equality and autonomy of the state government", but the judgement failed to consider the specific provisions of the Act impinging those principles and the nature of interference. Counsel examined the provisions, of the Act in some considerable detail from pages 14 to 16 and ended by submitting that section 61(3) of the Act is clearly unconstitutional and void by the decision of the Su-

preme Court in Attorney-General of Ogun State v. Attorney-General of the Federation (supra).

On issue No. 4, learned Senior Advocate dealt with the plenitude of legislative power granted to the federal and state legislatures under section 4 of the 1999 constitution and non-justiciability of the Fundamental Objectives and Directive Principles of State Policy in Chapter 2 of the Constitution and its implications in relation to the question whether the Chapter is a grant of power. On the plenitude of legislative power, learned Senior Advocate said that the provision in section 4 of the Constitution authorising the federal and state legislatures to make laws for the peace, order and good government of Nigeria or any part thereof, is a grant of sovereign law-making power in its entirety and plenitude. Every subject-matter with respect to which law can be made, including corruption and abuse of office is embraced within the powers, counsel conceded. He submitted that under section 4 the federal and state legislatures, each within the limits of its power under the division of powers between them, have all the powers they need to legislate with respect to corruption and abuse of power, and that they do not need any more power to be conferred on them for the purpose by section 15(5) of the constitution.

It was the submission of learned Senior Advocate that section 15(5) and other provisions in Chapter 2 of the Constitution grant no power but only impose a duty regarding the purposes for which the powers granted by the Constitution are to be employed. To learned Senior Advocate, the Supreme Court in Ondo State case erred in law and thereby distorted the whole scheme and design of the Constitution when it held that the power to legislate in order to prohibit corrupt practices and abuse, of power in concurrent.

On section 15(5) of the Constitution, learned Senior Advocate argued that even if, in clear distortion of scheme and structure of the Constitution in the interpretation by the Hon. Chief Justice of Nigeria when he held that both the federal and state governments share the power to legislate in order to abolish corruption and abuse of office, section 15(5) is read as a grant of power to the federal and state governments, then the

power so granted is not a concurrent one, as the lead judgement erroneously says, but a divided power. Each is to legislate on corruption within the limits of its powers under the division of powers between the federal and state governments.

Still on section 15(5), learned Senior Advocate argued that the provision must draw its meaning and effect from the character of the Fundamental Objectives and Directive Principles of State Policy in Chapter 2 of the Constitution of which it is a part. The provisions of that Chapter are merely a declaration expressly made non-justiciable by the Constitution itself in virtue of section 6(6). He contended that the word “state” in section 15(5) refers, not to the federal government alone, but to both it and the state government, each within the limits of the powers assigned to it by the Constitution. To learned Senior Advocate, to read section 15(5) as directed to the federal government alone would be a manifest distortion of the unequivocal meaning and intention of section 13 of the Constitution. He referred to Archbishop Okogie v. Attorney-General of Lagos State cited as suit No. FHC/L/74/80 delivered on 30/9/80. This case has long been reported in (1981) 1 NCLR 218. He also cited Madras v. Champalan (1951) SCR 252 and submitted that the Fundamental Objectives and Directive Principles have also to conform to and run subsidiary to the autonomy of the state governments *vis-à-vis* the federal government and to the division of powers between them.

On the non-justiciability of the Fundamental Objectives and Directive Principles in Chapter 2, learned Senior Advocate submitted that the Chapter is expressly made non-justiciable by section 6(6)(c). The non-justiciability of the Fundamental objectives and Directive Principles is predicated on the premise that they are not a grant of legislative power, since, if they were, a large part of legislative power would be excluded from jurisdiction of the courts contrary to section 4(8) of the Constitution, learned Senior Advocate reasoned.

On issue No. 5, learned Senior Advocate dealt with (a) the extent of the legislative power of the Federal Government with respect to the creation and punishment of criminal offences, with particular reference to the offence corruption, fraud and related offences; (b) extent of power

conferred by item 60(a) of the Exclusive Legislative List; (c) assuming that item 60(a) has power to abolish all corrupt practices and abuse of power, whether such power embraces power to legislate with respect to fraud and offences related thereto; (d) non-justiciability of a law made pursuant to item 60(a) of the Exclusive Legislative List; and (e) whether item 67 of the Exclusive legislative List has any bearing on the power of the National Assembly to enact the ICPC Act.

Dealing with (a) above, learned Senior Advocate said that the danger which the ICPC Act poses to the federal system and hence to unity and stability of Nigeria arises not so much from the Act being a usurpation of the powers of the state governments under the scheme of division of powers in the Constitution as from its being a grave interference with the autonomy of the state governments, their co-equality with the federal government and with the doctrine of mutual non-interference upon which the entire federal system is built; but the Act is also incontestably beyond the power of the National Assembly under the federal scheme of division of power in the 1999 Constitution.

Learned Senior Advocate argued that the creation and punishment of offences under the Constitution is largely a residual matter, since, it is not assigned to the federal government either in the body of the Constitution or in the legislative lists in the Second Schedule, and therefore the function belongs exclusively to the state governments, subject again to some exceptions. Counsel took pains to itemise some of the state offences punishable under the Criminal Code and the Penal Code. He also referred to some federal offences which he itemised under three categories. He included in the first category the offence of Corruption, which to me is material to this case. He cited R. v. Kidman (1915) without the name, volume and page of law report. I hope I am able to locate the law report. He also cited Balewa v. Doherty (1963) again without the name, volume and page of the law report. I will certainly locate this as it is a popular Nigerian case. He cited McCollok v. Maryland (1819), as usual.

Learned Senior Advocate would seem to have conceded that the federal government has power to punish corruption and fraud in relation not only to its property but also to all matters within its legislative compe-

tence. This is a sound submission and a good one for the respondent.

Dealing with (b) above, learned Senior Advocate said that Item 60(a) of the Exclusive Legislative List must also draw its meaning and effect from the character and purpose of the Fundamental Objectives and Directive Principles of State Policy. Construed in that light, it does not, nor is it intended to confer on federal government power to create and punish offences outside its power to do so under other provisions of the Constitution or power to derogate from autonomy of the State Governments, counsel argued. He interpreted in some detail item 60(a).

Dealing with (c) above, learned Senior Advocate examined specific sections of the ICPC Act, including sections 2, 13, 14, 15 and 16 vis-à-vis the Criminal Code, the Penal Code and even the repealed Corrupt Practices Decree 1975 and said that the essential ingredients of corruption is the asking for or the receiving of property, money or other benefit or promise or the giving of it as gratification for the performance of or forbearance to perform the functions of an office or position in abuse or perversion of such office or position. He went further in his examination of the criminal content of corruption and submitted that the term corrupt practices and abuse of power in section 15(5) of the Constitution is used in the sense defined above and does not embrace fraud and offences related thereto; accordingly Item 60(a) of the Exclusive Legislative list does not empower the National Assembly to legislate with respect to fraud and related offences. To learned Senior Advocate, these remain, in spite of item 60(a), matters within exclusive legislative competence of the State as residual matters – except of course, as regards fraud in relation to the property of the Federal Government.

Dealing with (d) above, learned Senior Advocate produced the *ipsissima verba* of the subsection and cited the New Webster's Dictionary definition of "to conform" as "to bring into correspondence, to comply with requirements". Counsel then submitted that the court lacks the jurisdiction to embark upon whether the ICPC Act is in conformity with the enforcement of the Fundamental Objectives and Directive Principles of State Policy. He submitted that this court therefore erred in law when in the lead judgement in the Ondo State case, it said at page 35:

B “The ICPC is by the provisions of item 60(a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles of State policy as contained under Chapter II of the constitution. The question is how can the ICPC enforce the observance? Is it to use force? The ICPC cannot do either of these because the use of force or coercion in enforcing the observance will require legislation. The ICPC has no power to legislate. Only the National Assembly can legislate”.

C Learned Senior Advocate contended that what the court said in effect is that the Act is in conformity with, is authorised by, or complies with the duty laid on the National Assembly to “abolish all corrupt practices and abuse of power” To counsel, this court is without jurisdiction to do that in view of section 6(6)(c) of the Constitution.

D Dealing with (e) above, it was the submission of learned Senior Advocate that the reliance placed by this court in the Ondo State case on item 67 of the Exclusive Legislative List seems to be misplaced. Quoting what this court said in the leading judgement at pages 33 and 34 of the brief, counsel submitted that item 67 has nothing to do with the matter. E To learned Senior Advocate, the item only empowers the National Assembly to make law with respect to any matter other than those listed as items 1 to 66 in the list on which exclusive power to make law is granted to the National Assembly in the body of the Constitution.

F It was the argument of learned Senior Advocate that there is no provision in the body of the Constitution granting to the National Assembly power to “legislate against corruption and abuse of office”, unless it be section 15(5). But if section 15(5), assuming it to be a grant of power is embraced in item 67, then, the National Assembly’s power to “legislate against corruption and abuse of power” will be exclusive, not concurrent. The reliance on item 67 in the passage quoted seems entirely misconceived, learned Senior Advocate contended. G

H Let me pause here and deal briefly with learned Senior Advocate’s reference to the repealed Corrupt Practices Decree, 1975. It is wrong in law to refer to a repealed law in the way learned Senior Advocate did. A repealed law no more has legal life as it does not exist any longer; it cannot be cited as if it still exists. If it must be cited at all, it must be cited

as a repealed law which has no life to influence an argument. A repealed law cannot be basis for any comparison with existing law. It cannot be quoted side by side with existing law as learned Senior Advocate did. I shall not deal with the Corrupt Practices Decree, 1975 in this judgement. I have enough in the ICPC Act to determine the fortunes of the reference before this court. B

Taking issue No. 6, learned Senior Advocate submitted without mincing words that the ICPC Act is unethical and void for uncertainty. Referring to the definition of corruption in section 2 of the Act to include “*bribery, fraud and other related offences*”, learned Senior Advocate argued that no one can say with certainty what offences are related to fraud. Are forgery and personation, for example, not related to fraud, counsel asked rhetorically. C

Learned Senior Advocate submitted on Issue No. 7 that the good and bad provisions of the Act are so interwoven as to make it impracticable to sever one from the other. He urged the court to allow the appeal. D

Learned Senior Advocate urged the court to answer the two questions referred to it in the negative for the following reasons: E

“(1) *Because the provisions contained in the Corrupt Practices and Other Related offences Act 2000 (hereinafter referred to as “the Act”) is (sic) outside the Legislative competence of the National Assembly.* F

(2) *Because the enactment of the said Act is not in conformity with the principles governing the Constitutional validity of Governmental acts in a Federal system of government.* F

(3) *Because the said Act impedes or interferes with the management of affairs of a State Government by the Federal Government or its Agency.* G

(4) *Because the entire Chapter on Fundamental Objectives and Directive Principles of State Policy (particularly Section 15(5) thereof) is not a grant of legislative, executive or judicial powers to any of the organs of government under the Constitution.* H

(5) *Because the said Act is ultra vires the National Assembly under Section 4 of the 1999 Constitution.*

(6) *Because the said Act is unconstitutional for uncertainty.*

(7) *Because the bad provisions of the said Act cannot be severed and the Act is accordingly unconstitutional and void”.*

Learned Counsel for the complainant/appellant (a fairly curious
B name of a party in the circumstances of this Appeal). Mrs. C. I. Onuogu,
Assistant Director, Federal Ministry of Justice, started in her brief with
an examination of the powers of the National Assembly under the 1999
Constitution. She cited sections 4, 14 , and 15 of the Constitution, Item
C 60(a) of the Exclusive Legislative List, and the case of Egbe v. Alhaji
(1990) 1 NWLR (Pt. 128) 581.

Dealing with Item 60(a), Learned Assistant Director submitted
that the National Assembly has the power to make laws that will establish
and regulate authorities for the Federation or any party thereof that will
D promote and enforce the observance of the Fundamental Objectives and
Directive Principles contained in the Constitution. She relied on Cham-
bers 21st Century Dictionary, Revised Edition definition of “*establish*”,
“*authorities*”, “*provide*” and “*enforce*” at pages 448, 1174, 86, 1109 and
E 435, respectively.

It was the submission of learned counsel that the National Assem-
bly enacted the ICPC Act in virtue of the powers conferred on it by Item
60(a) of the Exclusive Legislative List and section 15(5) of the Constitu-
F tion. She disagreed with learned Senior Advocate for the appellant that
section 15(5) being a social ideal cannot be achieved by any sensible
person or relied upon by a single once for all legislative, executive or
judicial action. To learned counsel, section 15(5) when read along with
the provisions of Item 60(a) of the Exclusive Legislative List shows that
G there is a strong political will on the part of the State to achieve this ideal
by abolishing all corrupt practices and abuse of office.

Reacting to the submission of Learned Senior Advocate that the
authority mentioned in Item 60(a) has no business to direct its activities
H towards individuals or persons who are not acting for or on behalf of any
government organ or who are not exercising government powers under
the Constitution, learned Assistant Director pointed out that the Funda-
mental objectives and Directive Principles of State Policy is part of the

1999 Constitution and it applies to every citizen of this country. She cited section 17(2) and 24 of the Constitution and the case of Egbe v. Alhaji (supra).

It was the submission of learned counsel that it is the clear intention of the Constitution to protect the entire Nigerian public from corrupt practices and abuse of power. To say that the protection does not apply where the perpetrators of corruption are private individuals is tantamount to reading into the Constitution an exception which it has not expressed, learned counsel reasoned. She cited once again Egbe v. Alhaji (supra) and section 6(6)(c) of the Constitution. Conceding that ordinarily the provisions of Chapter II do not give rise to legally enforceable rights and obligations, the use of the expression “*except as otherwise provided by this Constitution*”, means that the judicial powers provided for in the Constitution shall extend to the matters in the Chapter when appropriate legislation is passed in accordance with the relevant provisions of the Constitution for their enforcement, counsel argued.

Counsel submitted that the provisions of section 4(2) and (3) of the Constitution when read in conjunction with Articles (sic) 60(a) and 68 of the Exclusive Legislative List have clearly satisfied the conditions precedent in section 6(6)(c) of the Constitution for the justiciability of the Fundamental Objectives and Directive Principles to the effect that the State shall abolish corrupt practices and abuse of power. This conclusion, learned counsel contended, becomes more imperative since there is no allegation that the constitutionally stipulated modes of exercising legislative powers by the National Assembly under section 58 of the Constitution have not been complied with. She urged the court to hold that the combined effect of sections 4(2), 6(6)(c), 15(5) of the Constitution, Items 60(a) and 68 of the Exclusive legislative List is to empower the National Assembly to enact the Corrupt Practices and Other Related Offences Act, 2000.

On Item 67 of the Exclusive Legislative List, learned Assistant Director submitted that the item gives a general power to the National Assembly to legislate on matters which are not specifically itemised in the Exclusive Legislative List but which are provided for in the Constitu-

tion. Without Item 60(a), the National Assembly would still be able to legislate on matters touching on corrupt practices and abuse of power but it would not be able to establish authorities such as the Independent Corrupt Practices And Other Related offences Commission, learned counsel maintained.

Learned counsel submitted that the National Assembly has power to enact laws that create offences. She cited sections 4(a), 286(1)(b) and (2), and Item 68 of the Exclusive Legislative List in the Second Schedule to the Constitution. Interpreting section 15(5) of the Constitution, learned counsel submitted that the phrase “*enforce the observance*” shows that there must be a penalty for non-observance and that there cannot be any penalty if there is no offence created. Accordingly, the creation of offences is incidental to the provisions in Item 60(a), counsel argued.

Citing sections 9(1)(a), 9(1) and 26(1)(c) of the Corrupt Practices And other Related Offences Act, 2000, Item 68 of the Exclusive Legislative List, section 2(a) of Part III on Supplemental and Interpretation, learned Assistant Director submitted that the creation of offences is incidental to the establishment of the Independent Corrupt Practices And Other Related Offences Commission under Item 60(a) of the Exclusive Legislative List. To learned Assistant Director; without the creation of offences, the commission would be like a toothless bull dog as it can neither promote nor enforce the observance of section 15(5) which deals with the abolition of corruption.

On the time factor for the trial of offences under the Act, learned counsel made references to section 26(3) of the Act and submitted that the case of Unongo v. Aku (1983) 14 NCCC 563 cited by learned Senior Advocate for the appellant is not applicable as that case is distinguishable from the present case. Relying on the provision to section 26(3) of the Act, counsel claimed that no evidence has been taken in this matter since the appellant was arraigned on the 22nd May 2000 as a result of this appeal, but the trial of the case will not be affected. She therefore submitted that section 26(3) of the Act is constitutional.

On the interpretation of the Constitution, learned Assistant Director urged

the court to follow the principles enunciated in the case of Rabiu v. The State (1981) 2 NCLR 293. She cited once again Egbe v Alhaji (supra) and argued that since the provisions of sections 4(2), 6(6)(c), 15(5), Items 60(a) and 68 of the Exclusive Legislative List and section 2(a) of Part III on Supplemental and Interpretation of the 1999 Constitution are very B clear and unambiguous, this court must give them their grammatical and ordinary meaning.

Dealing with Issue No. 1 of the Supplementary Brief. Mrs. Onuogu, learned Assistant Director, submitted that the National Assembly has the requisite power to enact the Corrupt Practices And Other C Related Offences Act, 2000. She cited sections 4(1), 15(5), 1(1), 318(1), Item 60(a) of the Exclusive Legislative List and Attorney-General of Ondo State v. Attorney-General of the Federation (2000) 9 NWLR (PT. 772) 222. D

On Issue No. 2, learned Assistant Director contended that the power to create offences is not a residual matter as argued by learned Senior Advocate for the appellant. She submitted that the constitution of the Federal Republic of Nigeria is the grundnorm from which both the E Federal and State Governments derive their power. She cited Attorney-General of Oyo State v. Attorney of the Federation (supra); Attorney-General of the Federation v. Attorney-General of Abia State (No. 2) (2000) 6 NWLR (Pt. 764) at 542; sections 15(5) and 174 of the Constitution and F Items 60 and 68 of the Exclusive Legislative List; sections 3, 5, 61 of the ICPC Act.

Taking Issue No. 3, learned Assistant Director examined when this court can depart from its previous judgement. She cited Okulate v. Awosanya (2000) 2 NWLR (Pt. 646) 530 at 537; Adisa v. Oyinwola (2000) 10 NWLR (Pt. 674) 116; Alao v. ACB Ltd. (2000) 9 NWLR (Pt. 672) 264 at 268; Global Transport Oceanico SA v. Free Enterprises Nigeria Limited (2001) SC 154 at 166 and Order 8 Rule 16 of the Supreme H Court Rules.

Learned Assistant Director urged the court to answer the two questions referred to it by the Court of Appeal in the affirmative and hold that (i) the combined effect of the provisions of (a) section 4(2), (b)

section 15(5), (c) Items 60(a), 67 and 68 in Part I of the Second Schedule and (d) section 2(a) of Part III of the second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, is to confer powers on the National Assembly to make laws for the peace, order and good government of the Federal Republic of Nigeria with respect to offences arising from, connected with or pertaining to corrupt and abuse power as contained in the Act; (ii) that the National Assembly has the power to enact sections 9(1)(a), 9(1)(c), 26(1)(c) of the Corrupt Practices And Other Related Offences Act, 2000.

The reply brief of the appellant was argued by Professor B. O. Nwabueze, SAN, in reply to the supplementary brief. He submitted that learned counsel for the complainant was able to advance her arguments on the questions in issue in the case without paying any regard whatsoever to the underlying principles of federalism upon which the Constitution of Nigeria is founded. He cited Attorney-General of Lagos State v. Attorney-General of the Federation (2003) 35 WRN 1. Learned Senior Advocate quoted Uwaifo, JSC, *in extenso* in respect of the concept of federalism in the case. He also cited the case of Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 13 NSCC 1 at 12 and quoted extensively and copiously from the decision. The import of the submission of learned Senior Advocate is that this court decided in that case that the Public Order Act, 1979 which, to counsel, is like the ICPC Act, was unconstitutional, null and void.

Perhaps apart from the case of Attorney-General of Lagos State v. Attorney-General of the Federation (supra), the reply brief is virtually and materially a repetition of the appellant's brief.

I wish to make some comments on the briefs. Let me first take the appellant's brief. Issues 1 and 2 are worded as follows:

1. *The Act as an exercise of power by the Federal Government.*
2. *Principles governing constitutional validity of governmental Acts in a federal system*".

The above sound more like sub-title or sub-heading of a book, article, or monograph than issues. An issue is the question in dispute between the parties necessary for the determination of the court. See

Chief Ejowhomu v. Edok-Eter Mandilas Limited (1986) 5 NWLR (Pt. 30) 1. An issue, which is usually raised by way of a question, is usually a proposition of law or fact in dispute between the parties, necessary for the determination by the court; a determination of which will normally affect the result of the appeal. See Adejumo v. Ayantegbe (1989) 3 NWLR (Pt. 110) 417. Issues for the determination of appeal, are short questions raised against one or more grounds of appeal and are meant to be a guide to the arguments and submission to be advanced in support of grounds of appeal. It is a succinct and precise either of law or of fact for determination by the court. See Imonikhe v. The Attorney-General of Bendel State (1992) 6 NWLR (Pt. 248) 396; Ngilari v Mothercat Ltd. (1993) 8 NWLR (Pt. 311) 370. An issue is a disputed point or question to which parties in an action have narrowed their several allegations and upon which they are desirous of obtaining either decision of the court on question of law, or of the court on question of fact. See Chief Okoromaka v. Chief Odiri (1995) 7 NWLR (Pt. 408) 411. B C D

It does not appear to me that any effort was made to formulate issues out from what seems like sub-titles or sub-headings. Should I E formulate issues from above? The case law is divided on the issue. In Nwokoro v. Onuma (1990) 3 NWLR (Pt. 136) 22, the Supreme Court held that it is dangerous practice for the Court Appeal to formulate issues for the parties. See also Anie v. Chief Uzorka (1993) 8 NWLR (Pt. 309) F 1; Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566. In Labiya v. Anretiola (1992) 8 NWLR (pt. 258) 139, the Supreme Court approved the formulation of issues by the Court of Appeal. See also Ogunbiyi v. Ishola (1996) 6 NWLR (Pt. 542) 12; Erhahon v. Erhahon (1997) 6 NWLR (Pt. 510) G 667.

Although order 6 of the Supreme Court Rules does not provide that the court can *suo motu* formulate issues for determination, there could be compelling situations when there will be need for such an exercise. If such situations arise, there may be need to get the reaction of H counsel, which could be brought to their notice during the hearing of the appeal. That will go in a big way to comply with the fair hearing principles in our law. In this matter, only two questions were referred to this

court for answers. And I expect the appellant's brief to formulate the issues directly from the two questions. Here, the principle of law which says that issues should be formulated from the grounds of appeal or related to the grounds of appeal, apply *mutatis mutandis* to the questions referred to this Court.

As against the two questions, appellant has formulated seven issues for determination. I ask: what are seven issues doing in a two-question reference? In the same way that courts frown upon a proliferation of issues, so too I frown upon a proliferation of issues in respect of the two questions for reference. I have seen that quite a number of the issues formulated gallivant or flirt in the brief. Some of the issues overlap and coalesce in some material particular. Some of the issues are formulated in the abstract. See Buraimoh v. Bamgbose (1989) 6 SC (Pt. 1) 1. A few of them are merely academic. See UBA v. Stahlbau GMBH (1989) 1 NWLR (Pt. 1) 22.

I move to the complainants/appellant's brief. I must say straightaway that the nomenclature is strange to Order 6 of the Supreme Court Rules in the sense that the rules do not provide for Complainants/Appellants Brief. An originator or initiator of an appeal is an appellant and the person responding to the appeal is a respondent. Accordingly, Order 6 provides for an appellant's brief and a respondent's brief. Although the Order provides for other types of briefs, it does not provide for complainant's/appellant's brief. That apart, there cannot be two appellants of opposing interests in a matter. I know of a number of appellants representing similar interests in an appeal by way of same or common grounds of appeal. I think the so-called complainant's/appellant's brief is the respondent's brief and nothing more. I will regard the Federal Republic of Nigeria in this matter as the respondent.

The courts are prepared to accept innovations of or by counsel in an area where rules of court are silent. Courts of law will not be prepared to accept innovations of counsel where rules of court clearly spell out the court process in any given litigation or situation. In the latter situation, counsel should follow the prescribed court process and not embark on unnecessary innovation, which the courts will not accept. The nomen-

clature of complainant's/appellant's brief is one of such innovations. As I indicated above, it is nothing but a respondent's brief because it is refutatory of the appellant's brief.

The respondent's brief did not formally formulate issues for determination. Under paragraph 2 at page 6 of the brief is stated: "*Issues for determination*". The respondent then copied word for word the two questions for reference to this court by the Court of Appeal. I do not see anything wrong in our adjectival law for a party to adopt or use the same questions for reference as issues for determination. But I expect the party to indicate clearly that the questions for reference are also the issues for determination. I expected learned Assistant Director to so indicate. It is bad that she did not.

That takes me to the supplementary brief. The Rules of this court do not provide for supplementary brief. In Okpara v. Ibeme (1989) 2 NWLR (Pt. 102) 208, the Supreme Court held that apart from the fact that there does not appear to be any authority for filing a supplementary brief, there is no provision in the rules for filing a supplementary brief without leave of court. The implication of this decision is that a supplementary brief could be filed with leave of this court. In Chief Okenwa v. Military Governor, Imo State (1996) 6 NWLR (Pt. 455) 394, this court accepted a supplementary brief "*in support of the new issue*".

A supplement is an addition. A supplementary brief is therefore an additional brief. It adds to or complements an existing brief, which is the main brief. In human life and human conduct, an addition usually comes by way of new knowledge which the person acquired after the original work or thing; or an improvement of existing knowledge. It is also an extra information.

A supplementary brief should therefore show additional knowledge by way of additional law dovetailed with new facts or factual situation in the brief. It should contain new "discoveries". It is not a repetition of existing law or existing fact in the original brief. Supplementary brief should be an improvement on the original brief and not a repetition of it. The so-called supplementary brief is essentially a repetition of the original brief. The old stuff of sections 4, 15(5), Items 60(a), 67 and 68

is re-echoed in the brief almost to an annoying point; but I will not be annoyed.

B And finally on the briefs. I take the reply brief. The main purpose of a reply brief is to answer any new points arising from the respondent's brief. See Okpala v. Ibeme (supra). A reply brief is filed when an issue of law or argument raised in the respondent's brief calls for a reply. See Nwali v. The State. Where a reply brief is necessary, it should be limited to answering any new points arising from the respondent's brief. A new point is a fresh point, which was raised by the respondent in his brief. A
C reply brief cannot be used to strengthen the appellant's brief by way of repeating the arguments made in the appellant's brief. A reply brief is not a recitation of the appellant's brief. Where there are no new points in a respondent's brief, a reply brief is otiose.

D The reply brief is essentially a repetition of the appellant's brief. It rehearsed the appellant's brief. As a matter of fact, apart from the decision of this court in Attorney-General of Lagos State v. Attorney - General of the Federation and Others (supra), the reply brief is a repetition of
E the appellant's brief. And what is more, it does not seem to have replied to some of the new points raised in the respondent's brief; and that is serious.

I have pointed out some defects in the briefs. What should I do?
F Do I throw away the briefs into the dustbin? Order 6 does not contain provisions in respect of what the courts should do to bad or defective briefs. But the case law is helpful. In Obiora v. Ogele (1989) 1 NWLR (Pt. 97) 279, Oputa, JSC, said at page 300:

G *"A bad, faulty and/or inelegant brief will surely attract some adverse comments from the courts but it will be stretching the matter too far to regard such defective Brief as no Brief. A faulty Brief is a Brief, which is faulty. One cannot close one's eyes to the fact of its existence".* See also Gbafe v. Gbafe (1996) 6 NWLR (Pt. 455) 417.

H Oputa, JSC, further held that the *"aim of the whole exercise is to do justice between the parties hearing their appeals on the merits in spite of any mistakes made by counsel in the preparation prosecution of the appeal"*. See also Incar Nigeria Plc v. Bolex Enterprises Nigeria Ltd.

(1996) 6 NWLR (Pt. 454) 318, Ebe v. Nnamani (1997) 7 NWLR (Pt. 513) 479, Ideh v. Onyejese (1997) 8 NWLR (Pt. 518) 610.

Later decisions placed some qualifications on Obiora's decision that the courts cannot close their eyes on a faulty brief because of its existence. In Nwokoro v. Onuma (1990) 3 NWLR (Pt. 136) 22, Karibi-Whyte, JSC, said at page 32:

"It is a fundamental principle of legality that where an act or course of conduct fails to meet with the requirements prescribed by law, such that the non-compliance renders the act or course of conduct devoid of legal effect, no legal consequences flow from such acts or course of conduct. Hence, in the instant case, the court below, having recognised the defect of the original brief of argument, for its non-compliance with Order 6 r. 3 of the Court of Appeal (Amendment) Rules 1984, had no brief of argument before it on behalf of the appellant. The court below could not therefore be heard to talk of making use of and relying on the defective brief of argument as it is. See Bioku v. Light machine (1986) 5 NWLR (Pt.39) 42".

In Shell Petroleum Development Company of Nigeria Limited v. Federal Board of Internal Revenue (1996) 8 NWLR (Pt. 466) 256, a case involving the payment of petroleum tax, Uwais, CJN, said on the briefs of the parties at page 274:

"Surely these are, with respect, far from the ideal. Rather than assist the court to easily follow the argument in support of the questions for determination, they helped in making the arguments complex. Had it been the circumstances herein were ordinary, we would have no difficulty in striking out the briefs for offending the rules."

Belgore, JSC, was more blunt when he said in his concurring judgement at page 297:

"The Honourable Chief Justice, in the lead judgement 'unbrief briefs'. I agree that but for the importance of this appeal as a revenue matter of the government on strategic petroleum tax, the respondent's brief of argument is not a brief for the purposes of our Rules. I would have discountenanced it, but I take it for what it is worth as some aide memoire."

I must pause here to say that the briefs I presented in this case are not as bad as those in Shell Petroleum Development Company of Nigeria Limited case. As a matter of fact, the issues I have raised above are the only areas in the briefs that worry me. In the light of the circumstances of this case as in Shell Petroleum Company Nigeria Limited case, and my utmost desire to take the merits of the appeal, I shall ignore the apparent defects in all the briefs; and that takes me to the merits of the case.

In view of the fact that the whole appeal zeros on the concept and meaning of federalism or a federal government in the context of Nigerian Constitution *vis-à-vis* the ICPC Act, I shall start with the merits by examining what is a federalism or federal government.

The impression is given in the appellant's brief that federalism in law has a single or exact concept or meaning which the courts must interpret in respect of cases that come before them. The brief contains the following statements at page 8 and 12:

"The doctrine rests upon necessary implication from the establishment by the constitution of the Federal and State Governments as separate and autonomous governments, and the necessity for the maintenance of their capacity to continue to exercise their respective constitutional functions as such governments... The principle autonomy in a federal system implies, further, that neither the central government nor its regional ones can confer functions or impose duties, obligations, restrictions and liabilities on the functionaries of the other."

The above is a dogmatic statement meant to be applied in all federal Constitutions. That is the position of learned Senior Advocate. But is that the situation? Should that be the correct position? Do all federal Constitutions have the same nature and characteristics?

In my humble view, there is not much in name, but there is so much in a name by way of definitions, amplification, restrictions and all that. Constitutions are named as federal, unitary and confederal, to mention the major ones. A federal government will mean what the Constitution writers say it means. And this can be procured within the four walls of the Constitution and the four walls only. Therefore a general definition of federalism or federal government may not be the answer to the pecu-

liar provisions of a nation's Constitution which is the *fons et origo* of its legal system.

Ideal federalism or true federalism is different from specific or individual federal Constitutions of nations, which may not be able to achieve the utopia of that ideal federalism or true federalism but which in their own sphere are called federal Constitutions. I think Nigeria falls into the latter category or group. It will therefore be wrong to propagate theories based on ideal or true federalism in a nation's Constitution, which does not admit such utopia. I will return to this later.

The point I am struggling to make is that there is no universal agreement as to what is a federalism or a federal government. Definitions of words, including 'federalism' or 'federal government', by their very nature, concept or content, are never fully accurate all the time, like a mathematical solution to a problem. Definitions are definitions because they reflect the idiosyncrasies, inclinations, prejudices, slants and emotions of the person offering them. While a definer of a word may pretend to be impartial and unbiased, the final product of his definition will, in a number of situations, be a victim of partiality and bias. I seem to see the definitions given in the appellant's brief in the light of the above analyses.

Let me illustrate the diversity and non-universality of what federalism or federal government means. Defining what he meant by federal principle as the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent, that great Professor of Government and Public Administration in the University of Oxford, K. C. Wheare, said at page 10 in his well-written book on Federal Government:

"This restriction of the word 'federal' to the sense just defined may be objected to by some students on historical grounds. They will point out, quite correctly, that the authors of The Federalism, for example, use the word 'federal' or describe both the system set up by the Articles of Confederation of 1777 and that proposed by the Constitution of 1787".

Professor Wheare continued at page 11:

"It is proper to add that this definition of the federal principle is

not accepted as valid by all students of the subject. Some authorities find the essence of federalism in some different principle. There are those, for example, who hold that the federal principle consists in the division of power in such a way that the powers to be exercised by the general government are specified and the residue is left to the regional governments. It is not enough that general and regional governments should each be independent in its own sphere. That sphere must be marked out in a particular way. The residuary powers, as they are called, must lie with the regional governments. On this view a government is not federal if the powers of the regional governments are not specified and the residue is left to the general government”.

A. H. Birch in his article titled “Approaches to the Study of Federalism” 14 Pol. Studies 15 (1966), recognising the diversity of views on the meaning of federalism, said:

“Its meaning in any particular study is defined by the student in a manner which is determined by the approach which he wishes to make to his material”.

And finally, Professor Nwabueze, in his book Federalism in Nigeria (1983) correctly said at page 34:

“The application of the Federal System in Nigeria and in many later federations has shown that a federation could be formed by a state hitherto under a unitary government, devolving part of its powers to two or more independent state governments”.

By the above statement, Professor Nwabueze rightly recognises that a federation can take its branches from the tree of a unitary government. In such a situation, the historical ties may make it impossible for the federal Constitution to entirely and totally strip of its relationship with unitarism. That could be the Nigerian experience for now.

It is clear from the above that it is wrong to sound dogmatic and final when dealing with the meaning, concept or constituents of federalism or federal government as there is in law no finality in the meaning, concept or constituents in the sense of total agreement of theorists on the word. Although the word ‘federalism’ may be knit in theories of political science, it conveys different meanings in different Constitutions, as the

constitutional arrangements show, particularly in the legislative lists.

Let me now deal with specific issues raised in the appellant's brief. The first issue raised by learned Senior Advocate for the appellant is the *ultra vires* doctrine. Although the brief concentrated on theories of the doctrine of *ultra vires* in constitutional law, learned Senior Advocate did not submit in the body of the brief that the ICPC Act is *ultra vires* the National Assembly. I should point out that at page 5 of the brief, learned Advocates said:

"The only question arising in this case concerns the application of the doctrine, i.e. Whether the corrupt practices And Other Related Offences Act 2000 is intra vires or ultra vires the National Assembly under section 4 of the constitution. This is considered below."

I have carefully gone through the appellant's brief and I do not see where the brief considered the above, that is, the ICPC Act *ultra vires* the National Assembly in virtue of section 4 of the Constitution. Section 4 of the Constitution is dealt with at pages 9,10,16 and 18, but there is no specific examination of the section in relation to the ICPC Act vis-a-vis the *ultra vires* doctrine. Suddenly, in a General Conclusion and in particular under the reasons for the conclusion, paragraph 5 at page 36 said:

"Because the said Act is ultra vires the National Assembly under section 4 of the 1999 constitution."

With respect, that is rather untidy. The aim of the last paragraph of a brief is to give an apt summary of the brief including the relief sought. In brief writing, a very important aspect is the summary of the relief sought and that is the last important word the party wants to leave with the court. But reliefs are not presented or summarised to the court from the blues. Reliefs are presented or summarised to the court from the arguments on the body of the brief. In other words, the summary of the brief must be based on the arguments in the brief. Where the body of a brief does not contain arguments on law, it is not proper to suddenly expose the court to a summary of the position of the law, which is not available in the body of the brief. It is like removing fish from a river or aquarium. In view of the fact that the appellant has not made a case on

the body of the brief, it might be difficult for me to deal with the issue at this stage. I will take it later mainly in the interest of justice.

That takes me to the doctrine of mutual non-interference which learned Senior Advocate argued on pages 7 to 11 of the brief. Dealing with the doctrine, learned senior Advocate quoted the following statement made by Uwais, CJN, in Attorney-General of Ondo State v. Attorney-General of the Federation and 35 others (Supra):

“It has been pointed out that the provisions of the Act impinge on the cardinal principles of federalism, namely, the requirement of equality and autonomy of the state government and non-interference with the functions of state government. This is true, but as seen above, both the Federal and State Governments share the power to legislate in order to abolish corruption and abuse of office. If this is a breach of the principles of Federalism, then, I am afraid, it is the Constitution that makes provisions that have facilitated breach of the principles As far as the aberration is supported by the provisions of the Constitution, I think it cannot rightly be argued that an illegality has occurred by the failure of the Constitution, to adhere to the cardinal principles which are at best ideals to follow or guidance for an ideal situation”

Chief Williams strongly emphasised the expression: *“this is true”* and *“are at best ideals to follow or guidance for an ideal situation”*. I had the impression at the hearing that the above, to learned Senior Advocate, was in some self-contradiction. It is possible I got it wrong. What I think I did not get wrong is the submission that the court in Attorney-General of Ondo State misconceived the doctrine of mutual non-interference entirely.

Let me analyse the above statement of Uwais, CJN, in the way I understand it. It is true that he used the words, *“this is true”*. The words relate to the sentence immediately following them. And here, the learned Chief Justice of Nigeria seems to admit the truth of his first sentence and it is to the effect that the provisions of the ICPC Act *“impinge on the cardinal principles of Federalism...”* as it relates to equality and autonomy of state governments. But the learned Chief of Justice did not leave the statement open-ended. He was careful in qualifying it by the sentence

commencing with the words. “*If this is a breach...*”

What did Uwais, CJN, say? He said clearly that if there is a breach of the principles of Federalism, it is the constitution, which has facilitated the breach and not him or any Judge for that matter. He went further to say that no counsel could be heard to argue on B illegality when an aberration is supported by the provisions of the Constitution. In other words, it is not available to counsel to say that a constitutional provision is illegal. Uwais, CJN’s argument in the way I understand it is basically this: where a Constitution has provided for a situation, the courts are bound to interpret the provisions as laid down in the Constitution, I think Uwais, CJN, is C right, the judge that he is (or can this be a mistake for Justice?) In effect, Uwais, CJN, was saying that his duty as a judge is to interpret the provisions of the Constitution whether they agree D with the principles of ideal federalism or not. His hire as a judge is to interpret the Constitution and that is what he did. It is difficult to fault him for a constitutional interpretation which, in my view, is correct in law. E

Let me add a bit to what Uwais, CJN, said about “*best ideals to follow or guidance for an ideal situation*”, which learned Senior Advocate attacked. He submitted that far from being “*at best ideals to follow or guidance for an ideal situation*”, the doctrine of mutual non-interference is the basis, the foundation of every true federal system, without F which no such system can exist. I will return to this argument.

I think Uwais, CJN, got the point properly when he mentioned “*best ideals*” in the statement above. There are ideals of federalism propounded and developed by constitutional law scholars G and political scientists the world over. These ideals and ideas (if I may so add) are goals set out to achieve true federalism. I do not think any Constitution can really achieve such goals which are largely utopia. Such goals are ideals but by and large, and at the H end of the day, Judges must interpret the provisions of the Constitution and not what Uwais, CJN, correctly called “*best ideals*”. I think that is the essence of what he said in the above statement

which should not be lost to us. I do not see anything wrong with what Uwais, CJN, said in the above statement.

Let me take here the doctrine of mutual non-interference. I entirely agree with the exposition of the doctrine by learned Senior Advocate in his brief. Our area of quarrel is whether the doctrine is applicable in the light of the clear provisions of the 1999 Constitution.

In arguing the applicability of the doctrine in the interpretation of the Nigerian Constitution of 1999, learned Senior Advocate quoted the following statement by Professor B. O. Nwabueze in his well written book titled, Federalism in Nigeria (1983) at page 3:

“From the separate and autonomous existence of each government, and the plenary character of its powers within the sphere assigned to it by the Constitution, flows the doctrine that the exercise of those powers is not to be impeded, obstructed or otherwise interfered with by the other government while existing within its own powers. The doctrine rests upon necessary implication from the establishment of the Constitution of the Federal and State Governments, as separate and autonomous governments, and the necessity for the maintenance of their capacity to continue to exercise their respective constitutional functions as such governments. It operates to invalidate an interfering act. The invalidity results from the act being inconsistent with the implied prohibition of the Constitution against interference. From the time when it was first explicitly announced in 1819, the doctrine has become firmly established as a principle of federalism”.

There is a twist in the above quotation. I think I owe the administration of justice a duty to point it out. The original words at page 3 are *“in the United States”*. These are replaced by the words *“as a principle of federalism”*. In legal writing including briefs, an author or writer who quotes another author or writer will not leave his reading audience in doubt as to the portion he is quoting. This is usually done by inverted commas open and inverted commas close. Where a writer substitutes an expression in the place of the actual words used, this is usually done by a parenthesis by way of bracket as follows: []. That was not done in the brief thus passing the words *“as a principle of federalism”* as authentic

in the sense that the words come from the original source in Federalism in Nigeria by Professor Nwabueze. Professor Nwabueze did not use the words “*as a principle of federalism*”. If the aim was to emphasise the content or element of federalism, seriously canvassed by learned Senior Advocate that is certainly not the way to do it. I say no more. B

Let me go to the merits of the doctrine. I do not think the doctrine is universally applicable to all federal Constitutions. Professor Nwabueze, a very fine scholar, who always looks at the two sides of argument in all his works, said immediately after the words “*United States*” in the quotation: C

“...but is spurned by the Judicial Committee of the Privy Council. Rejecting a claim that a state tax on the salary of an officer of the Commonwealth of Australia was invalid because it interfered with the free exercise of the legislative or executive power of the Commonwealth, it held that the Australian Constitution left no ‘room for implied prohibition.’” D

The case the learned author referred to is Webb v. Outrim (1907) AC 81. I have read the case. Rejecting the principle of implied prohibition, the Earl of Halsbury said at page 91; E

“*Their Lordships are not able to acquiesce in any such interpretation. The Legislature must have had in their minds the Constitution of the several States with respect to which the Act of Parliament which their Lordships are called upon to interpret was passed. The 114 section of the Constitution Act sufficiently shows that protection from interference on the part of the Federal power was not lost sight of. It is impossible to suppose that the question now in debate was left to be decided upon the implied prohibition when the power to enact laws upon any subject whatsoever was before the legislature. For these reasons their Lordships are not able to acquiesce in the reasoning of the High Court judgements governing the judgement on appeal.*” G

See also Baxter v. Commissioner of Taxation NSW (1907) 4 CLR 1087; H Amalgamated Society of Engineers v. Adelaide Steamship Company Ltd. (1920) 20 CLR 729; City of Essendon v. Criterion Theatres Ltd. (1947) CLR 1; Melbourne Corpn. V. Commonwealth (1947) 74 CLR 31, cases H

cited by Professor Nwabueze on the issue.

Where a constitutional provision is clear and unambiguous, the courts cannot read into the provision an implied term because by the clear and unambiguous provision, an implied term is impliedly forbidden to be part of the Constitution. After all, a Constitution is not a transient agreement, like contract where implied terms could be read into the wordings in the interest of the commercial transaction of the parties. This court will not accept the invitation of learned Senior Advocate to read implied terms into the 1999 Constitution just for the asking *qua* contention. Where a constitutional provision is clear and unambiguous and the courts read into them so-called implied terms, the courts will be going outside their interpretative jurisdiction and will be branded as making the law in a bad way. Let that day not come in the history of our legal system.

Still on this issue, learned Senior Advocate would want this court to read into the 1999 Constitution a provision which was in the 1963 Constitution as an implied term. Specifically he urged the court to read into the 1999 Constitution the provision in the 1963 Constitution forbidding the President as well as the federal legislature from conferring functions or imposing duties on the Governor or other functions of the State Governments without the consent of the State Governor and *vice versa*, "as a necessary implication of the autonomy of the federal and state governments in relation to each other". With the greatest respect, this submission sounds most strange. **I do not know of any canon of statutory interpretation which vests in a court of law the power to use a Constitution which is no more in existence to interpret a current Constitution to achieve the purpose of a party in a litigation. Has this court jurisdiction to resuscitate a Constitution, which is dead for the purposes of interpreting a current Constitution to give birth to a so-called implied term? How can this court do it? Where is the authority for doing that? Unfortunately, learned Senior Advocate did not cite any authority on the issue. This is quite a new learning to me and I am not prepared to learn it.**

Learned Senior Advocate gave a hypothetical illustration at page

11 of his brief in the following words:

“Suppose that a federal government, invested with plenary power over taxation, levies, by law, a tax of say N1 billion on every law made by a State House of Assembly and another N1 billion on every executive action taken under such law. Surely, the practical effect of the tax would be to cripple the state governments, to put them out of action or meaningful existence as governments, and thereby destroy in all but name, the federal system which it is the object of the Constitution to establish.”

I do not think this court has the competence to go into the above hypothetical point. Courts of law, as most serious and scared institutions, do not build upon hypothesis, which is an idea suggested as a possible way of explaining facts or providing an argument. The adjective “hypothetical” really means that which has not been proved or shown to be real. It also connotes imaginary. Can this court rely on imaginaries to give judgement? Hypothesis by their very nature generally have no limitation and courts of law by their judgments have limitations. And the limitations are the pleadings and the briefs in trial and appellate courts respectively. A theoretical hypothetical point is not for this court or any other Nigerian Court for that matter.

In Adewumi v. The Attorney-General of Ekiti State (2002) 2 NWLR (Pt. 751) 474, the Supreme Court held that it is not given to making moot decisions or to decide hypothetical cases which have no bearing with the case the court is called upon to decide. See also Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt. 622) 290; Anyankpele v. Nigerian Army (2000) 13 NWLR (Pt. 684) 209; Moriki v. Adamu (2001) 15 NWLR (Pt. 737) 666.

That takes me to the submissions of learned Senior Advocate on the autonomy of the state vis-à-vis the doctrine of mutual non-interference. On the issue of state autonomy, learned Senior Advocate argued at pages 11 and 12 of the appellant’s brief:

“The national government is necessarily bigger than a regional government in terms of the territorial area over which its powers are exercised. Its powers are exercised over the whole country while those of

regional government are confined to only a part of it. Secondly, while a fair balance should be maintained between the powers assigned to each, they cannot be so weighted as to be equal. Matters within their respective competence must necessarily differ in their relative importance, and
B equally is not determined by how numerous or few are the matters assigned to it... The conception of federalism as implying a dualism between two equal and competing sovereignties therefore gives a misleading picture”.

I must say that the above is a very brilliant ‘treatise’, if it is not one
C at all, as it fits knitly to the arrangement in the 1999 Constitution. It is noteworthy that learned Senior Advocate said, and rightly too for that matter, that the powers of the national government are exercised over *the whole country*. And here, it is my understanding that the national govern-
D ment is the federal government. It cannot be otherwise. It is equally reassuring that learned Senior Advocate said, and again rightly too, that the concept of federalism does not imply a dualism between two equal and competing sovereignties. And here, it is my understanding that the
E federal government and the component state governments cannot compete for sovereignty, which in my views lies in the federal government in this context, and this context alone the Federal Republic of Nigeria as a nation. I would regard the above as some concessions on the federal
F principle.

Still on the autonomy of the states, learned Senior Advocate quoted what Fatayi-Williams, CJN, said in Attorney-General of Ogun State v. Attorney-General of the Federation (supra). He also quoted what Sir Udo Udoma, JSC, said in the case.

**I do not think the case of Attorney-General of Ogun State is relevant or apposite to this matter. In that case, this court held that neither the National Assembly nor the President has the constitutional power to regulate or interfere with the exercise by a
H state Governor of his executive functions. In that case, a duty was imposed on the State Governors in virtue of the Constitution of the Federal Republic of Nigeria (Adaptation of Public Order Act) Order 1981. In other words, in that case the Act imposed legal obligation**

on the State Governors. The ICPC Act does not impose any such legal obligation on the State Governors. It was in that circumstances that Sir Udo Udoma, JSC, said at page 189 of the judgement:

“On the basis of the provisions of the Constitution, and having regard to the autonomy of the State and realising that the Governor is bound only to enforce all laws constitutionally made by the State House of Assembly, I accept the submissions made by Chief Williams, learned counsel for the defendants, and I am satisfied that neither the National Assembly nor the President has the constitutional power to impose any new duty on the Governor of a state. Such an imposition would normally meet with resentment, refusal to perform for the enforcement of which there is no constitutional sanctions.”

I do not see any duty imposed on the Governor of a State by the ICPC Act, 2000. In the circumstances, I do not find the decision relevant in determining the issue in this appeal.

The concept of state autonomy must be examined in the context of the Constitution of the Federal Republic of Nigeria, 1999. This is because it will be useful exercise to take the concept outside the constitutional arrangement and therefore in a vacuum or *in vacuo*. It is my view that there could be an ‘*incursion*’ or ‘*erosion*’ into the concept of state autonomy by a particular Constitution, particularly in respect of the doctrine of covering the field.

Recognising the existence of the doctrine, Professor Nwabueze said at page 67 of his book titled, Federalism in Nigeria (1983):

“with the backing of the highest courts in the United States, Australia and Canada, the doctrine of covering the field, operating with the limited effect noted above, must now be regarded as firmly established. What seems to make it objectionable, however, is the pre-emptive effect which it seems to imply, that is to say, the assertion that where a federal law intends to cover the whole field of a concurrent subject and so long as it remains in force, a state government is thereby precluded or prohibited from acting on it to any extent. This is objectionable in that the effect would be to preclude the state law from coming into existence at all even though, if it does come into existence, it cannot become operative in

competition with the federal law.”

Section 4(5) of the Constitution is one clear provision on the doctrine of covering the field. The subsection reads:

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

The above provision is consistent with the doctrine of covering the field, a doctrine which has been applied by this court in a number of cases. Professor Nwabueze referred to it in the above quotation but with a critique. An academic or scholarly criticism of the greatest learning of an existing law does not wipe out the existing law. And the courts are bound to interpret the existing law and not a critique of it. And the existing law here is section 4(5) of the Constitution. Legal history says that Isaacs, J. made the pioneer statement in Clyde Engineering Co. Ltd. V. Coroburn (1926) 37 CLR 466:

“But surely the vital question would be: Was the second Act or its true construction intended to cover the whole ground and, therefore, to supersede the first? If it was so intended, then the inconsistency would consist in giving operative effect at all to the first Act., because the second was intended entirely to exclude it”.

It is referred also to as the doctrine of inconsistency. See Attorney-General of Abia State v. Attorney-General of the Federation (2002) 6 NWLR (Pt. 763) 264; Lakami v. The Attorney-General of the West (1971) 1 ULR 201; Attorney-General of Ogun State v. Attorney of the Federation (1982) 1-2 SC 13. Taken in that position, the concept of state autonomy is not after all as sacrosanct as learned Senior Advocate impresses on the court. The concept will, in appropriate situations, bow to the overall sovereignty of the federal government, a sovereignty, which presents its head clearly in section 4(1)(2)(3)(4), and (5) of the Constitution in the major area of legislation.

Learned Senior Advocate look the relevant provisions of the Constitution and the ICPC Act from pages 13 to the end of the appellant’s brief, He vehemently criticized the decision of this court in Attorney-

General of Ondo State. He dealt copiously with sections 4, 6(6), 15(5) of the Constitution, and items 60(a) and 67 of the Exclusive Legislative List. He also dealt with some specific provisions of the ICPC Act.

I should follow the trend with liberty to change my course when necessary. Let me first take section 4. Section 4 provides for the Legislative powers of the Federal Republic of Nigeria. While the legislative powers of the government of the federation are vested in the National Assembly, the legislative powers of the State Governments are vested in the House of Assembly of a State. The section is in two parts. Section 4(1) to (4) provides for the legislative powers of the National Assembly while section 4(6) and (7) provides for the legislative powers of the House of Assembly of a State. Section 4(5) seems to be hybrid provision as it provides for the legislative powers of both the National Assembly and the House of Assembly of a State. That is the subsection which provides for the doctrine of covering the field.

By subsection (3) of section 4, all the legislative powers for the peace, order and good government of the federation in respect of any matter included in the Exclusive Legislative List are vested in the National Assembly. By subsection (4) of section 4, any matter in the Concurrent Legislative List set out in the first column part 11 of the Second Schedule to the extent prescribed in the second column opposite thereto, is vested in the National Assembly.

By section 4(7) the House of Assembly of a State has power to make laws for the peace, order and good government of the state with respect to (a) any matter not included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to the Constitution; (b) any matter included in the Concurrent Legislative List set out in the first column of part 11 of the Second Schedule to the Constitution to the extent prescribed in the second column thereto. Both section 44(b) and section 4(7)(b) make omnibus provision for Legislative powers of the National Assembly and House of Assembly of a State respectively.

By section 4(9), both the National Assembly and a House of Assembly of a State are prohibited from making a criminal offence with retrospective effect. This means that the Legislative Houses have the

power to legislate on criminal offences without retroactive effect. Section 4(a) seems to vindicate section 36(8) of the Constitution.

Section 6 vests judicial powers on the courts, which are enumerated in the subsection 5. By subsection 6(6)(c) of the section, judicial powers shall not, except as otherwise provided by the Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter 11 of the Constitution.

In my humble view , the non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words “except as otherwise provided by this Constitution”. This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter 11 justiciable, it will be so interpreted by the courts.

Let me pause here to take a little bit of the history behind Chapter 2. Professor Nwabueze was the Chairman of the Sub-Committee on National Objectives and Public Accountability. One of the objectives was to examine and make recommendations on institutional and other arrangements to prevent corruption and abuse of power on the part of all persons holding public offices or exercising power (be it executive, legislative, or judicial). In particular the Sub –committee was requested to recommend a code of conduct for all persons holding public offices. The committee, headed by professor Nwabueze, *inter alia* drafted the following three articles :

“Article 2: *Any person may apply to a law court of competent jurisdiction for a declaration whether any law or action of an organ or authority of the state or of a person performing functions on behalf of the organ or authority of the state is in accordance with the Directive Principles of Policy .*

Article 3: *A declaration by the court of law or other action is [sic] not in accordance with the Directive Principles shall not render the law or other action in question invalid to any extent whatsoever, and no*

other action shall lie against the state, any organ or authority of the state or any person on this ground.

Article 4: *A declaration by the court that the state or an organ therefore is not complying with the Directive Principles shall nevertheless be a ground for the impeachment of the appropriate Functionaries in accordance with the provisions of the constitution in that behalf “.*See Reports of the Constitution Drafting Committee volume II, [1976] page 38.

By the above recommendations which were made to the 1976 Constitution Drafting Committee in respect of the justiciability of some provisions of chapter 2, Article 2 provided for justiciability of the Chapter.

It is clear from the above three articles that the element of enforceability was not totally lost to the committee. That might explain the final wording of section 6(6)(c) which provided that where justiciability of the provision is guaranteed elsewhere in the constitution, of course, that will remain the position.

Although Article 2 is not provided for in the 1999 Constitution, it has some affinity with the provision of item 60 of the Exclusive Legislative List as both talk about authorities though in different situations. I am tempted to invoke one canon of statutory interpretation, and it is that in the interpretation of a statute, the interpreter may call to his aid historical facts which are necessary for the comprehension of the subject matter and for this purpose, the courts are not oblivious of the history of the legislation in question, but the courts are, however, not at liberty to construe an enactment by the motives which influenced the Legislature. See Uwaifo V. Attorney-General of Bendel State (1982) 7 SC 124. In view of the fact that the provisions are clear on the issue of justiciability which I will take anon, I am not likely to fall into temptation of digging into the history of chapter 2 by taking the strength from Article 2 of the recommended draft.

That takes me to the issue whether the provisions of chapter 2 are justiciable in law. Learned Senior Advocate for the appellant submitted that the provisions are not justiciable. Learned Assistant Director, Fed-

eral Ministry of Justice submitted that the provisions are justifiable in law.

Section 15(5) provides for corrupt practices and abuse of power. It reads:

B *“The State shall abolish all corrupt practices and abuse of power”.*

By the provision of section 6(6)(c) of the constitution, section 15(5) as it stands and on its face value are, is not justiciable. But that is not the end of the issue. Reliance must be placed on item 60(a) of the Executive Legislative List of the Second Schedule to the Constitution.

C The sub-item provides:

“The establishment and regulation of authorities for the Federation or any part thereof - (a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this constitution”.

D “It should be emphasised that Item 60 (a) is one of the items that the National Assembly is vested with legislative power. Putting the position nakedly, By Item 60 (a), the National Assembly is empowered to establish and regulate authorities “to promote and enforce the observance of the provisions of Chapter 2 of the Constitution”.

A community reading of Item 60 (a) and section 15 (5) results in quite a different package, a package which no more leaves Chapter 2 a toothless dog Which could only bark but cannot bite.
F **In my view, by The joint reading of the two Provisions, Chapter 2 becomes clearly and obviously justiciable. And if I may fall Back on section 6(6)(c) of the Constitution which provided for an exception clause. It is my view that section 6(6)(c) anticipates amongst**
G **other possible provisions, the Provision of Item 60(a).**

What is the purport of Item 60 (a)? It talks of establishment and regulation of Authorities for the Federation or any part thereof. By the provision, the National Assembly’s legislative powers are
H **extended beyond the Federation, as they cover “any Part thereof”. This provision vindicates the law making power of the National Assembly in section 4(2)(3)(4) and (5) of the Constitution.**

What is the meaning of authority under Item 60(a)? Section 318,

the Interpretation Clause, provides the answer. Authority is defined to include government. And here I relevantly take the provision of section 3 of the ICPC, Act which provides for the establishment of the Independent Corrupt practices and Other Related Offences Commission and appointment of Chairman and members of the Commission.

Section 3 (1) reads as follows:

“There is hereby established a Commission to be known as the Independent Corrupt practices and Other Related Offences Commission (hereinafter in this Act referred to As the Commission).”

It is clear to me from the above that the National Assembly has the Constitutional legislative power to enact the ICPC Act, 2000, vide Item 60 (a) of the Exclusive Legislative List as the item relates to section 15 (5) of the Constitution. This is because the ICPC qualifies as an authority within the meaning of Item 60 (a).

In construing item 60 in a beautiful article titled: *“Fundamental Objectives and Directive Principles of State Policy: Possibilities and Prospects”*. Uwais, M, said at page 179.

“Item 60 of the Exclusive Legislative List of the CFRN specifically empowers The National Assembly to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles, and to prescribe minimum standards of education at all levels, amongst other powers. The breathtaking possibilities created by this provision have sadly been obscured and negated by non-observance. This is definitely one avenue that could be meaningfully exploited by our legislature to assure the betterment of the lives of the masses of Nigerians, whose hope for survival and development in today’s Nigeria have remained bleak, and is continuously diminishing. The utilization of this power would ensure the creation of requisite bodies to oversee the needs of the weak and often overlooked and neglected in our society. It would also provide a unique and potent opportunity for our legislators to monitor and regulate the functions of these bodies, where the Executive, for reasons best known to it, fails or neglects to prioritise and implement the provisions of Chapter II, and by extension, the welfare of all Nigerians.” (See Nweze C.C. (ed)

Justice in the Judicial Process (Essays in Honour of Honourable Justice Eugene Ubaezonu. JCA, Chapter 5)).

The writer will certainly be happy when the National Assembly enacted the ICPC Act, 2000 because that is one of the Laws the writer might have anticipated. The Act establishes one of the authorities or bodies the learned writer might have had in mind.

A further search for legislative power of the National Assembly to enact the ICPC Act, 2000 takes me to the omnibus provisions of items 67 and 68 of the Exclusive legislative List. They provide:

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

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

In my view, a joint reading of the legislative powers of the National Assembly under section 4 and the above two items, vests in the National Assembly the power to make laws for the peace, order and good government of the Federation with respect to matters the National Assembly is vested with such law making powers, including any matter incidental or supplementary thereto.

In Attorney –General, Ondo State case (supra), Uwais, CJN, in his leading judgment correctly said at pages 305 and 306.

“Since the subject of promoting and enforcing the observance comes under the Exclusive Legislative List it seems to me that the provisions of item 68 of the Exclusive Legislative List come into play. Therefore, it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy..... Section 15 subsection (5) directs the National Assembly to abolish all corrupt practices and abuse of power. The question is how can the National Assembly exercise such powers? It can only do so effectively by legislation. Item 67 under the Exclusive Legislative List read together with the provisions of section 4, subsection (2) provide that the National Assembly

is empowered to make law for the peace, order and good government of the Federation and part thereof. It follows therefore that the National Assembly has the power to legislate against corruption and abuse of Office even as it applies to persons not in authority under public or government office”.

In the context of the major issue involved in this matter as it relates to Chapter 2 of the Constitution, perhaps one of the nearest Constitutions, if not the nearest one, is the Indian Constitution. This is because that Constitution provides for Fundamental Objectives and Directives Principles of State Policy. The Sub-Committee on National Objectives and Public Accountability headed by Professor Nwabueze, on the 1979 Constitution in its report said:

“Here the Commonwealth has something to offer. The provisions in the Indian and Pakistan Constitutions have served as a model for us. We also derived assistance from the United Nations Charter and Economic Rights”.

It will therefore be proper to examine decisions of Indian Courts on the issue of justiciability or non-justiciability of Chapter 2 of the 1999 Constitution. Let me take just one. In the case of Mangru v. Commission of Budge Bude Municipality (1951) 87 CLJ 369, it was held that the Directive Principles require to be implemented by legislation, and so long as there is law carrying out the policy laid down in Directive neither the State nor individual can violate any existing law or legal right under colour of following a Directive.

Professor Obilade, a Professor of great learning, in his solid article titled: *“The Corrupt Practices and Other Related Offences and the Right to Privacy”*, after analysing section 4(2), 6(6)(c), 15(5) and Item 60 of the Exclusive Legislative List of the 1999 Constitution, said:

“It is clear, therefore, that although section 15(5) of constitution is, in general, not justiciable, as soon as the National Assembly exercises its power under section 4 of the constitution with respect to item 60(a) of the Exclusive Legislative List, the provisions of section 15(5) of the Constitution becomes justiciable”. (See Contemporary Issues in the Administration of Justice: Essays in Honour of Justice Atinuke Ige,

Page 127).

In the light of the above, I reject the argument of learned senior advocate for the appellant that the provisions of chapter 2 are not justiciable in virtue of section 6(6) of the constitution. I accept the argument of learned Assistant Director for the respondent that the provisions could be justiciable.

That takes me to the issue whether the ICPC act is intra vires or ultra vires the National Assembly under section 4 of the constitution. I have to take it here although not much came out of it in the appellant's brief. Since I have stated the ipsissima verba of the section, I will not repeat myself here. An act is ultra vires the National Assembly when it is enacted outside the legislative powers of the National Assembly. Where the enactment of an Act is within the legislative powers or legislative competence of the National Assembly, such an act is intra vires the National Assembly.

I realise that learned senior advocate made some concessions at pages 23 and 24 of his brief, concessions which in some way are not complementary to his argument that the ICPC act is ultra vires the National Assembly. One major concession is that "*the federal government has power to punish corruption and fraud in relation not only to its property but also to all matters within its power. Beyond this, the rest of the offences in the Corrupt Practices and Other Related Offences Act, 2000 are unconstitutional as being ultra vires the federal government*". I think this is a good one for the respondent.

The National Assembly as earlier indicated in this judgement, has the power to make laws, under section 4, for the "*peace, order and good government of the federation*". In my view, a corrupt society will trouble or disturb the peace, order and good government of the entire country. For instance, where it is realized that persons in government freely put or dip their hands in the treasury and steal government money at will, the masses will complain and such complaints could threaten the stability and social equilibrium of the nation. In most nations, including Nigeria, the masses abhor corruption and that is one reason, though not the most important reason, why the ICPC Act was enacted. A govern-

ment which embarks upon a large scale scheme to stop corruption will certainly be regarded by its people as a good government as it responds to the economic needs of the people. Such a governmental action will certainly vindicate section 15(5) of the constitution.

Another way of looking at the ICPC act is from the point of view B of the extensive provisions of the Act on corruption, as compared to the criminal code and the penal code. The ICPC Act is quite an ambitious Act which has added so much to the offence of corruption in both the criminal code and the penal code, as we know it. It is a fact that only a few C sections of both Codes deal with the offence of corruption as against the ICPC Act which deals mainly with the offence. Since I have held that the National Assembly has the legislative power to enact laws on corruption, the extra provisions (if I may use the expression unguardedly) which are D not found in both the criminal code and the penal code will be deemed to have added enormously to the offence of corruption. And by section 4(5) of the constitution, the ICPC Act will, in the specific areas dealt with, prevail, in the event of any inconsistency with either the criminal code or the penal code. E

Since the first question for reference includes paragraph 2 (a) of part 111 of the second schedule to the constitution, I should examine the paragraph.

“In this schedule, references to incidental and to supplementary F matters includes, without prejudice to their generality, references to offences.”

The second schedule contains items 68 which generally provides for “any matter incidental or supplementary to any matter mentioned elsewhere” in the Exclusive legislative list. The opening words of paragraph G 2 (a) are the same as the words in item 68. By the inclusion of “offences” in paragraph 2(a) it is my considered view that the paragraph, in combination with item 68, confer on the National Assembly the power to make laws with respect to offences arising or pertaining to corrupt practices and abuse of power as contained in the ICPC Act. H

The impression is created at pages 30 and 31 of the appellant’s brief that the ICPC Act punishes the offences of fraud

simpliciter. With respect, I do not agree with that contention because it is not borne out from the Act. The Act does not “legislate with respect to the entire wide field of fraud” as claimed by learned senior Advocate. I seem to see only two fraud related offences in the Act. Section 12 is one. Section 13 is another. While section 12 provides for the offences of fraudulent acquisition of property, section 13 provides for fraudulent receipt of property. Where lies the claim that the Act legislates on the “entire wide field of fraud”? I do not see it.

I see some contradiction in the submission of learned senior Advocate on Issue Nos. 6 and 7. Learned Senior Advocate would appear to concede in Issue No. 7 that some of the provisions of the ICPC Act are good. Let me quote him at page 35 of the brief.

“The good and bad provision of the Act are thus so interwoven as to make it impracticable to sever one from the other.”

In my view, the above submission anticipates this court’s decision in Attorney-General of Ondo State. That is not my problem. My problem is that learned Senior Advocate Submitted in issue No. 6 that the Act is unconstitutional and void on one ground that *“the provisions contained in the Corrupt Practices and other Related Offences Act, 2000 is (sic) outside the legislative competence of the National Assembly”* I see or spot some contradiction in the above position taken by learned Senior Advocate. If he concedes in one breath that some provisions of Act are good, he cannot contend that the whole provisions of the Act are outside the legislative competence of the National Assembly and therefore should be thrown into the dust bin on ground of unconstitutionality. I must say that learned Senior Advocate did not say that the Act should be thrown into the dust bin; but that is the essence of his submission. I have the feeling that the submission is an effort to run down the judgment of this court in Attorney-General of Ondo State.

Learned Senior Advocate referred to the following statement of Uwais, CJN, in Attorney-General of Ondo State at pages 33 and 34:

“Item 67 under the Exclusive Legislative read together with the provisions of section 4 subsection (2) provides that the National Assem-

bly is empowered to make law for the peace, order and good government of the Federation, and any part thereof. It follows therefore, that the National Assembly has the power to legislate against corruption and abuse of office even as it applies to persons not in authority Under public or government office.”

Learned Senior Advocate criticized the above statement, particularly the CJN’s reliance on item 67. With respect, I do not agree with learned Senior Advocate. The Learned CJN had earlier in his judgment used Item 60 which deals with “*authorities for the federation*”, a provision which cannot be interpreted by the wildest imagination to include “*persons not in authority under public or government office*”, It appears to me that the learned CJN added the last qualification probably in the light of the restrictive nature of Item 60 which provides for only “*authorities for the federation*”. In the circumstances, the learned CJN is correct in falling back on the omnibus item 67 to accommodate “*persons who are not in authority under public or government office*.” I do not know his mind. I am merely speculating in the light of the wording. I hope I am right. It will be terrible if I am wrong.

Learned Senior Advocate also criticized the following statement of Uwais, CJN, in Attorney-General of Ondo State.

“*The power to legislate in order to prohibit corrupt practices and abuse of power is concurrent and can be exercised by the Federal and State Governments and being a concurrent power, any law made on the matter by the federal government has overriding effect.*”

Learned Senior Advocate took up Uwais, CJN, on the above and submitted as follows.

“*But even if, in clear distortion of the scheme and structure of the Constitution, section 15(5) is read as a grant of power to the federal and state government , then, the power so granted is not a concurrent one, as the lead judgment erroneously says, but a divided power. Each is to legislate on corruption within the limit of its powers under the division of powers between the Federal and State Governments.*”

Can this be the correct legal position? Professor Nwabueze, in his book on Federalism in Nigeria (1983) defined concurrent at page 59 as follows:

"The word 'concurrent' is defined by the Concise Oxford Dictionary as "existing together '. What is meant therefore when a matter is said to be concurrent to federal and state government is that their powers in respect of it exist side by side together. In other words, the powers of both government in respect of the matter are co-existent, not mutually exclusive; the power of one does not exclude that of the other. Both governments can, in theory at least, act on the matter. But their powers need not necessarily be co- extensive in the sense of extending over the entire field of the matter they may co-exist only in respect of some aspects of it."

The above is the correct position of the law of concurrent legislative power, if I may so put it. And the position taken by Uwais, CJN, is consistent with the above definition when he said that the power to legislate in order to prohibit corrupt practices and abuse of power is concurrent and can be exercised by the Federal and State Governments. In my view, the words "and can be exercised by the Federal and State Governments," are definitive of concurrent powers and I so hold. It was in the light of the concurrent nature of the legislative powers that Uwais, CJN, by implication, invoked the doctrine of covering the field in the statement above in Attorney-General of Ondo State case.

Is there any meaningful difference between the expression "concurrent" and "division of powers", as they relate to the federal and state governments legislating on the concurrent legislative list? Division of powers which is one of the greatest attributes or one of the brides of federalism involves the division of legislative powers between the federal and state governments. Again, let me fall back on Professor Nwabueze who said:

"The federal arrangement under the presidential Constitution assigns to the federal government power over enumerated matters, leaving to the state governments, the residue of matters not so enumerated, called residual matters. The enumeration of matters within the competence of the federal government is done partly by enumeration under two lists scheduled to the Constitution (2nd Schedule)."

In the context of the constitutional arrangement in the 1999

Constitution and particularly on the provisions on corruption I have examined above, the distinction drawn between concurrent and division of powers is not sacrosanct. This is because at the end of the day, we must agree with Uwais, CJN's conclusion that corrupt practices and abuse of power is concurrent to both the Federal and State Governments. B

That takes me to the meaning of "State" under section 15(5) of the Constitution. The word "State" conveys different meanings in different circumstances. In international law, it means a nation with full status of statehood, as a sovereign entity. In this context, it is regarded as a person in international law with power to sue and be sued in the State name. It must go beyond *status nascendi*. In municipal law, our focus, it also conveys the above meaning. That apart, in municipal law it could also mean component parts of the nation. That is one meaning of the expression as in Section 4(6) of the Constitution. D

It was the submission of learned Senior Advocate that the word "State" in Section 318(1) includes government, and government includes "*the Government of the Federation or any State*", and that the power granted by Chapter 11 must be taken to be granted to both the federal and state governments not as a concurrent power, as was held in the case of Attorney-General of Ondo State v. Attorney-General of the Federation (supra), but as a divided power. F

Referring to the definition of State in section 318 of the Constitution, learned Assistant Director submitted that the provision shows that the word "State" refers to both the federal and state governments and that the federal and state governments can legislate on corruption but where both legislate on corruption, the legislation by the federal government will prevail by virtue of the provision of section 4(5) of the Constitution. G

I think this court dealt with the issue in Attorney-General of Ondo State v. Attorney-General of the Federation (supra). Uwaifo, JSC, appropriately dealt with the issue when he said at page 392: "*That takes me straight to section 14(1) which provides that 'the Federal* H

Republic of Nigeria shall be a State based on the principles of democracy and social justice'. It is plain that it is the Federal Republic of Nigeria, as a State, that is looked upon under the Constitution to take steps, or perhaps to spearhead the policy, to abolish all corrupt practices and abuse of power".

I entirely agree with the above construction. It cannot be otherwise. I can move a bit further. Section 14(1), which defines a State in terms of the Federal Republic of Nigeria, is a sub-section in Chapter II of the Constitution on Fundamental objectives and Directives Principles of State Policy. The word "State" in section 15(5) immediately after section 14 in the same Chapter II cannot bear any other meaning. The Federal Republic of Nigeria as a State, is wider in operational scope than the definition of government in sections 318 (1) of the Constitution, as it conveys the meaning in section 1 of the constitution. After all, words used in proximate sections will be presumed to have the same meaning and will be so construed unless it is clear from the particular section that the word is used in a completely different sense and therefore conveys a completely different meaning. I think this is a correct canon of statutory interpretation. From whichever side one looks at the coin, the construction placed on section 15(5) by Uwaifo, JSC, is correct.

Learned Senior Advocate relied on the majority decision of this court in Attorney-General of Lagos State v. Attorney- General of the Federation (supra), particularly as the decision related to state autonomy. I wrote a dissenting judgment. It will not be fair for me to take the case because I will finally land on my dissent. That will be unfair to Uwaifo, JSC, who wrote the leading majority judgment. Fortunately, Uwaifo, JSC, is on the panel in this appeal and he will certainly make a better job of it. This is because I do not want to waste my dissent, which I concede, by the principles of *stare decisis* is not the legal position of this court, as it is not the law of the court.

The decision of this court in Attorney-General, Ondo State v. Attorney-General of the Federation (supra), was heavily criticised by learned Senior Advocate for the appellant. He is not happy with the

interpretation given by Uwais, CJN, because he feels that the learned Chief Justice of Nigeria is wrong. I am happy with the interpretation because I feel that the learned Chief Justice of Nigeria is right. Unfortunately for the appellant, litigants do not join issues with the Supreme Court. And so the matter ends now and here. B

Learned Assistant Director dealt with the principles of law in respect of when this court can depart from its earlier judgement. I do not see the relevance of the submission because learned Senior Advocate did not urge this court to depart from the decision in Attorney-General, Ondo State v. Attorney-General of the Federation (supra). It is one thing for counsel to criticise a judgement and quite another for him to urge the court to overrule that judgement. In my view, the two are different and should be so treated. This court has no jurisdiction to raise *suo motu* the issue and resolve it. A litigant must instigate this court to examine its previous decision with a view to overruling it, if the court is wrong. It is possible learned Senior Advocate forgot about it. It is also possible that he did not feel that the wrongful content of the judgement is enough for this court to overrule itself. I need not speculate any further. Let me stop here. D E

Learned Senior Advocate cited some Australian authorities on federalism and the doctrine of state autonomy. He urged the court to follow the decisions which were given on the Australian Constitution. The Australian Constitution was enacted under different economic, political, social and cultural background and circumstances. The Nigerian Constitution was enacted under different economic, political, social and cultural background and circumstances. F

The above apart, the Australian Constitution is not the best example in terms of exactness or nearness to the Nigerian Constitution. I would like to think that although Australia operates a federal Constitution, it should be one of the last places that counsel should rely on the decisions of that country's High Court, which is the equivalent of Nigeria's Supreme Court. The interpretation of the federal system of government in Australia cannot be basis for the interpretation of the Nigerian Constitution for the following G H

reasons: Firstly, the constitutional arrangement in Australia is quite different from ours. There are State Constitutions in Australia as provided in section 106 and 121 of the constitution. The constitutional implication of state autonomy is clearer than a federal Constitution such as ours, which has no provision for State Constitutions.

Secondly, Australia operates a parliamentary system of government while Nigeria operates a presidential system of government. Putting it in another language, while the Australian Constitution is closer to the Constitution of the Federal Republic of Nigeria, 1963, the Presidential Constitution of 1999 is closer to the Constitution of the United States. I should not be understood as making the point that the Constitution of the United States is the same as that of Nigeria. I am not saying that because it is wrong to say that. Considering the fact that the 1963 Parliamentary Constitution is very different from the 1999 Presidential Constitution, the reference to the principles of federal government or Federalism in the Australian Constitution is not helpful to the appellant.

Thirdly, the Australian Constitution does not contain fundamental objectives and directive principles of state policy, and therefore has not the provisions of section 15, items 60, 67 and 68 of the Exclusive Legislative list that have been interpreted in this reference. And this is most material.

Fourthly, the Australian constitution which provides for powers of Parliament, contains 39 matters in the Legislative List under section 51. The Nigerian Constitution provides for 68 items in the Exclusive Legislative List. The implication of this from the viewpoint of federalism is that it contains more items for federal government. And this is the basic criticism of most Nigerians on the Constitution. A court of law cannot follow the bandwagon and interpret the Constitution to suit popular ideas. Rather a court of law must interpret the provisions of the Constitution and nothing more and nothing less.

What this court must interpret is the Constitution of the Federal Republic of Nigeria 1999. While I agree that this court can take advantage of interpretations of similar provisions by courts of other jurisdictions in

more advanced legal systems, by and large, the end of the journey will be the Nigerian Constitution. In Rabiu v. The State (1981) 2 NCLR 293, Udo Udoma, JSC, emphasised the indigenous nature of the 1979 Constitution and the need to interpret the provisions of the Constitution in its autochthonous content. He said at page 326:

“My Lords, in my opinion, it is the duty of this court to bear constantly in mind that the present Constitution has been proclaimed the Supreme Law of the Land, that it is written, organic instrument meant to serve not only the present generation, but also several generations yet unborn, that it is made, enacted and given to by the People of the Federal Republic of Nigeria in Constituent Assembly assembled...”

In the case of Attorney-General of Ondo state v. Attorney-General of the Federation (supra), Ejiwunmi, JSC, did not mince words when he talked about the need to abide by the Nigerian Constitution. He said as page 462:

“Now, having regard to the principles enunciated above with regard to the interpretation of a Constitution, it is necessary to observe that what has to be construed is the Constitutional document wherein all the provisions for governance of the nation, Nigeria have been set out. In other words, it is the Constitution of Nigeria 1999 that is under scrutiny in this matter. It is certainly not the Constitution of any other country, no matter how desirable and perfect that Constitution may be. We as Nigerians have to live and abide with all the provisions of the Constitution which have been fashioned for us by those whose fate was ordained to fashion the Constitution for the governance of the people of Nigeria.”

No two countries operating federal Constitutions practice federalism exactly in the same way. I am yet to see two countries operating federal Constitution providing for exactly the same federal content in the Constitutions. All countries, including those operating federal Constitutions, have their peculiar provisions which they rightly call theirs.

As our country is sovereign, so too our Constitution and this court will always bow or kowtow to the sovereign nature of our Constitution, a sovereignty which gives rise to its supremacy over all other laws of the land, including decisions by foreign courts. Gone are the days when all

things from the older common law jurisdictions were preferred to everything from the younger common law jurisdictions. Gone are also the days when differences between judgements of this court and foreign judgements, implied that the judgements of this court could be wrong. Let B those days come back and they will not come back. In Adigun v. The Attorney-general of Oyo State (No. 2) (1987) 2 NWLR (Pt. 56) 197, karibi-Whyte, JSC, correctly made the point at page 230:

C *“The court has reached the stage where it does not regard differences from the highest English or other Commonwealth court or other courts of common law jurisdiction as necessarily suggesting that is wrong.”*

D **Decisions of foreign countries are merely of persuasive authority. This court will certainly allow itself to be persuaded in appropriate cases but this court will not stray away from its course of interpreting the Nigerian Constitution by resorting to foreign decisions which were decided strictly in the context of their Consti-**

E In Okon v. The State (1988) 1 NWLR (Pt. 68) 172, Nnaemeka-Agu, JSC, said at page 180:

F *“It is well to remember not only that a foreign decision should at best be persuasive authority in a Nigerian court but also that before it can even qualify as such, the legislation, substantive or adjectival, upon which it was based must be in pari materia with our own. It is dangerous to follow a foreign decision simply because its wording approximates to our own. Nigerian courts are obliged to give Nigerian legislation its natural and ordinary meaning, taking into account our own sociological circum-*
 G *stances as well as other factors which form the background of our local legislation in question. A ‘copy-cart’ transposition of an English decision may in some circumstances turn out to be inimical to justice in our own courts.”*

H When this matter was adjourned for judgement, learned Senior Advocate for the Appellant, Chief Williams, sent to us a letter No. 2A/1/1/24(1) dated 31st October, 2003. He called the court’s attention to the case of Peenok Investment Ltd. v. Hotel Presidential Ltd. (1982) 13 NSCC at 477 on

joinder of necessary parties. With the greatest respect, I do not find the authority relevant in the determination of the live issues in the reference. The respondent's brief did not raise the issue of joinder. I therefore discountenance the authority.

I think what is left now is to take the two questions and answer them for the Court of Appeal. My answer to question 1 is "YES". My answer to Question 2 is also "YES", as the answer relates to and affects sections 9(1)(a), 9(1) and 26(1)(c).

My answer to Question 2 as it relates to and affects section 26(3) is "NO" because the subsection is unconstitutional, and it is ultra vires the law making powers of the National Assembly. The subsection was struck out in Attorney-General, Ondo State v. Attorney-General of the Federation (supra). I reject the submission of learned Assistant Director on the subsection.

I make no order as to costs.

BELGORE JSC

My learned brother, Tobi, J.S.C., in the lead judgment, has set out summarily the briefs of the parties to this reference and I am in full agreement with him. This Court in Attorney-General of Ondo State Vs Attorney-General of the Federation (2002) 9 NWLR (part 772) 222 held that Corrupt Practices and Other Related Offences Act 2000 was validly enacted by National Assembly. The subject of that case is the same as in this case. Sections 4, 13, 14(1), 15(5), 174 and 318(1) of the Constitution of 1999 were considered along with items 60(a), 67, and 68 of Part 1 of the Second Schedule to the same Constitution and the same has now come up for consideration therefore I answer Question 1 in the affirmative.

I also answer Question 2 in the affirmative as far as it relates to sections 9(1) (a), 9(1) and 26(1) (c) of the Corrupt Practices and Other Related Offences Act, 2000. But S.26(3) of the Act is ultra vires the law making powers of the National Assembly and my answer to that S.26(3) is in the negative.

MOHAMMED JSC

The appellant was arraigned before the High Court of the Federal Capital Territory together with three others on a four-count charge for committing offences contrary to Sections 26(1) (c), 9(1) (a); 10(a) (ii);
 B and 23(1) of the Corrupt Practices and Other Related Offences Act, 2000.

The appellant was concerned with the first two of the four-counts charge. He objected to the jurisdiction of the court on the ground that
 C Corrupt Practices and Other Related Offences Act, 2000, is unconstitutional and void. The High Court overruled the objection and, on appeal, the Court of Appeal referred certain questions relating to the interpretation of the Constitution to the Supreme Court. The questions are:

*"1. Whether the combined effect of the provisions of Sections 4(2),
 D 15(5), items 60(a), 67 and 68 in Part 1 of the Second Schedule and Section 2(a) of Part 111 of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, is to confer power on the National Assembly to make laws for peace, order and good government of the
 E Federal Republic of Nigeria with respect to offences arising from, connected with or pertaining to corrupt practices and abuse of power.*

*2. Whether the National Assembly has the power to enact sections
 9(1) (a), 9(1), 26(1) (c) and 26(3) of the Corrupt Practices and Other
 F Related Offences Act, 2000."*

Before the above questions were considered this court handed down its decision in Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9(N.W.L.R. (Part 772), 222. In that case the Supreme Court pronounced that the Corrupt Practices and Other Related
 G Offences Act, 2000 was validly enacted within the powers conferred by the Constitution on the National Assembly. The appellant has not applied under Order 6 rule 5(4) of the Supreme Court Rules for the Supreme Court to depart from the decision it made in A-G Ondo State v. Attorney-General of the Federation (supra). Thus that decision still remains as the
 H relevant law.

For the above reasons and the fuller reasons given in the lead judgment of my learned brother, Niki Tobi, J.S.C. I will answer question

I in the affirmative. Question 2 is also answered in the Affirmative except the matter which relates to Section 26(3) of the Act which is answered in the negative because the National Assembly has no power to enact such Law.

I also make no order as to costs.

B

IGUH JSC

Two issues have been referred to this court by the Court of Appeal for determination in these proceedings. These are-

C

1. Whether the combined effect of the provisions of-

(a) Section 4(2)

(b) Section 15(5)

(c) Items 60(a), 67 and 68 in Part 1 of the Second Schedule, and

D

(d) Section 2(a) of Part III of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, confer powers on the National Assembly to make laws for the peace, order and good government of the Federal Republic of Nigeria with respect of offences arising from, connected with or pertaining to corrupt practices and abuse of power as contained in the Corrupt Practices and Other Related Offences Act, 2000.

2. In the light of the answer to Question 1, whether the National Assembly has the power to enact Sections 9(1)(a), 9(1), 16(1)(c) and 26(3) of the Corrupt Practices and Other Related Offences Act, 2000.

F

Copious briefs of argument were filed by the parties in connection with the reference. A summary of the submissions and arguments of learned counsel for the parties are fully set out in the leading judgment of my learned brother, Niki Tobi, J.S.C. and I find it unnecessary to recount them any more. I need only state that in the recent decision of this court in Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 N.W.L.R. (Part 772), 222 the validity of the Act in issue was pronounced upon. In that case, this court in a unanimous decision H declared in no uncertain terms that the Corrupt Practices and Other Related Offences Act was validly enacted by the National Assembly within its constitutional powers.

G

I think I ought to stress that in the Ondo Case (supra), the same questions which are now the subject matter of this reference were fully considered. In particular, Sections 4, 13, 14(1), 15(5), 174 and 318(1) of the constitution of the Federal Republic of Nigeria, 1999 came up for consideration together with items 60(a), 67 and 68 of Part 1 of the Second Schedule and paragraph 2(a) of Part III of the Second Schedule to the same Constitution. I need only affirm that in the light of the light of the pronouncements of this court in the Ondo Case, Question I must be answered in the affirmative.

With regard to Question 2, the short answer thereto must again be in the affirmative in so far as it relates to Section 9(1) (a), 9(1) and 26(1) (c) of the Corrupt Practices and Other Related Offences Act, 2000. However, in view of the fact that Section 26(3) of the Act is unconstitutional and ultra vires the law making powers of the National Assembly, the answer to the question posed in so far as it concerns the said Section 26(3) must be in the negative.

I, too, make no order as to costs.

E _____

KATSINA-ALU JSC

The Appellant herein is one of four persons charged before the High Court of the Federal Capital Territory, Abuja for giving gratification to the 1st Accused. He was also charged for conspiracy to give gratification. All the offences were based on contravention of the Corrupt Practices and Other Related Offences Act, 2000 (hereinafter referred to simply as the "Act"). The Appellant objected to the jurisdiction of the trial court to try him on the ground that the Act is unconstitutional and void.

The learned trial Judge in his ruling of 13 June, 2001 came to the conclusion that the National Assembly validly enacted the Act by virtue of section 4 and 15 (5) of the 1999 Constitution and items 60(a) and 67 of the Exclusive Legislative List and paragraph 2(a) of Part III of the Second Schedule to the Constitution. The court accordingly dismissed the objection of the Appellant.

Upon appeal by the Appellant from this ruling to the Court of Appeal, that court referred certain questions relating to the interpretation of

the 1999 Constitution to this court. The two questions referred were in the following terms:

(i) Whether the combined effect of the provisions of sections 4 (2), 15(5), items 60(a), 67 and 68 in Part 1 of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, confer powers on the National Assembly to make laws for the peace, order and good government of the Federal Republic of Nigeria with respect to offences arising from, Connected with or pertaining to corrupt Practices and abuse of power.

(ii) In the light of the answer to Question (i) whether the National Assembly has power to enact section 9(1) (a), 9(1), 26(1)(c) and 26(3) of the Corrupt Practices and Related Offences Act, 200."

The Appellant set down seven (7) issues to be resolved. I must confess that I find it intriguing that reference in the terms set out was ever made to this court. This is because this court has earlier decided that the Act, was validly made by the National Assembly. That decision is subsisting. The Appellant referred to the said decision in his brief of argument. This is the case of Attorney-General of Ondo State v. Attorney-General of the Federation (2002)9 NWLR (pt. 772)222. That decision binds this court and all other courts in this country.

I would like to point out that this court was not invited to depart from its previous decision. It is in the light of this I do not consider it necessary to deal with the submissions of learned counsel in this case.

In Attorney-General of Ondo State v. Attorney-General of the Federation (supra), section 4, 13,14(1) 15(5), 174 and 318 of the 1999 Constitution were considered. So were items 60(a), 67 and 68 of Part 1 of the Second Schedule and paragraph 2(a) of Part iii of the Second Schedule to the 1999 Constitution.

In the light of the foregoing, I conclude as follows:

Answer to Question 1

yes.

Answer to Question 2

(a) the National Assembly is empowered to Enact sections 9(1)(a), 9(1) and 26(1)(c) of The Act.

(b) Section 26(3) of the Act is unconstitutional. I only wish to add that the answers to both questions are clearly reflected in the earlier decision of this court in the ondo case. I make order as to costs.

B

UWAIFO JSC

The Court of Appeal, Abuja Division has referred two questions to this court. They arose in an appeal by Chief Adebisi Olafisoye against the decision of the High Court of the Federal Capital Territory. That decision overruled the preliminary objection which Chief Olafisoye raised to the jurisdiction of the High Court to try him on a two-count charge brought against him and two others. The substance of the objection is that the Corrupt Practices and Other Related Offences Act, 2000 (the Act) under which he was charged was unconstitutional and invalid. The charged is in respect of an alleged contravention of some offences under the said Act. Count 1 charges for conspiracy to give gratification N3,500,000.00, an offence under section 26(1)(c) and punishable under section 9(1) of Act. Count 2 charges for giving gratification of the said amount, an offence under section 9(1) (a) and punishable under section 9(1)(b) of the Act. Chief Olafisoye had argued that the Act was unconstitutional and therefore invalid.

The learned trial judge in his ruling of 13 June, 2001, came to the conclusion that the Act was validly enacted by the National Assembly by virtue of sections 4 and 15(5) of the 1999 Constitution and items 60(a) and 67 of the Exclusive Legislative List and item 2(a) of Part III of the second Schedule to the Constitution; and that it had jurisdiction to entertain the charge. An appeal was lodged to the Court of Appeal on two grounds complaining essentially that the trial court was wrong. At the Court of Appeal, Chief Olafisoye as appellant, asked for a reference to this court. The two issues referred were stated thus:

"(i) Whether the combined effect of the provisions of section 4(2), 15(5), items 60(a), 67 and 68 in Part 1 of the Second Schedule and section 2(a) of Part III of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, confer powers on the National Assembly to make laws for the peace, order and good government of the

Federal Republic of Nigeria wit respect to offences arising from, connected with or pertaining to corrupt practices and abuse of power.

(ii) *In the light of the answer to Question (i), whether the National Assembly has power to enact sections 9(1)(a), 9(1), 26(1)(c) and 26(3) of the Corrupt Practices and Related Offences Act, 2000.*" B

The appellant proceeded before this court to set down seven issues to be resolved on the two question stated above. The respondent (complainant) set down three issues. I shall refer only to those set down by the appellant in the Appellant's Revised Brief of Argument thus:

"ISSUE 1: *The Act at an exercise of power by the Federal Government.*" C

ISSUE 2: *Principles governing constitution validity of governmental acts in a federal system.*

ISSUE 3: *Whether the Act impedes or interferes with a State Government's management of its affairs.* D

ISSUE 4: *Whether the entire chapter 2 on Fundamental Objectives and Directive Principles of State Policy (Particularly section 15(5) thereof) are a grant of Legislative, Executive or Judicial Power.* E

ISSUE 5: *Whether the Act is intra vires or ultra vires the National Assembly under section 4 of the 1999 Constitution.*

ISSUE 6: *Whether the Act is unconstitutional for uncertainty.*

ISSUE 7: *Whether the bad Provisions of the Act can be severed.*" F

In my view, these issues do not arise at all in so far as there is a subsisting decision of this court which has pronounced unequivocally on the validity of the Act in question. The appellant referred to the said decision in the Appellant's Revised Brief of Argument. It is the case of Attorney General of Ondo State v. Attorney-General of the Federation SC. 2000/2001 delivered on 7 June, 2002, now reported in (2002) 9 NWLR (pt. 772) 222. The judgment represents the law at the moment which has declared the Act to have been enacted within the constitutional powers H conferred on the National Assembly. That decision binds this court and all other lower courts in this country. This principle is erected on the doctrine of stare decisis which demands certainty: see *Ekperoken v. Uni-*

versity of Lagos (1986) 4 NWLR (pt. 34) 162; Clement v Iwuanyanwu (1989) 3 NWLR (pt. 107) 39; Osho v. Foreign Finance Corporation (1991) 4 NWLR (pt. 184) 157; Rossek v. African Continental Bank Ltd (1993) 8 NWLR (pt. 312) 382; Adesokun v. Adetunji (1994) 5 NWLR (pt. 346) 540 at 562. The appellant did not take steps in compliance with Order 6 rule 5(4) of the Supreme Court Rules (as amended in 1999) for this court to depart from the said decision. The said rule reads:

Before this court will embark on considering to depart from its previous judgment, an appellant who desires to have this done, must comply with the necessary procedure provided by the Rules; see Adesokun v. Adetunji (1994) 5 NWLR (pt. 346) 540 at 562. The appellant did not take steps in compliance with Order 6 rule 5(4) of the Supreme Court Rules (as amended in 1999) for this court to depart from the said decision. The said rule reads:

"5(4). If the parties intend to invite the Court to depart from one of its own decision, this shall be clearly stated in a separate paragraph of the brief, to which special attention shall be drawn, and the intention shall also be restated as one of the reasons.

Unless this is done, this court will continue to feel bound by its earlier decision in the Ondo case and faithfully apply it as occasion may demand. It will not otherwise be swayed by any argument of counsel which may do no more than criticise that decision. Such criticism will be brushed aside as unnecessary and misconceived.

With the utmost respect, I consider it was a complete waste of effort for me to have had to peruse the copious arguments made by counsel towards answering the two questions referred to this court only to conclude that they serve no useful purpose. In the said arguments, the appellant engaged merely in criticising, for the better part of his argument, the said judgment given by this court in which it upheld the validity of the Act. My approach, therefore, will be to answer the question by reference to what the said judgment decided without having to defend it simply on the basis of the said criticism. Indeed, I have no obligation to consider the criticism in whatever form in the circumstances. It would be erroneous of me and would serve to divert attention if I did.

In the Ondo case judgment, sections 4, 13, 14(1), 15(5), 174 and

318(1) of the 1999 Constitution were considered. Items 60(a), 67 and 68 of Part 1 of the Second Schedule and paragraph 2(a) of part III of the Second Schedule to the 1999 Constitution were also considered. In the circumstances, there is nothing more to be said in respect of Question 1.

I, therefore, conclude thus:

B

Answer to Question 1

Yes

Answer to Question 2

(a) The National Assembly is empowered to enact section 9(1)(a), 9(1) and 26(1)(c) of the Act. C

(b) Section 26(3) of the Act is unconstitutional.

It is to be noted that the answers to both questions are clearly reflected in the earlier decision of this court cited above. The court below is directed to consider the appeal before it in the light of the above answers. D

I make no order for costs.

EJIWUNMI JSC

When this matter came before the Court of Appeal, it was considered by that Court that it could be useful to refer the following 2 issues for determination of this Court. E

These are:-

(1) Whether the combined effect of the provisions of - F

(a) Section 4 (2)

(b) Section 15 (5)

(c) Items 60 (a), 67 and 68 Part 1 of the Second. Schedule, and

(d) Section 2 (a) of Part 111 of the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999, confer powers on the National Assembly to make laws for the peace, order and good government of the Federal Republic of Nigeria with respect of offences arising from, connected with or pertaining to corrupt practices and abuse of power as contained in the Corrupt Practices and Other Related Offences Act, 2000. G H

2. In the light of the answer to Question 1, whether the National Assembly has the power to enact Sections 9 (1)(a), 9 (1), 16 (1)(c) and

26 (3) of the Corrupt Practices and Other Related Offences Act, 2000.

Both parties in this matter filed brief in support of their position, My learned brother Niki Tobi, JSC in his leading judgment also summarised the submissions made in connection with the answers, which this Court is required to give. I do not consider it necessary to also repeat the various submissions so made by learned counsel. However it is clear in my humble view that the question raised for determination in this Court had come for consideration in Attorney General of Ondo State v. Attorney General of the Federation (2002) 9 NWLR (pt. 772) p. 222. By reason of the decision of this Court, the validity of the Act as an issue was pronounced upon. This Court in a unanimous decision declared very clearly that the Corrupt Practices and Other Related Offences Act was validly enacted by the National Assembly within its constitutional powers.

It is important to state that in the Ondo case (supra), the same questions which are now the subject matter of this reference were fully considered. In particular, Sections 4,13,14 (1), 15 (5) 174 and 318 (1) of the Constitution of the Federal Republic of Nigeria, 1999 were duly considered together with Items 60 (a), 67 and 68 of part 1 of the 2nd Schedule and Paragraph 2 (a) of part 111 of the 2nd Schedule of the same Constitution.

In such circumstances, I must hold that in the light of the pronouncement of this Court in the Ondo Case, Question 1 must be answered in the affirmative. With respect to Question 2, the answer thereto must also be in the affirmative in so far as it relates to Section 9 (1) (a), 9 (1) and 26 (1) (c) of the Corrupt Practices and Other Related Offences Act, 2000. However, as Section 26 (3) of the Act is unconstitutional and ultra vires the law making powers of the National Assembly, my answer to the question so far as it concerns the said Section 26 (3) must be in the negative.

I also do not make any order as to costs.