

THE CONSTITUTIONALITY AND POWERS OF THE HUMAN RIGHTS VIOLATIONS INVESTIGATION COMMISSION (OPUTA PANEL)*

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Introduction

The nation Nigeria eventually returned to a democratic system of government on 29th May, 1999 after years of repressive and traumatic military dictatorship.¹ The latter, which may be conveniently described as “Nigeria’s dark years” witnessed unparalleled and unprecedented gross violations and abuse of human rights by government, its functionaries and agencies and even individuals who had some connections with the military government. From revelations at the Oputa Panel, evidence from top military officers showed in-fighting within the ranks of the top echelon of the Nigerian Military during this period. Discipline, comradeship, ESPRIT DE CORPS, was sacrificed in the process. “When two elephants fight, the grasses suffer”: the battle of the generals’ led to massive and horrendous human rights abuses, the worst so far in the history of Nigeria.²

Consequently, Nigerians heaved a sigh of relief when, on June 14th 1999 shortly after his inauguration, the President, Chief Olusegun Obasanjo, set up the Human Rights Violations Investigation Commission³ headed by a retired Justice of the Supreme Court of Nigeria, Justice Chukwudifu Oputa. Otherwise known as the “Oputa Panel” the Commission, which is fashioned after the Truth and Reconciliation Commission of South Africa, was mandated to investigate cases of injustice and abuse of human rights, and recommend measures to redress these injustices and prevent their re-occurrence thus fostering truth, justice and reconciliation among Nigerians.

However, the recent Judgment of the Court of Appeal in the case of *Togun v. Oputa (No. 2)*⁴ would appear to impugn the Tribunals of Inquiry Act Cap. 447 under which the HRVIC was set up and consequently impinge on the constitutionality and powers of the Commission. This is the subject of examination in this contribution. It is intended to examine this judgment, its correctness or otherwise, in the light of the extant law and present realities.

II. Facts of The Case

Between 1984 and May, 1999 there were successive military governments in Nigeria. there were coups and counter-coups with a set of officers taking over from another the governance of Nigeria. in this period, there were allegations of human rights violations. Mysterious deaths occurred in the strangest of circumstances. The people were traumatized to no end.

However on 29th May, 1999, the country was returned to democratic governance. On 7th June, 1999 the President of the Federal Republic (hereinafter referred as Mr. President) constituted and appointed a Judicial Commission pursuant

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¹ The Army held on to Political Power in Nigeria for about 30 years.

² The atrocities of the Military regime in Nigeria are so well documented in various books, magazines and Law Reports etc both national and international to require any citation of authority here. See however, for more details the Keynote Address By the Chairman during the closing session of the Public Hearing of the Human Rights Violations Investigation Commission dated 18th Day of October, 2001 at the Women Development Centre Abuja titled: “In Reconciliation Stat Progressio Humana.”

³ See Statutory Instrument No.8 as amended by No. 13 of 1999 and the Tribunals of Inquiry Act Cap. 447, Laws of the Federation of Nigeria, 1990.

⁴ (2001) 16 N.W.L.R. (Pt. 740) p. 597.

to powers said to be derived under section 1 of the Tribunals of Inquiry Act, 1966. The terms of reference of the Tribunal were to –

- “(a) ascertain or establish the causes, nature and extent of human rights violations or abuses with particular reference to all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria between the 15th day January, 1966 and the 28th of May, 1999;
- (b) identify the person or persons, authorities, institutions or organisations which may be held accountable for such mysterious deaths, assassinations or attempted assassination or other violations or abuses of human rights and determine the motives of the violations or abuses, the victims and circumstances thereof and the effect on such victims or the society generally of the atrocities;
- (c) determine whether such abuses or violations were the product of deliberate State policy or the policy of any of its organs or institutions or whether they arose from abuses by State officials of their office or whether they were the acts of any political organisations, liberation movements or other groups or individual;
- (d) recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress the injustices of the past and prevent or forestall future violations or abuse of human rights;
- (e) make any other recommendations which are, in the opinion of the Judicial Commission in the public interest and are necessitated by the evidence.”

The 1st defendant is the Chairman of the Judicial Commission set up by Mr. President. In the course of its work the Commission caused to be served on General Ibrahim Babangida (Rtd) a former Head of State and Commander-in-chief of the Armed Forces of the Federal Republic of Nigeria two summonses.

Subsequently, the two suits consolidated herein were instituted by the respective plaintiffs against the same set of defendants before the Federal High Court, Lagos.⁵ The Federal High Court referred the following questions to the Court of Appeal pursuant to section 295 (2) of the 1999 Constitution:

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

The Court of Appeal held that the Act is an existing law within the meaning of section 315 of the 1999 constitution and took effect as a Federal law but that it covered matters outside the legislative competence of the National Assembly. As the President failed to make textual amendments to it as would bring it into conformity with the 1999 Constitution, the Oputa Panel could not exercise powers to compel witnesses to attend its hearings under sections 5(c), 10, 11(1) (b), 11(3), 11 (4) and 12 of the Act. That

⁵ Plaintiffs sought the following relief's at the Federal High Court “(1) A declaration that the Tribunals of Inquiry Act, 1966 No. 41 is not an enactment on any matter with respect to which the National Assembly is empowered to make laws under the constitution of the Federal Republic of Nigeria, 1999 and it accordingly took effect as a law enacted by the House of Assembly of a State. (ii) A declaration that it is not lawful for the 1st or 2nd defendant to summon the plaintiff to appear before it to testify or to produce documents. (iii) An order of prohibition prohibiting the 1st and 2nd defendant, their servants and agents whomsoever or howsoever from – (a) sitting as a body empowered to exercise powers or functions claimed to be conferred upon it pursuant to the Tribunal of Inquires Act, Cap. 447, Laws of the Federatio of Nigeria or exercising any of the aforementioned powers. (b) using the powers conferred or purported to be conferred on him or them by the Tribunals of Inquiry Act, 1966, to compel the plaintiff to attend a sitting of the 2nd defendant body to answer questions or to produce documents.’

these sections contravene sections 35 and 36 of the 1999 Constitution and therefore unconstitutional and void.

III. Constitutionality of the Oputa Panel

This issue will involve an examination of the authority or instrument under which the President constituted the Human Rights Violations Investigation Commission (hereinafter referred to as "Oputa Panel"). The latter was constituted by the President of the Federal Republic of Nigeria by Statutory instrument No. 8 of 1999 as amended by Statutory Instrument No. 13 of 1999 in the exercise of the powers conferred upon him by section 1 of the Tribunals of Inquiry Act,⁶ 1990 and "all other powers enabling him in that behalf". This means that the President constituted the Oputa Panel in exercise of the powers conferred on him not only by section 1 of the Act, but also in the exercise of all other powers conferred upon him enabling him in that behalf. The latter, as we shall soon demonstrate, would obviously include the executive powers vested on the President by virtue of section 5 of the Constitution of the Federal Republic of Nigeria 1999.⁷ This point would appear to be very important in distinguishing the present case from that of *Balewa v. Doherty*,⁸ a point, which unfortunately, the Court of Appeal failed to grasp in this case.

It is submitted that the Tribunals of Inquiry Act Cap. 447 is an existing law within the meaning of the 1999 Constitution and therefore a valid enactment. The Act was promulgated as Decree No. 41 of 1966 by the Federal Military Government. Being an enactment of the Federal Military Government, it took effect as an existing law and a Federal enactment under section 315 of the 1999 Constitution. The latter provides:

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

- (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and;
 - (b) a law made by a House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws.
- (2) The appropriate authority may at anytime by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.
 - (3) Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of any existing law on the ground of inconsistency with the provision of any other law, that is say.

⁶ Cap 447, Laws of the Federation of Nigeria 1990

⁷ Section 5 provides: (1) Subject to the provisions of this Constitution, the executive powers of the Federation – (a) shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and (b) shall extend to the execution and maintenance of this Constitution, all laws MADE BY THE NATIONAL assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.

⁸ (1963) 1 W.L.R. 949 (P.C.)

- (a) any other existing law;
 - (b) a Law of a House of Assembly;
 - (c) an Act of the National Assembly; or
 - (d) any provision of this Constitution;
- (4) In this section, the following expressions have the meanings assigned to them respectively
- (a) “appropriate, authority” means –
 - (i) the President, in relation to the provisions of any law of the Federation.
 - (ii) The Governor of a State, in relation to the provisions of any existing law deemed to be a Law made by the House of Assembly of that State, or
 - (iii) Any person appointed by any law to revise or rewrite the laws of the Federation or of a State;
 - (b) “existing law” means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date; and
 - (c) “modification” includes addition, alteration, omission or repeal.”

From the above provision, there is no doubt that the Tribunals of Inquiry Act, Cap. 447 which was first promulgated in 1966 by the Federal Military Government came into force as a Federal Law under the 1999 Constitution under and by virtue of section 315(a) thereof. It is therefore deemed to be an Act of the National Assembly⁹.

The whole essence of the Act is the taking of evidence from witnesses on abuse of human rights, a matter for which copious provisions are made in sections 33 – 46 of the 1999 constitution. This is abundantly clear from the Terms of Reference of the Oputa Panel. Evidence is item 23 on the Exclusive Legislative List on which the National Assembly has power to make laws. It is indeed, unfortunate that the Court of Appeal failed to recognize this important point. Section 4 of the 1999 Constitution makes provision for this as follows:

- “4-(i) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.
- (2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.
- “(3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.”

It is therefore submitted that the conclusion that the Act does not cover matters on which the National Assembly is empowered to make Laws under the 1999 Constitution is erroneous. The same is true of the conclusion that section 1 of the Act is too wide that the President cannot lawfully act under a tribunal to inquire into any matter whatsoever which in his opinion would be in the Public Welfare. On the

⁹ Attorney-General, Benue State v. Ogwu (1983) 4 N.C.L.R. 213, 217-218, (per Nasir P.C.A. interpreting section 274 of the 1979 Constitution which is similar to section 315 of the 1999 Constitution), Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 1 & 2 S.C. 13 at 42 (per Fatayi-Williams C.J.N.)

contrary, it is submitted that the President could do this pursuant to his executive powers under section 5 of the Constitution which extend to the execution and maintenance of the Constitution especially in respects of evidence on human rights violations. Section 5 provides:

“(1) Subject to the provisions of this Constitution, the executive powers of the Federation – (a) shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being , being, power to make laws”.

It is also submitted that the President could even lawfully have set up a Tribunal of Inquiry to look into cases of abuse of Human Rights without any legislative authority from the National Assembly. Both the Privy Council in the case of *Belawa v. Doherty*¹⁰ and the Court of Appeal, in this case, clearly conceded this point.

The Privy Council said:

“The second reason is that if they had not intended such a body there would have been no need to have made any constitutional provision at all. It does not require a provision in the Constitution to enable any one, whether a minister or a private citizen to set up a body to seek information from anyone else who is willing to give it. The appointment of a committee of that sort is an ordinary ministerial act; it is not legislative in character. It is impossible to suppose that Parliament was given expressly the power to establish by legislation and to regulate tribunals of inquiry if all that was contemplated, was bodies without inquisitorial powers, for the creation of powerless body is something that any individual can do. Their Lordships therefore respectively disagree with the views of the Supreme Court on this point and do not think that the 1961 statute can be attacked successfully on this ground.”¹¹

In the same vein, following the Privy Council, the Court of Appeal also conceded this point. Oguntade J.C.A said:

“From the reasoning of the Privy Council, any Government, State or Federal or any private individual can set up any body to inform it or him about any matter irrespective of the legislative authority of the State, Federal Government or businesses of the individual. It does not require any statutory or constitutional authorization to be able to do so. The question of the limit of vires does not therefore arise in relation to such matters.”¹²

He continued:

“I have myself closely examined Section 1(1) of Cap. 447. There is no doubt that the provision is very wide and convey that the President has authority to set up a tribunal to look into any matters whatsoever. But I must be guided in my approach to the matter by the decision in *Balewa v. Doherty* (1963) 1 WLR 949. That decision is authority for the proposition that the President may at his election set up a panel of inquiry to look into any matter.”¹³

Obadina J.C.A. also agreed as follows:

“In the exercise of his executive Powers it cannot be said tht the President cannot constitute a Commission or Tribunal to ascertain or establish the cause or

¹⁰ *Doherty v. Belawa* (1961) 1 All N.L.R. 605, is a decision of the Federal Supreme Court while *Belawa v. Doherty* (1963) 1 W.L.R. 949 is a decision of the Privy Council.

¹¹ (1965) 1 W.L.R. 949, 958 – 959.

¹² (2001) 16 N.W.L.R. (Pt. 740) 597, 642.

¹³ *ibid.* at p. 645

causes, nature and extent of human rights violations or abuse and to advise him, the President.

“Apart from any question on the spending of public money which is not in issue in this case, there is nothing in the Constitution to prevent the President, with or without Legislative authority, from authorizing or constituting such inquiries as he thinks fit, and that is all section 1 of the Act, Cap 447 taken by itself gives the President power to do.”¹⁴

It appears clear from this that the argument that the powers vested on the President by section 1 of the Tribunals of Inquiry Act, Cap. 447 are too wide and not within the legislative competence of the National Assembly, ought to be rejected outright by the Court of Appeal. This is because, in *Belewa v. Doherty* relied on by the Court of Appeal, it did not matter in the opinion of the Privy Council that the areas into which the Tribunal was to inquire were not within the legislative competence of the Federal Government. The Council was of the view that section 3(1) of the 1961 Act¹⁵ (equivalent to section (1) of Cap. 447 of 1990) could not be held invalid for the reason that it was open to the Prime Minister (The President in this case) to seek to inform himself or derive more intimate knowledge concerning any matter in the country by setting up the Tribunal of Inquiry.

It is also important to consider the Terms of reference of the Oputa Panel which clearly indicated and circumscribed the matter into which the tribunal was to inquire in this case, which is, the issue of Human Rights. The latter is not only a matter within the 1999 Constitution¹⁶ but one in which the Government of the Federal Republic of Nigeria is in Treaty relationship with the rest of the world. The Federal Government is a party to the Universal Declaration of Human Rights by the General Assembly of the United Nations and other Human Rights Covenants¹⁷ and recently the African Charter on Human and Peoples Rights the latter of which is now part of the Nigerian law by virtue of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act.¹⁸ It is in this respect that the submission of Mr. Oyetibo, Counsel to the third defendant becomes relevant. He said that since the Oputa Panel was set up in connection with violations of Human Rights, it was intended to assist the President in the implementation of these Treaties/Covenants on human Rights, a matter on which the National Assembly is empowered by virtue of section 12(2) of the Constitution to make laws for the whole country whether or not in the Exclusive Legislative List. Section 12(2) provides:

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

Regrettably, the Court of Appeal also failed to appreciate this point even though it would only have taken a little more effort to look at the terms of Reference of the Panel with the benefit of hind sight to discover this. Lamentably, Obadina J.C.A. declared:

“.....it is equally true that the National Assembly is empowered by section 12(2) of the 1999 Constitution to make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty. However, I find it very difficult to see any fact or evidence from which I can draw a conclusion that the Tribunals of Inquiry Act, Cap. 447 under consideration was promulgated for the purpose of implementing a treaty. I am also

¹⁴ *ibid.* at p. 653

¹⁵ No. 26 of 1961.

¹⁶ See Chapter 4, Section 33 – 46 of the Constitution

¹⁷ These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights etc.

¹⁸ Cap. 10, Laws of the Federation of Nigeria 1990. See also *General Sani Abacha and others v. Chief Gani Fawehinmi* (2000) 6 N.W.L.R. (Pt. 660) 228.

unable to see any basis to support a conclusion that Oputa Panel was indeed set up for the purpose of implementing a treaty.”¹⁹

It is submitted that without recourse to the Tribunals of Inquiry Act Cap. 447 or any other law, the President could also lawfully have set up the Oputa Panel under and by virtue of these international Covenants, Treaty and pursuant to his executive powers under section 5 of the 1999 Constitution. The latter constitute “all other powers enabling him in that behalf” under Instruments Nos. 8 and 13 of 1999 by which the President established the Oputa Panel.

IV. Powers of the Oputa Panel

The powers of the Oputa Panel are contained in the Tribunals of Inquiry Act Cap 447 which is its enabling law. That law is clearly the Panel’s Magna Carta from where it derives its jurisdiction and powers. The terms of reference of the tribunal are made pursuant to section 1(2) (a) thereof. Section 5 contains the powers of the tribunal with regard to conduct of proceedings while section 10-12 provide for penalties for refusal to give evidence and contempt of the tribunal. These provisions were challenged as being in conflict with sections 35 and 36 of the 1999 Constitution. Unfortunately, the Court of Appeal upheld this argument as valid. The affected provisions are hereby reproduced:-

“1(1) The President (hereinafter in this Act, referred to as “the proper authority”) may, whenever he deems it desirable, by instrument under his hand (hereinafter in this Act referred to as “the instrument”) constitute one or more persons (hereinafter in this Act referred to as member” or “members”) a tribunal to inquire into any matter or thing or into the conduct of affairs of any person in respect of which in his opinion an inquiry would be for the public welfare; and the proper authority by the same instrument or by an order appoint a secretary to the tribunal who shall perform such duties as the members shall prescribe.

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

- a. -----
 - b. -----
 - c. the power to summon any person in Nigeria to attend any meeting of the tribunal to give evidence or produce any document or other thing in his possession and to examine him as a witness or require him to produce any document or other thing in his possession subject to all just exceptions. Summonses issued under this paragraph may be in Form A in the schedule to this Act, and shall be served by the police or by such person as the members may direct:
10. Any person who, after service on him of a summon to attend as a witness or to produce a book, document or any other thing and notwithstanding any duty of secrecy however imposed fails or refuses or neglects to do so or to answer any question put to him by or with the concurrence of the tribunal shall be guilty of an offence, and liable on summary conviction to a fine of two hundred Naira or to imprisonment for a term of six months. Provided that no person shall be bound to incriminate himself and every witness shall, in respect of any evidence written by him for or given by him before the members, be entitled to the same privilege to which he would have been entitled if giving evidence before a Court of Justice.
- 11 (1) Any person who commits an act of contempt, whether the act is or is not committed in the presence of the members sitting in an inquiry, shall be liable:
- (a) -----
 - (b) On the order of the tribunal to a fine of twenty Naira such fine being recoverable in the same manner as if it were imposed by a magistrate.

¹⁹ (2001) 16 N.W.L.R. (Pt. 740) 597, at 662.

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

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

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

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

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

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

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

In declaring these provisions as “compulsive powers” and therefore unconstitutional, the court relied heavily on the decision in *Balewa v. Doherty*.²⁰ It is submitted that the latter case ought to be distinguished as inapplicable in this case. First, the facts are not *impari materia*; one is on banking while the other is on human rights. Secondly, the provisions of the 1960 and 1999 Constitutions differ. For instance, under the 1999 Constitution, “Evidence” is a matter contained in the Exclusive Legislative List whereas this was not the case with the former.

It is regrettable that the Court of Appeal succumbed to undue allegiance to precedent in this case instead of distinguishing it. It is interesting to observe that the court conceded that the purpose of these powers given under the Act was to give teeth and strength to section 1(1) thereof. “A tribunal of inquiry that could not enforce attendance of witnesses and punish for contempt is not likely to be able to achieve much or command respect.”²¹ It is therefore tantamount to a contradiction for the Court after this observation to hold these powers void. For instance, the ultimate aim of these sections is to secure the attendance of witnesses to give evidence. If every witness refuses to attend to give evidence, without power to compel attendance, there would be no witnesses to examine. This will definitely defeat the entire purpose of setting up the tribunal. So also the power to punish for contempt is to secure respect for the tribunal. These are all in accord with the observation of the Court quoted above.

Accordingly, it is submitted that these provisions do not violate sections 35 and 36 of the 1999 Constitution as held by the Court of Appeal. Section 36 provides:

(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a

²⁰ Supra.

²¹ (20010 16 N.W.L.R. (Pt. 740) 597 at P. 644 (per Oguntade J.C.A.

person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

- (2) Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law –
 - (a) provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and
 - (b) contains no provision making the determination of the administering authority final and conclusive.
- (3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.”

There is no doubt that Oputa Panel is a tribunal established by law under this provision. The power of the tribunal to issue witness summons under section 5 (c) of the Act therefore, cannot be said to contravene section 36 of the Constitution. Furthermore, the composition and public sitting/procedure of the Panel satisfy the requirements of fair-hearing under section 36. There are other provisions of the Act which also support this submission. Under section 5 (b) evidence is required to be given on oath as is required of a witness testifying before a magistrate court. Under section 5 (c) the power to summon witnesses is subject to all just exceptions. Section 10 contains the very important proviso that “no person shall be bound to incriminate himself and every witness shall, in respect of any evidence written by him for or given by him before the members, be “entitled to the same privilege to which he would have been entitled if giving evidence before a Court of justice.” Under section 11 power to punish for contempt, is subject to conviction before a court of competent jurisdiction. It is important to note that while such court may impose imprisonment under (a) thereof, the tribunal is only empowered to impose a fine of twenty Naira only and such fine being recoverable in the same manner as if it were imposed by a magistrate. Subsection 2 thereof guarantees appeal to the High Court. Section 12 (2) provides that no punishment for contempt shall be imposed by the tribunal until the members shall have heard the offender in his defence. Finally, section 18 gives a witness the right to be represented by counsel of his choice throughout the inquiry! How do these provisions violate section 36 of the 1999 Constitution?

In the interpretation of statutes, while it is important to look at the history of the statute, it is submitted that it is also important to look at the history of the case and present realities particularly in the case under consideration. This, unfortunately, the Court of Appeal failed to do. For instance, sub-paragraphs (a) and (b) of The terms of Reference of the Oputa Panel constitute a public admission that atrocities were committed during the period covered by the terms of reference which is 1966 to 1999. Accordingly, the plaintiffs and, indeed, every government functionary in those dark Military years, are relevant and necessary witnesses by virtue of section 18 of Cap. 447. They have to account for their stewardship to the people of Nigeria in respect of all gross human rights violations committed during their period of office. That is all what Cap. 447 and, indeed, the Oputa Panel, is about. Even the incumbent President attended upon summons of the Tribunal twice. How on earth could the Oputa Panel accomplish its terms of reference if it failed to invite and secure the attendance of these witnesses?

Accordingly, it is submitted that the Court of Appeal ought to have adopted the purposive and broader interpretation or beneficial construction rather than the narrow

technical approach in this case. The former approach, which is the liberal construction, is the tendency of the courts, when faced with a choice between a wide meaning which carries out what appears to have been the object of the legislature more fully and a narrow meaning which carries out less fully or not at all, to choose the former. This is the approach to interpretation of statutes and the Constitution adopted by the Supreme Court in a number of cases. In *Rafu Nabiu v. The State*²² Sir Udo Udoma explained the position thus:

“It is the duty of this Court to bear constantly in mind that the present Constitution has been proclaimed Supreme Law of the Land... that the function of the Constitution is to establish a framework and principles of government, broad and general in terms intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society and therefore mere technical rules of interpretation of Statutes are to some extent inadmissible in a way so as to defeat the principles of Government entrenched in the Constitution.”

Accordingly, it is submitted that the case of *Nabiu Rabi v. The State* had set the pace and made paramount the need for liberal approach to the interpretation of our Statutes and the Constitution. Consequently, the Law now is that in all cases in the interpretation of Statutes and the Constitution, the Court should adopt such a construction as will promote the general legislative purpose underlining the statute. It is unfortunate that the Court of Appeal failed to adopt this approach in this case

Finally, it is submitted that the argument that as the President did not make any modification to the Tribunals of Inquiry Act it is necessarily unconstitutional, is hollow. This is because, modification is not mandatory. It is only when the President deems it necessary that he could modify. At any rate, since the Court of Appeal followed the Privy Council's decision in *Balewa v. Doherty* that the President could set up the Oputa Panel even without legislative authority from the National Assembly, the pronouncement of the Court of Appeal on section 1(1) of the Act must be regarded as obiter. Secondly, with the fair hearing provisions in the Act already discussed and giving the realities of the situation during the public sittings of the Oputa Panel, it is difficult to see how the so-called “compulsive provisions” of the Act could be regarded as unconstitutional for want of modification by the President. This is especially true since the ultimate aim of those provisions is only to secure attendance of these witnesses/plaintiffs to give account for their human rights record during the period of their office. Human rights owe their origin to the need to protect the individual citizen from the wrong use or abuse of power. Under the Rule of Law, it is imperative that those who exercised powers which injuriously affected the persons or properties of individual citizens should have their actions reviewed by the court or a tribunal. That was the rationale for setting up the Oputa Panel.

In addition, since the Oputa Panel never invoked the “compulsive powers” at the time the plaintiffs went to Court, their complaint on this point was both speculative and premature.

Concluding Remarks

From the foregoing analysis our conclusion is that the tribunals of Inquiry Act Cap.447 satisfies the requirements of section 315 of the 1999 Constitution as an existing law, a Federal enactment and is deemed to be an Act of the National Assembly. We are of the view that the Act is valid and constitutional. The case of *BalEwa v. DohErty* is distinguishable from the present case in many respects. Accordingly, the absolute

²² (1981) 2 N.C.L.R. 293, 326, (1980) 12 N.S.C.C. 291, 300 – 301; See also *Savannah Bank of Nigeria Ltd. and Another v. Ammel Ajilo and Another* (1989) 1 N.S.C.C. 135, 155 (Per Obaseki, J.S.C.)

reliance by the Court of Appeal on the latter case as precedent is erroneous. In view of the importance of the subject – matter investigated by the Oputa Panel (Human Rights) and the fair-hearing provisions in the tribunals of Inquiry Act already discussed, it is not true to say that sections 1(1), 5(c), 10, 11(1) (b), 11(3), 11(4) and 12 contravene sections 35 and 36 of the Constitution. It is hoped that the Supreme Court will reverse the decision of the Court of Appeal in this case in the interest of the Nation.