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**LAW LECTURERS AND PRIVATE PRACTICE**

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### I INTRODUCTION

Section 2(b) of the Code of Conduct for Public Officers in the 1999 Constitution of the Federal Republic of Nigeria<sup>1</sup> prohibits public officers from engaging in private practice with exception to farming:

Without prejudice to the generality of the foregoing paragraph, a public officer shall not-...(b) except where he is not employed on full time basis engage or participate in the management of or running of any private business, profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming<sup>2</sup>

This paper examines whether in view of the foregoing provision, and of the provisions of the Regulated and Other Professions (Private Practice Prohibition) (Law Lecturers Exemption) (No. 2) Order 1992, law teachers are exempted from private practice. In the next section, I examine the position of the law prior to the 1999 Constitution. I then consider the position under the 1999 Constitution. In Section IV, I make a case for the exemption of law

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<sup>1</sup> The Code can be found in Part 1 of the Fifth Schedule to the 1999 Constitution of the Federal Republic of Nigeria.

<sup>2</sup> Section 2 (b) *ibid.*

lecturers from the prohibition on private practice. In the final section, I make concluding remarks and proffer solutions.

## II. PRE 1999 POSITION ON LAW LECTURERS AND PRIVATE PRACTICE

The question of whether public officers may engage in private practice did not feature in the 1963 Constitution of the Federal Republic of Nigeria. The earliest piece of legislation that would foreclose private practice for public officers came in the garb of the Regulated and other Professions (Miscellaneous Provisions) Act 1978, which placed an absolute ban on public officers engaging in private practice in the following words:<sup>3</sup>

A year later, the prohibition took on a constitutional flavour in section 2 (b) of the Code of Conduct for Public Officers in the 1979 Constitution,<sup>4</sup> which is more strictly worded than the corresponding provision of the Code in the 1999 Constitution and provides as follows:

Without prejudice to the generality of the foregoing paragraph, a public officer shall not- (b)engage or participate in the management or running of any private business, profession or trade but nothing in this subparagraph shall apply to any public officer who is not employed on full time basis..

Section 15 of Part II of the Fifth Schedule to the 1979 Constitution, an interpretative provision, provided a list of public offices including all staff of universities, colleges and Institutions owned by the Federal or State Governments or local government councils.

These prohibitions had the unpleasant effect of precipitating a brain drain of law lecturers from a good number of academic institutions. There was a mass exodus of highly qualified and scholarly law teachers from tertiary institutions of learning who left to set up very lucrative law firms. The pittance they received as remuneration for occupying professorial seats hardly provided sustenance for them.<sup>5</sup>

Alarmed by the brain drain, the then Federal Military Government decreed the Regulated and other Professions (Private Practice Prohibition) Decree 1984. The Decree reiterated the essential position of the 1979 constitution, but relaxed the extent to which the prohibition would apply: public officers who

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<sup>3</sup> The Regulated and other Professions (Miscellaneous Provisions) Act 1978 which *inter alia* put a ban on public officers from engaging in private practice was affected by Schedule 3 to the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) 1979, to permit newly qualified professionals to get into private practice if they so desire. The Regulated and other Professions (Private Practice Prohibition) Decree No. 34 1984 repealed what was left of the 1978 Act.

<sup>4</sup> Part 1 of the Fifth Schedule 1999 Constitution

<sup>5</sup> This reaction is not peculiar to Nigeria. In Namibia for instance, the Faculty of Law at the University of Namibia was greatly understaffed as the lawyers preferred to be employed on part-time basis in order to supplement their remuneration through private practice. See the University of Namibia 1998 Information book.

qualify under any of the list of scheduled professions may engage in private practice provided such practice comes under a delineated scope of services.<sup>6</sup> A scheduled profession was defined as one that falls under any of the public offices listed in Part II of the Fifth Schedule of the 1979 Constitution, which comprises all staff of universities, colleges and Institutions owned by the Federal or State Governments or local government councils. Private practice in relation to these scheduled professions was described by the Decree to include the rendering of or offer to render to any other person (not being the employer or any other person entitled in the course of his official duties to receive such services) any service relative to the profession concerned whether or not it is executed after normal working hours or on work free days, for money or money's worth or for any other valuable considerations. It includes in particular<sup>7</sup> –

- a. the performance of services of all descriptions relating to the profession concerned including the tendering of advice or provision of consultancy services connected with or relating to the profession concerned; or
- b. the issue of certificates, the certification of documents or any other matter concerned with the issue or certification of documents connected with or relating to any of the aforementioned services; or
- c. the establishment of any undertaking either by the professional concerned or in partnership, or in any other form of association with any other person (whether or not himself a public officer) for the provision of any of the services or matters referred to in this subsection.

The relaxation by the 1984 Decree of the prohibition applied to services rendered for remuneration or rendered gratuitously. It thus became lawful for a public officer to render, outside the course of his normal official duties, any of the above services. But the decree also defined the compass within which professional services may be rendered for remuneration<sup>8</sup> as including services to persons in emergency, or to persons (whether corporate or incorporate) authorised either generally or specifically by the Government to receive the services of that professional for the time being or, where a permit is specified, for that specified period. A public officer may also render such gratuitous services to members of his family, to charitable organisations or other persons on purely humanitarian grounds, or to a professional association s/he belongs to.<sup>9</sup> A public Officer may also offer such services to himself. Violations of these regulations attracted criminal sanction.<sup>10</sup>

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<sup>6</sup> See Section 1 (1) of the Regulated and Other Professions (Private Practice Prohibition) Decree No. 34 1984.

<sup>7</sup> Section 1 (2) *ibid.*

<sup>8</sup> Section 1 (3) *ibid.*

<sup>9</sup> Section 1 (3) (d) (i) – (iii)

<sup>10</sup> Specifically at Subsection 2 (a)–(c) Penalties for the violation of the prohibition were N2,000 or one year imprisonment for a first offender; N5,000 or one year imprisonment upon the conviction of a second offender; and three years imprisonment without any option of fine upon conviction of a third offender.

Despite the decree's relaxation of the prohibition on private practice in the 1979 Constitution, it could not dispel the agitation of public officers for unhindered rights to private practice. The limitations were still considered to be too strict. Consequently certain professionals that occupied public offices successfully agitated to have these limitations removed. The outcome of this for law lecturers is the Regulated and Other Professions (Private Practice Prohibition) (Law Lecturers Exemption) (No. 2) Order, 1992, which provides in its only section that:

1. A public officer engaged in the practice of law as a full time lecturer is hereby exempted from the provisions of the regulated and other Professions (Private practice prohibition) Act”

By this order, all restrictions, absolute or partial, imposed by the 1979 Constitution and the 1984 decree were lifted to permit full time law lecturers practice law unfettered.

### **III: LAW LECTURERS AND PRIVATE PRACTICE UNDER THE 1999 CONSTITUTION – *Has the Regulated and other Professions (Private Practice Prohibition) Law Lecturers Exemption (NO. 2) Order 1992 been Repealed?***

A very lively debate has emerged around what has become of the Regulated and other Professions (Private Practice Prohibition) Law Lecturers Exemption (NO. 2) Order 1992 after the 1999 Constitution came into effect.<sup>11</sup> Many have argued that the 1992 Order has not been specifically repealed and as such, continues to have effect even after the 1999 Constitution came into force. Some have also argued, when their attention is drawn to the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999,<sup>12</sup> that the decree does not specifically repeal legislation that relaxed the prohibition on private practice for law teachers. On the other hand are arguments that assert that the 1999 Constitution forecloses private practice for public officers, law teachers inclusive. So lively and practical has the debate been that some law teachers have had their appearances in law courts objected to by the opposing counsel. Though quite tempting to look the other side, academic integrity behoves an objective analysis.

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<sup>11</sup> It also commanded the attention of the National Executive Committee meetings of the Nigerian Bar Association that held at Abeokuta and Asaba in January and March, 2003. See A.O Giwa, 'Law Lecturers and Court Room Attendance' 1(4) *Nigerian Bar Journal* (2003) p. 503.

<sup>12</sup> The Decree came into force on 29<sup>th</sup> May, 1999 and had the effect of removing the exemption that the hitherto scheduled professions enjoyed,

The tension point in the debate engages the legal propriety of private practice for full time law lecturers. I proffer a solution to the dispute by examining whether the 1992 Order, which gave law lecturers unhindered right to private practice, survived repeal by Decree No. 63 of 1999 and, if it did, whether its full provisions can be said to remain in full force having regard to provisions of the 1999 Constitution. I argue the position that whatever gains law teachers may have benefited from the relaxation of the prohibition on private practice pre-1999 has been unfortunately radically whittled down by the 1999 Constitution which reawakened the prohibitive provisions of the 1979 Constitution - excepting of course, the practice of farming – and by Decree 63 also of 1999

Critical analysis invites attention to the key legislative provisions that have provoked such a dispute. The first is the earlier mentioned Decree No. 34 of 1984, which relaxed the private practice prohibition on public officers by creating a schedule of professions in which public officers may venture to provide an approved range of services for remuneration or gratuitously. Subsequent to the 1984 Decree, the Regulated and other Professions (Private Practice Prohibition) Law Lecturers Exemption (NO. 2) Order of 1992, was issued by the then Federal Military Government of General Ibrahim Babangida to remove the remaining strictures on private practice specifically for law teachers that were in the 1984 Decree. The 1992 Order was issued on the strength of Section 1 (5) of the 1984 Decree which provides: “The Head of the Federal Military Government may by order published in the Gazette, amend the schedule to this decree, either by way of deletion there from, addition thereto or otherwise howsoever”<sup>13</sup> The preamble to the Regulated and other Professions (Private Practice Prohibition) (Law Lecturers Exemption) (No. 2) Order 1992 is a government notice, and was in effect an amendment to the 1984 decree.

Proponents of the argument that the legislations that removed limitations on law teachers’ right to engage in private practice persist as an “Existing Law”<sup>14</sup> under the 1999 Constitution fail to take into consideration the collective effect of the entire body of legislation on the subject. Contrary to the arguments advanced, a comprehensive understanding of constitutional provisions and of provisions of the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No.63 of 1999 suggest otherwise. It will be useful to consider these provisions one after the other.

To start with, section 1 of Decree No. 63 of 1999 provides that

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<sup>13</sup> Emphasis mine.

<sup>14</sup> “Existing law” under Section 315 (4)(b) of the 1999 Constitution 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 on which having been passed or made before that date comes into force after that date.

“Subject to Section 6 of the Interpretation Act (which relates to the effect of repeals, expirations, and lapsing of enactments) the enactments set out in the schedule to this Decree **including all amendments thereto**, are hereby repealed or consequentially repealed with effect from 29<sup>th</sup> may, 1999.”<sup>15</sup>

In the schedule of Decree 63 is the Regulated and Other Professions (Private Practice Prohibition) Decree No. 34 of 1984. Thus, by virtue of the above provision, Decree 34 came under repeal together with its amendment which in this case, is the 1992 Order. In other words, the argument that the 1992 Order has not been specifically repealed following the coming into effect of the 1999 Constitution meets its Waterloo in Decree 63. The Supreme Court, in its notable pronouncement in the case of *Joseph Ibidayo V Lufthansa Airlines*<sup>16</sup> to the effect that an existing law must be specifically repealed for it to cease to be in force, leaves us with no other impression on the revoked status of the 1992 Order. Decree 63 specifically repeals the 1984 Decree and its amendment, the 1992 Order. Neither is an existing law.

The position that the 1992 Order persists as an Existing law under the 1999 Constitution may also run headlong into doctrinal questions of constitutional supremacy. The doctrine asserts the supremacy of the Constitution over every other legislation, be it an existing law or a law enacted after the Constitution comes into force. This doctrine has been enshrined in the 1999 Constitution to give its provisions pre-eminence over existing laws. As such existing laws will have effect only to the extent that they are consistent with constitutional provisions or where necessary, with such modifications as may be necessary to bring them into conformity with the provisions of the constitution.<sup>17</sup> Several decisions of the Supreme Court of Nigeria have affirmed the supremacy of the Constitution over existing laws. Among them are *Attorney General of Abia State and 35 others v Attorney General of the Federation*,<sup>18</sup> *Independent National Electoral Commission v Musa*,<sup>19</sup> *Fawehinmi v Babangida*,<sup>20</sup> and *Attorney General of Lagos State v Attorney General of the Federation and 35 others*.<sup>21</sup> Assuming therefore that the 1992 Order did survive repeal by Decree

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<sup>15</sup> Emphasis mine.

<sup>16</sup> (1997) 4 S.C.N.J. 1

<sup>17</sup> See Section 315 (1) of the 1999 Constitution. Note also Subsection (2) which provides that the appropriate authority may at any time by order make such modifications in the text of any existing law as it considers necessary or expedient to bring that law into conformity with the provisions of the Constitution

<sup>18</sup> (2003) F. W. L. R. (Part 152) p. 131.

<sup>19</sup> (2003) F. W.L.R. (Part 145) p. 729.

<sup>20</sup> (2003) F.W.L.R. (Part 146) p. 835.

The court also held that nothing in the Constitution shall be construed as affecting the power of the court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provisions of any other law, that is to say (a) any other existing law; (b) a law of a House of Assembly; (c) An Act of the National Assembly; or (d) any provisions of the Constitution.

<sup>21</sup> (2003) F.W.L.R. (Part 168) p. 909.

No. 63 1999, the question would be whether or to what extent it is consistent with the 1999 Constitution. The relevant provision of the 1999 Constitution against which we must juxtapose the 1992 Order is Section 2(b) of the Code of Conduct for Public Officers in Fifth Schedule of the Constitution.

It is obvious, that the sweeping exemption from prohibitions on private practice that the 1992 Order brought about offers far greater latitude than the 1999 Constitution is willing to concede. The effect of the 1999 constitution was to reawaken the ghost of the 1979 provision, with the exception that it permitted public officers, including law teachers, to practice farming. Consequently, the 1999 Order may at best, be deemed to have effect to the extent that it agrees with the constitutional exemption on farming.

Yet other arguments have been advanced to assert that the 1992 Order, more than amending Decree 34 of 1984, subsists as a subsidiary legislation.<sup>22</sup> Apparently anticipating that a subsidiary instrument may survive the repeal of a principal instrument, Section 37(2) of the Interpretation Act stipulates that nothing in the Act as regards any subsidiary instrument shall be construed in a manner to prejudice the provisions of the Constitution of the Federal Republic of Nigeria, 1999. The interpretation Act therefore puts paid to any insinuation that the 1992 Order remains in force.

Section 4 (c) of the Interpretation Act which provides that -any subsidiary instrument in force by virtue of the repealed enactment shall, so far as the instrument is not inconsistent with the substituted enactment, continue in force as if made in pursuance of the substituted enactments- does not apply to it. Even if it did, it will not scale the constitutional inconsistency rule. Section 6(2)<sup>23</sup> states that- “When an enactment expires, lapses or otherwise ceases to have effect, the provisions of subsection (1) of this section shall apply as if the enactment had then been repealed”.

The terms ‘expire’ and ‘lapses’ presupposes a situation whereby the purposes for which an enactment was made have been achieved; or a time frame within which an enactment should operate has run out. An enactment can cease to have effect in a situation (such as the subject of this discuss) where there is, as in this case, a prevailing law i.e. the Constitution (a grundnorm so to say)<sup>24</sup> which prescribes on a position to which the subsidiary law stands in absolute contradiction. In such an instance, subsection 2<sup>25</sup> provides that “the provisions of Subsection (1)<sup>26</sup> shall apply as if the enactment had then been repealed.

The explanation of section 6 (1) and (2) of the Interpretation Act on the effect of repeals, expiration, etc. of enactments however only protects the exercise of

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<sup>22</sup> Section 37(1) of the Interpretation Act of .... defines a subsidiary legislation to mean orders, rules, regulations, rules of court or bye-laws made before or after the commencement of the Interpretation Act in exercise of powers that are conferred by an Act.

<sup>23</sup> Interpretation Act.

<sup>24</sup> Oluyede, P. A. *Constitutional Law in Nigeria* (Evans Brothers (Nigeria Publishers) Limited, First Edition Ibadan 1992) pp. 490-511.

<sup>25</sup> Section 6 of the Interpretation Act

<sup>26</sup> Ibid.



rights accrued under an enactment before its repeal and does not in anyway permit the continuing exercise of such rights after they have been so repealed.

#### **IV. MAKING THE CASE FOR THE EXEMPTION OF LAW LECTURERS FROM THE PROHIBITION ON PRIVATE PRACTICE**

In 1999, apart from the shock of loosing its Head of State, Nigeria hurriedly adopted a new constitution. Even though this paper is not about the legitimacy of this constitution, it is important to point out that the way, manner and speed by which this new constitution was adopted may have contributed to the many provisions to which not a few protest have arisen. Of great agitation to public officers (particularly full time law teachers) is the said provision of Section 2(b) of the Code of Conduct for Public Officers. The campaign that certain professionals in the public service (particularly class room teachers) be given the right to engage in the practice of their profession is noteworthy and should not be ignored by any even –handed government.

The benefits of the 1992 Government Notice regime were felt in the quality of practical illustrations presented in class; by the students who had the privilege of being more adequately prepared for the Bar; and also by tertiary institutions as the drain of scholarly brains ebbed; brains who would have understandable opted for the more financially rewarding engagement of legal practice to provide a decent sustenance for themselves were hemmed within the walls of the academia. They were bolstered by unhampered practice, which enriched academic curriculum with fresh insights from their involvement with current legal developments in the market place.

But the gains also presented their challenges: the added vocation of private law practice meant law teachers had to be doubly committed to their primary teaching responsibilities. There were concerns about quality time and qualitative research that were and will always remain the benchmark of every academic pursuit. Obviously, some law teachers seemed to have taken their widened scope of affairs in a stride and their engagement with private practice did not so much as stir a crisis of commitment. On the other hand, the teaching of law also benefited from a fresh infusion of legal practitioners who had successful law practices, and a crave for teaching that they could not utilize until the restrictions were lifted. These brought a rich flair of practical skills and instruction to the classroom experience.

In the early eighties some public officers were indicted before a number of high courts for violating the provision of the law then that prohibited their engagement in private practice.<sup>27</sup> There are in fact decided cases of these officers who are lawyers.<sup>28</sup> At the moment, with the coming into force of the

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<sup>27</sup> Ojukwu, E. "Entitlement to Practise as a Legal Practitioner in Nigeria: A Comment" 1994 *Nigerian Current Law Review* p.130-132.

<sup>28</sup> *Ogbuagu v Ogbuagu* (1981) 2 N. C. L. R. 680. Here, Mr Okey Achike a legal practitioner and a staff of University of Nigeria and a public Officer by virtue of Section 15 of the 5<sup>th</sup> Schedule to the 1979 Constitution appeared for one of the parties in this divorce proceeding.

1999 Constitution, there is an upsurge of a repeat of the incident of the early 1980's. A number of lawyers are having their right of appearance (and perhaps involvement in other forms of practice)<sup>29</sup> challenged in court. Some of these persons (after the amendments of the provision of the 1979 Constitution which exempted law lecturers from the prohibition on private practice, by the 1992 Order), have within the confines of the law, established for themselves thriving law practice and are at a loss as to what next to do especially where they have ongoing cases for which they have already been remunerated. It must be admitted here that the outright prohibition on private practice for public officers was not made in accordance with the principle of fair play as no warning whatsoever was made prior to the 1999 constitution even if for the simple reason of enabling a form of preparedness by those affected.

It has been asserted<sup>30</sup> that the current 'UNIVERSITY AUTONOMY BILL' (initiated by the federal government) which divests the government control of universities, will divest full time law lecturers of the title 'Public Officers'. The advantage of this on fulltime law lecturers as opined<sup>31</sup> is that when it comes into effect, it will free them from the implications of the provision of the constitution on public officers there by giving them the liberty to be involved in private practice. This may have been a silver lining but for the provision of Rule 31 of the Rules of Professional Conduct in the Legal Profession<sup>32</sup>. It states that in general, a member of the Bar, while a servant or in salaried employment of any kind should not appear as an advocate in the Supreme Court or any High Court. Certain designations were however exempted from the outright prohibition to appear as advocates in court<sup>33</sup> by the Rules, but the full time lecturer is not included in the exemption. Consequently, the full time law lecturer will still be impeded to the extent to which he can practice even if this Bill becomes law. It is worthy of note that the prohibition contained in Rule 31 applies only to court appearance and does not extend to other forms of legal practice. In this instance, a legal practitioner in salaried employment of

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His right of appearance was challenged on the ground that it was in breach of the Code of Conduct laid down in the Constitution therefore, the court should not grant him a right of hearing. The court held that it is not its function but the function of the Code of Conduct Bureau to so determine. See also *Ebiesuwa v Commissioner of Police* (1982) 3 *NCLR*. 339. Here the court held that it is unconstitutional for Prince Olu Mafo, a legal practitioner and also a member of the State House of Assembly to appear in court is unconstitutional. In *Akinwumi v Diette-Spiff*(1982) 3 *NCLR*. 342, the court also held that the involvement of Mr Lagun -a legal practitioner and a member of the Oyo State House of Assembly- in private practice is unconstitutional.

<sup>29</sup> Court appearances are the most conspicuous form of legal practice. It will therefore not be surprising if it has received the most challenge.

<sup>30</sup> See Giwa, note 11, pp. 511 and 512.

<sup>31</sup> *Ibid*.

<sup>32</sup> Legal Practitioners Decree 1975 Government Notice No 67 Decree No. 1980.

<sup>33</sup> Rule 31 (a) of the Rules of Professional Conduct in the Legal Profession Provides the following exceptions- A director of a limited liability company which receives fees; a legal officer in any government department; and a part-time lecturer.

any kind may engage in any form of legal practice except appearing as an advocate in a court of law. Therefore, law lecturers must seek an amendment of these rules to exclude them.

## V. CONCLUSION

So far, the writer has endeavoured to comprehensibly proffer the correct position of the law as regards the involvement of a full time law lecturer in private practice. Regrettably the Regulated and Other Professions (Private Practice prohibition) (Law Lecturers Exemptions) (No.2) Order 1992 was clearly repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999. In addition, even in the absence of Decree No. 63 1999, the provisions of the No. 2 Order of 1992 cannot stand for being inconsistent with the clear constitutional provisions. Any controversy on this can appropriately be resolved by a competent court of law according to constitutional provisions<sup>34</sup>. Notwithstanding, I believe that not only is the position of the current constitution ill advised, the limitations set by it are repressive as the absolute nature of the prohibition of full time law lecturers from private practice is indeed almost not viable even as no distinction was made for the rendering of such services gratuitously to any member of the professional's family; any charitable organisation or any other person on purely humanitarian grounds; and to a professional association which he or she belongs.

Rather than continue in outright violation of the position of the law 'until the court so pronounces', (an act considered to be quite unethical), law lecturers are enjoined to take definite steps to ensure the reversal of the law by pursuing an enactment that replicates the exemption granted in the No. 2 Order of 1992, albeit without prejudice to their students. This should have been embarked upon since 1999 when the law was changed. Still grappling with this setback seven years after the law was altered does indeed depict laxity. The benefits that accrue from the former position (i.e. No. 2 Order, 1992) extend beyond the confines of law lecturers but also to the academic institutions, the legal profession and the society at large.

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<sup>34</sup> See Sections 6 (6) (b) and 315 (c) 1999 Constitution and *Fawehinmi v Babangida* (2003) F.W.L.R. (Part 146) p. 835. The court also held that nothing in the Constitution shall be construed as affecting the power of the court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provisions of any other law, that is to say (a) any other existing law; (b) a law of a House of Assembly; (c) An Act of the National Assembly; or (d) any provisions of the Constitution.