

# THE NIGERIAN JURIDICAL REVIEW

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## HOW MUCH FORCE IS STILL LEFT IN THE TAXES AND LEVIES (APPROVED LIST FOR COLLECTION) ACT?\*

### Introduction

By Decree No. 21 of 1998, the then Federal Military Government of Nigeria enacted the Taxes and Levies (Approved List for Collection) Decree (the “Decree”). The Decree was a response to the complaints of “multiple taxation” by tax payers, especially businesses. The complaints ranged from the number, types, and rates of taxes and levies (jointly, “taxes” hereafter) imposed by states and local government councils, to the manner of collection of these taxes.<sup>1</sup> At the time the objective of the Decree was to restrain the “excesses” of state governments and local government councils in the exercise of their taxing powers. The Decree then specifically allocated the power to collect specified taxes among the federal government, the state governments and the local government councils; and, in some cases, went further to fix the amount of tax to be collected.<sup>2</sup>

Upon the coming into effect of the 1999 Constitution (the “Constitution”), the Decree survived, by virtue of section 315 of the Constitution (“section 315”), as an existing law and became the Taxes and Levies (Approved List for Collection) Act (the “Act”).<sup>3</sup> However the position of this article is that the Act should not have survived to date, but should have been (i) actively abrogated as part of the undertaking that gave rise to the 2004 edition of the Laws of the Federation of Nigeria (“LFN”), (ii) ignored as having impliedly ceased to have any force or effect upon the coming into force of the Constitution, or (iii) struck

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<sup>1</sup> B. B. Kanyip, “*The Taxes And Levies (Approved List for Collection) Decree 1998 And The Constitution – An Appraisal*” (paper presented at the Joint workshop for Local Government Chairmen, Chairmen Boards of Internal Revenue throughout Nigeria and Others, organized by the Office of the Joint Tax Board and held at the National Centre for Women Development, Abuja, October 28, 2002) 1.

<sup>2</sup> See Part II, Schedule to the Decree.

<sup>3</sup> (Now as) Cap T2, Laws of the Federation of Nigeria (“LFN”) 2004, and reproduced as Cap T2, Laws of the Federation of Nigeria, Updated to the 31<sup>st</sup> Day of December 2010.

down as unconstitutional by the courts on the occasions that they were invited to pronounce upon the constitutionality of the Act.

In the following parts of this article we shall first resolve the question whether the Act falls within the scheme of section 315 as a law, being a statute which may survive (or has survived) as either an Act of the National Assembly or a Law of the House of Assembly of a state (“House of Assembly”). Thereafter we shall review the attitude of the courts to the Act, which will disclose that, in the cases that have come before the courts, no thought was given to the provisions of section 315 in the consideration and determination of the applicability of the Act to states and local government councils. The next part of the article will examine what should be the correct response to the Act. The article will close with a concluding section.

### **The Act as an existing law**

The effect of section 315 is that an existing law<sup>4</sup> would remain in force and effect either as an Act of the National Assembly, *i.e.* a statute with application throughout Nigeria (or in the Federal Capital Territory) or as a Law of the House of Assembly – depending on which of the legislatures has power under the Constitution to legislate on the subject matter of the existing law. Recognising that some of the existing laws may offend certain provisions of the Constitution in their existing forms, and may thereby be void by reason of inconsistency with the Constitution,<sup>5</sup> section 315 further provides that these laws could continue to

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<sup>4</sup> By s. 315(4)(b) of the Constitution, 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”. It is uncertain what the phrase “rule of law” within this definition of existing law implies, especially as it seems to have been used in contrast with “enactment or instrument”. Does it suggest common law rules or case law principles? If so, it hardly makes any meaning within the context of s. 315 as it is unimaginable how the President, the Governor, or any other “appropriate authority” can modify common law rules to bring them in conformity with the provisions of the Constitution. In our view, existing laws within the meaning of s. 315 must necessarily be limited to statutes and subsidiary legislation made thereunder.

<sup>5</sup> See the Constitution, S. 1(3). See also *Stabilini Visinoni Ltd v FBIR* (2009) 13 NWLR (Pt. 1157) 200; *Fasakin Foods (Nig.) Ltd v Shosanya* (2006) 10 NWLR (Pt. 987) 126; *Cadbury Nigeria Plc v FBIR* (2010) 2 NWLR (Pt. 1179) 561.

operate with such modifications as would bring them into conformity with the provisions of the Constitution. Specifically section 315(1) provides that –

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 by a House of Assembly to the extent that **it is a law with respect to which a House of Assembly is empowered by this Constitution to make laws**.<sup>6</sup>

It must quickly be added that the power granted to the courts or any tribunal established by law to deal with existing laws is wider than the power granted to the “appropriate authority”<sup>7</sup> for the reason that the courts and tribunals are empowered to declare invalid any provision of an existing law on the ground of inconsistency with not merely any provisions of the Constitution: the power of the courts in this regard also extends to occasions where the existing law is inconsistent with the provisions of any other existing law, a law of a House of Assembly, or an Act of the National Assembly.<sup>8</sup>

The Act no doubt survived as an existing law upon the coming into force of the Constitution. Thus the question that arises regarding its continued applicability is whether it should continue to apply as an Act of the National Assembly or a Law of a House of Assembly (for it is only when it can validly apply as either an Act of the National Assembly or a Law of a House of Assembly that it would be saved under the provisions of section 315). *Fawehinmi v Babangida*<sup>9</sup> presented the Supreme Court with an opportunity to deal with a similar question. The case involved the applicability of the Tribunal of Inquiry Act<sup>10</sup> (formerly

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<sup>6</sup> Emphasis added.

<sup>7</sup> S. 315(4)(a) of the Constitution defines “appropriate authority” to mean the President in relation to any law of the Federation, the Governor in relation to an existing law deemed to be a Law made by the State House of Assembly, and a law revisor who is appointed by any law to revise the laws of the Federation or of a State.

<sup>8</sup> See the Constitution, s. 315(3).

<sup>9</sup> [2003] 3 NWLR (Pt. 808) 604.

<sup>10</sup> Cap. 447, Laws of the Federation Nigeria 1990.

Tribunal of Inquiry Decree of 1966)<sup>11</sup> as an existing law under the Constitution. The respondent contended that ‘tribunal of inquiry’ was a residual matter and therefore the Tribunal of Inquiry Decree could not take effect as a federal legislation with nationwide application because the National Assembly did not have legislative competence over such matter. Upholding the respondent’s contention, the Supreme Court held that the Tribunal of Inquiry Act was not applicable to the states as an existing law because the subject matter of the Tribunal of Inquiry Act was within the exclusive competence of the states.<sup>12</sup> The Tribunal of Inquiry Act would nevertheless apply as an Act of the National Assembly within the Federal Capital Territory, Abuja by virtue of the power of the National Assembly to legislate therefor. In the words of Ejiwunmi, JSC–

...the 1999 Constitution did not make any provision for Tribunals of Inquiry. In the absence of such a provision, the National Assembly cannot pass a general law on tribunals of inquiry to affect the entire federation... **It remains to be said that under the 1999 Constitution, the establishment of tribunals of inquiry is now a residual matter which only the states can promulgate.**<sup>13</sup>

The Supreme Court thus decided that the subject matter of the Act was not within the competence of the National Assembly. The Tribunal of Inquiry Act was accordingly declared void and of no force and effect to the extent that it purports to apply in the states of the federation.

The Supreme Court however took a different approach in *Attorney General of Lagos State v. Attorney General of the Federation*.<sup>14</sup> In that case, the Lagos State Government challenged the validity of the Nigerian Urban and Regional Planning Act<sup>15</sup> on the ground that urban planning is not a matter on the exclusive or concurrent legislative lists, and can therefore only be legislated upon by a House of Assembly. The Supreme Court upheld the contention of the plaintiff and held that urban planning was a matter on the residual list and, therefore, could only be legislated upon by the legislature of a state. The Supreme Court, as per Uwaifo, JSC nevertheless held further that the National Urban and

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<sup>11</sup> Decree No. 41 of 1966.

<sup>12</sup> “Exclusivity” here is limited to the territory of each state.

<sup>13</sup> *Fawehinmi v. Babaginda*, *supra* note 8 at 652. Emphasis added.

<sup>14</sup> [2003] 12 NWLR (Pt. 833)1.

<sup>15</sup> Cap. N138, Laws of the Federation of Nigeria, 2004 (formerly Decree No. 88 of 1992).

Regional Planning Decree No. 88 of 1992 was deemed to be an Act of the National Assembly but limited in application only to the Federal Capital Territory, Abuja, as well as a Law of a House of Assembly. In dealing with the continued applicability of the said Decree as a Law of the House of Assembly of Lagos State by virtue of section 315, Uwaifo, JSC reasoned thus –

Being an Act applicable in the FCT, I need not discuss the implications since they are not in issue in this case. As a law in Lagos, which is the plaintiff state, that state cannot be concerned with any of the provisions in it relating to the Federal Government. The Governor of Lagos or any person appointed by any law to revise or rewrite the laws of the State [as ‘appropriate authority’ per section 315(4) (a)] can by order make such modifications in the text of that law (*i.e.* Decree No. 88 of 1992), as it stands, in the manner he considers necessary or expedient to bring it into conformity with the provisions of the Constitution. He may **do so by only omitting all the provisions relating to the Federal Government or may repeal the entire law** as it applies to Lagos State per s. 314(4)(c) ...**Let me assume that he takes the first alternative.** What will be left will be incoherent and incomprehensible because they are not amenable to the ‘blue pencil rule’; that is to say, the good is not severable from the bad as the sections relating to the State are invariably tied to the responsibility of the Federal Government under the Decree. **This completely exposes as unrealistic any attempt to save any of the provisions which affect Lagos State.**<sup>16</sup>

While Uwaifo, JSC would seem to have preferred the second of the two options he proposed, *i.e.* the repeal of the entire statute by Lagos State (being the approach consistent with the approach adopted in *Fawehinmi v Babangida*),<sup>17</sup> he nevertheless, in line with the decision of the majority of the Justices of the Supreme Court who sat on the appeal, gave reliefs and consequential orders that merely nullified certain provisions of the statute in question as those provisions applied to Lagos State,<sup>18</sup> apparently in line

<sup>16</sup> *Attorney General of Lagos State v Attorney General of the Federation*, above at note 13 at 200 – 201. Emphasis added.

<sup>17</sup> *Fawehinmi v. Babangida*, *supra* note 8.

<sup>18</sup> Specifically, Uwaifo, JSC in granting the second relief sought by the plaintiff in the matter granted a “... *DECLARATION* that the provisions of sections 1(2) & (3), 2(i), 3, 4, 5, 8, 9, 10, 11, 12, 28, 30 to 46, 47 to 63, 75, 76(30 and 86 to 88 of the *Urban and Regional Planning Act (Decree No. 88 of 1992)*



with his first option. It is however possible to justify the order made by Uwaifo, JSC on the basis that Lagos State did not ask for an annulment of the entire statute: the court merely, as it is limited in its power to do, granted the relief sought by the plaintiff. One may therefore speculate that had Lagos State asked for an annulment of the entire statute, the court would have granted that relief.

In arriving at its decision to annul certain provisions of the statute, the Supreme Court, *as per* Uwaifo, JSC, relied on section 315(3), which empowers a court of law or tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provisions of any other existing law, a law of a House of Assembly, an Act of the National Assembly, or any provision of the Constitution. It may therefore be deduced from the decision in *Attorney General of Lagos State v Attorney General of the Federation*<sup>19</sup> that the continued applicability of an existing law, which requires modification as contemplated by section 315, either as an Act of the National Assembly or a Law of a House of Assembly is subject to either of two major factors, *viz.*(i) the making of the relevant modification by the appropriate authority, or (ii) the invalidation of the offending provisions of such statute by the court or any other competent tribunal upon an application thereto. In the latter case, it is submitted that the application could be made even in the course of litigation where it is sought to apply the existing law. The continued applicability of the said existing law is, in the technical sense, not put in abeyance – even though the continued applicability of its offending sections becomes in substance ineffectual and inoperable. The court may also in the exercise of its interpretative jurisdiction effect the required modification – and this is likely to be the case where such modification is not fundamental. It must nevertheless be added that until an existing law is modified by the appropriate authority or by the court, lawyers may be in some difficulty when called upon to advise their clients on such statutes. It is also possible that until the Supreme Court exercises its interpretative jurisdiction

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*which seek to control Urban and Regional Planning as well as physical development of land in Lagos State are inconsistent with section 4 of the Constitution and to that extent null and void*": *id.* at 205.

<sup>19</sup> *Attorney General of Lagos State v Attorney General of the Federation*, *supra* above n 13.

with regard to any such statute, the specific contents of such statute would remain indeterminate.<sup>20</sup>

While the strict words of section 315(2) empower the appropriate authority to “modify” the “text of any existing law”, it would seem on the authority of *Attorney General of Lagos State v Attorney General of the Federation*,<sup>21</sup> especially the judgment of Uwaifo, JSC, that the power contemplated therein includes the power to repeal any existing law. It may, however, be argued that section 315(2) does not contemplate the repeal of an existing law for the reason that the object of the entire section is to ensure the continued applicability of the said law. The power to repeal such law exists outside of section 315 and inheres in the relevant legislature as a component of its power to legislate on the subject matter covered by the said existing law. It may, therefore, be argued further that it would constitute an unlawful usurpation of the legislative power of a House of Assembly or the National Assembly for a Governor or the President, as the case may be, to purport to repeal an existing law by virtue of section 315(2); and such purported repeal of an existing law would thereby be void.<sup>22</sup> The force of this argument may however be assailed by the provision of section 315(4)(c), which defines “*modification*” to

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<sup>20</sup> This uncertainty is compounded by the growing body of conflicting decisions of High Courts and the Court of Appeal, and even the Supreme Court generally in various areas of the law. Prof. RACE Achara in a speech delivered at the 2008 Law Week of the Enugu Branch of the Nigerian Bar Association also pointed out some conflicting decisions of the Supreme Court in the following cases: *Atolagbe v. Awuni* [1997] 7 SCNJ 1; *Offor v. Osagie* [1998] 1 SCNJ 122; *Amadi v. NNPC* [2000] 79 LRCN 1951; *Savannah Bank Ltd. v. Ajilo* [1989] 1 NWLR (Pt. 97) 302; *Yaro v. Arewa Construction* [2008] 154 LRCN 163; *Calabar Central Co-operative v. Ekpo* [2008] All FWLR (Pt. 418) 198.

<sup>21</sup> *Attorney General of Lagos State v Attorney General of the Federation*, above n 13.

<sup>22</sup> To argue otherwise would be an encroachment on the express provisions of the Constitution reserving legislative powers to the legislature. The power given to the appropriate authority under section 315 of the 1999 Constitution is limited to the purpose of making an existing law conform to the Constitution, so as to save that law and not to obliterate or destroy it. The applicable principle of statutory construction is as expressed in the Latin maxim: *Interpretare et concordare leges legibus, est optimus interpretandi modus*; meaning that to interpret in such a way as to harmonise laws with laws is the best mode of interpretation.

include “*addition, alteration, omission or repeal*”. The appropriate authority may therefore rely on the provision of section 315(4)(c) to repeal an existing law – so that it ceases to have any force or effect. This would however depend on the interpretation that the courts put on the precise wording of section 315(2) where reference to the modification power of an appropriate authority is limited to “*modification in the text*”<sup>23</sup> of the existing law. On the contrary, there can be no challenge to the proposition that the relevant legislature may exercise an inherent power to repeal an existing law without reference to, or despite the provisions of section 315.

In applying the reasoning in *Fawehinmi v. Babaginda*<sup>24</sup> and *Attorney General of Lagos State v. Attorney General of the Federation*,<sup>25</sup> to the circumstance of the Act, the answer to the question as to the scope of the continued applicability of the Act would depend on which of the legislatures as between the National Assembly and a House of Assembly has the power to legislate on the subject matter covered therein, *i.e.* **the allocation of the power to collect sundry taxes** (and in some instances the rate of tax) in Nigeria as among the federal government, the state governments and the local government councils. The answer to this question is in the Constitution. The Constitution allocates the legislative powers of the federation between the federal government and the governments of the component states. Under the Constitution, there is a clear-cut division of legislative powers between the National Assembly (for the federal government, including the Federal Capital Territory, Abuja) and the respective Houses of Assembly (for the respective state governments).<sup>26</sup> For this purpose, the Constitution provides for two legislative lists: the exclusive and the concurrent lists. The National Assembly has exclusive powers to make laws with respect to any matter contained in the exclusive list.<sup>27</sup> It also has concurrent powers with the Houses of Assembly to make laws with respect to any matter contained in the concurrent list, but only **to the extent**

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<sup>23</sup> Emphasis supplied. It may argued the power to effect a repeal “in the text” of an instrument may not authorize the abrogation of the entire instrument.

<sup>24</sup> *Fawehinmi v. Babaginda*, *supra* above n 8.

<sup>25</sup> *Attorney General of Lagos State v. Attorney General of the Federation*, above at note 13.

<sup>26</sup> In *Fasakin Foods (Nig.) Limited v. Shosanya* (2006) 4 KLR (Pt. 216) 1447 the Supreme Court held that the separation of the legislative powers of the federal and state governments in the Constitution is sacrosanct.

<sup>27</sup> See the Constitution, s. 4(3).

**provided for in the concurrent list.**<sup>28</sup> Finally, it has powers to make laws in respect of any other matter in respect of which it is empowered to make laws by any specific substantive provision of the Constitution.<sup>29</sup> It must also be added that the National Assembly exercises the legislative powers of a House of Assembly with regard to the Federal Capital Territory, Abuja.

On the other hand, the Houses of Assembly have power to legislate on matters contained in the concurrent list, to the extent prescribed therein.<sup>30</sup> They may also legislate on any other matter with respect to which they are empowered to make laws in accordance with the provisions of the Constitution.<sup>31</sup> Finally, they have power to legislate on any matter not included in either the exclusive or the concurrent lists.<sup>32</sup> The power of a House of Assembly to legislate on any matter not included in the exclusive list or concurrent list or reserved to the federal government under any other provision of the Constitution is also exclusive. These matters in respect of which a House of Assembly has exclusive power to make laws are otherwise known as residual matters. In *Attorney General of Abia State v Attorney General of the Federation* Niki Tobi, JSC explained the law as follows:

...the Constitution of the Federal Republic of Nigeria 1999, like most constitutions, does not provide for a residual list. And that is what makes the list residual. The expression emanates largely from the judiciary, that is, it is largely a coinage of the judiciary to enable it exercise its interpretative jurisdiction as it relates to the constitution. Etymologically, 'residual' merely means that which remains. In legislative or parliamentary language, residual matters are those that are neither in the exclusive nor concurrent legislative list.<sup>33</sup>

A similar statement is found in *AG, Ogun State v. Aberuagba*<sup>34</sup> where the Supreme Court stated that –

A careful perusal and proper construction of section 4 would reveal that the residual legislative powers of the government were vested in the States. By residual legislative powers within the context of section 4 [of the Constitution], [it] is meant what was left after the matters in the exclusive and concurrent

<sup>28</sup> See the Constitution, s. 4(4)(a).

<sup>29</sup> See the Constitution, ss. 4(4)(b) & 4(4) and Part II of the Second Schedule.

<sup>30</sup> See the Constitution, s. 4(7)(b).

<sup>31</sup> See the Constitution, s. 4(7)(c).

<sup>32</sup> See the Constitution, s. 4(7)(a).

<sup>33</sup> [2006] 16 NWLR (Pt. 1005) 265 at 380.

<sup>34</sup> (2002) Vol. 2 WRN 52; (1985) 1 NWLR (Pt. 3) 395 at 405.

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legislative lists and those matters which the Constitution expressly empowered the Federation and the States to legislate upon have been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature. The Federation has no powers to make laws on the residual matters.

Therefore, to determine where the power to legislate on a given matter lies, recourse must be had to the legislative lists in the Constitution and any substantive provision thereof which grants power to the National Assembly or the House of Assembly to make laws with regard to any specific matter. Where a matter does not fall under the exclusive or concurrent lists, it is regarded as a residual item if no other provision of the Constitution vests legislative power in respect thereof in the National Assembly or the House of Assembly; and only a House of Assembly<sup>35</sup> can legislate on it. The exercise of legislative power by the National Assembly on such matter will violate the Constitution and will consequently be nullified by the courts.<sup>36</sup> In *Attorney General of Abia State v Attorney General of the Federation*,<sup>37</sup> the Supreme Court nullified an Act of the National Assembly which sought to monitor the distribution of monthly allocations of revenue from the federation account to local governments on the ground that local government is a residual matter under the Constitution and the National Assembly thus lacked the competence to legislate on it.<sup>38</sup>

A study of the Constitution would disclose that the powers of the National Assembly to make laws with regard to taxation are limited to the exclusive list (item 16, customs and excise duties; item 25, export duties; item 58, stamp duties; and item 59, taxation of incomes, profits and capital gains), and the

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<sup>35</sup> It is to be noted that the National Assembly exercises the legislative powers of a House of Assembly with regard to the Federal Capital Territory. Thus reference to the legislative powers of a House of Assembly will also apply to the National Assembly with regard to the Federal Capital Territory.

<sup>36</sup> See *Attorney General of Ogun State v. Aberuagba* [1985] 1 NWLR (Pt. 3) 395. The Supreme Court decided in that case that the legislative competence of the National Assembly is limited to those matters on which it is expressly or by implication empowered to make laws by the Constitution. See also *Doherty v. Balewa* (1961) 1 All NLR 604.

<sup>37</sup> *Attorney General of Abia State v Attorney General of the Federation*, above at note 32.

<sup>38</sup> See also *Attorney General of Abia State v Attorney General of the Federation* [2002] 6 NWLR (Pt. 763) 264.

concurrent list (items 7 and 8).<sup>39</sup> The provisions of items 7 and 8 of the concurrent list merely provide a guide for the exercise of the powers of the National Assembly under the provisions of items 58 and 59 of the exclusive list. A close look at the powers of taxation of the National Assembly under the Constitution as aforesaid shows that the powers therein are limited to the types of taxes specified in items 58 and 59 of the exclusive list, *i.e.* stamp duties, capital gains tax and income tax (which is typically a tax on profits). They do not extend to the power to impose all manner of taxes, which may be imposed by a government on its citizens. It would therefore seem that these other taxes, which are not specifically enumerated in the Constitution, are reserved to the states under their residual legislative power. Thus in *Attorney General of Ogun State v. Aberuagba*,<sup>40</sup> the Supreme Court held that a state could validly legislate to impose sales tax on transactions that occur within the boundaries of the state, the imposition of sales tax being a power incidental to the residual power of a state to regulate intra-state trade and commerce. The Supreme Court also held that the federal government could validly and exclusively legislate to impose sales tax on inter-state and international transactions, the imposition of sales tax being a power incidental to the exclusive power of the federal government to regulate inter-state and international trade and commerce.

It would, therefore, seem from the decision of the Supreme Court in the *Aberuagba* case that the power of the federal government to impose taxes relates to (i) the taxes expressly reserved to the federal government under the Constitution, (ii) taxes that may be incidental to the items listed on

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<sup>39</sup> These items read thus:

“7. In the exercise of its powers to impose any tax or duty on –

- (a) capital gains, incomes or profits of persons other than companies; and
- (b) documents or transactions by way of stamp duties,

The National Assembly may, subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of law imposing it shall be carried out by the Government of a State or other authority of a State.

- 8. Where an Act of the National Assembly provides for the collection of a tax or duty on capital gains, incomes or profit or the administration of any law by an authority of a State in accordance with paragraph 7 hereof, it shall regulate the liability of persons to such tax or duty in such manner as to ensure that such tax or duty is not levied on the same person by more than one State.”

<sup>40</sup> *Attorney General of Ogun State v. Aberuagba*, *supra* above n 35.

the exclusive list and the concurrent list,<sup>41</sup> and (iii) taxes that may be incidental to the matters over which the federal government is specifically granted powers under some other provisions of the Constitution. The decision would also seem to have established the principle that states can legislate to impose any other manner of taxes not reserved to the federal government under the Constitution either directly or as incidental to any of the items listed in the exclusive list or the concurrent list or a matter reserved to the federal government under some other provisions of the Constitution.

If the power of the National Assembly to impose a tax can be incidental to any other power vested in that legislature by the Constitution, the question would then arise as to why in the first place it was necessary for the makers of the Constitution to expressly allocate to the National Assembly the power to impose specific and named taxes in the Constitution. Such express creation of taxing powers may, therefore, seem to be redundant if the power to impose taxes ordinarily inhered in any other general power over any matter, so that once a general power over a matter is vested in a person or authority such person may in the exercise of that general power impose a tax in relation thereto. While there is authority, though with regard to a specific statute passed by a legislature, that the power to impose a tax is not to be implied,<sup>42</sup> it would seem that the view is generally held that incidental power to impose a tax may arise from a general power to regulate the subject matter in respect of which that tax is imposed.<sup>43</sup> The validity of this view is however debatable if its force is not limited to the incidental power to impose taxes that are directly related to or necessary for the exercise of the underlying power that has been expressly created by the Constitution.

It is, however, thought that the Supreme Court in the *Aberuagba* case did not have to justify the power of a state government to impose sales tax on the basis that such power is incidental to the residual power of a state government to regulate intra-state trade and commerce. It was open to the Supreme Court to have held that the power to impose sales tax within the territory of a state is a residual power. This is because any power not

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<sup>41</sup> Subject nevertheless to the limitation on the exercise of powers by the federal government over items in the concurrent list, as discussed below.

<sup>42</sup> *Attorney-General v. Wilts United Dairies* [1922] 91 LJKB 897; *Congreve v. Home Office* [1976] 629.

<sup>43</sup> *Peterswald v. Bartley* (1904) 1 CLR 497. See also Nwabueze, “*Federalism in Nigeria under the Presidential Constitution*” 1983, 221.

reserved to the federal government in the Constitution may be exercised by a state government as a residual power.

The Constitution also empowers a House of Assembly to legislate for the collection, by its local government councils, of any tax not reserved to the federal government. Thus items 9 and 10 of the concurrent list are to the following effect:

9. A House of Assembly may, subject to such conditions as it may prescribe, make provisions for the collection of **any** tax, fee or rate or for the administration of the Law providing for such collection by a local government council.
10. Where a Law of a House of Assembly provides for the collection of tax, fee or rate or for the **administration** of such Law by a local government council in accordance with the provisions hereof it shall regulate the liability of persons to the tax, fee or rate in such manner as to ensure that such tax, fee or rate is not levied on the same person in respect of the same liability by more than one local government council.

The above provisions vest in a House of Assembly the power to legislate on the collection and administration of any tax, fee or rate by a local government in respect of any matter on which it can validly charge tax.<sup>44</sup> The only rider to this power however is that it must be exercised in accordance with the Constitution, *i.e.* that such tax is not one of the taxes specifically reserved to the federal government in the Constitution – these being customs and excise duties, export duties, stamp duties, and taxation of incomes, profits and capital gains – or being a tax that the federal

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<sup>44</sup> The power to impose such a tax being residual: see I. A. Ayua – *The Nigerian Tax Law*, (1996), 33. The decision of the Supreme Court in *Knight Frank & Rutley v. Attorney-General of Kano State* [1998] 7 NWLR (Pt. 556) 1 would, however, seem to suggest that a local government council, and not a state government, has the power to impose tenement rates. For a critical review of this decision, see R. A. C. E. Achara, “Can Nigerian Local Government Councils Autonomously Impose Rates?” *Journal of African Law*, (2003), Vol. 47, No. 2 at 221. Prof Achara argues, and rightly too, that the Constitution has not vested any legislative power in local government councils in Nigeria; and so they cannot legislate to impose or collect any tax or rate or levy (generally, “tax”), except by way of a power delegated to them by a House of Assembly. In *Shell Petroleum Development Co. Nigeria Ltd v. Burutu Local Government Council* [1989] 9 NWLR (Pt. 165) 318, which was decided after the *Knight Frank* case, the Court of Appeal merely recognised the power to “collect” (and not the power to “impose”) rates in a local government council. No reference was made to the *Knight Frank* case in the *Shell* case.



government may impose in the exercise of a power incidental to a power expressly vested in the federal government in the Constitution. What this implies is that the power to legislate for the purpose of the imposition and or administration of any tax outside of those reserved to the federal government falls under the legislative competence of a House of Assembly.<sup>45</sup> It is also important to note that the provisions of the concurrent list relating to taxes are limited to “collection” of taxes or the power to collect taxes – and do not extend to the power to impose taxes.<sup>46</sup> Also the scheme of the allocation of the power to collect taxes in the concurrent list as between the federal government and the states is such that the doctrine of covering the field may not apply, in its classical formulation, in most cases.<sup>47</sup> This is because the Constitution has expressly determined the extent and or limit of the competence of each tier of government in the federation in respect of most of the matters listed therein, so that no tier of government can validly legislate or exercise competence over a matter that has been expressly reserved to the other tier of government in the concurrent list. To argue otherwise would be to challenge the express wording of section 4(4)(a) of the Constitution, which unambiguously provides that the extent of the legislative powers to be exercised by the National Assembly in respect of matters contained in the concurrent list shall be limited to the extent therein provided, as follows:

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<sup>45</sup> It should be noted that with regard to the express provisions of the Constitution, this is more so when the reference to the powers of the federal government to make laws for the collection of taxes in the concurrent list is also limited to the taxes described in items 58 and 59 of the exclusive list in contradistinction to the taxing powers that are expressly reserved to the states in items 9 and 10 of the concurrent list.

<sup>46</sup> On the difference between the power to “impose” taxes and the power to “collect” and or “administer” taxes, see Elias, “*Company Mergers And Land Transfer Taxes*” (unpublished position paper) 3–4; Kanyip, above n 1 at 6, citing Abiola Sanni – “Division of Taxing Powers” in M. T. Abdulrazaq (ed.)–*CITN Nigerian Tax Guide and Statutes* (Lagos: The Chartered Institute of Taxation of Nigeria, 2002), 651; and also *Nigerian Agricultural and Cooperative Bank v. Jigawa State Board of Internal Revenue* [2000] 1 NRLR 62.

<sup>47</sup> It is also arguable that the doctrine of covering the field may not apply to the allocation of the powers to pass legislation to impose and or collect taxes in Nigeria. Thus a case such as *Attorney General of Lagos State v. Eko Hotels Ltd & Anor* (2008) All FWLR (Pt. 398) 235; (1960 – 2010) NTLR 809, which relied largely on the doctrine of covering the field for its conclusion may not have been properly decided.

The above argument is reinforced by the writing of Prof. Nwabueze with regard to the 1979 Constitution as follows:

Perhaps the most remarkable feature of the concurrent legislative list is that there is no co-existence of powers at all in respect of four of the five ... matters included therein – allocation of revenue (item A), antiquities and monuments (item B), archives (item C) and collection of taxes of taxes (item D). The delimitation in the schedule restricts the federal and state governments to specific aspects of the matters, thus making those aspects exclusive to the one or the other. The result is that, while these matters are dealt with under the concurrent legislative list, their inclusion therein in no way implies that the power of the federal and state governments to act over any aspect of them co-exist together.<sup>49</sup>

The analysis above reveals that the Constitution has not empowered the National Assembly or the House of Assembly to **allocate** taxing powers, but has only given them the power to make legislation to impose and collect taxes; these taxes being largely enumerated in the case of the National Assembly but residual and unenumerated in the case of the House of Assembly. It will therefore take an amendment of the Constitution for a re-allocation of the powers to legislate on the imposition and collection of taxes presently vested in the National Assembly and Houses of Assembly respectively to occur. And the process of constitutional amendment is one that involves the joint legislative action of both the National Assembly and the Houses of Assembly.<sup>50</sup> Thus the power to legislate on the allocation of the power to collect sundry taxes and levies generally (which is the subject matter of the Act) is not a power that is either vested in the National Assembly or in the House of Assembly of any state.

The subject matter of the Act (*i.e.* the allocation of powers to collect sundry taxes) being a matter on which neither the National Assembly nor the House of Assembly is empowered by the Constitution to make laws, it is arguable that the provisions of section 315 cannot operate to enable the Act to continue to have effect either as an Act of the National Assembly or as a Law of a House of Assembly. It is also arguable that the Act should have

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<sup>48</sup> Emphasis supplied.

<sup>49</sup> Nwabueze “*Federalism in Nigeria under the Presidential Constitution*” 1983, above at note 42 at 61.

<sup>50</sup> See the Constitution, s. 9(3).

ceased to have effect upon the coming into force of the Constitution on 29 May 1999 for the reason that the subject matter of the Act has been covered by Parts I and II of the Second Schedule thereto, read together with the constitutional law principle relating to legislative competence over residual matters. The courts for now would seem to think differently.

### **The Attitude of the Courts to the Act<sup>51</sup>**

The first reported case on the matter would seem to be *Mobil Producing Nigeria Unlimited v Tai Local Government Council & Ors*,<sup>52</sup> a judgment of the Federal High Court. In that case the plaintiff sued the defendants for the imposition and collection of “illegal taxes and levies” and the mounting of road blocks for the purpose of collecting these taxes and levies. Three issues were framed for determination, namely (i) whether the 1<sup>st</sup> defendant has the legal right to legislate on and impose the said taxes and levies outside those allowed by law, (ii) whether the imposition of the said taxes is unconstitutional, null and void, and (iii) whether the defendants’ action in mounting road blocks are illegal, an offence and a breach of sections 41 and 44 of the Constitution. The contested taxes and or levies related to community development, effluent discharge pollution, educational youth empowerment, and Niger Delta development permit. The cardinal argument of counsel for the plaintiff was that the power of the 1<sup>st</sup> defendant, a local government council, to impose and or collect taxes and levies is limited by the fourth schedule to the Constitution, the Act, and the Rivers State Local Government Law. The court gave judgment for the plaintiff and held that –

The 1999 Constitution in the Fourth Schedule also listed the functions of the Local Government council. From the provision of Decree No. 21 [the Act] and Fourth Schedule of the 1999 Constitution the Local Government has limited power on areas in which they can levy and impose taxes ... . Therefore any attempt by any Local Government to collect or demand taxes or levies outside the areas specified under the 1999 Constitution or Part III of Decree No. 21 will be outside the ambit of their power. Furthermore, under Section 1(2) of Decree No. 21 of 1998 the Minister of Finance may on the advice of the Joint Tax

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<sup>51</sup> No claim is made here that the two cases discussed here are the only cases on the point that the courts have decided. The two cases discussed here are however the only cases that I found in existing law reports.

<sup>52</sup> (1960 – 2010) 1 NTLR 182 (The case was filed in 2003 and decided on 12 May 2004.)

Board amend the Schedule to this Decree. I am not aware of any such amendment nor has it been brought to my attention.<sup>53</sup>

We take the view that the court could have decided the case by reference to the Constitution only. Reference to the Act, in our view, was misconceived. As we have argued above, the Act could only have continued in existence beyond 29 May 1999 either as an Act of the National Assembly or a Law of a House of Assembly. But as we also explained, the subject matter of the Act is not a matter in respect of which either the National Assembly or a House of Assembly could make laws. It is perhaps for this reason that the court repeatedly referred to that statute as Decree No. 21. The court would have therefore declared the Act inconsistent with the Constitution, acting under the powers created by section 315(3), and proceeded to test the validity of the contested taxes and levies by reference to the provisions of S. 4 of the Constitution and Parts I and II of the Second Schedule thereto wherein the legislative powers of the National Assembly and Houses of Assembly are listed. And assuming that the court found that the Rivers State House of Assembly is empowered to impose those taxes and levies for the benefit of local government councils in the state, the court would then have gone further to inquire into whether any enabling law to that effect was in force in Rivers State.

The judgment is also confusing as to its ratio due to the continued reference by the court to the joint application of the Act and the Constitution as the basis for its judgment. We submit, on the bases of the arguments that we have canvassed earlier, that the Act and the Constitution cannot co-exist. The import of the Act is the allocation of the powers to collect taxes among various “tiers” of government in Nigeria. A similar objective has been accomplished by the Constitution. (Indeed the Act went beyond this in Part II of its schedule to fix rates of certain taxes). And in aggravation of this difficulty, the Act contains provisions that are clearly inconsistent with the provisions of the Constitution for which reason the Act should be declared null, void and of no effect.<sup>54</sup> And section 315(3) enables the court to do so). First, the Act would seem to override any law on the same subject matter.<sup>55</sup>

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<sup>53</sup> *Ibid.* at 195

<sup>54</sup> See the Constitution, S. 1(2)

<sup>55</sup> The Act, s. 1(1): “Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, or in any other enactment or law, the Federal Government, State Government and local government shall

The Act by so doing puts itself on a collision course with the provisions of section 4 of the Constitution and the allocation of taxing powers in the federation in Parts I and II of the Second Schedule to the Constitution. For example, the Act would seem to suggest that a House of Assembly may not validly legislate to create a tax in the state (in addition to the taxes listed in Schedule II of the Act) being a tax in respect which legislative power is not reserved to the National Assembly in the Constitution. Second, the Act gives power to the Minister of Finance to amend the Schedule thereto, which implies a power to alter the present constitutional allocation of powers to legislate on tax matters between the National Assembly and a House of Assembly.

A similar decision was reached by the Court of Appeal in *Eti-Osa Local Government v Jegede*.<sup>56</sup> The central issue in that case as framed by the court was “*whether the Local Government can impose taxes outside the provisions of Decree 21 of 1998 which now form the provisions of Schedule II Part III of the 1999 Constitution ...*”.<sup>57</sup> Further in the judgment the court propounded the “*crux of the matter*” as “*whether the Appellant has the authority to impose ... tax outside the items in Schedule III of the 1999 Constitution and Part III of Decree No. 21 of 1998 without reference to the Joint Tax Board as provided for in section 1(2) of Decree No. 21 of 1998*”.<sup>58</sup> The court then went on to adopt the following decision and reasoning of the High Court as its decision<sup>59</sup> –

...The respondents in this case which is the Eti-Osa Local Government has no legislative power of their own to impose or determine taxes and levies, outside the enable Law Decree No. 21 of 1998 which is general application .... Where such residual power to collect taxes is given by the State Government, to the Local Government, it must be in conformity with the provisions of the enabling law. Thus the powers of the Local Government to make Bye Laws are subject to the enabling Law which gives the Local Government Power to collect taxes. Any attempt to

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be responsible for collecting the taxes and levies listed in Part I, Part II and Part III of the Schedule to this Act, respectively”. See also s. 2(1).

<sup>56</sup> [2007] 10 NWLR (1043) 537.

<sup>57</sup> *Ibid*, at 553.

<sup>58</sup> *Ibid*, at 557.

<sup>59</sup> *Ibid*, at 558. In the words of Dongban-Mensem, JCA, who read the lead judgment, “*In a well considered ruling, the learned trial Judge held that the appellant as defendant, has no power to legislate and impose the said tax.... I cannot possibly fault this well garnered decision of the trial court.*”

act outside the ambit of Part III of Taxes and Levies (Approved list for collection) Decree No. 21 of 1998 will be futile. I therefore hold that the respondent ... has no power to legislate and demand whatever taxes and levies it deems fit outside the provisions of Taxes and Levies Approved List for Collection Decree No. 21 1998.<sup>60</sup>

Further in the judgment, the court stated that the “*central Government has the controlling machinery*”<sup>61</sup> and that there was nothing “*unconstitutional with the requirement of the Local Government, the third tier of Government to root its taxes through the Joint Tax Board*”.<sup>62</sup>

With due respect to the Court of Appeal, the reasoning of the court in the decision in the *Eti-Osa Local Government* case (supra) is difficult to support in law.<sup>63</sup> First, as we argued in relation to the *Mobil* case (supra), the Act can be neither an existing law deemed to be Act of the National Assembly nor a Law of a House of Assembly: there is therefore no legal basis for its continued application post 29 May 1999. Second, the federal government does not have the “controlling machinery” with regard to all taxes in Nigeria (the context in which the statement was made). The Constitution has clearly defined the extent of the express and implied taxing powers of the federal government as limited to the items listed in the Constitution. Second, there is no basis in law for a local government to obtain the approval of the Joint Tax Board for its taxes. The power to regulate the imposition and collection of taxes by local governments is vested exclusively in the House of Assembly.<sup>64</sup> The only valid inquiries that the court should have made in the circumstance were (i) whether the tax sought to be collected by Eti-Osa Local Government was one of the taxes reserved to the federal government in the Constitution, and (ii) if the answer to the first question is in the negative, whether the tax is supported by a law of the House of Assembly of Lagos State.

### **What to do with the Act**

We have continued to suffer the effect of the Act beyond 2004 because it survived the revision of the laws of federation that was

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<sup>60</sup> *Ibid.*, at 558.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* at 559

<sup>63</sup> The court was, nevertheless, right to have held that a local government council does not have the power to impose a tax.

<sup>64</sup> See items 9 and 10, Part II, Second Schedule to the Constitution.

undertaken then (the “2004 revision”). Perhaps, if due consideration had been given to the Act in the course of that undertaking, the Act should have been deleted as a law of the federation.<sup>65</sup> The difficulty with this approach is that the law by which the 2004 revision was undertaken is unknown.<sup>66</sup> Section 315(4)(a)(iii) under which such power would have been exercised refers to a person appointed by law. It is also doubtful that the National Assembly may validly appoint a person to revise a law the subject matter of which falls outside its legislative competence under the Constitution. These arguments may, perhaps, explain why the Act was not affected by the effort that gave rise to the 2004 LFN.

It would, however, seem that the President of the Federal Republic of Nigeria should have validly exercised the power to repeal the Act at the time of the 2004 revision on the authority of section 315(4)(a)(i). A comparison of sub-paragraphs (i) and (ii) of section 315(4)(a) would show the intention of the draftsman to give the President wider powers with regard to the “modification” of existing laws than he gave to the Governors and the legislature. This is because while sub-paragraph (i) gives the President power in relation to “*the provisions of any law of the Federation*”, sub-paragraph (ii) gives the Governors power in relation to “*the provisions of any existing law deemed to be a Law made by the House of Assembly of that State*”. Thus the power of the President to modify an existing law is not limited to “*the provisions of any existing law deemed to be an Act of the National Assembly*”; for had the draftsman intended such limitation, he would have said so expressly as he did with regard to the power of Governors. This drafting approach would seem to suggest that the draftsman of section 315 was well aware (as we have contended above) that some of the decrees that were promulgated by the Federal Military Government prior to the coming into force of the Constitution may neither qualify as laws which may be deemed to be Acts of

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<sup>65</sup> “Appropriate authority” under s. 315 includes any person appointed by any law to revise or rewrite the laws of the Federation or of a State (s. 315(4)(a)(iii)); and “modification” includes addition, alteration, omission or repeal (s. 315(4)(c)).

<sup>66</sup> What we know is that the 2004 revision/2004 LFN was later authenticated in 2007 by an Act of the National Assembly following questions by lawyers as to the legal basis of the 2004 LFN. See Revised Edition (Laws of the Federation of Nigeria) Act 2007, with the following long title “An Act to enable effect to be given to the Revised Edition of the Laws of the Federation of Nigeria”. The commencement date of this Act is 25 May 2007.

the National Assembly (being statutes dealing with matters in respect of which the National Assembly is empowered to make laws under the Constitution), nor as laws which may be deemed to be Laws of a House of Assembly (being statutes dealing with matters in respect of which a House of Assembly is empowered to make laws under the Constitution). Each of these decrees would then qualify as “*a law of the Federation*”, being laws that up till 29 May 1999 applied to the entire federation. We take the view that Decree No. 21 is one of such decrees. We also take the view that the President would have validly repealed all the provisions of Decree No. 21 as “*a law of the Federation*” – the power to repeal being included in the definition of “modification” contemplated by section 315. It would thereafter have been valid for the 2004 LFN to have been printed without the Act. Nothing stops the President presently from repealing the Act.

It is also open to a court before which it is sought to invoke the force of the Act to declare the Act as void and of no force and effect to the extent of its inconsistency with the Constitution.<sup>67</sup> Assuming however that it is possible to save the Act under section 315 with respect to Part I of its Schedule as an Act of the National Assembly, then it would be open to the court to declare the Act null, void and of no effect with regard to its purported application to the states and local government councils with regard to the collection of all manner of taxes (on the authority of *Fawehinmi v. Babaginda*).<sup>68</sup> This would be the case with regard to the prohibition on the use of any person other than a tax authority to assess and collect taxes and erection of road blocks to collect any tax. While it has been argued that these specific provisions are valid for all cases,<sup>69</sup> it is submitted that the provisions will apply validly only in cases where the National Assembly has legislative competence. With regard to the limitation of the exercise of power to collect tax to a tax authority only, the provision will not apply to taxes that may be imposed by a state government in the exercise of its residuary legislative

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<sup>67</sup> See B. B. Kanyip, “*The 1999 Constitution and Fiscal Federalism: Issues Arising*” (a paper presented at a one day workshop of the Osogbo Branch of the Nigerian Bar Association, June 23, 2009) 6.

<sup>68</sup> *Fawehinmi v. Babaginda*, *supra* note 8. However, Hon. Justice Kanyip’s central argument in the paper (above at note 65) is that, save for the specific provisions of the Act relating to restriction of the exercise of the power to assess and collect tax to a tax authority and the prohibition on the use of road blocks in the collection of taxes, the Act is otherwise unconstitutional.

<sup>69</sup> *Ibid* at 5.



powers. Also, the prohibition on erection of road blocks in the course of collection of a tax will apply only in relation to taxes in respect of which the National Assembly has competence and or in respect of a road block erected on a federal highway. It is nevertheless thought that what would be left of the Act after the severance of its unconstitutional provisions both as an Act of the National Assembly and a Law of a House of Assembly will be so different from the original scheme and content of the Act that such an exercise would be unrealistic and a waste of the time of the court.

Another response to the Act is to presume that it has ceased to validly exist upon the coming into force of the Constitution. This option cannot be valid based on the current state of the case law on the point. As the case law stands presently (*i.e.* that “[a]ny attempt to act outside the ambit of Part III of Taxes and Levies (Approved list for collection) Decree No. 21 of 1998 [by any of the Federal Government, State Government or Local Government] will be futile”),<sup>70</sup> the Act operates in superiority to any Law of a House of Assembly made in exercise of its constitutional power to impose taxes other than as limited by the provisions of Parts I and II of the Second Schedule to the Constitution. Though this state of the law is unsatisfactory, it will take a contrary decision of the Supreme Court to definitively mark a change in the case law.

### **Conclusion**

Notionally, the Act would seem to have survived under the Constitution as an existing law. But in strict legal theory, it can hardly operate as such. We have shown that each existing law is meant to be continued in force as either a “*deemed Act of the National Assembly*” or a “*deemed Law of the House of Assembly*”. Where an existing law cannot continue in force as either of the two, then no legal basis exists for its continued existence. The basis of the operation of an existing law as either a “*deemed Act of the National Assembly*” or as a “*deemed Law of the House of Assembly*” is the *locus* of the power to legislate over the subject matter of the existing law under the Constitution as between the National Assembly and the State House of Assembly. But the power to legislate over the substance of the subject matter of the Act under the Constitution is located jointly in the National Assembly and the State House of Assembly, *i.e.* by way of an Act to amend the Constitution. Indeed beyond that, the subject matter

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<sup>70</sup> *Eti-Osa Local Government v. Jegede*, *supra* above n 54 at 558.

of the Act has been comprehensively addressed by the Constitution, and is meant to be so addressed for so long as the Constitution remains in force. It is no doubt true that the Act covers two other issues, which do not purport to allocate tax collection powers to the federal, state and local governments, *i.e.* the prohibition on the use of tax consultants and road blocks in the collection of taxes. But these issues are insignificant to warrant the continued existence of the Act. For these reasons, we have argued that the Act should have ceased to have effect upon the coming into force of the Constitution on 29 May 1999.

Our courts, however, have failed to see this inoperability of the Act under the Constitution in the numerous circumstances in which they had the opportunity to pronounce thereon. Rather they have made pronouncements that suggest that the Act not only operates under the Constitution but also operates above any enactments that may be made by a State House of Assembly in exercise of its constitutional powers. The Court of Appeal has also fallen into this error. It missed its opportunity in *Eti-Osa Local Government v. Jegede*<sup>71</sup> to pronounce the Act inoperable under the Constitution. It rather adopted a posture that suggests that the Act operates alongside the Constitution. In effect, given the principles of *stare decisis* as they operate under our judicial system, even a contrary pronouncement by the Court of Appeal might not be sufficient to settle the controversy. Only that of the Supreme Court can settle the controversy from a judicial perspective.

In a similar vein, the President, who arguably has the power under section 315(4)(a)(i) of the Constitution to repeal the Act, has not exercised this power till date. Hence the confusion arising from the presence of the Act in the corpus of our laws has continued to thrive.

It is only to be hoped that the Supreme Court, as soon as it is presented with the opportunity, should annul the Act. Otherwise, the President may take the initiative to repeal the Act and save us the possibly long wait for the intervention of the Supreme Court.

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<sup>71</sup> *Eti-Osa Local Government v. Jegede*, *supra* above n 54.