International Journal of Humanities & Social Science Studies (IJHSSS)
A Peer-Reviewed Bi-monthly Bi-lingual Research Journal
ISSN: 2349-6959 (Online), ISSN: 2349-6711 (Print)
Volume-I, Issue-III, November 2014, Page No. 49-74
Published by Scholar Publications, Karimganj, Assam, India, 788711
Website: http://www.ijhsss.com

Power of State High Courts in Nigeria to Transfer Labour Matters to the National Industrial Court: Suggesting the Way Forward

Martins Daniel
Department of Public and International Law, University of Abuja, Abuja, Nigeria

Abstract

This paper examines the power of State High Courts in Nigeria to transfer labour matters instituted before them to the appropriate court with the jurisdiction to entertain those matters, that is, the National Industrial Court of Nigeria. Following the enactment of the Constitution (Third Alteration) Act, 2010 which gave exclusive jurisdiction to the National Industrial Court (NIC) on labour matters, both the State and Federal High Courts including that of the Federal Capital Territory, Abuja ceased to have jurisdiction on labour matters pending before them. Therefore, there is the need for these courts to transfer the labour matters pending before them to the NIC. However, State High Courts in Nigeria do not have power expressly conferred on them under any law of the State or under their rules of practice and procedure to transfer labour matters to the NIC. The State High Courts can only strike out those matters, and if they are struck out and there is need to file them afresh, some of them may be caught by statute of limitation and the plaintiffs in such situation, without any fault of theirs, would suffer grave injustice. By way of scholarly exegesis, predicated on statutory and case law authorities, the paper explores this sphere of adjectival law in Nigerian jurisprudence and critically reviews the latest decision of the Court of Appeal in this regard. The paper posits that though the Court of Appeal rightly held that State High Courts should transfer labour matters to the NIC that decision, with greatest respect, was reached on a wrong reasoning. The paper further examines the provisions of Section 24(3) of the National Industrial Court Act, 2006 vis-a-vis the principles of separation of powers and federalism as enshrined under the 1999 CFRN, as amended and submits that the section is subversive of the cardinal principles of separation of powers and federalism entrenched under the 1999 CFRN, as amended and is therefore unconstitutional, null and void.

The paper submits that though State High Courts are not expressly empowered under any statute or rules of court to transfer labour matters to the NIC, there are some provisions under the States' High Court rules of practice and procedure, and judicial decisions verging on policy, which they can rely on to transfer labour matters to the NIC.

Key Words**: **State High Courts; Power to Transfer; Labour Matters; National Industrial Court; federalism; Separation of Powers; Echelunkwo John

Abbreviations: NIC: National Industrial Court; CFRN: Constitution of the Federal Republic of Nigeria; LFN: Laws of the Federation of Nigeria; NWLR: Nigerian Weekly Law Report; SCNJ: Supreme Court of Nigeria Judgment; FWLR: Federation Weekly Law Report; MJSC: Monthly Judgment of the Supreme Court; NSCC: Nigerian Supreme Court Cases; Cap.: Chapter; para(s): paragraph(s).

1. **Introduction**: Prior to the enactment of the Constitution (Third alteration) Act, 2010, there are several courts of coordinate jurisdiction with power to entertain labour and industrial disputes in Nigeria. Such courts include the High Court of the

Federal Capital Territory, Abuja, the Federal High Court of Justice, the State High Court of Justice and the National Industrial Court of Nigeria.[1] The major problem litigants and legal practitioners encountered with these courts is that apart from their jurisdiction to entertain labour matters and industrial disputes, they also have the jurisdiction to entertain other civil causes and matters. Due to this, the courts had huge volume of cases listed before them and coupled with their somewhat cumbersome procedures, proceedings before these regular courts took years before they are resolved.

To checkmate this problem on the part of the litigants who usually bear the ultimate brunt, the Nigerian National Assembly in collaboration with the States Houses of Assembly in Nigeria in 2010, amended the Nigerian Constitution through the Constitution of the Federal Republic on Nigeria (Third Alteration) Act, 2010, thus incorporating the establishment of the National Industrial Court, its composition and power, like other superior courts of record, into the provisions of the Constitution.[2]

The provisions of Section 254C(1) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 gave exclusive jurisdiction to the National Industrial Court on labour matters. Consequent upon this, the Federal High Court, the State High Courts and the High Court of the Federal Capital Territory, Abuja ceased to have jurisdiction in labour matters pending before them. Then the critical issue here is whether these courts should transfer the labour matters pending before them to the National Industrial Court or strike them out since they no longer have the jurisdiction to entertain labour matters.

The Federal High Court and the High Court of the Federal Capital Territory, Abuja do not have any obstacle in this regard. The Federal High Court is expressly empowered under Section 22(2) of the Federal High Court Act,[3] to transfer any matter before it to the appropriate court with jurisdiction once it discovers that it does not have the jurisdiction to entertain same. The High Court of the Federal Capital Territory, Abuja is also expressly empowered under the provisions of Section 24(3) of the National Industrial Court Act, 2006 to transfer pending labour matters to the National Industrial Court, since the National Assembly that made the Act has the legislative competence to make laws, including rules of practice and procedure, guiding the High Court of the Federal Capital Territory, Abuja[4].

However, State High Courts are not expressly empowered under any statute or rules of practice and procedure to transfer matters brought before them to the appropriate court with jurisdiction anytime they discover they do not have the jurisdiction to entertain those matters.[5] This apparent lack of express power on the State High Courts to transfer labour

---

[1] See Fagbemi, Sunday. "Jurisdiction of the National Industrial Court of Nigeria; A Critical Analysis." *Journal of Law, Policy and Globalisation* 28, (2014): 1-8. http://www.iiste.org.

[2] See also Section 6(3) (5) (a) – (i) of the Constitution of the Federal Republic of Nigeria 1999, as amended. Specifically, Section 254 of the Constitution (Third Alteration) Act, 2010, reaffirmed and reinforced the status and jurisdiction of the NIC as contained in the National Industrial Court Act, 2006; see further Amadi, K. L. "Reflections on the Status of the National Industrial Court under the Constitution (Third Alteration) Act, 2010." *Labour Law Review 5, no. 1 (2011): 1-22;* Fagbemi, Sunday, op cit, pp 1-8.

[3] Cap. F12 LFN, 2004.

[4] See section 259 of the 1999 CFRN, as amended.

[5] See D. I. Eferwerhan. *Principles of Civil Procedure in Nigeria,* 2nd ed. Enugu: Snaap Press Publishers Ltd, 2013, chapter 2; Basil, Momodu. *Court-Room Rapid Reference Handbook: Legal Practice at a Glance.* Benin-City: Evergreen Overseas Publications Ltd, 2014, vol. 1, Chapter 29.

matters pending before them to courts of co-ordinate jurisdiction has generated much controversy and debate among legal practitioners in Nigeria.

As State High Courts ceased to have jurisdiction in labour matters before them following the enactment of the Constitution (Third Alteration) Act, 2010, plaintiff counsel in such matters usually bring application urging the court to transfer the matter to the appropriate Judicial Division of the NIC. This application for transfer of the suit is usually met with stiff opposition from the defendant counsel who rather urge the court to strike out the matter since it is not empowered under any law or under its rules of practice and procedure to transfer the matter. Obviously, this situation poses a daunting challenge to a State High Court judge who has to decide whether to strike out the matter, despite its consequent grave injustice to the litigant, or to transfer the matter to the NIC despite apparent lack of express power to do so.

Some State High Court judges have relied on the provisions of Section 24(3) of the National Industrial Court Act, 2006 to transfer labour matters pending before them to the NIC. The said Section 24(3) provides as follows:

"Notwithstanding anything to the contrary in any enactment or law, no cause or matter shall be struck out by the Federal High Court or the High Court of a State or of the Federal Capital Territory, Abuja on the ground that such cause or matter was not brought in the appropriate court in which it ought to have been brought, and the court before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate Judicial Division of the National Industrial Court..."

In the opinion of such judges, the National Industrial Court Act, 2006 is an Act of the National Assembly and therefore, its provisions bind them.

However, some judges in considering an application to transfer pending labour matters to the NIC express the opinion that the provisions of Section 24(3) of the National Industrial Court Act, 2006, do not bind them. They hold that the National Industrial Court Act, 2006 is an Act of the National Assembly made to establish the NIC and to provide for some of it rules of practice. And that since the NIC is an independent and autonomous court, the Act establishing it and its rules of practice and procedure cannot bind State High Courts. These judges further express the opinion that the National Industrial Court Act, 2006 being an Act of the National Assembly, cannot bind them since the National Assembly does not have the competence to legislate on rules of practice and procedure to guide State High Courts.[6] Moreover, not having any power expressly conferred on them under any law made by the State House of Assembly or under their rules of practice and procedure, these judges proceed to strike out labour matters pending before them. An example of such pending labour matter struck out by the High Court of Enugu State instead of ordering for the transfer of same to the NIC is the case of ***Echelunkwo John O. & 90 Others v. Igbo Etiti Local Government Area***[7] In the instant case, after considering the Application for transfer of the matter to the NIC brought by the plaintiff counsel, the court ruled that the provisions of Section 24(3) of the NIC Act, 2006, do not bind it. In addition, that it is not expressly empowered under any law of the State House of Assembly or under its rules of practice and procedure to transfer the matter to the NIC. This is in spite of the grave injustice that the plaintiffs would suffer because the plaintiffs' suit by Section 136 of Local Government Law Cap 109 Laws of Enugu State 2004, would be statute barred should it be filed afresh at the NIC.

---

[6] See section 274 of the Constitution of the Federal Republic of Nigeria, 1999 which empowers the Chief Judge of a State to make rules of practice and procedure for the State High Court subject to any Law made by the House of Assembly of the State.

[7] **(2013) 7 NWLR (pt. 1352) 1 C.A.**

On appeal to the Court of Appeal, the appeal court held that the provisions of Section 24(3) of the National Industrial Court Act, 2006 is binding on all State High Courts in Nigeria and that the judge should have relied on that section to transfer the matter to the NIC. The appeal Court therefore set aside the ruling of the Enugu State High Court and ordered the transfer of the matter to the NIC.

Despite this decision of the Court of Appeal, which presently, is the law in this regard, because State High Courts are bound to follow the decision of the Court of Appeal,[8] based on the doctrine of precedent, the controversy rages on amongst members of the Bar and the Bench. Majority of members of the Bar and the Bench, including the present author, believe that Section 23(4) of the National Industrial Court Act, 2006 is not binding on State High Courts. Because it is an Act made by the National Assembly, to establish the NIC and to provide for some of its rules of practice, it cannot bind State High Courts that are independent and autonomous courts. Furthermore, the National Industrial Court Act, 2006 cannot State High Courts because the National Assembly, which enacted the Act, does not have the competence to legislate on rules of practice and procedure for State High Courts. Some go further to argue that because State High Courts are not expressly empowered under relevant laws or rules of practice and procedure to transfer suits, they should strike out labour matters pending before them.[9]

It is the need to examine this tendentious power of State High Courts to transfer labour matters pending before them to the NIC, which has generated great controversy amongst members of the Bar and Bench, and a critical review of the decision of the Court of Appeal in this regard[10] that informed this paper.

2. Aim, Scope, Rationale, Methodology and Structure of the Paper.

The paper aims at examining the power of State High Courts in Nigeria to transfer pending labour matters before them to the NIC. The paper further critically analyses the decision of the Court of Appeal in this regard in the case of ***Echelunkwo John O. & 90 Others v. Igbo Etiti Local Government Area.***[11] This is against the backdrop of the controversy and debate, which this issue has generated among members of the Bar and the Bench in Nigeria.

The significance of the paper stems from the fact that it is tailored to proffer fresh insights into the on-going debate on the power of State High Courts to transfer pending labour matters before them to the NIC. It may be stated in parenthesis here that Nigerian text writers have not done any detailed academic work in this area of procedural law. The available works of text writers do not go beyond stating that "while the Federal High Court has the power to transfer suits to courts of coordinate jurisdiction, State High Courts do not have such power of transfer and can only strike out such matters when they discover they do not have jurisdiction."[12] Furthermore, the decision of the Court of Appeal in ***Echelunkwo John*** was

[8] Even when the decision is wrong in the opinion of the High Court Judge.

[9] The author became aware of this controversial situation in the Nigerian legal system in the cause of his legal practice in superior courts of record.

[10] **Echelunkwo John O. & 90 Others v. Igbo Etiti Local Government Area (2013) NWLR (pt. 1352) 1 CA.**

[11] Supra

[12] See for example D. I. Eferwerhan, *Principles of Civil Procedure in Nigeria,* 2nd ed. Enugu: Snaap Press Publishers Ltd, 2013, chapter 2; Basil, Momodu, *Court-Room Rapid Reference Handbook: Legal Practice at a Glance.* Benin City: Evergreen Overseas Publications Ltd, 2014, vol. 1, Chapter 29; Fidelis, Nwadialo, *Civil Procedure in Nigeria,* 2nd ed. Lagos: University of Lagos Press, 2000, Chapter 3; Oniekoro, F. J. *Practice Notes and Guides on Litigation,* 3rd ed. Enugu: Chenglo Ltd, 2012, chapter 5; Kole, Abayomi, *Handbook on Civil Litigation.* Lagos: Orit-Egwa Ltd, 2005, chapter 2; Fred, Odibei, *Practice Notes for Trial Lawyers.* Port- Harcourt: Pearl Publishers, 2008, Chapter 32;

not appealed against to the Supreme Court so that the apex court will have the opportunity of pronouncing with finality on this subject matter. Amongst other things, this paper aims to bridge this obvious gap in the literature in order to add to the extant knowledge on the subject matter. In addition, it is expected that the research would make valuable recommendations on how to finally resolve this burning issue by a paradigm shift in judicial approach.

The paper considers its subject matter within the purview of the decision of the Court of Appeal in ***Echelunkwo John,*** which is presently the only decision of an appellate court on the subject matter**.** In this context, the paper applies itself to a critical review of the said decision and the *raison d' etre* for the decision with a view to emphasizing its shortcomings and its implication on the power of State High Courts to transfer pending labour matters before them to the NIC.

The method of the paper is qualitative and exploratory in nature. By way of critical analysis of primary legal sources (statutory and case law authorities), the paper draws insights from decisions of superior courts and practical legal experience. The outcome of this forms the fulcrum of the analysis in the paper. For the purpose of convenience of systematic organisation of thought, the thrust of the analysis in this paper is chronologically presented under a number of select headings and sub-headings carefully chosen to achieve the paper's major object.

In addition to the foregoing introductory sections, the paper is structured as follows: the position of the law on the proper order a State High Court should make when it discovers it's want of jurisdiction to entertain a matter before it**,** the decision of the Court of Appeal in ***Echelunkwo John,*** a critique of the Court of Appeal's decision, Section 24(3) Of National Industrial Court Act, 2006 and constitutional provisions for separation of powers and federalism, the way forward in practice and procedure with regard to the power of State High Courts to transfer pending labour matters before them to the NIC and conclusion.

3. Results And Findings

3.1 The Position of the Law on the Proper Order a State High Court Should make when it Discovers it's Want of Jurisdiction to Entertain a Matter Before it.

Case law in Nigeria is replete with decisions of superior courts on the position of the law with regard to what a State High Court should do when, at any stage of the proceedings, it is seized of the fact of its want of jurisdiction to deal with a matter before it. This is because where a party raises the issue of jurisdiction of a court to entertain a matter before it, the court must resolve that issue one way or the order before it proceeds to consider the matter on the merit. This stems from the fundamental nature of jurisdiction in adjudication as the bedrock upon which the powers of a court is founded and its effect in rendering any proceedings conducted in the absence of it a nullity no matter how well conducted. In ***Musaconi Ltd v. Aspinall,***[13] the Respondent as plaintiff commenced an action in the High Court of Kogi State, seeking payment of 60,000 US Dollars or N6,000,000 (Six Million Naira) being debt owed him by appellant arising from a contract of service between the parties. The appellant filed an application seeking an order striking out the suit on ground of lack of jurisdiction by the trial court. The application was dismissed and not satisfied, the appellant filled an appeal to the Court of Appeal, where the appeal was dismissed. Not yet satisfied, he appealed further to the Supreme Court. The Supreme Court, per Olukayode Ariwoola, Justice of the Supreme Court (JSC), speaking for his Learned Brothers held, with regard to the importance of jurisdiction to adjudication, thus:

Ernest Ojukwu, and C. N. Ojukwu, *Introduction to Civil Procedure in Nigeria,* 3rd ed. Abuja: Helen-Roberts, 2009, chapter 2.

[13] **(2014) All FWLR (pt. 710) 1276 at 1292-1293, paras. F-D.**

> *"Jurisdiction is of paramount importance in the process of adjudication. Where there is no jurisdiction in a court to handle or adjudicate on a matter before the court, everything done or every step taken in the proceedings amounts to nothing:* ***Attorney-General for Trinidad & Tobago v. Erichie[14]; Mustapha v. Governor of Lagos State.[15]*** *In other words, jurisdiction is the live wire of any proceeding in court and everything done in the absence of jurisdiction is simply a nullity:* ***Jumang Shelim & Anor. v. Fwendim Gobang.[16]***
>
> *It is now trite that when a court's jurisdiction or competence is challenged by the Defendant, it is neater and indeed far better for the court to settle that issue one way or another before proceeding to hearing of the case on the merit..."*

Similarly, with regard to the fundamental nature of jurisdiction, in ***Inyang v. Etuk,*** [17] the appellants commenced their petition outside the 180 days stipulated by Section 285(6) of the Constitution of the Federal Republic of Nigeria (First Alteration) Act 2010 within which a tribunal should deliver its judgment in an election petition. The tribunal struck out the petition for want of jurisdiction as a result of effluxion of time. The appellants were dissatisfied and therefore appealed to the Court of Appeal. The Court of Appeal, per Ndukwe Anyawu, Justice of the Court of Appeal (JCA), in emphasising the imperative of bringing an election petition within the constitutionally stipulated 180 days for the tribunal to be clothed with jurisdiction and the fundamental nature of jurisdiction in adjudication held, inter alia, thus:

> *"The question of jurisdiction of court is a radical and crucial question of competence because if a court has no jurisdiction to hear and determine a case, the proceedings are and remain a nullity ab initio no matter how well conducted and brilliantly decided they might be because defect in competence is not intrinsic, but extrinsic to the entire process of adjudication. Jurisdiction of court is therefore considered to be the nerve centre of adjudication, the blood that gives life to an action in a court of law in the very same way that blood gives life to a human being."*[18]

However, when a State High Court's Jurisdiction is challenged, the court still has the competence and jurisdiction to enquire into the question whether it has the jurisdiction to hear the case. In ***Attorney-General of Lagos State & 2 Others v. Dosunmu,[19]*** the Military Administration in Lagos State in 1975 evolved a new land policy that no person should own more than one plot of State Land at Victoria Island Lagos irrespective of whether or not such plot was acquired by direct allocation or by transfer or by assignment. Pursuant to the above land policy the Military Governor of Lagos State on the 11th day of August 1975 set up a Committee who were to compile a comprehensive list of names of persons who owned more

---

[14] **(1983) AC 518 at 522.**

[15] **(1987) 2 NWLR (pt. 58) 539.**

[16] **(2009) 12 NWLR (pt. 1156) 435.**

[17] **(2014) All FWLR (pt. 722) 1766 at 1783 paras. E-G; 1784 para. A**

[18] The following decisions of the Supreme Court are also authoritative with regard to the importance of jurisdiction as the bedrock upon which the powers of court is founded: ***Hope Democratic Party v. Peter Obi & Ors (2011) 12 MJSC (Special Edition) 67 at 95 paras. A-C,*** *per Olufunlola Adekeye, JSC****; Alhaji Fatai Alawiye v. Mrs Elizabeth Ogunsanya (2012) 12 MJSC (PT. 1) 145 at 184 paras. B-E*** *Per Chukwumah-Eneh, JSC****; Barclays Bank of Nigeria Ltd v. Central Bank of Nigeria (1976) 1 All NLR 409 at 421***. See further, Muiz Banire, et al, *The Blue Book: Practical Approach to the High Court of Lagos State (Civil Procedure) Rules.* Lagos, Ecowatch Publications Limited, 2008, pp 26-27, where the learned authors opined, "As a matter of law, jurisdiction is fundamental to adjudication as it is the special cord of a court of law. Therefore any decision taken by a court without jurisdiction is incompetent and is subject to being nullified on appeal."

[19] **(1989) 3 NWLR (pt. 111) 552 at 600.**

than one plot of land in Victoria Island. On receiving the Committee's Report, the Military Governor of Lagos State enacted the Determination of Certain Interests in State Lands Order LSLN No. 9 of 1976. The plaintiff/respondent was affected, as he owned more than one plot of land in Victoria Island. His (plaintiff/respondent's) interest in one of his plots of land in Victoria Island was determined by the 1976 Order LSLN No. 9 of 1976. Upon the above facts, the respondent as plaintiff in the trial court sued the defendants. In paragraph 8 of the Statement of Claim, the plaintiff pleaded the 1976 Order and added in paragraph 9:
"9. The plaintiff will contend, at the trial of this action that the 1976 Order was and remains illegal, null and void because the law under which it was made was unconstitutional."
The defendants raised a preliminary objection to the jurisdiction of the High Court of Lagos State to entertain the matter based on the provisions of section 6(6)(d) of the Constitution of Nigeria 1963 which reads:

> "6(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
> (6) The judicial powers vested in accordance with the foregoing provisions of this section-
> (d) Shall not, as from the date when this section comes into force, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law."

The trial judge however, overruled the objection, assumed jurisdiction and granted all he reliefs claimed by the plaintiff. The defendants appealed to the Court of Appeal with no success, and then appealed further to the Supreme Court relying on the same arguments canvassed before the lower court. It was the defendant/appellant's submission that the High Court of Lagos State should not have entertained the matter in the first place when the defendant/appellant raised the objection as to its jurisdiction. This is because the objection to the jurisdiction founded on section 6(6)(d) of the Constitution of the Federation 1963 amounted to a plea that the High Court of Lagos State has not and cannot exercise judicial powers in respect of the action or proceedings. And that the issues or questions as to the competence of the Determination of Certain Interests in State Lands Order 1976 was raised.
The Supreme Court in response to this submission, and particularly with regard to the position of the law that a State High Court has the jurisdiction to entertain a matter to determine its jurisdiction held, inter alia, thus:

> *"If a court has no jurisdiction in any matter, it cannot exercise judicial powers to adjudicate. If a court has no jurisdiction it cannot exercise the powers granted to it by the Constitution or law to enable it exercise the jurisdiction. If a court lacks jurisdiction to entertain a matter whatever merit the matter may have under other laws cannot be enquired into...* ***The only jurisdiction it can exercise is jurisdiction to enquire into the question whether it has jurisdiction to hear the case."***[20] (Emphasis supplied).

Authorities are now crystallised on the position of the law that where, at any stage of the proceedings, a State High Court becomes seized of the fact of its want of jurisdiction to entertain the matter before it, the proper order it should make is to strike out the matter. A State High Court has no jurisdiction to transfer a matter to another court of coordinate jurisdiction. This point was made writ large in the decision of the Supreme Court in ***Aluminium Manufacturing Co. (Nig.) Ltd v. NPA.***[21] In the instant case, the

[20] Supra at p. 600 paras. A-B. See also ***Barclays Bank of Nig. Ltd v. Central Bank of Nig. (1976) 1 All NLR 409 at 421.***
[21] **(1987) 1 NSCC 224 at 233-234.**

plaintiff/appellant sued the respondents in the Federal High Court, for special and general damages for breach of contract of bailment, or breach of duty as bailee in custody of appellant's goods. The respondent raised an objection in *limine* to the jurisdiction of the court. The trial judge holding that he had no jurisdiction to hear the case, transferred it to the State High Court, to try the case. The appellant appealed to the Court of Appeal, which upheld the decision of the trial judge, that the Federal High Court had no jurisdiction, but reversed the order transferring the case to the High Court of a State and struck out the claim. The appellants appealed further to the Supreme Court contending, inter alia, that the Court of Appeal should not have struck out the claim. The Supreme Court in this appeal considered the provisions of the Federal Revenue Court Decree 1973, which was promulgated before the Constitution of the Federal Republic of Nigeria 1979 came into force. Section 22(2) of the said Decree reads:

> "No cause or matter shall be struck out by the Federal Revenue Court merely on the ground that such cause or matter was taken to the Federal Revenue Court instead of the High Court of a State in which it ought to have been brought and the judge of the Federal Revenue Court before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate High Court of a State in accordance with the rules of court to be made under section 43 of this Decree."

A similar power was given to the High court of the States by section 22(3) of the Decree. This was before the Constitution of the Federal Republic of Nigeria 1979 came into force. The 1979 Constitution created and established the Federal High Court under section 230(2), which reads:

> "Notwithstanding subsection (1)[22] of this section, where by law any court established before the date when this section comes in to force is empowered to exercise jurisdiction for the hearing and determination of any of the matters to which subsection (1) relates, such court shall as from the date when this section comes into force by restyled 'Federal High Court' and shall continue to have all the powers and exercise the jurisdiction conferred upon it by any law."

With regard to practice and procedure to be followed in the Federal High Court,, section 233 of the 1979 Constitution provides as follows:

> "The National Assembly may by law make provisions with respect to the practice and procedure of the Federal High Court; **and until other provisions are made by the National Assembly the jurisdiction hereby conferred upon the Federal High Court shall be exercised in accordance with the practice and procedure for the time being in force in relation to a High Court of a State or to any other Court with like jurisdiction."** (Emphasis supplied).

The Federal High Court, which dealt with this matter in the first instance, exercised its jurisdiction in Lagos State, and the High Court of Lagos State does not have any provision under its rules of practice and procedure empowering it to transfer matters to other courts although section 22(3) of the Federal Revenue Decree purports to do so.[23] Again when this

[22] Subsection (1) of section 230 of the 1979 Constitution prescribes the jurisdiction of the Federal High Court.

[23] Section 22(3) of the Federal Revenue Decree 1973 provides thus: "Notwithstanding *anything to the contrary in any law, no cause or matter shall be struck out by the High Court of a State or of the Federal Capital Territory, Abuja on the ground that such cause or matter was taken in the High Court instead of the Federal Revenue Court, and the judge before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate judicial division of the Federal Revenue Court in accordance with such rules of court as may be in force in that High Court or made under any enactment or law empowering the making of rules of court generally which*

appeal came before the Supreme Court, there was no other law made by the National Assembly to empower the Federal High Court to transfer matters to other courts and as a result of this, the rules of practice and procedure of the Lagos State High Court will apply based on the provisions of section 233 of the 1979 Constitution reproduced earlier. The only provision in a law that empowered the Federal High Court to transfer cases to other courts was section 22(2) of the Federal Revenue Decree reproduced above. Therefore, a fundamental question that arose in this case was whether there is power in a State High Court, in this case, the Lagos State High Court, to transfer a matter which it has no jurisdiction to entertain. If this question is answered in the negative, then whether section 22(2) of the Federal Revenue Decree continues to reside on the Federal High Court after it was established by the Constitution of Nigeria 1979.

The Supreme Court, per Obaseki, JSC, in answering these questions, held inter alia, thus:

> *"It appears to me that the power of transfer granted by section 22(2) of the Federal Revenue Decree continues to reside in the Federal High Court. This is notwithstanding sections 231 and 233 of the Constitution. Section 231 (1) conferred all the powers of the State High Court on the Federal High Court for the purpose of exercising any jurisdiction conferred upon it by the Constitution of the Federal Republic of Nigeria 1979. On practice and procedure to be followed in the Federal High Court, section 233 of the 1979 Constitution provides as follows:*
>
> *'The National Assembly may, by law make provisions with respect to the practice and procedure of the Federal High Court; and until other provisions are made by the National Assembly, the jurisdiction hereby conferred upon the Federal High Court shall be exercised in accordance with the practice and procedure for the time being in force in relation to a High Court of a State or to any other court with like jurisdiction.'*
>
> *The Federal High Court, which dealt with this matter in the first instance, exercised its jurisdiction in Lagos State.* ***The question that arises in this matter is whether there is power in a State High Court, in this case, the Lagos State High Court, to transfer a matter which it has no jurisdiction to entertain. The clear answer is in the negative and in such cases, the order it has power to make is an order striking out the matter.*** *"*[24]

The Supreme Court also followed its decision in ***Aluminium Manufacturing Co Nig. Ltd v. NPA***[25] in the case of ***Alhaji Fatai Alawiye v. Mrs Elizabeth Ogunsanya.***[26] In this case, Chukwumah-Eneh, JSC, speaking for his leaned brothers, opined thus:

> *"... Therefore, it goes without saying that where at any stage of the proceedings in a court, the court seized of the fact of its want of jurisdiction to deal with a matter before it, it is enjoined to put a final stop to the proceedings in the matter and to strike it out without more whether or not the point on want of jurisdiction has been taken suo motu by the court or on the application of the parties."*[27]

---

enactment or law shall by virtue of this subsection be deemed also to include power to make rules of court for the purposes of this subsection."

[24] Supra at 233.

[25] Supra.

[26] **(2012) 12 MJSC (pt. 1) 145 at 184 paras. B-E**.

[27] The Court of Appeal has towed this line of judicial reasoning as can be vividly observed in most recent decisions of the Court. *In* ***Inyang v. Etuk (2014) All FWLR (pt. 722) 1766 at 1784 para. A,*** the Court of Appeal, per Ndukwe Anyawu, JCA, held that *"where a court decides that it lacks jurisdiction to continue entertaining a suit as in this case, the proper order to make is to strike out the suit."* In a similar vein, the Court of Appeal, per Sanusi, JCA, in ***Oyewopo v. Arasiola (2014) All***

Underlying the foregoing decisions is the firmly established principle of law that State High Courts in Nigeria do not have the power to transfer cases pending before them, including labour cases, to appropriate courts of coordinate jurisdiction.

It is intended to show in this sub-head that State High Courts in Nigeria are not expressly empowered under any statute or rules of practice and procedure to transfer pending cases before them where they become seized of the fact of their want of jurisdiction. The proper order State High Courts make in such circumstance is to strike out the case.

3.2 The Decision of the Court of appeal in *Echelunkwo John O. & 90 Others v. Igbo Etiti Local Government Area.* [28]

3.2.1 Synopsis of Relevant Facts of the Case.

The Appellants are some of the junior workers of Igbo-Etiti Local Government Area, Enugu State. The Appellants filed Suit No. N/56/10 against the Respondent before the Enugu State High Court and in an amended statement of claim dated 17th March 2011 and filed on 22nd March 2011 the Appellants claimed against the Respondent:

"A declaration that the Defendant is in breach of contract of employment it entered with the respective plaintiffs in 2002" amongst other reliefs.

Following the enactment of Constitution (Third Alteration) Act, 2010 with commencement date from 4th March, 2011 which gave exclusive jurisdiction to the National Industrial Court over the subject matter of the suit, the Appellants filed an application dated 23rd June, 2011 for the transfer of the suit to the National Industrial Court, Enugu Division in accordance with Section 24(3) of the National Industrial Court Act, 2006.

The learned trial judge of the High Court, in his Ruling delivered on the 28th of July, 2011 struck out the suit instead of ordering for the transfer of same to the National Industrial Court as prayed in their application. The learned trial judge struck out the suit instead of ordering for the transfer of same on the ground that he is not bound by the provisions of the National Industrial Court Act, 2006. The Appellants, being dissatisfied with the said ruling, appealed to the Court of Appeal.

3.2.2 The Decision of the Court of Appeal

It is apt to commence this section of the paper by reproducing the provisions of Section 24(3) of the National Industrial Court Act, 2006 which formed the basis of the sole issue distilled for the determination of the appeal. This is evident from the observation of his Lordship, Okoro, JCA, who read the leading judgment at page 13, paragraph H: *"The narrow issue in this appeal turns on the construction of section 24(3) of the National Industrial Court Act, 2006..."* The said Section 24(3) states:

> *"Notwithstanding anything to the contrary in any enactment or law, no cause or matter shall be struck out by the Federal High Court or the High Court of a State or of the Federal Capital Territory, Abuja on the ground that such cause or matter was not brought in the appropriate court in which it ought to have been brought, and the court before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate Judicial Division of the Court in accordance with such rules of court as may be in force in that High court or made under any enactment or law empowering the making of rules of court generally which enactment or law shall*

FWLR (pt. 719) 1192 at 1203 para. H, held that *"... when a court decides that it lacks the jurisdiction to entertain a suit, the proper order it should make is one of striking out the matter and not one of dismissal."* See further ***Okolo v. UBN Ltd (2004) 3 NWLR (pt. 859) 87; Afribank Nig. PLC v. Bronik Ind. Ltd (2006) 5 NWLR (pt. 973) 300.***

[28] **(2013) 7 NWLR (pt. 1352) 1 C.A.**

by virtue of this subsection be deemed also to include the power to make rules of court for the purposes of this subsection."

The Court of Appeal, Enugu Judicial Division, duly constituted by three Justices of the Court, held that the provisions of Section 24(3) of the National Industrial Court Act, 2006 is binding on State High Courts, and that the section imposes a duty on a judge of the State High Court to transfer a suit before it which ought to have been filed at the NIC in the first place.

Okoro, JCA, speaking for his learned brothers, at pages 14-15, paragraphs H-A; page 15 paragraphs E-F held thus:

"The clear and ordinary meaning of this first part (of the National Industrial Court Act, 2006) is to save all suits filed in the Federal, State and Federal Capital Territory High Courts which ordinarily ought to have been filed at the National Industrial Court. The intendment of the clear words used therein is that such a suit shall not be struck out by the High Courts aforementioned. And to make the matter very clear, the section uses the word 'shall'... My view is clearly that the provision insists that the suit must not be struck out by any of the courts listed therein before even if there is anything to the contrary in any enactment or law. ... 'any enactment or law' includes the High Court (Civil Procedure) Rules of Enugu State, 2006. That is as it relates to the first part of the section of the enactment in focus."

His Lordship proceeded at pages 15-16, paragraphs G-C to hold further thus:

"It was the contention of the learned counsel for the Respondent that the use of the word 'may' in the second part of that section connotes discretion and was provided to 'ameliorate' the harshness of the word 'shall' used in the first part in order to give the trial Judge the discretion whether to order a transfer or order a striking out as was done in this case. For me, such argument sounds puerile. This is so because having clearly, by the use of the word 'shall' in the first part stated that the High Court shall not strike out the suit for the reasons giving therein, it is inconceivable that the same section would shoot itself in the foot. That argument would appear to place the lawmaker in a position of approbate and reprobate. That is to say giving power in one hand and taking it with the other hand. That is unacceptable in law."

His Lordship concluded by setting aside the ruling of the Enugu State High Court and ordered the transfer of the suit to the Enugu Judicial Division of the NIC.

3.2.3 A Critique of the Court of Appeal's Decision

With greatest respect, His Lordship's reasoning process seems to have proceeded on the wrong track. This is discernable from his Lordship's statement and approach to the sole issue for determination in this appeal as he observed at page 13, paragraph H thus: *"The narrow issue in this appeal turns on the construction of section 24(3) of the National Industrial Court Act, 2006..."*

To begin with, section 24(3) of the National Industrial Court Act, 2006 which the Appeal Court construed is an Act made by the National Assembly to specifically establish the NIC and provide for some of its rules of practice and procedure.

It is a principle firmly rooted in judicial soil in Nigeria that the law and rules of practice and procedure made for one court cannot be binding on another court either higher or lower in the judicial hierarchy. This principle was stated writ large by the apex court in ***Bukar Salami v. Modu Bunginimi & Anor.***[29] Appellant in this case filed an action in the Upper Area Court, Geidamin Yobe State, against the respondents seeking an order of court confirming that a motor vehicle Toyota Land Cruiser pick-up was duly sold to him by the

[29] **(1998) 9 NWLR (pt. 565) 235 at 243 ratio 3.**

respondents. The respondents however argued against the appellant's claim and denied sale of the motor vehicle to him. At the conclusion of the trial, the Upper Area Court held that there was no valid sale of the motor vehicle to the appellant and consequently ordered that the appellant return the motor vehicle to the respondents. The appellant was dissatisfied with the judgment of the Upper Area Court and therefore appealed to the High Court. When the appeal came up for hearing, the respondents raised an oral preliminary objection on the ground that the appeal was incompetent for failure of the appellant to write his name on the notice of appeal as required by the law. The preliminary objection was argued and the High Court ruled that the appeal was incompetent for failure of the appellant to state his name on the notice of appeal "in order to make the appeal authentic and valid." The appeal was then struck out. And in arriving at this decision, the State High Court relied on the provisions of **Order 3 Rule 2(1) of the Court of Appeal Rules 1981.** The appellant was again dissatisfied and appealed to the Court of Appeal contending, inter alia, that the State High Court's reliance on the Court of Appeal Rules 1981 was wrong, as that rule is not binding on the State High Court. The Court of Appeal agreed with this submission of the appellant and held, inter, alia, thus:

> *"It is the absence of the name of the appellant beneath the thumbprint that made the High Court declare the appeal incompetent. The High Court in my view was wrong to have held that the notice of appeal was incompetent simply because the name of the appellant was not written under the thumbprint.* ***In arriving at this decision, the High Court was also wrong to have relied on the provisions of Order 3 Rule 2 (1) of the Court of Appeal Rules 1981 even though the court itself stated that the provisions of Order 3 Rule 2 (1) of the Court of Appeal Rules 1981 are not in pari materia with the provisions of Order 2 Rule 3 of the High Court (Appeals from Native Courts) Rules. In any event, the laws and rules of practice made for one court cannot be binding on another court either higher or lower in the judicial hierarchy."***[30] Based on these authorities, the National Industrial Court Act, 2006 made by the National Assembly to establish the NIC and provide for some of its rules of procedure cannot be binding on a State High Court, which is an autonomous and independent court.

The Constitution of the Federal Republic of Nigeria 1999, as amended established the High Court of a State under Section 270(1) when it provides that "There shall be a High Court for each State of the federation." The same Constitution established the NIC under Section 254 of the Constitution (Third Alteration) Act, 2010. Thus, the Constitution of the Federal Republic of Nigeria established the NIC and the High Court of a State as independent and autonomous courts. Therefore, on the authority of ***Salami* v. *Bunginimi,***[31] the law and rules of practice made for the NIC cannot be binding on a state High Court. The Honorable Justice Benedict Bakwaph Kanyip[32] wrote, with regard to section 24(3) of the National Industrial Court Act, 2006, as follows:

> *"By section 24 of the National Industrial Court Act, 2006, where the NIC finds that it has no jurisdiction over a matter before it, it can order a transfer of the matter to the*

[30] Supra at 243 paras. A-D. See also ***Nneji v. Chukwu (1988) 3 NWLR (pt. 81) 184 SC; Owoniboys Technical Services Ltd v. John Holt (1991) 6 NWLR (pt. 199) 550 SC.*** In the ***Owoniboys' case,*** the Supreme Court held that the Court of Appeal cannot rely on its own Practice Direction to extend time for appeal to the Supreme Court, since the power to extend time within which an appellant can appeal against the decision of the Court of Appeal to the Supreme Court is a power exclusive to the Supreme Court.

[31] Supra.

[32] The Presiding Judge, National Industrial Court, Lagos Division in his article "*Form and Formlessness: An Appraisal of the National Industrial Court Rules 2007." http://nicn.ng/k4.php*.

> *appropriate High Court instead of striking it out. The advantage of this provision is that such a matter may thereby not be caught up by the limitation period. This same section also provides that where a High Court lacks jurisdiction, it may transfer a matter before it to the NIC.* ***The snag with this provision is the issue whether the NIC Act can legislate for other courts in this manner. Commenting on a similar provision applicable to the Federal High court, the learned authors, Ernest Ojukwu and Chudi Nelson Ojukwu,[33]remark that 'such a provision is void as being inconsistent with the basic legal principle that each court shall be governed by its own rules. Thus, it would be incongruous for the Federal High Court Act to purport to legislate for the State High Courts.' That where a State High Court finds that it has no jurisdiction, the proper order would be an order striking out the matter."[34]***

Therefore, in ***Echelunkwo John,*** the Enugu State High Court was right when it held that Section 24(3) of the National Industrial Court Act, 2006 could not bind it. On this ground, the Court of Appeal's decision in ***Echelunkwo John,*** in so long as it held that the provisions of Section 24(3) of the National Industrial Court Act, 2006 is binding on State High Courts, is not good law.

What is more? An issue similar to that in ***Echelunkwo John*** arose in the case of ***Chima Ocean Shipping v. N.P.A. Suit No. CA/L/30/3B/84 judgment delivered on 10/12/84.*** In this case, the issue was whether section 22(3) of the Federal Revenue Decree 1973 (now Federal High Court Act) is binding on State High Courts. The said section provides thus:

> "*Notwithstanding anything to the contrary in any law, no cause or matter shall be struck out by the High Court of a State or of the Federal Capital Territory, Abuja on the ground that such cause or matter was taken in the High Court instead of the Federal High Court, and the judge before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate judicial division of the Federal High Court in accordance with such rules of court as may be in force in that High Court or made under any enactment or law empowering the making of rules of court generally which enactment or law shall by virtue of this subsection be deemed also to include power to make rules of court for the purposes of this subsection."*

The Court of Appeal, as we shall soon see, approached the issue on constitutional ground and held that the said section is not binding on State High Courts. The Appeal Court, further held that since the 1979 Constitution (then in force) established the High Court of a State and the Federal High Court as independent and autonomous courts, s. 22(3) of the Federal High Court Act, in so far as it purports to make provisions for State High Courts, is unconstitutional, null and void.

Similarly, in ***Echelunkwo John***, the Constitutional law approach is most relevant and the Appeal Court, with greatest respect, should not have embarked on the hocus-pocus of construction of the provisions of Section 24(3) of the National Industrial Court Act, 2006. The proper approach for determination of the sole issue distilled in ***Echelunkwo John*** should

---

[33] See Ernest Ojukwu and Chudi Nelson Ojukwu, *Introduction to Civil Procedure in Nigeria, 2nd ed. Helen Roberts, Abuja, 2005, p. 64*

[34] The author further recounts his experience on the Bench in another article as follows *"The experience so far shows that only the Federal High Court has transferred matters to the NIC since the passing of the NIC Act. No transfer as yet has been made by the other High Courts. The reason may well be that only in relation to the law establishing the Federal High Court is there a corresponding provision similar to section 24 of the NIC Act. Since especially the State High Courts do not have similar provisions, it becomes understandable why no such transfer has been or can even be made."* See B. B. Kanyip, *"The National Industrial Court: New Vistas in the Resolution of Labour Disputes." http://nicn.gov.ng/k5.php.*

be on Constitutional ground. And a fundamental constitutional poser that beckons for their Lordships' answer is: Does the National Assembly which made the provisions of section 24(3) of the National Industrial Court Act, 2006, have the legislative competence to make laws on rules of practice and procedure for State High Courts?

What a State High Court should do with a matter pending before it where it is seized of its want of jurisdiction to entertain the matter, is a question of rules of practice and procedure of the court. And the power to make rules of practice and procedure for State High Courts is provided for under the Constitution. There is no dearth of legal substratum in this sphere of adjectival law in Nigeria. The Supreme Court laid this judicial foundation in ***Aluminium Manufacturing Co. (Nig.) Ltd v. Nigerian Ports Authority***[35] where the Apex Court held thus:

> *"The practice and procedure of the High Court of a State is regulated by Section 239 of the 1979 Constitution which reads:*
> *'The High Court of a State shall exercise jurisdiction vested in it by this Constitution or by any law in accordance with the practice and procedure from time to time prescribed by the House of Assembly of the State.'..."*

In this wise, the court of Appeal in ***Chima Ocean Shipping v. N.P.A.***[36] declared Section 22(3) of the Federal High Court Act inconsistent with the provisions of Section 239 of the 1979 Constitution reproduced above in so far as it purports to confer power on State High Courts to transfer suits to other courts of coordinate jurisdiction. The Court of Appeal approached the issue on constitutional ground and held that the 1979 Constitution made both the Federal High Court and the State High Court autonomous and independent of each other. Under that Constitution, section 239 vested on the House of Assembly of a State the power to make rules of practice and procedure for a State High Court. In view of this express conferment of constitutional power on the House of Assembly of a State to make rules of practice and procedure for a State High Court, Section 22(3) of the Federal High Court Act which is an Act made by the National Assembly that does not have the legislative competence to make rules of practice and procedure for a State High Court, is inconsistent with Section 239 of the Constitution. Therefore, the Appeal Court, in accordance with section 1(3) of the 1979 Constitution, declared the said Section 22(3) of the Federal High Court Act unconstitutional, null and void to the extent of its inconsistency with section 239 of the 1979 Constitution.

This approach of the Court of Appeal in the ***Aluminium Manufacturing case*** is undoubtedly, quite apt to ***Echelunkwo John*****.** Presently, the power to make rules of practice and procedure for a State High Court is expressly conferred on the Chief Judge of a State by Section 274 of the 1999 Constitution of the Federal Republic of Nigeria (CFRN), as amended. And this power is exercisable by the Chief Judge of a State subject only to any law made by the House of Assembly of the State. The said Section 274 provides as follows:

> *"Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State."*

This is a provision of the Constitution, the *fons et origo* of the Legal System. And it follows invariably, in the absence of any law made by the House of Assembly of a State or rules of practice and procedure made by the Chief Judge of the State expressly conferring power on the State High Court to transfer suits to other courts of coordinate jurisdiction, section 24(3) of the National Industrial Court Act, 2006 which provides that a State High Court should not strike out a labour matter pending before it where it discovers it's want of

[35] Supra at 234
[36] **Suit No. CA/L/30/3B/84 judgment delivered on 10/12/84.**

jurisdiction but should transfer the matter to the NIC, is inconsistent with section 274 of the 1999 CFRN as amended. Consequent upon this, the inevitable fate of section 24(3) of the National Industrial Court Act, 2006 is that it is null and void to the extent of its inconsistency with the Constitution as provided under section 1(3) of the 1999 CFRN, as amended. Section 1(3) of the 1999 CFRN, as amended provides as follows:

> *"If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."*

3.3 Section 24(3) Of National Industrial Court Act, 2006 And Constitutional Provisions For Separation Of Powers And Federalism

It will be imperative now to examine in some detail the fundamental nature of the Constitution, its supremacy and effect of it in rendering inconsistent provisions in other laws ineffectual. In this regard, a writer has observed that, "the Constitution is the highest law of the land. All other laws bow or kowtow to it for 'salvation'. No law which is inconsistent with it can survive. That law must die and for the good of the society[37]. The Supreme Court's decision in ***Alhaji Banigaa Nuhu v. Alhaji Ishola Ogele***[38] is quite apt with regard to the supremacy of the Constitution over all other laws of the land. In the instant case, the appellant who was the plaintiff in the trial Upper Area Court in Ilorin, Kwara State succeeded in a land suit which he brought against the respondent. The respondent filed an appeal against the judgment of the trial court to the High Court of Kwara State contending, inter alia, that the judgment was invalid by reason of the fact that the trial court delivered its judgment in chambers and not in open court in violation of section 33 (3) of the 1979 Constitution then still in vogue and extant. In its judgment, the High Court held that there was no material in the record of appeal before it in proof of whether the judgment was truly delivered otherwise than in open court. It therefore found against the respondent and dismissed the appeal and affirmed the decision of the trial Upper Area Court. The respondent appealed further to the Court of Appeal where his appeal was allowed, the decisions of the two courts below were set aside and the trial in the upper Area Court was declared a nullity for being in violation of section 33 (3) of the Constitution. The appellant appealed against the judgment of the Court of Appeal to the Supreme Court, contending inter alia, that the provisions of section 33 (3) of the Constitution was not absolute and in its construction should reflect the nature of the particular court's rule. Learned counsel for the appellant contended, inter alia, that section 33 (3) of the Constitution should be read subject to the provisions of section 61 of the Kwara State Area Courts Edict of 1967 which states as follows:

> "*No proceedings in an Area Court and no summons, warrant, process, order or decree issued or made thereby shall be varied or declared void upon appeal or revision solely by reason of any defect in procedure or want of form but every court or authority established in and for the state and exercising powers of appeal or revision under this Edict shall decide all matters according to substantial justice without undue regard to technicalities."*

The Supreme Court in dismissing this argument and holding that the Constitution is supreme over all other laws of the land held, inter alia, thus:

> *"To suggest that the provisions of the Constitution should be construed subject to the prescription of an inferior statute is a legal apostasy. Nothing could be further from the truth. The provision of the Constitution is all embracing in its operationality and*

[37] Professor Emeka, Chianu, "Towards Fair Hearing for all Nigerian Workers." *CALS Review of Nigerian Law and Practice* 1, no. 1 (2007): 1-36.

[38] **(2003) 12 SCNJ 168 at 173.**

> *has general application and any law inconsistent with such provisions would have done violence to the spirit of the organic and primary law and therefore to the extent of such inconsistency, is null and void and of no effect."*[39]

The foregoing principle of law is, unarguably, the same in most legal systems of other climes. In ***Hinds and Others v. R.,***[40] Lord Diplock said:

> *"A Constitution is the organic law of a country. It sets the parameters within which the country shall be governed. It establishes the institutional structures of government, and either expressly or by necessary implication, their inter-relationship, and spells out the basic rights of citizens and the obligations of the executive."*

As the organic and supreme law of Nigeria, there are certain propositions that flow from the supremacy of the 1999 CFRN, as amended. Firstly, all powers, legislative, executive and judicial, must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised inconsistently with the Constitution, where it is so exercised, it is invalid to the extent of such inconsistency.[41]

Therefore, what then does the spirit of Section 274 of the 1999 CFRN, as amended postulate and invariably dictate when it holds sway that "*Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State*" ? The clear answer is that without exceptions, save where there is a law made by the House of Assembly of a State to the contrary(and this is inclusive of rendition of judgments, rulings and/or orders), it is only the Chief Judge of the State that has the Constitutional power to make rules of practice and procedure for a State High Court. It cannot be doubted that in a democratic setting like Nigeria where the rule of law prevails *id est*, where all people, organs and institutions of government are under the law, it is essential that the dictates of the Constitution should be given full force by all. It is against this backdrop that it becomes crystal clear that the provisions of Section 24(3) of the National Industrial Court Act, 2006 transgresses the ***legislative competence*** of the National Assembly and makes serious incursions into the ***judicial functions*** of the states as contained under Section 274 of the 1999 CFRN, as amended.

This further strengthens the need for separation of powers as enshrined under sections 4, 5 and 6 of the 1999 CFRN, as amended which respectively provides for the legislative, executive and judicial powers of the country. Therefore, each of the organs of government can only operate within the parameter laid down by the Constitution. Ours is a written Constitution and the powers of each organ are to be discerned from the Constitution.

---

[39] Supra at p. 173. The Court of Appeal, per Salawu, JCA, recently held similarly in ***Christopher Okeke v. Securities and Exchange Commission (2013) All FWLR (pt. 687) 731 at 753 paragraphs G-H,*** when it opined thus: *"As the ultimate grundnum, the Constitution of the Federal Republic of Nigeria, 1999, as amended is undoubtedly supreme, and takes precedence over and above all other enactments in this country. Thus, if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail. And that other law shall, to the extent of the inconsistency, be void."*

[40] **(1975) 24 W.L.R. 326 at 330,**

[41] The decision of the Supreme Court in ***Independent National Electoral Commission v. Balarabe Musa (2003) 1 SCNJ 1 at 29*** is instructive in this regard. See further the postulations of Professor Ben, Nwabueze in his book *Federalism in Nigeria under Presidential Constitution.* London: Sweet & Maxwell, 1983, pp 3-17, 39-42,170.

Therefore, any exercise of power by any of the organs of government not expressly granted by the Constitution is ultra vires that organ and therefore invalid.

This principle of separation of powers, apart from the express provision for it under the Constitution, appears to be a principle firmly rooted in judicial soil in Nigeria. The Supreme Court in a line of cases has affirmed this principle. In ***Attorney-General of Abia State & Others v. Attorney-General of the Federation,***[42] the existing law that was applicable on the allocation of revenue was Allocation of Revenue (Federation Account Etc) Act as amended by Allocation of Revenue (Federation Account Etc) Decree No. 106 of 1992. Under this Decree, the revenue of the Federation was allocated to the three arms of government-the federal government, the state governments and the local government councils- and 7.5% of the nation's revenue was allocated to Special Fund. The Supreme Court[43] subsequently declared the allocation of 7.5% of the Federation Account to "Special Funds" as null and void and unconstitutional for being contrary to section 162(3) of the 1999 Constitution which provided for distribution of the Federation Account amongst the three tiers of government, that is, the Federation, States and local governments. Soon after the decision, the President of the Federal Republic of Nigeria exercised his power under section 315 (1)(a), (2) and 4(a)(i) of the 1999 Constitution and made the Allocation of Revenue (Federation Account, etc) (Modification) Order 2002, the subject matter of this suit. The Order purported to have altered the existing formula of revenue allocation as stipulated in the existing law, that is, the Allocation of Revenue (Federation Account etc) Act 1990 as amended by Decree No 106 of 1992. Under the new Presidential Order, the 7.5% of the Federation Account allocated to "Special Fund" which was declared illegal was reallocated to the Federal Government. The argument of counsel for the plaintiffs was that the President has no power, constitutional or statutory, to issue the Order and that the President has trespassed into the realm of powers essentially belonging to the legislature, i.e., the National Assembly because what he has done by the Order now being challenged is legislating. The plaintiffs' counsel submitted further that in a constitutional democracy like Nigeria, the powers of government are categorised into three, i.e., "the Legislature, Executive and Judicial" each of which is vested in a separate and distinct department/arm of government. The Supreme Court, per Belgore, JSC, in upholding this submission and restating the principle of separation of powers enshrined in the 1999 CFRN, held, inter alia, as follows:

> *"The principle behind the concept of separation of powers is that none of the three arms of government under the Constitution should encroach into the powers of the other. Each arm-the executive, legislature and judiciary-is separate, equal and coordinate department and no arm can constitutionally take over the functions clearly assigned to the other. Thus, the powers and functions constitutionally entrusted to each arm cannot be encroached upon by the other. The doctrine is to promote efficiency in governance by precluding the exercise of arbitrary power by all the arms and thus prevent friction."*[44]

More precisely, the Supreme Court has also held that the National Assembly has no power to dictate to the judiciary how to conduct its affairs, just as the judiciary cannot fix a time limit for the proceedings in the National Assembly.[45] The facts of, and the decision of the Supreme Court in, the case of ***Paul Unongo v. Aper Aku***[46] are quite germane for a proper

[42] **(2003) 1 SCNJ 131 at 145.**
[43] In the case of ***Attorney-General of the Federation v. Attorney-General of Abia State & 35 others (No. 2) (2002) 6 NWLR (pt. 764) 542.***
[44] Supra at p. 145
[45] ***Paul Unongo v. Aper Aku (1983) NSCC 563 at 569.***
[46] Ibid.

appreciation of how the provisions of section 24(3) of the NIC Act 2006 and the decision of the Court of Appeal in ***Echelunkwo John*** run contrary to the constitutionally entrenched principle of separation of powers under the Nigerian legal system. In this case, the appellant was one of the unsuccessful candidates for election to the office of Governor Benue State. The first respondent was dully returned as Governor. The appellant dissatisfied filed a petition in the Benue High Court and questioned the validity of the return of the first respondent and praying that the election was null and void. In the High Court, the petition was struck out on the ground that the immunity accorded to a Governor by section 267[47] of the Constitution 1979 protected him. On appeal this decision was set aside by the Federal Court of Appeal but the court did not know what relief to grant to the appellant because sections 129 (3) and 140 (2) of the Electoral Act 1982[48] set the time limit of 30 days within which the court must complete the trial of the petition. The appellants appealed to the Supreme Court. The Supreme Court, per Bello, JSC, in considering the validity of the provisions of the Electoral Act which set a time limit of 30 days within which the court must complete a trial of election petition and in re-affirming the principle of separation of powers enshrined under the Constitution held, inter alia, thus:

"Now the principle of separation of powers of the federal Republic of Nigeria was well entrenched in our Constitution which under section 4 vests the legislative powers of the Federation of Nigeria in the National Assembly and under section 6 vests the judicial powers of the Federation in the courts specified therein. It is pertinent to state that the National Assembly is not a sovereign parliament. Its legislative powers are limited by express provisions in the Constitution. Sections 1(1), 1(3), 4(8), 6(6)(a)(b) and 33(1) of the Constitution 1979[49] are germane to the issue on appeal. The sections provide:

'1(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

1(3) If any other law is inconsistent with the provisions of this constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void.

4 (8) Save as otherwise provided by his Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law...

6(6) The judicial powers vested in accordance with the foregoing provisions of this section-

---

[47] The Governor of a State in Nigeria still enjoys immunity from both civil and criminal proceedings during his period of office pursuant to section 308 (1)(a) and (3) of the 1999 Constitution of the Federal Republic of Nigeria.

[48] Though the Electoral Act 2002 did not set any time limit for concluding trial of election petition, it provides under section 137 that "election petition and appeals arising from them shall be given accelerated hearing and have precedence overall other cases or matters." Section 134 (2) and (3) of the Electoral Act 2010 prescribes time limit within which trial of election petition and appeals arising from election petition must be concluded. However, the time limit within which an election tribunal must complete a trial of election petition and the time limit within which an appeal from a decision of an election tribunal shall be heard and disposed off are now provided for under the Constitution of the Federal Republic of Nigeria 1999. See section 285 (6) (7) of the Constitution (First Alteration) Ac 2010. The Supreme Court has, in its later decisions, declared these provisions valid because of the "special nature" of election petitions. However, the apex court expressed the view that such provisions that set time limit for hearing and conclusion of proceedings in court will be unconstitutional with regard to other proceedings apart from election petitions. See for example **A.G. Abia State v. A.G. Federation (2002) 3 SCNJ 158 at 213.**

[49] These sections are now sections 1(1), 1(3), 4(8), 6(6)(a)(b) and 36(1) respectively of the 1999 CFRN, as amended.

(a) Shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;

(b) Shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of the person.

33(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law.'

This Court had occasion to consider the scope of the first limb of section 4 (8) of the Constitution in ***A. G. Bendel State v. A. G. Federation & 22 Others***[50]*wherein Fatai-Williams, CJN, as he was then, said:*

'By virtue of the provisions of section 4(8) of the Constitution, the courts of law in Nigeria have the power, and indeed the duty, to see to it that there is no infraction of the exercise of legislative powers, whether substantive or procedural, as laid down in the relevant provisions of the Constitution. If there is any such infraction, the courts will declare any legislation passed pursuant to it unconstitutional and invalid.'

I may, for the purpose of emphasis reiterate the opinion I expressed in that case to the effect that the courts ought not to entertain and must not entertain their jurisdiction under section 4 (8) of the Constitution over the conduct of the internal proceedings of the National Assembly unless the Constitution makes provisions to that effect. I said at p. 46:

'I would endorse the general principle of constitutional law that one of the consequences of the separation of powers, which we adopt in our Constitution, is that the court would respect the independence of the legislature in the exercise of its legislative powers and would refrain from pronouncing or determining the internal proceedings of the of the legislature or the mode of exercising its legislative powers. However, if the Constitution makes provisions as to how the legislature should conduct its internal affairs or as to the mode of exercising its legislative powers, then the court is duty bound to exercise its jurisdiction to ensure that the legislature comply with the constitutional requirements.'

As the courts respect the right of the legislature to control its internal affairs, so the Constitution requires the legislature to reciprocate in relation to the jurisdiction of the courts. It may be observed that sections 73 (1) (c), 111 (1) (c) 233 and 239 of the Constitution of Nigeria 1979[51]***empower the National Assembly or the House of Assembly as the case may be, to make laws for regulating the practice and procedure of the Federal High Court and the High Court of a State. It seems to me, if in the purported exercise of the powers under these sections, the National Assembly makes any law which hampers, interferes with or fetters the jurisdiction of a court of law, such law shall be void for being inconsistent with the provisions of the second limb of section 4(8) of the Constitution 1979.***[52]

The provisions of section 6 (6) (a) of the Constitution 1979[53] *to which I have earlier referred indicate that the judicial powers vested in the courts shall extend, notwithstanding anything to the contrary in the constitution, to all inherent powers and sanctions of a court of law. One*

[50] **(1982) 3 NCLR 1 at p. 40.**

[51] Presently, section 254 of the Constitution empowers the Chief Judge of the Federal High Court to make rules for regulating the practice and procedure of the Federal High Court subject to the provisions of any Act of the National Assembly. Similarly, section 274 of the Constitution empowers the Chief Judge of a State to make rules for regulating the practice and procedure of the High Court of the State subject to the provisions of any law of the House of Assembly of the State.

[52] Also section 4 (8) of the 1999 Constitution, as amended.

[53] Also section 6 (6) (a) of the 1999 Constitution, as amended.

of the powers which has always been recognised as inherent in courts has been the right to control their internal proceedings and to so conduct the same that the rights of all suitors before them may be safeguarded in such a manner that all parties are given ample opportunity to prosecute or defend the cases for or against them without let or hindrance.

On this account, any statute which prescribes time limit within which a trial court must try and determine cases or within which an appeal court must hear and determine appeals is inconsistent with the provisions of section 4 (8) and 6 (6) (b) of the Constitution 1979 and is therefore void by virtue of section 1 (3)[54] of the Constitution.*"*[55] (Emphasis supplied).

The implication of the decision of the Court of Appeal in ***Echelunkwo John*** is the grotesque picture it paints in the Nigeria Legal System that the National Assembly can hide under an Act enacted by it to legislate on rules of practice and procedure for State High Courts. What then becomes of the cardinal principle of federalism enshrined under Section 2(2) of the 1999 CFRN, as amended? The said section 2(2) provides that ***"Nigeria shall be a federation consisting of states and a Federal Capital Territory."*** It is a non-controversial political philosophy of federalism that the Federal Government does not exercise supervisory authority over the state governments[56]. The Supreme Court has also settled this area of law in Nigeria in a number of cases, which have been followed until date. In ***Attorney-General of Lagos State v. Attorney-General of the Federation & 35 others,***[57] the Supreme Court, per Uwaifo, JSC, observed thus:

> *"Nigeria operates a federal system of government. Section 2(2) CFRN 1999 re-enacts the doctrine of federalism. This ensures the autonomy of each government. None of the governments is subordinate to the other. This is particularly of relevance between the state government and the federal government, each being an autonomous entity in the sense of being able to exercise its own will in the conduct of its affairs within the Constitution, free from direction by another government."*

There is therefore no gainsaying the fact that in a federation like Nigeria, constituted by federal and thirty-six state governments as autonomous partners, each equal in status with the others, nothing could be more derogatory of the autonomy of a state government, its co-equality with the federal government or the doctrine of mutual non-interference, than for the federal government, by the force of its law, to direct the Judge of a State High Court to transfer a labour matter before him to another court. And this is in spite of the provisions of the rules of practice and procedure of the State High Court competently made by the Chief

---

[54] Also section 1 (3) of the 1999 Constitution, as amended.

[55] Supra at pp 576-578.

[56] Professor Ben Nwabueze, op cit, p. 3.

[57] **(2003) 6 SCNJ 1 at 37.** The main issue in the instant case was the validity of the Nigeria Urban and Regional Planning Decree No. 88 of 1992, which conferred ultimate responsibilities for town and country planning throughout the Federation of Nigeria on the Federal Government and the State and Local Governments. The Decree dealt with the making of physical plan within the framework of national physical development and formulation of a State policy for urban and regional planning amongst other matters. The 1999 CFRN came into force on 29/5/1999 and it created the Exclusive and Concurrent legislative lists but the function of making planning laws and regulations for the State was not in any of the two lists. The function therefore became a residual matter which only the States can legislate on. The plaintiff complains in this suit that the 1st defendant, the Federal Government, by making the Decree has interfered with, and has made incursions into the town and country planning matters which is exclusive function of the States. The Supreme Court agreed with the plaintiff, and held that the National Assembly cannot make a law in the form and to the detail and territorial extent of the Nigeria Urban and Regional Planning Decree No. 88 of 1992, and that to do so will be in clear breach of the principles of federalism and an incursion into the legislative jurisdiction of the States.

Judge of the State pursuant to powers conferred on him under Section 274 of the 1999 CFRN, as amended.

Therefore, it suffices for our present purposes here to say that the doctrine of federalism operates to invalidate a general law enacted by the federal legislature outside its constitutional power and which, in its practical effect, impedes, prevents or suppresses the exercise of an essential function of the state governments. The effect of the provisions of Section 24(3) of the National Industrial Court Act, 2006 is that the Federal Government is directing and imposing its will on the State judiciary. The federal government has no power under the 1999 CFRN, as amended to demand that the judge of a State High Court transfer any labour matter before him to a court of coordinate jurisdiction or in any way whatsoever to burden, charge and impose liabilities, duties and responsibilities on the courts and judicial officers of the state.[58]

Section 24(3) of the National Industrial Court Act, 2006 is therefore subversive of the cardinal principle of federalism enshrined under Section 2(2) of the 1999 CFRN, as amended, which provides for the autonomy of the state government vis-a-vis the federal government and the division of powers between them. It is therefore unconstitutional and void.

I cannot conclude this section of the paper without making reference to the dictum of his Lordship, Okoro, JCA, in ***Echelunkwo John*** at pp 16-17, paras. H-F that the provisions of Section 24(3) of the National Industrial Court Act, 2006 was made to serve a specific purpose. In his Lordship's view, the mandate of the said section is as follows:

> *"Following the enactment of the Constitution (Third Alteration) Act, 2010 which gave exclusive jurisdiction to the National Industrial Court on labour matters, both the States and the Federal High Courts including that of the Federal Capital Territory, Abuja ceased to have jurisdiction in those matters pending before them. If they are struck out and there is need to file them afresh, some of them may be caught by statute of limitation and the plaintiffs in such situation, without no(sic) fault of theirs would suffer grave injustice.* ***It became necessary to make such provision as Section 24(3) of the National Industrial Court Act in order to preserve such suits and be transferred to the National Industrial Court for proper adjudication."*** **(**Emphasis supplied).

With the greatest respect to his Lordship, it is a firmly established principle of law in the Nigerian Legal System that courts have a duty to state and apply the law as it is even where inconvenience is thereby caused to parties. The decision of the Supreme Court in ***The Honourable Justice E. O. Araka v. The Honourable Justice Don Egbue***[59] is very apt in this regard. In the instant case, in the cause of the hearing of the suit in the trial High Court, the plaintiff sought to tender in evidence a photocopy of a letter that both parties agreed was a public document after stating that the original letter could not be found. The copy was not certified as a true copy of the original. Counsel to the defendant objected on the ground that because the letter was a public document only a certified true copy of the original could be admitted in evidence by virtue of section 97 (2) (c) of the Evidence Act. The plaintiff counsel argued that where a public document is lost and cannot be found or where such document has been destroyed and is no longer in existence, the provision of section 97 (2) (c) of the Evidence Act does not apply, and that any secondary evidence of the document is admissible. The trial High Court agreed with the submissions of plaintiff counsel and admitted the photocopy of the public document. The defendant's appeal to the Court of Appeal was successful as the Court of Appeal upturned the ruling of the trial High Court and held that the document is not admissible in evidence. The plaintiff as appellant appealed to the Supreme

[58] See ***Attorney-General Ogun State v. Attorney-General of the Federation (1982) NSCC 1 at 12.***
[59] **(2003) 7 SCNJ 114 at 126.**

Court relying on his submissions at the trial court that section 97 (2) (c) of the Evidence Act should be interpreted to accommodate where the original of a public document is lost and cannot be found or destroyed and is no longer in existence. The Supreme Court dismissed this submissions of the appellant and reaffirmed the firmly established principle of law that the courts are duty bound to state and apply the law as it is even where the law is hard in the sense that it will do some inconvenience to the parties.

The purpose that Section 24(3) of the National Industrial Court Act, 2006 is made to serve cannot and should not be exalted to defeat the hallowed principle of constitutional law in the Nigerian legal system, which states that a legislative authority cannot legislate outside of its legislative competence. Apart from the express provision for this principle of law under the 1999 CFRN, as amended, the Supreme Court has settled this position of the law in a line of cases, which have been followed until date. This position of the law and the Supreme Court authorities has been succinctly highlighted in the preceding discussions in this paper.

Suffice it to say here that a comparable illustrative situation happened in the United States of America in the case of ***Bailey v. Drexel Furniture Co.***[60] Congress passed the Child Labour Tax Law. Under it, a furniture manufacturer in the district of Carolina was given notice to pay tax of a certain amount for having employed and permitted a boy under 14 years of age to work in its factory. Child Labour Tax Law came into conflict with the regulation in respect of the employment of child labour, which is an exclusive state function under the Constitution of the United States and within the reservation of the 10th Amendment.

The furniture manufacturer filed an action to challenge the constitutionality of the Act passed by Congress. The defence was that it was a mere excise tax levied by the Congress under its broad power of taxation. The Supreme Court of the United States rejected that defence, held that the power to make laws to regulate the employment of children belonged to a state government and not Congress, and gave judgment declaring the Act passed by the Congress unconstitutional.

Chief Justice Taft of the United States Supreme Court in expressing the opinion of the court, observed at 37-38 inter alia, in these striking words:

"It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the congress of the states. ***We cannot avoid the duty even though it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant or the harm which will come from the breaking down of recognized standards****. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic wand to the word 'tax' would be to break down all constitutional limitation of powers of Congress and completely wipe out the sovereignty of the states."*(Emphasis supplied).

I completely accept this statement of principle by the United States Supreme Court and am of the firm view that it is quite apposite to our present purpose. No argument can defeat or

[60] **259 US 20 (1922).**

reduce from the constitutional power of the Chief Judge of a State to make rules of practice and procedure for a State High Court subject only to any law made by the House of Assembly of the State. Any Act, be it the National Industrial Court Act, 2006, which tends or is implemented in a way to tend, to undermine or take away this constitutional function of the Chief Judge of a State, or allows the Federal Government to exercise or assume such function, is unconstitutional and in this circumstances should be declared so.

4.2 The Way Forward With Regard to Power of State High Courts to Transfer Labour Matters to the National Industrial Court

A tragic truth in this area of Nigerian jurisprudence is that there is no legislation in the form of statute or rules of practice and procedure of courts, which expressly empowers a State High Court to transfer a labour matter to the NIC. An even greater tragedy is that it still continues to be so with little or no hope for radical improvements necessary for a changing society and a fast developing economy with considerable volume of labour and industrial disputes[61]. Even in legal writing, with deep respect, no concrete thinking of major importance is done in this regard, much less suggesting steps in the direction of positive improvement. Innovative thought in this direction is conspicuous by its absence.

In the absence of legal substrata in this area of adjectival law in Nigeria, there is the need for a value-oriented approach to legal issues in this regard. This approach will lead to a narrowing of the cleavage that at present exists between "law in books" and "law in action."[62] Although State High Courts are not expressly empowered under any statute or rules of practice and procedure to transfer labour matters to the NIC, there is a fundamental provision under the rules of practice and procedure of State High Courts of almost all the states of the federation on which judges of State High Courts can rely to transfer labour matters to the NIC. The said provision enjoins Judges of State High Courts to adopt a procedure that will in their view do substantial justice between the parties concerned where a matter arises in respect of which no adequate provisions are made in their rules of civil practice and procedure. This all-important provision is couched in almost the same words in the civil procedure rules of almost all the State High Courts in Nigeria. It will suffice here to mention some instances of this provision under the civil procedure rules of some State High Courts, and they include: ***Order 1 Rule 1(3) of the High Court of Lagos State (Civil Procedure) Rules 2012 and Section 10 of the High Court Law of Lagos State; Order 1 Rule 2 of the High Court of Kwara State (Civil Procedure) Rules 2005; Preamble 1(2) of the Enugu State High Court (Civil Procedure) Rules 2006*, preamble 3 of the Kano State High Court (Civil Procedure) Edict 1988; Order 1 Rule 1(3) Rivers State High Court (Civil Procedure) Rules,** amongst others. ***Order 1 Rule 1(3) of the High Court of Lagos State (Civil Procedure) Rules 2012*** specifically provides as follows:

---

[61] See for example Babatunde, Adejuma A. "The National Industrial Court of Nigeria: Past, Present and Future." National Industrial Court official website, 10/10/2014, http://nicn.gov.ng.php; Arowosegbe, O. O. "National Industrial Court and Quest for Industrial Harmony and Sustainable Economic Growth and Development in Nigeria." *Labour Law Review 5, no. 4 (2011): 8-11;* Ogunye, J. "National Industrial Court and Judicial Absolutism in Nigeria." *Premium Times, 8/10/2014,* http://www.premiumtimesng.com/opinion/155180-national-industrial-court-judicial-absolutism-in-nigeria; Onyearu, A O. "The National Industrial Court Regulating Dispute Resolution in Labour Relations in Nigeria." *Metinpoynt, 1/10/2013,* http://www.metinpoynt.com.articles/the-national-industrial-court-regulating-dispute-resolution-in-labour-relatios-in-nigeria.

[62] Dias, R.W.M. "The Value of a Value-Study of Law." *Modern Law Review* 28, (1965): 397-410.

> *"Where a matter arises in respect of which no adequate provisions are made in the Rules, the Court shall adopt such procedure as will in its view do substantial justice between the parties concerned."*

What is proposed here is this: where a labour matter is pending before a Judge of a State High Court who is not expressly empowered under any law or rules of procedure to transfer the matter to the NIC, such Judge should transfer the matter to the NIC as the procedure that will do substantial justice between the parties concerned. This procedure will avoid the grave injustice that will be caused to the plaintiff if a State High Court strikes out his suit and he has to file it afresh at the NIC. The matter might have become statute-barred, as was the situation in ***Echelunkwo John.*** Substantial justice in a matter requires that the matter be heard on the merits, and the transfer of such labour matters to the NIC will enable the NIC to hear the matter on the merits. To strike out the matter will amount to technical justice and our courts are enjoined to do substantial justice and to shun all form of technicality. The Supreme Court, per Niki Tobi, JSC, in ***Omoju v. Federal Republic of Nigeria***[63] stated this position of the law clearly. In this case, one of the grounds upon which the appellant sought to impugn the judgment of the trial court was that the learned trial judge based his judgment on an Act of the National Assembly which does not exist. The Act is christened "National Drug Law Enforcement Agency Act" but the learned trial judge in his judgement referred to it as "Nigerian Drug Law Enforcement Agency Act." Therefore, the appellant contended that the Act, as cited by the judge, does not exist. The Supreme Court in dismissing this submission and enjoining courts to do substantial justice held, inter alia, thus:

> *"Substantial justice which is actual and concrete justice is justice personified. It is secreted in the elbows of cordial and fair jurisprudence with a human face and understanding. It is excellent to follow in our law. It pays to follow it as it brings invaluable dividends in any legal system anchored or predicated on the rules of law, the life-blood of democracy.* ***Courts must strive to do substantial justice rather than relying on technicality to defeat justice."(***Emphasis supplied*).*

The High Court of Enugu State (Civil Procedure) Rules, 2006 has this vital provision under Preamble 1(2), which provides thus:

> *"Where a matter arises in which no provisions or no adequate provisions exist in the Rules, a Court shall adopt a procedure as may do substantial justice between the parties concerned."*

The significance of this provision is that it enables a Judge of a State High Court, who is not expressly empowered to transfer suits, to use his discretion to do substantial justice by transferring a labour matter before him to the NIC for the matter to be heard on the merits.

I am of the firm opinion that the Judge of the Enugu State High Court in ***Echelunkwo John*** should have relied on this provision under the State High Court's rule of practice and procedure to use his discretion to do substantial justice by ordering the transfer of the matter to the NIC instead of striking it out. Such exercise of discretion by a trial court will not be lightly interfered with by an appellate court. The position of the law in this regard has .long been settled by the Supreme Court which has consistently observed in a line of cases that an appellate court is always reluctant to interfere with the way a trial judge exercises his discretion unless such exercise of discretion occasions miscarriage of justice or the discretion was not exercised in the interest of justice. In ***Nigerian Laboratory Corporation & Another v. Pacific Merchant Bank Ltd,***[64] the appellants were defendants in the High Court, Lagos whereon the respondent as plaintiff claimed against the appellants a sum it said was a debt owed by the appellants. In the course of the trial, the appellants brought a motion

[63] (2008) 11 MJSC 156 at 171 paragraphs D-E.

[64] (2012) 6-7 MJSC (pt. 1) 36 at 59-60 paragraphs G-E.

praying for an order setting down the hearing of the issues of law raised in the defendant's statement of defence, that is, the plaintiff's action is statute barred. The respondent did not file any counter-affidavit at the trial court but opposed the said motion on points of law. The trial court dismissed the said motion and the appellants went to the Court of Appeal praying for extension of time within which to apply for leave to appeal against the said ruling. The said application was supported by an affidavit and a proposed notice of appeal. The respondent did not file a counter affidavit neither did it oppose the said application. The Court of Appeal dismissed the said application on the ground that the appellants had not explained the reasons for the delay in bringing an application for extension of time. The appellants were dissatisfied by the decision of the Court of Appeal and they filed an appeal to the Supreme Court challenging, inter alia, the exercise of discretion by the Court of Appeal in refusing to grant their application. The Supreme Court, per Adekeye, JSC, in reiterating the attitude of an appellate court to the exercise of discretion of a lower court observed, inter alia thus:

> *"An appellate court will not generally question the exercise of discretion by a lower court merely because it would have exercised the discretion in a different manner if it had been in the same position as the lower court or where it has not been shown that a miscarriage of justice has been occasioned. However, an exercise of discretion would be questioned if as a result of that exercise, injustice is meted to either of the parties or if such a discretion was exercised wrongly in that due or sufficient weight was not given to relevant or important considerations."*

Similarly, rather than occasion miscarriage of justice, a High Court Judge who transferred a labour matter before him to the NIC has furthered substantial justice, and an appellate court cannot lightly disturb such exercise of discretion.

I am of the firm view that this provision under the rules of practice and procedure of State High Courts which enjoins the courts to adopt a procedure that will ensure substantial justice in a matter before them, where there is no specific procedure for such, is sufficient to enable Judges of State High Courts to transfer pending labour matters to the NIC. This value-oriented approach to legal issues is most imperative at this stage of our legal system. The Bar and the Bench should not fold their arms to wait for legislative intervention to expressly empower State High Courts to transfer labour matters to the NIC. The law should keep its perceptive organs open so as to keep pace with social needs, opinion and aspirations. That way law can continue to fulfil its function as an instrument of social control.[65] Judges of State High Courts in Nigeria should valiantly apply this beneficial principle of substantial justice provided under their rules of practice and procedure to defeat the hardship and injustice striking out pending labour matters would occasion to litigants.

5. **Conclusion**

This paper sets out to explore the power of State High Courts in Nigeria to transfer labour matters to the NIC where they are seized of the fact of their want of jurisdiction to entertain those matters. The paper observed that presently, there is no legislation in the form of statute or rules of practice and procedure of courts, which expressly empowers State High Courts to transfer labour matters pending before them to the NIC.

The paper reviewed the latest decision of the Court of Appeal in this regard-***Echelunkwo John***-and the paper submitted, with greatest respect to the learned Justices of the Court of Appeal, that the decision of the Court was reached on wrong reasoning.

[65] See Hans Kelsen, "General Theory of Law and the State," trans A. Wedberg (Harvard: Harvard University Press, 1949), 20. Cf H. L. A. Hart, "Positivism and the Separation of Law Morals," 71 Harvard Law Review 593 (1957), 600, 604.

The paper further highlighted the fact that Section 24(3) of the National Industrial Court Act, 2006 which requires Judges of State High Courts to transfer a labour matter before them to the NIC, and was held to be binding on State High Courts, is ultra vires the National Assembly which made the Act and therefore, is unconstitutional, null and void

The paper examined the provisions of Section 24(3) of the National Industrial Court Act, 2006 vis-a-vis the principles of separation of powers and federalism as enshrined under the 1999 CFRN, as amended and submitted that the section is subversive of the cardinal principles of separation of powers and federalism entrenched under the Constitution and is therefore unconstitutional, null and void.

The paper recommends that in the absence of legal substrata empowering State High Courts to transfer labour matters to the NIC, judges of these courts should not strike out labour matters, rather should apply beneficial principles of substantial justice provided for under their rules of practice and procedure to transfer labour matters to the NIC.

*****