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Edo State Agency for the Control of AIDS (EDOSACA) v. Com. Austin Osakwe & others (2018) 16 NWLR (Pt.1645) CA 199: Reviewing the decision through the lens of Constitutional Principles of State Interposition, Covering the Field and Cooperative Federalism

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ABSTRACT

In federal systems like Nigeria's, the balance of power between state and federal authorities often sparks legal controversies, especially when the state refuses to obey federal law not out of indifference but ego. This paper examines the landmark case of Edo State Agency for the Control of AIDS (EDOSACA) v. Com. Austin Osakwe & Others wherein the Court of Appeal of Nigeria held that the Freedom of Information Act of 2011 passed by the federal legislative body cannot be enforced against sub-national systems, even when there is no conflict. For 7 out of 14 years of FOIA in Nigeria, citizens of the state are subjected to disobedience to FOIA. The research explores the definition and application of cooperative federalism, covering the field and state interposition. The paper further examines how the lead judgment superimposes the doctrine of state interposition above the doctrine of covering the field to limit the scope of the application of cooperative federalism in the operation of the Freedom of Information Act (FOIA) of 2011 in Nigeria. The research adopts the case law analysis model of doctrinal research methodology and criticizes the decision for being based on stereotypical reasoning rather than on a fair and impartial application of the

law. The paper recommends that there should be an effort to promote cooperative federalism by encouraging dialogue and collaboration between federal and state governments on legislative matters, ensuring that both levels of government work together to create laws that reflect national interests while respecting state autonomy.

KEYWORDS

Access to Information, Cooperative Federalism, State Interposition, Covering the Field, judiciary, federal and Sub-National.

DEFINITION OF TERMS: STATE INTERPOSITION, COVERING THE FIELD AND, COOPERATIVE FEDERALISM

The Concept of State Interposition

This doctrine can also be called nullification. It is rooted in the principle of state sovereignty, a key aspect of federal systems, where states retain certain powers and responsibilities that are distinct from the national government. State Interposition refers to the ability of a state government to challenge or resist federal actions that it believes exceed constitutional limits or infringe upon state sovereignty. Historically, this concept has been contentious, often associated with state resistance to federal laws. Historically, interpositions have been invoked by states to resist federal encroachments on areas they believe should be governed locally. It is a legal doctrine that has been advocated for by various individuals and groups throughout history.[1] Most Americans have never heard of the word- state interposition[2] including African

[1] Some of the notable exponents of the doctrine of state interposition include; Thomas Jefferson who wrote the Kentucky Resolutions in 1798, which argued that states have the right to nullify federal laws they deem unconstitutional; John C. Calhoun: A leading figure in the Nullification Crisis of the 1830s, he argued that states have the right to interpose themselves between their citizens and the federal government; James Madison: While not a full-fledged proponent of state interposition, he argue in the Virginia Resolutions of 1798 that states have the right to protest and resist federal actions they deem unconstitutional. Some notable modern-day proponents of state interposition include: Thomas Woods: A libertarian historian and author who has written extensively on state interposition and nullification; Tom DeWeese: A conservative activist who has advocated for state interposition as a means of resisting federal environmental and education policies and Michael Boldin: Founder of the Tenth Amendment Center, which advocates for state sovereignty and interposition. Also the Nigerian jurist Justice Oseji (JSC) who ask the states to refuse to obey a federal law that imposes an obligation on them

[2] Christian G. Fritz, "Interposition: A State-Based Constitutional Tool that

constitutional researchers. Interposition was a claim that state sovereignty could or should displace national authority. The first instance of State interposition in American history was by Georgia through her executive order in 1794 against a decision of the Supreme Court of the United States in Chisholm v. Georgia[3] and a lot of people saw it as an act of judicial overreach that time.[4]

The word "interpose" was used in the Re: Booth case[5] where Justice Smith of the Supreme Court of Wisconsin nullified the Federal Fugitive Slave Act of 1850.[6] The court has this to say "At least, such shall not become the resistance as I may be able to interpose so long as her people impose upon me the duty of guarding their rights and liberties, and of maintaining the dignity and sovereignty of their state".[7] Thomas Jefferson supporting the state's deposition to nullify unconstitutional federal laws[8] struck down the Kentucky resolution of 1799. The people of the state of South Carolina nullified the Federal Tariff Acts of May 20, 1828, and of July 14, 1832, by their Ordinance of Nullification passed by the Convention on November 24, 1832, and ratified by the people at a referendum on December 20, 1832.[9] This event is a key moment in American history, known as the Nullification Crisis, where South Carolina, led by figures like John C. Calhoun, declared these federal tariffs null and void within the state, asserting the doctrine of state sovereignty over federal legislation.[10] As described by James Madison and Alexander Hamilton in the Federalist Papers, state interposition models are in various forms.[11] Given the inherent fluidity of federalism,

might Help Preserve American Democracy", Commonplace: the Journal of early American Life, (2023) 6. available at: https://www.commonplace.online/

[3] 2 U.S. (2 Dall.) 419 (1793)

[4] Benning, Henry L. *Speech to the Virginia Convention*, February 18, 1861, in *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Series IV, Vol. 1, U.S. Government Printing Office, 1900, pp. 72-78.

[5] 3 Wis. 1 (1854)

[6] (Ibid) 8

[7] But the case was eventually overturned by the U.S. Supreme Court in Ableman v. Booth, 62 U.S. (21 How.) 506 (1859)

[8] Kentucky Resolutions passed by the Kentucky General Assembly, November 16, 1799.

[9] Howard Newcomb Morse, Doctrines of Nullification and Secession- A Historical Study, 2 S.C.L.R. 245 (1950) 249

[10] (Ibid) 257

[11] First, state legislatures were well-placed to act as monitors for the people of the equilibrium of federalism since they represented all of the people of a state and were in frequent communication with the state's elected members of congress. Second, state legislatures could identify and declare their perception of any encroachments by the national government on the authority of the state governments- or the rights of the people. Both Madison and Hamilton described

interposition inevitably came to be used to resist policies of the federal government whenever it might be said that the party in power had directed concurrent legislative competence into anarchy. It is used by states to warn the national government that it cannot do whatever it wants or ride roughshod over the states. Whenever there is a palpable infraction of the constitution, the state interposes its authority for their protection. Interposition was not a claim that sub-national government could or should displace the federal government, but a claim that federalism needed to preserve the nexus between sub-nations and the federal government. It is a legitimate constitutional tool that has been used by states throughout our history to regulate the equilibrium of a re-configured federalism established by the Constitution. Interposition or nullification is the non-recognition of the validity of federal law by the people, the Governor, the legislature, or the judiciary of a state and the rendering inoperative of such federal law within the state by non-compliance with such federal law by refusing to obey the federal law.[12] It means a state reversal of federal action over executive or legislative overreach.

THE DOCTRINE OF COVERING THE FIELD

The doctrine of covering the field means that where a federal legislature makes a law on a subject matter, no sub-national legislature can make a law on the subject already covered by a federal law. The doctrine of covering the field can rise in two distinct situations; first, in the purported exercise of legislative powers of the National Assembly or a State House of Assembly, a law is enacted backed by the Constitution and, where a State House of Assembly by the purported exercise of its legislative powers enacted a law which an Act of the National Assembly has already made provisions covering the subject matter of the state law.[13] Where identical legislations on the same subject matter are validly passed by their constitutional powers to make laws by the National Assembly, it would be appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter, save the law is

this step as sounding the alarm. Third, they envisioned state legislatures initiating interstate efforts to bring widespread attention to the alleged enlargement of the national government's powers. Neither of them suggested that the "alarm" was a nullification of any acts taken by the national government. See James Madison and Alexander Hamilton, *Federalist No. 78*, 1788, in *The Federalist Papers*, ed. Clinton Rossiter, Signet Classics, 2003, pp. 464-472.

[12] Howard Newcomb Morse (supra) 245

[13] INEC v. Balarade Musa (2003) 3 NWLR (PT. 806) 72 @ 204

inconsistent.[14] To be inconsistent, the two legislations, that is the federal law and that of the state must be mutually repugnant or contradictory to each other so that both cannot stand. The doctrine renders the paramount legislation predominant and the subordinate legislation goes into abeyance and remains inoperative so long as the paramount legislation remains operative.[15] The peculiar nature of this case is not inconsistency of legislation but a deliberate legislative vacuum aimed at promoting anarchy. The case of the appellant is that it refused to obey the federal law on the ground that the law does not apply to sub-national, but strangely the appellant has refused to pass a similar law in the state. The impact is that citizens of the state are subjected to obedience to no law. It is a barren act of judicial misfortune for the court of the highest penultimate court in Nigeria to encourage such an action. The Court held that "In the instant case, the Edo State House of Assembly is yet to make any law on access to public records in which case the issue of inconsistency does not arise. There does not need to be an inconsistency between federal and state law for the doctrine of covering the field to apply.

DOCTRINE OF COOPERATIVE FEDERALISM

Federalism is often claimed to serve many diverse values which includes increasing opportunity for citizen involvement in democratic processes.[16] Justice O'Connor describes federalism as the oldest question of constitutional law.[17] There are two major threshold issues arising from the doctrine: What values does (and should) federalism foster? Are those values, whatever they are, best achieved by judicial enforcement or through the political process alone?[18] Though these questions are surely capable of independent analysis and separate treatment, in practice they are often fused, making them more difficult to answer. Cooperative federalism refers to the applied constitutional structure of federal practice in a more practical and participatory model in a given country. Cooperative federalism focuses on how federal principles play out in practice, particularly in terms of the connectivity for governance, the assemblage of custom and practice, policy-making, power distribution, and social outcomes as against the theoretical form of federalism. It is a concept that promotes how

[14] Attorney General of Abia State v. Attorney General of Federation (2002) 6 NWLR (Pt. 763) 264
[15] at page 435, paras D-F
[16] Calvin R. Massey, Federalism and the Relinquist Court, 53 Hastings L.J.431 (2002) 438
[17] New York v United States, 505 US 144, 149 (1992)
[18] Calvin R. Massey (Supra) 438

the state and national governments work together to implement laws and policies, especially in areas where both have jurisdiction. It emphasizes collaboration over competition between different levels of government, with a focus on shared governance across legislative jurisdiction. It accommodates power struggles between different levels of government (federal, state, and local) and the resulting policy outcomes. It also examines how the allocation of responsibilities and resources among different government levels leads to specific policy cooperation. In essence, cooperative federalism is not a theory but a co-designed framework that assesses federalism based on the real-life situation and governance realities. It refers to a model of governance where the federal and state governments work collaboratively to implement laws, policies, and programs that serve common objectives. In this case, both levels of government share powers and responsibilities for legislating in archives and public records. It requires sub-national acceptance and implementation without more.

CASE OVERVIEW: HISTORICAL BACKGROUND OF EDOSACA V. OSAKWE & OTHERS

On the 6th day of January 2014, the applicants namely Com. Austin Osakwe, Dr. Esther Aira, Com. Omobude Agho, Foundation for Good Governance and Social Rights Action (FGGSC), Gender Rights Action (GRA), Health And Environmental Concerns (HEC), Anti-Corruption Revolution (ACR), Media Awareness Group (MAG) wrote an FOI request to the Program Manager Edo State Agency for the Control of AIDS (EDOSACA) requesting for information on HIV/AIDS Program Development Project (HPDP II). Those copied include the State Coordinator for Civil Society Network for HIV/AIDs in Nigeria (ASHIWAN), State Coordinator for Network of People Living with HIV/AIDS in Nigeria (NEPWHAN), Speaker of Edo State House of Assembly, and Secretary to Edo State Government. The suit commenced with a motion on notice seeking for extension of time within which the applicant may file the originating summons. The letter of request dated 6th January 2014 and submitted on the same date, was drafted under the Freedom of Information Act and African Charter on Human and Peoples Rights.[19] The application for leave was filed on the 14th day of February 2014. The review period is 30 days from the date of the request, hence the application for extension of time. Ordinarily, the Freedom of Information Act judicial review process commences by way of ex parte but this action commenced by motion on notice because the review

[19] Article 9 of the African Charter on Human and Peoples Rights

timeline has passed and the Respondent (government) has to be put on notice.

At the commencement of the suit, the applicants (now the Respondent) sought information and records from the Respondent (now the Appellant) which include all documents detailing the expenditure of the agency, the subventions of the Edo State Government to the agency, grant-in-aid from corporate bodies and private donors to the agency between 2011 and 2014. The information sought also includes the contracting firms that handled the contract of printing and supplies for the agency, the amount of the award of the contract, the criteria used to place an individual organization in the selection list for grants, the criteria used to remove an individual organization from the selection list for grants and the current number of civil society groups in Edo State on the list for grant. Other information and records sought include the list of local and international donors partnering with the agency and the program and financial report of the agency forwarded to the donors. The appellant in this case did not respond to the letter as against the provisions of the law. The Applicants' (now respondents) request letter was left unattended without any valid explanation. The Respondents approached the court via an Originating Summons supported by a 26-paragraph affidavit to which is attached the letter of request. The Appellant upon being served with the said Originating Summons reacted by filing a 13-paragraph counter affidavit. Upon the adoption of the written addresses by the parties, judgment was delivered and all the reliefs were granted in favor of the applicants save for damages. On appeal, the appellant challenged the applicability of the law in Edo State. The Court of Appeal sitting in Benin City on March 28th, 2018 agreed with the Appellant and held that the law does not apply to Edo State and its institutions including EDOSACA seeing that it is only a law passed by the state lawmakers that can affect the state institutions.

The Freedom of Information Act (FOIA) of 2011 was passed primarily to enhance public participation in governance. One of the first applications of the law was in Edo State Agency for the Control of AIDS (EDOSACA) v. Com. Austin Osakwe & Others. This cuts across governance collaboration for constitutionality and state resistance against unconstitutionality. The paper will help in assessing how the court by default applied tested constitutional principles of state interposition, covering the field and cooperative federalism is functioning in items of listed powers under the concurrent listing. The court no doubt in analyzing the case failed to measure that the three constitutional principles of law highlighted in the Constitution will navigate the delicate

balance between state autonomy and federal oversight. On the one hand, the court's decision to allow EDOSACA to resist FOIA reflects a strong stance on state sovereignty over coverage of the field. On the other hand, critics of the decision argue that in areas of national concern of public health—the National Assembly's legislative competence should have been upheld. The interplay between these three doctrines is critical in determining whether Nigeria's federal system fosters effective collaboration between states and the federal government or whether it allows states to shield themselves from some federal legislation in ways that could undermine national priorities such as the fight against corruption, transparency, and good governance. This case underscores the need for clearer judicial guidance on the limits of the doctrines of state interposition, covering the field and the role of both state and federal lawmakers in matters concurrently shared. Freedom of Information Act 2011 was enacted by the National Assembly with the intention that it applies to the federation. Where a federal statute discloses an intention to cover the field, as it is in the case, it is inconsistent with it for a non-existent law to be limited by it or even pre-meditated. In the case of Attorney General Ogun State v. Attorney General of the Federation,[20] Fatayi–Williams CJN held that "where identical legislations on the same subject matter are vitally passed by their constitutional powers to make laws by the National Assembly and a state House of Assembly, it would be more appropriate to invalidate the identical law passed by the state House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter." The doctrine of covering the field is usually applied between a law enacted by the federal legislature and that enacted by a state legislature on the same subject.[21] This paper argues with effort that the lead judgment misunderstood the working and application of the doctrine of covering the field, state interposition, and cooperative federalism in a contemporary federal constitution.

The lead judgment had broader negative consequences on public citizens' engagement in sub-national systems but the minority decision of the court rightly redesigned the delicate balance between state autonomy and federal oversight but came like a tale of a successful operation but the patient died. The lead judgment favored the doctrine of State Interposition over the doctrine of covering the field, asserting that states had the right to regulate matters related to public records and archives even where there

[20] (1982) 13NSCC
[21] AG Abia v. Attorney General Federation (2002) 6 NWLR (Pt. 763) 264

is no state law for information disclosure. The court concludes that the sub-national governments need not comply with federal law since the matter of public records and archives does not impact its lonely situation. In this sense, state interposition was deployed to protect state autonomy and prevent an over-concentration of power at the federal level. The Court of Appeal has this to say; "To my mind, this will amount to taking the doctrine to the end undermining the fundamental principle of Federalism which is very vital to our nascent and budding democratic process. It will undermine the provisions of the 1999 constitution".[22] Following the Respondents' line of argument and perception of the doctrine of covering the field will amount to opening the door to a unitary system of government inherent in a military or autocratic regime. Thank goodness for the 1999 constitution which is the ground norm and reference point for a genuine road map for the operation of the principle of federalism as agreed and, subscribed by the people of this country. All said and done, a perusal of the Freedom of Information Act will not in my humble view, project the intention that it is meant to cover the field. In other words, it is nowhere indicated or prescribed in the whole gamut of the Act that it shall apply both to the central and state governments.

This stance reflects a classic example of state interposition, where the state is asserting its right to operate independently of federal legislation in areas where it is standing on the tiny line of concurrency. However, the application of the doctrine in this case raises questions about its appropriateness in matters that have national significance as the notion of freedom of information law is national as captured by its preamble and the implementation guidelines.[23] The power vested on the state by item 5 of part 2 of the 2nd schedule to the 1999 Constitution is exercisable only subject to item 4 thereof. The use of the phrase "subject to" in paragraph 5 of part of the 2nd Schedule to the Constitution, if properly interpreted would have changed the direction of the decision. The phrase 'subject to' in item 5 of part 2 of the 2nd Schedule to the 1999 Constitution shows clearly that the states of the federating units can only make laws in respect of public records and archives where the federal government has not made law on a particular subject relating to same.[24] The combined effect of items 4 and 5 of Part 2 of the 2nd Schedule to the 1999 Constitution is that any law enacted by the National Assembly on

[22] EDOSACA V OSAKWE & ORS (Supra) @ 223-234
[23] issued by the Federal Ministry of Justice in 2015
[24] "Subject to" used in the section is significant as the section is often used in the statute to introduce a condition, a proviso, a restriction and a limitation.

the aforementioned subjects will be binding and applicable to the states.

The lead judgment is that the law made by the National Assembly in respect of archives and public records is only applicable to the public records and archives of the federation whilst any law made by the House of Assembly of a state will apply only to public records and archives in that state. He further held that the state is not a stooge to the federal government but derives its powers and strength to exist and manage its affairs just like the federal government does from the Constitution. It is only where there is a clash of interest in legislation that the law made by the state Assembly shall give way to that made by the National Assembly as per section 4(5) of the constitution and the authorities cited.[25] The court relied on the case of the Attorney General of Ogun State & 3 Ors v. Attorney General of the Federation[26] in supporting its conclusion on covering the field. In this case, the issue for determination was whether the Adaptation Order 1981 enacted by the President was contrary to provisions of section 194 of the 1979 Constitution and thus null and void and of no effect. The said Order was argued to be an unlawful exercise of legislative power which does not reside in the President but in the National Assembly and an order of court restraining the IGP enforcement of the Order. Before the Order, there was the Public Order Act of 1979 enacted by the Federal Military Government that repealed all state laws on public order, regulating the conduct of public assemblies, meetings, and processions throughout the federation. The Military Administrator of a State was the only authority empowered to direct the conduct of the same. The plaintiff argued that although the law was centrally enacted. Fatayi Williams CJN in his ruling held that the Public Order Act 1979 took effect as an Act from its inception till when the 1979 Constitution came into force. When the Adaptation Order 1981 was enacted, it functioned as a national law being made by the National Assembly as provided for in section 4 (2) (11) (1) and Part 1 of the Second Schedule of the 1999 Constitution.

EDOSACA'S APPEAL RULING: LEGAL PRINCIPLES AND CRITICISMS

- ***The decision did not follow established precedents***

The Court of Appeal on 27th March 2018 held that public record is a matter listed in the concurrent legislative list. The court said, "FOIA is to my mind binding on all States of the

[25] EDOSACA (Supra) @ 223-234 paras H-A
[26] [1982] LLJR SC

Federation under the age-long doctrine of covering the field".[27] The decision in EDOSACA was delivered on the 28th day of March 2018 and failed to follow a decision of the court in another division delivered a day before without a reason and this marked its departure from precedent. The principle of covering the field is established in Nigeria's jurisprudence dictates that when federal law comprehensively regulates a subject, state law must yield, even in the absence of direct conflict. Despite its established status, the EDOSACA decision raises questions about judicial adherence to precedent and the evolving interpretation of legal doctrines. Nigeria's legal system operates under a common law tradition, where judicial decisions play a crucial role in shaping the interpretation of laws. While the practice of following precedent—stare decisis—is customary, it is not explicitly mandated by the Nigerian Constitution. In the case of Attorney General of Ondo State v. Attorney General of the Federation & 2 ORS where per UWAIS CJN, stated that "It has been argued also that the word "state" in section 5 subsections 5 means the Federal Government alone, because of the whole of the provisions of Chapter II of the Constitution of Fundamental Objectives and Directive Principles of State Policy are read together, it will be seen that only the Federal Government is in a position to carry out the principles and objectives with respect, I do not accept this argument, because the provision of section 13 thereof applies to "all organs of government, and all authorities and persons exercising legislative, executive or judicial powers"[28] In the case of A.G Lagos State v. Eko Hotels Ltd[29] Kekere Ekun JSC has this to say: "I am in complete agreement with the court below… that the VAT Act having covered the field on the issue of sales tax, its provisions prevails over the provisions of the Sales Tax Law of Lagos State. Thus, even if the Lagos State House of Assembly has the requisite legislative competence to enact Sales Tax law, which is not an issue before us, once an existing Federal law or an Act of the National Assembly has covered the field, the Act of the National Assembly or such existing Federal law must prevail"[30] The issue of covering the field is not much of any problem as regards subsections (1), (2) & (3) of section 4 of the Constitution. It is only in respect of sections 4(4) & (5) that the issue of covering the field poses a problem.[31] The reason is that there are certain items upon which the National

[27] Alo Martins v Ondo State House of Assembly (2018) LPELR-45143(CA)
[28] (2002) 9 NWLR (Pt. 772) 222 @ 307
[29] (2018) 7 NWLR (Pt. 1619) 518 (SC)
[30] (Ibid) @ 545, paras. F-G
[31] (Ibid) 558 paras C-F

Assembly legislates to cover the entire federation.

In *A.G. Federation v. A.G. Lagos State*[32] the case commenced by an originating summons taken out in the original jurisdiction of the Supreme Court by the plaintiff on behalf of the Federal Government, the plaintiff challenged the validity and constitutionality of some provisions in the three laws enacted by the Government of Lagos State.[33] The plaintiff's position was fortified by the provisions of the Tourist Traffic Act 1939 of the Republic of Ireland which dealt essentially with items such as enumerated in the exclusive legislative list of the Constitution of the Federal Republic of Nigeria, 1999 in respect of tourism. The defendants argued that item 60 (d) of Part 1 of the Second Schedule to the constitution of the Federal Republic of Nigeria, 1999, only gives the National Assembly power to enact laws to regulate tourist traffic.[34] In determining this suit the court construed, amongst others, section 2, 4, items 60 (d) and 68 of part 1 of the second schedule to the constitution of the Federal Republic of Nigeria, 1999. Galadima, J.S.C in delivering the leading Judgment agrees with the learned counsel for the defendant that the doctrine of covering the field has no application in the Exclusive Legislative List in respect of which the Federal Government has exclusive power to legislate. He opined that the doctrine is applicable where the concurrent legislative powers are validly exercised on the same subject matter.[35] The doctrine should be invoked where concurrent legislative powers are validly exercised by the Federal Government and the state Government on the same subject matter and no more.[36] The Court held further that "no state or even local government law can be enacted to cover the same field already covered by the constitution or the Federal enactment."[37] It is also inapplicable in a matter within the exclusive legislative competence of the National Assembly as any law made by such a State Assembly

[32] (2013) 16 NWLR (Pt.1380) S.C 249

[33] These are Hotel licensing Law, 1983, Cap. H6, Laws of Lagos State of Nigeria, 2003; Hotel Occupancy and Restaurant Consumption Law, No. 30, Vol. 42, Lagos State of Nigeria Official Gazette 2009 and Hotel Licensing (Amendment) Law 2010. The fulcrum of the plaintiff's case was that the defendant had no powers to enact tourism related laws which the plaintiff asserted were matters under the exclusive legislative list of the Constitution by item 60 (d) of part 1 of the second schedule of the constitution of the Federal Republic of Nigeria, 1999.

[34] Tourist traffic is not defined in the Constitution of federal Republic of Nigeria

[35] P. 306, paras B, C & G

[36] Fabiyi JSC @ 358, paras B-C

[37] (ibid) Per I.T Muhammad JSC at 327 paras G-H, @ 328 paras A

will be void for lack of power to make such law.

Similarly, in the case of Chief Adebiyi Olafisoye v. Federal Republic of Nigeria,[38] the appellant along with three other individuals, were charged under the Corrupt Practices and Other Related Offences Act, 2000 before the High Court of the Federal Capital Territory. The appellant challenged the jurisdiction of the High Court that the Corrupt Practices and Other Related Offences Act, 2000, was unconstitutional being an Act of the National Assembly lacked the authority to enact the law. The High Court overruled the objection and on appeal, the Court of Appeal referred the matter to the Supreme Court for interpretation on two key questions: Firstly, whether the combined effect of the provisions of Sections 4(2), 15(5), Items 60(a), 67, and 68 in Part I of the Second Schedule, and section 2(a) of Part III of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, conferred powers on the National Assembly to legislate for the peace, order, and good government of Nigeria regarding offences related to corrupt practices and abuse of power. And whether based on the answer to the first question, whether the National Assembly had the power to enact Sections 9(1)(a), 9(1), 26(1)(c), and 26(3) of the Corrupt Practices and Related Offences Act, 2000. The Supreme Court also extended its power to determine whether the Act interfered with the state government's ability to manage its affairs. The Supreme Court ruled in favor of the Respondent, affirming that the National Assembly legislative power under Item 60(a) of the Exclusive Legislative List, as it relates to section 15 (5) of the Constitution to enact the Act was valid.[39] It added that constitutional provisions conferred powers on the National Assembly to legislate on offences arising from corrupt practices and abuse of power and emphasized that the combination of Item 68 in Part I of the Second Schedule and Paragraph 2(a) of Part III of the Second Schedule granted the National Assembly the authority. The court concluded that the National Assembly has the power to make laws concerning corrupt practices and abuse of power as contained in the ICPC Act[40] and the ICPC Act did not impede or interfere with the ability of state governments to manage their affairs.

- ***The decision failed the National dimension text***

[38] (2004) 4 NWLR (Pt.864) 580
[39] (Ibid) 662, Paras. A-D; 665, paras. B-C; 676, Paras F-G; 683, Paras E-G
[40] (Ibid) 666 paras. E-F

The Freedom of Information Act 2011 was enacted by the National Assembly and the legislature intended to cover the field.[41] It is not the doctrine of federalism that state government should disregard federal laws on concurrent lists until the state government passes its own. Also, federalism did not foresee a scenario where the federal government should leave for the state government matters which are concurrent. This will make federalism difficult to practice. Federalism's role is simply to create opportunities; it is most unfortunate that the court ignored this value in creating its equal concurrent power jurisprudence. The lead judgment had the power to prevent an experiment of this nature but reiterated this configuration adversely when it held that section 29 (1) (a-h) of the Act which requires the concerned public institutions to submit a report to the Attorney General of the Federation on or before 1st February of each year did not make any reference to the Attorney General of States or the States House of Assembly in terms of over-sight responsibility over state institutions or submission of annual report. The court emphasized that the Attorney General of a State retains control over state agencies, and any federal attempt to exercise oversight in such matters would be a constitutional overreach. What would have happened if the law had incorporated the Attorney General of State? Would the reasoning of the court be different? In the brief of argument at both the trial and appellate court, the issue was not joined as to the submission of compliance report but on access to the record of fund disbursement for HIV/AIDS intervention in Edo State. Where the state makes no law on a subject, it cannot preclude the federal law on the subject from being binding under the doctrine of covering the field. This error was swiftly corrected by the dissenting judgment.

The lead judgment is not clear on the coverage of the law as stated in section 31 to aid analysis. Emotions have a more influential effect on the decision as the court was headstrong in the wrong direction as it concluded that it is at the discretion of any state interested in adopting and applying the provisions of the FOIA. The court added, "a few examples of Acts of the National Assembly which have been left to the discretion of any State that so desires to enact similar law includes the Child Rights Act, Administration of Criminal Justice Act, Administration of Justice Commission Act".[42] It is important to state that the object and scope of the Freedom of Information

[41] Section 4 (1), (2), (3) and (4) (a) and (b) and Section 39 of the Constitution of Federal Republic of Nigeria 1999
[42] (Ibid) 228 paras A & E

Act had a wider coverage unlike the Administration of Criminal Justice Act referred to by the court which specifically serves as criminal justice in the courts in FCT and federal courts in Nigeria.[43] For the Child Rights Act referred to by the court, the issue of children's rights is neither listed in the concurrent or exclusive list of the Constitution and so it is the prerogative of states to legislate on it. So the passage of the law by the National Assembly even with spicy cooperative provisions like state and local government implementation committees[44] does not make the Act constitutional and should not be used as a basis for the FOIA of 2011 and its bindingness on states. Where a federal statute discloses an intention to cover the field, as it is in the case, it is inconsistent with it for the law of a state governing the same subject matter to be enacted or even pre-meditated. The lower court therefore was in error when it held that "It is only where there is a clash of interest in legislation that the law made by the State Assembly shall give way to that made by the National Assembly as per section 4(5) of the constitution".[45]

FOIA, as a federal law, was intended to cover the field of access to information across sub-national governments. The Court of Appeal asked a rhetorical question thus "Can the Attorney General of the Federation exercise oversight function over state institutions or give directives to the Appellant (Edo State Agency for the Control of Aids) when the constitution has created the office of the Attorney General of a State and the court answer in the negative. It concluded "the Attorney General of a State cannot be expected under the Freedom of Information Act to submit an annual report of the activities of State institutions concerned to the National Assembly to the exclusion of the State House of Assembly"[46] a quick answer to the question is that State Governor appoints a State Chief Judge on the recommendation of the NJC.[47] The summation and conclusion reached by the court on the AG of State exclusion and applicability bias do not stem from any concretely proved facts and evidence put forward. The court lead judgment misunderstood the working and application of the doctrine of covering the field in a federal constitution like the 1999 Constitution. The majority judgment held that "… incidentally, the said Act did not make any reference to the

[43] Section 2 (1) of the Administration of Criminal Justice Act of 2015, No. 13
[44] Section 264 (1) & (2) & 268 (1) & (2) of the Constitution of 1999
[45] EDOSACA (Supra) 223 paras D-E
[46] (Ibid) 224 paras C-F
[47] Section 271 of the Constitution of 1999

Attorneys General of States or States House of Assembly in terms of oversight responsibility over state institutions or submission of annual report. The question then is, can the Attorney General of the Federation exercise oversight function over the institutions or require them to submit annual reports to the exclusion of the state Attorney General? Secondly, can the Attorney General of the Federation give directives to the Appellant (Edo State Agency for the Control of Aids) when the Constitution has created the office of the Attorney General of state? The answer is definitely 'No'. Conversely, the Attorney General of a State cannot be expected under the Freedom of Information Act to submit an annual report of state activities of state institutions concerned to the National Assembly to the exclusion of the State House of Assembly." This conclusion of the court was based on stereotype as the review or legal reasoning is influenced by generalized beliefs or assumptions about the oversight function of government institutions rather than reviewing the facts and applying the same to the enabling law.

- ***The judgment sidestepped federal mandate to legislate on matters of Good Governance and Public Participation (GG&PP)***

The lead judgment failed to recognize the legislative competence of the National Assembly, particularly on matters relating to good governance and public participation, a key element of the Freedom of Information Act. A federal Act that promotes good governance and public participation does not need to be re-legislated by the sub-national to be binding on sub-national systems. Freedom of information law is geared towards achieving good governance through public participation, transparency, accountability, and openness. It is not the doctrine of the rule of law, that state government should disregard federal laws on concurrent lists until the state government passes its own. In the case of Kiambu County Government & 3 Others v Robert N Gakuru & others[48] which arose from a dispute involving the Governor of Kiambu County, the Kiambu County Assembly, and other respondents regarding the appointment and vetting of certain county officials. The applicants, Robert Gakuru and others challenged the legality of the appointment process and how the Kiambu County Government was operating. The applicants' now respondent's case is that they were not invited to take part in

[48] Civil Appeal No: 200 of 2014 judgment reported (2017) eKL. See http://kenyalaw.org/caselaw/cases/view/137956. See [2014] eKLR

the passage of the Kiambu Finance Act of 2013. The appellants submitted that the Kiambu Act was passed by the representative of the people of the County Assembly and the millions of Kiambu people do not have to be consulted individually before the legislation is passed. The High Court (Odunga, J) on 17th April 2014 declared the Kiambu Finance Act of 2013 as null and void for lack of public participation and excessive legislative power appropriation as stipulated in the Constitution of Kenya[49] and the County law.[50] The decision was appealed and the Court of Appeal upheld the decision and held that "….. it is generally accepted that modes of public participation may include not only direct participation through elected representatives but also from direct participation". The court also added that "the general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. There is a duty to facilitate public participation and effective opportunity to exercise the right to political participation". It is a significant decision by the Kenyan Court of Appeal that touches on issues of governance, the powers of county governments, and the enforcement of constitutional principles in Kenya's devolved system of government.

In Re Greenhouse Gas Pollution Pricing Act[51] where the Canadian Federal Parliament passed the Greenhouse Gas Pollution Pricing Act 2018 that introduced the carbon-pricing scheme, and the law allowed provinces to devise their schemes and any provincial scheme that failed to meet minimal pricing arrangement in the law would be superseded by the federal scheme. Four provinces Saskatchewan, Alberta, Ontario, and Manitoba did not make their law but objected to the legislative competence of the federal parliament. The cases were referred to the various Courts of Appeal. Ontario and Saskatchewan found the GGPA constitutional; the Alberta Court of Appeal did not. The stage was set for a combined hearing before the Supreme Court of Canada. The question at issue was whether the provinces had exclusive authority to enact a carbon-pricing scheme under section 92 of the Constitutional Act of 1867 on 'property and civil rights' powers or whether the federal government could rely on its general 'peace, order, and good governance' power under section 91 of the Constitution. The Supreme Court decided by a 6-3 ruling that the federal government has the constitutional authority to impose a carbon-pricing scheme on those provinces that resist what they claim to be an unwarranted incursion on their provincial turf. Richard Wagner CJC in the lead judgment encouraged intergovernmental cooperative efforts, but also maintained that

[49] Articles 10, 174, 196 and 201 of the Constitution of 2010
[50] Section 87 and 115 of the County Government Act of 2012
[51] (2021) S.C.J No. 11

flexibility and cooperation cannot override or modify federalism and the constitutional division of powers.[52] Whether cooperative federalism can best be attained by exclusive reliance upon the courts or the political process is a mixed question of political theory and constitutional interpretation.

In a similar case of Attorney General for Ontario v The Attorney General for the Dominion of Canada and the Distillers and Brewers' Association Of Ontario[53], the issue of whether the federal government (Dominion of Canada) had the authority to enact legislation prohibiting the sale of alcohol within a province, or if such power belonged exclusively to the provinces arose again. In this case, the Federal Parliament had passed the Canada Temperance Act, which allowed local municipalities to prohibit the sale of alcohol through a referendum. Ontario challenged this Act, claiming it infringed on state legislative jurisdiction. The Federal Government argued that the legislation was within its powers under the peace, order, and good government (POGG) clause of the British North America Act, and also under its power to regulate trade and commerce. Ontario contended that the regulation of alcohol is a matter of a merely local or private nature which is within the state's legislative jurisdiction. The Judicial Committee of the Privy Council, which was then the highest court of appeal for Canada, ruled in favour of the federal government and established that the federal government had the authority to enact prohibition laws as a matter of national concern. This is the second time the court affirmed the federal supremacy to the state legislative competence. It has been accepted in Canada that the power of government to make laws for peace, order, and good governance about all matters not coming within the classes of a subject by the Constitution assigned exclusively to the legislature of the province encompasses parliament's ability to respond to a national emergency and its power to adopt legislation that is of national concern. Chief Justice Laskin in the lead judgment held that the federal parliament has the power to legislate as the case is one of national concern and emergency.

- **The judgment did not appreciate the right to information as a fundamental right and the legislative authority embedded in the Fundamental Objectives and Directive Principles framework.**

The right to information is an aspect of human dignity; the best means of ascertaining the truth on record and exposing causes of abuse and how to mitigate impunity and public denial. This right to information will help to address a dysfunctional society and reduce anomalies. Access to information is fundamental

[52] (Ibid) @ 6
[53] (1896)UKPC 20

for democratic participation just as the application of the law across states. States are not an extension of the federal government but bound by federal laws, particularly on issues captured under Chapter 4 of the Constitution. Access to information is not just a basic freedom; it is a fundamental human right intricately linked to the broader rights of freedom of expression and media freedom. It is a necessary ingredient of participatory democracy because there is a symbiotic relationship between the right to information, freedom of expression, and the rights of democratic participation as they are organically integrated. Participation in democracy progresses in an informed environment as information is the blood of democracy. The lead judgment robbed the Respondents not only of knowledge, but also, of the fundamental right to expression and participation in governance. Participation in government and publicity about the working of the government, which the right to information promotes is a consistent theme in fundamental rights advocacy. Archives and public records are important components of information dissemination and the concept of access to archival information or government records has evolved from a privilege to a right.[54] The fundamental objectives and directive principles being an exclusive matter[55] inherently mandate the government's active facilitation of public participation in governance, thereby establishing a clear constitutional foundation upon which the National Assembly is well-positioned to legislate access to public records as a means of advancing and actualizing these directive principles. The court overlooked the importance of these objectives in arriving at its conclusion.

CONCLUSION/RECOMMENDATIONS

Judicial reasoning is fundamental to the legitimacy of a court's decisions since it provides parties and the public with the basis for understanding the conclusion as well as creating standards

[54] See sections 27, 28 & 29 National Archives Act 1992

[55] Item 60 (a) of the Exclusive List of the 1st Schedule to the Constitution of 1999 has this to say "The establishment and regulation of authorities for the federation or any part thereof to promote and enforce the observance of the Fundamental Objectives and Directives Principles contained in [Chapter II] the Constitution". Section 14 (1) (2) (c) of Chapter II of the Constitution of 1999 has this to say; "The Federal Republic of Nigeria shall be based on the principles of democracy and social justice. The participation by the people in their government shall be ensued in accordance with the provisions of this Constitution".
Also, Items 4 and 5 in Part 2 of the 2nd Schedule to the 1999 Constitution states as follows:-

for appeal. The court in this case relied on preconceived notions about the assumption of the workings of government institutions rather than precedents in making its judgment. A court ruling that reflects assumptions about government designs could be criticized for being based on stereotypical reasoning rather than on a fair and impartial application of the law. The court must refrain from any behavior, action, or expression that could undermine confidence in their impartiality. The conclusion reached by the court resulted solely from the generalization of preconceived ideas and stereotypes not based on concrete facts or law. Judges are bound by the doctrine of judicial precedent, which mandates that decisions made by higher courts must be followed by lower courts in subsequent cases with similar facts. The binding nature of precedent means that judges cannot freely interpret the law based on evolving societal norms or public opinion; they must apply the law as interpreted by higher courts, no matter how a judge feels about that earlier decision, he must follow it if he has no cogent distinction. Even if he is convinced that the earlier case was wrongly decided, or will result in injustice, he must follow it, otherwise he will be guilty of judicial impertinence.[56]

The interpretation of the provision of any statute should mirror the social accentuation of the society and also meet the needs of the society. The court's reasoning was centered on ease of implementation and convenience and not the tenet of the enabling law. A judge must be alert to avoid behavior that may be perceived as an expression of bias or prejudice. The decision is a major setback in the global campaign for probity, accountability, and transparency in the sub-systems and it does not portray the Nigerian judiciary to the entire world as a veritable arbiter of democratic ideals. The debate on federalism is not all about sub-nations or the center but about the Constitution and the sovereignty it stands to protect. The constitution should be a living document that promotes active citizenship above governmental structure and legislative listing. The review of this decision is important because it has far-reaching effects on development institutions that have strengthened thousands of citizens' capacities to hold their government accountable at all levels. It will also impact the provisions of Section 22 of the 1999 Nigerian Constitution whose fundamental objective is to empower the media to uphold the responsibility and accountability of the

[56] Abiodun Akinyemi, "How Judges Think: (An Insight into Judicial Reasoning)", also available at: <https://www.thisdaylive.com/index.php/2024/03/05/how-judges-think-an-insight-into-judicial-reasoning/> (last accessed 22 May, 2024)

government to the people. It will equally affect the objectives of Section 39 (1) of the Constitution, which stipulates that “every citizen shall be entitled to freedom of expression, including the freedom to hold opinions and to receive and impacts ideas and information without interference”. It will similarly impinge on the intents of Article 9 (1) of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act which demands that every individual shall have the right to receive information.

Also, there should be an effort to promote cooperative federalism by encouraging dialogue and collaboration between federal and state governments on legislative matters, ensuring that both levels of government work together to create laws that reflect national interests while respecting state autonomy. This collaborative approach will help prevent conflicting legal interpretations and support a more cohesive application of laws across the country, ultimately enhancing the overall effectiveness of governance and the protection of citizens' rights. It is not only where there is a clash of interest in legislative competence that the law made by the State Assembly shall give way to that made by the National Assembly. So long as the field is covered, there is no need for legislative wastage. Also, the state cannot refuse to obey a federal law on the ground that the law does not apply to it. Nothing derogates the power of the National Assembly to legislate on public records or archives of the state in the interest of good governance and development. Cooperative federalism, with its emphasis on shared responsibilities, offers a more balanced approach to governance, particularly in sectors like public health that require both state and national cooperation. States should be encouraged to adopt their versions of the FOIA, harmonizing them with the national legislation to promote transparency and accountability at sub-national. This will help to bridge the current gap and ensure citizens have access to essential public records, fostering greater civic engagement and participation.