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FEDERALISM VERSUS TRANSPARENCY

THE JURISDICTIONAL DILEMMA OF NIGERIA'S FREEDOM OF INFORMATION ACT OF 2011

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Editor's Note

The issue of concurrent legislative powers concerning Nigeria's Freedom of Information Act (FOIA) of 2011 has been a focal point of contention, resulting in numerous court rulings marked by inconsistent application and enforcement. This edition offers a comprehensive analysis of the interplay between federal and state legislative authority with regard to the FOIA, which is designed to enhance transparency and accountability by providing public access to governmental information. The overlapping jurisdiction between federal and state entities has introduced significant legal ambiguities and practical enforcement challenges. The study begins with a historical overview of the FOIA to establish its scope and applicability and discusses judicial decisions relevant to its implementation. It further explores the legislative competencies of both federal and state governments under the framework of concurrent legislative powers, examining how the division of these powers has led to legislative discord. Additionally, the work considers global models, such as the U.S. system, which discourages legislative duplication, and the African model in Kenya, to identify more effective practices. The primary aim is to clarify the specific roles of legislative bodies in managing concurrent powers and practical devolution within a federal state. The writer argues that to mitigate confusion arising from Nigeria's legislative division, State Houses of Assembly should focus on developing procedural legislation to support enforcement and inclusivity, particularly for marginalized communities.

***President Aigbokhan** - Editor-in-Chief*

Background

Nigeria is the fifth African Nation with a freedom of information law. The pressure for the right of access to information in government custody was for public participation. The main deliberation was the establishment of the right of access to information, who can sue for breach of the right, the departments or organs of government responsible for releasing information, the categories of documents to be made public, and the coverage of the legislation.[1] A significant milestone that emerged from the conference and contributed to the law in Nigeria today is the application of the law to federal, state, and local governments with a focus on public citizen ownership of the law. But by the provisions of the constitution, the authority conferred on the State House of Assembly must be exercised subject to the concurrent legislative stretch of the National Assembly.[2] The Supreme Court in interpreting "Concurrent" stated that it means existing together, side by side but with different institutional mechanism.[3] Concurrent legislative power is the exercise of federal and state government in the same policy area.

Generally, states are not precluded from making laws with respect to public records but any such law will be superseded by an Act of the National Assembly if there is inconsistency capable of diminishing the rights in the Act. State Houses of Assembly have consistently waited for the National Assembly to legislate on a subject matter and thereafter prop up to say that the Act does not apply to them. To allow the states to continually arise from slumber to oppose the enforcement of a federal law is not justified in any circumstance and is the height of official irresponsibility.

Freedom of Information Act, a noble and worthwhile piece of legislation has automatic peculiar application to states. It does not behoove any state interested in adopting the provisions of the Act in its territory to set the necessary machinery in motion for the enactment of a similar law before citizens can enjoy the benefits of the law. Where the State House of Assembly does not pass a law on access to public records and there exists a federal legislation on the same which promotes good governance and public interest and the court must without choice implement the law. It is the existence of two equivalent but different aspects of authority that establishes a concurrent field. But where the exercise of one is dependent on the other, the lesser cannot duplicate but complement. The passage of the law by the

1. Chidi Odinkalu, "Nigeria's Freedom of Information Law: How friends launched a movement", Open Society Foundation, (2011) available at http://www.opensocietyfoundations.org/voices/Nigeria-s-freedom-information-law-how-friends-launched-movement (accessed on Jan. 2, 2024, 10: 45PM)

2. See paragraph 5 of Part II of the 2nd Schedule to the Constitution of 1999

3. Olafisoye v. FRN (2004) 4 NWLR (Pt. 864) SC 580

National Assembly does not exclude the State House of Assembly from obeying the law or passing implementation guidelines or rules. It is not the intent of the doctrine of federalism that the state government abandons matters which are concurrent in nature to the federal government but where there is a directive to be subjected to the law, the state cannot do more than procedural rules.

The reluctance of both the courts and states to enforce the FOIA persists. Most laws are one-size-fits-all but this should not lead to legislative inertia. The Lagos State Government has said that the Freedom of Information Act does not apply within the State as same has not been domesticated by its House of Assembly. This was contained in a letter signed by the Chairman of the Lagos State Government Internal Revenue Service in response to an FOIA request made on the IIR over revenue of the State's transport sector. During training sessions in Benin City, Abuja and Lagos, it was discovered that citizens have stopped to apply for public records from states because there seems to be limitation on same placed by the court. This work will explore the cases and the reasoning of the courts as it relates to the applicability of the FOIA at the sub national.

The refusal of some states to apply the FOIA 2011 and their preference for state laws can be attributed to several interrelated factors. The FOIA may have failed to account for the diverse needs and preferences of states and local government administration, imposing uniform standards that may not be suitable or effective in every context. The states may become susceptible to influence by vested interests, leading to the resistance of the implementation of the law at the states. States may have shut out with unintended consequences, such as encouraging abuse of office and secrecy which can undermine the intended goals of democracy.

Compliance with regulatory standards often requires investments in infrastructure, personnel, and technology, which can drive up the overall cost of law and justice services. The executive branch of the federal government, particularly the Attorney General of Federation and the President plays a crucial role in implementing and enforcing national laws. So also, the Attorney General of State also plays a crucial role in implementing law passed by the State House of Assembly. State executives are reluctant in implementing some federal laws under the disguise of no state structure to implement. The hiccups is artificial because were the will is, obstacle is but a ruse. Many states have deeply ingrained administrative and bureaucratic beliefs that may clash with certain provisions of the FOIA. As a result, states might choose to create laws that better reflect their local situation and bureaucratic structure and administration for ease of implementation. It seems that there are several reasons why states are refusing to comply with the Freedom of Information Act of 2011. One

key factor is the potential burnout and dissatisfaction that compliance with regulatory requirement such as documentation and reporting obligations, can contribute to states burnout and dissatisfaction, potentially impacting the acceptance of the law. This standard often requires investments in infrastructure, personnel, and technology, which can drive up the overall cost of law and justice services. FOI law has the tendency to fashion more flourishing and stable society in non-economic ways for the states. Some communities still fear the social changes that could come with the implementation of the FOIA. And this includes the fears that the implementation of the law opens up corruption in states.

The 1999 Constitution contains a long list of exclusive federal competences and short list of joint federal-state concurrent legislative competences. Some sixty eight (68) items are listed under Part I of the 2nd Schedule of the 1999 Constitution and Some 30 items are listed under Part II of the 2nd Schedule of the 1999 Constitution. Before now, sixteen matters were hitherto concurrent to both federal and regional governments under the 1960/1963 Constitutions. These items are now made exclusive to the federal government and they are arms, ammunition and explosives, bankruptcy, insolvency, census, poisons, finger prints, drugs, criminal occupations, registration of business names, regulations of tourism industry, traffic on federal trunk roads, public holidays, regulation of political parties, service and execution in a state of the civil and criminal processes, judgment, decrees, orders and other decisions of any court of law outside Nigeria or any court of law established by the legislature of a State.[4] The complete exclusion of a State government from all these areas is a significant change for it takes away the initiative which in the past, the regions undertook in some of these matters.[5]

Not only is the scope of concurrent matters now severely restricted by the transfer of roughly fifty percent of the items to exclusive competence of the federal government, but also some of the matters still formally listed are actually meant to be dealt with in such a way as to make them exclusive to the federal government. For example, public safety and order remains a concurrent matter yet the federal government is in charge of Fire Service, Nigeria Police and Nigeria Maritime and Safety Agency (NIMASA) to mention a few. This seminar paper submits that it is the application clause of the law made by the National Assembly that will decide if the field has been covered even though a state cannot re-enact a law it is subjected to. There are many superstitions in the United States about how a federal system necessarily entails. The United States of America does not have strong states' rights in some

4. Nwabueze, Ben (1987), Constitutional Democracy in Africa, vol. 1 Spectrum Book, 80-81

5. (ibid) 81

respects. The provinces in Canada are more powerful in their national governments than in States in United States. Canada recognizes far more legislative power in the provinces than the United States. In Canada, common law is national and provincial law is statutory subject to interpretation by the Canadian Supreme Court. In some sense, the provinces seem less supreme than the United States.[6] In Canada, the intent, clearly reflected in the Constitution of 1867, was for the central government to predominate, but the Judicial Committee of the Privy Council which interpreted provincial powers generously and federal powers with restraint, giving the provinces a much greater share in balance of power than had been contemplated. The United States has moved in the opposite direction resulting in strong central government[7] but Canada's provinces do have a separate legislative sphere, acceptance and validation in contrast to the United State and Nigeria.

This paper identifies that the Nigeria's federalism copied the United States version where duplication is forbidden but needs to make bold step towards a model legislative federalism as practiced in Kenya. More remarkable is that the trio of Nigeria, Canada and United States federal systems have departed from the original understanding of the distribution of federal power as expressed in the Constitution. In both cases, the departure has been eaten deep primarily by the teeth of judicial interpretation. The U.S. tenth amendment granting to states only whatever power was not possessed by the federal government, ipso facto cut down on what was reserved to the states.

Federal powers in the United States were interpreted so broadly that little or nothing remained of the residuum.[8] State legislation on archives and public records depends on the availability of legislative space. Where a state does not have any open government law and yet claims that the National Assembly is 'over' legislating on the state's public records and archives amounts to a clear case of asking for a toothpick for an absent tooth.

The Court on the Scope of Freedom of Information Law in Nigeria

In January 2014, an application letter requesting public records on the list of beneficiaries of the World Bank grant for HPDP II was transmitted to the Edo State Agency for the Control of Aids (EDOSACA). The applicants were requesting the conditions for the selection of beneficiaries in addition to other records. The request was left

6. Martha A. Field 'The Differing Federalisms of Canada and the United States' Law and Contemporary Problems (1992) 55 (1) 114

7. (Ibid) 108

8. (Ibid) @ 109

unattended without a valid reason and the applicants proceeded with judicial review at the court. At the trial court, the Applicants instituted an action by Originating Summons against the Respondent on 14th February 2014. The Applicants sought for declaratory reliefs as well as damages from the respondent.

The Originating Summons was supported by a 26-paragraph affidavit to which is attached the letter of request. The Respondent 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, the learned trial Judge delivered a ruling on 29th of April /2014 wherein all the reliefs were granted in favor of the applicants save for damages.[9] On appeal, the appellant challenged the applicability of FOIA in Edo State. The Court of Appeal sitting in Benin City on March 28th, 2018 gave judgment in favor of the appellant and held that the law is not applicable to Edo State. The court held that the government of Edo State is not bound to comply with the provisions of the Freedom of Information Act 2011 by acceding to the request until the State government enacts a law pursuant to the powers conferred on it by section 4 (7) of the 1999 Constitution.

Similarly, in Alo Martins v Speaker of Ondo state House of Assembly the trial court judge, Hon. Justice William Akintoroye of the High Court of Ondo State on 18th July 2016 held that information is neither in the exclusive nor concurrent legislative list in the 2nd schedule to the 1999 Constitution (as amended) thus making the freedom of Information Act enacted by the National Assembly inapplicable to the States. On appeal, the Court of Appeal disagreed and held that Freedom of Information Act of 2011 was enacted by the National Assembly in exercise of its legislative powers pursuant to section 4 (1) (2) & (3) of the Constitution of 1999.

The issue raised in Alo Martin's appeal is whether the learned trial judge was not wrong by refusing to grant the reliefs sought by the appellant on the ground that the freedom of Information Act of 2011 was not applicable to the States in spite of the fact that the documents sought to be obtained by the appellant through the order of mandamus is a public document which the appellant is entitled to in law and equity. This is because public document is within the meaning of section 102 of the Evidence Act and public duty is imposed by the Freedom of Information Act of 2011. The Court of Appeal on 27th March 2018 has this to say *"Public record is a matter listed in the 'Concurrent Legislative List'. The FOIA is to my mind binding on all States of the Federation by virtue of the age-log Doctrine of Covering the filed".*[10]

9. Edo State Agency for the Control of Aids v. Com. Austin Osakue (SUIT NO: B/17M/2014)

10. Alo Martins v Ondo State House of Assembly (2018) LPELR-45143(CA)

In **Edo Civil Society Organizations (EDOCSO) & 3 Ors v. Edo State Oil & Gas Producing Area Development Commission (EDSOPADEC)**[11] the Applicant wrote an FOI letter to the Respondent seeking to know the numbers, locations and payment schedule for police stations constructed across Edo state by the Edo State Oil & Gas Producing Area Development Commission (EDSOPADEC) hereinafter referred to as Respondent. The Respondent filed a counter affidavit challenging the applicability of the law to the sub national in line with the decision in EDOSACA v Osakue's case and the Court held that *"I therefore agree with the submission of the learned counsel for the applicant that the law 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 the public records and archives in that State, I therefore hold that the FOIA 2011 is not applicable in Edo State".*

Accordingly, it is my view that the Applicant cannot rely on the said Act to seek the release of the documents sought from the Respondent which is Edo State agency. I award cost of 30, 000 in favor of the Respondent against the applicants" The Court added that' "Public record is a matter listed in the 'Concurrent Legislative List'. The FOIA is to my mind binding on all States of the Federation by virtue of the age-long doctrine of covering the filed".[12]

In 2015, World Bank and European Union signed MOU to fund State Employment and Expenditure for Results (SEEFOR) Project to the tune of 280 Million Dollars for 65 per cent and 35 percent respectively. The project is to assist in road construction in four selected states in Niger Delta namely Edo, Rivers, Bayelsa and Delta States. In one of the beneficiary states – Edo State, a Civil Society group and activists on 17th day of May 2018 sent a freedom of information request to access the records of the state as per information relating to lists of roads construction/rehabilitation and school projects shortlisted to be executed under the SEEFOR Project across Edo State between 2016-2017 and certified true copy of the bill of quantity drawings of the projects awarded. The Edo State government refused to make the information available and a suit was filed by FOIA Counsel on behalf of Edo Civil Society Organization.[13]

The court in delivering its judgment on 19th day of December 2019 relied on an existing decision of the Court of Appeal in EDOSACA v. Austin Osakue and reiterated that the Freedom of Information Act 2011 though a noble and worthwhile piece of legisla-

11. Suit No: B/13/OS/2018

12. Ibid

13. EDOCSO & Ors v. Government of Edo State (B/C/80os/2018)

tion does not have automatic application to the states.[14] Again, in the case of **Com. Omobude Agho & 2 Ors v. Government of Edo State & 3 Ors**[15] the Applicants sent a freedom of information request to the Accountant General of Edo State seeking for the list of contracts awarded and executed since 2015 and a Certified True Copies of audited account of the Edo State government since 2016-2018.

Edo State government refused to make the information available, therefore leading to a judicial review. FOIA Counsel assisted the applicants to file a suit for judicial review at the High Court of Edo State. The court in delivering its judgment on 19th day of December 2019 held also that by the existing decision of the Court of Appeal in EDOSACA v. Austin Osakue the Freedom of Information Act 2011 lacks automatic application to the states even though the Court attention was drawn to the decision in Alo Martins. In his judgment, he said that *"I am being faced with two conflicting decision of the Appeal Court, one supporting the respondent, the other supporting the appellant. I am fully aware of the fact that I am bound by the decision of the appellate Court but in this kind of situation I am allowed to choose which to follow between the two decisions."*[16]

Mr. Olukunle Ogheneovo Edun, a human right lawyer alongside his friends submitted an FOI request letter dated 15th day of September 2015 to the Governor of Delta State seeking amongst others the amount of money disbursed to Delta State Oil Producing Area Development Commission and the lists of projects awards. The Governor declined the request and a suit was commenced.[17] The applicant sought before the court a declaration that by the provision of sections 1 (1) (3), 3 (1) and 4 of the Freedom of Information Act of 2011, the Governor of Delta State is under a legal obligation to provide the claimants with the information requested as contained in the letter of request. On 4th day of July 2016, Hon. Justice Onajite-Kuejubola, Judge granted the reliefs as sought. On appeal, the Delta State Governor asked the court to determine whether a State government can be compelled to disclose any information or document pursuant to the Freedom of Information Act of 2011.

The Court of Appeal justices allowed the appeal agreeing that Freedom of Information Act applies only to the Federal Government and its agencies.[18] In the judgment, Danjuma, JCA held that it could not have been the intention of the law makers that the State Ministries, Parastatals, Agencies not specifically mentioned in the Act

14. Victor Oviawe, Judge in EDOCSO & Ors v. Government of Edo State (B/C/80os/2018)

15. B/81/OS/2018

16. Victor Oviawe, Judge in Com. Omobude Agho & 2 Ors v. Government Of Edo State & 3 Ors (Ibid)

17. Olukunle Ogheneovo Edun & 3 Ors v. Governor of Delta State & Anor (Suit No: W/377/2015)

18. The Court of Appeal rested its decision on the interpretation of sections 1, 2, 3, 5, 14, 15, 16, 29, 31, and 32 of the FOIA 2011

would be covered by it and even when that could also lead to an invasion into the confidentialities and privacy of the patrons of State Agencies and as such not in the interest of the peace, order and good governance of the State. And so a State is not bound to supply or provide and an Applicant is, ipso facto records or information. And where, an applicant seeks for information and he is refused, there is no cause of action. The court added that *"FOI Act is, to me, therefore, a legislation of high persuasive value to States including Delta State and Local Governments but without any element of legal compulsion; rather it is a legislation of moral suave and coloration; as relating to State Governments."*

The Lagos State Government has said that the Freedom of Information Act does not apply within the State as same has not been domesticated by its House of Assembly. This was contained in a letter signed by the Chairman of the Lagos State Government Internal Revenue Service in response to an FOIA request made on the IIR over revenue of the State's transport sector. The response reads *"we are unable to provide the information because the FOI Act does not 'automatically' apply in the state"*.[19] During training sessions in Benin City, Abuja and Lagos, it was discovered that citizens have stopped to apply for public records from states because there seems to be limitation on same placed by the court. This same question was raised as an issue in the case of Yenge v. A-G., Federation[20] and the court held that Child Rights Act is not applicable all over the states of the Federation unless domesticated by the State Government? The refusal of some states to apply the FOIA 2011 and their preference for state laws can be attributed to several interrelated factors. In order to fully appreciate the legislative competence of the law, one has to look at the history of the legislation. The purpose and interpretations are sometimes provided with-in the ambit of the text of an Act, Law, regulation or Bill to specially determine the object and scope of legislation.

Barriers to State–Level Implementation of Freedom of Information Act 2011

States Burnout: Compliance with regulatory requirements, such as documentation and reporting obligations, can contribute to states burnout and dissatisfaction, potentially impacting the acceptance of the law. This standard often requires investments in infrastructure, personnel, and technology, which can drive up the overall cost of law and justice services. The executive branch of the federal government, particularly the Attorney General of Federation President plays a crucial role in im-

19. Ijeoma Opara "The Lagos State Government rejects request for public information despite Court ruling on FOI". See https://www.icirnigeria.org/lagos-state-rejects-request-for-public-information-despite-court-ruling-on-foi/ July 30, 2021

20. Yenege v. A-Federation (2023) LPELR-61122(CA)

plementing and enforcing national laws. So also, the Attorney General of State also plays a crucial role in implementing law passed by the State House of Assembly. State executives are reluctant in implementing some federal laws under the disguise of no state structure to implement. The hiccups is artificial because were the will is, obstacle is but a ruse. There is no doubt that in discovery of the truth and promoting political and social participation at the grassroots, freedom of information is indispensable. Many states have deeply ingrained administrative and bureaucratic beliefs that may clash with certain provisions of the FOIA. As a result, states might choose to create laws that better reflect their local situation and bureaucratic structure and administration for ease of implementation. A dearth of information facilitates a lack of accountability for the exercise of power and influence and the impact of these forces have upon the public welfare is the absence of democratic leverage.

Federalism and State Autonomy: Our constitution distributes powers and responsibilities by two lists of categories or classes[21] but our federalism is tripartite in administration and franchise. It is wasteful of legislative and administrative resources to allow simple duplication, besides being confusing for all concerned.[22] FOI is the most effective tool to fight poverty, disease and maladministration. Our democracy will not work without zeal for good governance and the quest to keep ourselves informed.[23] Democracy and public service culture ostensibly clash over oath of secrecy and culture of confidentiality. Nigeria's system of government grants states considerable autonomy. Some states may oppose the imposition of a federal law, preferring to exercise their own legislative powers. Central to the guarantee in practice of a free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public[24] but the right and responsibilities must be identified. When there is a breach there is a remedy.

Disputes over the application of national laws in the states can be cumbersome where there is a review of an action against a state government that has liability but no obligation of accountability under the law. The state government prefers to be liable for its own misconduct as created by them and not imposed. State-level development of the law is notable, while most states are out to make mischief by questioning the power of the National Assembly to make laws on public records and archives, some are making efforts to address the imperative for better citizen

21 One list for the federal, the other for both the federal and states legislators

22. Lederman, W.R (Supra) 196

23. Mnadu, L.N; "Good Governance in Nigeria And the Right of the People to Know" In a Democracy: An Appraisal of the Nigerian Freedom of Information Act 2011" Nigeria National Human Rights Jounal (2013), vol. 3, p. 150

24. See Mendel, Toby, Freedom of Information: A Comparative Legal Survey (2008) 1

participation in public affairs.[25] States are reluctant in passing the law and at the same time shying away from enforcing the existing law. The 1999 Constitution states that for an international law to take effect, Nigeria's legislature must create a national version not states version. Added to this in some states is the additional clearance protocol implementation of the law. Under the Ekiti Freedom of Information Law, the governor is the sole approving authority for the implementation of the law. This alone contrasts the demand of the law that response must be made within 14 days. The centralization of information processing is the hallmark of states that have passed the law while those who have not passed the law live in the dream of implementation hiccups just to chase the users away. The States tried it with Child Rights Law and they got away with it but it may not succeed with the FOIA. Various executive agencies and departments in the states must be mandated to implement federal laws across the states so long as it promotes peace and unity.

The states do not want the people to know the truth forgetting that fake news and propaganda is a tool that can substitute a proactive disclosure. The factor that accounts for this is that the law was not enacted to promote public civic involvement or access to public information but to demonstrate the government's commitment to honor international concerns and open the vista for towering foreign aid that ultimately ends in private accounts. There are arguments that since Nigeria operates a federal system of government; the law does not automatically become applicable in all of its 36 states. Each state legislature has been striving to make the national law applicable within its territory by re-enacting instead of obeying the law.

Fear of Corruption Exposure: Show me a state that implements FOI law, I will show a state that is in turmoil. The more there is disclosure, the higher the corruption trail. Nothing compares with access to information in opening up new possibilities and opportunities. FOI law has the tendency to fashion more flourishing and stable society in non-economic ways for the states. Some communities still fear the social changes that could come with the implementation of the FOIA. There are fears that the implementation of the law and open up corruption in states. By actively addressing these factors, it is conceivable that a more conducive atmosphere could be cultivated, thereby enhancing the likelihood of widespread application and effective implementation of the law across all states. Exercise of power through institutional frameworks whose arrangement is only justified to the extent that it facilitates discussion and information cannot be used to influence public opinion about

25. Ekiti State was the first State to enact a state level FOI Law in 2011; The Imo state Governor signed the state's FOI law into effect in June 2012. Delta State Government also signed the law in 2019. Kebbi State issued a Memorandum on the Implementation of the Freedom of Information Law and Edo State Government has refused to forward the draft freedom of Information Bill prepared by FOI Counsel and African Network for Environmental and Economic Justice

government actions at the sub nationals. It must be accepted, however, that citizens cannot know everything about the government's operations and decision-making whenever they want. Anti-information legislation at the sub nationals are fuelling corrupt political culture. This is because information is important as corrupt stains are lost in the continuous flow of it. To keep the issues that inform anti-corruption alive, there must be a free flow of information. Efforts to weaken the applicability of the FOIA by sub-nationals explain the brazen corruption and lack of accountability at the sub nationals. By allowing easy access to information in public records, the Freedom of Information Act is also patently aimed at achieving one of the fundamental objectives and directive principles of State policy, as enshrined in section 15 (5) of the constitution of the Federal Republic of Nigeria, 1999 (as amended), namely to expose and "abolish all corrupt practices and abuse of power". Section 13 of the constitution of the Federal Republic of Nigeria, 1999 (as amended) imposes a duty on all arms or organs of government and all authorities and persons "to conform to, observe and apply" the provisions of chapter II of the Constitution, of which section 15 (5) is an integral part.

Lack of Awareness and Advocacy: Public information cannot be too much as information about state activity can demystify the process of governance. Government cannot hoard information about itself and expect citizens to be abreast with its activities.[26] As at today only information on the price of rice and fuel is on the public table. There might be a lack of awareness or insufficient advocacy for the importance of the Child Rights Act among local leaders and the general population. Public awareness and advocacy campaigns can also plays a significant role in implementation and compliance. The state wants to participate and own their laws. States engagement in law making also enables public understanding, support and acceptance for a federal legislation. Without strong advocacy and education on the benefits of the Act, there may be little pressure on state governments to apply or adopt it.

The Limit of Concurrency of Legislative Powers in Nigeria

Federalism originated during the colonial epoch, beginning with the amalgamation of the Northernand Southern Protectorates and the Lagos Colony in 1914. It is an alien political device brought to Africa by European colonialism[27] but distinctly an American invention.[28] It was introduced into Nigeria by the 1946 Arthur Richard's

26. Tom, D.F; Nigerian Press Law, Chenglo Ltd, Enugu: (2006) 19

27. Ozekhome M, (2014), Zoning to Unzoning: the politics of power and Power of Politics in Nigeria' Mikzek Law Publications Limited @130-131

28. Fredrich, C.J (1967) 'The impact of American Constitutionalism Abroad, Holmes and Meier 45

Constitution. The Constitution introduced regionalism into Nigeria, for the first time, establishing Regional Assemblies in addition to the existing central legislature. In the colonial era, the Regional Houses in Nigeria were merely deliberative and advisory bodies, having no real legislative competence. The federation was officially established in 1954 with the Oliver Lyttelton Constitution, which granted substantial autonomy to the regions in some matters, including the establishment of regional civil services and judicial systems. Before this period, the country was governed as a unitary system, albeit with some level of power devolution. The 1960 Independence Constitution retained the federal structure with the three legislative lists, to wit, exclusive, concurrent, and residual. However, in order to safeguard the unity of the country, it was provided that regional executive authority of the regions should not be exercised in such a way that it would impede or prejudice the exercise of the executive authority of the federation or endanger the continuance of federal government in the country. The 1963 Republican Constitution retained the federal structure and the provisions protecting federalism as in the 1960 Constitution.

The 1979 and 1999 Constitutions recognized the need for separateness or some degree of autonomy among different levels of government[29] while also emphasizing the need for independence, harmonious and effective governance for the Nigerian federalism to be sturdy. Nigeria is no doubt a Federal Republic with a federal Constitution in which the legislative powers of the federal government rest on the National Assembly and the legislative power of the state government are vested in the State Houses of Assembly.

Between 1914 and 1958, Nigeria passed several constitutional phases, progressing from a unitary to a federal system of government with a consequential distribution of legislative powers in the exclusive, concurrent, and residual lists, which first featured in the 1954 Constitution, was to avoid conflicts of interest. K.C. Wheare, known as the father of federalism, describes it as a constitutional arrangement that divides law-making powers and functions between two levels of government, which are equal in status.[30] For Ben Nwabueze, the father of federalism in Africa, he defined federalism as a system where government powers within a country are shared between a national and a number of regionalized governments[31] in such a way that each government exists separately and independently, with authority in some matters exclusive to it.

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29. The 1979 and the 1999 Constitutions expressly guaranteed federalism in Section 2(1) and (2) thus: "Nigeria is one of the indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria

30. Wheare, K.C (1963), Federal Government: London, Oxford University Press.

31. Nwabueze, B (2004), Constitutional Democracy in Africa, vol. 4 Spectrum Book, 201

Federalism is a mode of government combing a central government with regional governments in a single political system. They are often deliberate or unintended intersections in the power and functions of the two levels of government which are often referred to as concurrent functions and powers. But practical federalism must be residuary as the left alone-local government strata are part of working fiscal federal structure. The powers for both the executives at federal, state and local government is the same in terms of removal, submission of budget, and the response of the executives to the oversight call of the legislative branch. But only the federal and state government enjoys the privilege to pardon offenders, and only the federal government enjoys sovereign relations in case of state and foreign international organization.

Both the National Assembly and the State Houses of Assembly in Nigeria have the authority to legislate on public records and archives, while the exclusive right to legislate on information and communication belongs to the federal government. The Constitution aims to ensure access to information through shared legislative responsibilities. The supremacy of the National Assembly means that any law enacted by the National Assembly on the concurrent list exhaustively covers the implementation of the Act in the federal, state, and local governments, overriding any existing state law on the matter. The Constitution does not make the power of the State House of Assembly to legislate on matters on the concurrent list immutable; rather it makes the law subject to an Act of the National Assembly.

The Concurrent Legislative List provides for items on which the federal and state governments can legislate. It includes various critical areas such as allocation of revenue, archives, tax collection, electoral laws, electric power and industrial, commercial, or agricultural development, as well as universities and more. The Exclusive Legislative List contains 68 items over which the National Assembly has exclusive power to legislate, while the Concurrent Legislative List covers matters on which both the federal and state governments can legislate. The division of powers between the federal and state governments is more qualified than absolute, allowing for flexibility and activism in constitutional interpretation. The state legislature has a right to interfere with federal legislative powers by prescribing additional regulations or auxiliary provisions for the same purpose. The Nigerian Constitution contains three different types of legislative list with two emphatically buttressed leaving the last for fall out. They are national assembly, state house of assembly and the local governments. The Constitution carefully defined the scope of federal and state powers for the 12 items on the concurrent legislative list. It grants exclusive power to both the federal and state governments. The aim of this distribution of power is to strength-

en the federal government and provide an overreaching umbrella under which all groups can be accommodated. A key concept in this division of legislative powers is that of "covering the field," where a law enacted by one legislative body covers the same subject matter as a law enacted by another legislative body. The doctrine of "covering the field" postulates mutual non-interference between the federal and state governments, ensuring effective working of the federal superstructure. The state legislature has a right to interfere with federal legislative powers by way of prescribing additional regulations or auxiliary provisions for the same purpose.[32] One example of concurrent legislative power is the conditional powers of the State House of Assembly, subject ti the exercise of powers by the National Assembly. The National Assembly is empowered to make laws for the federation or any part thereof with respect to certain matters, while the State House of Assembly is to make laws for states subject to the power of the National Assembly on the same subject matter.

One of the earliest decisions where the doctrine of covering the field was propounded was the U.S. case of Houston v. Moore.[33] In this case, the U.S. Supreme Court held that where Congress had legislated on a matter that clearly showed an intention to cover the field. In Australia's case of **Ex parte McLean**,[34] where Dixon, J after analyzing what the doctrine of covering the field is all about, observed that the "inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. The Court in this case concluded that passing a law on concurrent list by the National Assembly and asking the state to comply amounts to taking the doctrine to the extreme end undermining the fundamental principle of Federalism. In Nigeria, the case of **Lakanmi v. Attorney General of Western State** is the first on this subject. In this case, the Supreme Court voided Edit No. 5 of 1967, promulgated by the then Western State Military Government, because it covered the same field as Decree No. 51, which was promulgated by the Federal Military Government. Both laws purported to cover investigation of assets of public officers.[35] In conclusion, the division of legislative powers in Nigeria is of byzantine complexity and practical effort must be deployed to streamline roles to avoid institutional clash and enhance public participation and good governance. Similarly, the National Assembly can make laws for the promotion and establishment of national grid.[36] The State House of Assembly can only legislate on areas not covered by a national grid system within that

32. Story J in Priggs vs. Pennsylvania, 16 Pet. (1842) at 617-618

33 5 Wheat 1 (1820)

34. (1930) 43 CLR 472 AT 483

35. (1970) 6 NSSC 143

36. See Item F13 (e) of Part II of the 2nd Schedule to the 1999 Constitution

state.[37] The 2nd schedule of the Constitution dealing with statistics vests the National Assembly with the power to exclusively legislate on statistics as it relates only to any matter the National Assembly has the power to make laws[38] and the state to legislate on matters not within the ambit of the national assembly. 'Subject to' as used in the section is significant and conditional. The effect of the expression is to indicate an intention to subordinate the provisions of one section to another, ensuring that the latter section is not affected by the former. The use of the phrase confirms the statutory authority and recognition granted to the National Assembly to legislate on matters related to the right to information, archives, and public records. The phrase "subject to" limits the legislative activity of the State Assembly in certain circumstances.

Thus, the state's power to legislate on public records is subject to the National Assembly's authority to legislate on the same issues. When a subsection is made subject to a preceding subsection, it reinforces the authoritative nature of the preceding subsection and clarifies that it qualifies the content of the latter subsection. This means the referenced subsection takes precedence over the section containing the back reference. In the case of public records and archives, the National Assembly has a role that cannot be supplanted by any other body except for providing enabling regulations and guidelines.

It is trite that the National Assembly and State House of Assembly can legislate on matters on the concurrent legislative list but the Act prevails over the state law. The state`s quest to challenge a federal law on archives and public records is on a weak wicket particularly where the law has incorporated the state within the scope of application. Where the constitution has defined or provided for the exercise of legislative powers in a particular manner, no political will can alter it save outright constitutional amendment.[39] But it is inept for the state government to restrict the enforcement of a federal law and subject citizens in sub-nations to a gruesome disobedience to an existent law. The National Assembly has the authority to align any law with the provisions of the Constitution, regardless of whether the matters fall under the exclusive or concurrent legislative lists. William Ralph Lederman postulated that if there is a federal statute of any kind in a concurrent filed, this alone necessarily and invariably implies that there shall be no other legal regulation by a state of the concurrent subject.[40]

37. See Item F 14 (b) (Ibid) of Part II of the 2nd Schedule to the 1999 Constitution

38. Item J para 23 (a) of part II of the 2nd Schedule to the 1999 Constitution

39. AG Ogun State v. Attorney-General of The Federation (1982) 2 NCLR 166

40. Lederman, (Supra) @ 192

Also, Professor Bora Laskin points out that simple duplication of federal legislation by a state is forbidden in both the United States and Australia.[41] The State House of Assembly does not have the authority to legislate on the formation of political parties or the code of conduct for coalitions of political parties within the state. These matters are exclusively reserved for the National Assembly. Within the scope of concurrent legislative competence, the State House of Assembly can legislate on procedural aspects, while for residual matters, it can exercise substantive legislative jurisdiction. For issues on the residual list, the State Houses of Assembly have the authority to legislate. Constitutionally, the National Assembly has the power to make laws on matters incidental or supplementary to any item on the exclusive list.

Where the power for state to legislate is subject to federal law the states' legislative competence is the passage of guidelines and rules of implementation. But where the item is listed in the concurrent list and no subjective clause, the state has the power to make a law on the subject. This is not an attempt to strengthen the states or to sustain center-periphery relationship but to tame legislative anarchy. Government is the key enabler of enforcement and implementation of law. In this case, states lack interest in implementing the la w because of their exposure to corruption and bad governance. The National Assembly haven covered the field on access to information; the State House of Assembly may well have to respect the same[42] by not making another law on the subject but can make supplementary regulations to aid ease of usage at the sub national.

The existence concurrent field means that there is room for administrative support by the States. The FOIA[43] has the covered the field and renders states law on access to information inoperative as it relates to the subject matter during the life span of the law. However, the state can make guidelines for the ease of implementation of the law. The constitution anticipates that both federal and state legislatures can enact laws in areas of concurrent jurisdiction, each pursuing its specific legislative competences and interests. However, if the constitution specifies or provides for the exercise of a right in a particular manner, no legislation can extend beyond that provision. The constitutional division of powers between the federal government and the constituent units is a key feature of a federal system. This division can take various forms, and often, the constitution specifies the exclusive competences of each level of government, leaving residual powers to the other. In the case of freedom of information, the constitution's provisions are quasi-federal, as states are not allowed

41. Bora Laskin (1960) Canadian Constitutional Law, Toronto: The Carswell Company Ltd. 1960 @ 98

42. Section 4 (5) of the Constitution of Federal Republic of Nigeria 1999

43. Freedom of information Act of 2011

to duplicate existing federal laws. The constitution and court decisions provide a framework for legislative jurisdiction.

Techniques for Division of Legislative Powers: A Source of Legislative Anarchy

The notion that the Freedom of Information Act (FOIA) can only affect states if adopted by the State Houses of Assembly contradicts our legal principles. When the National Assembly enacts a law under Item 4 of the Constitution, that law automatically applies to all federating states, even for matters within the concurrent legislative list. Typically, for items under this list, the National Assembly holds mutually exclusive powers, while State Houses of Assembly possess conditional legislative authority as outlined by the Constitution. Cletus Nweke examined the frameworks established by the 1999 Constitution and found that these frameworks did not resolve conflicts arising from concurrent legislative powers within a federal structure.[44] Instead, they facilitated a form of pragmatic federalism that has been shaped more by judicial interpretation than by the constitutional text itself. To navigate the challenges of legislative concurrency, states should focus on developing supplementary regulations or guidelines rather than duplicating existing laws. This approach enables states to align with federal legislation while adapting implementation to local needs. When an item is included in the concurrent list without a specific clause indicating federal supremacy, states retain the authority to legislate on that subject. This approach is intended not to enhance state power or sustain a center-periphery relationship but to manage legislative order effectively.

The Constitution's delimitation of the legislative schedule ensures that both federal and state governments operate within clearly defined areas of authority. Consequently, while some matters fall under the concurrent legislative list, this does not imply that federal and state powers overlap in every aspect. Rather, it establishes clear boundaries to prevent legislative conflicts and maintain orderly governance.

Legislative anarchy refers to a situation where there is a breakdown in the rule of law due to the absence of legislation, lack of implementation, or non-enforcement. It signifies instability in the governance of a country or organization, resulting in chaos. However, simply lacking legislation does not always lead to legislative anarchy unless it results in a breakdown of order. Legislative anarchy can arise from political polarization, institutional failure, social unrest, or an unclear division of legislative power. The Constitution empowers State Houses of Assembly to legislate on issues

44. See C. C Nweze, "Constitutional Adjudication For Democratic Consolidation In Nigeria: The Role Of The Supreme Court" A paper delivered on 16th Justice Idigbe Memorial Lecture held at University of Benin on 8th Nov. 2018 @ 43-44

in the concurrent legislative list without conflicting with the National Assembly. For example, while the National Assembly can make laws concerning voter registration and election procedures, State Houses of Assembly can legislate on similar issues for local government councils. However, if a federal law comprehensively covers a subject, any state law on the same subject becomes invalid.

This power-sharing arrangement ensures that both federal and state legislatures can enact laws on the same topics without conflict. It encourages cooperation among various levels of government by coordinating their legislative duties. This allows the federal government to establish a consistent legislative framework for national and subnational development. It is important for the state government to adapt a legislation that fits the diverse federal society. The frictions between federal and state legislative bodies are not uncommon, often stemming from the fear of dominance or ignorance of each other's powers. The Supreme Court has affirmed the division of powers in a true federation, stating that neither the Federation nor the States can impose extra burdens on each other. In a specific case, the Supreme Court ruled that each State House of Assembly has exclusive authority to make planning laws and regulations for the state.[45] The National Assembly cannot enact laws that go against the Constitution and impose responsibilities on a State. The Federal Capital Territory legislative arm has the authority to establish planning laws based on its residual powers. The issue of who has the power to legislate on Local Government Areas has been addressed by the apex court in the country.[46] The court has also determined the enacting power of the National Assembly over the Corrupt Practices and Other Related Offences Act, 2000.[47]

Historically, the dilemma of legislative jurisdiction was first raised in Nigeria in **Attorney General of Ogun State & 3 Ors v. Attorney General of the Federation**[48] where the Adaptation Order 1981 enacted by the President which modified the Public Order Act 1979 was considered. The said order was held to be an unlawful exercise of legislative power which does not reside in the President. A, state law which simply adds something to regulation of the concurrent matter without contradicting the federal statute in the field is valid and can operate concurrently with the relevant federal legislation.[49] This obfuscates the reality of the Nigeria's legislative constitutional framework like in some states in Nigeria.

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45. AG Lagos v AG Federation 2011) LPELR-7886 (CA)

46. A.G. Abia State v A.G Federation (2002) 6 NWLR (pt. 763) 264

47. Olafisoye (supra) 580

48. [1982] LLJR SC

49. Lefroy, A.H.F (1913) Canada's Federal System Toronto, 126

In Delta State, Freedom of Information Law, guarantees any information seeker, denied his/her request to first make a written complaint (pre action notice) to the Head of Service before a proper review process can commune. [50]Without this letter a proper review process cannot commence by this law and this is distant from the provisions of the FOIA. For Ekiti State, the Governor has control over the record as the request letter must first be attended to by the Governor before any action is taken in contrast with the provision of the law which assures head of public agency the duty to review applications.[51] The division of legislative power between the National Assembly and State House of Assembly is defined by the Constitution. The National Assembly has the authority to make laws on certain matters and the State House of Assembly can legislate on areas not covered by the National Assembly's laws.

The phrase "subject to" indicates that the power of the State House of Assembly is restricted in certain circumstances, and the National Assembly holds authority over certain matters. In cases where both levels of government have the power to make laws on the same subject, federal law prevails over state law. The Constitution provides for exclusive competences of each level of government and also leaves residual powers to the other. The principle of freedom of information is quasi-federal, and the Constitution and court decisions play a significant role in determining legislative jurisdiction. Under concurrent legislative powers, the state can make its own laws if there is no existing federal law on the subject. However, the Constitution sets the framework for national legislation and the state laws must not contradict federal laws. Overall, the Constitution defines the division of power between the federal government and the states, and it is essential to ensure that state laws do not conflict with federal laws.

One form of legislative anarchy arising from concurrency of legislative power is political gridlock. When power is divided among different branches or parties, it can lead to political stalemates and an inability to pass laws or make decisions. Another is Conflict of interests. Different legislative Houses may have competing interests, leading to contradictory legislation which can create confusion and chaos. Also, it leads to lack of clear authority. When power is divided, it can be unclear who has the final authority to make decisions, leading to a lack of accountability and a sense of anarchy. As in the case of EDOSACA, the legislative power on archives and public records by both the national and state legislative Houses exacerbated a participatory gap in governance leading to a breakdown in the usage of the law. However, it's important to note that the division of legislative power enhances diversity in the

50. Section 31 of the Freedom of Information Law of Delta State No. 5 of 2019

51. Section 5 of the Freedom of Information Law 2011 of Ekiti State

legislative process and reinforces checks and balances by preventing one level of law makers from becoming too powerful. The benefits can only be enjoyed if there is cooperation between federal and state governments in legislative making as there is need for clarity and consistency in the application of laws across different jurisdictions.

Concurrent Legislative Jurisdiction: Analysis of Canada, Kenya and the United States of America

Kenya is one of the model countries that has experimented with decentralization of power and function of government. The government abandoned the centralized system to embrace the government of devolution spearheaded by the Counties. It has a national government as well as county governments[52]. The devolution is between the national and county governments. Kenya was formerly a unitary and centralized government that structured devolution in 2010. Originally, the Independence Constitution of 1963 set up a system of regionalism, but in 1969, diffusion of power was disemboweled and substituted with a centralized government pattern. To return to the landmark centralized nation, the Constitution of the country was amended in 2010 and the 47 counties were strengthened. The counties were established as equal and interdependent organs, rather than as entities subordinate to the national government.[53] To address regional imbalances, the allocation of financing took the major stage in the 2010 Constitution. Kenya is an example of countries that have used centralization to promote a measure of local self-rule that gives sub-national governments meaningful authority over local matters.[54]

The 2010 Constitution sought to achieve these objectives by promoting the participation of more people in the governance of the country; ensuring a framework of equitable access to national resources; promoting inclusiveness of ethic and regional diversities to accommodating as many ethnic communities as well as safeguarding community rights.[55] The 2010 Constitution of Kenya guarantees that fifteen percent of all national revenues each financial year be allocated to county governments.[56] There is also a Revenue Fund established specifically for county

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52. Conrad M Bosire "Concurrency in the 2010 Kenya Constitution " in N.C Stytler (ed) (2017) Concurrency Powers in Federal Systems: Meaning, Making and Management, Brill Publication @ 261-278

53. Article 189(1) (a) of the 2010 Constitution states: "Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level. See also arts 6(2), 189(1)(b)-(c), Art 6(2) of the Constitution of 2010

54. James T Gathii and Harrison M Otieno, (supra) @ 599

55. Ibid

56. Article 203 (2) of the Kenya Constitution of 2010

governments, from which funds cannot be withdrawn except as authorized by parliament or an assembly.[57] The 2010 Constitution of Kenya provides a general scheme and sets a guideline for the management of concurrency of legislative powers. The legislative arm is made up bi-camera legislature alongside the County Assembly. The criteria for making laws in the County depend on whether the laws are incidental to the effective performance of the functions and exercise of the powers of the county government.[58] In Kenya, the central government legislates on both exclusive and concurrent lists. A law made by the central government on a concurrent list is executed by the central government. Matters outside the exclusive or concurrent list fall under the regional legislative competence exclusively, including rent control, probation services, town and country planning, registration of births, deaths, and marriages, as well as children and young persons, and adulteration of food. Kenya's devolution follows the South African model and has integrated devolution with autonomy to the counties and requires ongoing collaboration among national and county governments rather than competition.[59]

Concurrent powers are available in the Kenya Constitution and like Nigeria with some jurisdictional and definitional challenges. For agriculture and health,[60] the national government deals with both at the policy level and the counties deal with a myriad of functions under the head- agriculture'(crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal Disease control and fisheries)[61] and health services.[62] When national and county laws or policies on a concurrent power come into conflict, the national law or policy takes precedence.[63] This principle ensures uniformity and consistency in the application of laws across the country, allowing for a cohesive legal framework despite the presence of overlapping jurisdictional powers.

Assizes the clash of law, the service provides most times resent working with sub-national for the reason of low incentive and custom of pride associated with federal placement. How practical can the functionality under the cloud of concurrency be for the health sector? A good example is Makueni County in Kenya which initiated an ambitious experiment in the provision of universal health coverage for the county and sub-county hospitals. The residents were required to enroll by paying a

57. Art 207 (1) and 207(2) (Ibid)

58. Article 185 (2) (Ibid)

59. James T Gathii and Harrison M Otieno, (supra) @ 600

60. See Schedule 2 of the 2010 Constitution

61. Schedule 4 Part 1 Items 28-9 of the 2010 Constitution

62. Schedule 4 Part 2 Items 1-2 of the 2010 Constitution

63. Art 191 (2) of the 2010 Constitution

suscription fee of Ksh 500 (USD 5) per household annually to enjoy the benfits.[64] And it rode on the back of the national government's free primary healthcare policy and the national coverage provided by the National Health Insurance Fund (NHIF).[65] This is facilitated by the national government, including the provision of free treatment, in-patient care and ambulatory services, at the thirteen hospitals within the county, paid for by the county government.[66] The success witnessed in Makueni provides a good example of the uses of a situation-specific analysis of the benefits and challenges that are emerging from devolution, and how the principle of subsidiary is taking root within the Kenyan model of cooperative devolution.[67] The Kenya design reflects the cooperative model of devolution which requires the national and county governments to respect each other's functional and institutional integrity' information' and coordinating policies.'[68]

The most important institutional mechanism established by IGRA for conducting inter-governmental relations is the National and County Government Co-coordinating Summit and the Council of County Governors (CoG)[69] and the Council has been a very effective advocates of the interests of the countries vis-à-vis the national government.[70] The 2010 Constitution also requires that each level of government perform its functions and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level.[71] To make up for the likely dominance of national law in the counties, countries are represented in the national senate with powers mainly to legislate on matters concerning county government, particularly about county finances and elections.[72] In the case of Robern Gakuru & Ors v. Governor Kiambu County & 3 Others.[73]

Justice Odunga declared the Kiambu County Finance Act 2013 null and void, highlighting that it contravened constitutional provisions by imposing taxes and levies beyond the county government's authority. This ruling underscores the importance of adherence to constitutional limits on the powers of devolved governments. It en-

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64. Pius Maundu, 'Kibwana Launches Ambitious Free Healthcare Plan for Makueni Residents', Daily Nation (online), 16 September 2016 < https://www.nation.co.ke/counties/makueni/Makueni-county-to-offer-free-healthcare-to-residents/1183294-3383768-vwve2o/index.html

65. Patrick Gathara, "Devolved Healthcare: Makueni's Trailblazing Experiment in Providing Universal Health Coverage" The Elephant (Online) 11, Junaury 2018. www.theelephant.info/features/2018/01/11/devolved-healthcare-makuenis-trailblazing-experiment-in-providing-universal-health-coverage/

66. James T Gathii and Harrison M Otieno, (supra) @ 610

67. (Ibid) @ 611

68. Article 189 (1)(a)-(c) of the 2010 Constitution of Kenya

69. (Ibid) Article 19(1)

70. James T Gathii and Harrison M Otieno, (supra) @ 604

71. Article 189(1)(a) of the 2010 Constitution of Kenya

72. Art 109(4)-(5) (Ibid)

73. Petition No: 532 of 2013

sures that county governments operate within their legally defined competencies, preventing overreach and maintaining the integrity of the constitutional framework. In Nigeria, education falls under the concurrent legislative list, meaning both federal and state governments can legislate on the matter. However, federal laws provide a framework, while states have the authority to regulate specific aspects, such as technical education within their jurisdiction. This system allows for a division of responsibilities where federal laws set broad standards and state laws address local needs and conditions.

The Court of Appeal in Kenya examined how powers are distributed between the national and county governments, providing a critical interpretation of the Constitution's devolution principles. The court's guidance was essential in clarifying how constitutional and statutory provisions apply to county governance. This kind of judicial scrutiny helps reinforce the rule of law and ensures that county governments operate within their constitutional limits. The ruling emphasized the need for county governments to adhere strictly to constitutional and statutory provisions. It reinforced the principles of devolution by ensuring that county governments cannot exceed their constitutional mandates, which helps promote good governance, transparency, and accountability.

By clarifying the boundaries of county powers, the case contributes to a more stable and predictable legal environment for governance. The case serves as a precedent in Kenya's legal landscape, reinforcing the importance of constitutional compliance. It provides guidance for future cases and legislative actions, ensuring that county governments remain within their legal confines while upholding the principles of devolution. The case reinforced the principles of devolution, emphasizing that the county governments must adhere to constitutional and statutory requirements to uphold good governance.[74]

In the United States, Congress possesses the authority to regulate interstate commerce, thereby overriding any independent state legislative jurisdiction over the economy. Conversely, in Canada, the federal government's powers include regulating trade and commerce, criminal law, and enacting laws on matters not assigned to the provinces. The federal trade and commerce clause has been interpreted to encompass only national economic concern.[75] In Nigeria, the federal government legislates on marriage dissolution, akin to Canada's approach, while in the United States, this falls under state jurisdiction. In Canada, provincial legislatures handle

74. PN Waki; RH Nambuye; HM Okwengu, JJCA delivered the judgment on appeal in Civil Appeal No: 200 of 2014 judgment reported (2017) eKL. See http://kenylaw.org/caselaw/cases/view/137956

75. General Motors of Canada Ltd v National Leasing (1989) 1 SCR 641

laws related to marriage ceremonies.[76] Nigerian states, however, have the authority to regulate customary and Islamic marriages, as these are not specifically listed in the federal exclusive legislative powers, thereby falling under residual powers. Regarding trade and commerce, Nigeria's exclusive list encompasses interstate and international trade, including the inspection of exported produce.[77] However, the inspection of agricultural produce intended for distribution within Nigeria is a state responsibility, as it is neither covered by the exclusive nor concurrent legislative lists. According to the 1999 Constitution, state legislatures are empowered to enact laws concerning the industrial, commercial, or agricultural development of their states.[78] Unlike in Canada, where the central government cannot impose economic policies without provincial consent, the U.S. Congress wields the authority to regulate nearly all economic activities,[79] reflecting a more centralized approach to economic governance.

The architects of the U.S. Constitution envisaged federal law as the paramount authority, predicated on the assumption that its scope would be circumscribed. In contrast, the Canadian Constitution delineates substantial spheres of authority reserved for the provinces, ensuring that only provincial legislation may operate within these domains, thereby reinforcing the strength of federalism. The U.S. Tenth Amendment restricts states to powers not conferred upon the federal government, thereby constraining the scope of state authority. In the United States, the expansive interpretation of federal powers has rendered state powers considerably attenuated. Consequently, state legislation concerning archives and public records is contingent upon the residual legislative space available. If a state lacks an open government law and asserts that the National Assembly is encroaching upon its domain of public records and archives, it is akin to seeking a toothpick for a tooth that is absent.

The Drafting Committee on the Review of the Nigerian Constitution articulated that the federal structures of the USA, Canada, and Australia were established upon states relinquishing certain powers to a federal government for collective benefit. This approach contrasts with the creation of a federal system through devolution, a political experiment without historical precedent and fraught with inherent risks. In Canada, provincial powers include areas such as property and civil rights, and matters of a local or private nature. The division of federal and provincial powers is articulated in broad terms. Federations are founded on a constitutionally enshrined division of powers, empowering each level of government to exercise its authority

76. Field, M.A (supra) 108

77. Item 62 (a) & (c)of Part 1 of the 2nd Schedule to the 1999 Constitution

78. Item 18 of Part II of the 2nd Schedule to the 1999 Constitution

79. Field, M.A (Supra) 108

independently. In the Canadian model, the Access to Information Act is applicable solely to federal institutions. Canadian federalism is characterized by a clear demarcation of powers, yet federal laws enacted on subjects within provincial jurisdiction hold supremacy over provincial legislation. In Australia, states may enact legislation to further state objectives when federal laws are designed to advance federal purposes on concurrent subjects. Additionally, state legislation remains operative until superseded by subsequent federal laws, ensuring that state laws may become inapplicable when federal legislation takes precedence.

In the case of **Russell v The Queen**[80] the court was called to determine whether alcohol regulation was a matter of importance to the country as a whole, and therefore under federal jurisdiction or a local matter subject to provincial jurisdiction. In this case, the accused was convicted under the Act for selling alcohol. He appealed the decision on the ground that the law could best be legislated upon by the province. The Privy Council dismissed the appeal and held that "the declared object of the Parliament in passing the Act is that there should be uniform legislation in all the provinces to promote temperance in the Dominion. The Court added that "Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion".

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**[81] 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

80. 1882 UKPC 33 7 AC 829

81. (1896) UKPC 20

to the state legislative competence. In examining the test set out in Ontario Canada Temperance Federation, the Court found that the matter went beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole.[82] 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 also known as POGA power encompasses parliament's ability to respond to a national emergency and its power to adopt legislation that is of national concern.[83] The power should be applied in cases of emergency or exceptional circumstances.[84] No doubt foreign jurisdiction like Canada or United States retains a watertight compartment which was originally part of the ancient foundational democracy.

Recommendations

Concurrent legislative exercise within the framework of federalism seeks to unite various socio-political groups and fosters cooperation among different levels of government by coordinating their legislative duties and creating a consistent legislative framework for national and subnational development. State governments can enact laws concerning matters in concurrent legislative lists but where their laws are defined to be 'subject to' federal laws under the constitutional concurrency legislative powers; the state has no more than procedural duties. Irritatingly, State governments have sometimes delayed legislation on a subject, claiming that an existing federal Act does not apply to them. This stance, which allows states to consistently oppose the enforcement of federal law, is most irresponsible.

The Freedom of Information Act 2011 of Nigeria applies to states, and a state does not have to pass a similar law for it to benefit from it. When a state does not enact a corresponding law to maintain a uniform standard of transparency and accountability while a federal law on the same subject exists that promotes good governance and public interest, the courts are obligated to enforce the federal law. The absence of a law or a guideline on a particular subject on the concurrent legislative list by the state cannot prevent a federal law on that subject from being binding under the doctrine of covering the field. Summarily, federal law prevails in the absence of state

82. (Ibid) 218

83. See Re Anti-Inflation Act (1976) 2 SCR 373

84. Chief Justice Laskin in the lead judgment held that in the circumstance of the case, the federal parliament has power to legislate as there is an emergency. Justice Beetz in dissent consented that there must be exceptional circumstance to allow the federal law makers to intervene

legislation on a concurrent subject and the deliberate neglect of legislative duties by state governments cannot obstruct the federal government's authority to legislate for good governance and development. To achieve seamless acceptance and implementation of national laws by states, there must be clarity on legislative roles. The national assembly needs to amend the Constitution to define the roles and responsibilities of both the federation and its units. Under Kenya's system of cooperative devolution, the constitution vests more significant functions and powers such as defense, foreign affairs, security, police services, national economic, monetary policy and planning on the national government. The national government also has the function of National Referral health facilities (teaching hospitals), while the counties cover county health facilities and pharmacies, ambulance services, promotion of primary health care, veterinary services (excluding regulation of the profession), cemetery, crematoria and refuse removal, refuse dumps and solid waste disposal.

The Kenya model of application of concurrency legislative powers is backed with not only the constitution but also the Intergovernmental Relations Act of 2012 with the task of defining the framework of the institutional structures and mechanisms for consultation and cooperation between national and county governments and also provides a mechanism for the resolution of intergovernmental disputes. This is the only way both the federal and state laws remain relevant and effective in addressing concurrent policy areas and ensuring that state laws complement rather than contradict federal legislation. In a federal system where both Federal and State legislatures have the authority to legislate on the same subject, if federal law comprehensively addresses the topic, then any State law on that subject is invalid. Allowing simple duplication of legislative efforts seems inefficient, particularly when federal legislation deals with issues specific to state interests. The legislative powers of State Houses of Assembly are contingent upon the substantive powers of the National Assembly, which is designed to prevent conflicts between the two legislative bodies. Legislation concerning archives and public records is not a residual matter for individual states.

The concurrent jurisdiction allows for both legislative and administrative contributions by states. State Houses of Assembly can create procedural rules or guidelines for matters within their legislative scope. When the Constitution authorizes states to enact laws "subject to" federal laws, states are limited to supplementary legislation or duplicating existing federal laws. Given that the National Assembly has addressed the field of access to information, State Houses of Assembly should avoid enacting new laws on the topic and instead issue supplementary regulations to facilitate local implementation. Similarly, State Houses of Assembly can establish procedural

rules or guidelines for areas within their legislative purview, provided these are in compliance with federal laws. When the Constitution permits state legislation "subject to" federal law, states are restricted to enacting supplementary legislation or duplicating federal laws, with federal laws taking precedence. States should focus on creating supplementary regulations rather than re-enacting federal laws. State legislation remains valid as long as it complements federal laws. Under concurrent legislative powers, states may legislate in areas not covered by federal law, depending on the specific provisions of the Constitution. For instance, states have growing authority over local government elections, which are not regulated by federal law.

Public participation and advocacy are pivotal in fostering awareness, comprehension, and support for national legislation, thereby ensuring its acceptance among all stakeholders. There is an imperative need to amplify education and awareness concerning the advantages of national laws for both leaders and the general populace to facilitate widespread acceptance and effective implementation. Education and advocacy are crucial for ensuring compliance with the Freedom of Information Act (FOIA) and other federal statutes with extensive reach. First, state legislatures should be equipped with comprehensive training and resources that underscore the significance of harmonizing state laws with federal statutes or directly implementing such laws. Advocacy efforts should emphasize the value of compliance in achieving cohesive and effective governance, rather than promoting competition over legislative powers. Moreover, it is essential to fortify legislative accountability. The constitution should establish mechanisms to hold state legislatures accountable for their failure to enact requisite laws, ensuring that state-level non-compliance does not obstruct the enforcement of federal statutes. This framework will safeguard the integrity and efficacy of national laws.

FOI Counsel is a law group established primarily to provide legal assistance to NGOs and the media seeking for information, under the Freedom of Information Act 2011. We are also, the first Freedom of Information Act (FOIA) Liigation-specialized firm in Africa. As the demand for our services increased we billowed into four thematic areas of work and these are: FOI Advocacy & Litigation, Human Rights Litigation, Land reforms & rural development, Research & Policy Advocacy

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