THE POWER AND COMPETENCE OF STATES UNDER THE CONSTITUTION TO SET UP ENVIRONMENTAL AGENCIES IN NIGERIA

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INTRODUCTION

Constitution is the fundamental and organic law of a nation or state that establishes the institution and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties[3]. It refers to the document containing the substance of the law of the country. In its loose and abstract sense, it may mean, the system of laws, custom, and conventions that define the composition and powers of organs of the State, and regulate the relations of the various state organs to one another and to the private citizen.[4]

Prof. K. C. Wheare in analyzing constitutions noted thus:

> Constitutions may be classified in terms of the method by which the powers of government are distributed between the government of the whole country and any local government that exercises authority over parts of the country[5].

In the same way, Constitutions have been classified as federal or unitary[6]. In a Federal Constitution, the powers of government are divided between a government for the whole country and government for parts of the country in such a way that each government is legally independent within its sphere.[7]

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[3] B. Garner ED., *Black's Law Dictionary* Eight Edition (Thomson & West Publishers, 2012)

[4] Adeniyan O.S., *Sources of Laws, Rules, & Guidelines in Environmental Health,* (Environmental Health Watch 2012)

[5] Wheare K.C., *Modern Constitutions,* (Oxford Press) 2nd Edition, 1966

[6] Okoronkwo N., *The Odds Against True Federalism in Nigeria: A Critical Appraisal of the Constitution of the Federal Republic of Nigeria 1999* NJI law journal (2013)vol. 9 p.1

[7] Okoronkwo N., *The Odds Against True Federalism in Nigeria: A Critical Appraisal of the Constitution of the Federal Republic of Nigeria 1999* NJI law journal (2013)vol. 9 p.1

According to Ben Nwabueze[8],

> Federalism is an arrangement whereby powers of Government within a country are shared between a national, country-wide government and a number of regionalized (i.e. territorially localized) Governments in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others. Federalism is thus essentially an arrangement between governments, a constitutional device by which powers within a county are shared among two tiers of Government.

Hon. Justice Kayode Eso defines Federalism as

> An omnibus concept which connotes the sharing of the supreme legislative authority between the general or central government on one hand and the regional government on the other hand, in such a way that the two entities are coordinate yet sovereign and independent of each other in regards to the powers and functions which are vested in them by the constitution[9].

In Federalism therefore, laws made by a level of government without backing from the Constitution cannot pass constitutional muster. The courts must therefore declare such laws invalid. For as the American Supreme Court puts it in **BAILEY V. DREXEL FURNITURE COMPANY[10]**:

> It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of congress, dealing with subjects not entrusted to congress, but left or committed by the supreme law of the land to the control of the states

The Nigerian Constitution retains this principle of Federalism by effectively sharing the levels of government between the Federal Government and the State Governments[11]. To determine the competence of any level of government to make laws or set up agencies, an indebt look at

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[8] Nwabueze, B., 'Fe*deralism in Nigeria under the Presidential* Constitution' cited by the Supreme Court in HON. MINISTER FOR JUSTICE AND ATTORNEY-GENERAL OF FEDERATION v. HON. ATTORNEY-GENERAL OF LAGOS STATE (2013) LPELR-20974(SC) per GALADIMA JSC

[9] Kayode Eso *Enduring Democracy and Federalism in a new Democratic Nigeria* being a paper delivered in commemoration of the 60th year in active practice of Chief FRA Williams under the auspices of the Black Table Feb. 2004 p.7 cited in INNOCENT A. OJEFIA *THE NIGERIAN STATE AND THE NIGER DELTA QUESTION* A PAPER FOR THE 22ND ANNUAL CONFERENCE OF THE ASSOCIATION OF THIRD WORLD STUDIES, AMERICUS, GEORGIA, USA accessed on http://nigeriaworld.com/articles/2004/sep/071.html on 11/08/15

[10] 259 US (1922) 449 to 452cited by the Nigerian Supreme Court in ATTORNEY-GENERAL OF ABIA STATE & ORS V ATTORNEY-GENERAL OF THE FEDERATION & ORS (2006) 10-11 SCM 1 at 74

[11] Part II, Chapter 1 of CFRN 1999

constitutional and other legal principles embedded in the Nigerian Constitution is required. For as Professor Mike A. Ikhariale of Harvard Law School explains:

> Unlike in a dictatorship, a constitutional democracy is a limited political machine functioning within certain allowed and predictable parameters.[12]

The importance of the environment to human existence cannot be overemphasized. The quality of life is said to be enhanced by the quality of the environment.[13] In recognition of the importance of a good environment, the African Charter on Human and Peoples' Rights provides for the Right to a satisfactory environment in Article 24 thus:

> All peoples shall have the right to a general satisfactory environment favourable to their development [14]

Many authors have also argued that the right to a satisfactory environment is an offshoot of the right to life and is equally as important.[15] Giving more life to this reasoning, the Supreme Court of Nigeria in **ATTORNEY-GENERAL OF LAGOS STATE V. ATTORNEY-GENERAL OF THE FEDERATION**[16] opined as follows:

> The main object of section 20 of the Constitution Federal Republic of Nigeria is in my view to protect the external surrounding of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other conveniences

More so, in **JONAH GBEMRE V SPDC LTD & ORS.**,[17] the Federal High Court granted leave to the applicants to institute an action for an order enforcing the Fundamental Rights to Life and Human Dignity as provided by the Constitution[18]. The Court held that these constitutionally guaranteed rights inevitably include the right to clean, poison and pollution-free healthy environment.

Regardless of this importance of the environment, man in his legitimate quest to develop economically and industrially is involved with several activities that adversely affect the

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[12]Prof. Mike Ikhariale, *"Foundation of our Constitutional Democracy"* Accessed on June 28, 2015 from www.nigeriaworld.com/feature/publication/ikhariale/0818400.html

[13] Akeem Bello *Environmental Rights in Nigeria: issues, Problems and Prospects,* published in Igbinedion University Law Journal, Vol. 4, January 2006.

[14] Schedule to the African Charter on Human and Peoples' Rights(Ractification and Enforcement) Act LFN 2004

[15] R. R. Churchill *Environmental Rights in Existing Human Rights Treaties* in Human Rights Approach to Environmental Protection, Allen Boyle & Michael Anderson (Claredom Press, Oxford, 1996) p. 90,cited in Akeem Bello *Environmental Rights in Nigeria: issues, Problems and Prospects,* published in Igbinedion University Law Journal, Vol. 4, January 2006. See also Hakeem Ijaiya, O. T. Joseph *Environmental law and policies in Nigeria* Environmental Law Research Institute Synopsis of Laws and Regulations on the Environment in Nigeria <http://www.elri-ng.org/newsandrelease2.html>. Accessed on 25, July 2015.

[16] ATTORNEY-GENERAL OF LAGOS STATE v. ATTORNEY-GENERAL FEDERATION (2003) 12 NWLR (pt.833) 1 at 195

[17] (2005) unreported Suit No. FHC/B/CS/53/05.

[18] Section 33 and 34 of the Constitution.

environment. The difficult challenge confronting man therefore is how to meet legitimate desires to promote economic and industrial development without destroying the environment; that is, what the World Commission on Environment and Development (WCED) calls '*Sustainable Development'*[19]. This huge challenge explains the promulgation of laws to protect the environment and the creation of Agencies to enforce these laws.

The aim of this paper is to determine which level of government in Nigeria has this all-important function of legislating and managing the protection of the environment. The paper therefore:

1. Examines the constitutional provisions on the competence of the Federal and State government in Nigeria to make laws and the constitutional provisions on environmental laws;
2. Reviews theories that have been propounded by legal experts on the level of government that has this competence; and
3. Discusses some knotty issues that states introduce through their exercise of powers in creating environmental agencies especially the issue of taxes/levies relating to the environment and its enforcement.

THE NIGERIAN CONSTITUTION

In many ways, there is nothing peculiar to Nigerian Constitutional document as it simply restates the universal principle of supremacy of the Constitution, rule of law and constitutionalism, separation of powers among others[20].

According to the Supreme Court in **ABACHA & ORS. V. FAWEHINMI**[21]:

> The Constitution is the supreme law of the land; it is the grundnorm. Its supremacy has never been called to question in ordinary circumstances. For avoidance of doubt, the 1979 Constitution stated categorically in its chapter 1, Section 1(1) as follows: 1(1) "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federation Republic of Nigeria." For purposes of clarity, its Section 1(3) goes further to state: 1(3) "If any other law is inconsistent with the provision of this Constitution this Constitution shall prevail, and other law shall to the extent of the inconsistency be void.

This presupposes that all laws made in Nigeria must have their authority traced back to the Constitution, failure of which makes the law void. Nnaemeka-Agu JSC, made this clear when he stated in **KALU V. ODILI**[22] thus:

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[19] Olanrewaju Fagbohun *Mournfull Remedies, Endless Conflicts and Inconsistencies in Nigeria's quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability* 4th innugural Lecture of the National Institute of Advanced Legal Studies 2012

[20] Prof. Mike Ikhariale, *ibid* note 10

[21] (2000) LPELR-14(SC) Per ACHIKE, J.S.C (P. 90, paras. C-G)

[22] (1992) LPELR-1653(SC) at 104

> What I am constructing is the Constitution, an instrument of government under which laws are made and which will form the acid test for legislators and other functionaries of government.

On the test to determine the validity of a law, the Supreme Court further stated in **INEC V. MUSA**[23] that:

> The acknowledged supremacy of the Constitution and by which the validity of the impugned provisions will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised inconsistently with the Constitution. Where it is so exercised it is invalid to the extent of such inconsistency. Thirdly, where the Constitution has enacted exhaustively in respect of any situation, conduct, or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those Constitution in any way, directly or indirectly, unless, of course the Constitution itself as an attribute of its supremacy expressly so authorized.

Section 4 of the Nigerian Constitution provides for the legislative competence of the different levels of government as follows:

> 4. --(1)The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives.
> (2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.
> (3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.
> (4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say-
> a) Any matter in the concurrent legislative list set out in the first column of Part II of the second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
> b) Any matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

[23] (2003) LPELR-1515(SC) Per AYOOLA, J.S.C. (Pp.35-36, Paras.C-A)

(5) If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void.
(6) The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.
(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say-

a) Any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution;
b) Any matter in the Concurrent Legislative List set out in the first column of Part II of the second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
c) Any matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

(8) Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.
(9) Notwithstanding the foregoing provisions of this section, the National Assembly or a House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect.

By virtue of section 4(7) of CFRN, the House of Assembly of a State has power to make laws for the peace, order, and good government of the state or any part of the state with respect to

a. Any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule of this Constitution;
b. Any matter included in the concurrent Legislative List set out in the first column of part II of the Second Schedule to this constitution to the extent prescribed in the second column opposite thereto; and
c. Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

Section 4(7)(c) presupposes that the state legislature can competently make laws on issues not provided for in the Concurrent Legislative List. For example, the state legislative house can competently make laws based on powers derived from other constitutional provisions. The State Houses of Assembly is also competent to make laws on all issues not provided for in the Concurrent Legislative List or the Exclusive legislative List.

NIGERIAN LEGISLATION ON THE ENVIRONMENT

The basis of environmental policy in Nigeria is contained in the Constitution of the Federal Republic of Nigeria.

Section 20 of the Constitution provides thus:

"The state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria."

Some authors have argued that the legislative competence to make laws on environmental matters in Nigeria rest on the National Assembly[24]. They argue that the mention of fisheries in item 29 of part I of the second schedule of the Constitution settles the issue and grants power to make laws on the environment to the National Assembly. They further argue that the competence of the states to create agencies on the subject matter spurs from the provision of section 25 of the Defunct Federal Environmental Protection Agency Act cap 131 LFN 1990. The section provides that the President shall take necessary steps to encourage States and Local Government Councils to set up their own environmental protection bodies.

This argument however lacks foundation in the Constitution because a close look at item 29 part 1 of the second schedule to the Constitution waters down any merit in the argument. For as the Supreme Court rightly decided in **HON. MINISTER FOR JUSTICE AND ATTORNEY-GENERAL OF THE FEDERATION v. HON. ATTORNEY-GENERAL OF LAGOS STATE**[25] the mere mention of an aspect of an issue in the Exclusive Legislative List in part 1, second schedule of the Constitution does not therefore give exclusive legislative competence on that issue to the National Assembly.

In **HON. MINISTER FOR JUSTICE AND ATTORNEY-GENERAL OF FEDERATION v. HON. ATTORNEY-GENERAL OF LAGOS STATE,**[26] the Honorable Attorney-General of the Federation contended that since the Constitution grants legislative competence to the National Assembly concerning '*Touristic Traffic*' in item 60(d) of the second schedule to the Constitution, the National Assembly therefore has competence to legislate on all aspects of tourism. Rejecting this contention, the Supreme Court stated thus:

> In effect, the Federal Government lacks the Constitutional vires to make laws outside its legislative competence which are by implication residue matters for the State Assembly: the National Assembly cannot, in the exercise of its powers to enact some specific laws, take the liberty, to confer power or authority on the Federal Government or any of its agencies to engage in matters which ordinarily

[24] O. S. Adeniyan *Sources of Laws, Rules and Guidelines in Environmental Health* Environmental Health Watch April 2012 (tsarfarmuhalli.blogspot.com)
[25] (2013) LPELR-20974(SC)
[26] Supra note 23

> ought to be the responsibility of a State Government or its agencies. Such pretext cannot be allowed to enure to the Federal Government or its agencies so as to enable them encroach upon the exclusive constitutional authority conferred on a state under its residual legislative power: See ATTORNEY-GENERAL LAGOS STATE v. ATTORNEY-GENERAL FEDERATION (2003) 12 NWLR (pt.833) 1 at 195-196; ATTORNEY-GENERAL OGUN STATE v. ATTORNEY-GENERAL FEDERATION (1982) 3 NCLR 166 at 195 – 196

List of Acts Printed as Laws of the Federation of Nigeria further waters down this proposition. The list shows that the authority for the laws on the environment made by the National Assembly[27] is derived from item 67 of the Exclusive Legislative List.[28]

Item 67 provides thus:

> *Any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitution*[29]

Some other legal writers argue that since the issue of environment is not provided in the Exclusive Legislative List nor in the Concurrent Legislative List, it means that the issue rests in the '*residual list'*[30] and the power to legislate on it will therefore be exclusively on the state and the local government[31].

However, Prof. Fagbohun explains that the power of the States to make laws on the environment is derivable from section 4(7) of the Constitution and that of the Local Government is derivable from Schedule 4 of the Constitution. He stated that the implication is that all tiers of government can legislate on the environment as an offshoot of whatever powers it has to legislate on any issue from the Constitution.[32] For example, since the Federal Government by virtue of item 29 of the Part 1 in Schedule 2 of the Constitution can legislate on fishing and fisheries other than those in inland waters, this means it can competently make legislation on the environment concerning that particular issue. In addition, since the Local Government council has legislative competence to regulate abattoirs and markets, it can competently make laws in that regard as it concerns the environment. More so, since state Government can competently make laws with respect to town planning, it can competently make such laws or create agencies that carry out the environmental issues involved in town planning.

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[27] The NASREA Act cap N164 LFN 2004 and the EIA E12 LFN 2004
[28] See page ixxxii & ixxxviii of LFN 2004 Vol. 1
[29] This provision conforms with the theory that the National Assembly's power to make laws on the environment does not emanate directly from the Legislative Lists but from another provision in the Constitution.
[30] This list is not mentioned anywhere in the Constitution, but is used to denote issues outside the Concurrent and Exclusive Legislative List. *A.G. of Ogun State v A.-G. of the Federation, (2000) 2 WRN 52 at p. to 57*
[31] Olanrewaju Fagbohun(ibid) at page 32,
[32] Olanrewaju Fagbohun(ibid) at page 32 & 33

The learned Professor argues that this is the basis for legislation on the subject by all levels of Nigerian Government. He explains that this approach is used because there exists environmental issues that require the '*Federal Might*' for effective policing and there exists other environmental issues that are peculiar to certain local areas, which need not be of concern to the federal legislative body. He also explains that this approach reduces friction that will arise in interpreting the extent of legislative competent of a level of government generally and the duty given on environmental issues.[33]

Contributing to this idea, Hakeem Ijaiya, O. T. Joseph stated thus: [34]

> The federating units constitute the environmental theatre where the "substantial degree of activities" are conducted. They play significant roles in the enforcement of environmental laws.

This theory was affirmed by the Abia State High Court in **JUDE NWABUZOR & 24 ORS V NNAEMEKA ORJI & 3 ORS[35]. T**he Court in this case confirmed the competence of the Local Government Council to legislate on sewage and waste disposal in line with item 1(h) of the fourth schedule to the Constitution.

The same Court had earlier in **CHRINAN INVESTMENT LIMITED(SUING ON BEHALF OF IPMAN ABA BRANCH) V. ABIA STATE ENVIRONMENTAL PROTECTION AGENCY AND HON. ATTORNEY-GENERAL AND COMMISSIONER FOR JUSTICE ABIA STATE[36]** declared some parts of the Abia State Basic Environmental Law, 2004 unconstitutional because they were inconsistent with Section 7 and schedule 4 of the Constitution. The Court also declared that:

> The constitutional responsibility of carrying out the function of the refuse and sewage disposal resides in the Local Government Council and not in Abia State Government.

As stated earlier, the Constitution at section 20 Chapter 2 provides for the environment. Although writers and some legal commenters have insisted on calling the provisions of Chapter 2 '*Rights*'[37], largely due to the history of some of the provisions in that chapter, the chapter provides for the '*Fundamental Objectives and Directive Principles of State Policy'*.

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[33] Olanrewaju Fagbohun(ibid) at page 32 & 33

[34] *Rethinking Environmental Law Enforcement in Nigeria.* http://www.scirp.org/journal/blr accessed on 25/07/2015

[35] (UNREPORTED) SUIT NO: A/194/2011 delivered on January 22, 2013.

[36] (UNREPORTED) SUIT NO H8B/10/2008 delivered on July 22, 2008

[37] Ese Malemi *The Nigerian Constitutional Law* Lagos Princeton Publishing Company, 2006
Ironically, the provisions of the chapter confers no rights. The word 'Right' is used 3 times in the Chapter, that is in sec. 15(3)(b), 17(2)(a) and 24(c) to provide for state duty to integrate Nigerians by giving full residential rights, encouraging equality of rights and a duty on citizens to respect other citizens' rights respectively.

According to Ese Malemi[38]

> The objectives and principles enumerated in this Chapter are the fundamental objectives, principles and manifesto on which Nigeria as a nation is to be built … which are to guide and direct the actions of government, its agencies and every person in the Country

Section 13 of the Constitution makes the observation of these Objectives and Directive principles the *'duty'* and *'responsibility*' of all organs of government, and all authorities and persons, exercising legislative, executive or judicial powers. In the main, the provisions are responsibilities and functions that government must strive to achieve.

We have had write-ups on whether Nigerians should enjoy these provisions as '*rights'* as is guaranteed under some international charters[39] and conventions[40]. However, section 6(6) (c) of the Constitution says that except the Constitution otherwise provides, no legal action can be carried out to determine whether a provision of Chapter two of the Constitution was complied with in carrying out state functions by any authority. This therefore means that although these responsibilities are provided for in the constitution, they remain unenforceable except a provision of the constitution makes them enforceable.

The court had in the case of **OKOGIE V. ATTORNEY-GENERAL LAGOS STATE[41]** propounded that although the provisions of chapter 2 of the Constitution are generally unenforceable, the provision can otherwise be enforced if the legislature subsequently makes a law whereby government effectively assume the responsibility provided in Chapter 2 of the Constitution. Pursuant to this reasoning, the Federal Character Act has been enacted in line with Section 14(3) of the Constitution and Federal Characters Commission was established to carry out the function of enforcing the law. Independent Corrupt Practices Commissions Act was also enacted to enforce the responsibility enshrined in section 15(5) of the Constitution[42], Section 15 of the Child Rights Act provides for free and compulsory primary education in line with section 18(3)(a) of the Constitution[43].

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[38] Supra note 33 pg. 204

[39] Notably African Charter on Human and Peoples Rights 1981

[40] DONGBAN-MENSEM, J.C.A echoed this view ETI-OSA LOCAL GOVERNMENT V. MR. RUFUS JEGEDE & ANOR (2007) LPELR-8464(CA) P. 20, paras. A-E, see also Prof. C. A. Odinkalu, *Back to the Future: The Imparative of Prioritizing for the Protection of Human Rights in Africa (2003)* in Journal of African Law 237 at 1, Dr. J. A. Dada *Human Rights under the Nigerian Constitution: Issues and Problems* in International Journal of Humanities and Social Sciences Vol. 2 No. 12 June 2012

[41] (1981)INCLR 218 cited in UKAEGBU V. ATTORNEY-GENERAL OF IMO STATE (1983) LPELR-3339(SC)

[42] See ATTORNEY-GENERAL OF ONDO STATE V ATTORNEY-GENERAL OF FEDERATION AND 35 ORS(2002) 9SCM P.1

[43] Twenty-six states of the Federation have reportedly adopted the Child Rights Act as a Law of their States, thereby making it enforceable in those states. Reported on Nigerian Television Authority Newsline of 21/05/2015.

The Supreme Court explained in **ATTORNEY-GENERAL OF LAGOS STATE V ATTORNEY-GENERAL OF FEDERATION & 35 ORS**[44] that section 20 of the Constitution is the foundation for the legislative competence of the Federal Government to legislate on the environment. In the words of the Court, *"Although S. 20 of the 1999 Constitution gives the National Assembly the legislative jurisdiction on environment generally…"*

The Supreme Court restated the provision of item 60(a) of the Exclusive Legislative List to the effect that the Federal Government has the exclusive legislative competence to *'establish authorities for the Federation or any part thereof to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'*

This interpretation leads us to seek the interpretation of *'State'* in Chapter 2 of the Constitution.

MEANING OF "STATE" UNDER CHAPTER 2 OF THE CONSTITUTION

In interpreting section 318 of the Constitution, the Supreme Court in **ATTORNEY-GENERAL ONDO STATE V. ATTORNEY-GENERAL OF THE FEDERATION**[45] explained that *'state'* in relation to Chapter 2 of the Constitution means the Federal Government, the State Governments, and the Local Government Councils.[46] They stated in **ATTORNEY-GENERAL OF LAGOS STATE V THE ATTORNEY-GENERAL OF THE FEDERATION & ORS** that:

> Also the word "State" in section 20 does not mean Federal Government alone but according to S. 13 applies to "all organs of government and all authorities and persons exercising legislative, executive or judicial powers," and makes no distinction between Federal, State or Local Government as component parts of the Federation. See also S. 318(2) of the 1999 Constitution of the definition of "State".[47]

The Court explained it further thus:

> The word "State" is defined in section 318 subsection (1) of the 1999 Constitution and has been held by this court to mean "all the three tiers of government, namely, the Federal Government, State Government and Local Government[48]

This presupposes that the responsibility provided in Chapter 2 of the Constitution, including section 20 of the Constitution, which provides for environmental safety responsibilities, rests in the State Government, in the Local Government and in the Federal Government. The States

[44] (2003)9SCM 1 per Kalago JSC pp 105-106
[45] ATTORNEY-GENERAL OF ONDO STATE v. ATTORNEY-GENERAL OF THE FEDERATION & ORS (2002) LPELR-623(SC)
[46] See also ATTORNEY-GENERAL OF LAGOS STATE V. THE ATTORNEY-GENERAL OF THE FEDERATION & ORS. (2003) LPELR-620(SC)
[47] Supra note 42 Per Kalago JSC at p. 106
[48] Per UWAIS, C.J.N (P. 121, paras. B-C)

therefore are competent to legislate on the environment in carrying out the responsibility provided for in section 20 of the Constitution, subject only to overriding legal principle of covering the field.[49]

This conclusion raises two challenges,

1. Whether the States and Local Government Councils will not be violating the exclusive legislative competence of the Federal Government [item 60(a)] if it makes legislation or creates bodies to perform the responsibilities reposed on them (States and Local Government Council) by Chapter 2 of the Constitution.
2. The restriction on such competence by the doctrine of 'Covering the Field'.

ITEM 60(A) PART 1 OF THE SECOND SCHEDULE OF THE CONSTITUTION

A review of item 60(a) of the Exclusive Legislative List seems to suggest that the National Assembly has the exclusive competence to establish *authorities* that will promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution, thereby striping the State Legislature any power to create such bodies or make such regulations. The item provides thus:

> *60. The establishment and regulation of authorities for the Federation or any part thereof –*
>
> *a. To promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution*[50]

Notwithstanding this seeming clear provision, the Supreme Court concluded the matter in these words as follows:[51]

> It has been argued by the plaintiff that the reference to "state" in section 15 (5) can be ascertained by reference to the definition in section 318 subsection (1) of the constitution. The latter section provides that the word "when used other than in relation to one of the component parts of the federation, includes government." The same section of the Constitution has defined "government" to include the government of the federation, or of any state, or of a local government council or any person who exercises power or authority on its behalf." Going by these definitions the directive under section 15 subsection (5) of the constitution will apply to all the three tiers of government, namely, the federal government, state government and local government. In that case the power to legislate in order to prohibit corrupt practices and abuse of power is concurrent and can be exercised

[49] See MUSA V INEC (2003) LPELR-1515(SC). The Doctrine of 'Covering the Field' is discussed in full below
[50] Item 60(a) Exclusive Legislative List, contained in Part 1, Second Schedule to the Constitution
[51] ATTORNEY-GENERAL OF ONDO STATE v. ATTORNEY-GENERAL OF THE FEDERATION & ORS (2002) LPELR-623(SC) Per UWAIS, C.J.N. (P. 55, paras. B-F)

by the federal and state governments by virtue of the provisions of section 4 subsections (2), (4) (b) and (7) (c) of the constitution.[52]

This interpretation by the Supreme Court settles this issue. This shows that even though the Constitution gives the responsibility to create bodies that will administer the Chapter 2 of the Constitution to the National Assembly, the provision does not prohibit the State House of Assembly from legislating on those issues in line with States responsibility under chapter 2 of the Constitution. It is logical therefore to conclude that the State Assemblies can create bodies that will carry out steps towards executing its functions under Chapter 2 of the Constitution.

PRINCIPLE OF COVERING THE FIELD

This principle implies that once the National Assembly competently makes a law that is intended to operate in the whole federation, and the law sufficiently provides for an issue, whatever law made by the State House of Assembly on that issue becomes ineffective. Section 4(5) of the Constitution provides that such laws by the State House of Assembly that is inconsistent with a law validly made by the National Assembly will be void to the extent of its inconsistency.

In his exposition of the doctrine of covering the field Dixon J. in the case of **O'SULLIVEN V. NOARLUNGA MEAT LTD[53]**, posited that:

> The 'inconsistency' does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of paramount legislature to express by its enactment, completely exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a state to govern the same conduct or matter.

The Supreme Court in **HON. MINISTER FOR JUSTICE AND ATTORNEY-GENERAL OF FEDERATION v. HON. ATTORNEY-GENERAL OF LAGOS STATE [54]** sufficiently explained this doctrine thus:

> My lords, some safeguards may be deciphered from earlier cases decided by this Court in determining the relationship between a Federal enactment and State Government's enactment where both seem to legislate on same subject matter.
> (i) In the case of Federal Act covering the field, a State Law/enactment will not be void for competing with or supplanting the provisions of

[52] Note that Section 15 of the Constitution is a provision on Fundamental Objectives and Directive Principles contained in the Constitution.
[53] 1957 A.C.I. cited by Nigerian Supreme Court in HON. MINISTER FOR JUSTICE AND ATTORNEY-GENERAL OF FEDERATION v. HON. ATTORNEY-GENERAL OF LAGOS STATE (2013) LPELR-20974(SC)
[54] Supra per I. T. MUHAMMAD, J.S.C. (Pp. 96-103, paras. A-G)

the Constitution. Such a law will only be inoperative or be kept in abeyance or suspended. INEC v. MUSA (Supra).

(ii) The Constitution may, sometimes, allow the National Assembly or even State House of Assembly to enact a Law in addition to what the Constitution has provided for. In that case, the legislature concerned (State or Federal) must prove that in enacting those additional provisions, it derives it authority from the Constitution. See: INEC v. MUSA (Supra).

(iii) Minute details are not to be necessarily found in the Constitution. The Constitution provides outlines, leaving the filling-up of the gap to be deduced. This means that Federal or State enactments can be made to fill in some provisions in those outlines. See: DIRECTOR STATE SECURITY SERVICE (SSS) & ANOR. V. AGBAKOBA (1999) 3 NWLR (part 593) 314 at page 357.

(iv) Except where a State Law is inconsistent with a Federal Act (in which case it will be void) that Law can compete with a Federal Act and once not in conflict therewith, that State law will only be in abeyance pending when the Federal Act/enactment is repealed.

(v) A Federal Act does not automatically apply to any or every situation to abrogate a State Law. The aims and objectives of the Federal Act must be exactly the same and not merely alike See: CHIKE V. IFEMELUDIKE (1997) 11 NWLR (part 529) 390 at page 403. [55]

Therefore, to determine whether the States have competence under the Constitution to set up environmental agencies in Nigeria, a close look must be made to the existing laws made by the National Assembly on the environment.

The following are some of the legislation made by the National Assembly with regards to the environment.

a. ENVIRONMENTAL IMPACT ASSESSMENT ACT, CAP E12 LFN 2004

This Act provides for the assessment of the potential negative impacts public or private projects are likely to have on the environment[56]. It requires written applications to be submitted to the Agency before embarking on projects for their environmental assessment to determine approval[57]. It also creates a legal liability for contravention of any provision of the law.[58]

[55] See also MUSA V INEC (2003) 1SCM 61
[56] See Section 2(1) EIA Act, Cap E12, LFN 2004.
[57] See Section 2(4) EIA Act, Cap E12, LFN 2004. The '*Agency*' is the defunct Federal Environmental Protection Agency. The Federal Ministry in practice now handles the Application for the Federal Government while the State Environmental Agencies handle the one for the States.
[58] Section 60 EIA Act, Cap E12, LFN 2004.

b. NATIONAL ENVIRONMENTAL STANDARDS AND REGULATIONS ENFORCEMENT AGENCY (NASREA) ACT CAP. N 164 LFN 2004

This is administered by the Federal Ministry of Environment to protect and promote the sustainable development of the environment and its natural resources; it is also referred to as "the agency". It is the major federal body charged with the protection of Nigeria's environment. It is an embodiment of laws and regulations focused on the protection and development of the environment, conservation and sustainable development of Nigeria's natural resources as well as environmental technology.

It provides authority to ensure compliance with environmental laws, local and international, on environmental sanitation and pollution prevention and control through monitory and regulatory measures[59].

The agency makes and reviews regulations on air and water quality, effluent limitations, control of harmful substances and other forms of environmental pollution and sanitation[60].

The agency also prohibits, without lawful authority, the discharge of hazardous substances into the environment[61].

The law has no restrictions on the State Governments for the creation of State Environmental Agencies. In fact, The National Environmental Standards and Regulations Enforcement Agency (NASREA) Act seems to encourage the establishment of such bodies at the Local Governments and States. The Act provides for collaboration between the NASREA and '*Appropriate Authorities*'. Section 37 of the Act defines Appropriate Authorities as "*any governmental agency which has jurisdiction over the land or water affected by the pollution or any government agency which ordinarily has jurisdiction or any government over the operation which led to the pollution"*

In addition, Regulations made by the Minister of Environment, by the power conferred to make such regulations by virtue of section 34 of the Act, give States and Local Governments duties to carry on in enforcement of the Act. [62]

c. HUMAN WASTES(SPECIAL CRIMINAL PROVISIONS) ACT CAP H1 LFN 2004

Since the koko incident of 1988, the dumping of harmful wastes in Nigeria has been prohibited.[63] This Act prohibits, without lawful authority, the carrying, dumping or depositing of harmful wastes in the air, land, or waters of Nigeria[64].

[59] See Section 7 of the 2007 National Environmental Standards and Regulation Enforcement Agency (NESREA) Act.
[60] See Section 8(1) (k) of the 2007 NESREA Act.
[61] Section 27 of the 2007 NESREA Act.
[62] See Regulations 5&6 of the National Environmental (Wetlands, River Banks and Lake Shores) Regulations, 2009

It provides for punishment of life imprisonment for offenders as well as the forfeiture of land or anything used to commit the offence. Offenders are also liable to persons who have suffered injury as a result of his offending act.

d. Criminal Code Act (sections 243-248) Cap. 38 LFN 2004[65]
e. African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap 9 LFN 2004 (Article 24 of the Charter establishes Right to a general satisfactory environment)
f. Water Resources Act Cap W2 LFN 2004
g. Mineral and Mining Act Cap M12 LFN 2004
h. Petroleum Act Cap. P10 LFN 2004 ETC

However, to determine whether the laws made by the State Houses of Assembly does not violate these laws made by the National Assembly, a sample review of some of the State Laws creating environmental agencies is required.

i. ABIA STATE BASIC ENVIRONMENTAL LAW, CAP. 5 LAWS OF ABIA STATE OF NIGERIA 2005

Section 6 of this Law creates the Abia State Environmental Protection Agency (ASEPA) as a parastatal under the Abia State Ministry of Environment and Solid Mineral Resources. The Law gives power and several functions to the agency.

Interestingly however, Section 27 of the Law provides that all industries in Abia State shall have Environmental Impact Assessment certificate and the Law stated the fees to be paid for the Impact Assessment. This provision in effect fulfils the provisions of the Environmental Impact Assessment Act, Cap E12 LFN 2004.
Other provisions like abatement of nuisance, licenses for sinking of borehole and environmental health do not come in conflict with the provisions of any federal legislation.

The Abia State High Court in **CHRINAN INVESTMENT LIMITED(SUING ON BEHALF OF IPMAN ABA BRANCH) V. ABIA STATE ENVIRONMENTAL PROTECTION AGENCY AND HON. ATTORNEY-GENERAL AND COMMISSIONER FOR JUSTICE ABIA STATE[66]** however declared some parts of this law unconstitutional for being inconsistent with section 7 and schedule 4 of the Constitution.

[63] Hakeem Ijaiya, O. T. Joseph *ibid* note 13.
[64] Section 6 of the Human Waste (Special Criminal Provisions) Act, Cap H1 LFN 2004
[65]This is a Federal and State Enactment depending on competence of each level to enact it.
[66] Supra note 36

j. ABIA STATE ENVIRONMENTAL PROTECTION AGENCY LAW, CAP. 11 LAWS OF ABIA STATE OF NIGERIA 2005

Section 3 of this law also establishes the Abia State Environmental Protection Agency and gives it powers/functions. This law among others gives the Agency power to provide for guidelines for Environmental Impact Assessment.

The law also provides for the Technical committee of ASEPA of which a representative of the Federal Government Ministry of Environment is a member.

The Law further provides an environmental standard for the state, including issues on Water quality, solid waste, and management of toxic waste among others.

The Abia State High Court in **JUDE NWABUZOR & 24 ORS V NNAEMEKA ORJI & 3 ORS**[67] state that this law does not empower the Agency to do the job of sewage and waste disposal which is the constitutional responsibility of the Local Government Council.

k. KWARA STATE ENVIRONMENTAL PROTECTION AGENCY LAW[68]

This agency carries out research and development activity for environmental protection to educate the public on the types of disposal methods acceptable by the State Government for domestic and industrial wastes among others

l. ENVIRONMENTAL POLLUTION CONTROL LAW OF LAGOS STATE

Section 12 of this law makes it an offence to cause or permit a discharge of raw untreated human waste into any public drain or watercourse or onto any land or water.[69]

m. LAGOS STATE ENVIRONMENTAL PROTECTION AGENCY LAW 1996

Section 1 of this Law establishes the Lagos State Environmental Protection Agency. The agency has power and functions to among others, help in formulating policies for Lagos State Government, setting standard for environmental managemernt of Lagos State and collaborating with the Federal, State and Local Government and other statutory organization on issues relating to environmental protection.

[67] Supra note 35
[68] Cap K16 Laws of Kwara State 1992 cited in Hakeem Ijaiya, O. T. Joseph *Rethinking Environmental Law Enforcement in Nigeria.* http://www.scirp.org/journal/blr accessed on 25/07/2015
[69] Hakeem Ijaiya, O. T. Joseph *ibid* note 62

n. ENVIRONMENTAL SANITATION LAW CAP E5 LAWS OF LAGOS 2003

This law is titled as a:

> *A law to provide for Environmental Sanitation in Lagos State, to establish the Environmental Sanitation Corps and for connected purposes*[70]

Section 30 of the law creates Environmental Sanitation Corps. The law generally provides for sanitation standards in Lagos State and punishment for acts that are derogatory to the sanitation of Lagos State.

This law has also withstood a legal attack at the Lagos State High Court.

In **AGBODEMU ISHOLA MUSBAU & 9 ORS V. LAGOS STATE ENVIRONMENTAL SANITATION ENFORCEMENT AGENCY & 3 OTHERS,**[71] the Applicants applied to the Court for enforcement of their fundamental Rights. They contended that the Respondents have marked their houses for demolition in accordance with the Environmental Sanitation Law.

The Court dismissed their application and stated that the Lagos State Environmental Sanitation Enforcement Agency has legal power to issue abatement notice as it did and also has power to demolish structures in line with section 6 of the law. The Court stated that for the Applicant to succeed in his case, he must show that the Agency breached the provisions of the Environmental Sanitation Law or failed to follow the process prescribed by the Law before demolition of their houses or before issuing the Notice of Abatement as it did in this case.

In the case of **ADEGBORUWA V LAGOS STATE GOVERNMENT & OTHERS** (unreported)[72] the Federal High Court Lagos division, presided by Justice Mohammed Idris, on March 16, 2015 nullified the monthly environmental sanitation policy of the Lagos State government which restricts movement of residents for three hours.

The court held that there is no law in force in Lagos State by which any resident could be kept indoors compulsorily.

In the suit filed by Ebun-Olu Adegboruwa against the Inspector-General of Police and the Lagos State Government challenging the restriction of human movement on the last Saturday of every month for the purpose of observing environmental sanitation, the court held that there is no law in force in Lagos State by which any resident could be kept indoors compulsorily. The court

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[70] Preamble to the Environmental Sanitation Law Cap. E5 2005

[71] (Unreported) Suit No. M/710/2011 delivered on 5/3/2013

[72] See *Vanguard* Newspaper, March 16, 2015- "Court stops Fashola, LASG from banning movement on Environmental Sanitation Day", http://www.vanguardngr.com/2015/03/court-stops-fashola-lasg-from-banning-movement-on-environmental-sanitation-day/ accessed on 18th August 2015; http://www.bellanaija.com/2015/04/17/environmental-sanitation-court-rejects-movement-restriction-order/ accessed on 24/07/15

stated that Section 39 of the Environmental Sanitation Law 2000 of Lagos State, which the respondents claimed to empower the Commissioner for the Environment to make regulations, could not be the basis of restricting human movement on Saturdays, as no regulation in force has indeed been made for that purpose.

The court was quoted to have said thus:

> I have no doubt that the restrictions imposed on the movement of persons and sanctions meted out to those who breached them are clearly not supported by any law and unjustified. I must state, loud and clear, that the environmental sanitation exercise is not in itself unlawful, but what is unlawful and unconstitutional is the restriction imposed by the respondents during the exercise.[73]

This decision of the Federal High Court does not challenge the law in anyway, but impliedly supports its constitutionality. The court merely declared the restriction during the Monthly sanitation exercise illegal because the Lagos State Environmental Sanitation Law does not back it.

The judge said the Constitution of the Federal Republic of Nigeria grants freedom of movement to every citizen, and as such, freedom cannot be taken away by executive proclamation in the absence of any law to that effect.

o. CRIMINAL LAW OF LAGOS STATE 2011[74]

The Lagos State House of Assembly made this law. The provisions of the law with relation to the Environment and issues on the environment are exactly the same provision in the Criminal Code Act and therefore poses no conflict.[75]

p. ABUJA ENVIRONMENTAL PROTECTION BOARD ACT 1997[76]

It should also be noted that the National Assembly in exercise of its functions under section 299 of the Constitution created the Abuja Environmental Board. According to the AEPB website,

> *The Abuja Environmental Protection Board was created pursuant to the AEPB Act of 1997 with the objectives of achieving sustainable development in the territory and shall: Secure the quality of environment adequate for the health and well being of the residents of the territory. Conserve and use the environment and its natural resources for the benefit of the territory.*

[73] http://www.bellanaija.com/2015/04/17/environmental-sanitation-court-rejects-movement-restriction-order/ accessed on 24/07/15

[74] See also the Criminal Code Law Cap. 80 The Laws of Abia State of Nigeria 2005

[75] Note that according to section 2 of the Criminal Code Act, the Act applies as a State Law except on issues that are within the legislative competence of the Federal Government. Therefore, since the National Assembly is competent to make laws on environmental protection the criminal code will on that issue become a Federal Enactment.

[76] If there is any need to inquire to the intention of the legislators on extensive provision in environmental law, this Act shows that the intention is not to provide exhaustively on the issue.

Minimize the impact of physical development on the ecosystems of the territory. Raise public awareness and promote understanding of essential linkages between environment and development within the territory; and Co-operate with the Federal Ministry Of Environment and such other states environmental protection agencies to achieve effective prevention of and abatement of trans-boundary movement of waste.[77]

It is clear then that the state laws, most times, enforces the laws made by the National Assemble and the provisions poses no conflict with such laws made by the National Assembly.

LEGALITY OF TAXES/LEVIES IMPOSED BY STATE LAWS ON SANITATION/ENVIRONMENT AND COMPETENCE OF DIFFERENT COURTS TO ENFORCE SUCH TAXES/LEVIES

The basic problem with State Laws on sanitation is parts of the law that provide for taxes and levies. There are also issues on competence of different courts to recover the taxes imposed by State Environmental Laws.

The Supreme Court settled the issue on competence of any level of government to impose tax in the case of **ATTORNEY-GENERAL OF OGUN STATE V. ABERUAGBA**[78]

The issue in the case was the Sales Tax law of Ogun State, which imposed tax and levies on goods sold in the State. The Respondent in the matter challenged the competence of the Ogun state house of Assembly to impose such tax and contended that the imposition of tax on interstate goods was in the exclusive legislative competence of the Federal Government and that the State Legislative Body cannot make laws on the issue.

Resolving the issue of competence of any level of Government to impose tax on any matter, the Supreme Court per M. BELLO, J.S.C stated that:

> By virtue of section 4, section 150 and item D of Part II of the Second Schedule to the constitution the Federation has the power to impose tax on any of the matters in the Exclusive and Concurrent lists. Similarly, pursuant to section 4 and item D9 of Part II of the Second Schedule, which provides:
>
> *"9. A House of Assembly may, subject to such conditions as it may prescribe, make provisions for the collection of any tax, fee or rate....."*
> a State has the power to impose tax on all matters in the Concurrent List and residuary matters. However, it must be noted that the taxing power of a State over the concurrent matters is subject to the rule of inconsistency under section 4(5)

[77] http://aepb.fcta.gov.ng/?AspxAutoDetectCookieSupport=1 accessed on 24/7/2015
[78] (1985) LPELR-3164(SC)

> and the doctrine of covering the field, which I have stated at the beginning of this judgment.
> It is axiomatic that in the absence of any constitutional provision, express or implied, to the contrary the respective taxing power of the Federation and of a State includes sales taxing power. Accordingly, the Federation is entitled to levy sale tax on any saleable matters within its competence. A state can also do the same within its competence. It must, however, be emphasized that it is not within the competence of a State:
> (1) to make sales tax law affecting any of the matters in the Exclusive Legislative List; or
> (2) to make any sales tax law in the Concurrent Legislative List which is inconsistent with any law validly made by the Federation; or
> (3) to make any sales tax law in the Concurrent Legislative List on any matter in the Concurrent List where any law validly made by the Federation has covered the field.
> It is in pursuance of the above stated constitutional law that several States in the Federation enacted Sales Tax Laws.[79]

Therefore, a level of government cannot impose tax on a matter not within its legislative competence.

Confirming this reasoning, the Supreme Court Uwais CJN, put it succinctly thus in **KNIGHT FRANK & RUTLEY (NIG) v. ATTORNEY-GENERAL , KANO STATE:**[80]

> It is clear from the Provisions of Paragraph 1(b) and (i) of the Fourth Schedule read together with the provision of Section 7(5) of the Constitution that the intendment of the constitution is that only Local Government Councils have the power to assess and impose rates on privately owned property.

Further elucidating on this, the Court of Appeal, per KUMAI BAYANG AKAAHS, J.C.A, in a recent case that challenged the Urban Development Tax Law of Cross River State, stated thus:

> The constitutionality or otherwise of the Urban Development Tax Law should not be hinged on the Taxes and Levies (Approved List of Collection) Act Cap T2 Laws of the Federation of Nigeria 2004. That Act was made during the period of Military inter regnum when the 1979 Constitution was suspended and only such amendments that were introduced by the Military was the groundnorm. However since the Act was not repealed after the coming into existence of the 1999 Constitution it became an existing Law which was deemed to have been made by the National Assembly. Unlike the time it was first promulgated in 1998 when the Military held sway and Decrees took precedence over the unsuspended sections of

[79] Supra P. 21
[80] (1998) LPELR-1694(SC), (1998) 7 NWLR (Pt.556) 1 @ 19

> the 1979 Constitution, with the coming into being of the 1999 Constitution, any existing Acts of the National Assembly would be valid subject to their being consistent, with the Constitution.[81]

It should further be noted, that in determination of the competence of any level of government to impose tax in Nigeria, recourse cannot be made to the Tax and Levies (Approved List for Collection) Act. This is because, the wordings of the Act shows that it distributes the responsibility of '*collecting taxes and levies*[82]*'* and not the responsibility of 'imposing tax'.

Therefore, for a state law to impose tax and levies on an environmental law issue, the State Government must have competence to make laws on that aspect of the environment. Therefore, since the State has no legislative competence to make laws concerning Nuclear energy[83], it will have no business imposing tax or levies on a company for production of nuclear energy.

However, the states will be competent to impose taxes on issues it has legislative competence to legislate. For example, the State Government can dully impose tax on environmental law issues relating to town planning since it has the legislative competence to legislate on town planning.[84]

It is important to note that an environmental agency created by statute cannot impose taxes & levies in execution of its functions if the enabling statute does not give it power to impose taxes and levies. This was reaffirmed in **JUDE NWABUZOR & 24 ORS V NNAEMEKA ORJI & 3 ORS**[85] and **CHRINAN INVESTMENT LIMITED(SUING ON BEHALF OF IPMAN ABA BRANCH) V. ABIA STATE ENVIRONMENTAL PROTECTION AGENCY AND HON. ATTORNEY-GENERAL AND COMMISSIONER FOR JUSTICE ABIA STATE**[86] where the Abia State High Court declared that the Abia State Environmental Protection agency law and the Abia State Basic Environmental Law did not give Abia State Environmental Sanitation Agency the power to impose or charge sanitation fee for refuse disposal.

COURTS TO ENFORCE LEVIES IMPOSED BY STATE ENVIRONMENTAL LAW

The House of Assembly of the States can create courts in line with section 6(5)(k) of the Constitution which provides thus:

> Such other court as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.[87]

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[81] ATTORNEY-GENERAL OF CROSS RIVER STATE & ANOR. v. MATTHEW OJUA (2010) LPELR-9014(CA)
[82] Tax and Levies (Approved List for Collection) Act 1998
[83] Item 41 of the Exclusive Legislative List
[84] See Attorney-General of Lagos State V. Attorney General of the Federation *Supra*
[85] Supra note 35
[86] Supra note 36
[87] This is part of list of courts in the Constitution

Pursuant to this power to create additional courts on matters to which the House of Assembly may make laws, the State Houses of Assembly create Environmental/Sanitation Courts that environmental issues within its legislative competence are adjudicated on.

Sections 53-62 of the Abia State Basic Environmental law creates an Environmental Sanitation Court for every Local Government in the State manned by a lawyer and two other members appointed by the President of the Customary Court of Appeal. The Court has all the powers, privileges, and immunities of a magistrate under any law for the time being in force in the State. The Court exercises jurisdiction within the Local Government Area over all the offences created by the Law. Persons convicted in the Sanitation Courts under the law have the right to seek judicial review against the decision at the High Court of the State.

In addition, section 8 of the Abia State Weekly Environmental Sanitation (Appointed Day) Law[88] creates the *ad hoc* Sanitation Mobile Court for each zone of the State. A Magistrate or any other person who the Governor of the State deems qualified on the advice of the State Chief Judge mans the Mobile Court.[89] The Court enforces the provisions of the law, apprehend and detain offenders, and try such offenders immediately[90]. Members of the Court also have all the powers and, privileges, and immunities of a magistrate under any law enforce in the State. However, the provisions of this Law does not preclude the jurisdiction of the Magistrate Courts in the State from enforcing the Law. [91]

The Sanitation Mobile Court created by the Weekly Environmental Sanitation (Appointed Day) Law also enforces the provisions of Abia State Environmental Protection Agency Law[92]

Section 7 and 8 of the Lagos State Environmental Sanitation Law[93] gives the power to recover levies and try those who breach the law to a Special Court created by the law.

According to the Court in **AGBODEMU & ORS V. LAGOS STATE GOVERNMENT & ORS[94]:**

> The Environmental Sanitation Law under which the allegedly offensive notice cannot be applied without due and proper recourse had to the provisions on prosecution by the Special Court

This practice of special Court creation by State Environmental Laws is replicated in most environmental Laws made by other states. Any challenge of the jurisdiction given to these Special Courts is a challenge on the Environmental Laws or on its abuse by the Court.

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[88] Cap 173 Laws of Abia State 2005
[89] Section 9 Abia State Weekly Environmental Sanitation (Appointed Day) Law
[90] Section 10 Abia State Weekly Environmental Sanitation (Appointed Day) Law
[91] Section 13 Abia State Weekly Environmental Sanitation (Appointed Day) Law
[92] See Section 2 of the Abia State Environmental Protection Agency Law cap 11 Laws of Abia State 2005
[93] Laws of Lagos State
[94] Supra note 65

CONCLUSION

This paper examined the existing laws, and interpretations given by the Supreme Court to the constitutional issues relating to the environment. The paper also explored the theories of legislative competence of the different levels of government as propounded by legal authors. These theories and interpretations lead towards the interpretation that States and Local Government Council can competently legislate on the environment. However, specific provisions of the state laws that conflict with laws competently made by the Federal Government are inoperable.

The paper has also explained some of the knotty issues encountered in enforcement of these State Environmental Laws especially the issue of taxation and its enforcement. The taxation aspect is particularly important because of our current desire for foreign investment in Nigeria.

The Supreme Court has not pronounced specifically on the subject of discussion of this article. It was denied the rare opportunity to pronounce on the issue by the brilliance of Chief Olisa Agbakoba,SAN and the technicalities around pre action notice in **MOBIL PRODUCING NIGERIAN UNLIMITED V. LASEPA & ORS.**[95]

The question of whether creation of authority/agency by the States violates item 60(a) of the Exclusive Legislative List remains a challenge for competence of the State to create agencies on environmental matters. The law needs to be tested on this issue and the Supreme Courts needs to make pronouncement on the issue in line with its decision that States and Local Government Councils also have responsibilities under the Fundamental Objective and Directive Principles of State Policy.

The safest bet for the state is to cling to Prof. Fagbohun's theory[96] that all levels of government has competence to make laws on the environment and create environmental agencies as an offshoot of its original legislative competence.

This interpretation will settle the question. This interpretation also works out well as it would have been a heavy burden, almost impossible to achieve, for the Federal lawmaking body to make laws for each peculiar local area or State concerning the environment; also since the Federal Government cannot impose obligations on unwilling State governments[97]. Moreover, the fact that the state environmental agencies have engaged in litigations up to the Supreme Court and their legality has not been questioned at any stage seems to suggest that such agencies are legal.

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[95] (2002) LPELR – 1887(SC)
[96] Explained earlier
[97] *ATTORNEY-GENERAL . of Ogun State & Ors. v. ATTORNEY-GENERAL . of the Federation & Ors (1983) 3 NCLR 583*

We must remember that having the competence to create agencies does not translate to the competence to act without due process.

Courts must always watch for infractions of the Constitution, provisions of laws and legal processes and human rights.