A COMPONENT ANALYSIS OF THE FEDERAL AND STATE LEGISLATIVE INTERCOURSE IN CONCURRENT LEGISLATIVE FIELDS IN NIGERIAN, AMERICAN AND AUSTRALIAN FEDERAL SYSTEMS.

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Abstract

The practice of federalism in Nigerian, American and Australian federations ensures that each of the respective political systems is composed of semi-independent states having full-formed governments which are givers of law with regards to events and persons within its jurisdiction. Here also, the federal and state members in a Federal arrangement strive to exist as an independent entity and at the same time each one completing the other to exist as one indivisible nation. The shared principle of federalism also contemplates separation of powers that focuses on co-operative relationship in what approximates to three distinct functions of government termed legislative, exclusive and judicial powers. In this federal power relationship legislative wise, federal and state government have areas of legislative exclusivity of which when pertaining to state is exercised as residual or reserved powers and to the federal it is categorized as federal legislative exclusive power. This paper however focuses on concurrent aspect of this legislative power relationship that allows for

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a legislative intercourse in that both federal and state can operate in the same legislative field at the same time and on the same subject in absence of conflicts. The high point of this paper is in its determination of these legislative items where co-operative federalism plays out in comparative terms and in case of conflicts or inconsistency between the valid laws of the federal and states governments. The federal laws overrides that of the states by doctrine of covering the field in case of Nigeria and Australia and Preemption in case of U.S.A.

Key Words: federalism, concurrent power, legislative intercourse, covering the field, preemption

1.0 Introduction

In the federal relationships of shared powers, States enjoy sovereign rights over reserved matters however minimal, and the centre wields greater powers, all assigned by a greater authority – the people by the Constitution. Nigerian, American and Australian federations partake in this relationship in that the defining character of their respective political system is federalism. That is to say that each of the respective political systems in question is composed of semi-independent States having full-formed structure of governments, which are givers of law with regards to events and persons within their jurisdictions. It therefore goes without saying that citizens in America, Australia and Nigeria just like any other federation are subjected to two sets of laws. As well, they can use two kinds of courts-federal and State courts. During elections two governments are elected: Federal and State governments. In American, Australian and Nigerian federal systems,

these two sets of laws, courts and governments may be called Federal and State.

It is the province of this paper to carry out a survey of the exercise of legislative powers under concurrent legislative fields in Nigerian, American and Australian Federations. The case is made that in these countries though there is practice of dual federalism the concurrent power enables the practice of cooperative federalism with inbuilt system of resolution of conflicts. Invariably for the working of federal system in exercise of concurrent legislative powers, the federal legislative power overrides the states in areas of conflict. In every legislative intercourse under concurrent fields the federal legislation remains the supreme partner vis-a-vis the state with the constitution remaining the supreme law of the land. Under these terms we carry out a survey of Nigerian, American and Australian situation starting with Nigerian.

2.0 Concurrent Legislative Power in Nigeria

The concurrent list in Nigerian federation provides a common ground where legislative power can accommodate both the Federal and State government within one legislative arena. Little wonder concurrent matters in legislative terms are a reference to a matter where the powers of both governments coexist. That is:

> The powers of both governments in respect of it exist side by side together. In other words, the power of both governments is in respect of the matter are co-existent, not mutually exclusive; the power of one does not exclude that of the other. Both governments can, in theory at least, act

> on the matter, but their powers need not necessarily be co-extensive in the sense of extending over the entire field of the matter; they may co-exist only in respect of some aspects.

In assigning concurrent legislative powers under the powers of the Federal Republic of Nigeria, the Constitution vests in the National Assembly powers to make laws on:

> [A]ny matter in the concurrent legislative list set out to the first column of part II of the Second Schedule to the extent prescribed in the second column opposite thereto.[1]

In the same breath, the State House of Assembly is vested with the power to make laws for:

> Peace, order and good government of the State or any part thereof with respect to …(a) any matter not included in the Exclusive legislative list …(b) any matter not included in the Exclusive legislative list ….(c) any matter included in the concurrent list set out in the First Schedule … to the extent prescribed in the second column opposite thereto; and (d) any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.[2]

[1] S. 4(4) (a) (CFRN) 1999 as amended constitution of the Federal Republic of Nigeria

[2] *ibid.* S. 4 (7).

In 1979 Constitution, under our first experiment of presidential system of government *Nwabueze* saw the provisions of Concurrent list in the Nigerian Federal Constitution as innovative given the fact that besides the enumeration of twelve matters there are in addition the definition of extent of both Federal and State power thereto as well as the effect of the doctrine of covering the field.[3] This innovation stressed the point that the legislative co-existence of the Federal and State government is not unlimited but defined. Flowing from above:

> The result is that a concurrent matter has no longer necessarily implies that both the Federal and State governments are competent to act over its entire field. In respect of some matters in the list, their competence is respectively restricted to some aspects only of a so-called concurrent matter making such aspects exclusive to one or the other.[4]

In this case, the current concurrent legislative lists of thirty (30) items are enumerated in Part II of the Second Schedule to the Constitution.[5] A formalised co-existence of the Federal and State legislative powers is clearly secured and guaranteed under Part II of the Second Schedule to 1999 Constitution. However, in this regard, it is clearly provided by

[3] B.O Nwabueze, Federalism in Nigeria under the presidential constitution (London: Sweet and Maxwell, 1983) & (Lagos State Ministry of Justice, 2003) 34.

[4] *ibid.*,

[5] These list are categorized other various heads namely: Allocation of revenues, Collection of taxes, Electoral Law, Electric power, exhibition of cinematograph films; industrial; commercial or agricultural development; Scientific and Technological research ; Statistics; Trigonometrical, Cadastral and Topographical surveys; and University, Technological and Post-Primary Education.

implication that such guarantee is not a concurrent legislative item in all aspects to necessitate the application of the doctrine of covering the field as the only setting of the extent of respective legislative competence. In essence, the concurrent legislative list is an umbrella under which the legislative powers of both the Federal and State government especially matters unlisted in the exclusive list are juxtaposed while the exercise thereof are prescribed, giving exclusivity and concurrency as the case may be to federal and State government or both respectively. The concurrent list may equally be viewed as providing the list of legislative competence of both federal and State legislative powers. The extent of such concurrent powers is clearly defined as to afford as the case may be an exclusivity in exercise of legislative powers with respect to specific matter within a particular item in the concurrent list to federal government, while the State retains a measure of right of exercise of legislative powers as well within the residue in the same area as it applies to the State. Equally, it may even be that both powers can run concurrently subject to the provision of the Constitution on the paramount of the Federal in case of inconsistency with the State law.[6]

The concurrent list it must be noted though is the primary source of concurrent power, but the list is not exhaustive of powers exercisable concurrently. In the body of the Constitution namely s. 11 relating to public safety and public order a concurrent power equally exists. By virtue of s.11 therefore both the National Assembly and State House of Assembly are granted power to make laws touching on maintenance

[6] See s. 4(5) (n.1).

and securing of public safety and providing and maintaining and securing of such supplies and services as designated by the National assembly as essential supplies and services. However, this power grant may not completely in itself be construed as conferring such concurrent empowerment except a recourse is had to other provisions of the Constitution namely s. 4 on legislative powers of both Federal and State government. To this end, *Nwabueze* looking at the legislative power under public safety and public order posited that it "ensures (sic) to the federal and State government by virtue of s. 4(4) b) and s. 4(7) (c)"[7] respectively. This position is not strange, given the fact that any government properly so called must be imbued with power to maintain Public Order and Public Safety. In Nigerian situation having the power in theory to do that is one thing for the States, and having the coercive power through the instrumentality of the police is a different ball game altogether. This is not to say that this power is untrammelled as state laws are executed through the instrumentality of the police. Again as the chief security officer of a state, the governor often gives directives to the commissioner of police in the governor's state leaving compliance at the discretion of the commissioner of police and ultimate directive from the Inspector General of Police. This naturally leads to question of nascent vociferous agitations for State police. The police having been made the exclusive competence of the Federal power by s. 45 leaving the States to be a government without coercive authority properly so called. Thus, the agitation is not misconceived within the context that policing should be a concurrent

[7] Nwabueze (n 3) 59-60.

matter. This issue is a proper subject of further discussion and enquiry under a unique research template and not a primary focus of this paper.

2.1. Concurrent List Form:

The dimension of our discussion presently will be appreciated better if we keep in perspective, the fact that within the enumerated items under the concurrent list in Nigerian Federal Constitution, the extent or scope of Federal and State legislative competence are defined and parameters set. Taking cue from Nwabueze's categorization of the extent of concurrency prescribed by the concurrent list, we find four matters in place[8] where legislations are not exercised concurrently or put in a different way, where co-existence of Federal and State powers is lacking. It is not in doubt that they fall within the legislative items termed concurrent list. However the point being stressed is that their "delimitation in the schedule restricts the federal and State governments to specific aspects of the matters thus making those aspects exclusive to the one or the other".[9] The implication of this restriction is that there is no aspect of them where the Federal power and State power co-exist together. To drive the point home, allocation of revenue (item A) is vested exclusively in the Federal government, while the auxiliary provisions thereto inures to the Federal or State governments to exercise other power grants, touching on imposition of charges upon the revenue and assets of the federation or State, as the case may be. In the area of antiquities and monuments, and

[8] 61, These items are allocation of revenue item (A) antiquities and monuments item (B) archives (item C) and collection of taxes (item D).

[9] *Ibid.,*

archives legislative powers are exercised on exclusive items. Here the federal is limited to antiquities and monuments designated as national antiquities and monuments as well as over the archives and public records of the federation; while the States enjoy legislative exclusivity over those that come under its authority.

In the area of taxation, there is a clear separation of power in the imposition of taxes. The taxes which the Federal and State governments can impose are clearly spelt out. However, the provisions touching on collection of revenue give the National Assembly the power to authorize a State government to collect tax or duty levied by it:

> In the exercise of its powers to impose any tax or duty on
> (a) Capital gains, incomes or profits of persons other than companies and
> (b) Documents or transactions by way of stamp duties.
> The National Assembly may, subject to such condition as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State.[10]

Clearly there is no piece of item in the foregoing provision to suggest a co-existence of Federal and State authority to impose tax, for instance, on capital gains. In a situation where a Federal authority authorizes a State authority to collect taxes on its behalf; such situation

[10] Item (C).

cannot translate to power on the agent in this case the State to impose such taxes. In the same vein, a State authorization of local government council to collect any rate or rates levied by it does not imply that the body so authorized can also exercise the main authority of imposition or levying of those taxes in the first place.

In area of electricity we find a classical exclusivity of federal power over electric power (Item F). Admittedly, it is provided that:

> A House of Assembly may make laws for the State with respect to
> (a) electricity and establishment in that State of electric power stations.
> (b) the generation, transmission and distribution of electricity to areas not covered by National grid system within that State; and
> (c) the establishment within that State of any authority for the promotion and management of electric power stations established by the State.[11]

It is to be pointed out that the foregoing powers of the State over establishment of electric stations as well as generation, transmission and distribution thereof are mere icing on the cake. The real power lies with the National Assembly.[12] Thus, the qualification of States

[11] See item 4 part II Concurrent Legislative List Second Schedule, to CFRN 1999 as amended.

[12] Item 13 *Ibid.*, gives the federal government via National Assembly extensive and overriding power over electricity its generation, transmission and distribution within the federation and beyond. Most importantly in the provision under item

power to make laws with respect to generation, transmission and distribution of electricity to areas not covered by national grid system within the State gives the federal legislature exclusivity to those area covered by the national grid. It stands to reason that a complete excision of the State House of Assembly's legislative competence over electric power translates to extension of the national grid system to the entire state. The power of the promotion and establishment of a national grid system is a power resident in the National Assembly denied the States. The implication is that potentially the federal power over electricity is exclusive. The inclusion of the four categorized items given their exclusive nature shown above, under concurrent list implying and co-existence of legislative power of federal government and State government over them makes such inclusion an anomaly. This is more so, when the principle of covering the field cannot apply in all its colours the exercise of such powers as the areas of exclusivity are clearly delimited as explained

3.0 Concurrent Legislative Power in U.S.A

There are a number of subject areas where federal legislation and regulatory power of the State can operate together in American Federal Constitution. Since the power of Congress is by enumeration, it seems plausible that the concurrent legislative power is that power that points to powers excluding the powers denied the States and those not denied the Congress. This is so for un-enumerated federal legislative powers to wit Congress in the constitution are largely

13(F) regulating the right of any person or authority to use, work or operate any plant, apparition, equipment or work designed for supply.

reserved to states as residual matters. In the same vein, the powers denied the States are exclusive to United States Congress.

Matters denied the States expressly under Article I (10) of US Constitution include:

i. Treaty with foreign country;
ii. Coining of money;
iii. Emitting bills of credit;
iv. Making of anything but gold a legal tender in payment of debt;
v. Passage of Bill of Attainder, *ex post facto law* or law impairing the obligation of contract or grant of title of mobility;
vi. Constitutional prohibitions except with Congressional consent;
vii. Keeping troops or ships of war in time of peace;
viii. Laying of imports or export duties on imports or exports;

In concurrent legislative field with the congress and State legislatures exercise legislative powers. In this field such rights include legislative powers:

i. To enact Laws relating to bankruptcy;
ii. To fix standards of weights and measures;
iii. To borrow money;
iv. To charter banks;
v. To promote Agriculture;
vi. To foster education;

3.1 Taxing Powers:

By provision of Article I, s. 8, the Constitution provides that:

> The Congress shall have Power to lay and collect Taxes[13], duties Imposts and Exercises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Exercises shall be uniform throughout the United States.

In these foregoing provisions there is a complete conferment of taxation power on the Congress. Equally found is "the largest measure of discretion in the selection of purposes for which the national revenues shall be expended",[14] implicit in the terms of general welfare of the United States. It is only in the imposition of uniformity of such taxes that there is a limitation. In any case, the power of taxation delegated to Congress herein does not amount to denial of State's taxing powers. The power of taxation is thus retained by the States. The grant of similar power to the government of the union does not amount to the abridgment of the States taxation power. In essence "that it is to be concurrently exercised by the two governments are

[13] This power was later curtailed by provisions that no tax shall be levied on exports (see s. ix 5) and other doctrine of tax exemptions like taxation of stall instrumentalities, holders or State and municipal bonds. It was believed that Sixteenth Amendment had removed the grounds of this exemptions in relation to income taxes, this believe informed the compilation of Edward S. Corwin's, "Constitutional Tax Exemption. *Supplement to the National Municipal Review* XIII, No. 1 (January 1924) as evidence. The Supreme Court however in *Brushaber v Un. Pac R.R.* Co., 240 U.S. 1 [1916]; and *Evans v Gore*, [1920] 253 U.S 245 ruled otherwise.

[14] E.S Corwin's, *The Constitution and What It Means Today*, (14th ed.) H.W Chase & C.R. Durat eds. (New Jersey: Princeton University Press, 1978) 38 – 39.

truths which have never been denied".[15] Nevertheless the paramount character of the Constitution lies in "its capacity to withdraw any subject from the action of even this power, is admitted"[16]. In this regard the States taxing power does not extend to duties on imports or exports by express constitutional provisions. However, States can equally find justification to lay duties on imports or exports by a rider in so far as there is a connection on what may be absolutely necessary for executing their inspection laws.

In *Mc Cullock's* Case,[17] the Supreme Court found the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States unconstitutional and void on the premises that the tax in question is a tax on the operation of the bank and in consequence, a tax on the operation of the instrument employed by the national government. The Court however went ahead to State that:

> It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State nor to a tax imposed on the interest which the citizen of Maryland may hold in this institution, in common with other of the same description throughout the State[18]

[15] *Mc Cullock v Maryland* [1919] 17 U.S. (4 Wheat) 316, per Marshal, Ch. J. See also E. Chemerinsky C 2004 *Supplement Constitutional Law* (New York: ASPEN Publ. Inc., 2004)

[16] *ibid.*

[17] *ibid.*

[18] *ibid.*, 128-129

3.2 Federal power to tax and spend:

The first power given to Congress under Article I, s. 8 was the power to lay and collect taxes. This is not surprising as the Federal Constitution was aimed at correcting the imperfections of the Confederal Constitution of which the chief problem was the inability of the national government to tax. The power of Congress to levy taxes by provisions of the Constitution is not qualified but subject to one exception[19] and two qualifications. In this wise Articles exported from any State may not be subjected to taxation. In like manner on one hand direct taxes must be levied by the rule of apportionment and on the other hand, indirect taxes by the rule of Uniformity.[20]

Congressional power of taxation is clothed with a sweeping character, in that, viewed in a generic sense it among others "reaches every subject"[21], "exhaustive"[22] as well "embraces every conceivable power of taxation".[23] It is observed that:

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[19] C. S. Jayson, and Others, (eds.) *The Constitution of America Analysis and Interpretation* (Washington: U.S. Government Printing Office, 1973), xxx. .

[20] The rule of uniformity exacts only that the subject-matter of a levy be taxed at the rate wherever found in the United States; or, as sometimes phrased, the uniformity required is "geographical" not "intrinsic"- See *Labelle Iron Works v United States*, [1921] 256 U.S 377; *Brushaber v Union Pacific R. Co.* [1916] 240 U.S. 1; Head Money cares, [1854] 122 U.S 580; The Clause thus places no obstacle in both the way of legislative classification for purpose of taxation and the way of what is called progressive taxation. See *Knowlton v Moore*, [1900] 178 U.S 41. In essence a taxing statute does not fail.

[21] License Tax cases, 5 wall [1867] 72 U.S. 462, 471.

[22] *Brushaber v Union Pacific R. Co*., [1916] 240 U.S 1.

[23] *ibid.*, 12.

> Despite these generalizations, the power has been at times substantially curtailed by judicial decision with respect to the subject matter of taxation, the manner in which taxes are imposed, and the objects for which they are levied.[24]

Thus in considering the meaning for example of direct tax the Supreme Court as early as 1796 did not believe that a tax on personal property was direct tax,[25] as direct taxes were limited to land and pool taxes. The Supreme Court later conceived direct tax as applying to personal property in late 1800s, thus overruling Hylton case.[26] There was resurgence in judicial restoration of the national taxing power via Congress on most of the subject matter hitherto withdrawn from its ambit by judicial decisions. Notable cases in these directions include the cases of *Evans v Gore*[27] and *Miles v Graham*[28] where the holding that the inclusion of the salaries received by federal judges in measuring the liability for a non-discriminatory income tax violated the constitutional mandate. Again, the holding that compensation of such judges should not be administered during their continuance in

[24] Jayson (n 19) 120.

[25] *Hylton v United States*, [1796] 3 U.S 171 Where a case challenging the imposition of tax on carriages was brought. The tax in question was a uniform tax on anyone who owned a carriage and it was challenged as being in violation of direct tax, because the tax was not assessed in proportion. The Court found this tax to be an indirect tax as the Court reasoned that if this tax were a direct tax, the owners of carriage in a State A would pay ten times as much as carriage owned in State B.

[26] J.B Hames and Y. Ekern, *Constitutional Law: Principles and Practice* (New York: Thomson Delmar Learning, 2005) 87-88.

[27] [1920] 253 U.S. 245.

[28] [1925] 268 U.S. 501.

office was later repudiated in *O'Malley v Woodrough.*[29] Also overruled is the specific ruling in *Collector v Day*[30] that the salary of a State officer is immune to federal income taxation.[31] In this decision however, the principle that Congress may not lay a tax which would impair the sovereignty of the States remain sacrosanct and unimpeachable. Apparently this principle was left with some energy. In relation to federal taxation of State interests a succession tax of

[29] [1939] 307 U.S 277.

[30] [1871] 11 Wall (78 U.S) 113.

[31] The decision in *Collector v Day* was overruled in *Graces v New York* Cr vel, O'Keefe, [1939] 306 U.S. 466. The decision in *Collector v Day* in 1871 came at the time the U.S was still in the throes of reconstruction. As remarked by Justice Stone in *Helvering v Gerhardi*, [1938] 304 U.S 405, 44 (n. 4) there had not been a determination by the Court of how far the Civil War Amendments had broadened the federal power at the expense of the States but the fact that the taxing power had prior to that been used with destructive effects upon notes issued by the State Banks, the learned jurist noted that in 1869 in *Veazie Bank v Femo* [1869] 8 Wall (75 U.S.) 533 the possibility of similar attack upon the existence of United States themselves was suggested. Two years later (in 1873) in the case of *United States v Railroad Company*, [1873] 17 Wall (84 U.S.) 322 the Court took the logical step of holding that the Federal income tax could not be imposed on income received by municipal corporations from its investments. In *Pollock v Farmers Loan & Trust Co.*, [1895] 157 U.S 429 where interest received by a private investor on State or municipal bonds was held to be exempted from federal taxation: a far reaching extension of private immunity was granted. The doctrines in the foregoing cases received application largely as a fall out of subsiding of the apprehensions of the era pushed them into the background. This left the decision in *McCullock v Maryland*, [1819] 4 Wheat (17 U.S) 316 in curbing the power of the States to tax operations of the instrumentalist of the Federal Government receive a wider application. It was until the turn of 20th Century precisely in 1931 in the name of dual federalism that the national taxing powers was narrowed down. Thus in *Indian Motorcycle v United States*, [1931] 283 U.S 570 the Court held that a federal exercise tax was applicable to the manufacturers and sale to a municipal corporations of equipment for the police force.

1901 upon a bequest to a municipality for public purpose was upheld on the ground that the tax was payable out of the State before distribution to the legatee. Finding support in form and not in substance against the tenor of *Brown v Maryland,*[32] a divided court failed to regard the succession tax "as a tax upon municipality it might operate incidentally to reduce the bequest by the amount of the tax".[33]

The decision in *Flint v Stone Tracy Co.*[34] was equally a clear departure from the logic of *Collector v Day*. Here, the Court sustained an act of Congress taxing the privileges of doing business as a corporation, the tax being measured by the income. The ground of rejection of the argument that the tax imposed an unconstitutional burden on the exercise by a State of its reserved powers to create corporate franchise was rejected on two grounds. First, was on the basis of the principle of national supremacy; and second was the fact that the corporate franchise was private property. A number of subsequent cases can be identified where a State tax of various categories have been held to be subject to federal taxation despite a possible economic burden on the State.[35] It must be still emphasized that federal taxation power though

[32] [1827] 12 Wheat (25 U.S) 419, 444.
[33] *Snyder v Bettman* [1903] 190 U.S. 249, 254.
[34] [1911] 220 U.S. 107.
[35] Such of those cases are *Greiner v Lewey* [1922] 11 258 U.S 284 tax or State bonds; *Wheeler Lumber Co. v United States,* [1930] 281 U.S 572 - excise taxes on transportation of merchandise in performance of a contract to sell and deliver to a country; *Board of Trustees v United States*, [1933] 289 U.S 48 - tax on importation of scientific apparatus by a State university; *Allen v Regents,* [1938] 304 U.S 439 - on admissions to athletic contests sponsored by a State institution, the net proceeds of which were used to further its education programme; *Helvering v Powers* [1934] 293 U.S 214 the compensation of trustees appointed to manage a

very elastic, but there is still a limit when it comes to State immunity. Notwithstanding the differences of opinion among members of the Supreme Court in a number of cases dealing with tax immunity and State functions and instrumentalities, it is still a fact that there is a consensus available that not all of the former immunity is gone. The problem however is the difficulty in setting the general principle by which the right to such immunity shall be determined. In *Helvering v Gerhardi*[36] in narrowing the immunity of salaries of State officers and federal income taxation the Court announced:

> [T]wo guiding principles of limitations for holding the tax immunity if the State instrumentalities to its proper function. The one dependent upon the nature of the function being performed by the State or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of State governments even though the tax to be collected from the State treasury… The other principle, exemplified by those cases where the tax laid upon individuals affects the State only at the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the State is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible.

street railway taken over and operated by a State *Willcutts v Bunn* [1931] 282 U.S 216 profits derived from sale of State bonds.

[36] [1938] 304 U.S 405.

The Court has held that "express congressional consent" was not necessary for a federal instrumentality to starve off State taxation.[37] In this instance the Supreme Court had to strike down as unconstitutional a Mississippi State Tax Commission requiring in the words of the Court:

> Out of State liquor distillers and suppliers to collect from military installations without Mississippi and remit to the commission, a tax in the form of a wholesale mark up of 17% to 20% on liquor sold to the installations.[38]

In reaching this decision the Court found applicable Chief Justice Marshalls enunciation of the principle in *Mc Cullock v Maryland.*[39]

> That possessions, institutions and activities of the federal Government itself in the absence of express congressional consent are not subject to any form of State taxation.

The conclusion of the court is that the exception provided in the Buck Act of 1940 that no person would be relived of liability for State taxes "on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part without a federal area" is inapplicable. The reason is for the further provision that it "shall not be deemed to authorize the levy or collection of any tax on or from the United State or any instrumentalities thereof. In Court's view the legal

[37] *Rittman v Holc*, [1939] 308 U.S 21 *United States v Stewart*, [1940] 311 U.S 60. Indeed the Supreme Court has held that national securities are intrinsically exempted from State taxation. *Society for Savings v Bowers*, [1955] 349 U.S 143.
[38] *United States v State Tax Com'n of the State of Mississippi* [1975] 421 U.S 599.
[39] *Mc Cullock v Maryland* (n. 15)

incidence of the tax that fell upon the purchase by the military was an instrumentality of the United States.

3.3 Interstate Extradition:

Interstate extradition in character is largely a federal and not a State matter.[40] This nature of constitutional empowerment notwithstanding the federal constitutional and statutory provisions governing the extradition of fugitives does not purport to encompass the entire legislative field.[41] In this wise, the State can enter the legislative field with a rider that such State legislation on the subject is valid and subsisting in so far as it is ancillary to or in aid of the federal requirements.[42] In this direction a somewhat legislative intercourse is possible between the Federal Statute and State regulation. It is clear in this situation that while the power to extradite is governed by the federal statute, the procedural details become a matter of State law. Thus a State may enact legislation regulating extradition procedures at an early stage than that of the Federal statute. The provision of such enactment is that the measures enacted are not inconsistent with the Constitution. It is to be noted that an alleged criminal is not subject to Interstate extradition except in circumstances contemplated by the applicable Federal and State laws.

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[40] *Lee Gim Bor v Ferrari* (CAI Mass) 55 F2d 86, 84 ALR 329; Ex Parte Mc Cabe (Dc Tex) 46 F 303;.

[41] See Re Davis, 68 Cal App 2d 798 158 P2d 36& People ex rel, *Mato Chik v Baker*, 1306 NY32, 194.

[42] Re Morgan, 86 Cal App 2d 217, 1 194 Ped 800; *Work v Corrington*, 34 Ohio St. 64.

4.0 Concurrent Legislative Power in Australia

In the main, concurrent list[43] in Australian Federation refers to items of legislative competence of both the Commonwealth and States. That is to say areas both Commonwealth and States can make laws. Taxation, health, marriage, weights and measures are examples of such areas Commonwealth shares powers with the State. Essentially the Constitution allows the States to make laws in areas over which the Commonwealth has power with a provision that such State laws do not conflict with those of the Commonwealth. Largely if any provision in the Constitution can be reckoned with as containing the concurrent powers it will definitely be s. 51 of the commonwealth constitution 1901. It was shown that exclusive empowerment by characterization is clearly conferred by S over some items. After excision of the identified exclusive items by characterization or express provision what is left of s. 51 are matters for concurrent legislation. To what is left of the 39 subjects in list of s. 51 after excision of exclusive matters *Quick* and *Garran* observed that:

> 23 old powers which formerly belonged to the States, but are now concurrently vested in the State parliaments and the federal parliament, subject to the condition imposed by sec. 109

These powers are as follows:

(1) Astronomical and metrological observations (viii)

[43] Though there is no specific list referred to as concurrent list. Preferably the correct terminology is concurrent powers not concurrent list.

(2) Banking, other than State banking; also State banking extending beyond the limit of the State concerted, the incorporation of banks, and the issue of paper money (xiii).
(3) Bankruptcy and insolvency (xvii).
(4) Bills of exchange and promissory notes (xvi).
(5) Census and statistics (xi).
(6) Copyrights, patents of inventions and designs, and trade-marks (xviii).
(7) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants (xxii).
(8) Foreign corporations, and trading or financial corporations formed within the Commonwealth (xx).
(9) Immigration and emigration (xxvii).
(10) Influx of criminals (xxviii).
(11) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned (xiv).
(12) Invalid and old-age pensions (xxiii).
(13) Light-houses, light-ships, beacons and buoys (vii).
(14) Marriage (xxi).
(15) Naturalization and aliens (xix).
(16) People of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws (xxvi).
(17) Postal, telegraphic, telephonic and other like services (v).

(18) Quarantine (ix).
(19) Railways, control with respect to transport for naval and military purposes of the Commonwealth (xxxii).
(20) Railway constructions and extension in any State with the consent of that State (xxxiv).
(21) Taxation; but so as not to discriminate between States or parts of States (ii).
(22) Trade and commerce with other countries, and among the States (i); except that on the imposition of uniform duties of customs the power to impose duties of customs the power to impose duties of customs and excise becomes exclusively vested in the Federal Parliament (sec. 90).
(23) Weights and measures (xv)[44].

4.1 Taxation Power:

In general terms the taxation powers of both the Commonwealth and States are concurrent and independent.[45] However power of taxation relating to imposition of duties of custom and excise is exclusive to the Commonwealth: In s. 51 (ii) federal taxation is authorized for federal purposes; while s. 109 of the Constitution allows the States with taxation power to deal with State taxation for State purposes. The consequences that flow from the concurrent and independence nature of the Commonwealth and State taxation powers under s. 51(ii) are

[44] J. Quick, *Legislative Powers of the Commonwealth and the States of Australia with Proposed Amendments* (Sydney: The Law Book Company, 1919) 1. .
[45] *State of Victoria v The Commonwealth* [1959] 99 C.R. 575 at 614.

dual pronged. In the first place, s. 5(ii) cannot be construed as a power over the whole subject of taxation throughout Australia, whatever parliament or other authority.

4.2 Conciliation and Arbitration Power

4.2.1 Corporations:

The Commonwealth is vested with power to make laws with respect to "foreign corporations formed within the limits of the Commonwealth".[46] This provision is Jigsaw in practical rendition of its meaning. It gives Commonwealth power to make any law whatsoever which applies to the Corporations mentioned in the paragraph. Under this categorization of power the Commonwealth would be able to control all the large – scale business enterprise in Australia. The varied opinions on this issue had stayed the legislative hand of the Commonwealth parliament from venturing upon any general legislation with respect to Corporations.[47] In *New South Walls v The Commonwealth, South Australia v The Commonwealth,* and *Western Australia v The Commonwealth*[48] the High Court of Australia held that the Commonwealth parliament has corporations power under s. 51, (xx) of the Australia Constitution is subject to the rigorous restriction that the parliament may not legislate with respect to the incorporation – trading and financial corporations.[49]

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[46] Constitution, S. 51 (xx) of the Constitution of the Commonwealth and States of Australia 1901

[47] See *Huddart Parker & Co. Pty Ltd v Moorehead* [1947] 74 C.L.R 31., for the consideration of the corporation power.

[48] [1990] 64 ALJR 157.

[49] J.G Starke, '*A Severe Limit on the Commonwealth's Corporation Power'* in Australian Law Journal (ALJ) 24, 1990, 235.

Here, *Starke* in analyzing the above opinion refers to what *Stone* called "Leeway of Choice" owing to the diabolical word "formed" in s. 51 (xx) as being critical to the majority decisions.[50] In an opinion *Deakin* expressed the view that:

> [S]ubsection (xx) only enables the Commonwealth to legislate with respect to corporations "formed" within the Commonwealth; it does not confer the power to 'form' corporations[51].

4.2.2 Matters referred by the States:

The subject matters in the primary legislative domain of the States can be subject of concurrent legislative exercise with the Commonwealth parliament. This possibility is occasioned by s. 51 (xxxvii) of the Constitution which confers upon the Commonwealth power to make laws with respect to matters referred to in the parliament of the Commonwealth by the parliament or parliaments of any one State or States, but so that the law shall extend only to States by whose parliaments the matter is referred. It is not clear whether a matter referred to the Commonwealth would be for a specified description of a subject matter and/or whether it might be made by reference to any

[50] In reaction to the High Court decision the Australian Government in a Press Release on 8 February 1990 (PR 9/90) by Attorney General (Mr. L. Bowen) on the same day of the judgment reaffirmed the Government's commitment to a National Companies and Securities Scheme, stating that the High Court's decision exemplified "the problem of trading and financial corporations in Australia and overseas investors being inhibited by words drafted in the last century" leaving the companies.

[51] Starke (n. 49)

attributes whatever including temporal situation.[52] In practical terms there are dearth of situations it has been put into effect. Instructively however it was held in *Giraham v Paterson*[53] that when a State parliament referred a power to the Commonwealth parliament it did not thereby itself lose the capacity to legislate upon the matter referred. The implication is that such referred items by the referral does not completely extinguish the legislative competence of the State in question but places referred matters within a concurrent template.

5.0 Applicability of Covering the Field

In Nigerian, U.S.A and Australian federations a federal law may provide a statement of law governing a matter in a legislative field deemed concurrent in which the State can equally operate. There are questions in situations where the federal law in this concurrent legislative field manifests expressly or by implication imputing an intention to cover the whole field. Principally voicing the vexed questions through Nwabueze, it was asked:

> Can the State law co-exist with the federal one in those circumstances? If the State law was enacted before the federal law, will its continued existence be inconsistent with the federal law so as to render it void? If the federal law was enacted first, does its existence preclude or prohibit

[52] R. Anderson, 'The States and Relations with Commonwealth'; in *Essays on the Australian Constitution* Else – Mitchel Pty. Co. (ed.) (Sydney: Law Book Co. of Australia 49, 1961) 40.

[53] [1951] 81 C.L.R. 1.

> the enactment of a further State law on the matter through the sanction of invalidity for inconsistency?[54]

Or whether the two laws can co-exist the American Apex Court in *Houston v Moore*,[55] in 1820 per *Washington* that:

> The two laws may not be in such absolute opposition to each other as to render the one incapable of execution without violating the un-restrictions of the other yet the will of the one legislative may be in direct collusion with the other.

Continuing:

> I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other… if they correspond in every respect then the latter is idle, and imperative, if they differ, they must in the nature of things oppose each other, so far as they do differ.[56]

In his further adumbration this:

> Course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the State governments have a concurrent power of

[54] Nwabueze (n 3) 63.
[55] [1820] 5 Wheat 1 at 22.
[56] *ibid.,* 23.

> legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two law are not in terms or in their operation, contradictory and repugnant to each other.[57]

The import of the foregoing holding is that after federal enactment in a concurrent field in this case Congress, with a declared or obvious intention to cover the entire legislative ground a State legislation is incapable of operating in that field again, it is immaterial that the State legislation was not in direct contradiction to that of the Congress.

The judicial reasoning in *Houston's* case did not stand isolated for long. Precisely 22years later there was explicit affirmation of the decision in *Priggs v Pennsylvania*[58] in 1842 when it was observed that:

> If Congress have a constitutional power to regulate a particular subject and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislative have a right to interfere, and, as it were, by way of complacement to the legislation of Congress, to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe manifestly indicates that it does not intend that there shall be any other legislation to act upon the subject. Its silence as to what it

[57] *ibid*., 24.
[58] [1842] 16 Pet 617 – 618.

> does not do is as expressive of what its intention is as the direct provisions made by it.

Wholly the paramount of the federal enactment over the State law was clearly stated in the two cases above. Indeed, in these judgments the metaphor in the phrase 'covering the field' may not be found, nevertheless, it sits pretty well by a community reading of the material words the same message is covered. The closest expression to it was "covering the entire ground" used by *Field J* in 1889 when delivering the opinion of U.S Supreme Court in *Davis v Brown*[59]. It took over 100years after *Houston's* case of 1920 for *Justice Isaac* of the Australia High Court to make a definitive judicial statement using the metaphor 'covering the field'; in 1920 to be dubbed its originator. The coveted trophy he captured in these judicial statement:

> If a competent legislature expressly or impliedly evinces its intention to cover the whole field that is a conclusive test of inconsistency where another legislature assumes to enter to any extent to upon the same field… The inconsistency is demonstrated, not by comparison of detailed provisions, but by the mere existence of the two sets of provisions.[60]

In *Ex P Mclean*[61] the conduct of neglecting to perform a contract of employment, was made an offence under both federal and State law in a classical reformulation of the principle of impeaching State law

[59] [1889] 133 U.S 333 at 348.
[60] *Clyde Engineering Company Ltd. v Cowburn* (1926) 37 C.LR 466.
[61] [1930] 43 CLR 472 at 483.

upon conflict with the federal law. In a concurrent legislative field, under the metaphor 'covering the field' attributed to his brother *Isaac J.* of Australia High Court *Dixon* said:

> When the parliament of the Commonwealth and the parliament of State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent notwithstanding that the rule of conduct is identical which each prescribes…. The reason is that, by prescribing the rule to be observed, the federal statute shows an intention to cover the subject matter and provide what the law shall be… The inconsistency depends upon the intention of the 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.[62]

[62] *ibid.*,., 483; The Nigerian Supreme Court referred to this case with approval in cases of *Lakanmi v A.G Western Nigeria,* (1977) 1 UILR 201 at 209; (1974) ECSLR 713 at 722 and in *A.G Ogun State & Ors. v A.G of the Federation & ors.* (1982) 13 NSCC 1 at 11. In Nigerian case of *Lakanmi* the Supreme Court held that Western State Edit No. 5 of 1967 covered the same field as Decree of the Federal Government and, so inconsistent with it and therefore *ultra vires* and void. The field in the next case of *A. G. Ogun State*, the Nigerian Supreme Court was more definite in stating its application to the effect that where "a Regional legislative enacts an identical law on the same subject matter, the law made by the parliament shall prevail, that made by the irrelevant and therefore impliedly repealed".

Notably U.S Supreme Court in 1820 and 1842 struck down the State law based on doctrine of "collision of wills" with the will of the federal legislation coming out stronger. This doctrine is analogous to 'covering the field' doctrine in effect and in substance making their differences only to lie in semantics.

The applicability of doctrine of Covering the field in practical terms is similar in Australia, Nigeria and U.S.A. In all situations in Australia[63], Nigeria[64] and USA[65], once it is judicially recognized that the federal law has covered the concurrent legislative field on any subject matter then the State law will give way. It sounds so simple but in reality the determination of such conflict situations in definitive terms seem unclear. The terminology coined by the U.S Supreme Court relating to the co-existence of both State and federal law on the same subject matter is the doctrine of "pre-emption" of State law by

[63] S. 109 of Australia Constitution reads: "when a law of a state is inconsistent with a law of the commonwealth, the latter shall prevail and the former shall to the extent of the inconsistency be invalid".

[64] A similar provision with that of Australia in Nigeria in S. 4 of Constitution of the Federal Republic of Nigeria enacting the covering the field principles states that: "If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly shall prevail and that other law shall to the extent of the inconsistency be void".

[65] In U.S. Constitution the Supremacy clause is asserted under Article VI Clause 2 to the effect that: "This constitution, and Laws of the United States which shall be made in pursuance thereof and all treatise made or which shall be made under the authority of the United States, shall be the Supreme Law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding".

Federal law. In U.S.A Congress most times explicitly provide for the pre-emption of State law right in the federal statute.

In essence either called doctrine of pre-emption or principle of covering the field the substance of its application remains largely unchanged. Admittedly it operates is with particular reference to matters within the concurrent legislative competence of the respective countries. This is so because the doctrine of covering the field applies in situations where both Federal and State are competent legislators. That is to say, it applies within legislative field where both federal and state legislative powers co-exist. Whether is the American pre-emptive doctrine or both the Australian and Nigerian's doctrine of covering the field is called into question their application is determined by a divination of the intention of the federal legislature.

6.0 Conclusion

In U.S.A and Australia under the scheme of division or legislative powers there is grant of legislative power to the federal legislature over matters previously exercised by the States without mentioning the terms exclusive list and concurrent list. This is understandable as in these countries it is the States that came together to surrender some of their powers to the national government for the good of all as against that of Nigeria where powers devolved to the units from a unitary structure.

The concurrent legislative field under discussion allows the state and federal government to operate concurrently within the same legislative field. This creates legislative intercourse within this field,

this is equally where the beauty of federalism lies in terms of creation of unity in diversity, independence and inter-dependence, sovereigns within a sovereignty. The consummation of this legislative intercourse is simultaneously carried out on any legislative item within the concurrent legislative field. There is a rider in the contemplation of this concurrent legislative field where the federal legislative body evinces an intention to cover the entire legislative field then the State will leave the field. This gives paramount to federal legislation over that of the State. Thus, inseparably fused to discussion of concurrent legislative field is the applicability of doctrine of covering the field.

The implication of referral of matters to the Federal Government from areas deemed residual to central government in Australian Federation to create a somewhat concurrent field is somewhat curious. If actually calls for further enquiry but to suffice to say that this uniquely Australia states way of bringing legislative item to the joint table for a legislative intercourse with the federal government is quite remarkable as it has all the shades of colours of cooperative federalism. It will be of interest to discover if there's equally a possibility of the federal parliament in like manner throw down on the table some areas of exclusive legislative table to give competence to the states.

I must confess that this scenario cannot play out in Nigeria as well as in U.S.A. In the first place each legislative body is a delegate of power, the delegator being the people by the federal constitution. The ubiquitous phrased legal postulation that a delegate cannot sub delegate will apply fully in these peculiar circumstances. Again, in

Australia and in U.S.A as well the States have so many legislative items in their residual. So won't mind a few to spare this is not so with States in Nigeria were fewer weak legislative items are reserved for the States.

On this final note it is quite clear that the fields of concurrent exercise of legislative power are more in U.S.A and Australia as against Nigeria. It is advocated that there should be an increase in the case of Nigeria so that areas of cooperation which is the hall mark of federalism should be increased and pronounced in Nigeria. A few areas to be suggested in this cooperation are areas of policing, correctional facilities, and even fire services and their likes that do not have a national outlook in Nigeria.