

# **Void for Duplication? Thoughts on A.G Abia v A. G Federation.**

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## **INTRODUCTION**

The doctrine of covering the field is a well rooted one in Nigeria's jurisprudence. By this doctrine, if the National Assembly enacts a law in respect of any matter in the concurrent legislative lists in the Constitution of the Federal Republic of Nigeria 1999,<sup>1</sup> and a state House of Assembly enacts an identical law on the same subject matter, the law made by the National Assembly prevails all over the country. That made by the state House of Assembly becomes irrelevant and therefore, inoperative.<sup>2</sup>

Originally, this doctrine was applied in federal systems between laws made by the central legislature and those made by state legislatures.<sup>3</sup> Hitherto, state lawmakers were the only ones often concerned about the content of laws to be passed by them so that provisions of federal laws already in existence were not repeated. Under this arrangement, the National Assembly which was perceived as having sovereign legislative powers was never bothered about the repetition of the provisions of any other statutory instruments. The only limitations to the legislative competence of the National Assembly were those contained in the Constitution.

There seem to have been added another limitation. This is by the application of the doctrine of covering the field to Acts of the National Assembly. This novel application was done by the Supreme

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<sup>1</sup> Hereinafter "the Constitution".

<sup>2</sup> There seem to be judicial discrepancy on whether the lesser law caught by the doctrine of covering the field becomes inoperative, void, impliedly repealed or would be in abeyance during the subsistence of the superior law. See text, *infra*, at 8.

<sup>3</sup> The words 'state' and 'federal' are used here as a matter of convenience. In some federal systems, national, central, commonwealth (government), and, provincial, regional (government) are used to designate the tiers of government.

Court in the case of *A.G. Abia State v. A.G. Federation*.<sup>4</sup> What are the implications of this extension of the doctrine of covering the field?

### **A.G. ABIA STATE V A.G. FEDERATION**

This case bothered on the Electoral Act 2001.<sup>5</sup> The Act was enacted into law by the National Assembly and it received the assent of the President of the Federal Republic of Nigeria. An action was instituted by Abia state, leading the 35 other states at the Supreme Court invoking the original jurisdiction of the court. The plaintiffs were seeking to nullify the Electoral Act 2001. This was on the grounds that most of its provisions contravened the provisions of the Constitution. Specifically, the plaintiffs asked, *inter alia*, for:

A declaration that the provisions contained in sections 15 to 73 and 110 to 122 of the Electoral Act 2001 are, from the date of the commencement of the said Act, inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria 1999, and are accordingly null and void and inoperative.

A declaration that by reason of the provisions of the Electoral Act 2001 which are inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999, the said Electoral Act is rendered null and void and inoperative in its entirety.

In a unanimous decision, the Supreme Court nullified some sections but not the whole Act. Kutigi, J.S.C. who delivered the lead judgment laid down three guiding considerations, amongst which were that:

1. Where the provision in the Act is within the legislative competence of the National Assembly as provided in the Constitution and it has not already been provided for in the Constitution, the provision will be regarded as valid.
2. Where the provision in the Act is within the legislative powers of the National Assembly but the Constitution is found to have already made the same or similar provision, then the new provision will be regarded as invalid for

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<sup>4</sup> [2002] 6 N.W.L.R pt. 763, p. 264.

<sup>5</sup> This Act was repealed by the Electoral Act 2002 Cap. E6 LFN 2004..

duplication and or inconsistency and therefore inoperative. The same fate will befall any provision of the act which seeks to enlarge, curtail or alter any existing provision of the Constitution. The provision or provisions will be treated as unconstitutional and therefore null and void.

Based on these guiding considerations, section 15 of the Act was struck out with the following words:

Many of its provisions are duplications of the constitutional provisions relating to the election into the office of the President, members of the National Assembly, Governors and members of the Houses of Assembly.... I have therefore no hesitation whatsoever in coming to the conclusion that the entire section is void for duplication, inconsistency and lack of legislative competence. The section is accordingly struck out.

Similarly, on sections 23, 24 and 25, His Lordship said:

Many of the existing provisions of the Constitution have been repeated,... All these sections are hereby struck-out for duplication, inconsistency and want of legislative competence.

Some other sections of the Act were declared void because they transgressed express provisions of the Constitution and exceeded the legislative competence of the National Assembly.

### **SCOPE OF THE DOCTRINE OF COVERING THE FIELD**

The doctrine of covering the field operates in a federal structure where, by reason of exclusive fields of legislation, conflicts may arise between the federal and state legislations. As a rule of interpretation, it saves the legal order from confusion and conflict that may arise from superfluous duplication of statutory provisions.

This doctrine has been linked with section 109 of the Constitution of the Commonwealth of Australia. That section declares invalid any state legislation which is inconsistent with any Commonwealth Act on any matter in respect of which both the Commonwealth and the States are empowered to make laws. In interpreting section 109, the courts in Australia laid down many tests to determine inconsistency between commonwealth and state laws.<sup>6</sup>

In *Clyde Engineering Co. Ltd v. Cowburn*<sup>7</sup> Isaac, J. suggested as a conclusive test of inconsistency, the express or implied intention of the commonwealth legislature to “cover the whole field”<sup>8</sup> According to him:

But sure the vital question would be: was the second Act on its construction intended to cover the whole ground and, therefore, to supersede the first? If it was so intended, then the inconsistency would consist in giving any operative effect at all to the first Act, because the second was intended entirely to exclude it.<sup>9</sup>

This test was adopted in *Ex parte McLean*<sup>10</sup> in which a clear meaning was given to what became the doctrine of covering the field. It was thus laid down as the rule that if the commonwealth law intended to govern completely, exhaustively, or exclusively a matter in the concurrent legislative list, then the state law on the same matter is inconsistent. It does not matter whether the state law was in existence before the commonwealth law or not.

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<sup>6</sup> Howard Zelling, “Inconsistency between Commonwealth and State Laws”, (1948) 22 *Australian Law Journal* 45. The author pointed out that Quick and Garran in their work on the Australian Constitution expressed the opinion that S. 109 is superfluous.

<sup>7</sup> (1926) 37 Commonwealth Law Report 466.

<sup>8</sup> Ilmar Tammelo, “The Tests of Inconsistency Between Commonwealth and (1957) 30 *Australian Law Journal* 496.

<sup>9</sup> *Supra*, note 7, at 489.

<sup>10</sup> (1930) 43 Commonwealth Law Report 472 at 483. See also *The State of Victoria and Ors. v. Commonwealth of Australia and Ors.* (1937) 58 Commonwealth Law Report 618.

In *Attorney General of Ontario v. Attorney General of the Dominion of Canada*<sup>11</sup> the Privy Council enunciated a rule of interpretation which embodies “covering the field” even though there is no corresponding section 109 in the Canadian Constitution. Similarly, the United States Supreme Court rejected the argument that after Congress has legislated on a concurrent matter in a manner that evinced an intention to cover the entire ground, a state legislature could still legislate on it. Thus, the court recognised the doctrine of covering the field.<sup>12</sup>

This doctrine has gained inroad into the Nigerian legal system. Its first somewhat explicit application was in *Lakanmi v. Attorney General for Western Nigeria*<sup>13</sup> This case was decided during military rule in Nigeria. The Supreme Court held that since the Federal Military Government as the supreme legislative body had by Decree No. 51 of 1966 enacted what was the law governing the investigation of assets of public officers, and which law was operative throughout the country, any state law, such as Edict No. 5 of 1967 of Western State, on the same subject matter was *ultra vires* and void under the doctrine of covering the field. The clearest application of this doctrine in Nigeria was in *A.G. Ogun State v. A.G. Federation*<sup>14</sup> Here the Public Order Act 1979, which repealed all the existing Public Order Laws passed or deemed to have been passed by each of the States, expressed by its enactment, completely, exhaustively, and exclusively, what shall be the law governing the conduct and control of public assemblies, meetings, and processions throughout the federation. The court concluded that the Act covered the whole field of the subject matter.

From the Australian, Canadian, American, and Nigerian authorities cited so far, the doctrine of covering the field, hitherto, operated under these conditions:

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<sup>11</sup> (1894) A.C. 189.

<sup>12</sup> *Houston v. Moore*, 5 Wheat 1 (1820). See also *Priggs v. Pennsylvania*, 16 Pet. (1842) at 617-618, per Story, J.; *Davis v. Beason* 133 U.S. 333 (1889).

<sup>13</sup> (1974) U.I.L.R. 201. Compare with *Giremabe v. Bornu N.A* (1961) All N.I.R. 489.

<sup>14</sup> (1982) N.S.C.C.1.

1. In a federal system of government with a federal constitution, possibly with a concurrent legislative list.
2. Both laws, that is, that of the federal legislature and that of the state legislature are valid, not having any inherent invalidity and not being unconstitutional.

Going by these conditions, the scope, hitherto, of the doctrine was restricted to state laws being covered by provisions of federal laws. Laws made by the federal legislature were not affected as it was thought, perhaps, that there was no direct superior legislature which exercises legislative powers on concurrent matters with the federal legislature, like the National Assembly. Thus, the doctrine of covering the field arises where the issue is whether a state law on a concurrent subject matter can co-exist with a federal law on the same matter where the latter expressly or impliedly evinces an intention to cover the whole field, or to provide a complete statement of the law governing the matter. One point needs attention. There seem to be judicial division as to whether-

- 1 the doctrine of covering the field is distinct and separate from the 'inconsistency rule.
- 2 the law of a state affected by the doctrine becomes void, invalid, impliedly repealed, or inoperative in which case it is merely suspended during the subsistence of the superior legislation.

Australian courts take the doctrine as one of the tests for determining inconsistency as provided for by section 109 of the Australian Commonwealth Constitution<sup>15</sup>. That section provides that where there is inconsistency between a state law and that of the commonwealth, the later shall prevail and the former shall become invalid. The word invalid in the context of the provision is construed to mean that the state law remains formally in existence, but is also rendered inoperative. Its operation and effect is merely "suspended" but the law itself is not nullified.<sup>16</sup>

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<sup>15</sup> Ilmar Tammelo, *supra*, note 8; Howard Zelling, *supra* note 6; Clyde Engineering Co. Ltd v. Cowburn, *supra*, note 7.

<sup>16</sup> *Ibid.*

In Nigeria, the opinion has been expressed that the state law becomes "irrelevant and therefore, impliedly repealed",<sup>17</sup> "becomes inoperative for the period the federal legislation is in force... not... void",<sup>18</sup> "irrelevant, and to that effect, unconstitutional, as not being compatible with, in the sense of its having no locus in the face of, the law passed by the National Assembly",<sup>19</sup> "invalid",<sup>21</sup> "inconsistent",<sup>22</sup> "void".<sup>23</sup>

In the Australian Courts, covering the field is not different from the inconsistency rule. In Nigeria, the view has also been expressed that where a state law is on the same subject matter as a federal law, then the state law is inconsistent.<sup>24</sup> This seems to equate the doctrine of covering the field with the rule of inconsistency. There is another view which is sharply opposed to this. This view which accords with reason was led by Fatayi Williams, CJN, when he said:

I would only wish to add that, where identical legislations on the same subject matter are validly passed by virtue of their constitutional powers to make laws by the National Assembly and a State House of Assembly, it would be more appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter. To say that the law is "inconsistent" in such a situation

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<sup>17</sup> A.G. Ogun State v. A.G. Federation, supra, note 14, at 3, per Fatayi Williams, CJN.

<sup>18</sup> op. cit, at 35, per Eso, JSC; Black's Law Dictionary, 6<sup>th</sup> Edition.

<sup>19</sup> A.G. Abia v. A.G. Fed, supra, note 4, at 389, per Uwais, CJN.

<sup>20</sup> A.G. Ogun State v. A.G. Federation, supra, note 14, at 36, per Aniagolu, JSC.

<sup>21</sup> A.G. Abia v. A.G. Federation, supra, note 4, at 463, per Ogwuegbu, JSC.

<sup>22</sup> Ibid, at 465, per Ogwuegbu, JSC.

<sup>23</sup> Lakanmi v. A.G. for Western Nigeria, supra, note 13, at 209, per Ademola, CJN.

<sup>24</sup> Ibid; Oluyede, P.A & Ailse, D.O., Cases and Materials on Constitutional Law in Nigeria, 2nd edition, Ibadan, University 2003,128.

would not, in my view, sufficiently portray clarity or precision of language.<sup>25</sup>

Similarly, Aniagolu, JSC, Opined that:

The use of the word "inconsistent" would appear to me, with all due respect, to be inappropriate as the use of the word in those circumstances does violence to its meaning.<sup>26</sup>

In the case under review Ogundare, JSC, had this to say:

In my respectful view where the doctrine of covering the field applies there is no inconsistency in the strict sense of that word. To be inconsistent, the two legislations, that is the federal legislation and that of the state must be mutually repugnant or contradictory of each other so that both cannot stand. The acceptance or establishment of the one implies the abrogation or abandonment of the other.<sup>27</sup>

The opinion of Ogundare, JSC, clears the air and brings out the distinction between the doctrine of inconsistency and that of covering the field under the Nigerian law. This view is more supportable than its opposing one. Where a state law is on the same subject matter with a federal law it is inoperative because it is superfluous. Where by its tenor it is inconsistent with a federal law, it is inconsistent and thus becomes void to the extent of its inconsistency.<sup>28</sup>

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<sup>25</sup> A.G. Ogun State v. A.G. Federation, *supra*, note 14, at 11; Oluyede, P.A.O., *Constitutional Law in Nigeria*, 1st edition, Ibadan, Evans Brothers Limited, 1992, 77, where the author said: "strictly speaking, this is not a matter of inconsistency, but that of the federal law covering 'the whole field of that particular subject matter'. It is erroneous to say that the law is inconsistent in such a situation. The truth is that the whole field having been covered or occupied by the federal law, there is nothing left for the state enactment".

<sup>26</sup> A.G. Ogun State v. A.G. Federation, *supra*, at 36.

<sup>27</sup> A.G. Abia State v A.G. Federation, *supra*, note 4, at 435.

<sup>28</sup> S. 4(5) of the Constitution. A provision on covering the field in the Constitution is unnecessary and would be superfluous if included. This is because the doctrine derives from the existence of two or more identical legislations, one superior, while the other is inferior, coupled with the need to preserve order in the Legal Order.

## EXTENSION OF THE DOCTRINE OF COVERING THE FIELD

Unlike the earlier Nigerian cases on the point, the application of covering the field in the case of A.G. Abia v. A.G. Federation<sup>29</sup> seem to have been based on section 1 sub 3 of the Constitution which provides<sup>30</sup>

If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other Law shall to the effect of the inconsistency be void.

It is difficult to see how covering the field can derive from this section given the distinction between the same doctrine and that of inconsistency which the Supreme Court leaned towards. In applying the doctrine, the Supreme Court came to the conclusion that the doctrine applies as between the Constitution and any other legislation, be it federal or state.

According to Ogundare, JSC:

The fact that the doctrine has hitherto been applied between the Federal and State legislations where both Federal and State legislatures have power to make laws - usually on matters on the concurrent legislative list - is no reason to exclude it from a situation where the Constitution has completely, exhaustively or exclusively stated what should be the law governing a particular conduct or matter; any

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<sup>29</sup> Supra, note 4.

<sup>30</sup> Ibid. See Uwais, C.J.N. at 319-392, Ogundare, J.S.C., at 435. It was not quite clear as counsel relied on S. 1 (3) of the Constitution but no clear comment in relation to covering the field was made by their Lordships on that section. Besides, the use of 'void for inconsistency and or duplication' by their Lordships in granting some of the reliefs sort made it difficult to know the views of the court on that section in connection with the doctrine of covering the field.

law enacted by any legislature that is in Part materia with it is inoperative.<sup>31</sup>

On his part, Ogwuegbu, JSC said:

I agree with Chief Williams, SAN, that the doctrine of covering the field should apply equally between the Constitution and any other law whether Federal or State where the Constitution has completely, exhaustively or exclusively stated the law governing a particular matter or set of rights and duties.<sup>32</sup>

Based on this new approach, many of the provisions of the Electoral Act 2001 were struck down. It is of interest that in the cases of Lakanmi and A.G Ogun State, the whole legislations affected were nullified. But in A. G. Abia State, only some sections of the Electoral Act 2001 were struck down. This means the superior legislation may have covered exhaustively only some aspects of a matter now touched on by the inferior law. In such a case, only those sections offend the doctrine of covering the field. In granting the reliefs sort by the plaintiffs, the word duplication was used for the first time. The offending sections were thus struck down for duplication of constitutional provisions. This reasoning is indubitable. Federal law-makers are now to ensure that statutory provisions are not just massed together in disregard for their similar existence in the Constitution.<sup>33</sup>

This consciousness was demonstrated by the Senate during the consideration of the Report on the Electoral Act (Amendment) Bill 2006.<sup>34</sup> The bill contained the same error of duplication of provisions of the Constitution. After the consideration of clause two of the bill, Senators were sharply divided over the duplication of provisions of the Constitution. Further consideration of the Report was deferred till Tuesday, February 7, 2006 to enable the Senate to be informed of the

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<sup>31</sup> *op. cit.* at 435.

<sup>32</sup> *op. cit.* at 465-466.

<sup>33</sup> This has some utility. Lawyers now have to read very many statute books in order to find the law, the computers notwithstanding. The more concise and precise our statute books are, the better and tidier.

<sup>34</sup> Senate of the Federal Republic of Nigeria, Votes and Proceedings, No. 59, Wednesday, February 1, 2006. Which proceedings were aired on Friday, February 3, 2006 by the Nigerian Television Authority (NTA).

position of the law on the issue. On the next adjourned date, for the consideration of the report, the duplicated provisions were expunged. During the sitting of Wednesday February 1, the Senate President said that "The size of the law does not guarantee its quality. The smaller the better. Who has seen the constitution of the United States? It is so small that you can put it in your pocket."<sup>35</sup>

This development owes its thanks to *A.G. Abia v A.G. Federation*. It is a positive development that would remove unnecessary duplication and verbosity from our laws, both state and federal, and make them compact.

### IMPLICATION OF THIS EXTENSION

The new dimension this doctrine has taken has some obvious implications. Firstly, the doctrine is no longer restricted to a federal system only; it may be accepted by other jurisdictions that though operating a unitary system have a written constitution. Parliaments in such countries must not duplicate the provisions of their Constitutions. This doctrine cannot be applied to Britain which has an unwritten constitution and where the doctrine of parliamentary supremacy holds sway. The Supreme Court in a country like Ghana may be persuaded by this authority in any future case. Secondly, state legislations in Nigeria cannot duplicate provisions of the constitution. Thirdly, though sovereign legislative powers are conferred on the National Assembly, the constitutional provision that sovereignty and indeed sovereign legislative powers as evidenced by the enactment of the constitution, belongs to the people was affirmed.<sup>36</sup> The Nigerian citizenry is thus a superior law-maker whose enactment, the Constitution, has evinced the intention to completely, and

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<sup>35</sup> Monitored on NTA on Friday, February 3, 2006 on the programme 'Senate 109 Interactive' at 10 am.

<sup>36</sup> The preamble to the 1999 Constitution reads: "we the people of the Federal Republic of Nigeria... do hereby make, enact and give to ourselves the following Constitution..." S. 14 (2) (a) of the Constitution provides: "sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority". The legislature as part of government derives its powers from the Constitution. See s. 4 of the Constitution.

exclusively, provide the statement of the law governing some matters. Any Act of the National Assembly or Law of a House of Assembly which duplicates such provisions would be inoperative for duplication.

One other intriguing point is the place of international treaties which have been domesticated into local legislations in Nigeria.<sup>37</sup> Where the provisions of such a treaty (now an Act of the National Assembly) duplicate the provisions of the constitution what happens? An example of such a law is the African Charter on Human and Peoples Rights (Enforcement and Ratification) Act.<sup>38</sup> As was fitly put by Ogundare, JSC that it is interesting to note that the rights and obligations contained in the charter are not new to Nigeria as most of those rights and obligations are already enshrined in our Constitution. See chapter iv of the 1979 and 1999 Constitutions.<sup>39</sup>

During military rule when chapter four of the 1979 Constitution was suspended, this Act came in handy for the possible enforcement of human rights. Now that chapter four of the Constitution is in full operation, going by judicial opinions earlier cited, it seems, articles of the Charter which are duplications of the Constitution may be inoperative. They are in abeyance for as long as those provisions of the Constitution remain in force.

## CONCLUSION

The extension of the doctrine of covering the field in *A.G. Abia v. A.G. Federation* is a unique and novel application by the Supreme Court. This has given a new impetus to the supremacy of the Nigerian Constitution, and the sovereignty of the Nigerian people. It is hoped that legislatures in Nigeria will henceforth ensure full compliance with the new dimension of this doctrine.

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<sup>37</sup> s. 12 (1) of the Constitution.

<sup>38</sup> Cap A9 LFN 2004. Art. 5, 8, 10 & 11, 12 (1), and 14 duplicate ss. 34, 38, 40, 41, and. 43 of the Constitution respectively. Art. 17 seems not to accord with s. 18 of the Constitution which is not justiciable. The same goes for art. 22 which seems not to accord with ss. 16, 17 and 20 jointly.

<sup>39</sup> *Abacha v. Fawehinmi* [2000] 6 N.W.L.R (pt. 660), p. 229 at 289.