Frontline Bar Journal (FLB), Volume 1 Number 2, 2023
A Publication of the Nigerian Bar Association, Aguata Branch, Anambra State, Nigeria

COMPARATIVE SURVEY OF STATES EXERCISE OF RESIDUAL LEGISLATIVE POWERS IN NIGERIAN, AMERICAN AND AUSTRALIAN FEDERATIONS*

Abstract
Nigeria, United States of America and Australia in governmental structures are federations. By being federations powers are invariably shared between the central authority and the federating states in a manner that gives each entity areas of exclusive sphere and areas of intercourse in power divisions giving rise to the practice of Federalism. The American and Australian Federations were established through centripetal process while that of Nigeria was by centrifugal process. In this wise the federal government powers in U.S.A and Australia are delegated by the States which had a prior sovereign existence before federation under the tag 'we the people' and specified the Constitution leaving exclusively residual powers with the states as well as other vast authority upon which such powers not being denied them. In Nigerian power divisions, the Federal Government on one hand enjoys exclusive powers and concurrent powers with the States. while on the other hand States enjoy residual powers exclusively to ensure its continued existence and that of the local governments. Flowing from the forgoing this paper in comparative terms surveys the residual powers of states in Nigerian, American and Australian Federations that taint States therein as co-sovereign within a federal arrangement that is an indivisible and an indissoluble entity.
Keywords: Residual, Reserved Powers, Federalism, Federation, Sovereignty.

Introduction

The idea of two sovereign governments occupying the same territory and governing the same people at the same time implicit in Federalism in theory and practice was thought unworkable. American Federal structure blazed a trail in this novel adventure in human governance. Indeed looking at U.S.A Federal Constitution, one cannot help looking in awe to marvel to this typical American wonder. Kennedy J. in a concurring judgment in relation to this wonder aptly conjured such an elated and animated spirit when he said that:

> The framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.[1]

By the federal design the great powers of nationhood were assigned to the national government. The residue of the powers equally important relative to day to day workings of the government was reserved to the States.

It is a truism to assert that as against Australian Federation both Nigeria and U.S.A disagreements touching on federal principles led to the worst cataclysm in the annals in of their constitutional developments leading to civil wars[2]. In the aftermath of American civil war Chief

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[1] U.S Term limits, Inc. v. Thornton, [1995] 514 U.S. 779, 838 (Kennedy J. Concurring).

[2] Following the first military intervention in Nigeria federation in 1966 the military government under *General Aguiyi Ironsi via* Decree No.34 of 1966 offically declared Nigeria to be a Unitary state called National Government of Nigeria immediately revised by Decree 52 of 1966 under *General Yakubu Gowon* tagging about in nomenclature tagged federal military government .

Justice Chase following the peace of the Appomaltox Courthouse penned down an epithet for the crisis in the manner following: "The Constitution, in all its provisions looks to an indestructible union, composed of indestructible States"[3]

Australia and Nigeria looked up to U.S.A and imbibed the basic ingredients of federalism in their systems of governance. Nigeria upon independence in her first ever Federal Constitution as an independent nation adopted the Westminster Models[4] Constitution making of Australia until 1979 when it changed to United States Presidential system[5].
A persuasive salutary Federalism implicit in its principles is spelt out:

> Federal principle consists in the division of power such a way that the powers to be exercised by the general government are specified and the residue is left to the regional governments should each be independent in its own sphere.[6]

Thinking in this forgoing wise implicates federalism as "chiefly a property of the constitutions not of societies"[7]. Allied to this is the definition of federalism that anchors on "a legal-constitutional arrangement which delimits, albeit vaguely or ambiguously, the legal political competence of the levels of Government"[8]. This paper in relation to the federal allocation of powers as espoused cursorily above to carryout a survey of the states exercise of residual/reserved legislative powers in Nigerian, American and Australian federations. The objective lies in the determination of states importance in the federal arrangement that ensure states independence in a sphere however minimum. This being the case, this paper is tasked to sift out areas of States exclusive legislative competence without the legislative shadows of the Federal might lurking anywhere within precincts of this residual sphere.

Residual Legislative Matters in Nigeria

The exercise of exclusive legislative power over residual matters by the state government in a federation ensures the autonomy of such government. These matters deemed reserved to the States are not specifically captured in the Constitution, In ordinary and conventional parlances, the legislative items classed residual are those items not enumerated in the Exclusive and concurrent legislative lists which the federal government as well by incidents of exercise of incidental powers or any other powers by which the federal government can be authorised to assume legislative competence[9]. This right of states to exclusively assume powers over matters

[3] Texas v White, 74 U.S (7 Wall) 700, 725 (1868).
[4]This model also known as parliamentary method is one of the approaches to modern constitution making of which the other two recognized are the Philadelphia model and the constitutional commission approach in a typical Westminster's model a committee is formed to draft a constitution to be approved by parliament in a plenary session.
[5] This system typifies the model tagged Philadelphia Model that resulted in the Philadelphia Convention of 1787, which debated and drafted the U.S Constitution after which it was ratified by the States.
[6] K. C. Wheare, *Federal Government* (Oxford University press, 1963)110.
[7] Stephen Brooks, *Canadian Democracy*: An Introduction (Ontario: Oxford Univeristy Press, 1996) 120.
[8] L.A Jinadu, *"A Note on the Theory of Federalism in Readings on Federalism* (Lagos: Nigerian Institute of International Affairs, 1979) 15.
[9] In the enumerated Exclusive Legislative lists brought within legislative competence of the Federal Government are two legislative items by elastic clause provisions chiefly: item No. 67 and item No 68 in Part 1 of Exclusive Legislative lists 2nd Schedule item No: 67 read: "any other matter with respect to which the national assembly has power to make laws in accordance with the provisions of this Constitution" Item No. 68 read: "Any matter incidental or supplementary to any matter mentioned elsewhere in this list. Though these two elastic provision are wide enough to admit many items or subject matters within Federal legislative competence, they can not by that fact supplement or erode completely the exclusive legislative powers of the State wide enough to admit many

deemed residual or reserved is sacrosanct though there is no constitutional or statutory provision on this albeit as principle of Federalism implicit in its dual pronged nature. Nigeria operating a federal system of government by virtue of the 1999 Constitution re-enacts the doctrine of federalism[10]. The significance of this in Nigerian federation is that none of the government within the federation – federal or state government is subordinate to the other. In essence the sense of being an autonomous entity in its local sphere not withstanding another sovereign translates to the ability of a state "to exercise its own will in the conduct of any government in its affairs within the Constitution free from direction by another government"[11]. Given the exclusivity of states jurisdiction on matters that are neither listed in the exclusive nor concurrent list as residual matters other rules and regulations of state may permit the states to assume jurisdiction first lets us look at the exclusive legislative list to find residual matters.

Residual Items in the Exclusive Legislative List

Some of the matters deemed residual pertaining to state by principle of reading down can be shifted or excused from the federal exclusive legislative powers as contained in the Exclusive Legislative Lists[12] This can be put simply as matters subtly mentioned as non-exclusive otherwise reserved for the states in the exclusive list and constructively denied the national Assembly legislative competence. These matters can be deduced from the items exclusive legislative list as follows:

i. Item 22 – Election to local government council
ii. Item 29 – Fishing and fisheries in rivers, lakes, waterways, ponds and other inland waters within a state.
iii. Item 32 – incorporation, regulation and winding up of co-operative societies, local government councils and bodies corporate council established by law enacted by a state House of Assembly
iv. Item 36(b) – Shipping and navigation on inland waterway not designated by National Assembly to be an International waterway or to be an intra-state waterway
v. Item 36(d) – Ports established by states and not declared as Federal Ports.
vi. Item 36(e) – Parks in the state that has not been designated as National parks with state consents.
viii Items 53 - Public service of state,
ix Item 60(c) – The establishment, regulation of museums and libraries established by the government of a state.
X Item 61 – Formation, annulment and dissolution of marriages under Islamic or Customary law including causes relating thereto;
Xi . Item 63 – Traffic on non-federal trunk roads

items or subject matters within Federal legislative competence, they can not by that fact supplement or erode completely the exclusive legislative powers of the State.

[10] According to s. 2 (2) of CFRN 1999 "Nigeria shall be a Federation constituting of States and a Federal Capital Territory" s. 2 (1) of the State Constitution thereof provides for the Federal Republic of Nigeria that "Nigeria shall be one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria"

[11] B. O Nwabueze, *The Presidential Constitution of Nigeria* (London: C Hurst & Company, 1982) 53.

[12] See Ibid 2nd schedule to .S.4

Comment

The items in the exclusive legislative list classed as residual matters constructively can be regarded as residual lists by default. The clear cut exclusion of the exercise of Federal government legislative power over those items does not give much room for an opposing view. Granted that all enumerated matters in the exclusive legislative list in Nigeria are exercised by the Federal government to the exclusion of the States. This generic statement can be dislodged on the basis of express exclusion of the Federal competence in the same list as shown in discussions above earlier concept

Residual Matters based on Judicial Decision

In *A.G Lagos State v. A.G Federation & 35 Ors*,[13] the principal issue or question touched on whether;/ "Town and Country Planning" otherwise termed "Urban and Regional Planning" is a matter classed residual or concurrent. The answer then is if such matter is residual within the context of the Constitution, it is a matter for the states exclusivity in exercise of its residual legislative power, federal government is left to exercise similar legislative powers on town planning exclusively as well however with respect to only the federal capital territory by virtue of s. 299 of the 1999 Constitution[14]. Conversely if the subjects – urban, town and regional planning as well as physical development, are not residual matters in strict to sense under the Constitution but incidental to matters of fundamental objectives and directive principles of state policy or touching on exclusive list or concurrent list then National Assembly is a competent legislator.

The brief facts are that the government of Lagos State took out a writ of summons against the federal government wherein it sought in order to nullify or revoke approvals permits or licenses illegally granted by the federal government in respect of any building or development in Lagos State. In addition it sought a perpetual injunction to restrain the federal government, its servants, agents and privies from further granting approvals, permits and licenses for the development of land etc. later by a plaintiff's application all the remaining 35 states of the federation were joined as 2nd to 36th Defendants respectively with leave of the Supreme Court.

On whether urban and regional planning as well physical development are residual matter the Nigerian Supreme Court majority judgment of 4 to 3 led by S.A Uwaifo J.S.C with S.A Ejiwumi JSC, U.A Kalgo and S.U Onu JSC as against minority judgment of M.L Uwais JSC, E.U Ayoola JSC and Niki Tobi JSC were in affirmative terms. Uwaifo JSC in rejecting all the arguments canvassed to cloth the federal government with legislative competence over urban and regional planning law had this to say:

> No argument can defeat or reduce from the general planning legislative power of the House of Assembly of a state which is a residual Constitutional power. It gives the states the exclusive function for planning, Layout and development of their respective areas. Any Act, be it the Federal Highways Corporation Act, which tends, or is implemented in a way to tend, to undermine or take away this function of any state,

[13] (2003) 14 NSQCR (Pt. 2) 838.

[14] Which expressly accentuates the only instance it can exercise residual power in the manner following: "The provisions of this constitution shall apply to the Federal Capital Territory, Abuja as if it were one of the states in the Federation , and accordingly- all the Legislative powers, the executive powers and Judicial powers vested in the National Assembly, the Governor of a State, and in the courts of a state shall respectively rest in the National Assembly the President of the Federation and in the court which by virtue of the foregoing provisions are courts established for the Federal Capital Territory Abuja.

> or allows the federal government to exercise or assume such function is unconstitutional and in appropriate circumstances will be declared so."[15]

The forceful argument of *Professor Uthama* then Attorney General of Delta State that the federal government and its agencies may under the Federal Highways Act authorize the building of a petrol station or erection of housing project within the vicinity of a Federal Highway without complying with the planning laws and regulation of the State concerned by duly obtained permits for the projects could not sway the Nigerians Apex Court[16]. The court reasoned that though the Federal Government has the power to authorize development projects in respect of for example Federal Highways, Act Nigerian Railway Corporation Acts etcetera but

> It cannot go beyond those matters which are inextricably part of the traditional, operational, technical and all high – tech aspects of the subject matter of a particular Act, for example erection of toll booths in respect of the Federal Highways control tower and other buildings or stands within the airport in respect of Civil Aviation Act; Station building like station platform/staff houses, bus/ coach/taxes stands and toilets within railway vicinity in respect of the Nigerian Railway Corporation.[17]

The note that was struck in the foregoing is that the exercise of such express or incidental powers, will not be in a manner as to affect the general planning power and control of the state when such becomes the issue it is for the court to decide when legislative boundaries are exceeded. The majority decision per Uwaifo was unequivocal as to exclusive nature of the general planning law resident in the states as residual matter. Any doubt is dispelled in the point blank diction of Uwaifo to the foregoing effect:

> No argument can defeat or reduce from the general planning legislative power of the House of Assembly of state, which is a *residual* Constitutional power. It gives the states the exclusive function for the planning, layout and development of their respective areas. Any act, be it the Federal Highways Corporation, which tends, or is implemented in a way to tend, to undermine or take away this function of any state, or allows the federal government to exercise or assume such functions is unconstitutional and in appropriate circumstances will be so declared[18]

The position that represents the current state of the law in Nigeria which is that urban and regional planning is a residual matter by the judgement of the highest court in the land. By judicial interpretation a law with judicial flavour has been restated and validated. It will equally not be out of place to term it as a judge made law. In all it has been shown that matters classed as States residual matters in Nigeria context are not expressly provided in the constitution, however in nascent Nigeria constitutional development they can be spotted as we did and also judicially pronounced upon.

Residual Legislative Matters in U.S.A

Residual matters in US termed reserved powers forms to a great measure the exclusive powers of the State Government which makes it possible for the State to be a sovereign within a sovereign implying dual federalism. This power is guaranteed under the 10th Amendment to

[15] *Ibid*; 959 paras F – G.
[16] *Ibid*; 960 paras C – E.
[17] *Ibid*; E – F.
[18] *Ibid.*

the US Constitution in 1791 in these words."The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people". The federal government under the division of legislative power in US federal system has only limited and enumerated powers. Each State invariably was delegated the remainder of governmental powers not retained by the people. The people here refers to the people of the Unite States as constituting a political community. They are the same people who ordained and established the Constitution of the United States. Notably under the terms of the 10th Amendment retaining as well as reservation of powers to the States and the people but which the people's acts is different from that of the states.

Reserved Powers to the People

The provoking question is how can the people exercise reserved powers in situation where federalism accommodates two entities the states and the federal government acting through congress? The argument can be put forward that the Tenth Amendment to United States Constitution when speaking of other rights being retained by the states or the people is a proclamation and recognition of the right of the residents of a state to amend the state Constitution. In *Gatewood v Mathews*[19], the power to amend a State Constitution was viewed a right inherent in the resident of that particular state. The doctrine of popular sovereignty backs the foregoing no*tion.* It is not just a notion but a law as gleaned from California State Constitution[20] which provides as follows:

> All political power is inherent in the people. Government is instituted for their protection, security and benefit and they have the right to alter or reform it when the public good may require.

In essence after creation of United States and retention of some inherent rights by the States the reservation of right to the people tends to regulate that of the state. By this it could be said that were a power is reserved such a power is not granted. Implicit in the foregoing argument is the ever readiness of the court judicial authority stamp and endorse an approval seal on this inherent power that inures to the people under reserved power with regards to constitutional amendment

As such the reserved power that flows from the people to the States are usually exercised as police powers. This Police power is recognised in a judicial decision as "one of the great titles of Constitutional law"[21]. In a situation were a constitution failed to specify a particular manner for amending a constitution, the principle of popular sovereignty will rear into the fore, to aid the courts in recognising the inherent power of the people to revise their other basic law. In the same vein were state constitutions prescribe limited methods of revising a state constitutions the same principle will apply to leave open other possible methods and thus imply into the limited methods prescribed as not exclusive[22]. In support of the people of a state to imitate a measure for constitutional amendment Godin argues that:

> There is a principle basis for sustaining the validity of an initiative measure that would (1) amend the state constitution to permit the people call a constitutional convention through a ballot measures and (2) authorize such a convention call a procedure for

[19] 403 s.2d 716(Ky at App 1966)403.
[20] Cal. Const. art. 11, s . 1 .
[21] *Brown v. Maryland* [1827] 12 Wheat (25 U.S) 419.
[22] *See In* Re opinion to the Governor{1935} 178A. 433.

selecting delegates... both to specify in the current constitution and to specify limits on the convention's agenda.[23]

The Police Power

This police power constitutes the 'immense mass' of legislative power to be used in the protection of the welfare and the promotion of local interests in the State[24] was judicially recognised to be extant and existing. In *Brown v. Maryland*[25], it was held that States reserved power over public health and safety. It was argued that If the State was not permitted to tax imports in the original package before they left the hands of the importer, it would also be unable to prevent their introduction into its midst although they might comprise articles dangerous to the public health and safety. In this direction, *Chief Justice Marshall* said:

> The power to direct the removal of gun powder is a branch of the police power which unquestionably remains and ought to remain with the States. The removal or destruction of infections or unsound articles they equally fell within the same category. [26]

In *New York ex rel. Site Hesterberg* [27], a New York Statute establishing a closed season for certain game, during which season it was a penal offence to take or possess any of the protected animals, fish or birds was considered. It provides further that the ban should equally apply "to such fish, game or bird coming from without the State as to that taken within theState".[28] The provision was held to have been validly applied in the case of a dealer in imported game who had in his possession during the closed season "one dead body of an imported goose … and taken in Russia" in absence of conflicting legislation by Congress.[29]

In the legitimate exercise of reserved powers under police powers in U.S.A, it seems that exclusive power of the Congress may be affected. The position has always been that the application of such laws to particular cases will be allowed to stand in absence of any congressional action. This is different from States legislating on exclusive area of Congress, which is void even without congressional action. Legislative action on primary exclusive area of the State which rubs off in the exclusive area of the Congress is however a valid action.

Residual Legislative Matters in Austrialia

Essentially the reserved legislative powers of the States are not specified and cannot be examined or identified one by one exhaustively. In lucid terms the States residual powers are substantially identifiable by examining the express legislative powers of and implied prohibitions of the Commonwealth. In a comparison with the provinces of Canada where reserved legislative powers of States are specific *Justice English Clark*[30] had this to say:

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[23] Joseph R.Grodin'Popular Sovereignty and its lessons for a Constitutional Convention in California' ,*in Loyola of Los Angeles Law Review* 63(2011) 15 htt.11 repository u chastings edu/faculty-scholarship repository/1070 assessed on 2nd November,2023.

[24] *Gibbon v. Ogden* [1824] 9 Wheat. (22 U.S)1.

[25] (n. 21).

[26] *Ibid*., 443 – 444.

[27] (1908) 2 11 U.S. 31.

[28] *Ibid.*, 36 – 37.

[29] The following cases explained concessions by the court to the practical necessities of enforcement. *Boyside Fish Co. v. Gentry* [1936] 297 U.S 422; and *Whitfield v. Ohio* [1936] 297 U.S 431.

[30] Commonwealth Law Review vol. 1, P. 200 cited in J Quick, Legislative powers of the Commonwealth and the States of Australia with proposed Amendments(The Law Book Company 1919) 107 .

> The process of interpretation is entirely different in the Australian Constitution from that in the Canadian Constitution. The question of an alleged encroachment by the parliament of the Commonwealth upon the field of legislative power reserved to the States, must frequently involve the consideration of the extent to which the legislative powers of the States are necessarily curtailed by the Constitution or made subject to the exercise of a superior legislative power vested in the Commonwealth. *The legislative powers of the States ought not to be declared to be curtailed or limited by the Constitution to any larger extent than that to which the purpose for the Commonwealth was established require them to be curtailed and limited*. The absence of any power in the general of the Commonwealth in council to disallow any legislation of a State is in itself a clear indication that, in contrast with the Constitution of the Dominion of Canada the purpose of the Constitution of the Commonwealth is to fully preserve the political autonomy of the States, in respect of all matters which are not placed by the Constitution within the legislative power of the parliament (Emphasis Supplied).[31]

Aside the Federal exclusive empowerment and the concurrent legislative terms field where inconsistency test applies, the reserved powers of the State suffices to create another placinta to be reckoned with in constitutional interpretation and its attendant problems . In legislative field the occupation of the States in the areas where powers are concurrent albeit jointly and exclusively in reserved areas are jointly considered in resolving the conflicts arising from the powers inter-se of the Commonwealth and the States. Instructively:

> The explicit declaration of covering clause v of the Australian Constitution Act and of s. 109 of the Constitution does not settle all problems of interpretation. They do not relieve the judiciary of the task of determining the boundary lines of the legislative powers of the Commonwealth and the States, in many cases of alleged encroachment by a consideration of the purposes for which the Constitution was established and the respective positions inter-se which the Commonwealth and the States were intended to occupy under it. In other words a clear recognition of the Federal character of the system established by the Constitution of the Commonwealth is indispensable to a true interpretation of its provisions.[32]

In view of the foregoing statement, it is salutary to appreciate the place of the reserved powers of the State in the scheme of distribution of legislative powers in the Constitution of Australian Commonwealth. In creating States exclusive legislative power under reserved powers of the State s. 107 of the Constitution equally occasioned the saving of power of State parliament. This is so, for it was the same State Parliament that in the first place submitted the delegation of powers they exercised to the federal parliament under a federal arrangement. It was thus observed that:

> The powers left to States are of a purely local, domestic, and provincial character, and were left to them because it was believed that the parliaments of the States, having special knowledge of local conditions, could be better trusted to solve local problems.[33]

[31] *Ibid.*
[32] *Ibid;* 201.
[33] *Ibid;* 309.

Police Powers

There is no general acknowledgment that as a doctrine in all cases the Federal power yields to any reservation of the State police power so as to create States exclusive empowerment. If the Commonwealth power is made subjective, the implication is that the parliament would not have any right to legislate so as to circumvent the exercise of the State power termed reserved. In line with canons of construction laid down, by the Privy Council in Canadian cases, it is said with reference to State police powers that:

> Generally it may be said in respect to laws of this character that though vesting on the police power of the State, they must yield whenever Congress, in the exercise of the power granted to it legislate upon the precise subject-matter, for that power like all the other reserved powers of the States is subordinate to those conferred by the Constitution upon the nation.[34]

However according to *Isaac J*. in the *King v. Smithers: Ex parte Benson*,[35] definitions of the Police power must however, be taken subject to the conditions that the State cannot in its exercise for any purpose whatever encroach upon the powers of the general government or rights granted or secured by the supreme law of the land. Notwithstanding the above statement the Australian courts have in a number of cases affirmed the State powers against intrusion by the federal power. In *Peterswald v. Bartley*[36] the court held that notwithstanding the provisions of the Constitution namely ss. 86 and 90 giving the Federal parliament exclusive control over duties of exercise, the State parliaments may still collect brewers license fees; as the court reasoned that such license fees are not duties of exercise. Their imposition is within the police power of the States reserved to the States by s. 107 including the regulation and supervision of internal trade. Similarly, early High Court decisions have reinforced the exclusiveness of the reserved powers of the States touching on internal trade. In this wise, the court never hesitated to invalidate any legislative act of Commonwealth to enter such field. In *Owners Of S.S Kalibia v. Wilson*[37] it was determined that a State has by s. 107, exclusive authority to pass laws regulating shipping and navigation in and upon the rivers, ports harbours, and the territorial waters of a State, determining the rights and liabilities of those engaged in such callings or business. A Commonwealth law purporting to regulate such shipping and navigation was therefore held to be invalid.

In the *King v. Barger* and *The Commonwealth v. M.C Kay* [38] under the terms of what we many call State labour conditions, it was held that the Commonwealth power of taxation cannot be used in an indirect manner to interfere with or regulate the internal industrial and domestic affairs of the State reserved to the States by s. 107. In another respect it was held in *Attorney-General of New South Wales v. The Brewery Employees Union of New South Wales.*[39] The Commonwealth Trade Mark Act, part VII authorizing the registration of and giving proprietary rights in a workers label is in substance an attempt to regulate the internal trade and commerce of the States. The power to legislate respecting such internal trade and commerce is by the Constitution, s. 107, reserved to the States to the exclusion of the Commonwealth legislation touching on personal property fall under reserved powers of the State. In *Duncan and Others*

[34] *Kellar v. United States*,. 213 U.S 146.
[35] (1912) 16 C.L.R, at 115.
[36] (1903) 1 C.L.R. 497.
[37] (1910) 11 C.L.R, 689.
[38] (1908) 6 C.L.R, 42.
[39] *Ibid.*

v. The State of Queensland Another[40] it was held that the reserved powers of the State under s. 107 of the Constitution include the power to pass laws relating to sale, purchaser, control, disposition and location of personal property within the State directing that such property may be held in *custodial egis* or impressed with trust for possible purchases such as by the imperial government or by the State Government itself. Such laws are not inconsistent with s. 92 of the Constitution providing that trade, commerce and intercourse among the States shall be absolutely free.

In preserving the exclusive of States power termed reserved it was apparent that the courts will readily disallow the Federal parliament from entering exclusive States legislative filed under any guise. In *Huddart; Parker & Co. Ltd v. Moorhead* the Commonwealth attempts to under the guise of laws relating to corporations to regulate trade and commerce within the limits of the State and not relating to, trade and commerce among States was construed as invasion of the reserved powers of the State. It was held that contracts made within the State not relating to Interstate trade were to be governed exclusively by State laws. It was reasoned that the words of the Constitution "corporations formed, etc." were open to two constructions, but they ought not be considered as authorizing the Commonwealth to invade the field of State law as to domestic trade carried on by corporation under State law. A conviction was quashed based on the ground of invalidation of the offending sections of the Commonwealth law.

In a case stated[41] it was sought from the High Court whether the President of the Commonwealth court of conciliation had power to make an award which was inconsistent with a determination of a State wages board. It is strongly contended even by dissent judgment that although parliament could not make a law inconsistent with the State domestic laws within the reserved powers of the States, parliament can appoint a judge or arbitrator to do what it cannot do itself. In rejecting this contention, the majority of the High Court held that any invasion by the Commonwealth of the sphere of the domestic concerns of the States is disallowed by the Constitution save to the extent expressly sanctioned.

The language that runs through our current discussion on the exclusivity of the preserved powers of the State suggests unequivocally that such a field can only be entered legislative wise by the Commonwealth upon express constitutional guarantee in that strict constructionist approach leanings of the court. The Commonwealth is caged and made to operate within the parameters of the express assigned legislative powers. This interpretation and conception of the Commonwealth legislative powers from the corridors of express powers was to change and completely alter all calculations and allow invasion of areas usually termed reserved. This change was necessitated by the doctrine in *Engineers case* and the law on incidental powers which added fullness to all Commonwealth powers, including the trade and commerce. As *Isaac J.* wrote in Engineers case:

> The grant of legislative power to the Commonwealth is….the grant of an authority as plenary and as ample … as the plenitude of its power possessed and could bestow…where the affirmative terms a Stated powers would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power to indicate if in the Constitution.[42]

[40] [1916] 22 C.L.R at 556.
[41] *The Bootmakers' Case (Australian Boot Trade Employees Federation v. Why brow & Co,)* (1910) 10 C.L.R 266.
[42] *Amalgated society of Engineers v Adelaide Steamship co.Ltd.* (1920) 28CLR 153-154.

By the centrist leanings of the court in Engineers case, the Commonwealth legislative power expanded into fields otherwise termed residual. From 1920 when the judgment was given until 1947 in *Melbourne Corporation v. The Commonwealth,*[43] a vague reminder of the tenets of Federalism was made but the decision stands to date. Apart from the judicial flavour given to Commonwealth expansionist inclination in *Engineers case*, an invocation of Commonwealth incidental powers implied in s. 51(1) itself and as expressed in s. 51(xxxix) can further expand the power grants in s. 51(1) as it were. The point stressed here is that in a situation where Commonwealth can show a flicker of assistance from an incidental matter towards effective exercise of the main grant or even reasonable means in carrying out the trade and commerce power, in s. 51(1) such exercise of power will be valid. The general imputation is that:

> All the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons or things from State to State are also part of the concept (of inter-State trade), because they are essential for accomplish.

By an acknowledged end[44]an act otherwise an intra State can be controlled by Commonwealth leaning on a power dealing with inter-State or overseas trade. However, the only problem extending the Commonwealth power, under s. 51(1) cases is to show how in each occasion such otherwise intra-State activities fall within the grasp of the Commonwealth under s. 51(1) plus its incidental powers. This will fall into place if such an intra-State activity is for example judicially declared to be "connected with" or "relevant to" overseas or inter-State commerce[45]on one hand, and on the other hand is "directly" related to inter-State trade.[46] Invariably, standing alone intra-State is the exclusive preserve of the State legislative wise. The Commonwealth does not have authority to legislate with respect to the internal trade of a State save under instances its power under external trade or trade among States are equally called into question one way or the other. In concluding the discussion under the terms of reserved powers of the State, it will be necessary to restate that the powers denied the Commonwealth still falls largely into place as reserved powers. As a matter of fact s. 107 operates under the reserved powers as well as some powers denied the Commonwealth.

Comparative Survey

There is no doubt that in Nigerian, American and Australian Federal step up and specifically under their division of legislative powers, states exercise residual or reserved powers

[43] (1947) 65 C.L.R 31, 82 where the Federal thesis permeating the Constitution was States thus "a central government and a number of State government and a number of State governments separately organized. The Constitution predicates the continued existence as independent entities". Presupposing that neither party to the Federation, be it commonwealth or the State should use its powers to truncate the existence of the other party. See Howard (n 555) 65 – 66.

[44] *W & N A Mc Arthur Ltd v. State of Queensland* (1920) 28 C.L.R 530 at 549.

[45] *R. v. Foster;* ex parte Eastern and Australian steamship Co. Ltd (1959) 103 C.L.R 206, at 276; *General v. Marrickville Mrrickville Margarine Pty Ltd* (1955) 93 C.L.R 55, 177 by way of an example that loading and unloading of a ship's cargo is a localized act that takes place in a wharf as such an intra-State act, however, if the cargo comes either from overseas or from another State, the loading and unloading relates as it were to overseas or inter-State commerce as the case may be.

[46] *Redfern v. Duncop Rubben Australia Ltd* (1964) 110 C.L.R 194 at 213, 219, 220. *Huddent Parker Ltd v. The Commonwealth* [1931] 44 C.L.R 492, 514 – 516. Example in this instance suffices where for an instance a New South Wales manufacturers enter into an agreement among themselves at a particular spot without none of the terms of the agreement referring to either inter-State or intra State trade but refers to the manufacturers trade at large. Nevertheless in putting into effect the agreement, a Victorian distributor though blacklisted was supplied at a non wholesale prices.

exclusively. Since there are no specific residual legislative list in the federal constitutions in Nigeria, U.S.A and Australia under consideration it becomes not easy to classify exclusive residual matters. However in course of constitutional developments more with the level of judicial authority residual powers of the state had been delineated in these federations. There are now seemingly clear cut express and implied boundaries in the division of legislative powers, between federal government and state government by acts of judicial interpretations. This is not to say that all the overlaps in exercise of legislative functions by the Federal and State Government have been closed.

Implicitly in division of legislative powers there are structural differences in Nigerian Constitution to that of United States of America and even Australia that lie in Nigerian federal constitution's detailed method of arranging apportionment of legislative items in exclusive and concurrent legislative list in U.S.A and Australia such details are not there the gaps are therefore usually filled by statutory, interpretation. In *A.G Ogun State v. Aberugba & 7 ors*[47] the Supreme court validated a state tax law on the premise that the particular product of inter-state commerce that had been brought into the state had intermingled with local products and the tax imposed on both the inter-state product and the local products. In upholding the Nigerian States taxing ability on sales Tax Australian and America precedents were rejected on the score that for example Australian States had no power resident in them to make sales Tax but Nigerian States have. The Supreme Court per Bello referring to sales tax observed as follows:

> In Australia a state has no power to make law while in Canada a province has such power but the tax imposed therein must be "direct taxation". So it is wrong as the court has done to rely in Australian and Canadian decision in the interpretation of our constitution.[48]

Clearly when the provisions of Nigerian Constitution is open to interpretation by its letters it is needless to travel outside the shores of the country to seek guide from interpretation given under U.S.A or Australia constitution. However time and again the need will arise to do just that given near similar federal templates on which Nigeria runs with older federations like U.S.A and Australia. Notwithstanding the increasing notable differences in manner of Nigerian structured Federal setup like absence of state Constitution constructional principles after apply muntandis mutander with U.S.A and Australia. For example the doctrine of covering the field developed in Australia or pre-emption relative to U.S.A that allows federal government to override side

Local Government as Residual Matter

Local governments do not feature in the federal constitutions of U.S.A and Australia but in Nigeria they are clearly recognized third tier[49] governments whose existence under a democratic setting to be generated by the governors of the respective states[50]local governments in exercise of exclusive sovereign rights are creation of states in U.S.A and Australian Federations one common feature in all these Federations is that the states exercise of powers over local government is exclusive as a residual or reserved right to the exclusion of the central government as a sovereign entity.

[47] (1985) 1 NWLR (Pt. I) 51 at 74.
[48] *Ibid*.
[49]In U.S.A and Australia it seems largely that local governments are structured to be an administrative unit of state governments and not a third tier government under a federal model .
[50] S.71 CFRN 1999 (as amended).

Local governments being a residual matter resident in the states it is the constitutional right of states to create local governments. In Nigeria the federal constitution provides the guide[51]and in U.S.A and Australia it is the state Constitutions under popular sovereignty. In consequence local governments in U.S.A and Australia exercise only powers delegated to them by the states of this Davies wrote:

> Selected powers, out of full array of sovereign powers are given to local units either by the state constitution or more community through legislation delegating responsibility for policy making on certain issues.[52]

The reserved powers of the Federation under study is more reinforced and pronounce in the area of criminalization. The police powers exercisable in American and Australian federations as reserved powers enable the states to make varied provisions even touching on death penalty. In Nigeria the residual power over criminalization is the basis why criminalization is the basis for creation of state offences and their non-uniformity in Nigeria. The southern states adopted the criminal codes while penal codes in most northern states are largely laced with Koran or Islamic injunctions.

As in a general sense the states in U.S.A and Australia have absolute power over local government units within then except for constitutional limitations[53]from this survey local government been placed under residual/reserved matters. The Federal Government can only assert influence on states and ultimately on local government as states instrumentality through distribution of grants, incentives and aid and attaching some strings.

Interchange of Residual Powers

Certain subject matters in the exclusive domain of states can change character by contingent act of the State. In Australia this possibility is occasioned by the commonwealth constitution[54]which vests in the commonwealth parliament the power to make laws with respect to matters referred to it by the parliament of anyone State or States Chukwura[55]while noting that laws made thereto shall extend only to state by whose parliaments the matter is referred without such states losing its legislative competence to legislate on matters referred

[51] This is so because the states in Nigeria do not have individual constitutions as in U.S.A and Australia in Nigeria case of *A.G Lagos state v A.G Federation* (2004) 11-12 SC 85 at pp. 122-123 the Nigerian Supreme Court upheld the constitutional right of the Lagos State to create new Local Government areas however with a rider that the passing of the Local Government Area Law No. 5 of 2002 or similar enactment of the New Local Government(Amendment) Law 2004 cannot give life to a New Local Government be operative respectively until the appropriate consequential Act is passed by the National Assembly as provided in the Federal Constitution.

[52] Jack Davies, *Legislative Process in A Nutshell*(3rd ed. Thomson West, 2007) 203.

[53] In village of Perrysburg v Ridgway[1923] 108 Ohio St 245 were by Article xvii section 3 of the US state of Ohio granted local self governance to its municipalities it cannot again act in such matters as it has limited its power under rule provisions by which local units are granted autonomy over their local affairs. In Australia in regulation of local governments the state most times by issuing bulletins informs the local government of its intents one of such bulletin was issued by Queensland in April, of 216 on increase of a penal unit see dilsp.gld.gov.au/about-ilsp/news media.

[54] S.51(xxxvii) constitution of the commonwealth and states of Australia 1907.

[55] Chinwuba Chukwura 'A component Analysis of the federal and state legislative intercourse in concurrent legislative fields in Nigerian, American and Australia federal systems in Chukwuemeka Odumegwu Ojukwu University Law journal of private and public law(COOUJPPL)2022 4(1), 88.

reasoned in *Graham v Paterson*[56] stated he in relation to referral states not losing its legislative competence that:

> 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[57].

A similar provision but of a different legal consequence can be seen in Nigeria concurrent legislative list in particular item No 3 on Antiquities and Monuments hitherto within residual domain of the state but which by the said state consent designated ones with state consent becomes exclusive leaving the antiquities and monument not designated as national to remain residual.

Again there are still other ways since Australian Federation via which power has shifted from state to commonwealth Parliament. This was largely in area of fiscal federation[58] where the States are dependent on the Commonwealth occasioned founded on what Hanks said to be "the twin rocks of the 1929 financial depression and second world war"[59] sequel to second world war. Commonwealth centralized the imposition and collection of income tax with the endorsement of the law by the High court[60] to a most significant tax base.

In the federation of Nigeria U.S.A and Nigeria Interactions of all the levels of governments is the cruz of a federation. In this sense in Australia and notably USA that do not recognize local governments in their constitution the local governments join the states and federal governments in implementing federal programs and mandates largely in areas relating to education and environment.

Conclusion

In relation to power division in a federation between the federal government and state government, Tocqueville said: "Division of authority between federal government and the states- the government of the states is the rule, the federal government the exception[61]. In this paper it has been shown that in certain sphere's the states have exercised legislative power as an independent entity were the federal power cannot override them. It does not matter how mineral or the extent such power has been wilted down by federal interference for it is by medium of exercise of residual power that federalism is assured. In essence the exclusivity of federal power over certain enumerated subjects did not take away the independence of the states in certain areas. There in USA a formal recognition of the independence of each state in its sphere "nevertheless the federal government was authorized to interfere in the internal

[56] (1951) 81 CL.R 1.
[57] *Ibid;* 89.
[58] Noticeably there is a fiscal imbalance in Australia and Nigeria. This lead to what is called vertical fiscal; imbalance were the federal government has increased capacity to raise revenue with the states having limited capacity to raise revenue notwithstanding its responsibilities in the area of provision of public services ie health, care, education etc.
[59] P. Hanks, *Australian Constitutional Law Material and Commentary(*5th ed. Butterworths (1994) 8.
[60] The endorsement came in a line of cases referred to a Uniform Tax cases. The first case that of *South Australia and others v Commonwealth and Anors* (1942)65CLR 373; (1942) HCA 14 where the court ruled that four pieces of legislation made which was designed to raise funds to support the war effort by encouraging the states to give up their right to collect Income Tax was valid; In *Vitoria v Commonwealth(1957)(The second Uniform Tax case)[1957]99CLR 575,[1957nder section] HCA54, the High Court held that commonwealth grants to states under section 96 of the constitution may be validly tied to prescribed purposes.*
[61] Alex De Tocqueville, *Democracy in America* vols. I and II; *Henry Reeve(ed) (*Bentham Books,2000) 127

affairs of the states in a few predetermined cases in which an in discreet abuse of their independence might compromise the security of the union at large".

The legislative powers of the state in Nigeria is derived from the constitution directly but this is not the case in Australia were the states independently derive their powers in variegated forms[62] so in these comparative survey we have Nigeria in which the states do not have state constitution and U.S.A and Australia whose states all have state constitutions, less the absence of individual state constitutions in Nigerian federation. State in Nigeria enjoy the enjoy the same sovereignty in exercise their legislative in exclusively assigned sphere tagged like states in USA and Australia were certain powers reserved to the states are derived the federal government.

[62] For example state *Tasmania* derive its legislative power from imperial Act 1850 section 14, sec s.13 & 14 Victorian constitution 59 not a direct conferral by constitution; in case of Victoria uniquely expressed is the power to make law "in and for Victoria in all cases whatever-constitution Act 1975(VIC) S.16; In South Australia it is equally by constitutional Act section 5.