

**AN APPLICATION OF THE DOCTRINE OF BASIC STRUCTURE  
IN THE FEDERAL SYSTEM OF NIGERIA\***

**Abstract**

*Nigeria operates the federal model of governance. Federalism which is a principle of government structure often applied to heterogeneous systems, consisting of at least two constituent parts that are not wholly independent but together form the system as a whole. A comparative examination of the concept of federalism shows that there are certain basic features which an ideal federal structure ought to possess. There have been criticisms aimed at the lack of basic federalism features in the country. One of such criticism is directed at the Supreme Court's somewhat lack of enthusiasm to apply basic federalism principles in the country. The paper therefore appraises federalism practice in Nigeria as well as the Court's posture concerning the application of basic federalism features in the country. The researcher aims to situate the basic structure doctrine in an attempt to urge the Courts to evolve a culture of promoting basic features of federalism in Nigeria*

**Keywords:** Federalism, Basic Structure, Supreme Court

**1. Introduction**

Federalism has been championed both as an instrument of unity in diversity within States - its intra-state dimension - and as a means by which established States have attempted to forge a closer relationship between States - the inter-state dimension. The former case has been largely a transient phenomenon with few enduring examples while the latter has had a chequered career in terms of regional, mostly economic, Unions of States.<sup>1</sup> Again, even though scholars are divided as to the true nature and meaning of federalism,<sup>2</sup> there seems to be consensus on the minimal features [or principles] of federalism.<sup>3</sup> That is, federations rest on the two constitutionally protected pillars of 'shared rule' and 'self-rule'. Shared rule refers to the common power-sharing mechanisms that characterize federations, for example, a bicameral, national parliament in which the states are represented as well as formal or informal power-sharing mechanisms that may exist at the national level within the executive and sometimes the judiciary to facilitate power sharing. Self-rule denotes the idea that both the national and state governments are autonomous to make and implement decisions within the limits set by the constitution; the right of states to enact their own constitutions and design their own institutions which are directly elected; and the right of state to participate in the conduct of intergovernmental relations.<sup>4</sup> Essentially therefore, these dictates of federalism relates to the issue of power distribution and sharing between the federal and state governments. The Nigerian State, which is structured along the federal model of governance, has been the subject of several criticisms from federalism enthusiasts. Prominent amongst the several criticisms which have been aimed at federalism in Nigeria is the criticism that a complete application of federalism principles in the country seems to be missing in the polity. In this sense, basic federalism principles are often neglected in the country. In the Nigerian situation, there appears to be an absence of these features of federalism. Thus, a review of the legislative competences<sup>5</sup> of the federal and State governments of Nigeria would ultimately show that power distribution in Nigeria appears to be inequitably tilted in favour of the federal government. Hence, the several struggle for legislative functions between the federal government and the governments of several States, as evident in the several federalism cases between the federal government different states.<sup>6</sup> On the other hand, the evolution and practice of the doctrine of basic structure is rooted in India. The doctrine was established as a response to the normative concern to preserve the sanctity of the Constitution as a higher law in the country. The Supreme Court of India, with intentions to protect the basic and original ideals of the makers of the Constitution, has acted as a check over the legislative enthusiasm of Parliament ever since independence. The apex court has pronounced that the Indian Parliament cannot distort, damage or alter the basic features of the Constitution under the pretext of amending it. The phrase 'basic structure'

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<sup>1</sup>Michel Burgess, 'Federalism in Africa: An Essay on the Impacts of Cultural Diversity, Development and Democracy' *The Federal Idea, A Quebec Think Tank, on Federalism* <<https://ideefederale.ca/documents/Africa.pdf>> accessed 22 June 2020.

<sup>2</sup>Adeleke, O. O., 'Federalism as a Political Ideology and System of Government: The Theoretical Perspectives' [2017] *IJAAR*; 53

<sup>3</sup>Anna, Gamper, 'A Global Theory of Federalism: The Nature and Challenges of a Federal State' [2005] *German Law Journal*; 1299

<sup>4</sup>Bertus de Villiers, 'Federations: Shared Rule And Self Rule in the Search for Stable Governance' [2013] *University of Western Australia-Faculty of Law Research Paper*; 394 and 396

<sup>5</sup>See the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999

<sup>6</sup>The cases of *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Ors.* (2002) 14 WRN 1 (SC); *Attorney General, Lagos State v Attorney General, Federation & others* (2014) LPELR 22701 (SC) are illustrative of this point

itself cannot be found in the Constitution. The Supreme Court recognized this concept for the first time<sup>7</sup> in the historic *Keshavanad Bharti v. State of Kerala* in 1973.<sup>8</sup> Hence, in preserving the intentions of the makers of the Constitution, Indian courts would often restrict the legislative enthusiasm of the Indian Parliament, while upholding the intentions of the makers of the Constitution.

In this work, the researcher proposes an application of the doctrine of basic structure as a way to preserve, uphold, apply and situate the minimal principles or precepts of federalism in Nigeria. The researcher interrogates federalism in a bid to identify some basic features or principles of federalism. The work also reviews the doctrine of basic structures as developed in India. The work encompasses a comparative analysis of the application of federalism principles. The work is then concluded by proposing certain recommendations in accordance with federalism principles and the doctrine of basic structure.

## 2. Federalism in Nigeria

In 1914, the Northern Protectorate and the Southern Protectorate were amalgamated by the British Colonial Administration. Nonetheless, before Europeans arrived in the territory now known as Nigeria, a number of different civilizations existed whose presence is still felt today. For example, in the North, Islam was predominant. In the Nineteenth Century, there were two Islamic Empires, the Sokoto Caliphate and the Bornu Empire. In the Southwest, there lay numerous Yoruba city-states that generally had in common animist religion and were only sometimes united. In the Southeast, there was an Igbo kingdom, Nri, and a collection of semi-autonomous towns and villages in the Niger River Delta. Such regions were linguistically, religiously, and politically distinct.<sup>9</sup> The British colonial administrators made use of the Indirect Rule or Native Authority system, which gave prominent functions to traditional rulers in the country. Nonetheless, The Nigerian state became a federation in 1954 by virtue of the Lyttleton Constitution.<sup>10</sup> Federalism was also retained at independence and has been reflected in the 1954 Constitution, 1960 Constitution, 1979 Constitution, 1963 Constitution and the current version of 1999. Hence, irrespective of the flaws noticeable in the system, Nigeria continues to operate a federal system of governance. Over the years, the practice of federalism has been the subject of scholarly discussions. Also to have caught the attention of the said intellectuals and think-tank bodies alike are pressing national questions of race and identity – United States, Brazil, India, Canada, South Africa, Australia; the agitation of minority ethnic groups – Russian Federation, Nigeria; formulating an appropriate revenue sharing formula – Nigeria; the centralisation of power at the centre – Nepal, Ethiopia, Russian Federation, Venezuela, Nigeria; and the demand for self-determination via secession – Pakistan, Russian Federation, Canada, Spain. In order to address these complex challenges bedeviling federations the world over, federalism study has received prominent attention from intellectuals.<sup>11</sup> Nonetheless, there are salient normative features of federalism which every ideal federal structure ought to contain. Hence, scholars have made several proposals on the ideals of federalism. Thus, federalism could be conceptualized as a form of government which institutionalizes vertical distribution of power in such a way as to demarcate which, between national and subnational tiers, is competent or authorized to exercise defined powers within the framework of a written constitutional text.<sup>12</sup> Federalism therefore rests on:

- i. the existence of two or more levels or orders of government;
- ii. a written constitution, which distributes powers and responsibilities among
- iii. orders or levels of government, while providing sources of revenue for them to carry out these functions;
- iv. adequate representation of the views and members of subnational groups in policy-making institutions at the centre, such as a House of representatives or a second legislative chamber in some countries;
- v. independent and impartial judiciary (such as a Supreme Court) to interpret the constitution; and play the role of an impartial umpire;

<sup>7</sup>Ifitikhar Hussian Bhat, 'Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries' [2013] (1) (3) *IJRHS*; 27

<sup>8</sup> [1973] AIR 1461 (SC)

<sup>9</sup>John Campbell, 'Lord Lugard Created Nigeria 104 Years Ago' [2018] < <https://www.cfr.org/blog/lord-lugard-created-nigeria-104-years-ago> > accessed 22 June 2020.

<sup>10</sup>Egugbo, Chuks Cletus, 'Resource Control and The Politics of Revenue Allocation in Nigerian Federation' [2016] (5)(4) *IJA*; 186

<sup>11</sup>Ogunnoiki, Adeleke Olumide, 'Federalism as a Political Ideology and System of Government: The Theoretical Perspectives' [2017] (3) (9) *IJAAR*; 54

<sup>12</sup>Edoba, Omoregie B., 'The subsidiarity principles and federalism fissures in Nigeria' [2013] *Journal of Constitutional and Parliamentary Studies*; 228 - 243 <<http://www.vanguardngr.com/2012/10/the-subsidiarity-principle-and-federalism-fissures-in-nigeria-1/>> accessed 22 June 2020.

- vi. the establishment of institutions and processes to facilitate effective intergovernmental relations or collaboration in shared areas of responsibility or overlap.<sup>13</sup>

Further to the above, it has been suggested that federations rest on the two constitutionally protected pillars of 'shared rule' and 'self-rule'. Whereas, shared rule refers to the common power-sharing mechanisms that characterize federations, for example, a bicameral, national parliament in which the States are represented as well as formal or informal power-sharing mechanisms that may exist at the national level within the executive and sometimes the judiciary to facilitate power sharing, self-rule on the other hand denotes the idea that both the national and state governments are autonomous to make and implement decisions within the limits set by the constitution. To this end, it has been stated that 'Federalism requires mutuality, not command, multiple rather than single causation, a sharing instead of a monopoly of power.'<sup>14</sup> Again, another author<sup>15</sup> has posited that federalism requires a self-sustainable and robust institutional design (a federation), a complex, decentralized party system, and a set of attitudes and values: a shared political understanding that provides civic support for the system. In other words, federalism cannot be reduced to the mechanics of the federation. It involves a program or set of ideas, a substantive political vision, a common cultural capital that defines and when necessary condemns deviant behaviors; constituting for each country appropriate or permissible federal behavior at the various levels of government. This federal perspective is articulated in three tightly-interwoven normative spheres: 1) a political theory rooted in an extensive federal-republican tradition; 2) an ideology linked to a political movement; 3) the empirical-normative aspect of a shared federal political culture, which we shall examine here. From the above however, what is clear is that there is a general acceptance that in order to adequately practice federalism as a concept, there are certain features which must be present in the polity, the absence of which in the Nigerian federal structure which has led to the several criticisms aimed at the system. The Federal structure of Nigeria is believed to be 'a bad marriage that all dislike but dare not leave, and that there are possibilities that could disrupt the precarious equilibrium in Abuja'.<sup>16</sup> Given the very fact that Nigeria is a heterogeneous State, the whole idea of federalism stems from the desire to integrate the different groups within the entity now known as Nigeria. However, the adoption of federalism notwithstanding, Nigeria's political system has continued to operate with minimum cohesion.<sup>17</sup>

The challenges with Nigeria's federalism seem to relate to the fact that basic federalism principles are usually neglected. For example, as noted in the previous chapter of this work, although scholars hold different views on the meaning and proper definition of federalism as a system of government however, there seems to be consensus on the minimal features [or principles] of federalism.<sup>18</sup> On this ground therefore, scholars hold the view that federations rest on the two constitutionally protected pillars of 'shared rule' and 'self-rule'. Shared rule refers to the common power-sharing mechanisms that characterize federations, for example, a bicameral, national parliament in which the states are represented as well as formal or informal power-sharing mechanisms that may exist at the national level within the executive and sometimes the judiciary to facilitate power sharing. Self-rule denotes the idea that both the national and state governments are autonomous to make and implement decisions within the limits set by the constitution; the right of states to enact their own constitutions and design their own institutions which are directly elected; and the right of state to participate in the conduct of intergovernmental relations.<sup>19</sup> Essentially therefore, these dictates of federalism relates to the issue of power distribution and sharing between the federal and state governments. However, a review of the contemporary federal arrangement in Nigeria would show that the application of these features of federalism seem to be on the relapse. Thus, a review of the functions-allocation provisions of the constitution<sup>20</sup> would reveal that power distribution in Nigeria appears to be inequitably built in favour of the federal government. Suffice it to say therefore that in theory, Nigeria can be said

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<sup>13</sup>Jonah Isawa Elaigwu, 'The Practice of Federalism in Africa, the Nigerian Experience and the Way Forward', [2013] *Public Lecture delivered at the Goddy Jidenma Foundation*; 6

<sup>14</sup>Wildavsky, Aaron, 'Federalism Means Inequality: Geometry, Political Sociology, and Political Culture', in Golembiewski, Robert T. and Wildavsky, Aaron (ed.), *The Costs of Federalism* (Transaction Books. 1984); 55-69.

<sup>15</sup>Ramon Maiz, 'The Normative theory of federalism and the Idea of Nation' [2014] <[https://www.researchgate.net/publication/265612099\\_The\\_Normative\\_theory\\_of\\_federalism\\_and\\_the\\_Idea\\_of\\_Nation](https://www.researchgate.net/publication/265612099_The_Normative_theory_of_federalism_and_the_Idea_of_Nation)> accessed 22 June 2020.

<sup>16</sup>Ogbe O., Max M., Shija M.D and Zever A.T, 'The Need for Reform of Fiscal Federalism in Nigeria' in Sunday O. U. and Ekpu C. E. (Eds.), 'Federalism: Problems and Prospects of Power Distribution in Nigeria' [2011] (13) (5), *Journal of Sustainable Development in Africa*; 3

<sup>17</sup>Ola R. F., 'Nigerian Political System: Inputs, Outputs and Environment', in Sunday O. U. and Ekpu C. E (Eds.), 'Federalism: Problems and Prospects of Power Distribution in Nigeria' [2011] (13) (5) *Journal of Sustainable Development in Africa*; 53

<sup>18</sup>Gamper, 'A Global Theory of Federalism: The Nature and Challenges of a Federal State', 1299

<sup>19</sup>Bertus de Villiers, 'Federations: Shared Rule and Self Rule in the Search for Stable Governance' [2013] *University of Western Australia-Faculty of Law Research Paper*; 394 and 396

<sup>20</sup>See the Second Schedule of the Constitution of the Federal Republic of Nigeria 1999

to be operating the federal system of government, whereas in actual practice, the country is tending towards a unitary system.<sup>21</sup> It is therefore noteworthy that the basic challenge of Nigeria's federalism is the issue of power distribution and allocation between the federal and state governments of the federalism. Thus, there have been several struggles for power between the federal government and the governments of several states. This is evident in the several federalism cases between the federal government different states.<sup>22</sup>

However, closely related to the above challenge of power distribution and allocation in Nigeria's federal system is the challenge of resource allocation under Nigeria's federalism. The issue of resource allocation is particularly crucial given the fact that there is an attempt to establish a fiscal federal system in Nigeria. At this point, it is pertinent to reiterate the fact that fiscal federalism is essentially about the allocation of government resources and spending to the various tiers of government. Consequently, in Nigeria, the issue of resource allocation is a very controversial question. There have thus developed mutually suspicion between the component groups in the country and this has snowballed into such problem of the national question, revenue allocation and resource control.<sup>23</sup> The controversy on resource control have manifested in arguments for and against the derivation principle or indeed other principles. To this end, scholars are of the view that the debate on Nigeria's fiscal relations hinges on the fundamental question of who gets what of the 'national cake', when and how?<sup>24</sup> In the same vein, it has opined that this question of resource allocation is especially fundamental in Nigeria, given the fact that Nigeria as a monolithic economy gets over eighty percent of its revenue from crude oil.<sup>25</sup> Hence, there have been several issues concerning resource allocation. This has manifested in the call for resource control by persons of the Niger Delta Region<sup>26</sup> of Nigeria and several court cases.<sup>27</sup>

### 3. The Doctrine of Basic Structure

The doctrine of basic structure originated in India. While setting up the National Commission to Review the Working of the Indian Constitution, the National Democratic Alliance government of Indian (formed by a coalition of 24 national and regional level parties) stated that the basic structure of the Constitution would not be tampered with.<sup>28</sup> A careful look at Indian history shows one of the most entrenched debates at the Indian Constituent Assembly and one that would provide the historical seeds of the basic structure doctrine, which was between the similar, but competing ideologies of Jawaharlal Nehru and Sardar Vallabhbhai Patel, who were the most powerful political leaders of the Indian Congress Party at the end of the British rule.<sup>29</sup> The difference in Nehru and Patel's economic perspectives came into the fore in the drafters' debates over property rights. Nehru wanted no compensation for property seized by the government, while Patel demanded full compensation.<sup>30</sup> Patel's death in 1950 essentially ensured that Nehru's perspective on the property rights would never again be seriously challenged. When early judicial decisions signaled that the courts would limit the government's ability to expropriate property, Nehru's government acted swiftly. In 1951, it passed the first amendment to the Constitution which created articles 31A and 31B. These articles would provide the origin of the dispute that would ultimately create the basic structure doctrine. Article 31A stated that any acquisition of property by the state through law could not be called into question under the rights to property, equality, freedom of speech, or freedom to practice one's profession. Article 31B created the Ninth Schedule, a list of laws inserted in the back of the Constitution. Property owners challenged the Constitutional amendments which placed land reforms laws in the

<sup>21</sup>Sunday O. U. and Ekpu C. E (Eds.), 'Federalism: Problems and Prospects of Power Distribution in Nigeria' [2011] (13) (5) *Journal of Sustainable Development in Africa*; 3

<sup>22</sup>The cases of *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Ors. (2002) 14 WRN 1(SC)*; *Attorney General, Lagos State v Attorney General, Federation & others* (2014) LPELR 22701 (SC) are illustrative of this point

<sup>23</sup>Bello-Imam, I. B and Agba, A. V., 'Fiscal Federalism, the National Question and Resources Control: Practice and Prospect' in Aigbepue S. and Ainabor Augustine E., (Eds.), 'Issues and Challenges of Nigerian Fiscal Federalism' [2014] (1) (10) *Interdisciplinary Journal of Research in Business*; 4

<sup>24</sup>Odoko, F. O and Nnanna, Fiscal Federalism: Fiscal Discipline and Service Delivery in Nigeria, in Aigbepue S. and Ainabor Augustine E., (Eds.), 'Issues and Challenges of Nigerian Fiscal Federalism' [2014] (1) (10) *Interdisciplinary Journal of Research in Business*; 4

<sup>25</sup>Akindele, O., 'Local Government Tax Mobilization and Utilization in Nigeria', in Aigbepue S. and Ainabor Augustine E., (Eds.), 'Issues and Challenges of Nigerian Fiscal Federalism' [2014] (1) (10) *Interdisciplinary Journal of Research in Business*; 4

<sup>26</sup>Aderonke Majekodunmi, 'Federalism in Nigeria: The Past, Current Peril and Future Hopes' [2015] (9) (2) *Journal of Policy and Development Studies*; 114

<sup>27</sup>On this point, see *Attorney General of the Federation v Attorney General of Abia State* (No 2) (2006) 6 NWLR (PT 764) 542.

<sup>28</sup>Venkatesh Nayak, 'The Basic Structure of the Indian Constitution'

<[http://constitutionnet.org/sites/default/files/the\\_basic\\_structure\\_of\\_the\\_indian\\_constitution.pdf](http://constitutionnet.org/sites/default/files/the_basic_structure_of_the_indian_constitution.pdf)> accessed 22 June 2020.

<sup>29</sup>Ifitkhar Hussian Bhat, 'Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries'[2013] (1) (3) *IJRHS*; 28

<sup>30</sup> Ibid

Ninth Schedule before the Supreme Court, saying that they violated Article 13 (2) of the Constitution.<sup>31</sup> Article 13 (2) provides for the protection of the fundamental rights of the citizen. Under that Article, parliament and the state legislatures are clearly prohibited from making laws that may take away or abridge the fundamental rights guaranteed to the citizen. They argued that any amendment to the Constitution had the status of a law as understood by Article 13 (2).

The first attempt by the Indian Courts to salvage its review power came in 1967 in *Golak Nath v. State of Punjab*, which challenged articles 31A and 31B. An eleven-judge bench of the Supreme Court reversed its position. Delivering its 6:5 majority judgment, the then Chief Justice of India, Subba Rao, put forth the curious position that Article 368, that contained provisions related to the amendment of the Constitution, merely laid down the amending procedure. Article 368 did not confer upon Parliament the power to amend the Constitution. This decision of the court seems to usher in the doctrine of basic structure which was later entrenched by virtue of the argument taken up by Nani Palkhivala in *Kesavananda Bharati case*, when the Parliament sought to destroy the structure of the Constitution embodied in provision other than part III of the Constitution, although a number of additional features have been added by the Indian Supreme Court under this umbrella, over the years.<sup>32</sup> Essentially, the doctrine of basic structure was established as a response to the normative concern to preserve the sanctity of the Constitution as a higher law in India. Thus, in the *Kesavananda Bharati case*, Sikri, C. J. laid down the very first list of features - 'discernible not only from the Preamble but from the whole scheme of the Constitution' - that would constitute the 'basic foundation and structure' of the Indian Constitution: 1). Supremacy of the Constitution; 2). Republican and Democratic form of Government. 3). Secular character of the Constitution; 4). Separation of powers among the legislature, the executive and the judiciary; 5). Federal character of the Constitution; Other judges added the following to the list: 6). The dignity of the individual secured by the various Fundamental Rights and the mandate to build a welfare state contained in the directive principles; 7). The unity and the integrity of the nation; 8). Parliamentary System.<sup>33</sup> Since then the constituents of the Basic Structure have reviewed, examined and delved into by the Supreme Court in several cases, adding to the above list. In *Smt. Indira Nehru Gandhi v. Raj Narain*,<sup>34</sup> the Court, expanding the scope of the Basic Structure, held that there were four unamendable features which formed part of the basic structure, namely, '(i) India is a sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and (iv) The nation shall be governed by a government of laws, not of men.' These, according to them, were 'the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution.' The Court also noted that the principle of free and fair elections is an essential postulate of democracy, and which, in turn, is a part of the basic structure of the Constitution.<sup>35</sup>

#### **4. Normative Features of Federalism: A Comparative Analysis**

One fundamental challenge which has continued to bedevil the application of federalism in Nigeria is the somewhat lack of basic federalism features or ideals in the Nigerian federal structure. There is therefore a dire need to reflect the basic features or principles of federalism in the Nigerian federal arrangement. The question therefore is, what are the basic features of an ideal federal system? This question can be properly answered by a comparative analysis of federalism practice in various countries as well as the opinions of scholars.

##### **South Africa**

Federalism in South Africa can be traced back to the Selborne Memorandum of 1906 as a British imperial initiative. Federal elements have always been present in the political culture of South Africa, even during the dark years of apartheid. It is no news that South Africa is occupied by sharply different races.<sup>36</sup> The features of South Africa federalism include:

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<sup>31</sup>Faraz Alam Sagar and CAM Disputes Team, 'Kesavananda Bharati v. State of Kerala and The Basic Structure Doctrine' <<https://corporate.cyrilamarchandblogs.com/2017/09/kesavananda-bharati-v-state-kerala-basic-structure-doctrine/>> accessed 22 June 2020.

<sup>32</sup>Setu Gupta, 'Vicissitudes and Limitations of the Doctrine of Basic Structure' [2016] (Winter Issue) *ILI Law Review*; 112

<sup>33</sup>Chauhan, B. S. 'Doctrine of Basic Structure: Contours' <[http://www.nja.nic.in/Concluded\\_Programmes/2018-19/P-1110\\_PPTs/6.Doctrine%20of%20Basic%20Structure.pdf](http://www.nja.nic.in/Concluded_Programmes/2018-19/P-1110_PPTs/6.Doctrine%20of%20Basic%20Structure.pdf)> accessed 22 June 2020.

<sup>34</sup> [1975] AIR 2299 (SC)

<sup>35</sup> Ibid

<sup>36</sup>Michel Burgess, 'Federalism in Africa: An Essay on the Impacts of Cultural Diversity, Development and Democracy' *The Federal Idea, A Quebec Think Tank, on Federalism* <<https://ideefederale.ca/documents/Africa.pdf>> accessed 22 June 2020.

### *Power Sharing*

By section 40 of the South African constitution, the government in South Africa is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. Part B of Schedule 4 of the constitution contains the concurrent list of legislative competences over which the national and provincial governments can exercise powers. The items under the concurrent list include Agriculture, Airports, consumer protection, education at all levels excluding tertiary education, health services, language policy, police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provinces, legislative competences in respect of policing, etc. Part A of Schedule 5 of the constitution contains legislative competences for the provinces of south Africa. These include abattoirs, provincial planning, provincial recreation and amenities, provincial roads and traffic, etc. The component units in South Africa are called provinces'

### *Cooperative Arrangement*

Chapter three (sections 40 and 41) of the South African constitution provides for a cooperative arrangement. More specifically, section 41 of the constitution states that all spheres of government and al organs of State within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

### *Subnational Constitutions*

Section 104(1) of the South African constitution is instructive on this point. That section confers on the provincial legislature the power to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143.

### *Local Governance in South Africa*

On local governance, section 151 of the constitution provides that the local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic. The executive and legislative authority of a municipality is vested in its Municipal Council. A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

### *Supremacy of National Legislations*

Section 147 (1) of the South African constitution provides that if there is a conflict between national legislation and a provision of a provincial constitution with regard to a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; national legislative intervention in terms of section 44 (2), the national legislation prevails over the provision of the provincial constitution; or a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section. National legislation referred to in section 44(2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.

## **Canada**

The Canadian federalism started with just four provinces (Ontario, Quebec, Nova Scotia and New Brunswick) in 1867.<sup>37</sup> Years later, Canada now has ten provinces. Canada's federalism reflects the country's unique history, social and economic makeup, and institutional design. The features of Canadian federalism include:

### *Power Sharing*

The Canadian federal system model assumes independence of government levels as well as independent activities under the remit of defined competencies.<sup>38</sup> Along this line, section 91 of the Canadian constitution contains twenty nine items of powers wherein the national government is entitled to exercise legislative competence. The items mentioned under that section include defence, bankruptcy, currency, marriage and divorce, etc. On the other hand, section 92 of the constitution contains sixteen areas wherein the provinces can exercise legislative competence including direct taxation within the province, incorporation of companies, the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts, etc. Again, subsection (4) of section 92A gives each province the power to raise money by any mode or system of taxation in respect of non-

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<sup>37</sup>Advisory Commission on Intergovernmental Relations, 'Studies in Comparative Federalism: Canada' <<https://library.unt.edu/gpo/acir/Reports/information/M-127.pdf>> accessed 22 June 2020

<sup>38</sup> Hawkesworth, M and Kogan, M. Governments and Politics, (Routledge. 1992)

renewable natural resources and forestry resources in the provinces, sites and facilities. Section 93 puts education within the exclusive legislative competence of the provinces.

#### *Police Structure*

On police structure, while the federal government is responsible for the creation of the criminal law and legislation, under the Constitution Act, the provinces are responsible for the administration of justice, including policing. Therefore, it is a well-established law that the provinces are responsible for, and has control and supervision of law enforcement within their province with respect to provincial legislation and criminal law as defined by the federal Parliament.<sup>39</sup> This power of the province seems to stem from item 14 of contained in section 92 of the constitution which provides for the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts as one of the legislative competences of the Canadian provinces.

#### *Distribution of Resources*

On distribution of resources, section 92A gives each province the power to raise money by any mode or system of taxation in respect of non-renewable natural resources and forestry resources in the provinces thereby granting each province autonomy as to the resources within its domain.

#### *Local Governance in Canada*

On local governance in Canada, the structure of local governance in Canada is highly varied across the country. Each province and territory make legislations for specific powers and areas of responsibility in respect of local governance within their province. The names given to local governments, such as city, village, town, urban or rural, in general reflect the type of area rather than powers or responsibilities, which are specific to each province or territory. The administration and arrangement of local governance is therefore within the legislative competence of the various provinces. This is due to the salient provision of Section 92(8) of the Constitution Act 1867 which gives the provinces exclusive powers to make laws in relation to ‘municipal institutions in the province’ (Constitution Act 1867).

#### **United States**

The United States of America was a confederation before it became a federation with the enactment of the constitution of 1787. What then led to the adoption of federalism as the system of government? When the 13 North American colonies declared their independence from Great Britain on July 4, 1776, they recognized the need to coordinate their efforts in the war and to cooperate with each other in order to stand a chance against the efforts of Great Britain to retain control of the colonies. To these ends, they adopted the articles of Confederation, a constitution which created a league of sovereign states which committed the states to cooperate with each other in military affairs, foreign policy and other important areas. The Articles were barely sufficient to hold the states together through the war against England and, at the successful conclusion of that war, the articles fell apart completely as the states pursued their own interests rather than the national interest of the new United States. As a means to remedy the defects of the Articles (or, in the words of the Constitution of 1787, ‘to create a more perfect union’), George Washington, Alexander Hamilton, James Madison, and other nationalist leaders called upon the states to send delegates to a constitutional convention to meet in the city of Philadelphia in May, 1787. It was, of course, that convention that produced the Constitution of the United States. The framers of the Constitution rejected both confederal and unitary models of government. Instead, they based the new American government on an entirely new theory: federalism. In the American federal system, the people retain their basic sovereignty and they delegate some powers to the national government and reserve other powers for the states. Individuals are citizens of both the general government and their respective states. American federalism therefore appears to be a direct consequence of the failure of the American articles of confederation which completely fell on apart at the end of the war against Great Britain.<sup>40</sup> The key features of the American federalism include:

#### *Power Sharing*

The Tenth Amendment to the American constitution appears to contain the provisions for power sharing between the federal government of the United States of America and the American States. The Tenth Amendment which was ratified on the 15<sup>th</sup> day of December, 1791 states that 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. In essence, the powers of the federal government are delegated whereas those of the States are residual. Section 10 of the United States constitution contains the powers of the federal government, which include the power to collect taxes,

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<sup>39</sup>Bilton, J and Stenning, C. ‘Extra-jurisdictional authority of provincially appointed police officers in Canada’ [2001] *A discussion paper prepared under the contract for the uniform law conference*

<sup>40</sup> Katz, E. ‘Issues of Democracy’ (1997) (2) (2) *Electronic Journals of the U.S. Information Agency*

duties, imports and excises, pay the debts, defence, general welfare of the United States, the powers to borrow money on the credit of the United States, regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes, establish uniform Rule of Naturalization, Bankruptcies, coin money, foreign coin, the Standard of Weights and Measures, provide for the punishment of counterfeiting the Securities and current Coin of the United States, post offices and post roads, science and useful arts, constitute Tribunals inferior to the Supreme Court of the United States, define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations, declare War, provide for the organization of the United States army, exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings. The section then provides a somewhat omnibus power for the Congress by stating that the Congress shall have the power to make all Laws which shall be necessary and proper for carrying into execution the powers contained in the section, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. Again, section 10 of the constitution contains those powers prohibited of States. As mentioned earlier, owing to the provisions of the Tenth Amendment, the powers, those 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. Therefore, the States can exercise powers concerning all those powers not reserved for the federal government and not prohibited of States including property law, education, estate and inheritance law, commerce laws of ownership and exchange, banking and credit laws, labour law and professional licensure, insurance laws, family laws, public health and quarantine laws, public works laws, including eminent domain, building codes, corporations law, land use laws, water and mineral resource laws, judiciary and criminal procedure laws, electoral laws, including parties, civil service laws, etc.

#### *Supremacy of National Government*

The American system is characterized by supremacy of the national government in the sphere of delegated powers and supremacy of the states in the sphere of residual powers.

#### *Local Governance*

The local government is responsible for the adaptation and implementation of State laws to local conditions, public works, contracts for public works, licensing of public accommodations, assessable improvements, and basic public services.<sup>41</sup>

#### *Cooperative Arrangement*

On the cooperative arrangement between the federal and state governments in America, it is pertinent to note that a lot of important tasks of government have been accomplished due to the mutually cooperative and congenial relations of the state and federal governments. One of the essential provisions of the United States constitution which shows this cooperative arrangement is Article I, section 10 which makes it mandatory for any State intending to enter into agreements or compacts with other states or with a foreign power to obtain the consent of the Congress. This is evident in the Colorado Compact of 1928 which involves six States as well as the federal government.

#### *Police Structure*

The component States of the American federation are entitled to set up their own police system. The power to do this appears to stem from the Tenth Amendment to the United States constitution which gives States those powers not delegated to the federal government and not prohibited of States.<sup>42</sup>

The above suggests some basic features which federalism systems ought to possess. Nonetheless, what is clear from the above federalism features as reflected in the countries above is, the attempt to create distinct layers of governance within a specific territory. That is, an attempt to share legislative functions between the central government and the component parts. Thus, flowing from the discussion above, it is the view of the researcher that the totality of federalism revolves around power sharing and allocation of legislative functions between the tiers of government. One way which authors have therefore aimed to determine who gets what power is the application of the subsidiarity principle.<sup>43</sup>

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<sup>41</sup>Hao, B. 'Distribution of Powers between Central Governments and Sub-national Governments' [2011] 11<sup>th</sup> Edition *Paper presented at the Committee of Experts on Public Administration, eleventh session* <<http://libguides.murdoch.edu.au/APA/conference> accessed 22 June 2020

<sup>42</sup>Santiago, L. 'The Historical Background of the Police Power' [2007] (9) *U. PA. J. CONST. L.*

<sup>43</sup>Conceptually, the subsidiarity principle postulates that in a federal political order, the powers of government should firstly be distributed to and administered by the federating unit because they possess more competence in solving problems which



## **5. The Discourse**

By virtue of section 232 (1) of the constitution, the Nigerian Supreme Court possesses the function of adjudicating and resolving federalism issues in the country. There have been several federalism disputes in Nigeria,<sup>44</sup> however, the Supreme Court has often shied away from a complete application of the basic features of federalism in its attempt to resolve federalism disputes. Hence, the criticism of the court's attitude in the several cases including the case of *Attorney General of Ondo State v Attorney General of the Federation & Ors.*,<sup>45</sup> where the Supreme Court, with due respect, curiously held that it is the Federal Government of Nigeria that has the power to combat corruption. This is despite the fact that section 15 (5) of the constitution provides that the 'state' shall abolish all corrupt practices and abuse of power. It is noteworthy that section 318 of the constitution, being the interpretation section, provides that 'State' when used otherwise than in relation to one of the component parts of the Federation, includes government. Furthermore, the section provides that 'government' includes the Government of the Federation, or any State, or of a local government council or any person who exercises power or authority on its behalf. It is clear that the makers of the constitution in drafting the above sections aimed to promote 'dual sovereignty'<sup>46</sup> in Nigeria, being a fundamental principle of federal practice. The Supreme Court therefore appears to have neglected the application of federalism features in the said case. Again, the case of *Lagos State v. Attorney General of Federation*<sup>47</sup> has also reflected the attitude of the Supreme Court in applying basic federalism features in resolving federalism disputes. The Lagos State government in that case challenged certain provisions of the Value Added Tax Act, a law of the National Assembly which empowered the collection of value added tax on goods and services in the State. Even though the parties to the dispute were agencies of a State government and the federal government, the Supreme Court stated that its original jurisdiction had not been properly invoked, a decision which has been several criticized by scholars, noting that the decision of the court seems to amplify the court's rather worrisome misunderstanding of basic federalism principles.<sup>48</sup> Like the application of the doctrine of basic structure in Indian, it is essential to evolve a means where the basic features of federalism must be upheld by the courts in furtherance of the need to promote federalism practice in Nigeria. Hence, in the next segment of this work, the researcher makes recommendations along this line of reasoning.

## **6. Conclusion and Recommendations**

In this work, the researcher examined federalism, embarking on a comparative analysis of the concept in a bid to x-ray the basic features of the concept. The researcher also analysed the doctrine of basic structure as originated in India. The researcher considered the endemic challenges posed to the application of federalism principles in Nigeria. The researcher therefore proposes the following recommendations as solutions to these challenges: The Supreme Court of Nigeria should develop a doctrine, tailored in line with the doctrine of basic structure as developed by the courts in India. By this doctrine, the Supreme Court should develop a culture to examine and extrapolate all actions of government, including the Acts of the National Assembly and the laws of the various State Houses of Assembly, making sure that these acts of government are in line with the basic features of federalism practice in Nigeria. It is recommended that the courts should form the habit of declaring acts of government as null and void, where such acts are contrary to federalism practice in the country. It is suggested that there should be a thorough overview of all existing legislations in order to bring it in conformity with the basic features of federalism in the country. It is suggested that the constitution of Nigeria should be amended in order to reflect the basic features of federalism. In the alternative, where it would be too far reaching to commence the rigid process of amending the constitution, the courts should form the habit of deciding constitutional cases in line with basic federalism practice.

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confront government and have the greatest impact on the people, while the federal or national government should only possess and exercise powers in respect of those matters for which the federating units lack capacity to achieve result acting on their own due to their wide scope. E. B Omoregie 'Implementation of treaties in Nigeria: Constitutional provisions, federalism imperative and the subsidiarity principle' [2015] *Extract of Proceedings of the 2nd International Conference on Public Policy*

<sup>44</sup>The cases of *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Ors.* (2002) 14 WRN 1; *Attorney General, Lagos State v. Attorney General, Federation & others* (2014) LPELR 22701 (SC) are illustrative of this point.

<sup>45</sup> (2002) 9 NWLR (Part 772)

<sup>46</sup>The notion of dual sovereignty prescribes that the powers of both the federal government and the States derive not from either of them but from the people through the constitution made for them as the expression of their inalienable supreme authority over both the federal and the states. E. A. Young, 'the Puzzling Persistence of Dual Federalism' available at [https://scholarship.law.duke.edu/faculty\\_scholarship/2689/](https://scholarship.law.duke.edu/faculty_scholarship/2689/).

<sup>47</sup> (SC 70/2004) [2004] 19 (10 DECEMBER 2004)

<sup>48</sup>Omoregie, E. B., 'Federalism, Dual Sovereignty, and the Supreme Court of Nigeria' [2014] (8) *WASETIJ*; 3643