

THE PURSUIT OF TRUE FEDERALISM AMONG FEDERATING UNITS*

Abstract

Federalism is a principle of government that defines the relationship between the central government at the national level and its constituent units at the regional, state, or local levels. Under this principle of government, power and authority is allocated between the national and local government units, such that each unit is allocated a sphere of power and authority for its exclusive jurisdiction while other powers must be shared. This paper examines the path of pursuit of true federalism among federating units.

Keywords: Principles, Central Government, Constituent Units, Local, State, Regional, power, jurisdiction.

1. Introduction

States are forms of government in a given defined territory with its own permanent population, a government which has capacity to enter into relations with other states not minding the nomenclature of those other states¹. The above characteristics are attributes of any state whether unitary, federation or confederation. It is suffice to say here that federal systems of government are a creation of independent sovereign states for reasons which may be economical, political, social, security and more among others. This paper will focus its attention on the federal system of government as presently being practiced in Nigeria with the aim of highlighting on some areas for improvement so as to engender public interest and the purpose of promoting the security, welfare and good governance and fostering the unity and progress of the people of Nigeria. The federal system of government is not peculiar to Nigeria but practiced in many other countries of the world like the United States of America, the Federal Republic of Germany, Australia, Russian Federation just to mention a few. The Nigerian type of federalism resembles that of the United States of America in features but the impact of the federal system as it is being felt by the Americans is not the same by Nigerians due to a lot of militating factors which shall later be discussed in this paper. This paper will also focus on some fundamental issues as presently provided for in the Nigerian constitution with the aim of subjecting them to objective analysis for the benefit of the system for the enjoyment of Nigerians.

2. Federalism

According to Black's law dictionary, federalism is the legal relationship and distribution of powers between the national and regional governments within a federal system of government². Federalism is a system of government of a country under which exists simultaneously a federal or central government and several states or provincial governments i.e., federating units. Both the federal and the state governments derive their powers from the federal constitution with different powers that operate directly on the people³. Federalism has also been defined as an association of states, which has been formed for certain common purposes but in which its member states retain a large measure of their original independence. The central and provincial governments are distinct and coordinate and the powers are divided among them so that the central and provincial governments are each, within their sphere coordinate and independent.⁴ Federal government exists when the powers of government are divided substantially according to the principle that there is single independent authority for the whole area in respect of some matters and that there are independent regional authorities for the other matters each set of authorities being co-ordinate with and not subordinate to the others in its own prescribed sphere.⁵ Wheare says further that 'the fundamental and distinguishing characteristic of a federal system is that neither the central nor the regional governments are subordinate to each other, but rather, the two are co-ordinate and independent'.⁶ According to Ben Nwabueze;

Federalism is an arrangement whereby powers of governments within a country are shared between a national country-wide government and a number of regionalized (i.e. territorially

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¹ See Art.1, Convention of Rights and Duties, 1933.

² Bryan A. Garmer (ed.), *Black's Law Dictionary*, 8th Edition.

³ See Rufus O. Olaoluwa, *Introduction to International Law*, Published by Silk Communications Ltd, Ikeja, Nigeria 2000, p. 36.

⁴ Wheare, K.C., *Federal Government*, 4th Edition, Oxford University Press, 1963, p. 1

⁵ Ibid, p. 33.

⁶ Ibid, see also Edwin Obimma Ezike, 'Resource Control and True Federalism', in Uchefula Chukwumaeze; Rufus Olaoluwa and Ahamefule Nnabue (eds.), *Law, Social Justice and Development – A Festschrift for Professor Uba Nnabue*, Imo State University Press, Owerri, 2013, pp. 363-379

localized) governments in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others.⁷

A federal union is formed in various ways. We shall attempt to discuss some of these forms and see which of them matches the Nigerian federal union.

Federalism by dispersion: This is a type of federalism in which originally independent and autonomous states willingly submit some of their powers with respect to some specific agreed matters in order to form a desired federal or central government. This is the type of federalism existing in the United States of America, Canada, Australia, Switzerland and the Russian Federation.

Federalism by devolution: This is a form of federalism in which a country that was originally independent devolves some of its powers with respect to some matters, to state governments with or without their consent with the intention of developing them into a federal government. In this type of arrangement, it is the central or the national government that surrenders some of the powers that were formerly exclusive to it to the component states.⁸ It is the view of this writer that Nigeria belongs to this type of federalism. The drafting committee on the review of the Nigerian Constitution in 1951 had observed that:

The federal government of USA, Canada and Australia have been built on the basis of separate states surrendering to federal government some of their powers; for the process in which we are engaged that of the creation of a federal government by devolution is a political experiment for which there is no precedent to guide us and we are very conscious of the danger involved in such an experiment.⁹

The real issue about true federalism is that the federating units who are originally independent and subsequently surrendered some aspects of their independence and sovereignty to the central government ought to continue to have dominant voice in the affairs of the central government. The main idea of a federal government is for the federating units to contribute to the formation and running of the central government for their own benefit and purpose. Anything contrary to this can jeopardize the corporate existence of the central government. Where the central government assumed a dominant position, this may not work as it should because loyalty, support and happiness of the people constituting the federating units may not be forthcoming and the survival of the central government may then only need to thrive on the use of either force or resort to bad governance with all its attendant consequences as we are currently experiencing in Nigeria. To ensure usual rapport between the central government and the federating states, there need to be guarantee enshrined in the federal constitution. The absence of such a guarantee in the different Nigerian Constitutions since after independence lead to a 30 months civil war, whose wounds have healed but the scars are very visible always¹⁰. This is not the case in the former Soviet Union (USSR) where the constitution provides that: The Union of Soviet Socialist Republic is a socialist state of the whole people, expressing the will and interests of the workers, peasants and intelligentsia, the interests of the working people of all the nations and nationalities of the country.¹¹ To guarantee the above and other such provisions, the constitution of the USSR further provides that 'each Union Republic 'State' shall retain the right freely to secede from the USSR'.¹² Paradoxically, the Nigerian constitution does not mince words in asserting the superiority the central government exerts on the federating units by providing that 'Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria'.¹³

3. Federating Units in the Federation

These are groups of people, national, regional, local entities which were originally independent but for objective reason decided willingly to form a larger central government to defend and develop their interest better than

⁷ B.O. Nwabueze, *The Presidential Constitution of Nigeria*, London: C. Hurst & Coy, 1982, p. 37

⁸ Edwin Obimma Ezike, 'Resource Control and True Federalism' in Uchefula Chukwumaeze; Rufus Olaoluwa and Ahamefule Nwabue (eds.): *Law, Social Justice and Development – A Festschrift for Professor Uba Nwabue*, Imo State University Press, Owerri 2013, p. 365.

⁹ Cited by B.O. Nwabueze, *Echoes on the 1999 Constitution*, Nsukka: AP Express Published Ltd., 2003, p. 39.

¹⁰ A civil war took place in Nigeria between the Central government and the Eastern Region popularly called 'Biafra' between 1967 – 1970 on the account that Biafra wanted to secede from Nigeria and become an independent State but the Federal government of Nigeria refused by using force of war to keep it within the federation.

¹¹ Article 1, The New Constitution of the USSR English Translation, Progress Publishers, Moscow 1980.

¹² Ibid. Art. 72

¹³ Section 2(1) 1999 Constitution of the Federal Republic of Nigeria.

what it would have been had there not been such central government. In Nigeria, it may be correct to assert that the federating units in the Nigerian federation have been intentionally, technically or otherwise relegated to play subsidiary roles as dictated by the central government. One of the issues for discussion is the onshore/offshore dichotomy in the application of the principle of derivation in Nigeria.

The question of equitable formula for revenue allocation from the Federation Account based on the principle of derivation from resources of the federating units called states has always been and remains a vital point of controversy on the agenda of the Nigerian state to be determined. This question arose as a result of constitutional provision that all revenues collected in Nigeria be paid to the Federation Account from where all the federating units shall receive their allocation based on certain principles and especially that of derivation from natural resources yielding revenue to the Federation Account.¹⁴ Here, we can vividly see federalism by devolution in practice. It is likened to a man with many children who help him to carry out different assignments but he has to feed, clothe and attend to other needs of the children who are most comfortable with that arrangement. The 1999 constitution of Nigeria which sought to settle the problem arising from revenue allocation provides: 'The federation shall maintain a special account to be called the federation account into which shall be paid all revenues collected by the government of the federation...'¹⁵ The constitution further provides that:

The president, upon the receipt of advice from the Revenue Mobilization Allocation and fiscal commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of states, internal revenue generation, land mass, terrain as well as population density; provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the federation account directly from any natural resources¹⁶

The mainstay of the Nigerian economy are crude oil (petroleum) and gas which account for more than 80% of the revenue accruing to the Federation Account. These essential mineral resources are found in about 9 coastal states of Nigeria called the litoral states. These include all the Niger Delta states. These essential mineral resources are not only found in the land territory of these states but also in the adjoining and adjacent prolongation of the land territory of the coastal states submerged into the sea beyond the territorial sea to the outer edge of the continental margin and touching the sea bed popularly known as the continental shelf.¹⁷ The mineral resources found in the land territory of the litoral states are on the shore. Hence, the right of litoral states to derivation on activities of the federal government on petroleum and other natural resources on their territories is not in dispute. But the mineral resources found in the continental shelf are found off the shore of litoral states and hence the term offshore.

The Federal Government of Nigeria is of the opinion that the mineral resources found in the continental shelf are found outside the territory of litoral states and that the litoral states cannot legally seek to control the natural resources located beyond their seaward boundaries¹⁸ or seek to have undue advantage over other states of the federation based on the principle of derivation of revenue from the Federation Account. This opinion of the federal government was vehemently rejected by the litoral states and that is the crux of the onshore/offshore dichotomy between the federal government and the litoral states. When the two sides to this all-important dichotomy could not reach amicable negotiation, the federal government headed for the Supreme Court and the Apex Court of the land being the only legally recognised arbiter in this situation. The court delivered its judgment on April 5, 2002. The Supreme Court ruled in the case of *Attorney-General of the Federation v. Abia State & Ors*¹⁹ that the litoral states have no legal right to revenue accruing from oil derived off the shore of their states. Legal experts and practitioners have generally acclaimed this judgment of the Supreme Court of Nigeria as a landmark judgment. The judgment contains a lot of material on the application and interpretation of municipal law, international law, maritime law and constitutional law among others. According to Chief Richard Akinjide,²⁰ the Supreme Court could not have done otherwise on the judgment it gave. If it did otherwise, it

¹⁴ Olaoluwa, R.O. 'Onshore/Offshore Dichotomy in the Application of the Principle of Derivation in Nigeria', *Ekpoma Bar Journal* 2013, Vol. 1, No. 1, p. 196, see S. 162 (1 & 2).

¹⁵ S. 162 (1) CFRN 1999.

¹⁶ S. 162 (1) CFRN 1999

¹⁷ Art 76, 1982 UN Convention on the Law of the Sea.

¹⁸ *The Guardian Newspaper*, April 6, 2002, p. 1.

¹⁹ Sc 28/2001, or (2001) 7 Sc (Pt. 1), particularly at p.32.

²⁰ Former Minister of Justice, and A.G. of the Federation who signed the 1982 UNCLOS for Nigeria. See *The Guardian Newspaper* April 13, 2002, p. 16.

would have gone contrary not only to international law but also to the interpretation and application of the conventions which are international treaties and therefore, binding on Nigeria.

Despite the hard work, plethora of analysis of international and municipal legal materials and cases leading to the landmark judgment of the Supreme Court, the dichotomy continues to rear its strong head in the Nigerian polity. This is because the implication and consequences of the Supreme Court's judgment if implemented to its letter are that it will have adverse effect on the socio-economic relation and the general development of oil producing states and their people. As it stands now, it appears that there are two different dichotomies on the application of the principle of derivation for the purpose of Allocation of Revenue accruing to the Federation Account. The first one is between the federal government and the littoral states on whether the littoral states have right to revenue accruing from oil/natural resources derived off their shores. This is a disengagement that exposes the weaknesses of the sandy oil on which the Nigerian federation was built. Federation is a central government formed by other independent governments. This is to say that all the federating units must have deliberated and agreed to form the central government. As it were, the Nigerian federation came into being by the fact of colonialism. Hence, the component units now called states are still trying to find their feet in an arrangement of government that they supposed to have brought into being which in fact inadvertently brought them to being. The union of independent national states usually gives birth to federation.²¹ The above being the case, the constitution of a federal state devolves powers to both the federal and state government showing the areas where they can validly operate. The supreme court judgment of the 5th of April 2002 has decided that the littoral states cannot operate beyond their land borders, meaning that all the natural resources in the territorial sea, contiguous zone, exclusive economic zone, the high seas and that of the continental shelf are exclusively put under the jurisdiction of the federal government whether for the purpose of derivation of revenue or for other purposes.

The other dichotomy is between two federal arms of government i.e. the executive and the National Assembly on what part of the sea territory is to be ceded to littoral states to mitigate the harshness of the Supreme Court judgment on the littoral states and for the purpose of computing the revenue accruing to the Federation Account from those states pursuant to Section 162 (2) Constitution Federal Republic of Nigeria 1999. Looking carefully at the text of the bill presented by the Executive to the National Assembly and the Bill adopted by the National Assembly,²² one can vividly see that both bills created different problems. The executive bill ceded contiguous zone to the states knowing fully well that the littoral states cannot exercise jurisdiction in this zone and the fact that the contiguous zone is only a body of water where oil and gas, the subject matter of the dichotomy, do not exist. The only natural resources that can be found here is the fish and other living resources. What is more, even fishing and fisheries; maritime shipping and navigation are vividly placed in the exclusive legislative list where only the federal government can legislate.²³ The contiguous zone is established as stated earlier on, for purposes of preventing infraction of the coastal state's custom, fiscal, immigration or sanitary laws and regulations. All these are items listed in the executive legislative list for the federal government to the total exclusion of the jurisdiction of the littoral states.²⁴ Finally, the bill presented by the executive did not recognise the fact that the littoral states are either subjects of international law or parties to international treaties especially the 1982 UN convention on the law of the sea and as such have no obligation under that law.

On the other hand, the bill amended and passed by the National Assembly ceded two other sea areas comprising the continental shelf and the exclusive economic zone to the littoral states for purposes of enjoying derivation from revenue allocation. These two sea areas belong to the whole of human kind but by international customary and treaty law ceded to the coastal states only for the purpose of exercising control on the exploration, exploitation and management of living and non-living natural resources and, taking all the economic benefits there from. The sovereign coastal state has only exclusive economic rights in these two regions. These are the two sea areas especially the continental shelf where the government of the federation is getting all its oil and gas offshore.

There are lots of questions that beg for answers. Can the federal government have sea areas without the littoral states, having any interest whatsoever? Can the federal government carry out oil and gas exploitation in the sea areas without concrete adverse effects on the lives of the people in the littoral states? What is the quantum of rights and benefits that should accrue to the littoral states whether these sea areas are deemed to be part of their territory for the purpose of computing revenue accruable to them from the Federation Account or not? There are

²¹ V.I. Lenin. *The Right of Nations to Self-Determination/Selected Works in three volumes*, Vol. 1 Progress Publishers Moscow 1977, pp. 568-569.

²² Bill on the allocation of Revenue (Abolition of Dichotomy in its application of the Principle of Derivation) Act 2000.

²³ CFRN 1999, 2nd Schedule Part 1.

²⁴ Ibid.

a lot more questions. But what is clear in Nigeria today is that most of the problems have neither been addressed nor fully addressed. The current Nigerian constitution²⁵ puts such items as mines and minerals, including oil fields, oil mining, geological surveys and natural gas; water from such sources as may be declared by the National Assembly to be sources affecting more than one state; fishing and fisheries other than fishing and fisheries in rivers, lakes, waterways, ponds and other inland waters within Nigeria, maritime shipping and navigation and implementation of treaties in the exclusive legislative list. Meaning that whatever the federal government decrees concerning any of the items remains valid without any query from other levels of government.

The Constitution, the Petroleum Act and many international legal instruments are in favour of the federal government. But legal instruments whether municipal or international are always the result of negotiated settlements. Where this is not so as it is the case with the current Nigerian constitution,²⁶ agitations and counterclaims will continue to emanate from segments of the people and levels of government who feel shortchanged in the distribution of the national cake that is baked in their kitchen with their ingredients. The question of derivation has been looked at from one point which is derivation to the States from what accrues to the federal government. The other issue is how the accrued resources are invested in the act of governance for the benefit of the people. The Constitution of Nigeria provides for the principles of democracy and social justice stating that sovereignty belongs to the people of Nigeria, that the security and welfare of the people shall be the primary purpose of government and that the composition of the government of a state, a local government council or any of the agencies of such government or council shall carry out in such manner as to recognise the diversity of the people within its care of authority amongst other provisions.²⁷

Despite the above provisions, Nigerian people are today detached from the government except during elections when the people get to see some of the people seeking elective positions promising the same things which are being promised even before independence. Such services like electricity, water, roads even with tollgates, which are not rendered free to the people, are becoming impossible to provide. What then do you say concerning security issues which do not directly generate income to the government?

In other climes, individual guaranteed rights are enshrined in the constitution. In Russia, rights of individuals are guaranteed. According to the constitution of USSR²⁸, Article 30, citizens of the USSR enjoy in full the social, economic, political and personal rights and freedoms proclaimed and guaranteed by the constitution of the USSR and by the soviet laws. The socialist system ensures enlargement of the rights and freedoms of citizens and continuous improvement of their living standards as social, economic, and cultural development programmes are fulfilled. Enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or the state, or infringe the right of other citizens. Citizens of the USSR have the right to work (that is, to guarantee employment and pay in accordance with the quantity and quality of their work, and not below the state-established minimum), including the right to choose their trade or profession, type of job and work in accordance with their inclination, abilities, training and education, with due account of the needs of society. This right is ensured by the socialist economic system, steady growth of the productive forces, free vocational and professional training, improvement of skills, training in new trades or professions, and development of the systems of vocational guidance and job placement.²⁹ The fundamental rights and objectives principles of the Nigerian constitution³⁰ should always be upheld as justifiable and applicable to adjudicate in matters between governments, institutions, citizens and matter between them. Federalism in essence, is a mechanism of governance for better concerted efforts to alleviate any problem that are or may confront the federating units in their development.

4. Conclusion

Federalism is not the problem in governance. Inequality in the distribution of powers between the federal government and the government of federating state is equally not the problem. Equality is a fundamental human right yardstick for measuring the standard of a state's effort in satisfying the aspirations of its people. It should be noted however that even 'equality' is a relative term as there cannot be equality in absolute term. As such inequality can exist in terms of set standards and objective that will not result in bitterness, envying, hatred and unhealthy rivalries. Devolution or non-devolution of powers may also not be the problem. The issues militating against the Nigerian federation are other incidental issues such as non-compliance with the rules of law,

²⁵ CFRN 1999 2nd Schedule, Part 1.

²⁶ Ibid

²⁷ See Sec. 14 Constitution FRN 1999.

²⁸ See Art. 39, The New Constitution of the USSR English translation, progress publishers, Moscow, 1980.

²⁹ Ibid. Article 40

³⁰ Chapter 2, Constitution of the Federal Republic of Nigeria, 1999

complacency from those whose rights have been taken away, failure of the state based on traditional tendencies that are not in tune with 'imported' system of government. Finally, it should be stated that the needs of the people like provision of social amenities, food, job, good environment and good governance are the panacea to good and effective federalism.