

VERTICAL POWER SHARING IN NIGERIA'S FEDERAL SYSTEM: ISSUES, CHALLENGES AND PROSPECTS*

Abstract

The Constitution of the Federal Republic of Nigeria 1999 contains the basic legal and political values which form the foundation of the Nigerian State. The Constitution provides the framework within which the legal, political and economic system of Nigeria is organised. It establishes federalism and the federal structure as the recognized system. The doctrine of Federalism which has been adopted by virtue of Section 2(2) of the Constitution that stipulates the autonomy of each government, presupposes its separate existence and its independence from the Federal Government, is essential to federal arrangement. Therefore, each government exists not as an appendage of another government but as an autonomous entity in the sense of being able to exercise its own will in the conduct of its affairs, free from direction by another government.¹ However, the division of powers as enumerated in the Second Schedule to the Constitution shows a tendency towards centralization. This has given the Nigerian Federation a powerful centre. The experience so far reveals a constant pull and push with flexing of muscles between the legislature and the executive; and complaints by federating units of overbearing influence and interference with their independence while the federating units continue to depend on the centre for their survival. This paper attempts to examine the contemporary issues, the multidimensional agitations by the various components of the structure, and the challenges towards attaining an ideal federal system.

Keywords: Nigeria, Constitution, Separation of Powers, Federalism, Democracy

1. Introduction

The doctrine of separation of powers emerged as a result of two needs; the need to protect liberty, and the normal process of specialization of the functions and functionaries of government.² Proponents of the doctrine argue that the best way to prevent tyranny and check the excesses of government functionaries is to split up governmental powers among different organs of government. That way they check and balance each other. The division of government into three departments; the legislature, executive and judicial was seen as resulting from specialization of functions as government moved from the hands of omnipotent despots in early times into the hands of constitutional democratic forces where the idea of government is exercised according to law and through democratic institutions.³ This laid the foundation for the emergence of the theory that the basis and protection of liberty lay in the vesting of state powers in different organs of government. This will prevent the concentration of powers in a person or institution, which is the very definition of tyranny, and protect the liberty of the citizen.⁴ A systematic theory of the separation of powers was first developed by Montesquieu, a French man, in his book, *The Spirit of the Laws*, first published in 1748.⁵ He had visited Britain and was impressed by the amount of freedom the citizens enjoyed as opposed to his country, France. He thought the reason was that there was a fair amount of separation of powers in Britain while in France the monarch had absolute powers and was, therefore, a despot. In Britain then, power was shared between the Monarch and Parliament. He therefore concluded that tyranny resulted if the same ruling body were to exercise all powers of government. To guarantee the liberty of the citizen, Montesquieu recommended that different bodies should exercise legislative and executive powers.⁶

The 1787 Constitution of the United States of America has remained the standard example of the practical attempts to apply the doctrine of separation of powers as articulated by Montesquieu, Locke

*By **Abdulkarim Abubakar KANA, PhD**, Associate Professor of Law, Attorney General of Nasarawa State. Email: abdulkana@yahoo.com. Phone No.: +2348036003675.

¹ *Attorney-General of Lagos State v Attorney-General of the Federation* (2003) 12 NWLR (Pt. 833) 1.

² See Geoffrey Marshall, *Constitution Theory*, (Oxford: Oxford University Press, 1971).

³ See generally Carl Friedrich, *Constitutional Government and Democracy*, (1968), Chapter One.

⁴ See generally Nchi, Kana, Yamusa., *Nigeria's State House of Assembly: Powers, Functions and Authority* (Keffi: Greenworld, 2015).

⁵ See e.g. Montesquieu, (Nugent, transl.) *The Spirit of the Laws*, (London: Hafner Press, 1949).

⁶ *Ibid.*

and other Western political philosophers.⁷ The USA constitution separates power horizontally between the legislature, the executive and the judiciary. It attempts to make these organs independent and equal in status. It also divides power vertically between the federal and state governments and grants them independence and powers in some areas. Nigeria has tried to follow the American constitutional framework. Thus, the 1999 Constitution of Nigeria has horizontal and vertical division of powers too. The scope of this paper is doctrine of separation of powers in the vertical sense as applicable in the Nigerian Constitution 1999, which will now be examined.

2. Vertical Separation of Powers

This is the division of powers between a central nation-wide government and a number of regional or local governments or authorities each operating in its defined territory with its own apparatus of government, which may have exclusive authority over certain matters.⁸ In its pure form, a vertical division of powers will result in powers of government being divided neatly among different tiers of government each conducting its affairs independently. Each will form and control its organs of government and their personnel. Within each level of this vertical structure of governments, there will also be a horizontal separation of powers. In other words, each tier will have its legislature, executive and judiciary. The vertical division of powers is aptly exemplified by federalism which is a system of government where powers are shared between a central government and a number of regional governments in such a way that each government exists separately and independently of the others and with authority in some matters exclusive to it.⁹ However, even in a unitary state there is some form of vertical division of powers since the central government usually delegates certain powers to regional and local authorities.¹⁰ The Nigerian Constitution divides power between the federal, state and local governments. An Exclusive Legislative List is provided containing legislative powers exclusive to the federal government. A Concurrent Legislative List spells out powers that both the federal and state governments share. The residual powers go to the state governments. A list of functions for local governments is also made out. The three tiers of government have their own legislatures and executives.¹¹ There are federal and state judiciaries but none for the local government.

3. Federalism

The Nigerian Constitution is a federal constitution and attempts to mould a federation out of the diverse and often conflicting groups in the country. Federalism is a fundamental basis and one of the final objectives of the Nigerian Constitution. As explained above federalism is a constitutional device whereby governmental powers are shared among tiers of government rather than among geographical entities.¹² The tiers of government are usually a federal government and regional or state authorities. Thus, the federal government exercises nation-wide powers while regional authorities hold sway in their regions. These governments exist separately and independently of each other. They operate directly on persons and property within their territory and possess their own government apparatus. They have authority in some matters exclusive of all the other tiers.¹³ The basis of federalism is the division of powers between governments rather than geographical entities or communities. Though the nation is one there are distinct governments for the whole nation and its component regions. Each of these governments is separate and autonomous and exercises its will free of direction from another government.¹⁴ Contrast this with a unitary state where all powers are vested in one central government

⁷ See Kelly et al; *The American Constitution: Its Origin and Development*, (New York: Norton & Company, 1993); M J C Vile, *The Structure of American Federalism*; *American Federalism: A Concise Introduction*, 2007.

⁸ This is the foundation principle of federalism. See generally Norman, W., (Ed.), *Theories of Federalism: A Reader*, op. cit.; Riker, W. H., *Federalism: Origin, Operation, Significance*, op. cit.; Nchi, *Separation of Powers under the Nigerian Constitution*, (Jos: Greenworld Publishing Company Ltd, 2000).

⁹ See Ibid. See also Ikenga K.E. Oraegbunam, 'Separation of Powers and Nigerian Constitutional Democracy'. Available at <http://www.dawodu.com/oraegbunam1.htm,9/3/2005>,

¹⁰ Loc. cit.

¹¹ The legislative powers of the local government are dependent on what the State House of Assembly grants it.

¹² See Ikenga K.E. Oraegbunam, 'Separation of Powers and Nigerian Constitutional Democracy', *Benin Journal of Public Law*, Volumes 5-7, 2009, pp. 26-59.

¹³ Ibid.

¹⁴ See McWhinney, *Comparative Federalism*, (1973); Wheare, *Federal Government*, (London: Oxford University Press (1963); Awa, *Issues in Federalism*, (Benin: Ethiope Publishing Company).

which is omnipotent and merely delegates some of its powers to regional authorities existing at its mercy;¹⁵ or a confederation, which is a loose union of sovereign States delegating a few of their powers to the confederal government.¹⁶ A federal constitution divides power among the tiers of government using the technique of enumerated and residual powers.¹⁷ A list of powers is usually spelt out and given to each tier while the remaining unlisted powers, the residue, are also given out to one of the tiers.¹⁸ Thus, whether a constitution is federal or not is determined by the way it locates or distributes legislative powers. Nigeria's current Constitution is a federal one and provides for three tiers of government for the federation, the states and local government areas.¹⁹ Powers of government are distributed among one central administration in Abuja for the whole country and a number of regionally-based units called states and the sub-units of the states called local governments so that each tier of government would have an area of exclusive legislative, executive and, sometimes, judicial competence and within such area of competence, would be supreme and independent of the others.

Under the constitution the device used to distribute legislative powers is by enumerated lists, the Exclusive Legislative List (exclusive to the federal government) and the Concurrent Legislative List (which falls within the competence of both the federal and state governments.)²⁰ However, the constitution provides that once the federal government legislates on any matter in the Concurrent Legislative List, the state government cannot legislate on it again in similar terms. Powers not stated in any of the two Lists,²¹ i.e. residual powers, are given to the states.²² A list of functions given to local authorities is also spelt out.²³ The Constitution has clearly defined powers of the federal, state (regional) and local governments. It does not allow any tier to encroach on the powers of the others. Each tier makes laws on matters within its legislative competence and executes them.

Federalism is intended to be a solution to fears of domination that may arise in a plural society of diverse groups segregated by race, culture, language, religion, etc. It is aimed at allowing each group to govern itself on local issues leaving national issues to the federal government. There is a decentralisation or devolution of powers from the centre to the regions and local authorities. A federal constitution sets out to accommodate the plurality and diversity in a nation by allowing autonomy to regional authorities on peculiarly local matters. Its major aim is to allow each national group a large measure of autonomy over local matters while leaving national matters to the federal or national government and those matters that are both of local and national concern to be administered concurrently. This way the domination of one national group by another or others is prevented.

4. General Structure of the Nigerian Federation

The Federating Units

The Nigerian federation is made up of thirty six federating units called states²⁴ and the Federal Capital Territory.²⁵ It also has seven hundred and seventy four Local Government Areas entrenched in the current constitution.²⁶ The principal organs of the central government made up of the national parliament, the presidency and the Supreme Court, are located in Abuja, the national capital, while the principal organs of the state governments are located in their different capitals. Each state has its distinct

¹⁵ See Nchi, op. cit., Chapter 6.

¹⁶ See McWhinney, op. cit.

¹⁷ See Wheare, op. cit., pp. 1-10.

¹⁸ Ibid.

¹⁹ See section 3 CFRN.

²⁰ See section 4 CFRN generally.

²¹ Ibid.

²² Ibid.

²³ See section 7 CFRN and the Fourth Schedule.

²⁴ The states are Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe, Zamfara.

²⁵ The Federal Capital Territory is called Abuja.

²⁶ See First Schedule, Part I, section 3, CFRN.

legislature, executive and judiciary. Local Government Areas also have their elected legislative and executive councils but no judiciary.

The Legislative Arm of the Units

The federal or national parliament is called the National Assembly while the state or regional legislature is called the State House of Assembly. The National Assembly is bi-cameral, i.e. it is made up of two chambers, the Senate and the House of Representatives. The State House of Assembly is unicameral, i.e. it is made up of a single chamber. Members of the national and state Assemblies are elected through a direct, popular election. This election is by means of a universal and equal franchise open to all Nigerians above the age of 18 years who are registered voters. The elections shall be organised by the Independent National Electoral Commission, a federal body, on a date to be decided by the Commission which shall not be earlier than 60 days before and not later than the date on which each House stands dissolved.²⁷ Membership of the national and state legislatures is based on some constitutional qualifications. To qualify to be elected as a member of any of the legislatures in the country a Nigerian citizen must conform to certain constitutional requirements of age, education, health, etc., discussed in chapter four below. Members of the national and state Assemblies are not civil servants but may be regarded as public officers as defined under section 318 (1) and 5th Schedule, section 19, of the constitution. The sizes of the legislatures differ. The National Assembly has 469 members. Of these, 109 are members of the Senate while 360 are members of the House of Representatives.²⁸ The Senate consists of 3 members from each state and 1 from the Federal Capital Territory. The House of Representatives shall have members from each state of the federation representing constituencies of nearly equal population as far as possible so, however, that no constituency shall fall within more than one state.²⁹ The sizes of the different state Assemblies are based on the population of the states. The larger the population of a state the more members of the state legislatures it has.³⁰ The power to make laws is vested in thirty-seven legislative Assemblies. Of these, one, the National Assembly, exercises the legislative powers of the federation or federal government while the other thirty-six are state legislative Assemblies that exercise the legislative powers of the states that form the Nigerian federation. Local Government Areas, sub-units of states, also have legislative councils that the constitution granted some limited legislative powers to make by-laws.³¹

The Executive Arm of the Units

The three tiers of government have their different executive branches or organs that are completely independent of one another in terms of personnel and powers. The federal executive branch of government is headed by an elected President who is allowed a maximum of two terms of four years each.³² The President appoints ministers to head the various ministries and departments of the federal government. The state executive branch is headed by an elected Governor, who may only serve for a maximum of two terms of 4 years each.³³ The Governor appoints commissioners to head the different ministries and departments of the state government.³⁴ For local government areas, the executive branch is headed by an elected Chairman who appoints supervisory councilors to man the different departments of the local government.³⁵

The Judicial Arm of the Units

Judicial powers and functions are exercised by courts set up for the federation and the states. The Constitution establishes courts for the federation and vests them with judicial powers of the federal

²⁷ See e.g. section 77 CFRN.

²⁸ Sections 48 and 49 CFRN.

²⁹ Section 49 CFRN.

³⁰ See section 91 CFRN.

³¹ See generally section 7 of the Constitution.

³² See sections 130 – 146 of the Constitution for the powers, functions and authority of the President. See Akande, J.O., *Introduction to Constitution of Federal Republic of Nigeria*, (Lagos: MIJ Publishers, 2000), 228. See also generally Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, (London: Sweet & Maxwell).

³³ Sections 176 – 191 CFRN. See Akande, *op. cit.*, p. 285.

³⁴ See section 192 CFRN.

³⁵ Section 7 CFRN.

government.³⁶ It also establishes courts for each of the federating units of the federation, i.e. states, and vests in them the judicial powers of the states.³⁷ There is no judiciary for the sub-units of states, i.e. local government areas and the Area Councils of the Federal Capital Territory. The Nigerian federation has a centralised judiciary in the sense that it has a single structure of appellate jurisdiction in the most important judicial matters. It has a single Court of Appeal and a Supreme Court that entertain appeals from both lower federal and state courts. The jurisdictions of these two appellate courts cover all matters whether within federal, state or local legislative competence and authority.

5. Method of distribution of legislative powers

The device used by the Constitution to share powers among the tiers of government in the federation is by means of a structure of two legislative lists, the Exclusive and Concurrent legislative lists. In these lists, matters common to the whole country are kept within federal legislative competence while matters of regional or local interest are left under the legislative competence of states. The list containing federal powers is described as the Exclusive Legislative List,³⁸ while the list containing shared powers is the Concurrent Legislative List.³⁹ All powers not contained in the two Lists are residual powers and they are to be generally exercised by the state government.⁴⁰ The federal government in Nigeria may be described as a government of enumerated powers since the Constitution clearly specifies the matters within federal legislative competence. On the other hand, state governments are governments of residual powers since the Constitution leaves all unspecified legislative powers to them. The federal government may only exercise those powers specifically granted to it by the Constitution as contained in the two Lists. In contrast, the powers of the state government are not so limited and include all matters not enumerated to be exercised by the federal government.

Federal legislative powers

The Constitution vests legislative powers of the federal government in the National Assembly, consisting of the Senate and the House of Representatives.⁴¹ The National Assembly shall have power to make laws for the peace, order and good government of the Nigerian federation or any part thereof with respect to any matter set out in the Exclusive Legislative List which is in the Second Schedule to the Constitution. This power includes the power to make laws with respect to any matter incidental or supplementary to any item in the Exclusive Legislative List.⁴² The constitution specifically declares that the National Assembly's legislative powers as contained in the Exclusive Legislative List shall be exercised to the exclusion of the state governments and so no state government shall have the power to legislate upon any matter contained in that list.⁴³ The list contains important powers of government dealing with issues relating to defence and security, external relations, the economy, judicial authority, etc. Additionally, the National Assembly shall have powers to make laws with respect to any matter in the Concurrent Legislative List but this power is shared with the states.⁴⁴ However, where the federal government legislates on any matter in the Concurrent Legislative List, and a state government passes a similar legislation, the legislation of the federal government shall prevail to the extent of their inconsistency.⁴⁵ Once the National Assembly legislates on any matter contained in the Concurrent Legislative List it covers the field so legislated upon and excludes the state government from any attempts to legislate upon the field covered by the federal legislation.⁴⁶ This is what is called the doctrine of 'covering the field'. This is a doctrine of federalism and it provides that any regional or state legislation in respect of a matter of which both the federal and state governments may legislate upon shall be invalid if it is in conflict with the federal legislation on the same matter.⁴⁷ This is further

³⁶ See sections 230 – 254 CFRN.

³⁷ Sections 270 – 284.

³⁸ Second Schedule, Part I CFRN.

³⁹ Second Schedule, Part II CFRN.

⁴⁰ See generally section 4 CFRN.

⁴¹ Section 4 (1) CFRN.

⁴² Section 4 (2) CFRN.

⁴³ Section 4 (3) CFRN.

⁴⁴ Section 4 (4) CFRN.

⁴⁵ Section 4 (5) CFRN.

⁴⁶ See Nchi, *op. cit.*

⁴⁷ Section 4 (5) CFRN.

discussed below in the next chapter. The National Assembly also has the constitutional powers to make laws with respect to any matter not in the Exclusive and Concurrent Legislative Lists concerning which it has powers to make laws by some other provision in the constitution.⁴⁸

State legislative powers

The Constitution vests state legislative powers in the House of Assembly of each state. The state House of Assembly has powers to make laws with respect to any matter not included in the Exclusive Legislative List.⁴⁹ It is this provision of the Constitution that is the source of the residual powers of state governments discussed earlier. Generally, most, though not all, state powers are derived from this provision of the Constitution.⁵⁰ Additionally, the House of Assembly of a state is empowered by the Constitution to make laws with respect to any matter included in the Concurrent Legislative List which has not been legislated upon by the National Assembly.⁵¹ The state House of Assembly may also exercise any legislative power granted to it by some other provision of the Constitution.⁵²

6. Issues and Challenges

The above discussion summarises the general framework of the federal distribution of powers under the Nigerian Constitution. As we pointed out the Constitution uses two lists of enumerated powers of the National Assembly/ Federal Government and those of the State House of Assembly/ State Governments. Powers exclusive to the federal government are in the Exclusive Legislative List and shall be exercised only by the National Assembly.⁵³ Those powers that may be exercised by either the federal government or state government are contained in the Concurrent Legislative List and these powers may be exercised by the National Assembly or the State House of Assembly subject to the primacy of a federal legislation in case of any conflict where the federal law and state cover the same field.⁵⁴ A few of these powers are briefly examined in this paper.

The Exclusive Legislative List

This list is contained in Part 1 of the Second Schedule to the Constitution. It has 68 items, 66 items being specific issues which only the National Assembly shall legislate upon. Items 67 deals with non-specific powers not contained in the List but contained elsewhere in the Constitution, while item 68 deals with incidental or supplementary powers that may be required in the exercise of the specified powers. The list covers a wide range of important government powers covering revenue, defence and security, fiscal and banking issues, trade and commerce, communication and transportation, etc.

The Concurrent Legislative List

This List has twelve matters which both the National Assembly and a state House of Assembly may legislate upon.⁵⁵ The List covers matters like allocation of revenue, antiquities and monuments, archives and public records, collection of taxes on capital gains, incomes or profits other than those of companies and stamp duties, elections of local government, electric power, exhibition of cinematograph films; industrial commercial and agricultural development, scientific and technological research, statistics, surveys, university, technological and post-primary education. As for revenue allocation under section 1 of the Concurrent Legislative List, full control is given to the National Assembly to provide for legislation for the division of public revenue among the different tiers of government. The power of a state here only touches on its limited control over expenditure of funds allocated to the state and such power does not extend to allowing the state to determine how much of the federal revenue shall be allocated to the states. The Concurrent Legislative List itself has items which already belong to the Exclusive Legislative List.⁵⁶ This illogicality is not comprehensible and undoubtedly is a potential

⁴⁸ Section 4 (4) (b) CFRN.

⁴⁹ Section 4 (7) (a) CFRN.

⁵⁰ See Joye and Igweike, *Introduction to 1979 Constitution*, (London: Macmillan, 1981), p. 67. See Nchi, op. cit., p. 73.

⁵¹ Section 4(7) CFRN.

⁵² Ibid.

⁵³ See Second Schedule, Parts I & II CFRN. See also Joye and Igweike, op. cit., Nwabueze, op. cit., Chapter 3; Nchi, op. cit.

⁵⁴ See section 4 (5) CFRN.

⁵⁵ Second Schedule, Part II, CFRN.

⁵⁶ Examples are labour, industrial, commercial and agricultural matters.

source of conflict and confusion. States may be uncertain about the extent of their powers in such a situation. Some examples of similar provisions under the 1979 Constitution have been given elsewhere as illustrative of these potential situations of conflicts:

The Concurrent Legislative List specifically empowers state governments to make laws with respect to the safety and welfare of labour. Since the term 'labour' includes persons employed in factories, there is a direct conflict between these provisions. In the light of this conflict, it is uncertain whether state governments have constitutional power to enact legislation concerning the safety and welfare of labourers. A similar conflict may exist in connection with Item H on the Concurrent Legislative List, which gives power to the states to make laws concerning industrial, commercial or agricultural development. ... The Exclusive Legislative List vests exclusive power in the federal government to make laws with respect to trade and commerce. It would appear that the implied powers clause, as it relates to trade and commerce, vests exclusive power in the federal government over industrial, commercial or agricultural development. Certainly, such development could be considered incidental or supplementary to trade and commerce, and thus within the ambit of the implied powers clause ... Even if the federal government is not found to possess exclusive powers with respect to industrial, commercial or agricultural development, it can, under its concurrent power, dominate economic development within a state (since) any state law concerning industrial, commercial or agricultural development would be superseded by a federal law on the same subject. If the federal government wished to, it could enact such comprehensive economic development legislation as to exclude state government altogether from this area.⁵⁷

These observations call attention to the inherent problems of the duplicity of enumeration in the two legislative lists. The confusion and uncertainty that will likely arise may lead to recurring constitutional crisis which, ultimately, the judiciary has to resolve. A tidier draftsmanship would have avoided this illogicality.

Some powers shared by the federal and state legislatures

Some other powers are given to the National Assembly by the Constitution in addition to those contained in the Exclusive and Concurrent Legislative Lists. But in exercising them the national legislature has to get the involvement and support of the state legislatures. The most important of these powers are stated and briefly discussed below.

Public order and public security

The Constitution gives concurrent powers to the federal and state legislatures to make laws to ensure public order and public security.⁵⁸ However, the federal government has an edge since only the National Assembly has powers to legislate concerning the Police, the organisation directly concerned with ensuring public order and security.⁵⁹ Although the Governor of a state may give directives concerning public order and safety to the Commissioner of Police heading the Police Command in the state, and which the Commissioner of Police is obligated to obey, such directives cannot be issued independently of federal knowledge and control.⁶⁰ Before carrying out the Governor's directives, the Commissioner of Police may ask that the matter be referred to the President or the appropriate Minister for any directions which may override those of the Governor.⁶¹ As rightly observed:

This ... indicates the delicate balance of powers between the federal government and the state governments with respect to public security. It indicates that in order for public safety and order to be effectively maintained, there must be a harmonious working relationship between state Governors and Commissioners of Police. Otherwise, Commissioners could

⁵⁷ Joye and Igweike, op. cit., p. 76.

⁵⁸ Since they are both charged with the responsibility of making laws for "the peace, order and good government" of the federation and the states. See section 11 CFRN.

⁵⁹ Second Schedule, Part I, Item 45 CFRN.

⁶⁰ Section 215 (5) CFRN.

⁶¹ Ibid.

frustrate the efforts of Governors in this area by simply referring all security matters to the federal government. The resulting delay in Police action necessary to deal with emergencies would inhibit and perhaps prevent effective maintenance of public safety and order.⁶²

Emergency powers

The Constitution allows the President to proclaim a state of emergency in any part of the federation under certain specified situations subject to subsequent approval by the National Assembly. Such specified situations are alternative and not cumulative and these provisions will apply not only when the federation is at war or is in imminent danger of invasion or involvement in a war, but also when there is actual breakdown of public order and safety in the federation or any part thereof.⁶³ In addition to the power of the President to proclaim a state of emergency in any part of the federation, the Governor of state may, with the support of the House of Assembly of the state by a resolution of two-thirds of its members, request the President to declare a state of emergency in the state if the situations specified under section 305 (3) of the Constitution exists. However, subsection 4 states that if there is a breakdown of public order and safety, or there is a clear and present danger of an actual breakdown of public order and safety, or there is an occurrence of imminent danger or the occurrence of any disaster or natural calamity to such an extent as to require extraordinary measures to restore peace and security, and the Governor of a state fails within a reasonable time to make a request to the President to issue a proclamation, the President may take the initiative and declare a state of emergency in the state. The decision as to what is a reasonable time seems to be that of the President's, but ought to be objectively determined. Thus, it is not what the President subjectively thinks is a reasonable time but what an ordinary reasonable man might have cause to believe is a reasonable time. Thus, by means of emergency powers, federal authority may be enhanced and expanded. Such emergency powers and the power given to the National Assembly to make laws with respect to public safety and public order in non-emergency times tilts control of security matters in favour of the federal government.

Treaties

Under section 12 the Constitution provides that only the federal government has the power to bind Nigeria in a treaty with another country. No treaty between the federation and another country shall have the force of law unless such a treaty is enacted into law by the National Assembly. The National Assembly may make a law in respect of any matter for the purpose of implementing a treaty, whether or not the matter is in the Exclusive or Concurrent Legislative List. Ordinarily, any matter not in any of the two Lists is a residuary matter exclusively within the legislative competence of the State House of Assembly. However, a bill passed by the National Assembly with respect to any matter not in the Exclusive Legislative List for the purpose of implementing a treaty cannot become law without the participation of the state Assemblies since such a Bill must be ratified by a majority of the State Houses of Assembly before being presented to the President for his assent.⁶⁴ It seems that a strict interpretation of the treaty provisions in the Constitution would suggest that ratification by the states is necessary concerning such a matter that is not in the Exclusive Legislative List, regardless of whether or not it is within federal legislative powers as contained in the Concurrent Legislative List or under some other provision of the Constitution. As for matters in the Concurrent Legislative List, this may seem illogical because 'logic would seem to dictate against such a requirement since, presumably, ratification by the states was intended to apply only when the federal government acts beyond its usual powers and invades a field reserved to the states, and the federal government may exercise concurrently with the states any of the powers in the Concurrent Legislative List with the benefit of the federal government prevailing in the event of the conflicting exercise of a similar power by the federal and state governments.'⁶⁵ It is to be noted here that states cannot, by themselves, enter into treaties with other foreign countries.

⁶² Joye and Igweike, op. cit., p. 82.

⁶³ Section 305 CFRN.

⁶⁴ Section 12 (3) CFRN.

⁶⁵ Joye and Igweike, op. cit., p. 85.

The judiciary

Nigeria's judicial system is a centralised one. While the states and federal governments have supposedly independent judiciaries, the latter has significant powers over the national judicial system. The top appellate courts, the Supreme Court and the Court of Appeal, are under the control of the federal government. These courts hear appeals from all High Courts, whether federal or state. The National Judicial Council, a federal executive body has been set up by the Constitution under the Third Schedule, Part I, section 20, to advise the President and Governors on the appointment, promotion and discipline of judges of superior courts of the federation and states. The Council is also empowered under section 21 (h) 'collect, control and disburse all monies, capital and recurrent, for the judiciary', federal and state. These powers given to the Council over the judiciary of a state negates the principle of the federal separation of powers because a regional or state government in a federation ought to have a substantially independent judiciary with full jurisdiction over matters under its exclusive constitutional legislative competence. Some federations like the USA have this arrangement whereby states have independent judiciaries with full jurisdiction over state matters. This has resulted in the states of the American union having a Supreme Court each with final jurisdiction over judicial matters relating to their areas of legislative competence.⁶⁶

Power to prescribe the remuneration of officials

The National Assembly has the power to fix the salaries and allowances of federal officials and to prescribe the national minimum wage under the Second Schedule, Part 1, Items 34 and 44. This does not prevent the states from having their own separate structure of salaries and allowances provided the national minimum wage is not derogated from. There must, however, be a law by the National Assembly setting out the minimum wage. There are other federal legislative powers scattered around the Constitution and those discussed above are the most important. They show the vast range of federal powers under the Constitution and how delicate and complex the balance of federal and state powers is and how often Nigeria's brand of federalism tilts more towards a quasi – federal constitutional system.

When the federal government may take over the legislative functions of a state

The Constitution has empowered the National Assembly, under certain conditions, to take over the legislative functions of a State House of Assembly.⁶⁷ There are two of such conditions:

1. When the Nigerian Federation is at war;⁶⁸
2. When any State House of Assembly is unable to perform its functions by reason of the situation prevailing in that state.⁶⁹

Thus, when Nigeria is at war the National Assembly may legislate for any state without regard as to whether the House of Assembly of that state can perform its legislative functions or not as long as it appears necessary or expedient to the National Assembly for the sake of the defence of the Nigerian realm. In the second case, it is only when a state House of Assembly is unable to perform its usual legislative functions that the National Assembly may take over such functions. But as Akande asks:

... (1) How can it be determined that the House of Assembly of any state is unable to perform its function? (2) Can the National Assembly under its general legislative power – section 11(1) – still make laws for the state, in the general interest of public order and security even where there is no proof that the House of Assembly cannot perform its function? (3) Who determines what is in the interest of public order and security in this particular situation?⁷⁰

All these questions raise the problem of the precise limits of the powers of the National Assembly under these provisions.⁷¹ Be that as it may, the National Assembly seems to have the discretion in determining when to take over the functions of a state House of Assembly and for how long. It seems the minimum

⁶⁶ See generally Vile, *The Structure of American Federalism*, op. cit.

⁶⁷ See sections 11 and 305 CFRN.

⁶⁸ Section 11 (3) CFRN.

⁶⁹ Section 11 (4) CFRN.

⁷⁰ Akande, op. cit., p. 48. See her discussions on pp. 48 – 50.

⁷¹ See further discussions in Joye and Igweike, op. cit., p. 83.

requirement for the National Assembly to invoke its power here is for the State House of Assembly to be unable to hold its usual meetings or perform its usual constitutional functions.

It is provided that the power shall be used if the House of Assembly of the State is unable to perform its functions. Of course, it is the National Assembly that determines whether or not the (State) House of Assembly is unable to perform its function in spite of the proviso that a House of Assembly shall not be deemed unable to perform its functions so long as the House of Assembly can hold a meeting and transact business. It needs only be pointed out that it requires only one-third of all the members of the House for the House of Assembly to hold a meeting or transact business ...⁷²

This power in the hands of a greedy federal government may be abused in ways that may destroy the foundation of the federal Constitution and even to turn the country into a unitary country, as far-fetched as it may seem. As Akande concludes:

The addition of this special power effectively tilts the power structure in favour of the Federal Government and diminishes the professed autonomy of the states. It is also indicative of the type of federation intended, that is, a centrally strong federation.⁷³

7. Powers and Functions of a Local Government and the Debate over Autonomy

The Constitution provides for the existence of a democratic system of local government system in Nigeria and also sets forth some of its general powers and functions. But the Constitution makes it clear that the existence, powers and functions of a local government shall be provided for and regulated by a Law enacted by the State House of Assembly. Section 7(1) of the Constitution declares that:

The system of local government by democratically elected local government councils is hereby guaranteed; and accordingly, the Government of every State shall, subject to section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such Councils.⁷⁴

Section 7 (5) of the Constitution goes on to provide that the functions to be conferred by law upon local government councils shall include those set out in the Fourth Schedule to the Constitution. The Constitution merely provides for a system of local government in a generalised manner. It leaves the state Houses of Assembly the power as to the establishment, structure composition, finance and functions of the local government.⁷⁵ This rather broad language by the Constitution suggests that virtually all aspects of local government are within the legislative competence of the state legislatures. The Constitution seems to exclude the federal government in the regulation of the local government system in Nigeria. Thus, Item 32 of the Exclusive Legislative List allows the National Assembly the powers to make laws with respect to incorporation, regulation and winding up of bodies corporate, other than local government councils. This provision of the Constitution clearly removes the power to create, regulate and abolish local government councils from the Exclusive Legislative List of the National Assembly and it is also not included in Concurrent Legislative List. Since local government as a legislative matter is not in any of the two enumerated Lists, it becomes a residuary matter within the legislative competence of the states. Still, the National Assembly is not entirely without some measure of legislative authority over local government councils. Item 11 of Concurrent Legislative List gives the National Assembly the powers to make laws for the federation with respect to the registration of voters and the procedure regulating elections into local government councils. However, this power does not extend beyond local government elections and does not allow the National Assembly to regulate other aspects of local government system and Item 12 still allows a State House of Assembly to make laws with respect to elections to a local government council in addition to, but not inconsistent with, any law made by the National Assembly.⁷⁶

⁷² Akande, *op. cit.*, p. 12.

⁷³ Section 305 CFRN.

⁷⁴ See also Fourth Schedule, CFRN.

⁷⁵ Section 7 (1) CFRN.

⁷⁶ See Second Schedule, Part II, Items 11 and 12.

The entrenchment of the names of all existing local government areas in the federation under section 3, Part I of the First Schedule of the Constitution means that those provisions are part of the Constitution. Thus, they can be changed through an amendment of the Constitution. The effect is that while a state appears to have the constitutional power to create new local government areas or even abolish existing ones that can only be done with the support of the National Assembly amending section 3, Part I of the First Schedule of the Constitution.

The Constitution prescribes certain functions to be performed by a local government which, however, must be conferred by an enactment of the State House of Assembly.⁷⁷ This allows the state governments to determine the forms and functions of local government, since the Constitution merely states the mandatory functions in general terms. In conferring such general functions on the local governments, the Constitution still allows the state government the freedom to set out guidelines, standards and even policies to be followed by local government councils within such states.⁷⁸ The Constitution does not give to the local government any independent legislative powers except as may be provided for by a State House of Assembly. However, it must be made clear that the local government system cannot be abolished but an elected council can only be dissolved since the continued existence of local government councils as democratic structures of government is guaranteed by the Constitution under section 7 (1). It seems, therefore, that the state government may not appoint local government councils even if it may give itself the power to dissolve them under a state Law.⁷⁹ By virtue of section 7 (1), local government councils must be democratically constituted and so the practice of appointing ‘care-taker’ management committees or Sole Administrators for local government councils may well be unconstitutional, unless if done for a short period for ‘overriding public interest’ to allow the holding of elections into a council.⁸⁰

While local government councils appear to be subject to regulation in all respects by the state government, the Constitution still contemplates a close and cooperative relationship between the two tiers of government. Thus, section 7 (3) requires local government councils to participate in economic planning and development through an Economic Planning Board which the Constitution requires each state to establish. The local government councils are required to make recommendations to such State Planning Boards on matters relating to economic development of the local government areas.⁸¹ Also, the local government councils share with the state government the responsibility for the provision and maintenance of primary education and health care services, and the development of agriculture and natural resources.⁸² In development matters, it is clear that the Constitution intends to give the local government councils a major say although subject to state legislative powers.⁸³ State governments must restrain themselves and allow a viable and fairly independent local government system to emerge in their states. Such local governments should be properly funded since their activities touch directly upon the lives of ordinary Nigerians and they are the closest governments to the people.

In a multi-party system as we are operating, the party in control of the state government may be tempted to want to have its party in control of all the local government councils within the state even if clearly against popular will. It may also appear that this is the reality on ground across the states in Nigeria today. It may be necessary, therefore, to take another look at the constitutional provisions on local government and to provide additional constitutional guarantees to ensure greater independence to the local governments as a means of strengthening the structures of federalism in Nigeria.

⁷⁷ Fourth Schedule.

⁷⁸ Section 7(5) CFRN.

⁷⁹ Can the Law also allow the Governor to appoint such officers? Will such a law be constitutional in the light of section 7 (1) CFRN.

⁸⁰ *Gov. Ekiti State v. Olubunmo* (2017) 3 NWLR 11 See also *Eze v. Gov. Abia State* (2014) 14 NWLR 201

⁸¹ *Ibid.*

⁸² Fourth Schedule, Section 2 CFRN.

⁸³ As exercised constitutionally to guarantee a democratic local government system as stipulated under section 7 of the Constitution.

On the interpretation of Sections 7(1) and 197 and item 22 of the Second Schedule to the Constitution on the extent of the power of the National Assembly to make Laws relating to Local Governments of a State, the Court interpreted the provisions of Sections 7(1) and 197 and Item 22 of the Second Schedule to the Constitution in *Attorney-General of Abia State V. Attorney-General of the Federation*. Ogundare, JSC, in his judgment said at page 422:

In my respectful view, by the combined effect of Sections 7(1) and 197 and Item 22 of the Second Schedule Part I, the Constitution intends that everything relating to local government be in the province of the State Government rather than in that of the Government of the Federation. The minor exception to this scheme is to be found in Item 11 of the Concurrent Legislative List where power is given to the National Assembly with respect to the registration of voters and the procedure regulating elections to local government council. There is also, pursuant to Section 7(6)(a) provisions for statutory allocation of public revenue to local government councils in the Federation. Other than these I can find no provision in the Constitution empowering the National Assembly to make laws affecting local Governments.⁸⁴

Joint Account

On the Interpretation of Section 162 of the 1999 Constitution of Nigeria on the Functions and responsibilities of the State Government to maintain a Special Account in the name and style of 'State Joint Local Government Account'. By Section 162(6), it is the function and responsibility of the Government of a State to maintain a special account in the name and style of 'State Joint Local Government Account'. A State can decide to do so by the establishment of a committee or by any other means. Niki Tobi JSC has this to say on the interpretation of Section 162 (6);

I see from the briefs that a few States have established Committees for the purposes of maintenance of the special account. And that is in order. I do not see anywhere in Section 162, or more specifically, Section 162(6), and finally more generally, any constitutional provision vesting in the National Assembly the legislative power to establish the State Joint Local Government Account Allocation Committee in Section 1(1) of the Act. I can still go further. The word 'State' as used in Section 1(1) is not the same or co-terminus with the meaning of the word in international law, as a sovereign nation, which in that context, is Nigeria. On the contrary, the word means what it says in the context, and it is a State in the Nigerian Federation. It conveys the meaning provided for in Section 3 and Part 1, First Schedule to the Constitution. And bearing that meaning, the establishment of the Committee is clearly a forbidden area on the part of the National Assembly. If no section specifically spelt out the exclusive legislative power of the House of Assembly of a State, the second word in Section 162(6) should leave nobody or person or organization in doubt as the exclusive legislative function of the House of Assembly of a State. And the second word is 'State'. The word is unambiguous and I have no other way of interpreting it than what I have done above.⁸⁵

Limits of Federal Control and Extend of State Control over Local Government Funds

There is the issue of section 162(6) on Account. The law is that the Accountant-General of the Federation takes charges of or watches Federal Government finances anywhere in the country. The moment a State maintains a special account in the name and style of 'State Joint Local Government Account', it ceases to be Federal Government finance and the Accountant-General of the Federation, cannot police the funds. In other words, the Accountant-General has no constitutional power to sit in

⁸⁴ *Attorney-General of Abia State v. Attorney-General of the federation* (2002) 2 NWLR (Pt. 763) 264.

⁸⁵ *AG Abia & 2 Ors v. AG Federation* ND 35 Ors. I NSCQLR VOLUME 28 (2006) PAGE 170 (2006) 16 NWLR (PT. 1005) (2006) 7 S.C (PT. 1) 51 at pages 224-225.

judgment over the Section 162(6) Account.⁸⁶ The moment the amount standing to the credit of Local Government Councils in the Federation Account is allocated to the States in accordance with Section 162(5) of the Constitution, the business of the State in terms of fiscal policy starts under Section 162(8) of the Constitution. Accordingly, the National Assembly has not the legislative power to ensure that the funds paid into the State Joint Local Government Account are distributed to the Local Government Councils. In the view Niki Tobi JSC, ‘the National Assembly has not the legislative competence to legislate on the nicety or nitty-gritty of the allocation. Section 162(8) of the Constitution vests in the House of Assembly of a State the power to distribute amounts standing to the credit of Local Government Councils of a State on such terms and in such manner as it thinks proper.’⁸⁷

House of Assembly Vs Local Government Legislature in The Distribution of Allocation

The unresolved issue now however, is having conferred the power on the House of Assembly to distribute allocations to the Local Government Councils, where then do their powers stop whether it extends to policing nitty-gritty of the day to day expenditure in the face of the Local Government Legislative House? That is because while the law is clear that the responsibility of the Federal Government with respect to Local Government funds is to legislate and ensure allocation of the funds to the local governments, the state is to distribute; the law is not clear as to whether the House of Assembly still bares the duty of monitoring the administration of the funds by the local governments to the exclusion of the Local Government Legislature. The practice differs from state to state with some Houses of Assembly exercising considerable control over the Local Governments and day to day activities thereby rendering the Councilors redundant, while some tolerate relative autonomy for the local councils.

8. Conclusion/ Prospects

The Call for Restructuring: The fallacies, the falsities

There is no gainsaying that no constitution in the world is perfect, and no system is faultless. The call for restructuring on the grounds that the current structure has failed to produce the anticipated outcome of speedy development for the country has not gained traction, mainly because there has not been consensus as to the exact substitute or replacement for the present system. For every ten proponents of restructuring, there is likely to be ten different views or suggestions on models to adopt, and so goes the debate. Since the inception of the 1999 Federal Constitution, Nigeria continues to toil under the weight of multiple growth inhibiting factors that militate against proper operation of both the constitution and the system it created; Inhibiting factors such as corruption and abuse of power that hamper proper delivery of goals of governance; mediocrity that places at the helm individuals with absolutely have no competence to administer the implementation of the letter and spirit of the constitution and other laws; infrastructural inadequacy that disables the country from attaining its potentials; poverty and scarcity of basic amenities that steers up tension, mistrust and ultimately conflicts. It is really not clear if the stagnation and the myriad of challenges the country faces is as a result of human factor, or fault of the constitution.

This paper identifies a few areas that require repairs in the constitution. Such areas touching on revenue and resource control, fiscal and banking, defence and security/ police, commerce, trade and industry, judiciary and emergency powers, and many others mentioned in this paper that confer overbearing power on the centre, thereby rendering the federating units weak and unable to sustain themselves, or create the potential for conflicts and institutional disagreements. While the recommendation for a review of some of these provisions have been made, it is doubtful that any meaningful progress can still be achieved if some the inhibiting factors mentioned above are not addressed even after the repairs are carried out on the constitution. The fact is that the constitution has not been allowed to attain its full potentials to adequately confirm the claim that the gridlock in the nations development can safely be blamed on the constitution. This paper proposes and has discussed a number of issues that need to be addressed in the Constitution of Nigeria 1999, some of which have remained unchanged and recurring since the 1979 Constitution. The research however finds that the allegations that the problems the nation

⁸⁶ Ibid. page 172

⁸⁷ Ibid. page 173

faces are caused as a result of constitutional inadequacies has not been empirically verified. While on the other hand, it is well established that such factors as corruption, mediocrity, nepotism, illiteracy and ignorance are well settled as major vectors of backwardness and lack of development.⁸⁸

On the Meaning and Effect of the Federal system of Government, there is the need to reproduce in full the statement of W. S. N. Onnoghen, JSC as he then was, that;

A very important and relevant provision for the purposes of this action is Section 162(8) supra which provides that the amount standing to the credit of Local Government Councils of a State shall be distributed among the Local Government Councils of the state on terms and manner to be prescribed by the House of Assembly of the State. It is very clear that while the National Assembly is empowered by Section 162(5) of the 1979 constitution to allocate the amount standing to the credit of Local Government Councils in the Federation Account to the States for the benefit of their Local Government Councils on terms and manner to be prescribed by an Act of the National Assembly, Section 162(8) of the said Constitution empowers the House of Assembly of the State to prescribe the terms and manner of distribution of the amount standing to the credit of Local Government Councils among the said Local Government Councils of the state by enactment of a law to that effect. A very important fact that must not be lost sight of in this case is the fact that Nigeria operates, by constitutional arrangement, a federal system of government as opposed to unitary system. I had earlier stated that the adoption of the Federal System necessarily means that power must be apportioned between the Federal and the constituent states of the Federation thereby assigning to each, designated areas or spheres of legislative competence. This principle is designed to minimize areas of legislative conflicts between the Federal and State Legislatures.

On the other hand, in a unitary state such as Great Britain there is only one center of legislative power covering the whole state which state is usually, for administrative convenience divided into regions or provinces. I must confess that due to military incursion into the politics of this nation and having regard to the military's unique command structure, the line between Federalism and Unitary concepts of state structure became understandably influenced by the single chain command structure of the military thereby adulterating the Federal System of government as is usually known and practised in true federalism. I am afraid that the post-military era which has witnessed the re-introduction of popular democracy is not totally free from the tendency to practice pseudo federalism.⁸⁹

Nevertheless, with the complexities of the Nigeria's diversity, the federal system remains the best option. The constitution just like any man made document, needs to be constantly updated in line with the changing world and evolving challenges. The agitation for proper and thorough autonomy by the local governments is apt and timely, there is the urgent need however to initiate a programme that improves political participation of more educated and better experienced individuals at the local government level. That way the local governments may create means and ways of establishing enterprises and avenues that would enhance revenues and income for infrastructural improvement and job creation. The powers of the State Governments vis a vis that of the Federal Government as encapsulated in the constitution needs to be revised in order to grant more independence to the states. The way to this is amendment of the items in the Exclusive Legislative List to confer more powers on the states to raise much needed revenues and enhancement of security. Examples of such items are powers of control over police, transportation, resource derivation etc. Because most societal decays start from local settings, there is the need pay more intention to the legal framework, the operational and fiscal provisions in the constitution to create a deliberate policy to strengthen the local governments in order to enhance their capacity to handle responsibilities of managing the most ordinary Nigerians. The agitation for reduction in the cost of governance needs to be taken seriously in view of the fact that

⁸⁸ See A. A. Kana, *Corruption, Development and the Law in Nigeria*. (Lafia: Greenworld Company Ltd, 2014). Chapter 2.

⁸⁹ *AG Abia & 2Ors v. AG Federation and 35 Ors supra*.

resources are becoming ever scarcer, while the populace is becoming more conscious and demanding for both improved services and accountability from the government. A gradual process of substituting the bicameral legislature with a unicameral system may help in reducing costs. The call for abrogation of pensions and gratuities for political office holders may also help in reducing expenditure in budgets of states.