AN EXAMINATION OF THE ROLE OF FISCAL FEDERALISM AND RESOURCE CONTROL IN THE REALISATION OF THE RIGHT TO ECONOMIC SELF-DETERMINATION WITHIN NIGERIA

By:

Nuraddeen A. Ayagi*

Abstract

As a branch of the internationally recognized right to self-determination, the right to economic self-determination in its internal sphere principally seeks to guarantee fiscal federalism and resource control within a state. These are more often embodied in domestic legislations, usually the grundnorm, which spell out the limit and extent to which constituent units are fiscally independent and self-regulating in terms of resources. In recent decades, the zeal with which the self-determination right and its components have been received by various interest groups seems to have blurred the fine line between the qualified application of the two elements and their absolute implementation which invariably clash with national sovereignty and constitutionalism. This work thus, upon examination of the feasibility of the realization of fiscal federalism and resource control on the basis of the right to economic self-determination of the Nigerian peoples and its constituent units, finds the existence of the necessary constitutional and legal framework for minimal realization; albeit with some legal and structural impediments that require some adjustments. The work therefore recommends the amendment of the 1999 Constitution to widen the financial and resource powers of the lower constituent units subject to the overriding national sovereignty resident in the Federal Government, and the de-constitutionalisation of the Land Use Act, among others.

1.1 Introduction

One of the important elements of the right to self-determination is the right to federate[1] within a state by the various peoples coming together to form the polity. This right has been judicially alluded to in the *Katanga* case when the African Commission on Human and People's Rights admonished Katanga to seek a variant of self-determination that is in consonance with the unity of Zaire, now Democratic Republic of Congo in asserting its self-determination right[2]. The obvious essence of the recognition of federalism in the context of the right to self-determination is to give the various peoples within a state the legal leverage to operate within the sovereign entity with a measure of freedom to live and retain their unique political, social, economic and cultural structure

* Nuraddeen A. AYAGI, LL.B, BL, LLM, MDS, MPPA. Legal Practitioner and Notary Public.Currently a PhD candidate at the Faculty of Law, Ahmadu Bello University, Zaria. C/O, N. A. Ayagi & Associates, 36 Ibrahim Taiwo Road, Kano.GSM: 08036828617. Email: ayagi2003@yahoo.com.

[1] Ladan, M. T. (2007) *Materials and Cases on Public International Law*. Ahmadu Bello University Press Limited, Zaria.p.118

[2] *Katanga v Zaire*, Communication No. 75/92, IHRL 174 (ACHPR) 1995.

that suits them and their primordial peculiarities while still retaining higher allegiance to the nation-state as the sole sovereign entity into which they are constituent units.

Whereas in the political sense it connotes self-government and autonomy, in the sphere of the right to economic self-determination, right to federate boils down to fiscal federalism which sums up the economic freedom of the people or constituent units and the benefits derivable by them from their common resources, labour and other economic receivables that combine to constitute a level of economic freedom within a state by units thereof. Also, whereas there exists no doubt on the position of fiscal federalism as an aspect of economic self-determination and that virtually all federal arrangements factor in this reality and make provisions for same in their laws, of genuine concern is how broad can the economic leverage to each unit be without jeopardizing the unity of the polity and usurping the sovereignty of the state.

There seems to be a perennial thirst for wider and wider economic freedom or fiscal federalism by peoples or constituent units in particularly developing and transitional federations like Nigeria, who are increasingly demanding for wider fiscal freedom; and in the case of Nigeria absolute resource control by the units as against the centre. The challenge is thus of bringing the laws into conformity with the demands as presented by various interests for implementation and redirection of the economic structure of the entity. This predicament is further exacerbated by strong international legal scholarly opinion that regards resource control as an integral part of the right to economic self-determination within a state[3]. Consequently many canvass and rely on the right to economic self-determination in advancing their demands for resource control within the polity even in Nigeria. Whatever the pros and cons, the inescapable reality seems to be that Nigeria must ultimately find a way in its politico-legal structure of further giving vent to the desire for fiscal and resource control within the bounds of constitutionalism, law and overall national cohesion.

1.2 Conceptual Discourse

1.2.1 Fiscal Federalism

Fiscal federalism has been conceptualized to refer to a political and constitutional "arrangements around who determines and collects taxes and other revenues and who spends them, how and on what..."[4]. Several issues and questions arise from this conceptualization. These includes the "who" question; meaning the entity charged with the responsibility of tax collection; the "how" question on the modalities of the revenue collection, sharing and application, and "on what". The latter question lends itself to dual meaning. Firstly, "on what" (resources) should the tax be levied or revenue generated

[3] Saul, M. (2011) The Normative Status of Self-determination in International Law. A Formular for Uncertainty in the Scope and Content of the Right?*Human Rights Law Review*, Volume 11, Number 4, Oxford University Press.p.613 and Umozunike, U.O (1979) *International Law and Colonialism in Africa.* Nwamife Publishers Limited, Enugu, p.31.
[4] Anderson, G. (2008) *Federalism: An Introduction.* Oxford University Press, Ontario.p.30

from. Secondly, on "how" should the collected tax or revenue be applied and by whom, among the orders of government. In the Nigerian context, answers to these posers are to be found in the Constitution, particularly in the Second Schedule thereof[5].

While the above conceptualization conjures up a picture of cooperation and cordial division of tasks between orders of government in a federation, others project the relationship as a competition between the tiers' to exert control over the financial or economic fortunes of the entity. "This implies that each tier of government is (to) coordinate its sphere of authority and should have appropriate taxing powers to exploit its independent sources of revenue..."[6]. To this view, fiscal federalism provides an avenue for assertion of a right to, and claim over fiscal control, which assertion can be forceful by the constituent units against the centre in a fierce demonstration of independence. For this reason, according to this view, once the state authorities call the federal authorities for grants and subsides to assist them, they are no longer coordinate but subordinate to it, which subordination ruins federalism.[7]

To this school of thought, unlike the majority view of fiscal federalism as a consensual arrangement for legal and administrative convenience, fiscal federalism is a zero-sum game in that it is all or nothing for the constituent units. However, the practical feasibility of this view is doubtful and virtually none-existent in all federations around the world as seen below. Fiscal arrangements are generally a give –and –take system which accommodates a range of issues and concerns that combine to make the system workable. For instance, a fiscal arrangement that places constituents units at par with the centre in all ramifications stands the risk of encountering an obstacle with serious legal and political nature from the onset. This relates to sovereignty, as that proposition purports to confer sovereignty on each of the units. Yet in the eyes of the international law and international community, sovereignty lies with only one entity-Nigeria, personalized by the central government as sole representative or arbiter for the Nigerian State[8]. This includes economic sovereignty. For these reasons therefore, the Supreme Court of Nigeria has, in the case of *Attorney General of Abia State and 3 Others v Attorney General of the Federation and 33 Others*[9], finally settled the controversial status of states as units in the federal scheme of Nigeria. The apex court states that while the states are not to be regarded as "errand boys" in relations with the Federal Government, they also cannot purport to exercise sovereignty which only resides in the nation as a sovereign

[5] Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[6] Okeke, M. I.*et al* (2013) Issue of Fiscal Federalism and Nationalism in Nigeria During Obasanjo Administration. *Journal of Educational and Social Research.*MCSER Publishing, Rome-Italy.Vol. 3, No. 10.p.109.
[7] Ibid.p.10
[8] Cambou, D, and Smis, S. (2013) Permanent Sovereignty over Natural Resources from a Human Right Perspective: Natural Resource Exploitation and Indigenous People's Rights in Arctic. *Michigan State International Law Review*. Vol.22:1,p.376
[9]*Attorney General of Abia State and 3 Others v. Attorney General of the Federation and 33 Others*(2006) 7 SCNJ, 1 at page 8, holden 1.

entity. They only exercise a middle role between those two extremes through "exercising legislative and fiscal autonomy as provided for in the Constitution".[10]

In line with the above judicial guidance thus, other perspectives view fiscal federalism from a more harmonious angle of interrelationship between tiers of government as a by-product of federalism as a political structure[11].While recognizing the requirement of independence and autonomy of each tier of government in carrying out its financial functions, this view concludes that "[f]iscal federalism is concerned with "understanding of which functions and instruments are best centralized and which are best placed in the sphere of decentralized levels of government." It therefore sums up fiscal federalism as a "... a set of guiding principles or concept that helps in designing financial relations between the national and sub-national levels of government"[12]. Here comes again the discourse as earlier presented of Anderson regarding "who does what and how" as the main objective of fiscal arrangements in a state entity. Beyond theorization, this task is what laws set out to govern in streamlining and assigning financial powers in a wieldy manner amongst federating units.

1.2.2 Resource control

Whereas fiscal federalism is a formula by which receivables from resources are controlled, managed and utilized in a federation by the federating units, resource control is the claim of dominion over resource themselves which translate to fiscal expression. The two concepts are therefore not only interrelated but also intertwined such that rarely could one be discussed in isolation of the other. This also explains why most scholars choose to discuss the concepts conjointly. Resource control has thus been conceptualized as:

> ... a basic economic theory grounded in land (rent), labour (wages), capital (interest) and entrepreneurship (profit), (which) are factors of production within the context of federation. It implies that the component states within a federation have a right to primarily control the natural resources within their borders, and to make an agreed contribution towards the maintenance of common services at the centre.[13]

While conveying with it elements of fiscal federalism as discussed above, this conceptualisation equates resources in a federation to a property in capitalism whose ownership is privately held by subjects whose sole and only obligation is to pay taxes to

---

[10] Ibid.

[11] Ewetan. O. O. (2012) "Fiscal Federalism in Nigeria: Theory and Practice". *International Journal of Development and Sustainability*.Vol. 1, No. 3.p1076

[12] Ibid.p.1077

[13] Ekuri. K. A. and Etim, E. E. Op. Cit.,p.220

the state in return for full and unfettered control. In this analogy, the constituent units are taken to be the private citizens, while the centre is made to represent the State.

Perhaps, the view of Raji, *et al*, on the concept of resource control can be said to be more plausible and practical in contrast to *Ekuri's* cited above. To the former, "resource control is the power and right of a community or state to raise funds by way of tax on persons, matters, services and minerals within its territory."[14] To this definition, resource control is about leveraging by a unit on resources situated in its locality to exert fiscal control over its finances and economy. While it is a rehash of what fiscal federalism entails, it affirms the inseparability of the two concepts and the centeredness of fiscal federalism on resource control as the bedrock of any assertion to fiscal control.

Other scholars like Cambou and Smis[15], have viewed the topic of resource control from the perspective of the Permanent Sovereignty over Natural Resources (PSNR) by a people within its geographical indigenous territory. In support of this position, they argue that the provisions of Article 1 of the International Covenant on Economic Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) have in no uncertain terms guaranteed the right of a people, particularly indigenous people subject of their study, the right to the control of all natural resources in their territory[16]. For this, they particularly rely on the provisions of paragraph 2 of the common articles of the twin Covenants which provides thus:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any cooperation arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

In upholding the proprietary right of people over natural resources through the medium of international law, this view worked under the moral prism that the term "people" in the above cited provision should refer to a real people and not "states" as it is principally taken to be. In protest, they pointed out that "[w]hile in human rights law, the beneficiaries of PSNR is peoples by virtue of their right to self-determination, the doctrine of PSNR has evolved towards promoting the understanding that control over natural resources is reserved for state"[17].

[14] Raji, A. O. Y., *et al* (2013) The Politics of Resource Control in Nigeria: Example of Niger-Delta Region, 1990s-2010. *Kuwait Chapter of Arabian Journal of Business and Management Review*.Vol. 3, No. 2.p.1.
[15]Cambou, D. and Smis, S. (2013) Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resource Exploitation and indigenous' Rights in the Arctic.*Michigan State International Law Review*. Vol. 22:1.
[16] Ibid.p338
[17] Ibid.359

Realizing the inherent friction between States and "peoples" on claim over resources, the scholars sought to advance a middle ground that upholds state sovereignty and simultaneously recognizes peoples' claims over resources. They posit:

> Consequently, there is a need to invigorate indigenous peoples' rights as a new source of authority for governing and managing land and natural resources and to stimulate the establishment of a new legal arrangement through which indigenous rights can flourish. Only then will sovereignty be capable of working in tandem with indigenous self-determination with the goal to promote a more equitable, peaceful, stable and humane world[18].

It is submitted that reference to "a new legal arrangement" above implies the necessary constitutional forms that accommodate a measure of resource control by federating units or peoples, while preserving state sovereignty in the central entity. Such arrangements are, in the Nigerian context, examined below taking into account practices in other federal states around the world.

1.3 International Standards and Practices in Fiscal Federal Arrangements

For the importance and place of fiscal and resource relations in federations and the need to as much as possible reduce frictions inherent in federal arrangements between units on fiscal matters, methods have been evolved on revenue collection, sharing and spending regarding who does the collections, who spends what and on what object. In this task of the assignment of what role is to be performed by a particular order of government, several factors are taken into account not the least of which is the economic exigency and viability of the fiscal power being bestowed on a unit and the need for it to be in sync with the history and political culture of the polity.[19]

In general practice the world over however, central governments have been favoured by economist to have higher and wider influence over fiscal and economic matters for reasons of uniformity. Economists are also of the view that:

> ...A federation should minimize the extent to which constituent units use tax competition to influence companies and individuals to locate in a particular area. This suggests constituents units (and local governments) should have limited control over mobile tax payers and

[18] Ibid.p.379

[19] Akinola, S. R. and Adesope, A. (2011) Derivation Principle Dilemma and National (Dis)Unity in Nigeria: A Polycentric Planning Perspective on The Niger-Delta. *Journal of Sustainable Development*.Vol. 4, No. 5. p.260

tax bases (such as corporate and personal income tax and sales taxes)...[20]

The rationale for the above principle is not farfetched; it is directed at avoiding unhealthy competition between units in competitively lowering taxes in their respective jurisdictions to attract persons and corporations.[21] This will lead to over-concentration of economic activities in one part of the federation to the detriment of others, a practice that go against a cardinal object of fiscal federalism, namely, even-development of all units. Additionally, the practice may also engender a "downward spiral of tax rates" thereby hurting some tax bases and compelling the over reliance on others.[22] Nevertheless, a federally and (jointly) guided and well regulated competition can enhance the quality of fiscal relations within a federation if properly managed.[23]

Other factors taken into consideration in assigning tax and revenue powers include accountability requirements in coming up with modalities of ensuring that governments spend resources properly and for the purposes for which they are appropriated.[24] Many writers have expressed doubt on the readiness, competence and probity of states and particularly local governments when given unfettered control and management of resources at their disposal given the inherent financial rot and fiscal incompetence in their jurisdictions.[25] The Nigeria's Fiscal Responsibility Act of 2007 is principally enacted to address that concern. It is doubtful if that has been achieved in view of the prevailing reality. Besides fiscal discipline consideration, there is equity considerations in dealing with constituent units in a federation as poorer units should not be dealt with based on the same yardstick as wealthy units. Federal systems are known to address this by assigning lower services to such units needing expenditure and by monetary transfers to assist them.[26] Generally, two methods are employed, namely, the principle of equalisation and the principle of derivation.

i. The principle of equalization

This altruistic principle seeks to ensure equality between constituent units in a federation by shoring up the fortunes of poorer units through direct transfers to close the income gap. With the notable exception of the United States, most federations have in place an equalization mechanism through which federal transfers are made to even-up the differences of income between units.[27] In Germany, and Switzerland, such transfers even exist from richer to poorer units in addition to transfers from the centre.[28] This is similar

---

[20] Anderson, G. (2008) *Federalism: An Introduction.* Oxford University Press, Ontario.p.31
[21] Ibid.
[22] Ibid.p.31
[23] Ibid.p.32
[24] Ibid.
[25] Nwoba, M.O.E. (2015) Fiscal Crisis and its Impact on Local Government Administration in Nigeria: A case Study of South-Eastern States.*Journal of Policy and Development Studies.* Vol. 9, No. 5.p.9.
[26] Anderson, G. Op. Cit. p.32
[27] Ibid.
[28] Ibid.

the ideal scenario where for instance, Lagos State voluntarily and as a matter of conventional routine contributes monies to States like Kebbi or Ekiti or where Kano doles out financial transfers to Jigawa or Ebonyi States, that are relatively poorer. This may take the form of conditional transfers which ".... are programme specific". The usual object of such transfers is to promote a "national" purpose: achievement of uniform health care, basic education and so on.[29] By unconditional transfers, the receiving unit is not tied to any specific project and can apply the funds for any purpose that suits it.[30] This way, the independence of the constituent units is recognized and enhanced unlike in conditional transfers where national outlook is portrayed.[31]

ii. The Derivation principle

This principle implies the power of a unit from which resource revenue is derived to have a special claim on all or part of the revenue.[32] This makes the principle to be a direct opposite of the principle of equalization as a unit can claim a far higher revenue than others irrespective of the weakness of the fiscal status of the others. While some elements of equalization seem to exist in Nigeria's fiscal arrangement, the prominence of the derivation principle in Nigeria is not in doubt for having not only been in practice, but also for occupying a specific constitutional place by section 162(2) of the Constitution which means that the centre is ready to, and has indeed surrendered a part of its strict legal ownership of all resources based on its sovereign status, by yielding a part thereof to the resource-owning unit based on human rights principles as embodied in the right to self-determination of a people particularly in the economic sphere as espoused by Cambou and Smis[33].

The principle basically leaves collective ownership of resources to all federating units and subscribes to accepting a fraction from a pool collectively held based on actual contribution to the said pool[34]. The derivation quota is usually enjoyed in addition to general distribution to all units based on other criteria of equality, population and other yardsticks discussed below. It is perhaps for the balance it espouses that the derivation principle is said to be an antidote for much of Nigeria's economic doldrums if judiciously applied[35]. It is noteworthy that almost all of the principles and standards enunciated heretofore, have been constitutionally captured by the provisions of section 162(2) which in a categorical language mandates that in allocation of resources "the National Assembly shall take into account the allocation principles especially those of population, equality of States. internal revenue generation, landmass. terrain as well as population density"

---

[29] Ibid.p.37
[30] Ibid.
[31] Ibid.
[3 ›bid.p.36
[33] Cambou and Smis, Op. Cit. p.376
[34] Ibid.
[35] Onuigbo, R. A. And Eme, O. (2015) State Governors and Revenue Allocation in Nigeria: A Case of the Fourth Republic. *International Journal of Accounting Research.*Vol. 2, No. 7. pp.26-30

1.4 Current Legal and Constitutional Framework for Fiscal Federalism and Resource Control in Nigeria

1.4.1 Constitution of the Federal Republic of Nigeria, 1999, (as amended)

Although there exist no explicit provisions regarding the right to economic self-determination of the peoples or units comprising the Nigerian federation, provisions exist that affirm the status of Nigeria as a federation. Section 2 (2) of the Constitution states that "Nigeria shall be a federation consisting of states and a Federal Capital Territory". Additionally, section 2(6) of the Constitution provides for local government areas as third tier of government in the following words: "[t]here shall be seven hundred and sixty-eight local government areas in Nigeria as shown in the second column of Part I of First Schedule to this Constitution and six Area Councils as shown in Part II of that schedule". By these provisions, Nigeria has achieved one of the requirements for upholding the well settled scholastic view that the right to self-determination is synonymous with the right "to federate"[36]. This in turn necessarily includes fiscal federalism, an element of economic self-determination in the internal sense which has an implicit place in the Nigeria political and legal structure. As posited by Anderson, "...arrangements around who determines and collects taxes and other revenues and who spends them, how and on what, are fundamental to the division of power in a federal system".[37]

In line with the above proposition, the Nigerian Constitution of 1999 (as amended), proceeded to outline legislative powers on resources by Part I of the Second Schedule thereof. In particular, the powers to legislate and exert control over "mines and Minerals, including oil fields, oil mining, geological survey and natural gas" have been vested exclusively in the Federal Government.[38] This is in the area of resource and its management and control. In the area of fiscal and economic policies, the Constitution again vests the power to legislate on banking, insurance, custom and exercise, entirely on the Central Government by also listing them in the Exclusive Legislative List.[39]The constituent units, namely states have, on the other hand, been empowered to exert control over aspects of the economy alone or in concert with the Federal Government in the Concurrent List on the areas of stamp duties collection, capital gains and income tax other than that of a company[40].

By this constitutional arrangement in Nigeria, it is clear that the balance of power on economy tilts in favour of the central Government. Though this may seem to somewhat impede the internal economic self-determination of the constituent units, it is nevertheless more favoured by economists who believe that the concentration of public finance in the central government aids development and accelerates growth of the entire

---

[36] Ladan, M.T., Op. Cit. p. 118

[37] Anderson, G., Op. Cit. p. 30.

[38] Item 39, Part I, Second Schedule, Constitution of the Federal Republic of Niger, 1999 (as amended).

[39] Items 6, 16, 25, and 33, ibid.

[40] Item 7, Part II, ibid.

entity holistically.[41] This is based on the reasoning that "... constituent units (and local governments) should have limited control over mobile tax payers and tax bases (such as corporate and personal income tax and sales tax). Instead they should be given power over property taxes because property does not move[42]. This is to generally prevent capital and human flight and concentration of wealth in a particular region with less tax demand engendered by competition with the attendant consequences of skewing growth and development to a particular section.[43]This same view, of central control of the national economy, has been held and expressed by a renown economist, a former World Bank Chief and Nigeria's ex-Finance Minister, Okonjo-Iweala, who is reported to have declared that "we may have 36 states' governments(sic), Abuja, and 774 local governments but shall have only one economy in Nigeria."[44]

Federations are nonetheless dynamic and not static and thus susceptible to changes in order to accommodate changing times, climes and human interactions. By the Preamble to the Revenue Mobilisation Allocation and Fiscal Commission Act (*infra*), the Commission shall take into account this dynamism in the exercise of its statutory functions. Nigeria's fiscal federal arrangements should therefore be able to shift in line with the realities of the day and the aspirations of the generality of the Federation's inhabitants. That is self-determination in the internal economic sense. Nothing captures this truism more aptly than Anderson when he says:

> All federations evolve over time, some have gone through major formal constitutional changes, while others have changed significantly despite stable constitutions. Factors such as the creation of new constituent units, urbanization, major demographic and economic shifts, new technologies, major global and domestic political developments, and the experience of democracy have been critical in shaping federal experiences[45].

It is deducible from the foregoing that discussion on fiscal federalism invariably touches upon and boils down to resource control-an integral element of internal economic self-determination[46] within a nation state. It is also clear that the Nigerian Constitution through the legislative lists seems to be restrictive as regards the power of constituent units to control resources. This is not peculiar to Nigeria, as the Nigerian model is in current operation in a number of nations, a list which includes hybrid collection of both

---

[41] Olowomoni, G.D. (1998) Revenue Allocation and Economics of Federalism, in Amuwo, K. *etal* (eds.) *Federalism and Political Restructuring in Nigeria*. Spectrum, Ibadan.p. 248.
[42] Anderson, G. *Op.cit.*, p. 31
[43]Ibid.
[44]Ugo Jim-Nwoko, The Local Governments and Nigeria's Fiscal Policy.*Sahara Reporters, (online news media)*, 21st July, 2011.
[45] Anderson, G. *Op.cit.*, p. 31.
[46] Saul, M. Op. Cit., p.613.

developed and developing countries like Austria, Australia, Belgium, Brazil, India, Germany and Spain.[47]

Another aspect of the 1999 Constitution of Nigeria dealing with economic self-determination of peoples within the states, are the provisions dealing with the principle of derivation which in itself is a recognition of the right of the people from whose lands the mineral resources are extracted to a share over and above and in addition to what other components of the nation get. By the proviso to section 162 (2), the Constitution provides that "[p]rovided 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 resources".

Nigeria's constitutional choice of derivation model rather than hundred percent equalization model in resources' revenue sharing unlike what obtains in some advanced federations[48] may not be in consonance with the principle of equality of states or constituent units. It however recognises the claim of the producing units over parts of their natural resources as an ingredient of internal economic self-determination of peoples. Impressively too, the percentage payable as derivation is not fixed but rather made flexible when section 162 (2) (*supra*), makes the 13 percent figure a minimum, or the floor and not the ceiling of the percentage payable. The implication of this is that with enough national consensus, the percentage can be increased up to even 50 or 100 percent through simple legislation by the National Assembly on the recommendation of the Revenue Mobilisation, Allocation and Fiscal Commission.[49]

1.4.2 The Land Use Act[50]

As one of the principal and pre-eminent legislations in Nigeria, the importance of the Land Use Act can never be over-emphasized. It is so important that it has been captured in and made a part of the Constitution with the attendant prestige even though it is a legislation in its own right.[51] One of the major features of the Act is the delineation and devolution of ownership of land, first in the state where it is situated and then also to the local government in which it is located. Section 1 of the Act, provides that "subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the Governor and shall be held in trust for the use and common benefit of all Nigerians in accordance with the provisions of this Act". Further, section 2(1) (6) of the same Act vests the management of land situated in non-urban areas in the local government concerned.

It is without doubt that the basic logic and reasoning behind the cession of land to states and local governments despite the centripetal nature of Nigeria's federalism, may

---

[47] Anderson, G. *Op.cit.*p.33
[48] Ibid.p.36
[49] Cap. R7, Volume 13, Laws of the Federation of Nigeria
[50] Cap. 202, Laws of the Federation of Nigeria, 1990.
[51] Section 315(5)(d), Constitution of the Federal Republic of Nigeria, 1999 (as amended).

not be unconnected with the recognition of the constituent units' original entitlement to them. Bearing in mind the importance of land being the embodiment of mineral resources, many scholars have expressed the view that the provisions of the Act, though seemingly well intentioned, can be said to have eroded the essence of the right of a people over their natural resources particularly when it vests same in remote state entities and not directly on the people. The practice in the United States referred to above where much of the land is privately held seems capable of addressing the said imbalance.

What is missing in the Land Use Act is the endeavour to balance the yearnings and aspirations of indigenous peoples' quest for the control of their land resources, upon which most of their livelihoods depend, while ensuring its availability to the state for development and other purposes. This indigenous yearning is so potent and universal that the United Nations had to make a legislation respecting same as a right. In many respects it has been equated with the self-determination right in the economic sense and occupies a place in specific United Nation's Declaration[52].

Article 26 of the Declaration prohibits "[a]ny action that has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities" and "any action which has the aim or effect of dispossessing them of their lands, territories or resources"[53]. This direct recognition of the right of the grass root communities to their ancestral lands and resources prescriptive on states as it is, seems to have been eroded by the Land Use Act despite provisions relating to customary titles in non-urban areas. These land rights of the grassroots that are eroded, have been scholarly linked to the internal self-determination rights of indigenous peoples within a state[54].

It is the view of many rights scholars that indeed the Land Use Act is ripe for a reform to accommodate current global realities as, although the Act might have succeeded in making land available to governments for development purposes, same cannot be said as regards private utility.[55] Besides the difficulty created by the Act's encapsulation in the Constitution on any possible reform, the system of patronage created surrounding land administration by Governors as well as the revenue generated by state governments in issuing land rights make the prospect of future reform more bleak.[56]

[52] UN Declaration on the Rights of Indigenous Peoples, 2007.
[53] Article 26(6), ibid.
[54] Article 8(2)(a) and (b), ibid.
[55] Bola Fajemirokun (2002) *Land Resources Rights: Issues of Public Participation and Access to Land in Nigeria.* A paper presented at the First Workshop of Pan-African Programme on Land Resource Rights(PAPLRR) held in Cairo, Egypt, on March, 25-26 2002. Accessed at www.nigerianlawguru.com/articles, on 13th October, 2017.
[56] Ibid.

1.4.3 Petroleum Act[57] and Mineral Resources Act[58]

By the provisions of the Petroleum Act and those of the Mineral Resources Act, the property of all petroleum resources and mineral resources as defined in section 1 of the respective legislations, are vested exclusively in the Nigerian state. This is in line with Section 44 (3) of the 1999 Constitution which itself vests "... the entire property in, and the control of, all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the exclusive economic zone of Nigeria in the Government of the Federation".

The above provisions are clearly not in harmony with the provisions of section 1 of the Land Use Act, a part of the Constitution itself, which vests "all land in the state in the Governor" of that state. To that extent the right to economic self-determination of the constituent units and community in terms of the management and control of their resources has been impaired.

This is however also not peculiar to Nigeria as, almost all federations have in place mechanisms to limit appropriation of resources by producing communities for even development and stability. In essence, in some federations the central governments monopolize all such resources which they then share to all the constituent units equally irrespective of the resources' location[59]. Further, in the case of Nigeria, the principle of derivation as discussed above, serves as recognition of the dominion of the producing communities on the resources and also acknowledges their indisputable claim to benefit from same in accordance with the law taking into account overriding national sovereignty, security, development and stability interests.

Additionally, the seeming disregard for the people's right over their resources seems to be addressed, albeit indirectly, by both the Constitution and the Minerals Act in their provisions governing the payment of compensation to persons whose land resources have been acquired for exploration and exploitation of minerals and related matters. Section 44 (1) of the Constitution is to that effect and is in *parri materia* with Section 95 (1) (a) and (b) of the Minerals Act which stipulates that-

> (1) A holder of a mining title, shall on the direction of the Minister, in addition to any other amounts payable under the provisions of this Act, pay to the owner or the occupier of land held under a state lease or the subject of a right of occupancy –
>
> (a) reasonable compensation for any disturbance of the surface rights of the owner or occupier and for any damage done to the surface of the land on which the prospecting or mining is being or has been, carried on; and

[57] Cap. P10, Laws of the Federation of Nigeria.
[58] Cap. M12, Laws of the Federation of Nigeria.
[59] Anderson, G. *Op.cit*.pp.33-34

(b) in addition, pay to the owner of any crop, economic tree, buildings or work damaged, removed or destroyed by the holder of the mining title or by any of its agents or servants, compensation for the damage, removal or destruction of the crop, economic tree, building or work.

Note the term "owner" in reference to the person possessing the land subject of the acquisition to whom compensation is payable as a matter of obligation. This is a clear recognition of the "owner's" prior dominion being divested.

1.4.4 Revenue Mobilization, Allocation and Fiscal Commission Act

Pursuant to section 153(1) of the 1999 Constitution of Nigeria (as amended),the Revenue Mobilisation, Allocation and Fiscal Commission(RMAFC), was established by an Act of the National Assembly.[60] According to its Preamble, the Act has, as its main function as "...monitoring the accruals to and disbursement of revenue from the Federal Account and reviewing, from time to time, the revenue allocation formulae to ensure conformity with changing realities''.

Section 1 of the Act states thus:

> There shall be established for the federation a Revenue Mobilisation, Allocation and Fiscal Commission (in this Act referred to as ''the Commission'') which under that name, shall be body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name, and whose members shall exercise the functions specified in the Constitution of the Federal Republic of Nigeria 1999 and in this Act.

In addition to its functions as outlined in the Act's preamble as cited above, some of the paramount powers of the Commission are encapsulated in section 6 of Act. In particular, the power to review the extant sharing formulae and to advice the federal, state and local governments on modalities of increasing revenue sources as mechanisms to ensure dynamism through periodic changes in the fiscal arrangement which will in turn minimize friction and bring stability to the polity. It is by using the spelt out power that for instance the thirteen percent derivation by section 162(2) of the Constitution can be increased in deserving circumstances in a peaceful and legislative manner.

Another important provision of the Act that ensures equity and balance in the country's fiscal arrangement is the provision of section 2 which deals with the membership of the Commission. The section provides for the Commission to consist "of

[60] Cap. R7. Volume 13, Laws of the Federation of Nigeria.

a chairman and one member from each State of the federation and the Federal Capital Territory, Abuja". This means that each part of the country is represented on equal basis. The significance of this is that no action can be taken by the Commission without the representation and input of each state of the federation and the Federal Capital Territory. This is important in ensuring that no suspicion of collusion by members of the Commission to disadvantage a section of the country in revenue sharing in favour of another section or federating unit.

Furthermore, the effectiveness of the Commission is cemented by the provisions of section 7 of the Act which boldly states that 'the Commission shall be an independent and autonomous body and shall not be subject to the direction or control of any other authority or person in the exercise of its power to make appointment or to exercise disciplinary control over persons''. This provision is a necessary safeguard in a federal setting where the power of the central government is considered disproportionate and tendency to exert undue influence probable. Curiously, this freedom of action as espoused by the section is threatened when the area of such independence is stated to be "in the exercise of its powers to make appointments or to exercise disciplinary control over persons".

1.5 Conclusion

The place of the right to self-determination has been established not only by customary international law, but also by statutes, namely, the United Nation's Charter, the African Charter on Human and Peoples Rights and the twin human rights covenants of 1966. In particular, the latter Covenants, particularly the ICESCR, by its paragraph 2 of Article 1 and Article 25 provides for the right to economic self-determination not only between states but also between states and peoples that reside in them. This is referred to as the internal economic self-determination which scholars expound to encompass fiscal federalism and resource control. It has thus been found by this work that indeed these elements of internal economic self-determination have found expression in Nigeria's legal and constitutional arrangements by way of federalism, fiscal autonomy and a degree of resource control.

As regards fiscal federalism, it has been found to have a chequered history with various fiscal arrangements and rearrangements spanning several decades since before independence. The same thing goes for resource control which attracted little attention until much later with the discovery of petroleum resources. For this reason therefore, it has been found that fiscal federalism and resource control are just taking shape through legal adjustments and judicial processes in place.

It is however a significant finding that although a measure of fiscal control is achievable through devolution of more fiscal powers to federating units, absolute resource control and 100% fiscal freedom by units is not legally attainable anywhere in the world as the legal sovereignty resident in the centre makes it always the higher and ultimate arbiter of relations within and outside the state. Tax legislations are centrally made in most federations and this is favoured by most economists. Right to economic self-determination has thus been found not to be absolute, as it guarantees for the units as much fiscal and resource control as the confines of national sovereignty, unity and overall well being allow.

It has also been found that most of the criteria and yardsticks put in place for fiscal and resource control within federations are not peculiar to Nigeria, but have applications in other jurisdictions and climes and whereas the Nigeria's requirements can be restrictive in some respects, they are comparatively generous in others. There is thus no one formula-fits-all in fiscal arrangements in all federations and all shall depend on the history, politics and culture of given society.

In the area of laws, it has been found that though not perfect and nor devoid of any blemish, far reaching provisions have been made within the Nigerian Constitution of 1999 (as amended) and other laws on fiscal federalism and resource control. The Constitution in particular encapsulates some of the best practices in fiscal and revenue arrangements the world over. Commendably, it has not foreclosed the door of further improvement of its provisions by empowering the Revenue Mobilisation, Allocation and Fiscal Commission to make necessary changes to the existing allocation formulae, among other tasks. Also in the area of the application of the derivation principle, the constitution prescribes only the minimum receivable by producing states thereby allowing for future upward review by simple legislation on the recommendation of the Fiscal Commission. It is however found that there exist no adequate provisions to ensure fiscal autonomy of local governments which have been left at the mercy of the state governments financially even though they have a separate resource allocation. Efforts by the Supreme Court to protect the local governments in *Attorney General of Abia State and 3 Others v Attorney General of the Federation and 33 Others(supra)* are found to have been hamstrung by inadequate protective provisions for the local governments in the Constitution particularly against state governments.

Other laws have also been found to impair the attainment of reasonable fiscal and resource federalism and thus inimical to internal economic self-determination. The Land Use Act in particular is found to hamper land rights of particularly grass-root peoples. Its being in the Constitution makes it difficult to accommodate positive changes in line with the times.

Against the backdrop of the foregoing findings and their correlation with the status and implementability of the right to economic self-determination in the internal arena of fiscal federalism and resource control, below recommendations are proffered in enhancing the realization of the right in a pragmatic and balanced manner.

For the legal bottlenecks that stand in the way of achieving wider fiscal and resource control by peoples within the Nigerian state, it is recommended that the units may fall back on the legal and political avenues to seek wider fiscal and resource control based on self-determination right, while leaving the overall economic control and management to the centre for uniformity and national cohesion. One of the legal avenues exploitable is the upward review of the derivation percentage since the Constitution has not fixed a maximum payable to the mineral producing States. Politically, this can be achieved through consensus building and consultation. While percentage receivable by units of tax collected can be reviewed upwards, the current legal structure whereby the centre legislates on personal and corporate income taxes should be left undisturbed for healthy competition and even development.

To counter-balance the effect of higher derivation payments to producing states, the onshore/offshore dichotomy in resource allocation for petroleum resources should be restored such that littoral states are only entitled to derivation on resources extracted onshore and all offshore resources belongs to the federation as a whole with no derivation to any units. This is more in line with the international law. Note that the Onshore/Offshore Dichotomy Abrogation Act used to abolish the dichotomy and to overrule the Supreme Court was enacted purely on political considerations and at a time when derivation is strictly maintained at the minimum level of 13%.

Further, based on the finding confirming the universality of most of the revenue sharing considerations obtained in Nigeria, such should be retained with necessary changes to suit Nigeria's economic, social and political circumstance. This can be done by enabling the RMAFC to perform its statutory role of monitoring and designing a befitting formula from time to time in consultation with the National Assembly both of which institutions are adequately federal in character. In the same token, the Fiscal Responsibility Commission should be empowered to step up its acts in seeing to it that each tier of government manages and spends the resources allocated to it responsibly and strictly according to law.

On the laws generally, in widening the scope of states and local governments' fiscal powers, certain amendments need to be made on the Legislative Lists to devolve more powers to the units. In particular, as regards local governments, further adjustment needs to be made to section 162(5) of the Constitution to wean them from the current clutches of financial subordination to the States. They should also be empowered and the capacity of their manpower improved on fiscal management under adequate monitoring and supervision of the Fiscal Responsibility Commission.

On its part, the Land Use Act should be removed from the Constitution as a first step in reforming it and bringing it in line with the realities of the day and in consonance with international standards, obligations and treaties entered into since its promulgation.