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AN APPRAISAL OF THE CHALLENGE OF VERTICAL ALLOCATION OF FUNCTIONS AND REVENUE UNDER THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999

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Abstract

The major objective of fiscal federalism is the efficient and effective distribution of functions and revenue among tiers of government in a federation in such a way that there are favourable economic outcomes which promote socioeconomic development. A close examination of the practice of fiscal federalism in Nigeria shows that the sharing of functions and revenue is at two levels: the vertical level among Federal Government, States, and Local Government Councils; two, the horizontal level among States and Local Government Councils. A close scrutiny of the sharing at both levels shows there are challenges which act as obstacle to the realization of this objective. At the vertical level, there is concentration of functions and revenue in the hands of the Federal Government. This concentration has generated a number of negative outcomes which have brought into existence one challenge in the vertical sharing axis of functions and revenue: stifling of socio-economic development. Adopting the doctrinal method of analysis, this paper examines this challenge in the light of the prescriptive principles of vertical allocation under fiscal federalism with a view to proffering solution. In the end, the paper recommends that certain functions should be transferred from Federal Government to States.

Keywords: Fiscal Federalism, Revenue, Allocation, Vertical, Constitution and Challenge.

1.1 Introduction

A close scrutiny of the 1999 Constitution shows clearly that it has allotted functions in a way that concentrates them in the Federal Government. The disingenuous interpretation of what constitutes items in the residual clause by the Supreme Court has further expanded the legislative sphere of the Federal Government.[1] Since the sharing of functions determines the sharing of revenue,[2] it is no surprise that the same constitution creates a central pool which gives more than half of the revenue to the Federal Government.[3] The broad implication of all these is that the Constitution of Nigeria has created a Federal Government that is either a leviathan[4] or a behemoth of sort[5] with a federal system that is unitary in practice.[6] Expectedly, this concentration of functions and revenue in the hand of the Federal Government has generated a number of negative outcomes which have resulted in one main challenge in the vertical allocation of functions and revenue: one, the stifling of social economic development.

1.2 Principles of Vertical Allocation of Functions and Revenue

The major preoccupation of fiscal relations is the sharing of functions and revenues between the national and subnational government.[7] In each federation, the founding fathers have to decide what functions and revenue bases should be

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1. B. O. Nwabueze, *The Judiciary as the Third Estate of the Realm* (Ibadan, Gold Press 2007) 174.
2. Section 313 *Constitution the Federal Republic of Nigeria 1999*.
3. Section 162 Ibid.
4. A Gboyega *Democracy and Development: The Imperative of Good Governance*:(An Inaugural Lecture delivered at the University of Ibadan on 2nd October 2023) 5.
5. B E Omoregie, Nigeria: Between Refederation and Disintegration (Vanguard, Lagos, August 10 2018).10
6. D Babalola,and, H.Onapajo,. (2019) New Clamour for Restructuring in Nigeria: Elite Politics Contradictions and Good Governance. *African Studies Quarterly*, (2019) 10.
7. O Fjeldstad, Intergovernmental Fiscal Relations in Developing *Countries* (*Michelsen Institute*: *Development Studies and Human Rights. Bergen, Norway 2001)* 20

centralized or decentralized. The outcome of their decision as it relates to sharing is set down in the constitution.[8] The vertical and horizontal sharing of functions and revenues constitute the fiscal structure or relation of a federation.[9] In determining the question of which functions and revenues that should be centralized or decentralized, framers of the constitution usually take into account some principles which act as a guide to prevent obstacles that might impede the realization of the gains of fiscal federalism. To determine the sharing of vertical functions the principle of subsidiarity is applicable, while solidarity and equalization are applicable to the sharing of vertical revenue.

1.2.1 Subsidiarity

Generally regarded as a component of Canadian Federalism,[10] subsidiarity provides a rational for the division of powers.[11] No better words explain the meaning of Subsidiarity than the words of Justice L Heureux-Dube who describes subsidiarity in the following words:[12]

> The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the preposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also close to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.

Two criteria of assigning functions can be isolated from the above explanation: proximity and effectiveness. As a constitutional principle, subsidiarity ensures

8. See First and Second Schedule *Constitution Federal Republic of Nigeria 1999*
9. S.Ohiomu, and S A Oluyemi Resolving Revenue Allocation Challenges in Nigeria: Implication for Sustainable National Development. (2012) (64) *The American Economist* 145.
10. *Reference re Succession of Quebec* (1998) SC 6 (1998) 2 SCR 217 (SCC).
11. *Reference re Assisted Human Re Production Act* (2010) SCJ no 6 2010 3 SCR 457 (SCC).
12. *Canada Litee (Spraytech Societe d arr Osage) v Hudson Town* (2001) SCJ 42 (2001) 2 SCR 241 (SCC).

that functions are not shared at random but according to the application of these two criteria. Generally, in sharing functions between the national and subnational government in a federation, the issues of effectiveness and proximity are considered. Hence "the guiding principle for the distribution of powers was that matters of common interest for all provinces were placed under the responsibility of a Central Parliament, while matters of particular interest for each province remained under Provincial Jurisdiction."[13] The national government is considered to be in a better position to handle the former because it can discharge them more effectively, while the subnational government is considered to be in a best position to handle the latter because it is more effective by virtue of its proximity to the people. This explains why the Constitution of Canada[14] creates two exclusive lists, one which reserves all matters or subject matters that do not come within class of matters of local or private in nature[15] for National Parliament, and another which reserves all matters that are of merely local or private in nature to the provinces.[16]

By allocating functions in the manner described above, the Canadian Federation is able to achieve a number of advantages: first, both tiers of government are put in a position to effectively discharge functions allocated to them. Furthermore, the federation is able to preserve the diversity of the Canadian Federation as rightly observed by the Supreme Court in the case of *Reference re Succession of Quebec*.[17]

> The principle of federalism recognizes the diversity of the component parts of federation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the

13. E Brouillet, Canadian Federalism and the Principle of Subsidiary: Should We Open Pandara's Box. *The Supreme Court Law Review: Osgoode Annual Constitutional Conference* (2011) 614.
14. *Constitutional Act 1867.*
15. Section 91 Ibid.
16. Section 92 Ibid
17. Id (n7).

> government thought to be most suited to achieving the particular societal objective having regard to this diversity.

However, where a function is assigned to the subnational government by virtue of its proximity and the subnational government is unable to perform the function effectively, such function can be reassigned to the national government on the basis of its ability to perform it more effectively. This principle was given judicial notice in the case of *R v. Crown Zellerbach Canada Ltd*.[18] The fact of the case is that the appellant accused the respondent of dumping wood waste within the water of Beaver Cove which was part of the province of British Columbia in contravention of Section 4(1) of the *Ocean Dumping Control Act*. It was the contention of the respondent that since pollution was not listed in Section 91 of the *Constitution Act 1867* as an item on which the Parliament could legislate, the Act was ultra vires the power of the Parliament. The appellant countered this argument by saying that Parliament could legislate on pollution pursuant to its power to make law for the peace, order and good government of Canada. And the Supreme Court held that all matters relating to pollution of the ocean are within the exclusive jurisdiction of the Federal Government owing to the national concern branch of its power to make law for peace, order and good government. In reaching this conclusion, the Supreme Court of Canada formulated two criteria for the application of national powers of the Federal Government: one, the item must be single, distinctive and indivisible; two, the item must be of such a scale that the provinces do not have the ability to handle. In this instant case, although the pollution occurred in the province, the Supreme Court interpreted it as an environmental problem, the scale of which can only be handled effectively by the Federal Government.

Although the Supreme Court has transferred a function that could have been dealt with by the province to the Federal Government in the above case, the *Constitution Act 1867* has also made provisions for instances where provincial

18. *R v Crown Zellerbach Canada Ltd* (1988) SCJ 23 1 SCR 401.

laws made by Provinces have taken precedence over laws made by the Federal Government for the purpose of promoting proximity. A good example of this provision is Section 94A which provides as follows:

> The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

1.2.2 Solidarity

Otherwise known as federal loyalty,[19] the principle of solidarity refers to "the set of normative consequences that flows from the commitment of federal partners to belong to a common body politic"[20] This commitment is derived from the bond shared by participants in a federation and it is occasioned or fostered by the fact that different levels of government in a federation rely on a common citizenry.[21] The loyalty of the different levels of government creates a benevolent attitude that engenders a sense of sacrifice not limited to formal obligation.[22] Government forming a federation do not therefore take actions for their own benefit but for the common good of all members of a federation.[23]

This principle of solidarity acts as a normative justification for fiscal equalization.[24]

19. H Cyr, Autonomy, Subsidiarity Solidarity: Foundations of Cooperative Federalism. Retrieved from http://ssm.com/abstract=2512429(2014) Accessed 14th July 2024.
20. Ibid p 30.
21. Ibid p 31.
22. Ibid p 32.
23. Ibid p 32.
24. T O Hueglin, Social Justice and Solidarity as Criteria for Fiscal Equalization. Retrieved from http://www.nomos-elibrary.de(2015) .Accessed on 5th January 2023 29.

In virtually every federation, there are cases of vertical imbalance and horizontal imbalance.[25] The former is occasioned by uneven distribution of tax bases, whereas the latter is a consequence of differences in resource endowment and uneven economic development.[26] To solve these problems, the national government makes money available in the form of grants to sub national government.[27]

1.2.3 Equalization

Fiscal equalization is the redistribution of uneven revenue for the purpose of providing citizens across sub national boundaries in a federal state with equitable public services. The need to redistribute revenue is for two purposes: efficiency and equity. The redistribution for efficiency purpose usually leads to a situation where the high yielding tax bases like income and capital taxes are assigned to the national government, while immobile tax bases like property and resource taxes are assigned to the sub national government.[28] When taxes are assigned this way, the national government gets more revenue than the sub national government.

This disparity creates the problem of vertical imbalance. The difference in endowment of the different regions creates the problem of horizontal imbalance. For the sake of equity, the national government makes money available to the regions that are not materially rich in order to create a balance in the federation.[29] The principle of equalization is therefore applied to bridge the gap between the rich and the poor regions in a federation.

25. R Boadway, and R L Watt, (2004) fiscal Federalism in Canada, The USA and Germany. Retrieved from. http://policy commons.net.artifact.fiscal-federals. Accessed on 5th January .2024 1
26. Ibid p 2.
27. Section 164 *Constitution Federal Republic of Nigeria 1999.*
28. R Boadway, and R L Watt, (n26) 2.
29. Ibid 2.

1.3 Vertical Allocation of Functions in Nigeria

The term function is defined as power and duty.[30] Vertical distribution of functions between various levels of government in a federation entails the sharing of functions according to a legislative list of competence usually set out in a Constitution.[31] These functions are usually set out through the use of enumerated and residual power clauses.[32] In order to achieve a balance in the distribution of these functions, the draftsman of the constitution employs a number of mechanisms which include the following:[33]

(a). Enumerating the exclusive powers of one level of government while reserving powers not enumerated to the other level of government; or[34]

(b). Enumerating the exclusive powers of one level of government while reserving powers not enumerated to the other level of government. However, for the purposes of clarity some of the powers embedded in the residual clause are enumerated[35]

(c). Enumerating the exclusive powers of both levels of government and reserving the residual matters to any level of government; or[36]

30. Section 318(1) Constitution Federal Republic of Nigeria 1999.
31. T Akintola – Aguda, The Challenge of Nigerian Nation: An Examination of Its Legal Development 1960 – 1985, *(1985) Nigerian Institute of Advance Legal Studies Lagos* 21.
32. B O Nwabueze, (2000) Reflection on the 1999 Constitution: A Unitary Constitution for a Federal System of Government. Cited in O P Ademola, Law Making in Federal System of Government – the Nigerian Experience (2003) (2) (*1) Ibadan Bar Journal* 94.
33. P O Odiase, Comparative Analysis of the Use of Residual Clause in the Distribution of Powers in a Federation. (2008/2009) (1) *The Journal of Department of public Law and Jurisprudence. Faculty of Law, Usman Danfodiyo University, Sokoto – Nigeria*, 32.
34. The United States and Switzerland are Federation that exemplifies the distribution of functions reflected in (a) above.
35. Canada exemplifies distribution of functions reflected in (d) above.
36. India exemplifies the distribution of functions reflected in (c) and (d) above.

(d). Enumerating powers exclusive to each or one level of government in addition to a concurrent list and a residual clause.[37]

In addition to these mechanisms, there are principles which determine which function is placed within a particular sphere of competence. There seems to be a consensus of opinions among proponents of federalism that powers over matters of general concern to the nation should be allotted to the national government, while powers over matters that are peculiar to the sub national government should be allotted to the sub national government[38].

The functions of all levels of government are set out in the 1999 Constitution which confers legislative powers on the Legislature,[39] executive powers on the Executive[40] and judicial powers on the Judiciary.[41] The main import of Section 4(2) (4) (a) is to the effect that the Constitution creates two lists: exclusive and concurrent list.

1.3.1 Exclusive List

Section 4(2) provides that the National Assembly shall have power to legislate on all items contained in the First Schedule of the Constitution. Specifically, Section 4(2) (4) (a) (b) confers legislative powers on the Federal Government with respect to the functions enumerated in Part I and 2 of the Second Schedule of the Constitution, Section 4(7) (a) (b) confers legislative powers on the States with respect to the matters enumerated in the Concurrent List.

1.3.2 Concurrent List

Both Sections 4(4) (a) and (7) (b) confer power on both the National Assembly and State House of Assembly to legislate on the items or matters set out in the

37. Australia and Nigeria are federations that exemplify the distribution of functions reflected in (d) above.
38. O Fatula, Constitutional Issues in Nigerian Federalism (2003) *6 University of Maiduguri Law Journal,* 84.
39. Section 4 *Constitution Federal Republic of Nigeria* 1999.
40. Section 5 Ibid.
41. Section 6 Ibid.

first column of part II of the Second Schedule of the Constitution which contains a total of 14 items. Unlike the legislative competence of the exclusive list, the legislative competence of States is subject to two qualifications:[42] the doctrine of co-existence of power and the doctrine of covering the field.[43] The doctrine of co-existence of power prescribes a rule which makes it possible for both Federal and State Government to legislate on the same items in the concurrent list. This power could be partial or full. It is said to be partial only when both levels can legislate on different aspects of the same item and is full when both levels of government can legislate on all aspects of the same item. Arising from this distinction is the fact that all fourteen items on the concurrent list can be grouped into three:

i. matters in which both Federal and State Government can legislate on all aspects of the same item: Trigonometrical, cadastral and topographical Surveys (item K) and Exhibition of cinematograph films (items G).
ii. matters in which both Federal and State Governments can legislate on different aspects of the same item: Electoral law (item E), Electrical Power (item F), Industrial, Commercial or Agricultural Development (item H), Scientific and Technological Research (item I), Statistics (item J) and University, Technological and Professional Education (item L). Correctional Services (item 10A), Railway (20A).
iii. matters where there is no co-existence at all that is only Federal Government can legislate: Allocation of revenue (item A), Antiquities and monuments (item B), Achieves (item C) and Collection of taxes (item D).

42. I O Omoruyi, A critical Appraisal of Federal and State Legislative Competence Under the 1999 Constitution. (2003) (37) (1), *Journal of Constitution and Parliamentary Studies*, 108.
43. B O Nwabueze, *Federalism in Nigeria Under the Presidential Constitution* (Lagos State Ministry of Justice, 2003) 60.

Section 4(5) of the Constitution makes provision for the application of the doctrine of covering the field. This section provides that in matters where both Federal and State Government are vested with powers to legislate on particular items, such as items K and G above, and the Federal Government exercises its power and legislates on them, any legislative power exercised by the State on the same item is declared void to the extent of its inconsistency with the Federal Law. On the surface it appears that the Federal Government has power to legislate on 66 items in the exclusive list, in addition to the 14 items in the concurrent list, while the States have power to legislate on 10 items on the concurrent list. However, the application of the doctrine of co-existence of power and the doctrine of covering the field shows that the Federal Government has power to legislate on the entire 14 items in addition to the 66 in the Exclusive List, while the State Government has power to legislate on only 10 items. In all, out of a total of eighty (80) items, the Federal Government can legislate on all the eighty (80) items as against only ten (10) items that the States can share legislation with the Federal Government.

Since the assignment of functions determines the assignment of revenue, it is no surprise that more than half of the Federation Account is assigned to the Federal Government. Many have not only queried this disproportionate allocation of revenue in favour of Federal Government but have also identified it as the major cause of vertical imbalance[44] which has remained a challenge in the vertical allocation of revenue.[45] While some see this concentration of revenue and

44. A Salisu, 'Intergovernmental Relations and the Quest for the Management of Fiscal Federalism in Nigeria' (2010-2015) (2022) (12), (1), *NDA Journal of Management Sciences Research*. 303.
45. A Aligba,. Resource Control and Revenue Allocation Under the 1999 Constitution of Nigeria. (2005) (4) *Benue State University Law Journal*. 70.

functions at the centre as consequence of military rule,[46] others attribute it to failure to adhere to the principles of fiscal federalism.[47]

Just as many have questioned the allocation of the lion share of the revenue allocation formula to the Federal Government, others have provided a justification for this disproportionate allocation of revenue to the Federal Government. The concentration of functions and revenue at the centre was deliberately done to foster the unity of the Nigerian federation.[48] This school of thought is of the view that allowing the States to have too much powers and resources could result in a situation where the States could become more powerful than the Centre such that a state could assert her independence or threaten the territorial integrity of the Federation.[49] Beyond this justification lies the fact that the concentration of functions and revenue at the centre has created a unitary structure in a federal constitution.[50] This view was given judicial notice in *Attorney General of Abia State v Attorney General of the Federation*[51] where his lordship H.M Ogunwumiju (JSC) made this remark:

> The Nigerian brand of federalism, as outlined in the 1999 Constitution, differs from other federalism brands due to its quasi-federal or elevated unitary system of government rather that the

46. A Animashaun, Principles and Practice of Federalism: Some Reflection on the Problem of Resource Control in Nigeria; In K.S Chukkol et al (eds) *Annual Publication of Contemporary Issues in Nigeria Law,* (Faculty of Law Ahmadu Bello University, Zaria, 2005) 160; J O Nkweke; et al 'Fiscal Federalism and Challenges of Development in Nigeria': A Search for Remediation. (2013) (2) (3), *Review of Public Administration and Management,* 15.
47. K O Atoyebi, et al 'The Implication of Resource Control in Nigeria'. (2013) (2) *International Journal of Humanity and Science Intervention* 61.
48. G Oke, The Mistake Rotimi and I made about Nigeria's Constitution-Nwabueze Vanguard (Lagos 22nd March 2013).6
49. B O Nwabueze *Constitutional Law of the Nigerian Republc (*Sweet and Maxwell, London1964) 149.
50. Y. Isa, and Y. Saidu, 'Ownership and Control of Mineral Resources and Emergency (2018) Trends' *Nigerian Institute of Advance Legal Studies Journal of Public Law,* 22; J.A.M Agbonika, 'Nigerian Federalism: Problem and Prospects (2016)' *Kogi State University Bi Annual Journal of Public Law* 14.
51. (2022) LPELR – 57010 (SC) 130.

theoretical brand of federalism envisaged by political and legal theorists. This contradiction has made it difficult for the Nigerian federation to maximize the gains if fiscal federalism.

1.3.3 Residual Matters

According to Nwabueze, residual matters refer to matters not included in the exclusive or concurrent list and which are not mentioned in the body of the Constitution.[52] Such matters belong exclusively to the States.[53] One would expect that in conformity with this provision, the Supreme Court will uphold the power of the States to legislate on any subject not contained in both lists. This expectation was disregarded in two cases: *AG Ondo State v AG Federation & others*[54] and *Olafisoye v Federal Republic of Nigeria*.[55] In the first case, the Ondo State Government challenged the validity of the ICPC Act 2000 especially its powers to bring charges against state officials accused of corruption. The main argument of the Ondo State Government was predicated on the fact that corruption was a residual matter of the 1999 Constitution. In opposition, the Federal Government argued that she could legislate on corruption pursuant to the powers granted in sections 60(a) and 15(5) of the 1999 Constitution. And the Supreme Court held that the Federal Government has power to enact the ICPC Act pursuant to section 15(5) and item 60 (a) of the 1999 Constitution.

The decisions of the Supreme Court in the above cases have been criticized by Ipaye as an undue expansion of the legislative jurisdiction of the Federal Government.[56] In his view, by refusing to strike down the ICPC Act under the

52. B O Nwabueze, *The Presidential Constitution of Nigeria*. (C Hurst CO Ltd London, 1982). 54.
53. *A G Lagos State v A G Federation (2003) 2 N W L R (pt 833) 1*.
54. (2002) 9 NWLR (Pt772) 222.
55. (2004) 4 NWLR) (Pt 864) 58.

56. A Ipaye, Incidental Powers and Policy As Source of Legislative Jurisdiction: A Review of the Supreme Court's Decision in *A.G Ondo State v A.G Federation* & ors (2009), , (2009) (1) (1) *Appellate Review* 10.

guise of the Fundamental Objectives and Directive Principles of State Policy as contained in chapter two of the Constitution, the court unduly amplified the scope of federal legislative jurisdiction. He further argues that by holding that Section 15(5) of the Constitution applies, the Supreme Court wrongly assumes that the word State as used under this section only refers to the Federal Government. Lending his voice to the criticism, Nwabueze[57] describes the decision in the first case which seeks to include corruption as a subject matter on the concurrent legislative list by means of reference to chapter two of the Constitution as a disingenuous act of the Supreme Court in the light of the fact that what was contemplated by the framers of the Constitution is that section15(5) is a directive to both governments to formulate policies and not to enact legislations.

The positions of Nwabueze and Ipaye are fortified by the fact that the Supreme Court came to a different conclusion in another case of *A.G Lagos State v A.G Federation*[58] which considered the same issue and arguments as *A.G Ondo State v A.G Federation* [59].In this first case, the issue in contention was whether the Federal Government could legislate on urban Planning. It was the contention of Lagos State that since urban Planning is neither mentioned in the exclusive list nor concurrent list, it belongs to the residual powers. The Federal Government countered this position by presenting the same argument it presented in the second case above that the Federal Government could legislate on the above matter pursuant to its powers under Item 60(a) and Section 20(a) of the 1999 Constitution. Refusing to follow this holding in A.G Ondo's case, the Supreme Court held that since neither the exclusive legislative list nor the concurrent legislative list confers power on the National Assembly to enact law on Urban and Regional Planning, the combined effect of the provisions of Section 20 and Item

57. B.O Nwabueze, (n 1).
58. Id (n 52).
59. Id (n 53)

60(a) of the exclusive legislative list cannot be invoked to confer the National Assembly with such power.

1.3.4 Functions Conferred on the Local Government

Before the judgment delivered by the Supreme Court in *A.G Abia State v A.G Federation & others*[60] and by virtue of Section 7 of the Constitution and the decision in *A.G Lagos State v A.G Federation,*[61] the Local Government Areas in Nigeria were parts of the States and did not share legislative powers with the Sates like the States do with the Federal Government with respect to the functions conferred on them by the Fourth Schedule of the Constitution. By the judgment delivered in the first Abia' case above, the Supreme Court appears to have altered this position to the effect that Local Government as the third tier of government is autonomous. The facts of the case can be summarised as follows: worried by the abuses of the State Local Government Joint Account by Government of the State in Nigeria, the Attorney-General of the Federation approached the Supreme Court to interpret Sections 7(1) and 162(1-6) of the 1999 Constitution. Adopting a purposeful interpretation of Sections 7(1) and 162(1-6) of the Constitution, the Supreme Court held that the revenue allocation of Local Government Council should be paid directly to each Local Government in Nigeria. The foundation for this holding is predicated on the ratio captured in the following words of Emmanuel Akomuye Agim (J.S.C)

> A State Government or the Governor of a State has no power to constitute, appoint or determine a local government that S.7(l) of the 1999 Constitution has prescribed can only be by Local government councils democratically elected by persons in a local government area. As this court restated in *Friday v Governor of Ondo State*(supra) " the Local Government Council is the third tier of government in our federal structure government. No tier of government is a subset of the other. Their relationship is as defined by the Constitution and other laws. Each must respect this

60. Suit no. SC/CV/343/2024.
61. Id (n 52)

> relationship and deal with the other only in accordance the Constitution and other laws." In *Knight Frank Rutley (Nig.) v AG, Kano State* (1998) 7 NWLR (Pt 556) 1 at 19, this court per Uwais CJN held that "The powers exercisable by the Federal, State and Local Governments have been clearly identified under the 1979 Constitution. With the exception of the items under the Concurrent Legislative List each of the three tiers of Government exercises exclusive power over the subject under its control" In *AG of Abia State v AG of Federation* (2006) LPELR- 613(SC) this Court again stated that " where the rule of law reigns, political expediency ought to be sacrificed on the altar of the rule of law so as to guarantee the continued existence of institutions fashioned to promote social values of liberty, orderly conduct and development, particularly in a republic founded on the principles of federalism where power is not only apportioned between the federal and state governments, but also the local Governments with checks and balances.

The above judgment is flawed on four grounds: first and foremost, Section 232(1) does not confer original jurisdiction on the Supreme Court to hear a dispute between Local Government and States. What the facts of this case disclose is that there is a dispute between Local Government and the States and if the Attorney General is suing to resolve such a dispute and has clothed himself with locus standi under the guise of defending the constitution, he ought to have invoked the appellant jurisdiction of the Supreme Court in line with Section 233 (b) because what the decision shows is that the Supreme Court simply interpreted the violation of Section 7 and made consequential amendment of Section 162 (6) of the Constitution. The Constitution does not grant the Supreme Court powers to interpret its contents while exercising her original jurisdiction unless there is dispute between Federal Government and States, or between States or between National Assembly, States, House of Assembly of a State or the President of Nigeria. Besides, the failure of the Attorney General to make Local Government Councils a party to the suit means the judgment cannot be enforced in their favour

as a person cannot benefit from a judgment in a case in which he is not a party.[62] Furthermore, autotomy cannot be granted outside the legislative list of competence contained in a constitution. Although, Local Government Areas are given certain functions in the fourth schedule of the Constitution, these functions are only exercised through a law made by the House of Assembly of a State in line with Section 4(7) of the Constitution. To drive this point home, Sections 7 (6) (b) and 162 (8) specifically empower the House of Assembly of each State to distribute statutory allocation to Local Government Areas in their domain. Section 2(2) of the Constitution only recognizes Federal and State as two independent tiers of Government in Nigeria, while Section 4, 5 and 6 shares Executive, Legislative and Judicial powers between Federal Government and States in Nigeria. As long as these Sections above have not been amended, it cannot be said that Local Government Councils in Nigeria are autonomous. If it was the intention of the Supreme Court to make Local Government autonomous, it would have made a consequential order arising from the ratio amending the above Sections of the Constitution. Finally, The Supreme Court had held as far back as 2002 in the case of *A.G Ogun State & others v A.G Federation*[63] that the amendment of the Revenue Allocation (Federation Account) Act to allow Local Government Councils to receive their allocation directly from the Federation Account was unconstitutional as it violated section 162(5), (6), and (7) of the 1999 Constitution. The Supreme Court cannot alter this decision without drawing a distinction between it and her current position in *A.G Federation v A.G Abia State & others*.[64] By the application of the principle of stare decisis, the Supreme Court is bound by its previous decision on the same issue unless the Court can distinguish the latter position from the former. In the instant case, no reference was made to the

62. Section 84 Sheriff and Civil Process Act Laws of the Federation of Nigeria 2004, *Awoyale v Ogunde* (No 1) (1990) 7 NWLR (Pt 162) 254.
63. Id (n 23).
64. *Id* (n 38).

case of *A.G Ogun State & others v A.G Federation.*[65] In the absence of a distinction between the two cases, the decision in *A.G Ogun State & others v A.G Federation*[66] remains the valid law as far as the issue of autonomy is concerned. In the light of these observations, this Supreme Court judgment will not endure as the various States are likely to activate these extant provisions of the Constitution to go round this judgment as is the case in Anambra State. Section 13(1) of *Anambra State Local Government Administration Law 2024* provides for that a State Joint Local Government Account into which all federal allocations to Local Government in Anambra State shall be deposited. Section 14(3) of the same Law stipulates that each Local Government in the State must remit a state determined percentage of their federal allocation to the Consolidated Account within two working days of receiving their allocation from the Federation Account.

1.4 Vertical Allocation of Revenue in Nigeria

Basically, in the Nigerian Federation, revenue is derived from two major sources: taxes and proceeds from the sale of mineral resources. The Constitution makes provisions for the sharing of revenue from both sources between the Federal, State and Local Government on the one hand and among States and Local Government on the other hand. Specifically, Item A Part II paragraph 1(a) makes revenue allocation the exclusive preserve of the Federal Government as it provides as follows:

1. Subject to the provisions of this Constitution, the National Assembly may by an Act make provisions for-
   (a). the division of public revenue;
   (i). between the Federation and the States;
   (ii). among the States of the Federation;
   (iii). between the States and Local Government Councils;

65. Id (n 23).
66. Ibid.

(iv). among the Local Government Councils in the States; and

Paragraphs 1(a)(i) and (a)(iii) draw attention to vertical sharing of revenue, while paragraph 1(a)(ii) and 1(a)(iv) draw attention to horizontal sharing of revenue. Vertical revenue sharing is sharing of revenue among the Federal Government, State Government and Local Government Councils. Sections 162(1) (2) (3) of the Constitution provide the processes by which paragraphs 1(a)(i) and 1(a)(ii) can be realized. The main import of Section 162(1) lies in the fact that it creates a Distributable Pool Account known as a Federation Account into which all revenues collected by the Federal Government are paid except the income tax of the personnel of Armed Forces of the Federation, the Police Force, Ministry of Foreign Affairs and Residents of the Federal Capital Territory, Abuja. All the proceeds of revenue paid into the Federation Account are shared through an Act of the National Assembly among the Federal, States and Local Government pursuant to the power granted by section 162(2) of the Constitution. The administration of Olusegun Obasanjo maintained the revenue allocation of the 1981 Revenue Allocation Act which was reviewed as Revenue Allocation (Federation Account) Act 2004[67] and modified twice by means of Executive Orders to reflect the current revenue allocation formula as follows:

Federal Government	----------	52.68%
States	----------	26.72%
Local Government	----------	20.60%
Total:	----------	**100%**

Section 162 (3) grants the National Assembly power to share the amount in the Federation Account among the Federal, States and Local Government in accordance with a sharing formula. The power to alter the sharing formula was exercised by Olusegun Obasanjo who unilaterally amended the revenue allocation

67. Laws of the Federation of Nigeria 2004.

formula in May 2002 by means of Executive Order titled the Revenue (Modification Order) 2002 otherwise known as Statutory Instrument No 9 of 2002. Obasanjo increased the Federal Government share from 48.5% to 56% by adding the 7.5% for Special Funds to the share of the Federal Government following the Supreme Court decision in the case of *A.G Federation v A.G Abia & 35 others*[68] which nullified the allocation of 7.5% for Special Funds. In this case, the Supreme Court held that the allocation of 7.5% of the Federation Account to Special Funds was contrary to Section 162(3) of the Constitution and therefore unconstitutional.

Of course, this abuse did not go unchallenged; the States instituted an action to seek redress in the case of *A.G Abia State & 35 others v A.G Federation*[69] on the ground that it violated the principle of the separation of powers. While stating the principle of separation of power alright, the Supreme Court held that the Order was constitutional in that the President has power to modify an existing law to bring it in conformity with the Constitution. The Supreme Court further held that if the action of the President is an infraction of the principle of the separation of powers, then it is an infraction authorized by the Constitution.

Justice Niki Tobi (Justice of the Supreme Court as he then was) seems to have made amends for the above blunder when he ruled on a matter that also borders on abuse of power in the case of *A.G Abia State v A.G Federation*[70] In this case the Federal Government under Chief Olusegun Obasanjo enacted an Act, the Monitoring of Revenue Allocation to the Local Government Act[71] which gave the Federal Government the power to take over the supervision and allocation of funds to Local Government from the State Government through the establishment of a revenue committee. Seeing the establishment of this Committee as a

68. (2002) 6 NWLR (Part 764) 542.
69. (2003)4 NWLR (part 809) 120.
70. (2006) 16 NWLR (pt1005) 265.
71. Laws of the Federation of Nigeria 2004.

usurpation of their powers, the States instituted an action to challenge the Federal Government. The Supreme Court as per Justice Niki Tobi held that the Act which enjoins each State Government to establish a State Joint Local Government Account Committee is clearly against the federal arrangement in the Constitution and it was a trait of unitarism. The learned Justice further held that the word monitoring as used in the Act conveys some element of policing the State Government as it was an arrogant word that spells doom for the federal structure. This decision, unlike the decision in *A.G Abia & 35 others v A.G Federation*, is commendable as it reverses the abuse of powers as displayed by one level of government against another level of government in a federation.

Another issue that has generated conflict between the Federal Government and States in Nigeria is the application of thirteen percent (13%) derivation revenue. The proviso in Section 162(2) makes provision for the derivation as a principle for revenue derived from the proceeds of the sale of minerals in Nigeria. The sum of thirteen percent 13% of the revenue derived from the sale of mineral resources is to be paid to the States from where such minerals are derived. This sum is deducted as a first line charge from the total amount of revenue derived from the sale of mineral.[72] Although the Revenue Allocation Act provides for the 13% to be deducted from the proceeds of mineral resources, in reality the 13% is only deducted from the proceeds from the sale of crude oil. Other minerals are exploited by private individuals in collaboration with State Government in utter disregard of the Constitution which vests ownership on the Federal Government.[73] Apart from the agitations of the Niger-Delta people, the application of derivation principle has stirred contention with respect to two issues: one a determination of the seaward boundary of the littoral States for the purpose of calculating the 13% of mineral resources and two the validity of the dichotomy between onshore and offshore oil for the purpose of calculating the 13% revenue. The first issue came

72. Section *1 Allocation of Revenue (Federation Account, E.T.C) Act* Laws of the Federation 2004.
73. Section *44 Constitution Federal Republic of Nigeria 1999*

up for determination in the case of *A.G Federation v A.G Abia State & others*.[74] In this case, the Attorney General of the Federation approached the Supreme Court to determine the seaward boundary the littoral States within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from the States. After hearing from both parties, the Supreme court held inter alia that the Seaward boundary of the littoral States was the low-water mark of the inland surface thereof or (if the case so requires as in the Cross River State with an archipelago of islands), the seaward limits of inland water within the States. This judgment created a dichotomy between minerals found onshore and offshore.

Implication of this dichotomy with regard to oil revenue was generally unfavourable for all littoral States and particularly devastating for Akwa Ibom whose oil wells were mostly located off shore. Naturally, these littoral States of Edo, Delta, Ondo, Bayelsa, Rivers, Cross River and Akwa Ibom began to mount pressure on the Federal Government to provide a political solution to the loss of revenue occasioned by the decision in the above case. The prayers of the littoral states were answered when Chief Olusegun Obasanjo provided a political solution by passing into law the Allocation of Revenue (Abolition of on shore off shore Dichotomy) Act[75] which made it possible for the littoral States to be entitled to revenue from oil found off shore. Specifically, the Act provides that two hundred metre water depth isobath contiguous to a State of the Federation shall be part of that state for the purpose of computing the revenue accruing to the Federation Account from the State.[76] The validity of the Act was challenged in the case of *A.G Adamawa and others v A.G Federation*.[77] In this case the plaintiffs approached the Supreme Court praying her to declare the Act abrogating the off

74. Id (n 67).

75. Laws of the Federation of Nigeria 2004.
76. Section 1(1) Ibid.
77. (2005) 18 NWLR (pt 958) 581.

shore on shore dichotomy as unconstitutional, ultra vires, void and of no effect on the ground that the Act is in conflict with the international Conventions on the law of the sea and the 1999 Constitution. The Supreme Court held that the 2004 Act is not unconstitutional.

1.5 Challenge of Vertical Allocation of Functions and Revenue

As noted in the introduction of this paper, the major challenge of vertical allocation of functions and revenue is the stifling of social economic development of the Nigerian federalism.

1.5.1 Stifling of Social Economic Development of the Nigerian Federation

The sole purpose of sharing functions and revenue between levels of government in a federation is to bring about socioeconomic development. In the case of Nigeria, the generation of negative outcomes occasioned by the concentration of functions and revenue at the centre has stood in the way of the realization of this purpose. One of such negative outcomes is the incurring of monitoring costs by the Federal Government. By the way functions are distributed under the Constitution, the Federal Government has her hand directly in virtually every sphere including matters that are peculiar to the States. For instance, the Constitution places marriage under the exclusive list.[78] The truth remains that by virtue of this grant, the National Assembly cannot only legislate on it,[79]but the Ministry of Interior has also created a marriage registry[80]that conducts marriages. Meanwhile, virtually every Local Government in Nigeria has a marriage registry for citizens who wish to get married under the Act.[81] The maintenance of marriage registry at the federal level is a peculiar feature of the Nigerian federation as there

78. Item 61 Second *Schedule Constitution Federal Republic of Nigeria 1999.*

79. *Matrimonial Causes Act* Laws of the Federation of Nigeria 2004.

80. The Federal Government has a Marriage Registry at Ikoyi in Etionosa Local Government of Lagos State.

81. Section 7 *Constitution Federal Republic of Nigeria 1999.*

is no other federation where solemnization of marriage is conducted by the Federal Government. Although the Court of Appeal has held that both the Federal Government and Local Government have legal authority to celebrate marriages in Nigeria,[82] the truth remains that the former incurs avoidable cost by undertaking this function. The broad implication of Federal Government getting involved in private matters such as in marriage is that she incurs cost over a matter that only Local Government or States would have better handled alone.

Another good example of a matter peculiar to states but over which the Federal Government has exercised legislative authority is primary and secondary health care. Health as a function is neither in the exclusive list. nor in the concurrent list. Health is only mentioned in section 15 and section 2(c) of the fourth schedule of the 1999 Constitution. Section 15 talks about the health of workers in the workplace, while section 2(c) confers on the Local Government the power to provide and maintain health services. Health as a function that affects all Nigerian citizens is surprisingly omitted from both exclusive and concurrent lists. Therefore, by the authority of *A.G Lagos State v A.G Federation* health as a function that affects all Nigerian citizens belongs to the residual matters.[83] Contrary to this legal position, the Federal Government has not only legislated on health,[84] the Federal Ministry of Health has created Teaching Hospitals that provide health services for primary and secondary health issues which should be the primary responsibility of Local Government and States Government respectively.[85] The duty of Federal Government is tertiary health care.[86] Again, by getting involved directly in the provision of primary and secondary health care, the Federal Government increases administrative cost.

82. (2023) LPELR (CA).

83. (2003) 2 NWLR (pt 833).
84. *National Health Act 2014.*
85. Section 2 (1) (1) Ibid.
86. Section 2(1) (f) Ibid.

This mistake of increasing cost by getting involved in functions better performed by states is also replicated by the 1999 Constitution in the assignment of the responsibility of secondary education to both Federal and State Government.[87] This mistake was avoided in the 1963 Constitution, which confined both primary and secondary education to the residual matters[88] and tertiary education to the Federal Government.[89] The military transferred both primary and secondary education from the State list to the Federal Government in 1976 and established the first unity school in 1966. While primary education was returned to the States in 1999 Constitution, secondary remains in the current list,[90] a development that places an avoidable cost on the Federal Government. The assumption of responsibility by the Federal Government in these three areas in addition to others not mentioned here has brought about a situation in which the Federal Government has incurred avoidable huge cost which has constituted to huge recurrent expenditure and budget deficit with the concomitant effect of slowing down socio-economic development in the sense that a government that is experiencing deficit is not likely to have enough to provide social amenities. Moreover, a government at the federal level is likely to incur higher cost when it provides services or does a function that should have been better provided by the States and Local Government.

Another harmful effect of concentration of power at the centre that could hinder socioeconomic development is the absence of experimentation of ideas at the state level.

One of the advantages of federalism is that it enables a people to try experiments which could not be safely tried in a large centralized country.[91] Re-echoing this advantage, Justice Louis Brandis had this to say:

87. Section 28 Second Schedule *Constitution of Federal Republic of Nigeria 1999.*

88. Parts 1 and 2 the Schedule *Constitution Federal Republic of Nigeria 1963*.

89. Item 10-part 2 Ibid.

90. Section 28 Second Schedule *Constitution Federal Republic of Nigeria 1999*.

91. *New State Ice v Liebmann US 311 (1932).*

> There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meeting changing social and economic needs. To stay experimentation in things social and economic is a gave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may if its citizens choose, serve as a laboratory; and try novel social economic experiments without risk to the rest of the country.[92]

This advantage of a federal system is missing in Nigeria because of the centralization of functions. The effect of this loss can be better appreciated when we consider some of the provisions of the National Health Act. This Act is replete with provisions which nationalize health service. For example, the Act provides for a National Council on Health made up of the Health Minister as Chairman and Health Commissioners in the State as members.[93] One of the functions of this council is to coordinate health services rendered by the Federal Ministry of Health, and the Ministries of health of the various States in addition to Local Government, wards, and private health care providers.[94] This kind of provision centralizes power in a way that leaves the States with no freedom to experiment. When states experiment, innovations are created in a way that engenders socioeconomic development.

Closely related to the above outcome of centralization is the fact that it destroys competition that could derive socioeconomic development among states. Centralization of functions creates monopoly in the delivery of services as opposed to competition that is created when such functions are decentralized. Competition generates output that creates improvements in service delivery. One good illustration of the above fact is the position of the law on electricity in the Constitution before and after the fifth alteration. Before the fifth alteration,

92. Ibid.
93. Section *4 National Health Act* 2014.
94. Section 5 Ibid

generation, transmission and distribution were the sole business of only Federal Government and States could only perform these functions in areas not covered by this national grid.[95] This restriction was lifted when the phrase to areas not covered by the national grid was replaced by the phrase to areas within that State[96] in the fifth alteration. With this alteration, States have acquired the right to generate, transmit and distribute electricity within their territories including areas covered by the national grid.[97] Furthermore, States have right to pass Electricity Market Laws. Already four States, Edo, Lagos, Oyo and Kaduna, have taken advantage of this law to make their own laws to regulate electricity and other states will soon follow suit. With almost every State having its own regulatory laws, there will be competition in the delivery of electricity service in Nigeria. This competition will improve significantly the delivery of services thereby eradicating the perpetual problem of power outage in Nigeria.

Apart from destroying competition, centralization could also impede accountability. Accountability is an integral part of governance. Therefore, whether the governance model is federal, unitary or confederal, the need to hold government functionaries accountable remains indispensable for the sake of transparency and feedback. In a federation, each level of government is held accountable for the functions assigned to it in the Constitution.[98] In assigning these functions, deliberate efforts are made to assign functions that are general to the Federal Government and functions that are peculiar to the States.[99] The 1999 Constitution appears to have assigned functions in a way that is virtually every function has been allocated to the Federal Government. This way of assigning functions makes it difficult for the people to hold the right level of government responsible when there is a problem in service delivery. This is so because "it is

95. Section 13 (d) *Constitution Federal Republic of Nigeria 1999.*
96. Ibid.
97. Section 6 *Electricity Act 2023.*
98. Section 20 *Constitution Federal Republic of Nigeria 1999*
99. P O Odiase, (n34).

easier for people to physically observe and question government officials who are in close proximity to them ... than those who are thousands of miles away in the Federal Capital, Abuja."[100]

One illustration of this difficulty lies in the assignment of the role of the police in the enforcement of internal security as a function. While the protection of the State against external attack is always a matter in the exclusive list in all federations, the function of internal security is usually in the Concurrent List in most federations. Nigeria is the only federation that maintains a single police force charged with enforcement of internal security in the whole federation.[101] Meanwhile, the same Constitution makes the Governor the chief security officer of a State.[102] In situations where there are clear security breaches in which the police are complicit, the people often hold the Governor of the State accountable because he is the functionary that is in close proximity to them. In such instances, the Governor is forced to make promise to get the message to the President in Abuja because the same Constitution provides that the Commissioner of Police must seek permission from the Minister in Abuja before obeying the lawful directive of the State Governor.[103] In other words, the Commissioner is under the Minister and not the Governor.

100. E B Omoregie, The Proposed National Health Law: Emergent Federalism and Subsidiarity Issues in Nigeria. (2012) *NIALS Journal* Nigerian Institute of Advance Legal Studies, Maiden Edition. 20.
101. Section *214 Constitution Federal Republic of Nigeria 1999.*
102. Section 176(2) Ibid.
103. *A.G Anambra State v A.G Federation and others* (2005) MJSC I: *A.G Kano State v A.G Federation* (2007) 6 MJSC 161

1.6 Conclusion

This paper has examined the challenge of vertical allocation of functions and revenue in Nigeria. The writer of this paper reasons that the concentration of functions and revenue at the centre has given rise to some negative outcomes which have generated one challenge in the vertical axis of allocation of functions and revenue: stifling of socio-economic development. This challenge can be tackled if the functions in the Constitution are shared according to the principle of subsidiarity. This paper, therefore, recommends that in line with this principle some functions assigned to the Federal Government should be transferred to the States. These functions include marriage, primary and secondary education, primary and secondary health care and means of enforcing internal security. To reflect these changes the exclusive and concurrent legislative lists and other relevant portions of the Constitution should be amended. Since the allocation of functions determines the allocation of revenue, the revenue allocation formula should be altered to provide the States the means to execute these functions that have been transferred to them. This paper therefore, proposes a new revenue allocation formula which is as follows:

Federal Government	- 41.40%
States	- 38%
Local Government	- 20.60%

With this new revenue formula in place, the States will have more funds to provide public goods in the new functions transferred to them. Besides, the transfer of the functions to the States will reduce the overhead cost of governance for Federal Government. With the States performing these functions, there will be better service delivery which invariable will create better socio-economic outcomes.