

Federalism

1. Definition

The definitions of *Federalism* are often fraught with pitfalls because of their inability to encompass all forms of the particular concept or idea sought to be defined.

- Generally, the concept of federalism relates to the division of power between national government, and other regional or state governments and sometimes local governments. Such powers may however be shared in various ways, sometimes with a stronger centre or with weaker centre which is often referred to as co-federalism. According to Nwabueze, this division of power happens *‘in such a way that each [entity] exists as an entity separately and independently of the other, and operate on the persons and property within its territorial area, possessing a will of its own and apparatus for conducting its affairs, sometimes on matters exclusive to it.’*
- Lord Haldane in *Attorney General for Commonwealth of Australia v Colonial Sugar Refinery Co.* was of the view that: *‘...the natural and literal interpretations of the word ‘federal’ confines its appellation to cases in which states while agreeing on a measure of delegation of powers to a common government yet in the main continue to preserve their regional constitution. The word could only be used loosely, to describe states which agree to delegate their powers with a view to entirely new constitution even of the states themselves.’* This definition presupposes a voluntary act on the part of the federating states in keeping with the theory of the ‘social contract’ and perhaps does not contemplate the evolution of a federal state as a result of coercion or the mechanical drawing of borders.
- According to K.C. Wheare: *‘By the federal principle I mean the method of dividing power so that general and regional government are each within a sphere co-ordinate and independent.’*

However one looks at it, according to William Livingston, federations differ in their nature, form and scope, and this difference is attributable to the various economic, social, political and cultural factors that necessitated the formation of the federation. Hence, Niki Tobi JSC noted that: *‘there is... no universal agreement as to what is federalism. A federal government means what the constitution says it mean.’* Yet there are certain common features (some of which can be gleaned from the definitions above), which exist or must exist in all true federation, which features are necessary for it to function effectively and efficiently (as will be discussed later.)

2. Basis & Justification

Generally, federalism evolves in various nations for different reasons, but is mostly seen in nations (like Nigeria) with large population, vast expanse of land and multi-ethnic peoples, or diverse religious, historical, political, or other backgrounds. Sometimes, its evolution is to ensure effective and efficient administration of the various entities by bringing government closer to the people.

Particularly, federalism materialised in Nigeria *mostly* (but not only) as a result of:

- The **multi-ethnic nature** of the country and the need to ensure that the various groups, to an extent, continue to govern themselves in line with their peculiar persuasions and promote their unique local interests. This point finds support in the continuous agitation for the creation of more states with borders that mostly include people of particular (or related) ethnic origin or language;
- The **agitation by minorities** for a system of government which will ensure their continuity and give them a sense of belonging within a larger mass. This point strongly influenced the creation of the Mid-West Region in 1963 from the Western Region of Nigeria; of which Nigeria was a three-region federation until 1963; and
- The **existence side-by-side of two major religions** in the country – Christianity and Islam – and the need to allay the fears of one group dominating the other, by broadly giving each group autonomy over their local affairs within the context of state creation. It was also necessary to create some room for the expression of religious tenets in formal laws – see Penal Code Act (applicable to the North) and Criminal Code Act (applicable to the South). This point strongly influenced the division of Nigeria by the British Colonialists into three regions at the time of independence in 1960: Northern Region (largely Muslims), and the Western and Eastern Regions of Southern Nigeria (largely Christians).

Drawing on the above, the aim of federation in Nigeria according to Ogwurike was to promote unity, while providing adequately within that unity for the diverse elements to continue to manage their local affairs to an extent and express their uniqueness.

Why do units ‘federate’ or unite under one central government?

- Defence reasons
- Economic reasons
- Socio-cultural reasons
- Geographical neighbourhood reasons
- (Prior) Political association reasons

Whatever the basis or justification for the evolution or formation of a federal union, as noted earlier, there are certain minimum requirements which are the main focus of the concept of

federalism and which must be in place before a nation can be said to be truly federal and for it to function effectively and efficiently as such.

3. Essentials of Federalism

[a] Voluntary Submission of Autonomy

From the definition of the concept by Lord Haldane above, for there to be a true and sustainable federation, there must be voluntary submission of the powers which formerly belonged to the various federating states or units to the central government, thus, presupposing the existence of a democracy.

On the contrary, Nigeria's federal system was, in reality, largely created through coercion and the mechanical drawing of borders which brought together a very diverse group of people, and this does not augur well for the continuance or smooth running of the federation (e.g. see *USSR v USA*). A (Sovereign) National Conference has been proposed as a solution to this lacuna.

- Yet, see the Preamble of the 1999 Nigerian Constitution (as amended), which provides that: 'We the people of the Federal Republic of Nigeria... Do hereby make, enact and give to ourselves the following Constitution:'. And Section 2 thereof provides that '(1) Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria. (2) Nigeria shall be a Federation consisting of States and a Federal Capital Territory.'

[b] Co-operation among the various levels of the government

Certain issues or activities occurring in a state may be of national significance, and hence warrant the co-operation of the federal and state governments. For example, the federal government of Nigeria has an ecological fund, through which it provides assistance to states facing significant ecological challenges beyond their financial capacity.

- As observed by Jain M.P.: '*[The general and state governments] come in contact with each other at many points. Their areas of operation and functioning cross and intersect in several respects, thus creating a variety of governmental relations between the centre and regions inter-se. The pattern of intergovernmental relations in a federal country is not static; it is dynamic and constantly finding a new balance in response to [changing circumstances]*'

[c] Division of power

Generally, one of the basic purposes of federalism can be said to be allocation of political power between the various levels of government in society, in such a way that constitutional limitations are placed on the exercise of such powers. Indeed, the 1999 Nigerian Constitution (as amended) generally divides the sovereignty of the nation between the federal, states and local governments. According to the constitutional drafting committee of the 1979 Nigeria Constitution (which position applied to the 1999 Constitution):

- *‘No one can deny that there is need for promoting unity among the various ethnic and linguistic groups in the Nigerian Nation. In the circumstances, whilst it seems logical and realistic to ensure that the Constitution empowers the federal government to have adequate powers to enable it to take necessary measure for maintaining uniformity when this is absolutely essential the Constitution sets out at the same time to cater for our cultural and social diversities. This latter need means that the federal government must not have the powers to insist on uniformity whenever diversity in no way conflicts with national unity, fundamental objectives or the continuance of the federation.’*

Among others, Sections 4, 5 and 6 of the 1999 Nigerian Constitution principally divides the country’s legislative, executive and judicial powers, respectively, between the Federation and the states. To an extent, local government councils also share in this power by virtue of Section 7 of the Constitution. However, the extent to which the power sharing arrangement between the three levels of government has helped to ensure or inhibit the independence and autonomy of the various units, in accordance with the principles of true federalism, has been a constant bone of contention.

[d] Independence and autonomy

As the definitions show, one major ingredient of a true federation is the independence and autonomy of the various units making up the federation. That is, in certain spheres, the component units must be able to operate without interference from or control by any other unit. In other words, the relationship between the centre and the states or among the various states must not be one of security and inferiority as such. That does not, however, rule out the need for co-operation between them, but merely encourages diversity in certain areas, taking into consideration the peculiarities of the component units.

Relevant here is the dictum of Justice McKenna in Hoke v US 227 U.S. 308, 322, with regards to American federalism:

- *‘Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction... but it must be kept in mind that we are one; and the powers*

reserved to the States and those conferred on the nation are adapted to be excised, whether independently or concurrently, to promote the general welfare, material and moral.'

It is obvious that despite the need for co-operation, there is often express or implied prohibition of interference so as to ensure some measure of independence and autonomy. Hence, Nwabueze commented on the 1979 Constitution (and applicable to that of 1999) thus:

- *'From the separate and autonomous existence of each government, and the plenary character of its powers within the sphere assigned to it by the Constitution, flows the doctrine that the exercise of those powers is not to be impeded, obstructed or otherwise interfered with by the other government while existing within its own powers... The view that a written Constitution must accommodate necessary implications and that an implied prohibition against interference is necessarily implied in the nature of federalism is to be preferred, and we may therefore say... that the doctrine is part of Nigerian federalism.'*

In other words, though no express *general* prohibition of interference in the 1999 Constitution, it can be concluded that is implied. (However, see for example: Section 5(3) of the 1999 Constitution (as amended) which prohibits the governor from impeding the president in the exercise of his/her executive powers.) This is so because, according to Sir Isaac J. in *Pirrie v McFariare* (1925) 36 CLR 170 at 191:

- *'...where by one Constitution, separate and exclusive government powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provisions to the contrary to destroy or weaken the capacity or functions conferred on the other.'*

It has however been argued by Mowoe that the creation of certain bodies under the 1999 Constitution 'no doubt encroaches upon this implied independence and autonomy' of the various units, citing for example the Revenue Mobilization and Fiscal Commission established under Section 153 of the Constitution (see: KM Mowoe, *Constitutional Law in Nigeria* (2008) 78-79).

[e] Equality of size and power

A measure of equality between the states governments in terms of size and allocation of power, is require. This is to ensure that no state is so big as to make other states susceptible to its whims, or to dominate the central government. Attempts to address this imbalance in Nigeria has been through the creation of new states. According to Nwabueze:

- *'Such a situation of imbalance was exemplified before 1967 in Nigeria... [where] the Northern Regional Government was able, by reason of its disproportionate size in areas [75% of land mass] and population [60% of the country's population] to dominate the*

central government, almost turning it into an extension of itself, and dictating the policies to be pursued... which ultimately precipitated... the overthrow of the Constitution in a military coup.'

[f] Supreme Constitution

- According to Wheare: '*...if the general and regional governments are to be co-ordinate with each other, neither must be in position to override the terms of their agreement about the powers and status which each tier is to enjoy. So far as this agreement regulates their relations with each other, it must be supreme.*'
- For ensuring the independence and autonomy of various tiers of government, Nwabueze noted that: '*... the terms of the arrangement, especially concerning the division of powers, must be embodied in a constitution that is supreme over both the general and regional governments, and overrides any act done by either of them in violation of those terms.*'

Such an agreement/constitution must not be easily subject to change, except with the agreement of the majority making up the union.

See: Section 1 of the 1999 Nigerian Constitution (as amended) (on the supremacy of the Constitution); and its Section 9 (on the procedure for amending the Constitution).

[g] Independent judiciary

An offshoot of the requirement for a supreme constitution is the need for an independent judiciary to pronounce on the extent and scope of the rights of the various tiers, in cases of conflict. The extent of the independence of the judiciary is determined by issues such as the appointment, dismissal, remuneration, condition of service of officers of the judiciary who/(which) are not to be subject to the whims and caprices of the other arms of government or any other individual.

In Nigeria, it is only the Supreme Court that has the jurisdiction to try cases of disputes between states or between the Federation and a state in relation to the existence or scope of a legal right. For example, see:

- the case of Attorney General of Bendel State v Attorney General of the Federation & Others (1982) 2 NCLR 1, where the Supreme Court agreed with the contention of the AG of Bendel State and decided that the manner in which the National Assembly passed the appropriation bill was unconstitutional, and should therefore be sent back to the house to undergo the proper procedure.