

Techniques for Division of Legislative Powers under Federal Constitutions

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Abstract

This article appraised the techniques employed for the division of legislative powers under federal constitutions generally and under the Constitution of the Federal Republic of Nigeria 1999 in particular. In doing justice to the topic, the paper examined the two models for dividing legislative powers namely, the integrated or interlocking model and the dualist or classical model of which it was discovered that the latter is the model largely followed by the CFRN 1999. It also considered the method of dividing legislative powers by enumeration and by allocation of residual power; rationale or criteria for division of powers and symmetrical versus asymmetrical distribution of legislative powers. The author among others discovered that while the division of legislative powers under the CFRN 1999 is largely symmetrical, the rationale for the division could hardly be generalised in comparison with other federal constitutions.

Keywords: Federalism, Legislative Powers, Division of Powers, Constitutions

Introduction

This paper focuses on an examination of the techniques employed for the division of legislative powers under federal constitutions in general and the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as altered) in particular. Division of powers is a normal and universal incidence of all federal states¹. As noted by Wheare, the federal principle refers to the “method of dividing power so that general and regional governments are each within a sphere co-ordinate and independent.”² This same thought is reiterated by Nwabueze when he defines federalism as:

an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalised (i.e. territorially localised) governments in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others.³

As discernible from the above, federalism as a form of constitutional arrangement and political organisation of a state has to do with division of powers between a federal government⁴ and state governments⁵ of the component parts of a country. Now, state power is usually divided into three, namely: judicial power, executive power and legislative power. This is in consonance with the constitutional principle of separation of powers⁶.

This paper focussing as it is on techniques for division of legislative powers under the CFRN 1999 is therefore only concerned with an aspect of the broader issue of division of powers and an aspect of the more specific issue of division of legislative powers under federal constitutions. Without any gainsaying the fact, the nature, extent and mode of division of powers between a federal government and state governments is a major factor in determining whether a country’s system of government is actually federal, confederal, semi-federal or unitary. As put by Encyclopaedia Britannica, “Federal and unitary systems are ideal types, representing the endpoints of a continuum”⁷

This actually becomes more pertinent when the peculiar nature of Nigeria’s federalism is taken into consideration. For instance, Nigeria actually operates a unitary (that is, one) constitution for its federal governmental arrangement. This no doubt is an incongruity. As put by Nwabueze, “Few contradictions could be

¹ The word ‘states’ is used in this instance in the same sense as the concept of ‘State’ under international law. See Art.1, Montevideo Convention on Rights and Duties of States 1933 (1934) 165 L.N.T.S. 19

² KC Wheare *Federal Government* (Oxford: Oxford University Press, 4th edn, 1964). See also KM Mowoe *Constitutional Law in Nigeria* (Lagos: Malthouse Press Limited, 2008) p.49.

³ BO Nwabueze *The Presidential Constitution of Nigeria* (London: C. Hurst & Company, 1982) p.37.

⁴ Also “national government”, “central government”, “nation-wide government” or “country-wide government”.

⁵ Also “provincial governments”, “regional governments”, “sub-national governments” or “intermediate governments”.

⁶ The principle of separation of powers is well entrenched in the CFRN 1999 (as altered). See sections 4, 5 and 6 which respectively vest legislative, executive and judicial powers in separate organs and persons.

⁷ “constitutional law”, *Encyclopaedia Britannica Student and Home Edition* (Chicago: Encyclopaedia Britannica, 2010)

more self-evident than that of a unitary constitution for a federal system of government. For unitarism and federalism are mutually exclusive, logically opposing concepts.”¹

It should be noted also that the idea of a government implies a constitution. Nwabueze in the following words further elucidates this point:

In this sense, which is the sense in which it was originally used, a constitution refers simply to the frame or composition of a government, to the way in which a government is actually structured in terms of its organs, the distribution of powers within it, the relations of its organs inter se, and the procedures for exercising powers.²

This is the same sense in which McIlwain defines the word “constitution” taking it to mean “the substantive principles to be deduced from a nation’s actual institutions.”³ The normal practice therefore is for states in federal systems to:

...have their own constitutions that define the institutions of their respective governments, as well as the powers that are devolved further to their local governments. Such constitutional arrangements are a guarantee against possible efforts of the central government to enlarge its jurisdiction and so imperil the important political role that intermediate governments play in a federal system.⁴

The CFRN 1999 in this respect differs from the 1960 Independence Constitution which by virtue of the Nigeria (Constitution) Order in Council 1960 makes provision for the Constitution of the Federation of Nigeria in its 2nd Schedule and its 3rd, 4th and 5th Schedules respectively makes provision for the Constitution of Northern Nigeria, the Constitution of Western Nigeria and the Constitution of Eastern Nigeria.⁵ This arrangement was also followed in 1963 under the Republican Constitution whereby the Federal Parliament reviewed the federal constitution and therein granted authority to regional legislatures to enact their own constitutions.⁶ The arrangement was however discarded under the 1979 and 1999 Constitutions for reasons best known to the drafters of these constitutions reverting to the 1951⁷ and 1954⁸ constitutional form of organizing both the federal and regional governments under only one constitution.

It should also be noted that the current division of powers was actually arrived at by a process of devolution of government unlike what normally operates in federal states where the federating units or states are the ones that willingly and by (constitutional) agreement relinquish part of their powers (particularly sovereignty) to the federal or central government. In Nigeria’s case, an almighty central government was already in existence before part of its powers was devolved unto regional governments due to political agitation for self rule and regional autonomy particularly during the colonial period⁹.

The drafting committee on the review of the Nigerian Constitution in 1951 in this respect observed as follows:

The federal governments of U.S.A., Canada and Australia have been built on the basis of separate states surrendering to a federal government some of their powers for the benefit of all. The reverse process on which we are engaged – that of the creation of a federal government by devolution – is a political experience for which – there is no precedent to guide us and we are very conscious of the dangers involved in such an experiment¹⁰.

As aforesaid, the immediate aim of this article is to examine the techniques for division of legislative powers employed under the CFRN 1999 (as altered) with reference to the practice of federations across the world¹¹

¹ B Nwabueze, *Constitutional Democracy in Africa* vol.1 (Ibadan: Spectrum Books Limited, 2003), p.1.

² B Nwabueze, *Ideas and Facts in Constitution Making* (Ibadan: Spectrum Books Limited, 1993) p.1.

³ CH McIlwain, *Constitutionalism: Ancient and Modern* (1940) available at

<http://www.constitution.org/cmt/mcil/w/mcilw.htm> (accessed 18 October 2012).

⁴ ‘constitutional law’. *Encyclopaedia Britannica Student and Home Edition*, Chicago, Encyclopaedia Britannica, 2010.

⁵ See JA Yakubu, *Trends in Constitution Making in Nigeria*, (Ibadan: Demyax Law Books, 2003) pp.5-6.

⁶ See Nwabueze, above n 8, p.63.

⁷ Macpherson’s Constitution.

⁸ Lyttelton’s Constitution.

⁹ See MO Adediran *Constitutional History of Nigeria* (Ile-Ife: Cleanprint, 2004) for a succinct account of Nigeria’s constitutional history.

¹⁰ See Nwabueze, above n 8, p.62

¹¹ G Anderson *Federalism: An Introduction* (Ontario: Oxford University Press, 2008) p.22.

highlighting the underlying theoretical and philosophical bases. To this end, this article considers the two models for dividing legislative powers; division by enumeration and by allocation of residual power; rationale or criteria for division of powers and symmetrical versus asymmetrical distribution.

Models for dividing legislative powers

A quick survey of patterns or modes of distributing legislative powers in most constitutions will reveal two dominant models which are the integrated or interlocking model and the dualist or classical model. Under the integrated or interlocking model, the power to legislate on most of the specified subject-matters are jointly shared by the federal and state governments. Only a few subject matters (such as defence, currency and customs/excise taxes) are exclusive to the federal government. Where this model is in operation, the federal government, in exercising its concurrent powers, will enact laws that give broad policy framework which the member units “can complement (but not contravene) with their own legislation.”¹ This model, according to Anderson, is also sometimes called administrative federalism because the principal powers of the constituent units are administrative.² This however does not mean that the member units are mere appendages of the central government. For instance, in Germany (which aptly exemplifies the model), before federal laws are made in the areas of concurrency, the support of the representatives of the *Länder*³ in the *Bundesrat*⁴ by way of a majority vote, must be obtained. Other countries that follow this model are South Africa, Austria and Spain.

The dualist model is also known as the classical model of federalism. It is so named because it proposes a neat division of powers between the federal government and the state governments. Constitutional jurisdiction over certain subject matters should thus be specifically granted to one order of government to the exclusion of the other. The dualist model in practice however does not achieve the desired neat division or separation of powers as many issues cut across regional, national and international interests and inter-governmental consultation and cooperation are daily facts of governmental practice among various federations of the world. In fact, virtually all dualist constitutions have some areas of concurrent exercise of legislative powers. Brazil, Canada and the United States of America largely follow the dualist model.

Nigeria also largely follows this model. This is because section 4(1) of the CFRN 1999 vests the legislative powers of the Federal Republic of Nigeria in a National Assembly for the Federation while section 4(6) vests the legislative powers of a State in the House of Assembly of that State Assembly. The National Assembly is a bicameral legislative body consisting of a Senate and a House of Representatives. The National Assembly normally exercises exclusive and concurrent legislative powers by the combined reading of section 4(2), (3) and (4). Both the Exclusive Legislative List with 68 items and Concurrent Legislative List with 12 items are contained in the Second Schedule to the Constitution. There are however other matters in the body of the Constitution upon which the National Assembly exercises either exclusive or concurrent legislative powers.

State legislative powers under the CFRN 1999 are three-fold. First are the powers relating to matters expressly provided for in the body of the Constitution. Examples here are state legislative powers in relation to: public order and public security⁵, regulation of Local Government system⁶, creation of new local governments⁷, passage of Appropriation Bills⁸, and prescription of powers of and procedure to be followed by a panel set up to investigate allegation of gross misconduct against a Governor⁹.

Next are legislative powers granted under the Concurrent Legislative List and it should be noted that the Constitution has gone to a great extent to delineate between the concurrent powers exercisable by both Federal and State Legislatures so that the powers of both levels of government may not necessarily be co-extensive over all areas of the specified matters. That is, they may simply co-exist with respect to some aspects of the specified matters. In fact, the Concurrent Legislative List under the CFRN 1999 is somehow innovative in its approach. Credence is given to this observation because instead of simply enumerating the areas of concurrent legislative competence, the Constitution goes ahead to carefully define the scope of Federal and State powers in respect of the enumerated items. Hence, the fact that a matter appears on the Concurrent List does not mean that both the Federal and State Governments can legislate over the entire field. The specifications and limitations set against each matter on the list must be had in view to determine the legislative powers exercisable thereunder. In doing

¹ Ibid.

² Ibid.

³ That is the member units or states of the Federal Republic of Germany.

⁴ That is the 69-member Upper Chamber or Federal Council. See "Germany" in *Encyclopaedia Britannica Student and Home Edition*, Chicago, Encyclopædia Britannica, 2010.

⁵ Section 11.

⁶ Section 7.

⁷ Section 8.

⁸ Section 120 (2), (3), (4).

⁹ Section 188 (7).

this, the Constitution seems to have actually in certain respects granted exclusive legislative powers respectively to both the Federal and State Governments over the specified areas of some of the enumerated matters on a Concurrent Legislative List! .

The third category consists of legislative powers referred to by section 4(7)(a) as relating to “any matter not included in the Exclusive Legislative List,” and it by implication includes any matter not also included in the Concurrent Legislative List. This in other words refers to the residual legislative powers of the States making up the Federal Republic of Nigeria.

Switzerland and India have strong features of both the integrated model and the dualist model. But while Australia is largely dualist in arrangements, its large areas of concurrency make it to also possess features of the integrated model. The basic fact though is that no federation is purely of one form to the exclusion of the other. All share certain features of both models - it is the degree of conformity that differs.¹

Enumerated and residual powers

A universal technique for the division of legislative powers in federal constitutions is the use of enumerated powers and assignment of residual powers. There are different ways by which legislative powers are assigned via enumeration. First is to have only one list containing subject-matters upon which either the federal government or the state government exercises exclusive legislative competence. Where this occurs, the other government will be assigned the residual legislative powers. The United States Constitution for example contain only one list of enumerated powers exercisable by the Federal Government thereby reserving all other powers not specifically mentioned to the states.²

Second is to have two lists – an exclusive list and a concurrent list. This as previously stated is the method adopted by Nigeria under the CFRN 1999 which contains an Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution upon which the National Assembly can legislate and a Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution upon which both the National Assembly and State Houses of Assembly can legislate to the extent prescribed in the second column thereto.³

A federal constitution may also contain three legislative lists which will contain two exclusive legislative lists – one for the federal government and the other for the state government. The third list will then be a concurrent list upon which both levels of government can legislate. The Indian and Canadian Constitutions typify this arrangement. The Indian Constitution has what it calls the Union list, State list and Concurrent list. The Indian Constitution also grants the Union Parliament the power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State list.⁴

It should be noted however that apart from the legislative lists, power to legislate over certain matters may equally be assigned to either level of government elsewhere in the Constitution. The CFRN 1999 for example in section 11 bequeaths the power to legislate on public order and public security on both the National Assembly and the State House of Assembly. The section states:

- (1). The National Assembly may make laws for the Federation or any part thereof with respect to the maintenance and securing of public safety and public order and providing, maintaining and securing of such supplies and services as may be designated by the National Assembly as essential supplies and services.

- (2). Nothing in this section shall preclude a House of Assembly from making laws with respect to the matter referred to in this section, including the provision for the maintenance and securing of such supplies and services as may be designated by the National Assembly as essential supplies and services.

What are the implications of dividing legislative powers via enumerated and residual powers? According to Nwabueze:

¹Anderson, above n 18, p.22.

² See Tenth Amendment to the United States Constitution and sections 51 and 90 of the Constitution of the Commonwealth of Australia

³ Section 4.

⁴ See Articles 245-246 of the Indian Constitution.

Having only one list of matters exclusive to either the national or regional governments and leaving the residue to the other has the advantage of simplicity and eliminates the uncertainty and conflict which necessarily result from a second (i.e. concurrent) list; a third list inevitably adds to such uncertainty and conflict.¹

It would thus seem that having only one exclusive legislative list is a better arrangement thereby avoiding the perceived disadvantages of uncertainty, cumbersomeness and conflict occasioned especially by the existence of a concurrent list. The truth however is that even in federations where the federal constitution contains only one list, disputes over what constitute a constitutional exercise of legislative powers between the federal government and the states are not uncommon.²

However the advantages of assigning exclusive legislative responsibility to one level of government or another are somewhat obvious. And it needs be pointed out that residual legislative authority is also exclusive to whatever level of government it is assigned by the Constitution. Exclusive legislative authority reinforces the autonomy and independence of each level of government. This as previously explained is an important feature of federalism which primarily concerns itself with the delicate balancing of shared rule with self rule. Also, exclusivity makes evident the government responsible for policy formulation and implementation in particular areas.

Nonetheless, as pointed out by Watts;

... even where most powers are assigned exclusively to one level of government or the other, experiences such as those of Switzerland, Canada and Belgium indicate that it is virtually impossible to define watertight compartments of jurisdiction and some intergovernmental interaction are unavoidable.³

A recognition of this inevitable feature of federal systems has in practice “softened the exclusivity of the allocated powers even where they have been emphasized”⁴ thus leading to extensive concurrent legislative areas being ab initio assigned by the constitutions of some federal countries such as Nigeria, Australia, Germany, Mexico and Brazil.

It can be said then that a number of advantages do attach to the use of the technique of concurrent legislative powers. Some of the advantages have been clearly articulated by Watts.⁵ According to him, concurrency provides an element of flexibility in the distribution of powers, enabling constituent unit legislatures to pursue their own initiatives until such time as the subject becomes one requiring federal action. Also, especially in providing essential social services, concurrency provides a means by which the federal government “may legislate to secure a basic national uniformity and to guide regional legislation, while leaving with the regional legislatures the initiative for details and for adaptation to local circumstances”. In a country like Germany (and to some respects in Brazil, Mexico and Spain), the federal government is constitutionally specially empowered to enact “framework legislation” in certain fields so that the Lander may then by legislation supply the missing details.

Also, concurrency permits the federal government to intervene in normally regional fields of activity so as to “provide remedies for particularly backward regions or for difficulties arising from regional legislation which affects other regions”. Next, concurrent listing of legislative powers equally obviates the need for complicated and detailed enumeration of legislative jurisdictions for each level of government thereby avoiding the inevitable possibility of such detailed divisions and sub-divisions of responsibilities becoming obsolete and restrictive over time. And as earlier noted, the use of the concurrency technique also encourages cooperation among the different levels of government thus facilitating “cooperative federalism” and unity in diversity.

It may also be apposite to quote the observation of the Joint Committee on Indian Constitutional Reforms on the necessity for the use of the concurrency technique:

Experience has shown, both in India and elsewhere, that there are certain matters which cannot be allocated exclusively either to a central or to a

¹ Nwabueze, above n 3, p.45.

² See Constitution of Australia, available at <<http://www.experiencefestival.com/a/constitution-of-Australia/id/1922947>> (accessed on 22 February 2011)

³ RL Watts, “Comparative Conclusions” <http://www.federalism.ch/files/categories/IntensivkursII/comparative_g2.pdf> (accessed on 23 April 2012).

⁴ loc cit.

⁵ Generally Watts, above n 34. Also see Nwabueze, above n 3, pp. 45-46 quoting Watts, *New Federations: Experiments in the Commonwealth* (1966) pp 174-175.

Provincial legislature and for which though it is often desirable that provincial legislation should make provision, it is equally necessary that the central legislature should also have a legislative jurisdiction enable it, in some cases to secure uniformity in the main principles of law throughout the country, in others, to guide and encourage provincial effort and in others, again to provide remedies for mischief arising in the provincial sphere, but extending, or liable to extend beyond the boundaries of a single province.¹

On the use of the residual legislative power, it is important to note that while the extent of this power will definitely be influenced by the extent of the enumerated powers, it is of itself at the theoretical level infinite being not enumerated. Also while the power is usually granted to the states, it may also be granted to the federal government. The Indian Constitution following the Canadian model for example grants the residual powers to the Union Parliament. The CFRN 1999 however follows the United States model in assigning residual power to the states. In the same vein, the essence of the use of residual powers come to the fore when we realise that no matter how detailed enumeration is, some matters will still be omitted either due to oversight or because such are currently envisaged by no one from practical and experiential point of view.

One thing is certain, all federations via the use of enumerated and residual powers seek to pragmatically balance a system of shared powers and responsibilities consequently promoting interaction between the orders of government (integrated or cooperative federalism) on one hand with a system of independent and exclusive operation of the dual orders of government thus promoting self rule and handling of matters of local concern peculiarly as occasions demand (dualist federation) on the other hand.

Rationale or criteria for distributing legislative powers

A careful survey of the patterns of dividing legislative powers in various federal constitutions will hardly indicate an adherence to some universally accepted logical criteria. Instead, it seems that the criteria adopted in deciding upon the contents and modes of enumerated or residual legislative powers are largely informed by a process of political bargaining and interest groups compromises resulting from historical and socio-cultural experiences of the peoples of each federation.

For example, while some matters such as defence, customs/excise taxes, currency and external affairs always or usually fall under federal legislative competence, others such as post-secondary education, agriculture, mineral resources and criminal law have no clear pattern. Also while the Constitution of a country like the United States contains only 12 enumerated items, that of India contains three long lists- the Union list has 97 headings, the Concurrent list has 47 and the State list has 66. The Canadian Constitution originally had only agriculture and immigration² as areas of concurrent jurisdiction. To these have been added by constitutional amendments - old age, pensions and supplementary benefits,³ and export of non-renewable natural resources, forest products and electrical energy.⁴

A lot also depends on the process by which the federation is established. Where the process involves the coming together of previously independent or distinct units, since the units already possess specified or unlimited legislative authority, the new federal government will only be given exclusive and concurrent legislative authority in areas necessary for its effective functioning while the residual powers will remain with the member units. Switzerland, the United States and Australia are classic examples of this.

On the other hand, where as is the case in Spain and Belgium, the federation is created through a process of devolution of powers from a previously unitary state, the tendency is for the federal government to retain most of the powers while those of the units are clearly specified and the residual authority remains reserved to the federal government. In countries such as Nigeria, Brazil and Mexico which have experienced periods of military or authoritarian rule, the tendency is to have a relatively centralised division of legislative powers but in order to reflect the change to democratic rule, residual powers are reserved to the states while federal exclusive and concurrent powers are specified. Also, some federations such as India and Canada were established out of the processes of aggregation and devolution and their constitutions provide for exclusive federal, exclusive state or provincial and concurrent powers with residual legislative powers going to the federal government.

¹ Joint Committee on Indian Constitutional Reforms (1934) pp, 30-31, para 51 quoted by S, P. M. Bakshi, "Concurrent Powers of Legislation under List III of the Constitution" <http://lawmin.nic.in/ncrw_c/finalreport/v2b3-3.htm> (accessed on 2 February, 2011).

² Section 95, Constitution Act (Canada)

³ Section 94 A, Constitution Act (Canada)

⁴ Watts, above n 34.

The period during which a Constitution is drafted is also important. The newer federal constitutions of the latter half of the 20th century for example contain much more detailed lists of legislative powers than the earlier ones of the 18th and 19th centuries which contain division of powers in fairly general terms. One may in this regard compare Indian Constitution's exhaustive Union list (97 items), State list (66 items) and Concurrent list (47 items) with the United States Constitution's 12 listed items.

As noted by Watts;

Another factor affecting the character of the constitutional distribution of powers is the influence of earlier models. The example of the United States was consciously in the minds of the constitution drafters in Switzerland, Australia, Germany, Brazil and Mexico while in India the Government of India Act, 1935- itself patterned on the Canadian model had a strong influence upon the Constituent Assembly shaping the new Constitution in 1950.¹

The above observations of Watts are no doubt valid as touching the CFRN 1999 which to some extent seems to be patterned after the United States model.

The principle of subsidiarity has also been developed in rationalising the distribution of powers between a central government and the member units. This principle has recently come to prominence in Europe due to its inclusion in European Union treaties. According to Follesdal, the principle of subsidiarity "holds that authority should rest with the member units unless allocating them to a central unit would ensure higher comparative efficiency or effectiveness in achieving certain goals".² This has enabled the members of the European Union to continue to exercise exclusive legislative powers over traditional areas of federal governments such as defence and foreign policy.³ The principle as enshrined in the European Community Treaty 1957 (as amended)⁴ is to the effect that "in areas falling within its exclusive competence, the community shall take action only if be and in so far as its objectives cannot be sufficiently achieved by the member states."⁵ The practical essence of this principle is its ability to quell fears of undue centralisation resulting in an overtly strong central government which some member units may not be willing to permit in a federal arrangement.

Symmetrical versus asymmetrical division

A symmetrical division of legislative powers is the usual technique employed in most federal constitutions such as those of Nigeria, the United States, Australia, Germany, Switzerland and Mexico. By this arrangement, all member units enjoy equal or uniform legislative powers on the same fields of activity or matters. But sometimes, the asymmetrical division of powers may also be employed to cater for peculiar features, circumstances, needs, requirements or conditions of one or more member units. When the asymmetrical method is employed, there is some sort of variation in the legislative powers exercisable by member units or some member units enjoy greater autonomy than the others. India, Spain and Belgium are examples of countries that use the asymmetrical method.

The Canadian constitutional division of powers is basically symmetrical in form but special provisions do exist allowing Quebec different authority from (though this is usually harmonized with) that of the other provinces. Part of the reasons for this asymmetry is to enable Quebec preserve its rich French cultural heritage and civil law system as opposed to the English heritage and common law system of the other provinces.⁶ In Spain, "historical communities" such as Catalonia, Navarre, Galicia and the Basque country have more powers than other autonomous communities, partly to deal with their distinctness and to appease nationalist leanings, partly out of the respect of privileges granted earlier in history.⁷

Though not a federation, the asymmetrical devolution of legislative powers to Scotland by the Parliament of the United Kingdom is also quite significant.⁸ As pointed out by Watts, greater complexity is often

¹ Ibid.

² A. Follesdal, "Federalism" in *Stanford Encyclopaedia of Philosophy* <<http://plato.stanford.edu/entries/federalism/>> (accessed on 23 May 2011).

³ As at the date of writing this paper, the European Union is yet to empower Brussels in these areas.

⁴ Article 5, European Community Treaty (Treaty of Rome as amended) 1957.

⁵ See AW Bradley and KD Ewing, *Constitutional and Administrative Law* (Harlow: Pearson Education Ltd, 2007) p.132.

⁶ See The Canadian Encyclopaedia (2011 Historica-Dominion) <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0002320>> (accessed on 2 February, 2011).

⁷ 'Federalism' <<http://en.wikipedia.org/wiki/federalism>> (accessed on 23 May, 2011).

⁸ See A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* op cit pp.44-46.

introduced where there is asymmetry in the constitutional jurisdiction assigned to the member units. Nevertheless, it appears that the experience of some federations

has shown that the only way to accommodate sharply varying intensities in the pressures for political autonomy or to, as a transitional device, accommodate member units at different stages of political development; is to resort to constitutional asymmetry in the division of powers.¹

Some consequences of asymmetry division of powers are: pressure for the same treatment by others; pressure to limit the weight of representatives from the favoured unit(s) in the federal government's decision making processes; and contentious counter-pressure for greater symmetry. Nonetheless, the use of asymmetry in a federation is quite effective in ensuring unity in diversity. It should also be noted that even in symmetrical federal constitutions, federal territories or peripheral associated states and federacies are often differently treated. For instance, the Federal Capital Territory, Abuja enjoys a special status under the CFRN 1999.

Conclusion

As previously stated, an examination of the techniques for division of legislative powers must necessarily involve a consideration of federal principles and of pertinent provisions of federal constitutions. This is so as division of powers is a universal incidence of federalism and of nations which have embraced the federal system for their governmental arrangements. Unitary systems do not accommodate division of powers but devolution of powers. The latter concept describes what obtains in a unitary system of government where the (almighty) central government by statutory enactment grants a regional or local government some powers in specified areas. Yet, despite the creation of new level(s) of government and the devolved powers, the central government still retains executive and legislative powers over all of the country and may at any time (at least in theory) withdraw all or any of the devolved powers. For example, as pointed out by Bradley and Ewing, devolution in the United Kingdom "has come to mean the vesting of legislative and executive powers in elected bodies in Scotland, Wales and Northern Ireland, who thus acquire political responsibility for the devolved functions."²

Four basic matters concerning the techniques universally employed for division of legislative powers are considered in this paper. First are the two dominant models discernible in the distribution of legislative powers when most federal constitutions are surveyed. These are the integrated or interlocking model the dualist or classical model. While the CFRN 1999 (as altered) largely follows the dualist or classical model, it is clear that no federation fully adheres to one model to the exclusion of the other.

The technique of the use of enumerated powers and assignment of residual powers is secondly considered. This technique is utilized in Nigeria via an Exclusive Legislative List upon which only the Federal Legislature possesses legislative powers; a Concurrent Legislative List containing matters upon which both the Federal and State Legislatures may legislate to the extent prescribed by the Constitution, and the assignment of residual legislative powers to the States.

Also considered are criteria or rationale determining division of powers under federal constitutions. While there hardly exist any universally accepted logical criteria followed by federal constitutions in distributing legislative powers between Federal and State Governments, some factors do tend to affect the distribution patterns. These are: the process by which the Federation was established (that is, whether it was formed by the coming together of previously existing independent States or through a process of devolution of powers from a previously unitary State); the period the Constitution in question was drafted, and the application of the principle of subsidiarity. Finally, the technique of symmetrical or asymmetrical division of legislative powers was examined and it was discovered that the CFRN 1999 employs the former method.

¹ Watts, above n 34.

² Bradley and Ewing, above n 45, p.43.

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