The Subsidiarity Principle and Federalism Fissures in Nigeria

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Nigeria has had a chequered history in the practise of federalism. Almost six decades after it adopted the federal system in 1954, the country has continued to grapple with serious federalism fissures. A recurrent issue is the contention over distribution of vertical powers between the national and sub-national governments. A close perusal of Nigeria's federal history shows that there has been a marked increase in national power starting with the period of military government and culminating in the two Constitutions promulgated in the wake of their departure in 1979 and later in 1999. Despite the intensity of the passion generated by the issue, very little is offered in the literature on an acceptable template for distributing the country's vertical powers. Here, we propose the principle of subsidiarity as an appropriate mechanism for determining which, between the national/sub-national governments, should possess and exercise what power. We nonetheless conclude that unless the Supreme Court of Nigeria changes its attitude to federalism principles and acknowledges their relevance in federalism jurisprudence, the tide of increased national power may continue unabated.

KEYWORDS: federalism, fissures, national/sub-national, subsidiarity.

Introduction

Nigeria's federal system has continued to provoke interesting polemics the world over, perhaps because of the country's strategic and unique position as the most populous nation in Africa[2]. The debate over the system amongst Nigerians seems to have reached near feverish level (Osaghae and Suberu, 2005). While this appears to be a heartening development suggesting a growing culture of enlightened engagement necessary for democratic consolidation, some of the arguments invariably constrict the debate to ethnicity (Suberu, 2001). Even if we are wont to agree, as most scholars do, that the federal system is a veritable mechanism for managing ethnic diversity (Karmis and Norman, 2005:3) and blunting persistent agitation for secession(Clinton, 1999), federalism's virtue is far more profound than those concerns (Fenna, 2006). Its modern origin is owed more to the quest for efficient government free from the dominance of a single

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2 Nigeria is estimated to have a population in excess of 160 million people. See, for its current estimated population figure: http://www.trdingeconomics.com/nigeria.

central authority, than to its usefulness in curtailing ethnic or diversity agitations (Nivola, 2007). Despite the undeniable nexus of ethnicity and federalism, it would appear that the fissures created by unrestrained ethnic passion detract from the central problem of the federal system in Nigeria, namely how best to organize the system in such a way as to guarantee each ethnic group the benefits of the system.

There seems to be general agreement that the federal system in Nigeria is broken. This perception is premised on the cynicism which has trailed the steep increase in the powers of the national (federal) government since the late 1960s. In spite of this apparent national consensus, there remains an intense disagreement on how to resolve this obvious imbalance in the powers distributed to the federal government and the states. In this paper, we propose a principle to help refocus the debate on the future of federalism in the country. We suggest the adoption of the subsidiarity principle as the template on which to erect Nigeria's federal system and resolve the lingering question of which tier should possess and exercise what power. The rest of the paper is organised as follows: in the next section, we offer a descriptive understanding of federalism and the subsidiarity principle following which we extrapolate their invariable nexus in the federal system. Thereafter, we discuss Nigeria's federal system and examine its subsidiarity credentials. We then offer a comparative perspective on the application of the principle. In the concluding rubric we summarize the paper.

Conceptualizing Federalism and Subsidiarity

Subsidiarity is axiomatic of federalism (Ben-David, 2011:8) ; or to quote Jenna Bednar, subsidiarity is the "soul of federalism" (Bednar, 2013). Both ideas are inextricably tied together. Although there is a continuing global debate on the theoretical amplitude of the idea (Gampeer, 2005), federalism is not by any means formless, nor is it an abstract ideological model; rather, it is a process of bringing people together through practical arrangements intended to meet both common and diverse preferences of people (Watts, 1994:7). There are several conceptual perspectives of federalism, ranging from law, economics, politics, sociology and history among many others (Jinadu,1997: Okpanachi and Garba, 2010:4). From the legal standpoint, federalism could be conceptualized as a form of government which institutionalizes vertical distribution of power in such a way as to demarcate which, between national and subnational tiers, is competent or authorized to exercise defined powers within the framework of a written constitutional text.

The jurisdiction of each levels of government and the extent of their sovereignty in exercise of their assigned powers seem to dominate normative discus

sion of federalism more than all else. The primary concern of normative inquiry is to determine the extent to which the federal system of a particular country entrenches a scheme of vertical distribution of power in order to guarantee the dual sovereignty of the national and sub-national units within their respective domains of constitutionally assigned powers (Mark, 2003:4).

On its part, the subsidiarity principle postulates that in a federation, the powers of government should be exercised by the sub-national units (states) because they possess more competence in solving problems which confront government daily and that the national (federal) government should only exercise power in respect of those matters in which the sub-national units are incapable of achieving result acting on their own because such matters are wide in scope, complex in nature or are of broad national effect (Bednar, 2013; Follesdal, 1998).

The principle forms an integral part of federalism theory and manifests in the practical workings of successful federations the world over although not often expressed in their constitutions. Johannes Althusius (1995) in *Politica Methodice Digesta* (1614) first formulated and proclaimed the subsidiarity principle as the cornerstone of federalism. Recently, a number of scholars, notably Calabresi and Bickford (2011:4); and Bednar (2013) took a fresh look at the principle and reaffirmed its indispensability in federal formation. Their inquiries focus on the public good and efficiency utility of the principle in the federal system. Calabresi and Bickford identified four of the principle's public good virtues, namely: 1) subsidiarity ensures sub-national variation in preferences; 2) deepens competition for tax payers and businesses and thus improve the quality of public service delivery (Calabresi and Bickford, cited in Tiebout, 1956:3); 3) enhances experimentation to develop the best set of rules; and 4) makes public policy monitoring less costly and more effective when performed by state officials than when performed by federal officials since it is easier for people to physically observe and question government officials who are in close proximity to them than those far away in the national government.

Bednar suggests a novel benefit of subsidiarity namely, that it boosts the adaptive efficiency of the federal system. For her, to remain relevant, federal systems must adapt to meet changing circumstances. The process of adaptation requires furthering the boundaries of federalism in the quest to improve national/ sub-national balance. Bednar concludes that the imperative of subsidiarity to federal system robustness is not only in dispersal of authority but in generating different ideas about practical solutions to problems at different levels of government with the sub-national level taking the lead in policy initiative and experimentation.

The subsidiarity principle constitutes an integral part of the United States'

federal system (Halberstam; Bayer, 2004). The principle is present in the constitutional design of Germany (Rau, 2003), Switzerland (art. 5a of the Swiss constitution; Ladner, 2010; Church and Dardanelli), the European Union[3], Australia (Brown, 2002) and in normative federalism doctrines in Canada (Hogg, 1993). It also forms the basis of constitutional reforms in many European countries traditionally classified as unitary such as the Netherlands (Follesdal, 1998:194) and Italy (Groppi and Scatton, 2006).

Federalism in Nigeria and the Challenges of Subsidiarity

The pedigree of federalism in Nigeria appears to be markedly distinct. The historical foundation of Nigeria's federal system is quite unique. It is at once a testament to the success of the amalgamation of Northern and Southern Nigeria by the British in 1914 and to the unwillingness of the colonial regions to go their separate ways when faced with that choice during the decade of de-colonialization (1950 – 1960) (Ekeh, 2000). The form of federalism, especially distribution of power, which emerged from this historic foundation, was bottom-up. By that arrangement, the regions possessed a good amount of authority while the federal government was assigned major economic power (Afigo and Uya).

This normative arrangement was inspired by the consensus reached by the British colonial government and the major political actors of the time to avoid a unitary form of government in preference for a federal system with sufficient assurance of dual sovereignty of the national and sub-national units; and by the desire for union rather an implacable quest for unity[4]. What has remained consistent in all of Nigeria's federal constitutions is the dual structure of distribution of powers (Inegbedion and Omoregie, 2006). The structure of distribution of power from the first federal Constitution of 1954 to the current Constitution

3 Article 3b (2) of the Maastricht Treaty on European Union, 1992 makes the clearest reference yet to the subsidiarity principle when it provides that "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community..." See, Schtze, Robert "Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism? (2009) 68 (3) *Cambridge Law Journal* 525.

4 Osadolor, B.O. "The Development of the Federal Idea and the Federal Framework, 1914-1960" and Tamuno, Tekena "Nigerian Federalism in Historical Perspective" in Amuwo, Kunle, eds. et al, *Federalism and Political Restructuring in Nigeria* (Ibadan: Spectrum Books, 1998) at 42-5 and 4 respectively. In Tamuno's paper, he extensively quoted Honourable Justice Fatai-Williams' intriguing summation of how Nigeria became a federation which his Lordship described as "unscrambling scrambled eggs" whereby the country transmuted from a unitary colonial state to a federal system (after many years of practice of the former), an act Fatai-Williams implicated for the country's continued challenges with federalism.

of 1999 provide for two lists of powers, one exclusive to the national government and the other concurrent to both the national and sub-national governments (See for instance, s. 4(2) (3) of both the 1979/99 constitutions). All constitutions guarantee that unlisted residuary powers be exercised exclusively by the sub-national government (S. 4(4) (a) (7) (b) 1979/99 constitutions).

In due course, however, starting with the coup of January, 1966, this conscious arrangement began to unravel. In his pioneering critique of the trend which was underscored by assignment of more vertical powers to the national government, Dudley argued that whereas federalism, as a theory of organizing a pluralist society for governance, was consciously adopted by the founding fathers of Nigeria in the early 1950s in order to secure equal and co-ordinate constitutional status for the regions, on the one hand, and between the regions and the centre on the other, economic and political forces conjointly provided a political landscape in which the regions became virtually subordinate to the central authority (Dudley, 1966). He cited in particular the exercise of federal emergency power by the federal government in 1962 in the Western Region as a watershed in this scenario[5].

During the period of military rule (1966-1979; 1983-1999), the military claimed the power to decree laws in respect of all matters, including those hitherto constitutionally reserved for the states. The consequence of those decrees was that during the period of military rule there was no federalism at all (Sagay, 2008:40-56). In fact, federalism was virtually abolished, not necessarily in clear words[6], but by necessary implication[7].

5 That year, the Prime Minister, Sir Abubakar Tafawa-Balewa declared an emergency rule in the then Western Region pursuant to powers conferred on him by the Emergency Powers Act, 1961 following political schism in the region which resulted in a brawl in the regional parliament. The Act itself was passed by virtue of s. 65 of the 1960 Constitution which conferred on the federal parliament the power to make laws where it appears "necessary or expedient" for the purpose of maintaining or securing peace, order and good government during any period of emergency.

6 Perhaps to his eternal regret, only General Johnson Aguyi Ironsi, who took over the reins of government in the first military coup of January 15, 1966 had the indiscretion of openly abolishing federalism in the government of Nigeria when his government passed the infamous *Decree No. 34* of May, 1966 renaming the military government "National Military Government" and nationalized all federal and state institutions including the courts system as well as the civil and public service etc: see Elaigwu, Isawa J. note 60, at 9 – 11.

7 This implication can be found in the clear letters of the decrees. The first of them was Decree No. 1 of 1966 which stated in sections 1, 2, and 3 as follows:
1. the Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.
2. The Military Governor of a Region:
a) Shall not have power to make laws with respect to any matter included in the Exclusive Legislative List; and

While handing over to civilian government in 1979 and later in 1999, the military government appeared to have left the country with a mere shadow of federalism in the 1979/99 Constitutions. Basic principles of federalism seem to have been so fundamentally altered as to create a skewed distribution of vertical power by which the federal government currently possesses far greater powers than was the case in the 1954, 1960 and 1963 constitutional texts. Thus, whereas the 1960/63 Constitutions contained 45 items in their Exclusive Legislative Lists, the 1979/99 Constitutions contain 66 and 68 items respectively. Indeed, certain matters which were hitherto in the Concurrent Lists of the 1960/63 Constitutions were transferred to the Exclusive Lists of the 1979/99 Constitutions. Among these are, drugs and poisons, election of Governor and members of the House Assembly of a state, finger print identification and criminal records, meteorology, labour and trade union matters, police, prisons professional occupations, stamp duties, tourist traffic, registration of business names, incorporation of companies, among others.

In addition, under both the 1979/99 Constitutions five matters which hitherto belonged residually to the states under the 1960/63 Constitutions were assigned exclusively to the federal government. These were Evidence, Finger Print, Fishing and Fisheries, Public Holidays, Regulation of Political Parties and Stamp Duties[8].

In addition to the usual refrain of having been influenced by its central-command orientation, one possible reason why the military government felt compelled to constitutionally institute a sea change in the context of vertical powers was to further its goals of national unity and national integration having regard to the military's unpleasant experiences, including fighting a bitter Civil

b) Except with prior consent of the Federal Military Government, shall not make any law with respect to any matter included in the Concurrent Legislative List.

3. Subject to (sub)section (2) above and to the Constitution of the Federation, the Military Governor of a Region shall have power to make laws for the peace, order and good government of that Region.

This remained the pattern in all other military regimes of 1975 – 1979, 1983 – 1985, 1985 – 1993, 1993 – 1999. However, in the General Sanni Abacha regime which lasted from 1994 till his death in June 1998 the military government passed *Decree No. 12* of 1994 in which the Federal Military Government declared itself as being established with "absolute" powers to make laws for the peace, order and good government of Nigeria or any part thereof (including of course, all the states) with respect to any matter whatsoever. Sagay has described this declaration as the farthest and the most extreme extent the military went to undermine the federal status of Nigeria: Sagay, 2008: 37.

8 See items 24, 29, 51, 56 and 58 of the 1999 Constitution. These matters were not listed in the Exclusive and Concurrent Legislative Lists of the 1960/63 Constitutions and were therefore state matters in exercise of their residuary powers.

War (1967-70) after it shot its way to power in January 1966[9]. The military government may have been frightened to concentrate power more in the national government in the apparently uninformed belief that this might stave off centrifugal forces and guarantee sustainable national unity and integration. However, from the perspective of basic principle, including that of subsidiarity and with the benefit of hindsight, these goals do not fit with the idea of federalism which, to be sure, is focused on promoting union between the federating units for public good (Bednar, 2005; Ritzer and Ruttloff et. al, 2006), much more than promoting unity or integration!

Thus, it is possible to suggest that much of the current problem of dysfunctional federalism in Nigeria stems from the erosion of the imperative prin ciple of subsidiarity[10]. The principle was implicit in the design of the federal system introduced in the last colonial constitution of 1954. It was also manifest in both the Independence Constitution of 1960 and the Republican version of 1963. The subsidiarity template of the pre-1966 constitutional framework have evidently been discarded in preference for consociational precepts of "national integration", "national unity", "federal character" and the institution of economic policy to forestall "the concentration of wealth or the means of production and exchange in the hands of a few individuals or group(s)" (S. 16(2) (c), 1999 constitution) contained in the Second Chapter of the 1979/99 Constitutions.

The transfer of many concurrent matters in which the regions played active part in the First Republic to the Exclusive Lists of the 1979/99 Constitutions demonstrates a clear deficit of the subsidiarity principle, underscored by a conscious policy of the military junta to undermine sub-national power in favour of national power. The complete exclusion of the states from those transferred matters significantly undermines the initiative which the states, as laboratory of development, would have taken in such matters. As remarked by Justice Brandeis in his famous words on this subject, the denial of such initiative to the states

9 See ss. 14 (3) (4) and 15 (1) – (5) of the 1979 and 1999 Constitutions. S. 14 (3) (4) instituted "federal character" in Nigeria and require all federal and state governments' positions be evenly spread to forestall predominance of a few ethnic or sectional groups and promote national unity, national loyalty and recognise the diversity of the country. S. 15 (1) – (4) declares the promotion of national integration as a key political objective of the country.

10 Omoregie, Edoba "The Proposed National Health Law: Emergent Federalism and Subsidiarity Issues in Nigeria" (2012) 1 *Journal of Health Law and Policy*, 51. The gravamen of the paper is the assertion that federalism, nay subsidiarity principle, would be eroded if the President assents to the National Health Bill already passed by the National Assembly as the proposed law effectively seeks to nationalize health matters whereas such matters are essentially residuary matters for the states, subject to the provision of item 17 of the concurrent list of the 1999 Constitution which grants power to the federal government in certain health matters.

is fraught with serious consequences to the nation since "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 and economic experiments without risk to the rest of the country." [11]

The implicit constitutional distortion of federalism principles in Nigeria's extant constitutional framework notwithstanding, it seems that any hope of their revival through the judicial process seems to have been dashed by the attitude of the Supreme Court to those principles as they apply to federalism jurisprudence. Thus, in *Attorney General of Abia State & ors. v. Attorney General of the Federation*[12], Uwaifo JSC said with the approval of his brother Justices[13] that "once the words of any section of the Constitution are to be interpreted and applied, they cannot be defeated upon some idealism or doctrine, but the court must presume that the framers of the Constitution were well aware of such doctrine but preferred the wisdom of inserting in the Constitution an exigent though apparently aberrant provision."[14] In that case the dispute turned on the full amplitude of the revenue allocation principle contemplated by s. 162 of the 1999 Constitution. The suit was instituted by all 36 States against the Federal Government. The States appeared to have been buoyed by the earlier Supreme Court decision in *Attorney General of the Federation v. Attorney General of Abia State & ors* [15]. There, the court decided that s. 1 (d) of the Revenue Allocation (Federation Account, etc) Act, Cap 16 of the Laws of Federation of 1999 as amended by the *Allocation of Revenue (Federation Account, etc) (Modification)* Decree No. 106 of 1992 was inconsistent with of s. 162 of the 1999 Constitution in so far as the former made provision for allocation of revenue to special fund and was accordingly declared null and void.

Following this judgment, President Olusegun Obasanjo issued an Order, *Allocation of Revenue (Federation Account, etc) (Modification)* Order of 2002 with retroactive effect to 29th May, 1999, the day he was sworn in as President. The Order sought to modify Cap 16 (as amended) to bring it into conformity with the provisions of the Constitution, by which it gave 7.5 percent of the Federation Account to the Federal Government. The fresh suit was filed by the States to express their dissatisfaction with the Order where they claimed that its paragraphs

11 *See New State Ice Co. v. Liebmann* 285 U.S. 262, at 311 (1932).

12 *[2003] 4 NWLR (Pt. 809) 124.*

13 Per, Uwais, CJN; Belgore, Kutigi, Ogundare, Onu and Iguh JJSC.

14 Note 45 at 229.

15 [2002] 6 NWLR (764) 542.

2 (1)(a) and (3) giving 7.5 percent of revenue accruing to the Federation Account to the Federal Government are unconstitutional, null and void.

In unanimously affirming the authority of the President to make the Order pursuant to powers conferred on him in s. 315 of the 1999 Constitution to modify an existing law passed before the Constitution came into being, the court was of the view that even as the power conferred on the President being legislative in nature appears to infringe on the principle of separation of powers, where such principle are expressly or impliedly excluded by the constitution as it appeared in this instance, it is untenable for the court to rely on the dictates of such principle. In fact, Chief Justice Uwais went further to justify the court's attitude to constitutional principle by referring to his *dictum in Attorney General of Ondo State v. Attorney General of the Federation*[16] where, in response to the submission of learned counsel for the appellant that the provision of an Act (Corrupt Practices and Related Offences Act, 2000) impinged on the federalism principle of equality and autonomy of States and non-interference with the function of State Government by the Federal Government, he said:

> ...both the Federal and State Governments share the power to legislate in order to abolish corruption and abuse of office If this is a breach of the principles of federal ism, then, I am afraid it is the Constitution that makes provisions that have facilitated breach of principles. As far as the aberration is supported by the provisions of the Constitution, I think it cannot rightly be argued that an illegality has occurred by the failure of the Constitution to adhere to the cardinal principles which are at best ideals to follow or guidance for an ideal situation (ibid).

This attitude of the Supreme Court to tried constitutional principles is unhelpful. The court ought to adopt a more purposive approach in enforcing the provisions of the Constitution, if not to expand, but to expound their meaning and application[17]. This would be in furtherance of the court's position not only as a court of law but also that of policy (Ukhuegbe, 2011). In any event, it cannot correctly be said that in federalism cases, for instance, all the tools of proper adjudication on such matters especially with regards to philosophy of vertical distribution including the principle of subsidiarity have to be expressly enshrined by the clear letters of the constitution before they could be considered. Whatever then happens to the spirit of the constitution, which ought to weigh on the court's mind in formulating clear doctrines of the subject? After all, even as the constitutional document declares Nigeria a federation, no where in the letters of the text is a

16 [2002] 9 NWLR (Part 772) 222.

17 *Associated Discount House Ltd. v. Amalgamated Trustees Ltd* (Suit no. S.C.289/2002) delivered on 5th May, 2006, per Achulonu, JSC.

meaning fully ascribed to the word "Federation". It is probably vacuous to argue that when the Constitution declared the country a "Federation consisting of States and a Federal Capital Territory," as it did in s. 2 (2), that is all there is to the meaning of federation; or that federation actually means the "Federal Republic of Nigeria" as it is interpreted to mean in s. 318 of the 1999 Constitution. The word definitely has far greater meaning and implication than the letters of the constitution provide. Consequently, it seems logical to say that where there is a contention as to the full ambit of what is obviously a federalism provision in the Constitution, it would be a disservice if the court rejects any invitation to apply basic federalism principles in its task of judicial review simply because they are not expressly mentioned in the constitutional text.

Judicial Application of Federalism and Subsidiarity Principles: Comparative Lessons

Elsewhere, such federalism principles have been adopted in the process of judicial review of federalism matters. Thus in the American Supreme Court's decision in *Printz v. United States* ((1997) 521 US 898) , Justice David Scouter said quite emphatically that "in deciding these cases, which I have found closer than anticipated, it is the Federalist that finally determines my position." Justice Scouter statement's confirms what is well known to be a long standing practise of the American Supreme Court by which it has continued to demonstrate great deference to the *Federalist Papers*[18] in illuminating and enforcing federalism provisions of the American Constitution[19]. The Papers have indeed virtually assumed normative status having been relied on in a number of important federalism cases such as *Alden v. Maine* ((1999) 527 US 706)and *Bush v. Gore ((2000) 531 US 98)*. In fact, the court's decision in *United States v. Lopez (514 US 549 (1995)* has been extrapolated in the context of the subsidiarity principle by Calabresi and Bickford (calabresi and Bickford, 2011:4). According to them, subsidiarity considerations were revived in the court when in that case it applied

18 These were a series of 85 articles written with the pseudonym "*Publius*" by Alexander Hamilton, James Madison and John Jay and published between 1787-8 to promote the ratification of the Constitution of the United States of America following the Philadelphia Constitutional Convention of 1787. See, T*he Federalist Paper* accessible at www.2hn.psu.edu/faculty/jmanis/poldoc/fed-papers.pdf.

19 For a detailed calibration of the cases where this deference has been manifest see, Corley, P.C. and Robert, et al "The Supreme Court and Opinion Content: The Use of the Federalist Papers" (2005) 58:2 *Political Research Quarterly,* 29; Lupn, I.C. "Time, the Supreme Court and the Federalist (1998) 66 *George Washington Law Journal*, 1324; Melton, J. and Buckner, F. "The Supreme Court and the Federalist: A Citation List and Analysis, 1789 – 1996" (1997) 83 Kentucky Law Journal 243 and Melton, J. and Buckner, et al "The Supreme Court and the Federalist: A Supplement, 1996 – 2001" (2001) 90 *Kentucky Law Journal,* 415.

the so-called "substantial effect test" to hold that Congress lacked powers to regulate matters not under its jurisdiction but that of the States (here, gun control in school premises) when such regulation does not substantially affect powers to regulate interstate commerce which it does have under art. 1, s. 8 of the American Constitution.

The principle has also been affirmed in Canadian federal system (Hueglin, 2013) in a number of important decisions, including the *Spraytech* case [20] where even without clear constitutional premise to support its view, the Canadian Supreme Court declared that the case was appearing in its docket at a time when "matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to popular diversity." [21]

Judicial application of the subsidiarity principle in Germany's federal system is particularly noteworthy. In two papers (Taylor, 2006,2009), Taylor first demonstrates how the German apex constitutional court positively perceives the principle when it referred to art. 72(2) of the German Constitution (otherwise known as the Basic Law) to justify its application while deciding the *Geriatric Caregivers* case[22] .

That article limits the power of the national government to enact legislation in concurrent matters unless the national government law is necessary "in order to bring about living standards of equivalent standard" nationally; or unless the law is required "for the maintenance of legal or economic unity in the interest of the whole" federation.

However, in the second paper, Taylor shows that contrary to the doubts he expressed in the first paper whether the principle of subsidiarity was appropriate for judicial enforcement, the German apex constitutional court had done itself credit in enforcing the principle against the federal legislature's attempt to undermine the principle with the undesirable result that the federal parliament seeing its powers being greatly hampered by the determination of the court to continue to enforce the principle, passed a constitutional amendment to blunt further judicial application. By the amendment, which became effective in 2006,

20 See, *Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)* [2001] SCC 40.

21 Ibid: 40:3. The principle has continued to feature and receive judicial approval in Canada: see, Quebec (Attorney Gen*eral) v. Canadian Owners and Pilots Association [2010] and Reference re Assisted Human Reproduction Ac*t [2010] S.C.J. No. 61.

22 Also referred as the Geriatric Nursing Act case (decided on 24th October, 2002) accessible at http://www.bverfg.de/cgi-bin/link.pl?entscheidungen.

the national government is now conferred absolute powers to legislate on certain itemized concurrent matters without the subsidiarity limitations earlier contained in art. 72(2) of the German Basic Law. In Australia, the principle is implicit in the constitutional design which assigns only a limited number of functions to the national government leaving the sub-national units with much governmental power (Dawkins and Grewal, 2011:3). The High Court of Australia has continued to affirm this constitutional outlook[23].

Nigeria's federalism jurisprudence can immensely benefit from the foregoing comparative judicial template. It is well known that constitutional amendment through the political process is often mired in political manipulations with the possibilities of undesirable outcomes. In comparison, judicial review if properly articulated can resolve difficult questions of constitutionalism with far reaching and broadly satisfactory consequences. On the contrary, it has been argued that federal centralization tends to be promoted more where the apex court acquiesces to such tendency and abandon its role as an effective and dispassionate arbiter of federal/state disputes (Vaubel, 2009b). To avoid the eventuality of centralization, the Supreme Court of Nigeria could position itself, as some of its counterparts have done elsewhere, to set the country on the path of successful practise of federalism by judicially affirming the applicability of settled federalism principles, including subsidiarity (Bermann, 1999; Sagar, 2011).

A practical approach to achieve this is by curtailing federal legislative activities in the Concurrent List of the Constitution. The court can design an interpretive mechanism similar to the previous art. 72 (2) of the German Basic Law and require the federal government to justify its legislative action in the List on the basis of a desire to bring about an "equivalent living standard nationally"; or to justify such legislative activity on the premise of the "substantial effect test" formulated by the American Supreme Court in *United States v. Lopez!*

Conclusion

In this paper, we discussed Nigeria's federal system from the novel perspective of the principle of subsidiarity. We discussed the indispensability of the principle in the federal system and demonstrated why it is imperative in federal formation. Earlier in the paper, we argued that although the ethnic question is a live issue in the federal system, Nigeria's current contentious federal credentials is actually more of a crisis of unsatisfactory distribution of vertical power than the problem of ethnic conflict. The consociational provisions of the 1979/99 Constitutions appear to have unduly detracted from the real concern of ethnic relation in Nigeria and may have unduly accentuated it. The increase in national power deny the sub-national government the opportunities inherent in the subsidiarity prin-

23 See for instance, *Re Wakim; Ex parte Mcnally* (1999) 163 ALR 270.

ciple, including that of becoming the laboratory of development. We assessed the Nigerian Supreme Court's attitude to federalism principles and came to the conclusion that unlike its foreign counterpart, the court has dismissed constitutional precepts, including federalism principles, at critical moments preferring to be guided more by the bare letters of the constitution rather than such principles.

The net effect of this judicial attitude is fairly clear. Where the provision of the constitutional text is at variance with settled federalism principle, the latter would be ignored in preference for a textual interpretation. Where no clear provision exists in the constitution on a contentious federalism question, the Supreme Court is not likely to be persuaded by any precepts of federalism, as it considers them mere ideals. This creates a dilemma of federalism jurisprudence in Nigeria unlike elsewhere such as in the United States of America where the *Federalist Papers,* a collection of disquisitions on federalism, has assumed a normative status in judicial review of federalism. In the final analysis, except it reviews its stilted perception of tried constitutional principles, the Supreme Court of Nigeria could hardly be expected to play a purposive policy role in shaping the country's federal system more than staid affirmation of the bare letters of constitutional provisions however aberrant they may be to settled federalism principles. The Court could as well entirely deform itself from playing its expected policy role if it continues to stick to its attitude of avoidance of constitutional principle even when no discernible constitutional letters can be found to resolve a latent but contentious federalism issue.

References

Afigbo, A.E. and Uya, O.E. "Political Evolution of Nigeria" in Citizens for Nigeria (2005-2010) accessible at http://www.citizensfornigeria.com/index.php?option=com_content&task=view&id=2...

Althusius, Johannes P*olitica Methodice Digesta* translated by Carney, F. (Indianapolis: Liberty Press, 1995).

Associated Discount House Ltd. v. Amalgamated Trustees Ltd (Suit no. S.C.289/2002) delivered on 5th May, 2006, per Achulonu, JSC.

Bayer, J. "Re-Balancing State and Federal Power: Towards a Political Principle of Subsidiarity in the United States" (2004) 53 *American University Law Review,* 1421.

Ben-David, Ron "Federalism, Subsidiarity and Economics: In search of a unifying theory" being a paper presented at Improving Regulatory Performance Conference, Victoria, Australia, 1 April, 2011 at 8.

Bednar, Jenna "Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal Systems" (2013) publication of NOMOS accessed at www-personal.umich.edu/¬jbednar/WIP/nomos2.pdf April 2, 2013.

Bednar, Jenna "Federalism as a Public Good" (2005) *Constitutional Political*

Economy, 1.

Bermann, George "Judicial Enforcement of Federalism Principles" (1999) accessible at www.aei.pitt.edu/2226/1/002225_1.PDF

Brown, A.J. "Subsidiarity or Subterfuge? Resolving the Future of Local Government in the Australian Federal System" (2002) 61 (4) A*ustralian Journal of Public Administration,* 24.

Calabresi, S.G. and Bickford, L.D. "Federalism and Subsidiarity: Perspective from Law (2011) American Political Science Association Annual Meeting paper, accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902971 .

Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town) [2001] SCC 40.

Church, Clive and Dardanelli, Paolo "Switzerland: Historical Dynamics and Contemporary Realities" being a paper presented at Governing Together in the New Europe conference, April 2013 accessible at www.chathamhouse.org/sites/default/files...church_and_dardanelli.pdf.

Clinton, Bill "Federalism Speech", October 8, 1999 accessible at http://www.uni.ca/clinton99html.

Corley, P.C. and Robert, et al "The Supreme Court and Opinion Content: The Use of the Federalist Papers" (2005) 58:2 *Political Research Quarterly*, 29.

Dawkins, Peter and Grewal, Bhajan "Regulation and Commonwealth – State Relations: The case of Education" being a paper presented at Improving Regulatory Performance Conference, Melborne, April 1, 2011 accessible at www.vcec.vic.gov.au/CA256EAFOOIC7B21/WebObj/.../Session%204.p... .

Dudley, B.J. "Federalism and the Balance of Political Power in Nigeria" (1966) 4 J*ournal of Commonwealth Political Studies* 16.

Ekeh, Peter P. "Nigerian Political History and the Foundations of Nigerian Federalism" (2000) 12 Annals of Social Science Academy of Nigeria, 1.

Fenna, Alan "What Use is Federalism Anyway?" (2006) paper presented to the Australasian Political Studies Association annual conference, Newcastle New South Wales, September, 2006.

Follesdal, Andreas "Survey Article: Subsidiarity" (1998) 6 *Journal of Political Philosophy,* 190.

Follesdal, Andreas "Survey Article: Subsidiarity" (1998) 6:2 T*he Journal of Political Philosophy*, 190.

Gamper A. "A Global Theory of Federalism: The Nature and Challenges of a Federal State" (2005) 6:10 *German Law Review*, 2.

Geriatric Nursing Act case (decided on 24th October, 2002) accessible at http://www.bverfg.de/cgi-bin/link.pl?entscheidungen

Groppi, T. and Scattone, N. "Italy: The Subsidiarity Principle" (2006) 4 I*nt'l J. Const. L.* 131.

Halberstam, Daniel "Subsidiarity and Integration: Three of Federalism in Europe and America" accessible at www.law.ed.ac.uk/europa/files/subsidiaritychapter2oe.pdf .

Hogg, Peter W. "Subsidiarity and the Division of Powers in Canada" (1993) 3 *National Journal of Constitutional Law*, 341.

Hueglin, Thomas O. "Two (or Three) Tales of Subsidiarity" (2013) accessible at www.cpsa-acsp.ca/papers-2013/Hueglin.PDF.

Inegbedion, N. and Omoregie, E. "Federalism in Nigeria: A Re-Appraisal" (2006) 4:1 *Journal of Commonwealth Law and Legal Education*, 69.

Jinadu, Adele "A Note on the Theory of Federalism", in Akinyemi, A.B. et al eds. Readings on Federalism (Lagos: Nigeria Institute of Interantional Affairs, 1979) 13.

Karmis, Dimitrios and Norman, Wayne "The Revival of Federalism in Normative Political Theory" in Kamis, Dimitrios and Norman, Wayne (eds.) *Theories of Federalism – A Reader* (New York: Palgrave Macmillian, 2005) 3.

Ladner, Andreas "Switzerland: Subsidiarity, Power-Sharing and Direct Democracy" (2010) accessible at www.andreasladner.ch/.../ladner_2010_Subnational_Democracy.pdf.

Lupn, I.C. "Time, the Supreme Court and the Federalist (1998) 66 *George Washington Law Journal*, 1324.

Mark, Friesen "Subsidiarity and Federalism: An Old Concept with Contemporary Relevance for Political Society" (2003) 1:2 *Federal Governance*.

Melton, J. and Buckner, F. "The Supreme Court and the Federalist: A Citation List and Analysis, 1789 – 1996" (1997) 83 *Kentucky Law Journa*l 243.

Melton, J. and Buckner, et al "The Supreme Court and the Federalist: A Supplement, 1996 – 2001" (2001) 90 Kentucky Law Journal, 415.

New State Ice Co. v. Liebmann 285 U.S. 262, (1932).

Nivola, Pietro S. "Rediscovering Federalism" (2007) 8 *Issues in Governance Studies*, 1-18.

Okpanachi, Eyene and Garba, Ali "Federalism and Constitutional Change in Nigeria" (2010) 7:1 Federal Governance.

Omoregie, Edoba "The Proposed National Health Law: Emergent Federalism and Subsidiarity Issues in Nigeria" (2012) 1 *Journal of Health Law and Policy,* 51.

Osaghae, Eghosa E. and Suberu, Rotimi T. "A History of Identities, Violence and Stability in Nigeria" (2005) CRISE Working Paper No. 6.

Osadolor, B.O. "The Development of the Federal Idea and the Federal Framework, 1914-1960" and Tamuno, Tekena "Nigerian Federalism in Historical Perspective" in Amuwo, Kunle, eds. et al, *Federalism and Political Restructuring in Nigeria* (Ibadan: Spectrum Books, 1998) at 42-5 and 4 respectively.

Quebec (Attorney General) v. Canadian Owners and Pilots Association [2010] and Reference re Assisted Human Reproduction Act [2010] S.C.J. No. 61.

Rau, Markus "Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in Geriatric Nursing Act case" (2003) 4:3 *German Law Journal,* 226.

Ritzer, Christopher, Ruttloff, Marc et al "How to Sharpen a Dull Sword: The Principle of Subsidiarity and its Contro" (2006) 7:9 *German Law Journal,* 733.

Re Wakim; Ex parte Mcnally (1999) 163 ALR 270.

Sagay I.E. *Nigeria: The Unfinished Federal Project* (Benin: Faculty of Law, 2008) 35 – 38.

Sagar, Arun "Constitutional interpretation and its impact on Federal Balance (2011) 3:1 *Perspective on Federalism*, 1-22.

Schtze, Robert "Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism? (2009) 68 (3) *Cambridge Law Journal* 525.

Suberu, Rotimi T. *Federalism and Ethnic Conflict in Nigeria* (Washington D.C. United States' Institute of Peace, 2001).

Taylor, G. "Germany: The Subsidiarity Principle" (2006) 6 *Int'J. Const. L.* 115.

Taylor, G. "Germany: A slow death for Subsidiarity?" (2009) 7 *Int. J. Const. L.* 139.

The Federalist Paper accessible at www.2hn.psu.edu/faculty/jmanis/poldoc/fedpapers.pdf

Tiebout, C.M. "A Pure Theory of Local Expenditure" (1956) 64:5 *The Journal of Political Economy,* 416.

Ukhuegbe, Solomon O. "Jurisdictional Reform and the Role of the Supreme Court of Nigeria: The Path to a Policy Court" (2011) accessible at http://ssrn.com/abstract=1933944.

Vaubel, Roland "Constitutional Courts as Promoters of Political Centralization: Lessons for the European Court of Justice (2009b) 28 *European Journal of Law and Economics*, 203-22.

Watts, Roland "Contemporary views on Federalism", *in Evaluating Federal Systems,* ed. De Villiers, B. (Dordrecht: Juta & Co., 1994.