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Contents

GLR Volume 1 | Issue 1 hosts current articles and commentaries that have been categorised into 4 main themes: the right to free speech, the right to education, reform, and contemporary concerns. Furthermore, the publication has been compiled to showcase the pieces by topic and jurisdiction, as each section begins with articles that focus upon the 'New Gambia', and then complementary submissions that contemplate West Africa more generally are placed. Thus, consistency and flow are well-established for readership. Please find the contents of our inaugural publication listed below:

Right to Free Speech

Reinvigorating Freedom of Expression in Gambia Post-Jammeh by Aaron Olaniyi Salau	6
ECOWAS Court Judgment Against the Gambia: A Step Forward and a Step Backward by David Abraham	19
A Fine Balance: Assessing Restrictions on Freedom of Expression at the African Court on Human and Peoples' Rights by Oliver Windridge	25

The Right to Education

Legal Aid and Access to Justice in The New Gambia: A Case for Strengthening the Implementation of the Legal Aid Act by Christopher F. Gray	33
The Type of Lawyers Africa Needs: Lessons for The Gambia by David Ike	48
Law Clinic Commentary by Fanta Jawara	54
Towards Participation of Hearing-Impaired Learners from the South: Implications of Article 24 of the Convention on the Rights of Persons with Disabilities by Ngozi Chuma Umeh	55

Reform

I) Government

Africa, the International Criminal Court and the Future of Prosecuting International Crimes in Africa: Re-examining a Frosty Relationship by Henry Alisigwe and Chimere Arinze Obodo	64
A Critical Survey into The Gambia's Tripartite Regimes, 1965 to date by Jimmy Hendry Nzally	76
Electoral Reforms, Good Governance and Sustainable Development in Nigeria by Hanafi, A. Hammed	88
An Examination of the Doctrine of Implied and Inherent Power of the National Government and the Residual Power of State in a Federation: Two Doctrines in Perpetual Conflict by Shittu A. Bello, Dr Simon O. Abifarin, Joseph Ayo Babalola and N.O.A. Ijaiya	103
The Scope and Extent of the Immunity of Heads of State and Government under International Human Rights Law: A Brief Analysis of the House of Lords Judgement in the Pinochet Extradition Case by Dr Senghore	120

An Examination of the Doctrine of Implied and Inherent Power of the National Government and the Residual Power of State in a Federation: Two Doctrines in Perpetual Conflict

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Abstract

This paper discusses the doctrine of implied power of the Congress of the United States of America vis-à-vis the residual power of states. It is globally accepted that in a federation, powers are distributed between the central or federal government and the component states or regions. In this power distribution, there is bound to be confusion, conflicts and ambiguity due to the doctrines of implied and inherent powers of the congress, which are antithetic to the residual powers of the states. This paper examines the residual powers of the states in a federation, the implied and inherent powers of the Congress, and how they are in perpetual conflict. We further question the applicability of the doctrines of implied and inherent powers to the National Assembly in Nigeria. The paper concludes by recommending a strict constructionist approach in construing the constitution on whether the implied or inherent powers should be assigned to the National Assembly in Nigeria.

Introduction

The form of government established in the constitution exhibits several important principles. The first is that sovereignty resides and stems from the people.⁶²⁶ It may also be said that the government is a republic or representative democracy.⁶²⁷ In Nigeria, we operate federalism and presidential democracy where the national government is exercising limited or enumerated powers. Almost all the powers are listed in the constitution.⁶²⁸ The federal government has no power not granted by the Constitution or reasonably to be inferred therefrom. It is the State government that has the residual powers. Under this doctrine of residual powers of the States, the states are supposed to have broader and wider powers than the national government.

The power of the National government rests directly upon the people, as has been stated previously. The powers of the states' governments, too, rest upon the people. Neither level of government, national nor state for its existence depends upon the other, but are equal partners in another sense.⁶²⁹ This is the basic principle of federation. Despite the plane of equality upon which the national and state government exist the principle of national supremacy is observed between the two.⁶³⁰ The supreme-law-of-land clause establishes this principle. The Constitution, laws and duties of the national government will prevail over the state constitutions or laws in case of conflict.⁶³¹ While this might seem to be quite an impairment of the sovereign equality of the states, it is the only possible working arrangement otherwise the legal situation in each state could be slightly different from that of other state what national law means would be subject to 36 different interpretations (or four different interpretations under the four regions).

Again, the Constitution being the principal law of a state cannot contain in detail all the rights, duties and obligations of citizens, government and her apparatus, therefore the doctrine of residual power emerges after exclusive and concurrent⁶³² legislative lists. The doctrines of implied powers and inherent powers of the National Assembly may also be helpful in certain circumstances where the Constitution is not explicit on an issue.⁶³³ It is in the light of this that we intend to consider the issues of residual power

⁶²⁶ Section 14 (2) of the 1999 Constitution of Nigeria AS Amended

⁶²⁷ Section 1(2)

⁶²⁸ Section n14(2)(c)

⁶²⁹ R.B. Posey American Government Littlefield, Adams & Co New Jersey (1975) Although Nigerian federation is peculiar and does not conform to this principle thus the various agitations for restructuring.

⁶³⁰ Section 1(1) of the 1999 Constitution of Nigeria as Amended

⁶³¹ Section 12

⁶³² Section 4(2) & (3) see part III supplemental and Interpretation second schedule to the 1999 Constitution of Nigeria

⁶³³ R.B. Posey op cit

of states in a federation like Nigeria, and its inconsistency with the doctrine of implied and inherent powers of National Assembly as operative in America.

Constitutional Basis of Legislative List in a Federation

According to Akande, this important subject of distribution of legislative powers between the Federal and State Governments is embodied in the second Schedule.⁶³⁴ There are 68 numbered items and two items of matters both incidental and supplementary to those mentioned on the Exclusive List and 12 main items on the Concurrent List subdivided into 30 Subsidiaries.⁶³⁵ The National Assembly may also make laws for the peace, order and good government of the Federation or any part thereof in respect to any matter that is included in the two legislative lists. In addition to this, it can also legislate for the Federal Capital Territory on any matter, irrespective of its inclusion in the Legislative List.⁶³⁶ In this regard, therefore, the National Assembly has the same residual powers of Legislation with respect to the Federation Capital Territory as are granted to each State Legislature with respect to the State.⁶³⁷

In respect of matters on the Exclusive Legislative List, only the National Assembly may legislate. A State Legislature may legislate on matters not on Exclusive List. This means that the States can legislate on matters on the Concurrent Legislative List as well as on all other matters which are not on either of those two lists except where the matters are "incidental and supplementary" to the Exclusive Legislative List. This paper argues that such can be likened to implied and inherent powers of American Congress.⁶³⁸

In a way, the Concurrent Legislative List contains an element of exclusivity within itself for the state, as well as it being empowered to make laws with respect to antiquities and monuments. But the State House of Assembly may make laws for the State or any part thereof with respect to antiquities and monuments not so designated.⁶³⁹ As such, once an antiquity in a State with the consent of the State has been designated a national monument, it falls within the exclusive control of the National Assembly even though it lies physically in the State. Without such designation, the National Assembly has no power to make laws on it. In any case where the concurrent Legislative item is so spread as to be covered by both the federal legislature and the state legislature and both make laws, the law made valid by the National Assembly shall prevail and the State law, to the extent of inconsistency, shall be void.⁶⁴⁰

The question of an inconsistency between Federal and State Law came up in the case of *Girembé v. Bornu L.A.*,⁶⁴¹ where the appellant had been convicted in the court of the Shehu of Bornu on a charge of culpable homicide punishable by death. The High Court of Northern Nigeria had confirmed the sentence, but the conviction was set aside by the Supreme Court because, while the record of the trial disclosed evidence of severe assault by the accused person upon the deceased shortly before his death, there has been no medical evidence before the court that the deceased died because of the injuries inflicted upon him.⁶⁴² The court considered it appropriate to order retrial⁶⁴³ before the Northern Region High Court, and did so, having power to make such an order under section 20 of the Federal Supreme Court Act, 1960. The result would be the trial of the accused before the High Court in a situation not specified in section 185 of the Northern Region Criminal Procedure Code, which purported to define exhaustively the circumstances in which such trials could take place. It followed that the code, a Regional Law is inconsistent with a Federal Act. By virtue of the Constitution,⁶⁴⁴ the Act prevailed. Various criteria for determining inconsistency between a Federal and State Legislation have been employed in other Federal Constitutions. In the Australian case of *Australian Boot Trade Employer's Federation v. Whybrow*,⁶⁴⁵ the view was expressed that a Commonwealth Law and a State Law are not inconsistent if it was possible to

⁶³⁴ Part I Second Schedule

⁶³⁵ Part II Second Schedule

⁶³⁶ Part I Second Schedule

⁶³⁷ Jadesola Akande Introduction to Nigerian Constitution 1999

⁶³⁸ Ibid

⁶³⁹ Item 3B of Second Schedule

⁶⁴⁰ Section 1 (3) of the 1999 Constitution of Nigeria (as amended)

⁶⁴¹ [1961] 1 All N.L.R. 469

⁶⁴² 1961 1 All NLR 469 at 470

⁶⁴³ Ibid

⁶⁴⁴ Section 64(4)

⁶⁴⁵ (1914) 10 C.L.R. 266

obey the State Law without disobeying Commonwealth Law. It must be mentioned that there is no Concurrent List in the Australian Constitution, just as there is none in the United States and Canada; the Constitution enumerates only the Exclusive powers of the Federal Legislature. In spite of that, it is provided that where a State Law is inconsistent with a Commonwealth Law, the latter prevails. As more clearly enunciated by Dixon J. in *Victoria v. Commonwealth*:⁶⁴⁶ "where a State Law is inconsistent with a Commonwealth Law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid"⁶⁴⁷. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete enactment of the law governing a matter or set of rights and duties, then for a State Law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent. Thus, if a legislature clearly shows its intention of "covering the field" (a doctrine well known in Australia and United State of America) that is a conclusive test of inconsistency.⁶⁴⁸

In contrast to the Nigerian method of detraction or the Australian and American methods, the Indian Constitution⁶⁴⁹ provides a unique method. It has three distinct lists, one exclusive to the Union Parliament, one exclusive to the State and a third which is concurrent to both. Besides, only the Union Parliament can legislate on a matter not on any of the Lists. This is another method of indicating the superiority of the Union Parliament over State and is more indicative of a very strong-centred Federation. This later effect has been achieved in Nigeria by the placing of most of the important matters of government within the exclusive legislative competence of the Federation Legislature.⁶⁵⁰ These two broad legislative powers of the federation has led to discontent and the current agitations for restructuring and devolution of powers.

Distribution of Legislative Power in a Federation

Exclusive Legislative List

These are the powers reserved exclusively for the central government: This means that only the central government can legislate on the two lists and when a State or region legislate on the exclusive list it can be declared null and void and unconstitutional.⁶⁵¹

Concurrent List

These are where powers are shared jointly by both the central and regional/state government as stipulated in the constitution even though both governments can make laws on matters that falls under Concurrent List, the central is Supreme. This means where there is a Conflict of law made by both governments, that the law made by the central government is supreme and will super cede that of the regional/ State government.⁶⁵²

Residual List

These are the leftover power not included in either the exclusive or the concurrent list. The powers in the residual List are left for the regions/states. In some constitution, residual powers are exercised by both governments. Such matter in the residual list includes chieftaincy matters etc.⁶⁵³ In some jurisdictions like the USA, there is also the implied power of the federal Legislature.

⁶⁴⁶ (1937) 58 C.L.R. 618, p. 630

⁶⁴⁷ *Ibid*

⁶⁴⁸ Jadesola Akande *op cit*

⁶⁴⁹ *Ibid*

⁶⁵⁰ Jadesola Akande *op cit*.

⁶⁵¹ R.B. Posey-American Government little field Adams & Co New Jersey 1974 p. 84

⁶⁵² *Ibid*

⁶⁵³ *Ibid*

Knight Frank and Rutley (Nig) and Anor v. A. G. (Kano),⁷⁸⁷ equally, gives a clue to this technique. The issue there was whether the Kano State Government acted ultra vires in entering into contract with the appellant to prepare a valuation list of rateable hereditaments in the municipal area of Kano. By a written agreement between the then Commissioner for Finance, Kano State, and the appellants, the latter were to prepare a valuation list of rateable hereditaments for the collection or property rates in certain parts of Kano State. Later, the Commissioner intimated the appellants of Government's intentions to rescind the contract. The reason for this action was that the valuation of hereditaments fell within the responsibility of Local Government of the state and not the State Government. The appellant then sued.⁷⁸⁸

The Supreme Court had the onerous responsibility of giving meaning to the near laconic provisions of the Constitution defining the functions of the Local Government. The court construed section 7 (5) and paragraph 1 (b) and (j) of the Fourth Schedule to the 1979 Constitution. It, insightfully, concluded, from this combined reading of these provisions, that the collection of rates on rateable hereditaments and the assessment of rates on privately owned houses were subjects within the responsibilities of Local Government Councils. Accordingly, it held that it was the Local Government of Kano State that possessed the power to assess, impose and collect rates on privately owned property. The conclusion is worth quoting in extension for the guidance of the appropriate authorities: There is no legislation which empowers Kano State Government to dabble in and interfere with the compilation of valuation list for the purpose of assessing or collecting rates on private properties in Kano State. Therefore, the Government acted ultra vires in entering into contract with the appellant to do what only the Local Government Councils were entitled to do under the constitution and the law.⁷⁸⁹

Conclusion

We have examined the distribution of legislative powers within Nigerian federation and observed that the Exclusive Legislative List is for the National Assembly while states and National Assembly can legislate on concurrent legislative list. The residual list which is not expressly stated in the Constitution is by convention reserved for the states. The list contains all matters not included in either the Exclusive or Concurrent Legislative list. It is equally observed that in Nigeria the National Assembly and the States' Houses of Assembly have been having conflicts on legislation because either of them has been overstepping its legislative jurisdiction. The other very important issue noted in this paper is that the doctrine of implied and inherent powers of the National Assembly is not recognised in Nigeria although it is part and parcel of American Congress. Our observation is that the doctrine is in conflict with the residual power of states and will lead to further legislative conflicts between the states and National Assembly.

We must also stress that the doctrine of implied and inherent powers of Congress in America and the incidental and Supplementary matter in Nigerian Constitution are not the same. The purported attempt to make another NTDC (Nigerian Tourism Development Corporation) or NTA (Nigerian Tourism Authority) law without amending the constitution will be a futile exercise. The constitution must first be amended to increase the power of the National Assembly to cover hospitality and tourism before such a law can be validly made by the National Assembly. However, in view of the clamour for devolution of power in Nigeria, it is not advisable for the constitution to be amended to give more power to the centre. Rather, power should be dispersed or devolved on the states for a stable polity, and for states to have more power to generate revenue for sustenance and provision of infrastructure.

⁷⁸⁷ See, *Ibid.* 160-170

⁷⁸⁸ *Ibid.*

⁷⁸⁹ (1998) 4 KLR (pt 62) 847