DEVOLUTION OF POWERS THROUGH JUDICIAL AND LEGISLATIVE ACTIVISM IN NIGERIA

Written By ***Ikechukwu Unegbe***

Lecturer, Department of Social Sciences, School of Liberal Studies, Yaba College of Technology, Yaba, Lagos, Nigeria

ABSTRACT

Demands for the restructuring of the federal system of government in Nigeria have been constant among scholars and activists for years, recurring from one conference to another, with differing arguments as it suits various political interests. Interwoven in the clamour for restructuring the federation are such concepts as devolution of powers, resource control, review of revenue sharing formula, state and regional security autonomy, among others. Noticeable friction appears between the federal and state governments as each level seeks to firmly hold unto its constitutionally ascribed powers in the legislative lists of the Constitution, even if common sense and political exigencies dictate otherwise, contending, rightly, that until an amendment of the relevant sections of the Constitution is carried out the status quo must remain. However, some state governments have found ways around these constitutional hurdles by approaching courts for judicial interpretations of extant provisions of the Constitution in a way that enhances the letters and spirit of true federalism. This paper looks at the success stories of such endeavours with a view of using them to lay the foundation for greater judicial activism as key tools towards achieving robust restructuring of the federation and enhancing good governance in Nigeria. The paper gives other insights and recommendations to uphold greater devolution of powers to the federating units.

Keywords: Restructuring, devolution of powers, true federalism, resource control, judicial activism.

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INTRODUCTION

i. *Purpose of the Study:*

Nigeria operates constitutional democracy based on the written 1999 Constitution (as amended) which contains clear but rigorous provisions for amendments. The Constitution is a product of a military handover and therefore has inherent provisions seen by citizens as imposing military-style unitary governing structure as against the anticipated federal structure in a federation such as Nigeria. Agitations have arisen and gathering momentum from various concerned citizens and especially from state and local governments which constitute federating units under the Federal Republic of Nigeria. Much of the agitations stem from the excessive powers concentrated at the federal level which is perceived as anti-federalism and part of the reasons for the current slow development of the federating states. Some state governments have taken these agitations before the courts for judicial pronouncements, and others have enacted state laws which have clearly achieved devolution of powers. Increasing successes have been achieved through these judicial options, thereby elevating the strategy to public attention. This study seeks to show how through such judicial and legislative activism federating states in Nigeria could attain greater devolution of powers to the federating units, and thereby attain milestone amendments to the Constitution which political exigencies may otherwise not allow the Legislative and Executive arms of government to champion.

ii. *Methodology:*

The study is carried out through both primary and secondary methods, including examination of existing data, literature or documentary reviews of laws, judicial decisions and opinions of scholars and authors which are found relevant to the discussion.

iii. *Background :*

Nigeria's democratic governance is presently organized according to the provisions of the 1999 Constitution which has a military origination[1], having been promulgated by the Provisional Ruling Council, after making necessary changes and alterations to the outcome of the debates and contributions from Nigerians[2]. The Decree ushering in the 1999 Constitution (as amended) openly acknowledges that the Provisional Ruling Council of the military 'approved the report subject to such amendments as are deemed necessary'[3], thereby inadvertently confirming the

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contention by many Nigerians that the current 1999 Constitution is not a freely documented legislative product of *'We the people of the Federal Republic of Nigeria having firmly and solemnly resolved',* as its preamble claims. The preamble has been condemned by many as advancing falsehood as Nigerians never sat together to agree on every provision of the 1999 Constitution. In an interview granted to the Punch newspaper[4], Professor Akin Oyebode, a professor of International Law and Jurisprudence, canvassed the view that the 1999 Constitution should be jettisoned, as according to him, 'it cannot work for Nigeria because it is entirely faulty.' Part of the reason the 1999 Constitution cannot work or is faulty is that it borrows too much of the unitary, top heavy, hierarchical structure which gives a lot of powers to the federal government as against devolving powers to the states and the local government areas.[5] The 1999 Constitution creates three tiers of governments, namely, federal, state and local governments, with areas of authorities. It also creates an Exclusive Legislative List which grants powers over 68 exclusive items to the Federal Government.[6] Among these are such powers over control of Aviation, Construction of certain roads, Fishing and fisheries on rivers, lakes, waterways, Insurance, Labour maters, Maritime shipping and navigation, Mines and minerals, Police and other government security services, Posts and telegraphs, Prisons, Quarantine, Railways, Taxation of incomes, profits and capital gains, Formation, annulment and dissolution of marriages other than marriages under Islamic and Customary laws, Weights and measures, Water from such sources as may be declared by the National Assembly to be sources affecting more than one State, etc. Despite the already loaded list of items exclusively reserved for the Federal Government, the Constitution provides also a Concurrent List[7] which contains powers and items upon which both the Federal and State governments are authorized to control and legislate.

From the list it would appear that that the second tier of government being the States have no business legislating over railways, aviation, police, waterways, and even containing a pandemic such as COVID-19, as the power to legislate over the need for 'Quarantine' is reserved for the Federal Government. In addition to this top-heavy power equation between the federal and state governments, the revenue mobilization commission charged with determining the revenue sharing formula between the federal, states and local governments equally allocates a higher percentage of the accrued monthly revenues from the federation account to the federal government. The current sharing formula maintains the following ratio[8]: Federal Government- 52.68% (This is further divided into general ecological problems (1%), Federal Capital

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Territory (1%), Development of natural resources (1.68%), Statutory stabilization (0.5%) and the balance of 48.5% for the Federal Government); State Government- 26.72%; Local Government – 20.60%. From the indicated allocation formula it becomes clear that the Federal Government receives the lion share of all accrued revenues into the Federation account, leaving the States who carry the actual population of the federating units with mere 26.72%. In addition to the usual revenues accruing through agencies of the government of the federation, there is the special tax revenues coming in through Value Added Taxation (VAT) collected through the various state governments. According to Federal Account Allocation Committee (FAAC), 'there is a separate sharing ratio for Value Added Tax in which Federal gets 15%, States share 50% and Local Government share the balance of 35%'.[9] A combination of the powers accruing to the Federal Government under the Exclusive Legislative List and the revenue sharing formula of the federation leaves the federating states and local governments with the short end of the stick. Scholars argue that such an arraignment is anti-federalism.

In an editorial opinion[10], Daily Trust newspapers aligns with the view that the present revenue sharing formula stifles development activities at the states and local government areas of the federation because it unfairly hands a larger proportion to the Federal Government. While supporting the agitations of the Governors Forum for an urgent review, the Paper posits that 'the agitation over the years by Nigerian Governors Forum, and supported by experts on Fiscal Federalism, has been that the Federal Government should reduce its share of the revenue, while States and Local Government Governments, which are closer to the people, should be given more.' 'The objective of a true federal system' the Paper continued,' is to ensure that public services are effectively and efficiently provided for citizens. Government should be responsive to community through the provision of infrastructure and social amenities'; a situation currently lacking in Nigeria. Indeed many State governments have had to seek after internal financial engineering options to juggle the situation by collapsing the local government accounts with that of the state in order to shore it up to meet critical developmental needs. This has, however, left so much development deficits at the local government areas throughout the federation. In the face of the daunting challenges of effecting outright constitutional amendments of the sharing formula[11], some state governments in Nigeria have taken to judicial activism to break the backbone of rigid constitutional amendment procedures[12] and achieve aspects of devolution of powers and fiscal federalism through the rule of law.

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JUDICIAL ACTIVISM BY STATES IN NIGERIA

In the face of the daunting provisions of the 1999 Constitution as regards achieving amendments through the National Assembly, States have turned to the age old saying that 'necessity is the mother of inventions'. Such selected cases shall be briefly examined to show the dynamism of judicial activism as a tool for achieving devolution of powers, restructuring and fiscal federalism by federating states.

a. In the recent Suit No. FHC/PH/CS/149/2020 (Attorney General of Rivers State vs. Federal Inland Revenue Services & Attorney General of the Federation) which was decided by the Federal High Court in Rivers State, the Government of Rivers State went to court to challenge the constitutional powers of the Federal Government to continue to collect Value Added Tax (VAT), Withholding Tax, Education Tax and Technology levy in Rivers State or any other state of the federation. This case amounts to a judicial enquiry into the powers of the Federal Government under the Exclusive Legislative List, particularly items 58 and 59 thereof.[13] The Federal High Court, after receiving legal arguments for and against the issues raised in the case, granted judgment in favour of Rivers State Government, stating that "there is no constitutional basis for the FIRS to demand for and collect VAT, Withholding Tax, Education Tax and Technology levy in Rivers State or any other state of the federation, being that the constitutional powers and competence of the Federal Government is limited to taxation of incomes, profits and capital gains, which does not include VAT or any other species of sales, or levy other than those specifically mentioned in items 58 and 59 of the Excusive Legislative List of the Constitution."[14] The related relief sought by Rivers State Government in the law suit which also succeeded was in the way of "urging the court to declare that by virtue of the provisions of items 7 and 8 of the Part II (Concurrent Legislative List) of the Second Schedule of the Constitution, the power of the Federal Government to delegate the collection of taxes can only be exercised by the state government or other authority of the state no other person."[15] Although there are indications that the Federal Government may appeal against the judgment of the Federal High Court, but Rivers State Government has already moved quickly to promulgate, through her House of Assembly, a Value Added Tax revenue collection Law.[16] In his comments after signing the Rivers State VAT Collection Law into force, Governor Wike, as reported in the Nigerian Tribune, ventilated the frustration of most state governments in Nigeria in the

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following words: "Of course, we are all aware that the states have already been strangled. Most states depend on allocation from federation accounts. States have been turned to beggars; hardly any day will pass that you will not see one state or others going to Abuja to beg for one fund." Many who have complained about the lopsided nature of fiscal federalism practiced under the present 1999 Constitution (as amended) would applaud the steps taken by Rivers State Government.

b. Before the recent case by Rivers State challenging the powers of the Federal Government and FIRS to collect VAT in the states of the federation, Lagos State government had equally successfully challenged the powers of the Federal Government to 'register, classify, grade and regulate all Hotels, Motels, Hospitality and tourism enterprises, and tour operators'[17] The Lagos State government challenged the legality of the federal law which set up Nigerian Tourism Development Corporation (NTDC) Act 1992 by promulgating a State Law known as the Hotel Licensing Law Cap H6, Laws of Lagos State of Nigeria, 2003, which not only replicated all the provisions of the NTDC Act of 1992, but appropriated its functions as it pertains to the territory of Lagos State. It further went ahead to circulate a public notice to the effect that registration of hotels and tourism related establishments in Lagos State was the exclusive responsibility of Lagos State Ministry of Tourism and intergovernmental relations.[18] The conflict of interests thrown up by the NTDC Act and Hotel Licensing law of Lagos State led the Federal Government to approach the Supreme Court for judicial interpretation. The Supreme Court[19] in a well-considered judgement declared among others that " The Federal Government lacks the Constitutional vires to make laws outside its legislative competence which are by implication residue matters for the State Assembly: the National Assembly cannot, in the exercise of its powers to enact some specific laws, take liberty to confer power or authority on the Federal Government or any of its agencies to engage in maters which ordinarily ought to be the responsibility of a State Government or its agencies. Such pretext cannot be allowed to the Federal Government or its agencies so as to enable them encroach upon the exclusive constitutional authority conferred on a state under its residual legislative power." With this pronouncement, the Supreme Court upheld the powers of Lagos State, and indeed other states of the federation to regulate hotel and restaurant businesses in their various states thereby expanding their revenue bases.

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c. The next example flows from the Constitutional provisions[20]which confers on state governors 'Executive powers' and the responsibility of addressing the welfare and security needs of the people. It also stems from the provisions of the Land Use Act[21] which puts the State Governor in a position of public trust over all parcels of land in the states of the Federation. Taking advantage of these provisions of the Constitution some state governors have been able to take charge of the security situations in their states by influencing the enactment of legislations to institute local policing of their states, and prevent acts likely to cause breach of peace and harmonious co-existence. In their recent public announcement, the Governors of the 17 Southern Nigeria state recommended a legislative approach towards ban on open grazing of cows in all the southern states of Nigeria. This is ostensibly to contain the increasing violent clashes between cattle herders and local farmers with attendant loss of lives and negative impacts of farming activities. The proper context of this move will be better appreciated when read in the context of the provisions of the Exclusive Legislative list[22], which creates the areas of exclusive legislative authority of the federal government. Under item 45 of the Exclusive Legislative list only the Federal Government can legislate on Police and other government security services. Therefore, a successful enactment of state laws establishing state or regional security outfits[23] is a step in the right direction towards achieving devolution of powers. The emergence of these regional and state security outfits come as pragmatic response to the increasing state of insecurity across the country, and represent creative ingenuity in legal and constitutional engineering. In line with the Exclusive Legislative list under the 1999 Constitution of the Federal Republic of Nigeria, only the Federal Government has the powers to enact laws for the security and good governance of the peoples of Nigeria. Under the influence of the Exclusive Legislative list Nigeria has operated a centralized police force[24] which is known as the Nigeria Police Force, and the Constitution permits of no other Police Force to be established for the Federation of any part thereof. The framing of Section 214 of the 1999 Constitution which establishes a Nigeria Police Force and permits of no other Police Force in Nigeria initially presented challenges for states to promulgate state based security outfits even in the face of mounting security challenges at the state and local government levels. However, the deeper examination of the provisions under the Chapter II of Fundamental Objectives and Directive Principles of State Policy[25]under the 1999 Constitution opens up a new window for states and local

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governments to establish security outfits for the protection of their peoples and the promotion of their welfare and well-being. Section 14 (2) (b) of the 1999 Constitution specifically states that "the security and welfare of the people of Nigeria shall be the primary purpose of government". Although it is granted that the provisions of Chapter II of the 1999 Constitution are mere directives and not legally enforceable under the legal system in Nigeria, however it has since been recognized that the provisions assume the force of law and become justiciable and enforceable once a law is enacted based on the provisions, as well as when read or interpreted alongside other provisions of the Constitution.[26]

d. State governments have also leveraged on the power conferred on them by the provisions of the Land Use Act[27] to enact State Laws[28] which have the effect of addressing acts of criminality and insecurity in their various areas of jurisdiction. The recent example is with laws banning open cattle grazing which some states in the Southern region of Nigeria and Middle Belt have enacted.[29] These state based anti-open grazing laws are proactive steps arising from creative legislative utilization of the constitutionally sanctioned legislative lists, and expanding them to accommodate otherwise legislative responsibilities assigned to the federal government. The anti-open grazing laws addresses not just land allocation and utilization issues for which state governors are empowered under the Land Use Act, but also directly addresses issues of insecurity, banditry, rape, vandalism, violence between herders and local farmers, as well as control of agricultural resources.

DISCUSSIONS, CONCLUSIONS AND RECOMMENDATIONS

It is the fact that the current 1999 Constitution of Nigeria (as amended) has a military origin and is therefore criticized by many scholars and commentators for the fact that, among others, it does appear to tell lies in its preamble when it declares "We the people of the Federal Republic of Nigerian, having firmly and solemnly resolved:..", as Nigerians never fully participated nor unanimously resolved to bring it about, through a general consensus. Indeed, the current agitations for the amendment of the Constitution and restructuring of the Nigerian political space convey evidence of the inadequacies of the Constitution. One key criticism dogging the 1999 Constitution (as amended) has been the fact that it seems to promote a

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military-like unitary structure, which gives more powers to the centre and less to the federating states. This paper displays this lopsided (top-heavy) structure with the comparison of the contents of the Exclusive and Concurrent Legislative lists. There are therefore agitations for restructuring of the political structures and fiscal policy of the federation to achieve greater equity and balance between the federal government and the federating units. Despite these criticisms of the 1999 Constitution, it nevertheless remains the grund norm, that is, the fundamental order or rule that forms the basis of the legal system in Nigeria. Section 1 of the Constitution upholds that it is supreme above all other enactments.[30] The implication is that much of the expectations on equitable re-distribution of powers between the federal and state governments would require the further amendment of the 1999 Constitution. This path of constitutional amendment is however tortuous and rigorous, entailing expenditure of huge time and resources. Also, there are usual parochial political interests which frustrate such amendment processes. This paper, therefore, explores other legitimate ways, other than outright amendment of the constitution, through which confederating states can achieve devolution of powers through both judicial activism and legislative approaches. The other credible ways adopted by some states in Nigeria come other what has been described as legislative and judicial activism.

In this regard, recently the Attorneys General of the 36 states of the federation filed a suit against the federal government of Nigeria at the Supreme Court (SC/CV/690/2021) seeking after judicial interpretations of Section 4(2) of the Stamp Duty law and practice in Nigeria which they contend the Federal government has usurped over the years, and requesting the federal government to reimburse to the states all the revenues that have accrued through Stamp Duty regime from 2015 to 2021.[31] Before this suit, we also cited cases of states now promulgating their own laws on local security, Value Added Tax administrations, as well as controlling registrations of hotels and livestock grazing activities. These are salutary steps which more states of the federation are encouraged to adopt to achieve greater devolution of powers.

This paper recommends that both the federal and state governments should constantly find ways of achieving greater dividends of democracy and true federalism through legislative and judicial activism instead of lamenting the existing rigid constitutional amendment procedures. In this respect both level of governments should take more pragmatic examination of the provisions of Chapter II of the 1999 Constitution (as amended) which contains non-justiciable

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provisions on 'Fundamental Objectives and Directive Principles of State Policy', such as security, greater participation of citizens in governance, observance of federal character, increased economic welfare of citizens, promotion of the ideals of freedom, equality and justice, among many others.[32] A more benevolent interpretation of Section 13 of the 1999 Constitution which enjoins all organs of government to implement Chapter II would yield greater results in the proposed path towards more legislative and judicial activism because states and local governments have organs which are included in such 'authorities and persons, exercising legislative, executive or judicial powers'.[33]

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3. Ibid
4. 'Nigeria must discard 1999 Constitution to make progress- Oyebode', Punch Newspaper, 31st October, 2018, online resource at https://punchng.com/nigeria-must-discard-1999-constitution-to-make-progress-oyebode/, accessed on 25th August, 2021.
5. Section 4 of the 1999 Constitution, under part II provides for Legislative powers spelt out in the Second Schedule under the Exclusive Legislative List in Part I and Concurrent Legislative List in Part II.
6. Section 4 (2) of the 1999 Constitution of the Federal Republic of Nigeria.
7. Part II on Concurrent Legislative List under the 1999 Constitution containing 30 provisions only as compared with 68 provisions under the Exclusive Legislative List.
8. https://www.nigerianstat.gov.ng/pdfuploads/Federation_Account_Allocation_Committee_(FAAC)_FEB_2019_Disbursement.pdf; online source accessed on the 25th day of August, 2021.
9. Ibid.
10. https://dailytrust.com/new-revenue-sharing-formula; online resource accessed on the 25th day of August, 2021.

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11. The Revenue Mobilization Allocation and Fiscal Commission (RMAFC) was established under Decree No. 49 of 1989 as then National Revenue Mobilization Allocation and Fiscal Commission (NRMAFC), and later amended by Decree No.98 of 1993, and listed in the 1999 Constitution of the Federal Republic of Nigeria (as amended) under Section 153 (1) as one of the 14 federal executive bodies; see https://rmafc.gov.ng/establishing-law/; online source accessed on 26th August, 2021.
12. Section 9 (1) & (2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) contains provisions for amendment of the provisions of the Constitution and requires the proposal for amendment to be supported by the votes of not less than two-thirds majority of all the members of the National Assembly and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States of the federation.
13. Second Schedule, Legislative Powers, part 1 under Exclusive Legislative List of the 1999 Constitution of the Federal Republic of Nigeria (as amended) contains provisions under item 58 (Stamp Duties), and item 59 (Taxation of incomes, profits and capital gains, except as otherwise prescribed by this Constitution).
14. 'Court declares RSG, not FIRS, entitled to collect VAT related taxes in Rivers State', Guardian Newspapers online report of 10th August, 2021 by Ann Godwin, at https://guardian.ng/news/court-declares-rsg-not-firs-entitled-to-collect-vat-related-taxes-in-rivers/, accessed on 26th August, 2021.
15. Ibid.
16. 'Wike Signs Bill on VAT Collection into Law', Nigerian Tribune newspaper report of Thursday, August 26, 2021, obtained online at https://tribuneonlineng.com/wike-signs-bill-on-vat-collection-into-law/; accessed on 26th August, 2021.
17. The National Assembly purporting to act under the powers conferred to the Federal Government of Nigeria under Section 4 (2) & (3) Item 60 (d) Part I of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, (as amended) enacted the Nigerian Tourism Development Corporation Act, 1992.
18. See Hotel Licencing (Amendment) Law; Lagos State of Nigeria Official Gazette dated 20th July, 2010.
19. See SC. 340/2010 of 19th July, 2013
20. Section 5 (2) (a) & (b) of the 1999 Constitution (as amended) of the Federal Republic of Nigeria.

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21. Section 1 of the Land Use Act, 1978, vests all land comprised in the territory of each state of the federation in the governor of the state, to hold in trust for the use and common benefit of all Nigerians in accordance with the provisions of the Act. By virtue of Section 315 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) the Land Use Act is regarding as an 'Existing Law' accommodated under the Constitution.
22. Item 45 of the Exclusive Legislative list on exclusive powers of the federal government of Nigeria lists 'Police and other government security services established by law' as an item states are excluded from encroaching upon.
23. 'South-west States Pass Amotekun Bill into Law', ThisDay Newspapers report of March 4, 2020 by James Sowole & Yinka Kolawole, online at https://www.thisdaylive.com/index.php/2020/03/04/south-west-states-pass-amotekun-bill-into-law/, accessed on 30th August, 2021. See also: Kano State Hisbah Board Law No. 4 of 2003 and Kano State Hisbah Board (Amendment) Law No. 6 of 2005.
24. Section 214 of the 1999 Constitution (As amended).
25. Chapter II of the 1999 Constitution (as amended) comprises sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 & 24 of non-justiciable provisions, which the government, and all authorities and persons, exercising legislative, executive and judicial powers are enjoined , as a duty and responsibility, to observe.
26. See the case of Olafisoye V. Federal Republic of Nigeria (2004) NWLR, Pt 864
27. Section 1 of the Land Use Act, which vests all land comprised in the territory of each State (except land vested in the Federal Government or its agencies) solely in the Governor of the State, who would hold such land in trust for the people.
28. One example is the Open Rearing and Grazing Prohibition Law, No 5, 2021, Laws of Rivers State of Nigeria.
29. 'September 1 Anti-open Grazing Deadline: Where Southern States Stand.' Nigerian Tribune online report by Olayinka Olukoya, Hakeem Gbadamosi, et al; August 31, 2021, published on https://tribuneonlineng.com/september-1-anti-open-grazing-deadline-where-southern-states-stand/, accessed on the 31st August, 2021.
30. Section 1 of the 1999 Constitution (as amended) states that "This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria."

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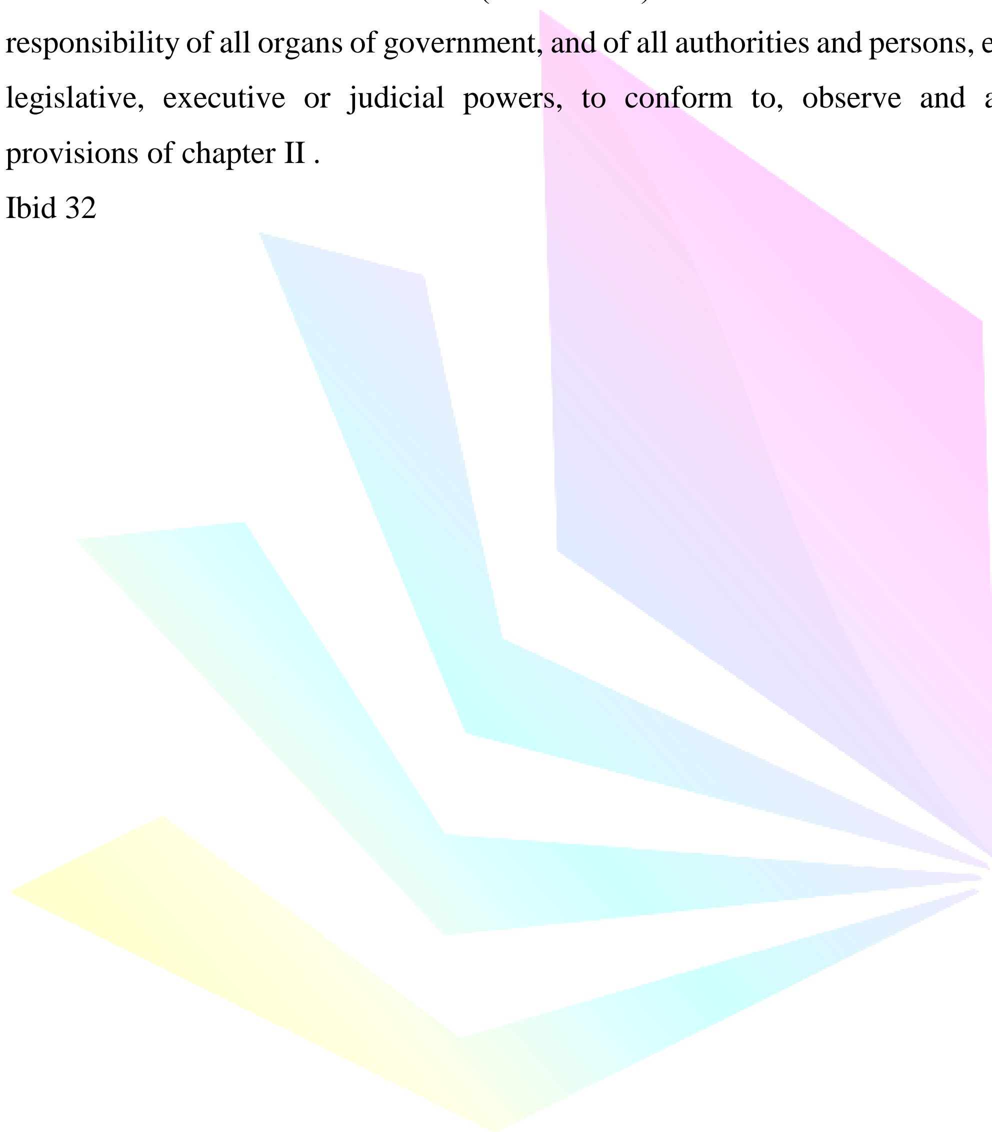
31. 'Amid VAT uproar, states sue FG over sharing of Stamp duties', the Guardian Newspapers news article dated 10th September, 2021, written by Kehinde Olatunji (Lagos), Ameh Ochojila (Abuja) et al; published online on https://guardian.ng/news/amid-vat-uproar-states-sue-fg-over-sharing-of-stamp-duties/, accessed on 11th September, 2021.
32. Section 13 of the 1999 Constitution (as amended) states that "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of chapter II .
33. Ibid 32



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