

**FOUNDATIONS OF FEDERAL GOVERNMENT
IN NIGERIA**

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The federal principle is a basic element of modern constitutional thought. It connotes a division of sovereign authority between the national government and the governments of territorial units that comprise the federal union. In the event of conflict between the laws or acts of the federal government and those of the constituent, territorial governments, federal authority shall prevail, unless the highest judicial body of the federation rules that the action in question exceeds the permissible boundaries of federal jurisdiction. If the constituent units themselves can, of their own accord, nullify federal acts, the form of government is not properly federal in nature, but confederal.

Some federal unions have been formed “from the bottom up” by pre-existing political entities; others have been created “from the top down” by federalizing the governments of previously unitary states. In the former instance, federalists have sought to unify independent states without concentrating political power in one central place. In the latter, federalists have wished to diminish an existing concentration of sovereign authority at the center by means of devolution. The realism of federalist thought has been questioned from time to time by thinkers who believe that sovereignty is indivisible and cannot be shared between the government of a sovereign state and its subordinate entities. Hence the federal idea has been as controversial in principle as it is durable and valuable in practice. Although the vast majority of governments are, and have always been, unitary

in form, federalist principles have often been invoked by democrats in unitary systems who wish to resist tendencies toward an excessive centralization of power.

Nigeria is the world's fifth largest federation, after India, the United States, Brazil, and Russia. Over the past quarter-century, Nigerians have pioneered two main innovations in federalist thought and practice; they are known as the principle of federal character and the three-tier federation. Both ideas were introduced into public discourse at roughly the same time in the mid-1970s, an especially creative period for Nigerian constitutional thinkers. This analysis begins with the proposed and partially, but by no means fully or permanently, realized structural change from a classic two-tier federation to the constitutional entrenchment of a third tier of government.

Double Devolution

A federal system of government, comprising three regions (in the north, southeast and southwest), was established in colonial Nigeria in 1954. It was based on an historic compromise negotiated by British officials and the leaders of three major Nigerian political parties, each one in control of a regional government. Northern leaders forsook their preference for a virtual confederation of autonomous regions, by which means they hoped to protect a traditional system of authority exercised by Muslim emirs in the northern provinces. In return, the eastern leaders agreed to retract their demand for either a unitary form of government or, at the very least, a strongly centralized federation. They acceded to the preference of western leaders for an American/Australian type federation, with all powers not expressly assigned to the center being reserved to the regions. Furthermore, the western view prevailed with respect to the formula that would be used to allocate revenue collected by the federal government to the regions. This would be done mainly in accordance with the principle of derivation, meaning that most revenues earned from exports would be returned to the region of origin. As a result, the Western Region prospered disproportionately due to a long-term rise in the world price of its main export product, cocoa, during that era. However, the western leaders were obliged to cede control of Lagos, the country's primary commercial center and principal port, which was designated the federation's capital city and, with its environs, federal territory.

In anticipation of a massive shift from reliance upon agricultural exports to oil, produced mainly in southeastern Nigeria, the principle of derivation was scaled back, in 1959, and combined with the principles of national need, national interest, and equity, in order to ensure that the nation as a whole would benefit from the oil bonanza.¹ Were it not for an egregious imbalance in the size of the three constituent regions (the Northern Region consisted of approximately three-fourths of the country's territory with 54% of the population), the Federation of Nigeria, which became independent in 1960, might have realized the bright and stable future envisaged by its architects. But the northern leaders were determined to maintain their numerical advantage in the National Assembly, and consequent control of the Federal Government, by using a variety of means, both fair and foul, to block attempts by southern political parties to penetrate the Northern Region.

In 1962, the northern-controlled Federal Government, led by Prime Minister Abubakar Tafawa Balewa, eliminated a serious threat to the northern political elite by imposing a caretaker administration (under an emergency powers act) on the Western Region and imprisoning a resolute adversary, Obafemi Awolowo, leader of that region's dominant political party, on charges of treason. Subsequently, in 1963, the Western Region was partitioned to create a fourth region, the Midwest, for ethnic minorities in that part of the country. At this time also, a republican form of government was established to replace the existing constitutional monarchy, bequeathed by Britain, with Queen Elizabeth as the nominal legal sovereign. Inexorably, eastern, as well as western, regional discontent with northern domination of the federal government undermined the First Republic, which succumbed to a coup d'état effectuated by eastern army officers, in January 1966. Several months later, the military government, headed by an eastern general, provoked a northern-led rebellion by threatening to impose a unitary form of government on the country. Recurrent episodes of violence against civilians of eastern origin in the north, as well as eastern officers there and elsewhere, culminated in an eastern secession and 31 months of civil warfare (1967-1970) before national unity was restored by force of arms.

¹ Adebayo Adedeji, *Nigerian Federal Finance* (London: Hutchinson Educational, 1969), pp. 130-132, 252-255.

The fall of the First Republic opened the door of political opportunity to persons of minority ethnic status who were disadvantaged in the northern and eastern regions, just as midwesterners had experienced neglect before their separation from the Western Region. Suddenly, northern minorities, who were strongly represented in the army, were in a position to assert their desire for separation from the region controlled by emirs and their political allies. In May 1967, the Federal Military Government, headed by Yakubu Gowon, a general of northern minority ethnic origin, acted to divide the country into 12 states – 6 in the north, 3 in the east, and 3 in the west (including the midwest). This historic decision corrected the flagrant territorial imbalance that had been the principal source of political instability in Nigeria. It also accomplished these strategic military aims: minority ethnic groups in the east were attracted to the federal side by grants of statehood; the nation as a whole, apart from the secessionist Igbo-speaking eastern sector, rallied to the popular cause of federal unity without regional domination. Despite this remarkable enhancement of federal stability, which the civilian political class of the First Republic could not have achieved, federalism in Nigeria was destined to languish under military rule. So long as the Supreme Military Council and its successors (in turn, the Armed Forces Ruling Council, the National Defense and Security Council, and the Provisional Ruling Council) could rule by decree, the system of government was effectively unitary, no matter its official description as a Federal Military Government. This was the actual state of affairs for all but 4 years and 3 months (the duration of the Second Republic of 1979-1983) between the coup d'état of January 15, 1966 and the restoration of a civilian government on May 29, 1999.

Since the disastrous attempt to abolish federalism in 1966, each successive military regime has declared that it would preserve and improve the system of federal government. Over the years, military rulers have increased the number of states thus: to 19 in 1976; 21 in 1987; 30 in 1991; 36 in 1996. Although state creation is a widely popular response to various political grievances, the number of presently existing states, 36, is three times the number deemed necessary to secure a stable balance of constituent states in 1967. Critics contend that proliferation has created an array of weak, and financially unviable, states that function as conduits for the transmission of resources and services

between federal and local authorities.² To be sure, successive military governments have promoted centralizing tendencies within the nominally federal framework. It is important, however, to distinguish between a centralized federal system and the unitary form of government, for which there is very little, if any significant, support in Nigeria. This crucial distinction is partially obscured by political and intellectual fallout from Nigeria's pathbreaking attempt to establish a three-tier federal system, one in which the units of local government are specified by name in the Constitution, regulated by federal law, and entitled to receive financial resources from the federal government. Just as they have calculated the political pros and cons of creating states so too have military rulers earned political credit by creating a few hundred new local governments, each one fortified, in principle, by a constitutional guarantee. In 1979 there were 301 local governments in the country; in the 1999 Constitution, 774 were named.

The conception of a three-, rather than two-, tier federation appears to have originated with the democratizing local government reform, effectuated under military auspices, of 1976.³ Its chief aim, in response to experience during the First Republic, was to protect local governments from threats of abolition and dissolution by overbearing state governments. While the spirit of this reform was embodied in the 1979 Constitution, no specific means were provided for its enforcement. Ten years later, the structural requisites for a third tier were powerfully reinforced by the 1989 Constitution, designed for a Third Republic that was, however, aborted at the moment of its birth in 1993.⁴ Arguably, the inclusion of a constitutional guarantee for "democratically elected local government councils" together with other provisions that identified the local governments by name,

² Ntiyong Akpan, "What Constitution for Nigeria? (2)," *The Guardian Online* (Lagos), January 26, 1999.

³ Brigadier Shehu Yar'Adua, Chief of Staff, Supreme Headquarters, "Foreword" to *Guidelines for Local Government Reform* (Lagos: 1976). On the democratic impulse to this reform effort, see Alex Gboyega, *Political Values and Local Government in Nigeria* (Lagos: Malthouse Press, 1987), pp. 136-139.

⁴ The legal scholar, B. O. Nwabueze, argued that the Constitution of 1979 stopped short of establishing what would be (to his mind) an incongruous "tripartite division of powers" among the levels of government. Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (London: Sweet & Maxwell, 1983), pp. 124-140. His interpretation was persuasive for the Second Republic of 1979-1983, but it was negated by the more explicit and comprehensive provision for a three-tier system in the Constitution of 1989.

established principles of local government organization, and support their viability by means of direct federal funding, should be reckoned an original Nigerian contribution to the science of government.⁵

This striking departure from normal federalist practice, wherein local governments are the creatures and subordinates of state governments, and exist at their pleasure, may also account, at least in part, for the intense controversy that has continued to swirl around the three-tier concept during the early years of the Fourth Republic. Admiration for both the innovative qualities of this idea and its contribution to the nurture of local democracy is mixed with regret for the concomitant disempowerment of state governments and the resulting intensification of centralizing tendencies.⁶ Critics warn that a federation of enfeebled states may not be able to contain the disruptive political pressures that continue to threaten Nigeria's national unity. However, the viability of Nigeria's federal union does not depend solely, or even mainly, on the constitutional articulation of relations between levels of government. A more fundamental issue is the system's capacity to accommodate ethnic identities and sentiments.

Polyethnicity

In a pathbreaking comparative analysis of "the territorial dimension of politics," Ivo D. Duchacek used the term "polyethnic" to describe federal systems in which the constituent territorial units "coincide with ... ethnic, tribal, or linguistic" boundaries.⁷ Polyethnic federations, like India, Russia, and Yugoslavia, have been liable to intense secessionist strains involving (whether or not they were caused by) ethnic conflicts. Yet demands for polyethnic federalism are not uncommon, and they are difficult to resist in countries that consist of two or more territorial groups, each with its distinctive customs and language.

⁵ *The Constitution of the Federal Republic of Nigeria, 1979*, s. 7 (1); idem, 1989, s. 7 (1-2), s. 160 (4-7), Ch. VIII, and First Schedule; idem, 1999, s. 7 (1), s. 162 (4-7), and First Schedule.

⁶ For lucid expressions of this dilemma in anticipation of the stillborn Third Republic, see John A. A. Ayoade and Rotimi T. Suberu, "Federalism," and Dele Olowu, "Local Government," in *Quarterly Journal of Administration*, 24, 3 (April 1990): 152-165 and 179-189.

⁷ Ivo D. Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* (New York: Holt, Rinehart and Winston, 1970), p. 293.

Nigeria's federation is polyethnic in form, meaning that most, if not all, of the 36 states have primary ethnic identities that depend upon the variable definitions of ethnicity, having regard to such criteria as language, culture, ancestral descent, and traditions of social organization. Linguists have identified more than 400 distinct languages in Nigeria. Historians apply the term nationality to any group of people who are aware of their potential capacity to establish and maintain an autonomous state. On this basis, historians have estimated the number of nationalities in Nigeria to be in the vicinity of 350. Three nationalities, defined with reference to language, account for approximately 60% of the Nigerian population, currently estimated to total some 120 million. They are the Hausa of the northwest (estimated at 28%), the Yoruba of the southwest (18%) and the Igbo of the southeast (14%).⁸ Other nationalities range in size from several thousand to several million; the larger groups include these: Fulani, Kanuri, Nupe, and Tiv in the northern part of the country; Edo, Ibibio, Ijaw, and Urhobo in the southern part. Such vast numerical disparities among so large a number of nationalities underlie the quest for institutional devices that will guarantee the autonomy of local and sectional groups within states as well as a federal form of national government. Some nationalities are too large to incorporate within a single state, while most states include local nationalities that crave constitutional as well as political recognition.

The architects of Nigerian federalism have endeavored to reconcile the claim of each nationality to its place in the constitutional sun with the practical necessity of having a reasonable number of viable states as constituent units of the federation. Among the attempts to resolve this problem, none have been more fateful, or less successful, than those involving the formation of geographical clusters, known as regions or zones.⁹ The lessons of Nigerian political history teach that political regionalism is not compatible with the empowerment of a multiplicity of politicized ethnic groups. Once regions are established and endowed with political power, ethnic interests are routinely sacrificed to

⁸ These are rough estimates, extrapolated from various reports. There is no official tabulation of the size of ethnic groups.

⁹ The two most influential proposals for reform of the colonial regional structure by Nigerian nationalists were these: Nnamdi Azikiwe, *Political Blueprint of Nigeria* (Lagos: African Book Company, 1943), p. 11; Obafemi Awolowo, *Path To Nigerian Freedom* (London: Faber, 1947), pp. 47-55.

regional interests, which often prove to be the interests articulated by the leaders of large ethnic groups. Smaller ethnic groups then look to the center for protection against their overbearing neighbors within the region.

After 1967, when Gowon's military administration created 12 new states to replace the regions of the independence era, regional movements subsided and were superseded by political movements based on ethnic values, on the one hand, and national values, on the other. Regionalist thought and organization remained relatively dormant until 1993, when the military government annulled the result of a presidential election and aborted a popular transition to civilian rule. In the aftermath of that failed transition, disillusioned democrats revived political regionalism as a strategy of resistance to the Federal Military Government. Ironically, their program resurrected a six-zonal blueprint of purely colonial origin that had not been mentioned in Nigerian political debates for over 50 years.¹⁰ In three of these proposed zones, a regional language is spoken by nearly all of the people: Hausa in the northwest, Igbo in the southeast, and Yoruba in the southwest. In the northeast, there is a large Kanuri-speaking population as well as many other ethnolinguistic groups. The north-central is extremely diversified, including a multitude of languages and ethnic groups. The remaining zone, named at first "southern minorities," then "south-south," encompasses a broad band of ethnic and linguistic groups, from Itsekeri, Urhobo, Edo, and Ijaw-speakers in the western and central sections to Ibibio, other Efik-speakers, and Ekoi-speakers in the east.

The impracticality of neo-regionalism as a political strategy for Nigerian federalists was indicated by the limited extent of its popular appeal during the recent struggle against military rule. Between 1993 and 2000, the most assertive and broadly-based regionalist sentiments were manifest in the Yoruba-speaking southwestern zone; surely this was a direct consequence of the outrageous annulment of a presidential election in June 1993, and subsequent imprisonment of the late Moshood Abiola, the Yoruba-speaking president-elect. Assertive regionalism has also been evident in the Igbo-speaking southeast, where it attests to the persistence of grievances dating from the civil war and its af-

¹⁰ John N. Paden, "Nigerian Unity and the Tensions of Democracy: Geo-Cultural Zones and North-South Legacies," in Paul A. Beckett and Crawford Young, eds., *Dilemmas of Democracy in Nigeria* (Rochester, N.Y.: University of Rochester Press, 1997), pp. 243-245.

termath. Igbo regionalist sentiment escalated sharply, in 2000, following a spasm of violence against Igbos in a northern state, as described below. In both (southeastern and southwestern) regions, or zones, organizations based on ethno-linguistic identity have assumed overtly political roles. Elsewhere, the impulse toward political regionalism is either relatively weak or virtually nonexistent. Thus, the northwestern zone is Hausa-speaking but multi-ethnic and predisposed toward transregional linkages with emirates in the northeastern and north-central zones, where the Sultan of Sokoto is widely revered as a spiritual leader. The two latter zones, as well as the south-south, are multi-ethnic, multi-lingual, and clearly lacking in regional cohesion. In the oil-bearing sectors of the south-south, specifically the Niger Delta and adjacent wetlands, ethnic and linguistic communities claim ownership rights and compensation for environmental damage as nationalities, but not in the name of the more extensive south-south zone; and not even in the name of states that comprise it, other than the two Ijaw-speaking states of Bayelsa and Rivers.¹¹

Federalist opposition to regionalism was pioneered during the pre-independence era by Nigerian students abroad, and generated at home by a small group of intellectuals who established a Citizens' Committee for Independence in 1956 and circulated their published views during the constitutional review of 1957. Both groups favored conversion of the 24 to 27 colonial-era provinces (12 in the north and 12 to 15 in the south) into states of a federation.¹² The spirit of this idea has prevailed in post-civil war Nigeria, especially since 1976, when the number of states reached 19. Although no more than two of the old provinces have survived the creation of 36 states intact,¹³ their traditions are more palpable in most parts of the country than are those of the former regions.

¹¹ For an overall normative assessment of the claims of ethnic groups in Nigeria, see John Boye Ejibowah, *Competing Claims to Recognition in the Nigerian Public Sphere* (Lanham and Oxford: Lexington Books, 2001).

¹² Eme O. Awa, *Federal Government in Nigeria* (Berkeley and Los Angeles: University of California Press, 1964), pp. 63-64, 69-71. The number of southern provinces at this time was variable because the former Oyo Province had been divided in 1934 and the status of two Cameroonian provinces, that were eventually separated from Nigeria, was uncertain.

¹³ The states of Katsina and Lagos respectively appear to be identical in area to the colonial provinces of Katsina and Colony.

Yet regionalist thought lingers persistently in the world of Nigerian politics. For example, in 1995, the military government modified a draft constitution to provide for the rotation of six high offices of state, including the office of president, among the aforementioned six zones. However, interest in this scheme appeared to fade when General Sani Abacha, the Head of State, indicated that he would contrive to retain power without incurring the risk of a competitive election. Following his sudden death, in June 1998, his arch-enemies in the National Democratic Coalition called for the formation of a government of national unity based on equality of representation of these same six zones. This political group also advocated regionalization of the armed forces with substantial autonomy for each regional command, in effect, a confederal army. Furthermore, various observers of the local, state, and federal elections, held between December 1998 and February 1999, used the 6-zone format to report results in the 36 states. Zonal identities have also been taken into account by leaders of the currently dominant political party, the National Assembly, and the civilian administration of President Olusegun Obasanjo in distributing appointments to various political offices.¹⁴

In January 2000, a group of influential thinkers, led by Chief F.R.A. Williams, a highly respected lawyer who chaired the committee that drafted the constitution of 1979, proposed the establishment of six governmental regions, each consisting of several (either five, six, or seven) of the existing states. Most of the members of this group, which named itself The Patriots, were either Yoruba or Igbo. While their proposal revived the old (and aforementioned) principle of derivation for distributing revenues earned from exports among the regions, they made an exception for revenues earned from offshore oil, which, they said, should go to the federation rather than the adjacent delta-wetland (South-South) region. As might have been expected, the delta and seacoast states reacted with indignation and insisted on their entitlement to all proceeds from oil production on the continental shelf extending 200 miles out to sea. Their claims were partially satisfied in 2003 by legislation that embodied a compromise negotiated by the governors of the oil producing states with the president, who needed their support for his re-election. The

¹⁴ These informational and political practices were repeated and reinforced during the electoral sequence of 2003 and its aftermath.

agreement provided for an extension of the principle of derivation to all existing, and many potential, offshore oil operations.

Ultimately, there is no getting around the incompatibility of neo-regionalism with the political demands of all but a few, large ethno-linguistic nationalities. Furthermore, double devolution has solidified the state-and-local structure of polyethnic federalism in Nigeria. History has bestowed its laurel for federalist thought on the little known Citizens' Committee for Independence of 1956-1958 rather than the major nationalist leaders of that era.¹⁵

Those who maintain their regionalist convictions may well allude to the ambivalent attitude of some multi-state federalists toward polyethnic policies and principles. For example, the 1987 Report of the Political Bureau (a study commission appointed by the Armed Forces Ruling Council to examine the causes of national problems and make recommendations for their resolution) was decidedly averse to polyethnic values.¹⁶ Thus, the Bureau recommended replacement of indigeneity requirements in the states by a minimum residence requirement of 10 years. Existing indigeneity requirements (then and now) restrict certain rights of citizenship, including public employment and eligibility for public office, to members of the indigenous community of the state or local government area concerned.¹⁷ That recommendation died in the Constituent Assembly of 1988.

For many Nigerians, the institution of traditional rulership is a cornerstone of ethnic identity. However, the Bureau portrayed Nigerian traditional rulers unfavorably, alleging that "they compete against the nation for allegiance, represent a force against the principle of popular democracy and are dysfunctional reminders of national differences." On no account, opined the Bureau, should they be permitted to play a role in government

¹⁵ Given the implications of this claim for both historical analyses and studies of the role of intellectuals in politics, specialist readers of this paper may be interested in the names of the committee's executive members: R. A. O. Akinjide, Eme O. Awa, D. A. Badejo, Aliyi Ekineh, A. B. Fafunwa, and H. A. Oluwasanmi. Ibid., p. 69, n. 18.

¹⁶ A majority of the Political Bureau's 17 members were university-based intellectuals, among them Eme O. Awa, who had been an executive member, and assistant secretary, of the Citizens' Committee for Independence. The influence of this scholar on political thought in Nigeria during the latter 20th Century merits special attention.

¹⁷ *Report of the Political Bureau* (Lagos: Federal Government Printer, 1987), pp. 196-198.

beyond the local level.¹⁸ This viewpoint did not prevail in the subsequent Constituent Assembly, which provided for both the establishment of Councils of Chiefs with advisory functions in the states and their representation in the federal Council of State, also an advisory body.¹⁹ But the Bureau's recommendation against conferment of legislative, executive, or judicial functions on traditional rulers was adopted by the 1989 Constitution.²⁰

Neither of these rival outlooks on the role of traditional rulers has been expressly endorsed in the 1999 Constitution. Unlike the Constitutions of 1979 and 1989, the current charter makes no mention at all of traditional rulership, an omission that may be reckoned a setback for polyethnic principles as well as the values of those who favor the preservation of traditional authority.²¹ Alternatively, it may be suggested that traditional authority does not require constitutional validation in order to function effectively in its own dimension of political space.²² Whether or not the Constitution is amended, as now seems likely, to incorporate this durable form of political authority, the traditional rulers of ethnic communities will continue to command the allegiance of most Nigerians in their everyday lives.

¹⁸ Ibid., pp. 74, 142-147. For illuminating commentary on this question, see Oyeleye Oyediran, "The Political Bureau," in Larry Diamond, Anthony Kirk-Greene, and Oyeleye Oyediran, eds., *Transition Without End: Nigerian Politics and Civil Society Under Babangida* (Boulder and London: Lynne Rienner, 1997), pp. 88, 92, and 99.

¹⁹ *Constitution, 1989*, s. 195; Third Schedule, Pt. 1, B (5).

²⁰ Ibid., Fourth Schedule, Pt. II, 2.

²¹ Alhaji Umaru Shinkafi, vice-presidential candidate for the defeated coalition in 1999, decried the omission of traditional rulership in the Constitution, asserting the efficacy of that institution in the national effort to combat both criminal and ethnic violence. *The Guardian* (Lagos), August 16, 1999.

²² For the present writer's theory of mixed government in Africa, involving the utilization of traditional authority as a political resource for the enhancement of social stability in turbulent times, see Richard L. Sklar, "The African Frontier for Political Science," in Robert H. Bates, V. Y. Mudimbe, and Jean O'Barr, eds., *Africa and the Disciplines* (Chicago and London: The University of Chicago Press, 1993), pp. 83-110; Sklar, "African Politics: The Next Generation," in Richard Joseph, ed., *State, Conflict, and Democracy in Africa* (Boulder and London: Lynne Rienner Publishers, 1999), pp. 165-177; and Sklar, "The Premise of Mixed Government in African Political Studies," in Olufemi Vaughan, ed., *Indigenous Political Structures and Governance in Africa* (forthcoming).

In plural societies that include diverse ethno-linguistic nationalities with territorial homelands, such as Nigeria, a federal form of government must, of necessity, be polyethnic in part. Polyethnic thought is exemplified by the previously mentioned recourse to ethnic boundaries in creating both states and local government jurisdictions. Supplementary arrangements meant to enhance the capacity of nationality groups to participate in public life may be identified as polyethnic features or characteristics of a governmental system. In Nigeria, the term “federal character” is used to connote the inclusive intent of such provisions. Introduced as a constitutional concept by the historic Constitution Drafting Committee of 1976, the principle of federal character requires equitable representation of states and ethnic groups in the federal government so as to “promote national unity, and also to command national loyalty thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in ... [the federal] government or in any of its agencies.” State and local governments are also enjoined to distribute offices and conduct their affairs “in such manner as to recognize the diversity of the people” within the jurisdiction concerned and reflect “the need to promote a sense of belonging and loyalty among all the peoples of the Federation.”²³

Like the device of “double devolution” and its potential consequence of a three-tier federation, the principle of federal character is a distinctive Nigerian contribution to federalist thought. Even the Political Bureau, with its inclination toward non-ethnic federalist values, embraced the idea in principle but cautioned that it should be implemented “without prejudice to the criteria of merit, excellence and achievement,” thereby prompting the kind of debate that has been engendered by “affirmative action” policies in many countries. True to its egalitarian ideological orientation, the Bureau emphasized the limitations of a policy predicated on the principle of ethnic justice:

²³ These defining phrases have been included in all constitutions since 1979: *Constitution, 1979*, s. 14 (3), (4); *idem, 1989*, s. 15 (3), (4); *Constitution of the Federal Republic of Nigeria, 1999*, s. 14 (3), (4). See also the *Report of the Constitution Drafting Committee containing the Draft Constitution, Vol. I* (Lagos: 1976), pp. ix-x, and xlii for the use of this term by the Head of the Federal Military Government at the committee’s opening session. The report of this committee, chaired by F.R.A. Williams, SAN, is “historic” for its having established a lasting intellectual foundation of constitutional principles for government in Nigeria.

“Ultimately ... the problem which the doctrine of federal character as well as other forces like ethnicity, statism and regionalism poses can be fully dealt with only when social justice in the form of unimpeded access to education, basic health care, social insurance for old age, housing, food, etc. is assured to all citizens, and hence to all nationality or ethnic groups. It is in this regard that we re-echo the primary recommendation of the Bureau for socialism as the philosophy of government appropriate to the socio-political and socio-economic conditions of contemporary Nigeria.”²⁴

Other critics have noted that reliance on governmental categories, such as states and local government areas, for implementation of the principle has resulted in the very evil it was meant to avert, i.e., neglect of the aspirations and grievances of ethnic groups, of which there are several hundred. It would appear, however, that such criticisms, and the refinements of policy to which they have contributed, have helped to embed the doctrine of federal character in the Nigerian constitutional system.²⁵

Polyethnic devices were prescribed for the electoral system by the Constitutions of 1979 and 1989, and the guidelines issued by the Independent National Electoral Commission for elections in 1998 and 1999. Thus, in 1999, political parties were required to win 5% of the vote for local councillors in 24 of the 36 states in order to qualify for subsequent elections at the state and federal levels.²⁶ For a first ballot election to the presidency, a candidate with the overall highest tally of votes would also be required to win 25% of the vote in at least two-thirds (i.e., 24) of the states and the Federal Capital Terri-

²⁴ *Report of the Political Bureau*, p. 201. See also Ladipo Adamolekun, *The Fall of the Second Republic* (Ibadan: Spectrum, 1985), pp. 24-25, 45; and Ladipo Adamolekun, John Erero, and Basil Oshionebo, “Federal Character and Management of the Federal Civil Service and the Military,” *Publius: The Journal of Federalism*, 21, 4 (Fall 1991): 75-88, published in a special issue on “Federalism in Nigeria,” edited by Ladipo Adamolekun.

²⁵ The standard scholarly treatment of this subject is Peter P. Ekeh and Eghosa Osagie, eds., *Federal Character and Federalism in Nigeria* (Ibadan: Heinemann Educational Books, 1989).

²⁶ A predetermined exception was made to ensure that three parties would qualify for these elections: in the event of only two parties achieving 5% in two-thirds of the states in local elections, the party that won 5% of the vote in more states than any of the others would also be deemed to have qualified. This was intended to avert the potentially dangerous disqualification of a major party.

tory. This requirement proved to be significant because the breadth of electoral support for the successful candidate, Olusegun Obasanjo, who was reported officially to have won at least 25% of the vote in 32 of the 36 states, helped to overcome the reservations of independent electoral monitors, who encountered evidence of widespread electoral malpractice.

One of the more prominent of all polyethnic features of Nigerian federalism is the constitutional provision for both Islamic and customary courts of appeal in those states that wish to have them.²⁷ The vast majority of Nigerians practice either Christianity or Islam. Although Muslims outnumber Christians, only some 35 to 40 percent of the entire population inhabits the emirate sector of the north, where Islamic law is an integral part of traditional political organization. (To be sure, many Muslims live outside of the emirates, for instance, in Yorubaland, where the Christian and Muslim populations are approximately even and there are no specifically Islamic courts.) Respect for the legitimacy of this religiously-based legal system of the emirate sector is widely considered to be a corollary of the doctrine of federal character because it accommodates a section of the population that lives in accordance with the precepts of Islamic personal law.²⁸ After years of debate and negotiation concerning proposals to establish a *Shari'a* Court of Appeal²⁹ at the federal level, that question has been resolved in the negative. Instead, the Constitution provides that appeals from the *Shari'a* Court of Appeal of a State shall lie to the federal Court of Appeal, as is the practice for appeals from the Customary Court of Appeal of a State. However, no fewer than three justices of the Court of Appeal “shall be learned in Islamic personal law” and, for the sake of cultural balance, no fewer than three “shall be learned in Customary law.”³⁰ These comparable requirements are not entirely logical since there are as many systems of customary law in Nigeria as there are ethnolinguistic nationalities, while there is but one system of Islamic law.

²⁷ *Constitution, 1979*, ss. 244-249; *Constitution, 1999*, ss. 275-279.

²⁸ For a similar observation with reference to both Islamic and customary courts, see Jadesola Akande, “The Legal Order and the Administration of Federal and State Courts,” *Publius: The Journal of Federalism*, 21, 4 (Fall 1991): 61-62.

²⁹ *Shari'a* signifies the legal system of Islam.

³⁰ *Constitution, 1999*, s. 237; previously, *Constitution, 1979*, s. 217 (b).

It has been suggested that this kind of problem would not arise if each state had a constitution of its own. The state constitutions would then prescribe the structures and jurisdictions of state courts in accordance with general principles established by the federal constitution, subject to interpretation by the Supreme Court. Proponents of this idea contend that its adoption would allow for a desirable degree of flexibility in the administration of justice and, at the same time, reduce the number and salience of contradictory implications that result from an excessive degree of legal centralization.³¹ Be that as it may, abandonment of the existing consolidated Constitution in favor of a multiplicity of state constitutions could also undo the basis for a three-tier federation and thereby provoke a new wave of demands by ethno-linguistic nationalities for constitutional status.

Religious Law

At the dawn of Nigerian independence, in 1960, the leaders of the new nation agreed to incorporate elements of Islamic law (*Shari'a*) into the penal code of the Northern Region as part of the nation's foundational compromise. Until the year 2000, however, *Shari'a* itself had not been the legal system of any state in the federation. Toward the end of 1999, the state of Zamfara, a northern state in the emirate sector, acted to adopt *Shari'a* in its entirety as the official legal system of that state.

Christians responded to this politico-religious demarche with furious indignation, as did civil libertarians who are concerned about the constitutional rights of Muslims. They observed that *Shari'a* mandates punishments for criminal offenses that are incompatible with "fundamental rights" protected by the Constitution. Soon after the promulgation of *Shari'a* in Zamfara, a punishment of eighty lashes was administered in a public place for the new offense of drinking an alcoholic beverage in public. *Shari'a* prescribes the punishment of amputation for theft; in March 2000, the hand of an ordinary farmer, who had been convicted of stealing a cow, was amputated in a Zamfara state hospital, raising the additional question of medical abuse. Various other provisions of *Shari'a* impose behavioral restrictions on women; for example, a prohibition against travel in public conveyances with men, other than family members.

³¹ Ayoade and Suberu, pp. 162-163.

Proponents of *Shari'a* argued that it would not be applied to Christians, although religious identity may not be obvious to those who enforce the law. In any case, the introduction of *Shari'a* for Muslims meant that there would be two categories of citizens in the state, each category based on religion; each with its own set of rights and penalties. That would appear to have created the menace of a proverbial "house divided against itself," one that "cannot stand."

Like previous constitutions, the 1999 Constitution prohibits the adoption of a state religion by either the Federation or any state of the union. However, it is uncertain at the time of writing whether the the Supreme Court will rule on this great constitutional question. President Obasanjo appears to believe that the issue is too emotion-laden for resolution by the court -- that it could tear the court apart and render any judgment a *casus belli*. The Attorney General submitted a brief in support of a suit against Zamfara by a human rights organization; however, that organization's legal standing to sue was contested successfully by the state. Meanwhile, the president has tried, but in vain, to build political support for his effort to restrict *Shari'a* to its traditional role in the northern states.

In February 2000 there were violent clashes between Christians and Muslims in Kaduna, a northern state with a religiously diversified population. The immediate cause of conflict was the establishment of an all-Muslim committee of the state House of Assembly to explore the implementation of *Shari'a* in that state. Petitions, both for and against the proposed change, were submitted to the state legislature while political tensions rose dramatically, leading to widespread violence and resulting in the deaths of several hundred Christians, mostly Igbos. When a bus-load of corpses arrived in the southeast, enraged mobs attacked innocent and defenceless Hausas; some 30 were murdered in the Igbo city of Aba, while Hausa property was destroyed in other southeastern towns.

President Obasanjo then convened a meeting of the Council of State, a constitutional advisory body that consists of the 36 state governors, former heads of state, and other officials. The Vice President, Atiku Abubakar, an emirate figure and former governor-elect, announced that the assembled governors had agreed to maintain the legal status quo. However, a few northern governors and other emirate personalities in the council denied that any such agreement had been reached. The President and Vice President then met with emirs and other leading chiefs from the 19 northern states. These traditional

authorities pledged to uphold the unity of the country, but their communique was silent on *Shari'a*. In due course, eleven of those northern states that consist entirely or mainly of emirates followed Zamfara's lead into the realm of theocratic law.

The *Shari'a* crisis has resulted in growing demands for basic constitutional change. Thus, in the immediate aftermath of the Kaduna massacre, all five governors of the Igbo-speaking southeastern states declared their support for a confederal form of government; as one of them said, "we subscribe to a future of a loose confederacy, with a weak, lean centre for purely administrative purposes."³² The Igbo governors' statement was welcomed by the leading Yoruba political organization, *Afenifere*, to which all six Yoruba governors belong. While the aim of confederation has also been endorsed by the broadly-based Igbo political organization, *Ohaneze Ndigbo*, the real intent of the Igbo governors may have been to warn their northern emirate counterparts that confederal government would be the price of *Shari'a*. More to the point, their expression of support for confederation conveys an implicit warning that the emirate states could lose their entitlement to oil revenues if they jettison the principle of a secular constitution.

Conclusion

During the early years of Nigeria's Fourth Republic, challenges to the federal form of government by ethno-linguistic and sectional groups encountered reality checks in the form of potentially high economic costs. The principal oil-producing (South-South) states have reminded confederationists in the southeast and southwest that they will not hesitate to demand their own confederal rights to the proceeds of offshore oil. Meanwhile, their possibly confederal ambitions and tendencies lack the moral reinforcement of ethno-linguistic homogeneity and may be discouraged by the danger of encroachment on their territory by powerful neighbors in the event of national dissolution. In the northern states, potential confederalists, motivated by their zeal for *Shari'a*, face the stark reality of economic deprivation if federalism is abandoned.

These reality checks appear to strengthen the incentive for each potentially separatist section of the country to seek reconciliation of competing claims by means of the

³² Enugu State Governor Chimaroke Nnamani quoted in *The Guardian Online* (Lagos), March 8, 2000.

federal form of government. If so, the firmly established principle of federal character will surely be invoked to justify federal institutions and policies. The meaning of federal character can, as we have seen, be construed broadly to encompass various forms of political incorporation, including sectional balance in the composition of executive bodies, fairness and proportionality in the distribution of resources, and due allowance for the enforcement of legal norms based on custom and religion. By contrast with the durability of this doctrine, the three-tier system of federal government is far less securely embedded in Nigerian constitutional thought. Indeed its vitality may have all but expired with the aborted Third Republic in June 1993.

Had the Constitution of 1989 become the law of the land in 1993, several of its features that troubled liberal democrats, including many ardent federalists, would have acquired the moral sanction of association with a popular transition to civilian rule. Thus, the two legal political parties, created by the military government in 1989, might well have consolidated their exclusive prerogatives to contest elections. By 1998, democratic opinion had turned against that era's mandatory two-, but only two-, party system, judging it to have been badly misconceived and undesirable. Similarly, many democrats who had been favorably disposed toward the three-tier federal system until 1993, renounced it thereafter as an impediment to regional autonomy, which they now favored. Moreover, the constitutional framework into which that experiment had been incorporated did not survive the stigma of its association with an era of military dictatorship. Nine years later, in December 1998, The Constitution Debate and Co-ordinating Committee, appointed by the Head of State to assess the preferences of Nigerians concerning various constitutional proposals, found that Nigerians generally favor resuscitation of the 1979 Constitution with relevant amendments from the Draft Constitution of 1995.³³

The 1979 Constitution guaranteed the existence of local government councils, but did not actually establish a tripartite federation as had been adumbrated in the 1976 *Guidelines for Local Government Reform* and desired by its proponents. That ambitious

³³ "Presentation of the Report of Constitution Debate and Coordinating Committee by Justice Niki Tobi," Association of Nigerian Scholars for Dialogue (Internet document). The 1995 Draft Constitution had been produced by a controversial National Constitutional Conference; among other alleged defects, one-fourth of the membership had been appointed by the military government.

aim was eventually realized in principle by the 1989 Constitution of the Third Republic that was never born. But the Nigerian nation has retired the name and number of the lost republic as a tribute to its main martyr (Moshood Abiola) and the popular-democratic struggle for its redemption. Hence the 1989 Constitution is entitled to a measure of recognition in the annals of Nigerian history; and the format of a three-tier federation, embodied in that Constitution, retains its standing as an historic political invention, even though it has never existed in legal reality. Yet its potentiality for realization is no less and arguably greater under the Constitution of 1999 than it was under that of 1979.

In its existing form, the 1999 Constitution reaffirms the 1979 guarantee that there should be a “system of local government by democratically elected local government councils.”³⁴ Like the 1989 Constitution, the current Constitution specifies local government areas by name,³⁵ but unlike the former charter it neither prohibits alteration of local government structures by state governments, nor does it prescribe the form of local government organization, nor provide for direct federal funding of the local governments. For a fully fledged three-tier federation to emerge, constitutional architects would have to follow the path that led toward the Constitution of 1989. It would also be possible for Nigeria to go in the opposite direction by empowering the states to adopt their own constitutions subject to broad requirements of conformance with basic principles of the federal constitution. Such principles would undoubtedly include the existing guarantee of democratic local government, but they would probably not deny the right of a state to redefine the boundaries of local government areas, or to prescribe the forms of local government organization, regulate their activities, and organize local elections. Were this direction to be taken, the vision of a three-tier federation would rapidly recede and all but disappear.

Most federal systems of government do presuppose the adoption of separate constitutions by constituent states. An important exception is the Republic of India, which example is especially relevant for comparison with Nigeria given the very high degree of ethnic pluralism in both countries. In all 25 states of the Indian federation, one or more of the indigenous languages have been accorded official status. Apart from the special

³⁴ *Constitution, 1999*, s. 7 (1).

³⁵ *Ibid.*, First Schedule.

case of Kashmir, due to the exceptional circumstance of its accession to the Indian Union in 1947, no state has a constitution of its own. As in Nigeria, the strongly centralist Indian Constitution prescribes a common organization for governments of the states. So long as the Nigerian Constitution disallows separate constitutions for the states, it too will be characterized by a high degree of centralization, but nothing to compare with the intrusive powers that have been vested by the Indian Constitution in the central government of that federation.³⁶

As Nigeria ponders the future of its federation, various proposals for revision will be debated with great intensity. These include the following matters, among others: the formula for allocating revenue collected by the federal government to the states; federalization of the centralized Nigeria Police Force; proposals to coordinate the activities of groups of states on a regional (zonal) basis. Surpassing the significance of every other question is the matter of choice between a consolidated constitution, as presently exists, and one that requires each state to adopt its own separate charter. Retention of a consolidated constitution implies perpetuation of the spirit, if not the letter, of the three-tier federal experiment. The third tier may be expected to become increasingly attractive as a venue for the pursuit of goals by a multitude of small and moderately-sized nationalities. By contrast, a federal system that follows the principle of divided sovereignty to its logical conclusion of a separate constitution for every state will also need to devise alternative outlets for polyethnic pressures.

Neither choice, or course of constitutional development, appears to be superior to the other in an absolute sense. Historic innovation, as represented by the third tier, is not an end-in-itself but a probative means for strengthening a polyethnic federation. The architects of constitutional change in Nigeria will be obliged to exercise judgement on this central question: Which system of federal government is better suited to address the

³⁶ Centralizing provisions of the Constitution of the Republic of India include these: the Union (or central) government can (and frequently does) suspend the government of a state and rule it directly; the Union legislature may appropriate state legislative authority on a temporary basis; the Union government can veto state legislation. Nonetheless, the Indian Constitution is frequently cited as a model for polyethnic countries.

needs, and cope with the problems, of this richly diversified, polyethnic and multilingual society?