

CHAPTER 4

FEDERALISM UNDER THE 1999 CONSTITUTION: THE CHALLENGE OF RESTRUCTURING AND DEMOCRATIC LEGITIMACY

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1 Introduction

Federalism under the 1999 Constitution of Nigeria¹ has a political, historical, economic, cultural, geographical and social background. The constitutional problems of Nigerian federalism up to this present dispensation stem from the inequality of the size of the component states, cultural diversity, a fear of dominion by the major ethnic groups, and ethnic politics. These factors among others fuel inter-ethnic rivalry and agitation for power at the centre, particularly by the major ethnic groups of Hausa, Igbo and Yoruba. These were also the major problems that eventually led to the military intervention in 1966, the civil war of 1967 to 1970 and further military rule until 1999.

The major reason behind the adoption of the federal principle in the Constitution was to address the above issues and to prevent the tribal or regional dominance of any government or its agency, thus protecting the interest of the minorities. This was also the reason for the inclusion of the federal character provision in the Constitution, which ordinarily should be able to protect the minorities. Unfortunately, this has not been the case as inequality, tribal dominance, marginalisation, a lack of transparency and corruption persist due to limitation, non-observance or lopsidedness in the application of the federal principle.

Federalism in Nigeria therefore has remained a perennial thorny issue that continues to attract scholarly research and passionate political discourse as to its viability as an ideal system for the country. Although the focus of this chapter is on post-1999 federalism in Nigeria, it is apposite

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1 In this chapter sometimes referred to as 'the Constitution'.

to provide a brief insight into its evolution from the colonial period. Thus, this chapter further argues that the Nigerian situation is caused by the nature of the federal system of government imposed on the nation by successive administrations (colonial as well as military) which lacked democratic legitimacy and therefore was not sustainable. The chapter concludes that until the foundation of the Nigerian federal arrangement is honestly and boldly addressed by Nigerians themselves, the country will remain at the edge waiting for its inevitable implosion. Restructuring of the country therefore is imperative in light of the realities of the frustrations occasioned by the present national socio-economic and political dynamics. This chapter therefore adopts the doctrinal methodology in addressing the above problem and recommends a fundamental amendment of the 1999 Constitution to give it legitimacy and make it reflect a sustainable and true federal constitution. This foundational approach inevitably raises the fundamental question as to who restructures, how, the possible challenges and possible solution, having regard to the existing 1999 constitutional framework, which this chapter seeks to address.

The first part of the chapter deals with the introduction. The second part deals with the concept of federalism, the diverse approaches to the study of federalism, an overview of its features, aims and principles as espoused by some scholars. The third part focuses on the evolution of the Nigerian federal structure. This part briefly examines the historical development of the federal arrangement and its culmination into the 1999 Constitution. The fourth part analyses the federal arrangement under the 1999 Constitution while the fifth part focuses on the challenges of its democratic legitimacy, application and sustainability. The sixth aspect of the chapter analyses the demand for restructuring as the only option for achieving a true and sustainable federal Nigeria and its constitutional and political challenges looking forward. Part seven analyses the role of the critical stakeholders in the restructuring project, especially the challenges of the powers of the legislature under the present constitutional arrangement. This part argues that the legislature will most likely pose a formidable opposition to the people's sovereignty *vis-à-vis* the repository power to bring about fundamental changes in the Constitution otherwise than in the manner provided for in the Constitution. The last part focuses on the concluding remarks, suggesting measures to produce a democratically-restructured and legitimate federal constitution for Nigeria.

2 The concept of federalism: approaches and definitions

There is no consensus among scholars on the definition of federalism. This is largely due to the inherent difficulties in establishing a proper linkage between theory and practice of federalism in various jurisdictions. This is coupled with the fact that different scholars view the concept of federalism from different perspectives due largely to differences in their experiences from their environments. These are also factors that gave rise

to the emergence of different approaches to the study of federalism as propounded by scholars, including the institutional or legal, sociological, processional and bargaining approaches.²

The institutional approach, also regarded as the classical approach, is very much associated with Wheare's definition of federalism based on the American federal structure in terms of constitutional division of powers and political relationships and institutions. In the sociological approach, federalism is viewed as a function of social diversity rather than of constitutional architecture. The essence of federalism in this approach lies in society itself and not merely in its constitutional or institutional structure. The approach presents federalism as a device for articulating and protecting the federal quality of a society with the emphasis on the diversity. The processional approach views federalism as a process, a continuous development, the process of achieving a union of groups which retain their respective identities, which may operate in both the direction of integration or aggregation and differentiation or disaggregation. The bargaining approach views federalism as a political solution, the result of a political bargain between prospective national leaders and officials of constituent governments for the purpose of aggregating territory.³

It must be noted that despite the variations in the approaches of scholars in the study of federalism, the crucial tenets of federalism are highlighted by all to more or less the same extent. These tenets individually or in combination with the others impacted on the decision or choice of states as to the type of federal arrangement that best suits their countries. The modern concept of federalism is predicated on the theory and practice of the American federation which was birthed in 1787. Using the American model as a yardstick, Wheare, in describing the federal principle, emphasised that 'by the federal principle I mean the method of dividing powers so that general and regional governments are each, within a sphere co-ordinate and independent'.⁴ Wheare provided the legal framework of a federal system, which includes:

- (a) the division of powers among levels of government;
- (b) written constitution showing this division; and
- (c) co-ordinate supremacy of the two levels of government (three in the case of Nigeria) with regard to their respective functions.

Wheare argues that since federal government involves a division of functions and since states forming the federation are anxious that they should not surrender more powers than they want, it is essential for a federal government that there should be a written constitution embodying the division of powers and binding all governmental authorities and from

2 AH Birch quoted by MI Ogu in 'Federalism as an essentially contested concept: A discuss', <http://nigeriaworld.com/articles/2011/jan/301.html> (accessed 10 April 2019).

3 W Riker *Federalism: Origin, operation and significance* cited in Ogu (n 2).

4 KC Wheare 'What federal government is' reprinted in P Ransome (ed) *Studies in federal planning* (1943) 34.

which constitution they derive their powers. Therefore, any of their actions contrary to the provisions of the constitution is liable to be declared by the court as invalid. This is the essence of the principle of separation of power and the supremacy of the Constitution.

Second, if the division of powers is to be guaranteed and if the Constitution embodying the division is to be binding upon federal and state governments alike, it follows that the power of amending that part of the Constitution which embodies the division of powers must not be conferred either upon the federal government acting alone or upon the state or local governments acting alone. The power to amend a federal constitution must rest in both the state and the federal governments concurrently and equally.

Third, and most significantly, in the case of a dispute between the various levels of government as to the extent of the powers allocated to them under the Constitution, somebody other than the federal, state or local government, as the case may be, must be authorised to adjudicate upon those disputes hence, the critical role of the judiciary in maintaining the federal arrangement.

Wheare's definition explains federalism in its classic sense and has been criticised by many writers as being too rigid and legalistic. On the other hand, Livingstone went beyond the legal formulation of Wheare and pointed out that the essential nature of federalism is to be sought for, not in the sharing of legal and constitutional terminology, but in the forces – economic, social, political, cultural – that have made the outward forms of federalism necessary. Following Livingstone's thoughts, a federal government is a device by which the federal qualities of the society are articulated and protected. In a federal society, there is a plurality of ethnic groups with different historical, cultural, and linguistic backgrounds, but in which each ethnic group occupies a marked and distinct geographical location from the others.

However, there is a recent trend towards what has been termed cooperative federalism or intergovernmental consultation by which is sought to make federalism work through cooperation with the various levels of government. A number of factors are responsible for the development in this direction of cooperative federalism. First is the fact that governmental powers are not always clearly divisible in that a function assigned to one level of government may overlap with or require supporting services from the other levels of government. Second, the general tendency towards federal ascendancy, in terms of grants, necessitates some regulation of state activities and also makes the state seek federal partnership in order to better perform their statutory functions. Third, it has become acceptable in all federations that the citizens could be best served if both levels of government consulted with each other. Towards this, most federal systems have set up permanent machineries for intergovernmental and federal-state cooperation.

Nwabueze defines federalism as an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalised, territorially-localised governments.⁵ This is done in such a way that each exists as a government separately and independently from others operating directly on persons and property within its territorial area. Each of them also has a will of its own and its own apparatus for the conduct of its affairs and with an authority in some matters exclusive of all others. He further explained that it is essentially an arrangement between governments, a constitutional device by which powers within a country are shared among two tiers of government, rather than among geographical entities comprising different peoples.⁶

The common element in the various definitions of federalism as highlighted above is the co-existence of concurrent governments within a state, with well-defined autonomy assigned in a constitution. This shows that the essence of federating is to realise the twin objectives of maintaining unity while also preserving diversity. This is particularly ideal in a pluralistic and multi-ethnic society such as Nigeria where there are obvious differences in the peoples' cultural and religious lives.⁷ In the final analysis, federalism can simply be defined as a system of government in which governmental powers that exist in a country are shared between the central (federal or national) government and the component units (regions, provinces, states, as the case may be).

3 Evolution of federalism in Nigeria

Based on the discussed conceptual background, the chapter interrogates the Nigerian political arrangement to see whether it can properly be termed federal within the contemplation of the definitions. In other words, considering the features, tenets, aims and principles of federalism as highlighted above, the chapter briefly examines the evolution of federalism in Nigeria and analyses the 1999 Nigerian Constitution showing to what extent it enshrines the features of federalism.

The federal structure and the practice of federalism in Nigeria have remained a recurring cause of agitations among the constituent nationalities. These agitations border on how best to grapple with the challenges of securing an efficient central government that can preserve national unity and at the same time allow the diverse federating units the free scope to flourish and develop at their own pace. Therefore, the main drive towards political restructuring in Nigeria is the recognition that the existing state institutions, particularly at the centre, cannot adequately comprehend and resolve the primordial conflicts with existential internal contradictions and the emerging global challenges of good governance.

5 BO Nwabueze *Federalism in Nigeria under the presidential Constitution* (2003) 1.

6 As above.

7 OE Nwebo *Critical constitutional issues in Nigeria* (2011) 23.

Historically, it is instructive to observe that the evolution of federalism in Nigeria shows that prior to the advent of colonial rule in what is now known as Nigeria, there existed indigenous political institutions, spread across over 250 independent nation states embracing over 500 ethnic and linguistic groups. These indigenous communities had their various systems of administration before the British penetrated Nigeria and began the annexation of the various colonies through force, non-negotiable treaties with traditional rulers and the establishment of total control in and over the whole of Nigerian territory.⁸ As a result, the decision of Lord Lugard to create a unified Nigeria on 1 January 1914 did not result from the desire of the natives but derived from considerations of administrative convenience that guaranteed easy economic exploitation of the Nigerian peoples.⁹

Nigeria became a federal state under the Lyttleton Constitution of 1954 due to the regionalisation of the executive, legislature, judiciary, public service and marketing boards. There were three regions with the federal territory of Lagos as capital. The governor of Lagos became the governor-general while the lieutenant governors became governors of the regions. There were the exclusive and concurrent legislative lists with residual matters left for the region and the exclusive list left for the federal government. Federal laws were to prevail in case of conflict with any regional law.

Self-government was granted to the western and eastern regions in 1957 with the effect of having premiers to preside over their executive councils. The 1960 Constitution maintained the federal structure in Nigeria under the British type of parliamentary system. In 1963 Nigeria became a republic and the Constitution gave exclusive powers in areas of fiscal and monetary policy, foreign affairs and defence to the federal government. At this point, the regions were relatively stronger than the centre, with their respective constitutions, bicameral legislatures and residual legislative powers, while revenue from the federal account was shared on the basis of derivation. The system, however, did not eliminate potential constitutional problems arising from inequality of the size of the states, dominance of the major ethnic groups, religious and ethnic politics and corruption, to mention but a few. All these problems eventually led to the military intervention in 1966 and consequently the civil war which lasted from 1967 to 1970.

An attempt in May 1966 by the first military ruler of the country, General Aguyi-Ironsi, a southerner, to unify the administration of the country, which would have virtually turned the country into a unitary state, provoked violent reactions from the north. Then, on 29 July 1966, a number of northern officers reacted through a bloody *coup* which saw

8 O Aguda *Understanding the Nigerian Constitution of 1999* (2000) 1.

9 NJ Obiakor 'Historical evolution and growth of federalism in Nigeria', <https://www.pen2print.org/2017/02/historical-evolution-and-growth-of.html> (accessed 18 November 2018).

Colonel Gowon, who later became a general in May 1967, expand the then country's four regions into 12 states in an effort to allay fears of sectional domination. Nigeria's bloody and turbulent political history between 1966 and 1970 once and for all settled the question of whether Nigeria was to be a federation or a unitary state in favour of federalism.

By the time the military relinquished power in May 1999, the military had increased the number of states in the country to 36 excluding the Federal Capital Territory of Abuja. Although the military had maintained the federal structure of government for the country, by the very nature of military rule, the centre had in all respects become stronger than the states with increased legislative powers, control of the federation account and complete subordination of the financially weak states to federal control, thereby completely destroying the federal principle.¹⁰

This development frustrated Nigerians that they became desperate in calling for an end to military rule upon the death of General Abacha which later led to the agitation for the summoning of a Sovereign National Conference (SNC) to work out a new system of government for the country. The expected constitution was to become the country's new Constitution without military interference or control, which was why the conference was styled 'sovereign'. However, General Abacha's successor as head of state, General Abdulsalami Abubakar, did not call for the SNC but simply prepared and gave the 1999 Constitution to the people on the very day of his departure from office.¹¹

4 Federal structure under 1999 Constitution

It is instructive to note that Nigeria, as in the case of other federations in the world, operates a written constitution, the supremacy of which is laid down in its provisions.¹² Section 2(1) of the 1999 Constitution clearly provides for one indivisible and indissoluble sovereign state to be known as the Federal Republic of Nigeria. Beyond the above declaration, in examining the extent to which the 1999 Constitution has attempted to entrench federalism in Nigeria, it is apposite to first consider the power-sharing formula between the levels of governments in the country as a prominent feature of federalism. Section 2(2) provides that 'Nigeria shall be a federation consisting of states and a Federal Capital Territory'. Section 2(3) provides for 36 states in Nigeria and lists them.

The clear description of Nigeria as a federation and the division of the country into 36 states with Abuja as the federal capital territory confirms the existence of a federation, at least in terms of structure. Section 3(6) of

10 Aguda (n 8) 10-15.

11 The 1999 Constitution was promulgated by the military upon the recommendation of the Constitution Debate Co-ordinating Committee (CDC) headed by Justice Niki Tobi which recommended the adoption of the 1979 Constitution with relevant amendments from the 1995 draft Constitution.

12 See sec 1 of the various Nigerian federal constitutions.

the Constitution provides for 774 local government areas in Nigeria, adding a third-tier level of government for the country, which is an innovation considering the classical definition of the federal principle by Wheare and Nwabueze which limits the federating units to two levels. Thus, in terms of structure, one can state that one important feature of federalism has been satisfied under the Nigerian constitutional arrangement.

Under the successive constitutions of Nigeria, there was strict division of law-making powers between the federal government and state governments. Accordingly, under section 4(2) of the Constitution of Nigeria, 1999 the National Assembly shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the exclusive legislative list set out in part I of the second schedule of the Constitution.¹³ It is pertinent to state that the Constitution also assigned functions to the local governments, as specified in the provisions of part IV of the schedule to the Constitution.

The above provisions provide evidence of federalism under the Constitution. The method of division of powers (legislative, executive, judicial functions and otherwise) among these tiers of government and their independence are also significant as determinants of federalism. In this regard, the legislative powers of the federal government are vested in the National Assembly consisting of a Senate and a House of Representatives, while the legislative powers of a state are vested in the House of Assembly. The executive powers of the federal government are vested in the President exercisable by himself directly, or through the Vice-President and Ministers appointed by him or through officers in the public service of the federation. Similarly, the executive powers of a state are vested in the state governor exercisable by himself directly or through commissioners appointed by him or through officers of the public service of the state. The judicial powers of the federation are vested in courts established for the federation, while the judicial powers of state are vested in the courts established for the state.

In light of the foregoing, it may be concluded that there is a division of powers among levels of government under the Constitution, that is, between the federal government and the federating units. However, the extent to which each tier of government exists within its own sphere, coordinate and independent needs to be critically examined. In other words, the totality of centralised functions being exercised by the federal government in relation to the state governments is a critical determinant

13 These include accounts of the federal government; aviation; arms; ammunition and explosives; banks; citizenship; currency; defence; external affairs; exchange control; etc. Part II of the schedule contains the concurrent legislative list in respect of which both the federal and state governments have concurrent powers. These include revenue allocation; antiquities; archives; collection of taxes; agriculture; education, etc. However, it went on to provide in subsec 5 of sec 4 that if any law enacted by the state legislature is inconsistent with any law validly made by National Assembly, the law made by the state shall to the extent of the inconsistency be void.

of 'true' or 'real' federalism as opposed to a decentralised unitary system.¹⁴

5 Examining the legitimacy of Nigeria's 1999 Federal Constitution

From the concepts of federalism discussed above, and what it seeks to achieve it, it cannot be gainsaid that the way in which Nigeria is structured and the making of 1999 Constitution raises questions as to the legitimacy and sustainability of true federalism. Indeed, many critics have expressed the view that the Constitution was established on the foundation of falsehood as encapsulated in the Preamble of the Constitution.¹⁵ Accordingly, federalism under the Constitution may be described as suffering from a legitimacy deficit and a lack of prospects for sustainability.

The above criticisms stem from the process of its emergence and partly because many of its provisions are alien to federalism.¹⁶ For instance, the 1999 Constitution has been described as an 'illogicity, a unitary constitution for a federal system of government and a contradiction'¹⁷ in that many of the provisions are typical of a unitary system rather than the tenets of federalism.¹⁸ It has also been described as a fraud, lacking legitimacy essentially because of its misrepresentation as the people's product, not being autochthonous.¹⁹ The misrepresentation is apparent from the Preamble to the Constitution which provides: 'WE THE PEOPLE of the Federal Republic of Nigeria: HAVING firmly and solemnly resolved: DO HEREBY make, enact and give to ourselves the following Constitution'. The point is that the above representation was not the true position in that the Nigerian people never passed such resolution. As stated earlier, it was rather the then military head of state, General

14 IE Sagay 'Federalism in an emerging democracy: A case study of Nigeria' Lecture delivered on 28 May 2003, [www.profitisesagay.com/pdf/TRUE%20FEDERALISM%20IN%20AN%20EMERGING%20DEM%20\(TINUBU%20LECTURE\).pdf](http://www.profitisesagay.com/pdf/TRUE%20FEDERALISM%20IN%20AN%20EMERGING%20DEM%20(TINUBU%20LECTURE).pdf) (accessed 16 April 2018).

15 See A Oyebo 'Nigeria's 1999 Constitution is a fraud', <https://www.youtube.com/watch?v=I1p8kEa6tUM> (accessed 20 May 2019); See 'Country-wide rejection of the 1999 Constitution as basis of Nigeria', document published in 2012 by the Lower Niger Congress explaining the reasons why the 1999 Constitution continues to represent a massive fraud on the various nationalities of what is currently known as Nigeria, <http://nigeriavillagesquare.com/forum/threads/country-wide-rejection-of-the-1999-constitution-as-basis-of-nigeria.91763/> (accessed 20 May 2019). See also the statement of the Catholic Archbishop of Owerri, Dr Anthony JV Obinna, who described the 1999 Constitution of the Federal Republic of Nigeria as a huge fraud. See <https://allafrica.com/stories/200401230168.html> (accessed 20 May 2019).

16 D Adesina 'Nigeria: A case for federalism' *This Day* 9 January 2017.

17 As above.

18 Eg the Land Use Act, 1978 which was made part of the Nigerian Constitution (under sec 315(5)), nationalised all lands and vested its ownership in the state governors. Furthermore, the exclusive legislative list of 68 items gave enormous powers to the federal government to legislate upon numerous matters including mines and minerals which should have been left to the states, while the revenue-sharing formula is heavily skewed in favour of the federal government.

19 An autochthonous constitution is one that originates from the people. See the argument on the question of the autochthonous status of the 1999 Constitution in part 6 of this chapter.

Abdulsalami Abubakar, who promulgated the decree which was handed down as the 1999 Constitution following the report of the Constitutional Debate Coordinating Committee and consequential amendment of the 1979 Constitution.²⁰

The people's constitution must be autochthonous and for it to be autochthonous it must have resulted from the voluntary discussion and agreement of the people and ultimately approved by the people themselves in a plebiscite or a referendum. This is the democratic way of making a constitution for it to acquire democratic legitimacy. Following this, it is important to note that on the contrary, all the constitutions and the states that were created since military intervention in 1966 were by military decrees, while all the local government councils that presently exist were also created by military decrees. Accordingly, the creation of the federating units was by fiat, arbitrary, inequitable and therefore lacking in democratic legitimacy. It is against the above background that this chapter argues that the 1999 Constitution lacks democratic legitimacy which thereby substantially contributes to the Nigeria's political debacle.

Another challenge to the democratic legitimacy of the Nigerian federalism stems from the highly-centralised administration and the distortion of institutions and processes by the military between 1966 and 1999. Before their exit, the military handed down a very strong central government and weak federating units, particularly with regard to the financial and power sharing aspects of federalism. The lopsided and unconscionable practices in which the federal government appropriates to itself enormous political powers and resources with paltry shares given to the goose that lays the golden eggs are not consistent with true federalism. Furthermore, the centralisation of the coercive powers of the state and the lopsided statutory allocation formula in favour of the federal government are the cause of violent agitations and the call for restructuring. It is suggested that the call for separation and disintegration will disappear if states are allowed to exploit their potentials and national endowments and begin to find ways to generate revenue internally to solve their problems without waiting for the federal government's allocation.

The concentration of power and decision making at the centre and a situation where every state goes to the federal government to lobby for federal presence in terms of development and for monthly funds to run their states clearly shows that the states are not independent. Rather, the country is running a unitary government in the guise of federalism. Therefore, there is something obviously wrong with the structure of the country as presently constituted contrary to the principles of independence and financial autonomy.

20 As indicated in the introduction regarding the evolution of the Nigerian Constitution. See the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree, 1999. This decree, which purports to repeal the 1979 Constitution, entered into force on 29 May 1999.

Furthermore, the activities of most of the critical institutions tend to tilt the balance of powers in Nigeria towards the centre to the detriment of the constituent states. This is very clear from the dominance of the federal executive agencies in the governance of the whole country to the exclusion of the federating units. These federal agencies include the Independent National Electoral Commission (INEC) which has the power to conduct state gubernatorial and state House of Assembly elections; the National Population Commission (NPC) which has exclusive powers to conduct census of Nigeria; the National Judicial Council (NJC) which is given the power to recommend the appointment and removal of state judges; and the centralised Nigerian police force under the direct command of the Inspector-General of Police (IGP), thereby leaving the security of the state in the hands of the federal government instead of the state governor. The monopoly of the functions of the above institutions as provided for in the Constitution clearly undermines the federal principle. This defeats the essence of the autonomy which each of the federating units, central or regional, must enjoy and be able to execute its own will in the conduct of its affairs.

One major failure of the Nigerian federal arrangement is the concentration of power in the central government. Thus, the federal legislature is empowered to make laws exclusively on any matter included in the exclusive legislative list set out in Part I of the second schedule. On the other hand, both the federal and state legislatures have powers to legislate on matters in the concurrent legislative list. These lists clearly show the dominance of the federal government in terms of law-making powers. Unlike the 45 items on the exclusive legislative list in the 1960/63 Constitution, there are 66 items in the 1979 Constitution and 68 items in the Constitution. Basic state matters, such as drugs and poisons, labour and trade union matters, meteorology, police, prisons, professional organisations, registration of business names, the incorporation of companies and others, were all transferred to the exclusive list from the concurrent list. Borrowing within or outside Nigeria for the purposes of the federation or of any state is included in the exclusive legislative list. The idea of giving power to the federal government by legislation to determine national minimum wage and federalism is a contradiction. Also, several matters that are residual and ideally should have been within the legislative competence of the states are contained in the concurrent list. The primacy of the lawmaking powers of federal government over that of the states is also evident in section 4(5) of the Constitution which provides that any law enacted by the state legislature which is inconsistent with any law validly made by the National Assembly shall to the extent of the inconsistency be void.

On the issue of fiscal federalism, which has to do with financial autonomy or resource control and revenue allocation to the tiers of government, this cannot be realised without an allocation regime that is fair, just, equitable and acceptable to all the component units. The current inability of states in Nigeria to meet most the elementary requirements

of government such as the payment of staff salaries even with the so-called bail-out handout from federal government, and the provision of basic infrastructure, is an antithesis of the autonomy of states in a federal arrangement. Under the 1963 Republican Constitution, section 140(1) provided that each region be paid a sum equal to 50 per cent of the proceeds of any royalty received by the federation in respect of any minerals extracted in that region as well as mining rents, thereby setting definite parameters for fiscal federalism. In contrast, section 44(3) of the 1999 Constitution states that 'the entire property in and control of minerals, mineral oil and natural gas in, under or upon any land in Nigeria ... shall vest in the government of the federation and shall be managed in such manner as may be prescribed by the National Assembly'. Furthermore, item 39 on the exclusive list puts mines, minerals and even geological surveys within the sole purview of the federal government. The combined provisions of section 44(3) and Part 1 Item 39 of the Second Schedule of the Exclusive Legislative List has the resultant effect of preventing the states in Nigeria from harnessing their non-oil resources, making them unproductive and heavily reliant on the federal government.

In addition to the above provisions, section 162(2) of the 1999 Constitution provides that in evolving a revenue allocation formula, the President shall table before the National Assembly proposals considering principles of population, equality of states, internal revenue generation, landmass, terrain and population density, also that the principle of derivation should be at least 13 per cent. This provision is vague, ambiguous and does not provide clear ambits for financial autonomy. On the other hand, section 162(5) fails to create financial autonomy for the local government councils as they receive joint allocation with the states which also determines how the money is spent.

As a result of this, the present system is open to abuse and indeed has always been abused by the federal government against the states and by the states against the local governments, respectively. Indeed, what we have today is a false federal system where a unit abuses powers because it can while being empowered by the instrument of the law.²¹ This shows that the balance of powers of governance tilts in favour of the centre and, when possible, the state because of nearness in constitutional hierarchy to the centre in relation to local governments, thereby making the regional units and local governments subservient to the centre respectively. Consequently, there have been several cases in which the federal and state governments have been engaged in battle over resource control and revenue allocation. Niki Tobi aptly put the thorniness of this issue in his opening statement of his lead judgment in *AG Abia State & Others v AG*

21 Sagay (n 14).

Federation and Others,²² when he said:

This is yet another open quarrel between the state and the federal government. This Court is by now thoroughly familiar and used to such quarrels, as they come before it fairly regularly in the last few years or so. The open quarrel dovetails to a subtle one between the concepts of federalism and unitarism in constitutional law and politics.

6 Restructuring and renegotiation of the basis for Nigerian federalism

When a structure is discovered to be in bad shape or fractured, the owners have a responsibility to fix it or suffer the consequences of not doing so, which may result in the total collapse of the structure. Restructuring therefore means rebuilding, reorganising or restoring to the former functional position in order to make the system function more efficiently and progressively.

It is important to emphasise that restructuring is not a new idea in Nigeria's constitutional engineering. Right from the inception, Nigeria has been undergoing series of restructuring as could be seen from the history of her constitutional development. The difference is that all previous constitutional restructuring of Nigeria had taken place under the control or supervision of either the colonial administration or the military and had focused on fragmentation. The latest attempt was the 2014 National Conference convened by Dr Goodluck Ebele Azikiwe Jonathan when he was President, to engineer a restructuring process under a democratic government so that the discussion will be free and sincere though the outcome was not implemented. The conference was headed by Justice Idris Kutigi whose report to the President approved over 600 resolutions, some dealing with issues of policy and issues of constitutional amendment. Unfortunately, to date the report has not been officially published though it dealt substantially with the issues of restructuring.

Based on the Nigerian experience in constitutional engineering, it must be admitted that federalism has been generally perceived as one of the most preferred form of government based on its assumed capability to integrate and harmonise the plural and heterogeneous socio-economic and political existence of the federating units. The plural nature of Nigeria in terms of its multi-ethnic, multilingual, multi-religious and multicultural life makes federalism ideal. 'Unfortunately, the essence of federalism in Nigeria is not being fulfilled, thus affecting the development of Nigeria

22 LER [2006] SC.99/2005; *AG Federation v AG Abia State & Others* (2001) 11 NWLR (Pt 725) 2001. See also *AG Lagos State v AG Federation* (2004) 18 NWLR (Pt 904)1. This case involves the action of the federal government withholding of local government statutory fund allocation as a result of the creation of additional local governments by the Lagos state government and conduct of elections therein without consequential amendment of the constitution by the National Assembly as provided for in the Constitution.

as a whole.²³ It is in this context that this chapter discusses restructuring. Asiwaju Bola Ahmed Tinubu (leader of the APC, the ruling party) was quoted as having said that '[w]e can't make progress under current structure. No progress can be made under the current political system, which operates like a military unitary system.'²⁴ Such a statement coming from the leader of the ruling party as against the opposition parties shows that the system indeed requires restructuring.

A host of elder statesmen and leaders have dissected the state of affairs in Nigeria and returned a grim verdict that Nigeria is on the verge of being a failed state.²⁵ They identified bad leadership as the bane of the country in that the wrong people who occupy leadership positions should not have been there under normal circumstances and those who possess what it takes and are ready to rule are usually not allowed to get into power by those who believe that Nigerian leadership is their birth right. The leaders abandoned true federalism of the First Republic when there was fiscal federalism and healthy competition among the federating units and allowed the centre to control 52 per cent of the nation's resources and thereby entrenching a bitter struggle for control of the centre while states are unable to pay salaries, giving rise to injustice, marginalisation and inequitable distribution of the nation's resources which are at the root of the agitation for Biafra Republic and restiveness in the Niger Delta. To halt the speedy slide into retrogression and put the country on the path of socio-economic recovery and harmonious coexistence there must be good leadership, political and economic restructuring, fiscal federalism, devolution of power to the federating units and youth empowerment and other measures that the process will determine.

It is significant to note that even the retired military generals and other Christian elders under the aegis of National Christian Elders Forum (NCEF) are not left out in the call for restructuring.²⁶ The group expressed sadness that Nigeria was drifting towards a needless conflict that could culminate in another war, if not well managed. They also noted that almost every key position in security and education is held by Muslims

23 See 'Problems of federalism in Nigeria and solutions', <https://naijaquest.com/problems-of-federalism-in-nigeria/> (accessed 20 February 2019).

24 AS Oduguwa 'Restructuring: A quintessential element of federalism', <https://ebiographer.wordpress.com/2017/08/05/restructuring-a-quintessential-element-of-federalism/> (accessed 20 February 2019).

25 C Ndujihe & G Oke 'State of the nation: Without restructuring we went go far – Nwabueze, Akinjide, Adebajo, Utomi', <https://360post.wordpress.com/2017/03/31/state-of-the-nation-without-restructuring-we-went-go-far-nwabueze-akinjide-adebanjo-utomi/> (accessed 20 November 2018).

26 See S Eyoboka 'Avert another war, Danjuma, Dogonyaro, Lekwot, others warn' *Vanguard* 14 July 2017. The group had in a statement issued after the meeting, signed by its chairman, Elder Solomon Asemota, SAN, NCEF noted with concern the budding constitutional crisis in the country, and said the threat of another major ethnic conflict, occasioned by the Indigenous People of Biafra (IPOB) call for secession and the response of Arewa Northern Youths for the eviction of the Igbo from the North, the agitations for fiscal federalism and resource control, among many other regional agitations, could set the country on the path of war the nation could not afford at present.

from the north, arguing that such 'is a flagrant violation of section 14(3) of the 1999 Constitution (as amended)'. The elders also urged Nigerians to sustain the clarion call for restructuring of the nation for true fiscal federalism, noting that the ongoing debate on restructuring was healthy and hoped that it would quickly resolve the choice between regions or states as federating units. The Christian elders gave the thumbs-up for the demand of the south-west zone and other well-meaning Nigerians for a new constitution for Nigeria to replace the current 1999 Constitution which is plagued with a dual, conflicting ideology. They argued that after 57 years of independence, 'Nigerians want to live together in peace so that they can make progress'.²⁷ From a different perspective, the Arewa Consultative Forum (ACF), while agreeing on the need to restructure, called for discussions which must be free of threats, intimidation or blackmail from any group or individual stressing that genuine restructuring must be just, fair and equitable to all and called for due process through our present democratic structure rather than just crass agitation, if we are to achieve true federalism.

The above statements show that that there is widespread dissatisfaction over the way in which Nigeria is presently constituted and run. Therefore, the Nigerian structure is long overdue for restructuring otherwise it will unavoidably collapse. What is needed is a restructured federation where each constituent part fends for itself to promote industry. Nigeria needs a federal arrangement that guarantees and allows every constituent state or region to be primarily in charge of its aspirations and preferences to catalyse competitive development. We need a mutually-agreed arrangement that allows every component unit to take charge of the security of lives and properties of citizens through decentralised policing, while the federal government takes care of defending our territorial integrity. We need a federal arrangement where the best excels, and does not have to be sacrificed in the name of federal character. We need a restructured federation where the Igbo man or woman and, indeed, every Nigerian can live and carry on his or her business in any part of the country without any form of discrimination, molestation, and the destruction of his or her life and property on the flimsiest excuses and where they freely exercise their democratic rights without being hounded and killed by security forces.

The demand for restructuring has become so popular among Nigerians that it has now become a banner with which opposing political parties go out for campaign. For instance, the All Progressive Congress (APC) had campaigned on the promise of restructuring²⁸ during the 2015 presidential election although the party appeared to have reneged after winning the election. The People's Democratic Party (PDP) also made it a cardinal issue in its 2019 presidential campaign. However, on the heels of the 2019

27 Eyoboka (n 26).

28 On the issue of restructuring, the APC constitution 2015 states: 'To achieve this laudable programme, APC government shall restructure the country, devolve power to the units, with the best practices of federalism and eliminate unintended paralysis of the centre (source, APC constitution, 2015)'.

presidential campaign, the APC set up a committee called APC Caucus which began by focusing its preliminary research and preparatory work on restructuring.

After a careful review of history, literature, and reports on the issues the APC Committee on True Federalism has reduced the issues around restructuring to the following:

- (1) The creation or merger of states and the framework and guidelines for achieving that;
- (2) The derivation principle, bordering on what percentage of federal collectible revenues from mining should be given back to the sub-nationals from which the commodities are extracted;
- (3) a devolution of powers: what items on the exclusive legislative list should be transferred to the recurrent list, especially state and community police, prisons, and so forth;
- (4) federating Units: should Nigeria be based on regions or zones or retain the 36-state structure?
- (5) fiscal federalism and revenue allocation;
- (6) form of government (parliamentary or presidential?);
- (7) independent candidacy;
- (8) land tenure system;
- (9) local government autonomy;
- (10) power sharing and rotation of political offices;
- (11) resource control; and
- (12) type of legislature – part-time or full-time, unicameral or bicameral.²⁹

From the issues formulated above it is obvious that there are defective structural issues that need to be addressed. Meanwhile, the Nasir El Rufai Committee on True Federalism has submitted its report to the National Working Committee of the ruling APC, calling for more devolution of powers to states and recommended that 10 items be moved from the exclusive legislative list to the concurrent list, including resource control and state police.³⁰ Whether the APC's approach and process are right and if it addresses all the important issues and what makes of the report are questions that can be answered when the recommendations of the report is implemented. However, what is clear from the foregoing is that at least majority of well-meaning Nigerians see restructuring as a panacea which will afford Nigerians the opportunity to discuss and find solution to its numerous problems.

One of the principles of true federalism is that the constituent parts

29 Nasir Ahmed El-Rufai, Chairman APC Caucus Committee address, Chatham House London, 21 September 2017.

30 O Ajayi 'APC c'tte. On restructuring recommends resource control, state police, others' *Vanguard*, <https://www.vanguardngr.com/2018/01/apc-ctte-restructuring-recommends-resource-control-state-police-others/> (accessed 20 February 2019).

must have a level of fiscal independence. To this end, the federating states must be given the power to control and manage its financial and economic resources. According to Amalaya,³¹ financial subordination marks an end of federalism in fact, no matter how carefully the legal forms may be preserved. It follows that the federating units including the federal authorities, the states and the local government councils as the case may be should constitutionally have access to, control and manage their own resources and even raise funds for development.

The above clearly confirms that the country is united on the view that there are fundamental structural and administrative defects in the Nigerian federal system and that there is an urgent need to address the issues peacefully and democratically restructure the country accordingly. The intention is not to dismember the federal structure but for the constituent units to come to the table with sincerity of purpose to negotiate for a federal system that will promote peaceful coexistence and efficient government for all Nigerians. This is the central object or purpose of restructuring. In more explicit words, the essential purpose of restructuring is to enable the component ethnic nationalities, grouped together by affinity of culture and language or territorial contiguity to govern themselves in matters of internal concern, leaving matters of common concern, not overwhelmingly extensive in their range, to be managed under a central government constituted in such manner as to ensure that it is not dominated by any one group or a combination of them, and above all, to ensure justice, fairness and equity to all in the management of matters of common concern. It assures an optimal measure of self-determination or self-government consistent with the territorial sovereignty of the country.³²

It is arguable that restructuring is intertwined with the right to self-determination. The right to self-determination is the right of a people to determine its own destiny by choosing its own political status and to determine its own form of economic, cultural and social development. These issues also come into play when restructuring is under discussion. This right is inalienable and recognised under international law³³ and must not be denied the people by government even if the process leads to unpalatable outcome. The right to make that choice freely should not be negotiable, what is negotiable is the terms of integration or union if the people choose to. Therefore, the people's demand for restructuring is consistent with the right to self-determination politically, culturally and economically.³⁴

31 NJ Amalaya 'Structure of the Nigerian state and the advancement of human rights: Challenges and prospects' Dissertation, Postgraduate School, Rivers State University, Port Harcourt, 2018 29.

32 C Ndujihz 'The restructuring that will save Nigeria – Southern leaders of thought' Vanguard 27 August 2017, <https://www.vanguardngr.com/2017/08/restructuring-will-save-nigeria-southern-leaders-thought/> (accessed 20 November 2018).

33 See art I(2) of the 1945 Charter of the United Nations, art 1(2) of the ICCPR, 1966 and art 20(1) of the African Charter on Human and Peoples' Rights, 1981.

34 Especially in relation to sovereignty over all the people's natural wealth and resources of a people.

7 The role of the legislature and other critical stakeholders

The question remains as to who has the constitutional power to restructure the country and give the new constitution the required legitimacy which the previous constitutions lacked. The answer to this question can only come from whether restructuring is a legal or political issue. Arguably, restructuring can involve both legal and political processes but ultimately its legitimacy can only arise from compliance with the legal process. Therefore, in the Nigerian case, where there is an existing constitution with legislative powers vested in the National Assembly for the federation including the power to alter any of the provisions of the Constitution. Any other process will necessarily encounter resistance from the legislature especially where such alteration is likely to disadvantageously touch on vested interest.

If the desired restructuring is as far-reaching as to involve the first option of possibly negotiating out of a united Nigeria, fundamental constitutional obstacles will arise in view of the provisions of section 1(1) of the Constitution on the supremacy of the Constitution and section 2(1) on the indivisibility and indissolubility of the sovereign state of Nigeria. It is inconceivable that such alteration can fly under the incumbent parliamentarians as that will amount to legislating themselves out of jobs, just as in the case of any alteration that will affect the structure and nature or even the life of the legislature. Otherwise with regard to the second option, no serious constitutional obstacle will arise provided the vested interests of the members of the legislature is not affected. What is required in that case is simply to comply with the provisions of section 9 on the mode of altering the provisions of the Constitution. However, the possibility of executive resistance employing the use of veto and other delay tactics for political reasons cannot be ruled out. The above are challenges that may frustrate the expeditious actualisation of the restructuring agenda.

The alternative is to convoke a sovereign national conference where all the contentious issues around the demand for restructuring will be tabled, frankly and freely discussed, agreed on, and approved in a plebiscite or a referendum organised for that purpose. The likely challenge with this process is that it will require the courage and cooperation of an incumbent government especially the executive and the legislative arms and all the critical stakeholders who must be prepared to make sacrifices, especially to eschew their acquired rights and vested interests under the present federal arrangement.

However, explaining the stand of his group on the above issue, elder statesman and Chairman of the Southern Leaders of Thought (SLT), Professor Ben Nwabueze, SAN, maintains that '[r]estructuring is not a matter that can be implemented by amendment of the 1999 Constitution. It imperatively requires a new Constitution adopted or approved by the people

at a referendum.³⁵ The leaders kicked against the National Assembly's stand that the 1999 Constitution can only be amended or altered (sections 8 and 9) but cannot be abolished and replaced by a new constitution. In reaction to this issue, this chapter argues that it is possible for the National Assembly to make fundamental changes in the Constitution and even replace the Constitution with a new one by amendment in exercise of its unlimited powers under sections 4 and 9 of the Constitution.³⁶ Therefore, there is nothing in section 9 of the Constitution which precludes the National Assembly from amending any section of the Constitution, but they are not in a position to cure the existing legitimacy deficit in the Constitution without reference to the people.

The above conclusion is in tandem with the argument of the SLT that the position of the National Assembly fails to take account of the fact that the 1999 Constitution is only a schedule to Decree 24 of 1999. That decree is an existing law under section 315 of the 1999 Constitution and, as in the case of all existing laws within federal competence, can be repealed by the National Assembly. Besides, the fact that the 1999 Constitution was not made by the people constitutes a flaw in it that cannot be cured. Nothing can change its character as a constitution made, not by the people, but by the Federal Military Government (FMG), and simply imposed on the people by that government.

8 Conclusion

This chapter has demonstrated that the existing constitutional framework for political participation since 1914 up to the present constitutional arrangement has proved inadequate for national unity and integration. This is because Nigeria was not built on a foundation for a nationally compact future, rather a mere colonial contraption meant to serve colonial interests. As a result, Nigerians individually and in groups, across regions, states and ethnic divides, have been advocating one or more aspect(s) of restructuring of the Nigeria's federal system, presenting a mixture of constitutional, legal and political demands. The factors that led to the agitation for restructuring are formed from the motives revolving around constitutional and political demands. There is a historical disaffection among the federating units that keeps reverberating simply because they did not come together of their own volition but for the administrative convenience of the British colonialists which amalgamated the north and south in 1914. On the other hand, as we have noted earlier, the military took Nigeria many steps backwards from where the country was by 1966. As a result, Nigerian leaders deliberately abandoned the tenets of true federalism and were rather busy exploiting the system for their selfish ends, instead of developing the nation. These are some of the problems that put the people of Nigeria in a position that can now be likened to a

35 Ndujihz (n 32).

36 To avoid doubt, sec 9 of the Constitution provides: 'The National Assembly may subject to the provisions of this section alter any of the provisions of this Constitution'.

forced marriage that the parties dislike but dare not leave.

Contrary to the tenets of fiscal federalism, the Nigerian leaders have institutionalised a pseudo-federal system of 'centralised resources dispensation', which has reduced the states and localities into no more than administrative conduits for the dissemination of the national oil largesse to diverse local elites and constituencies.³⁷

Irrespective of the intention of the British in amalgamating Nigeria and in imposing a federal system of government on Nigeria, the heterogeneous nature of Nigeria makes federalism the most viable option of protecting the core interest of the federating units. The federal option was also adopted by Nigeria's founding fathers to unite a country so deeply divided by cultural and religious cleavages. The choice of federalism is predicated upon the idea that it will help to unite the diverse elements that make up Nigeria.³⁸ Ironically, rather than achieving unity and national integration, the country is bedevilled by disunity, ethnicity, nepotism, agitations for resource control, kidnapping, electoral violence and insurgency.

However, as stated earlier in this chapter, at the inception of Nigeria's federalism there was an adequate devolution of powers to the regions. Each of the regions enjoyed autonomy over its internal affairs. Each region 'had a regional legislative assembly, executive council, judiciary, civil service and police force'. The principle of derivation was employed in the distribution of resources and there was equality, fairness and justice in the distribution of centrally-collected revenue before the military intervened and truncated the system.

The chapter has noted that as it stands today Nigeria constitutionally is a federal republic comprising 36 states and the Federal Capital Territory (FCT), Abuja. The states are further sub-divided into 774 local government areas (LGAs) as a third-tier level. In practice, however, for restructuring to succeed in institutionalising a continuum for the overall development of Nigeria, it has to be construed and instituted both through constitutional and political means. The content and the path the restructuring should follow the need to be agreed upon by Nigerians under the current leadership.

This chapter argues that the most critical of these demands for restructuring is the structure and the power-sharing formula between the federal and the federating units. However, from our discussion it is clear that the restructuring debate has produced many variants in terms of the structure and number of the federating units of which the options popularly being touted are returning to the 1960/63 Constitutions which enabled the regions/federating units to have their constitutions, controlled

37 E Onwudiwe & RT Suberu 'Introduction: The promise and pitfalls of Nigerian federalism' in E Onwudiwe & RT Suberu (eds) *Nigerian federalism in crisis: Critical perspective and political options* (2005) 4.

38 TA Olaya 'Federalism and international relations in Africa: Retrospect and prospects from Nigeria' (2016) 5 *Public Administration Research* 87-90.

their resources and contributed 50 per cent to the centre; retaining the 36 states as federating units with more powers and resources devolved to them; and adopting the six geopolitical zones as federating units.

In connection with the above, it has been argued in this chapter that the present 36 states and the federal capital territory structure with the institutions of governance encourage destructive competition for the control of power at the centre. There is also the problem of sustaining the largely non-viable states, which exacerbates the primordial instinct in divides and fans religious and ethnic differences. On the other hand, the six geopolitical zonal arrangement as recommended under the 2014 national conference appears to be a viable option and is being applied conveniently in recent times to deal with various national issues, albeit without constitutional backing. Without prejudice this issue is for Nigerians to decide through the restructuring process to be adopted by Nigerians in the exercise of the people's sovereignty. The restructuring deal is so fundamental that it cannot be left to the legislature alone to consummate even though they have a major role to play.

The chapter concludes that the Nigerian federal structure is in dire need of restructuring for the country's federalism to evolve peacefully and democratically, otherwise the inevitable will restructure the country cataclysmically and this will not be in the best interests of the country. To achieve the desired outcome, all the contentious issues around the agitations for restructuring must be treated as negotiable and should be placed on the discussion table without any inhibition and the outcome approved in a plebiscite or referendum. This process is recommended as the sure way to decisively remove the question of legitimacy deficit in the 1999 Constitution if the political will is there.