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**Towards a Symbio-Democratic Federal Framework: Division of Powers
and Fiscal Resources in Nigeria**

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**A thesis submitted in fulfilment of the requirements for the
Degree of Doctor of Philosophy in Law**

**University of Warwick
School of Law**

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DEDICATION

To Ronke, Femi and Folakemi, thanks for your love and support all through this journey.

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DECLARATION

I declare that this thesis is my original work. I confirm that the thesis has not been submitted for another degree at the University of Warwick or any other University.

Oluwole Anthony Kunuji

May 2018.

ABSTRACT

Nigeria's federal system of government is grossly problematic. It is characterized by an inordinate concentration of powers and fiscal resources in the central government. Not only is this centralist division of powers antithetical to the idea of federalism, it also fosters the dictatorship of the central government *vis a vis* the other levels of government. Furthermore, it indirectly entrenches the domination of the minority ethnic groups by the larger ones. So centralized is Nigeria's 'federal' arrangement that it is, perhaps, better described as a unitary contraption designed to perpetually establish the hegemony of the central government.

As we shall later see in this thesis, the existing division of powers among the levels of government in Nigeria has been the source of protracted acrimony, conflict, and rancour threatening to tear the federation apart.

Through theoretical analysis, this thesis examines the suitability of the existing power allocation structure for a country like Nigeria. The thesis argues that the ethnically diverse character of the Nigerian federation and the age-long clamour for autonomy by the constituent units of the federation make the existing division of powers absolutely untenable and unsuitable for Nigeria.

This thesis thus proposes a complete abrogation of the existing constitutional framework for the division of powers among the levels of government in Nigeria, and its replacement with a restructured federal framework that is popularly designed by the Nigerian people and cognizant of the country's diversity. Further to this, the thesis advocates a division of powers that entrenches state and local government autonomy without compromising the unity of the Nigerian federation. It is argued that only a framework such as this will conduce to the federation's peace and stability, and help to stem the secessionist tide currently rocking the country.

LIST OF ABBREVIATIONS

CA	Constituent Assembly
CDC	Constitution Drafting Committee
ECA	Excess Crude Account
EFCC	Economic and Financial Crimes Commission
EU	European Union
FMARD	Federal Ministry of Agriculture and Rural Development
ICPC	Independent Corrupt Practices Commission
INEC	Independent National Electoral Commission
MLG	Multi-Level Governance
MOSOP	Movement for the Survival of the Ogoni People
NBA	Nigerian Bar Association
NEITI	Nigeria Extractive Industries Transparency Initiative
NERC	National Electricity Regulatory Commission
NFC	National Finance Commission

NNPC	Nigerian National Petroleum Corporation
NPC	National Population Commission
NUC	National Universities Commission
RMAFC	Revenue Mobilization Allocation and Fiscal Commission
SIEC	State Independent Electoral Commission
UBEC	Universal Basic Education Commission
US	United States

TABLE OF LEGISLATION

1. Constitution of Canada 1982.
2. Constitution of Ethiopia 1995.
3. Constitution of South Africa 1996.
4. Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 5 May 1999.
5. Nigeria (Legislative Council) Order in Council, 1946.
6. Nigeria Constitution (Order) in Council 1951.
7. *Nigerian Council Order in Council, 1913.*
8. *The Nigerian (Legislative Council) Order in Council, 1922.*
9. Unification Decree (Decree 34 of 1966).
10. *Universal Basic Education Act 2004.*

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3. *Attorney General of Abia State v. Attorney General of the Federation* (2006) 7SC
(Pt 1) 51.
4. *Attorney General of Bendel State v. The Attorney General of the Federation*,
SC.108/1982.
5. *Attorney General of Lagos State v. Attorney General of the Federation*
S.C.70/2004.
6. *Attorney General Ogun State v. Attorney General Federation* SC. 53/1981.
7. *Gonzalez v. Raich* 545 U.S. 2005
8. *Gregory v. Ashcroft* 501 U.S. 452 (1991).
9. *McFroy v. UAC Ltd* [1962] A.C 152.
10. *NLRB v. Jones & Laughlin Steel Corporation* 301 U.S 1 (1937)
11. *Olawoyin v. Commissioner of Police* (1961) 2 All NLR 203.
12. *Solid Waste Agency of Northern Cook County v. United States Army Corps of
Engineers* 531 U.S. 159 (2001).
13. *Sule Sanni v. Durojaiye Ademiluyi* (2003) 4 SCM 145.
14. *Texas v. White*, 74 U.S. 700 (1869).
15. *United States v. Lopez* 514 U.S. 549 (1995).

16. *United States v. Morrison* 529 U.S. 598 (2000).

17. *Wickard v. Filburn* 317 U.S. 111 (1942)

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CHAPTER 1

INTRODUCTION

1.0 BACKGROUND

Nigeria's "federal" political system is in deep crisis. Forged in the crucible of colonialism and nurtured on the wings of military dictatorship, the country's "federal" experience since inception has been disconcertingly chaotic and problematic. Such is the dysfunction and discontent occasioned by the existing "federal" constitutional arrangement that except the slide is quickly arrested, the Nigerian state itself may unravel in the foreseeable future.

At the heart of Nigeria's federal crisis, is the highly centripetal division of powers and fiscal resources among the levels of government in the federation. In spite of the country's evident ethnic diversity,¹ and the age-long clamour for autonomy by the constituent units of the federation, constitutional division of powers and fiscal resources have, for several decades, remained overwhelmingly and inordinately skewed in favour of the central government,² a condition that has entrenched the dictatorship and hegemony of the central government, and concomitantly subjugated the state and local governments.³

So discredited is Nigeria's extant federal arrangement that the country has, at various times, been derided "as a unitary state in federal disguise,"⁴ or as a "hollow, embattled,

¹ According to the most recent population figures for Nigeria, the country has a population of 140,431,790 (one hundred and forty million, four hundred and thirty one thousand, seven hundred and ninety). This population is spread among more than two hundred and fifty territorially concentrated ethnic nationalities domiciled in thirty six (36) states and seven hundred and seventy four (774) local governments of the federation, with more than four hundred different languages. See National Bureau of Statistics, 'Annual Abstract of Statistics 2011 & 2016, Federal Republic of Nigeria' <<http://nigerianstat.gov.ng/elibrary?page=25&offset=240>> (accessed 8/8/2017).

² This is discussed in greater detail in chapters 3 and 4 of this thesis.

³ Rotimi Suberu, 'Nigeria: Dilemmas of Federalism,' in Ugo M. Amoretti and Nancy Bermeo eds., *Federalism and Territorial Cleavages* (Baltimore: The John Hopkins University Press, 2004) pp.334-335.

⁴ Ibid, p.328.

subverted, or failed federation.”⁵ The dictatorial and undemocratic character of Nigeria’s centralized power distribution architecture has fuelled ethnic conflicts as well as separatist and secessionist agitations across the federation throughout its over five decades history.⁶

This thesis advocates a complete abrogation of Nigeria’s centralist ‘federal’ arrangement and its replacement with a truly federal constitutional framework that truly recognizes the country’s diversity and conduces to genuine democratic governance without jeopardizing the unity and stability of the federation. It is, essentially, an advocacy of state and local government autonomy within the framework of a united federation.

Like many other African states, Nigeria is a political entity formed through the compulsive and indiscriminate colonial amalgamation of several hitherto independent and distinct ethnic kingdoms, empires, city-states, townships and villages, many of which had already attained some significant degree of political sophistication by the time the first set of colonialists arrived on the shores of Africa.⁷ Most of these ethnic nationalities are culturally, religiously, economically, and linguistically different.⁸ In fact, Nigeria, Africa’s most populous country, is widely known for its pronounced ethnic diversity and heterogeneity. It stands to reason therefore that any constitutional arrangement for Nigeria must sufficiently take into consideration the fact of its diversity and heterogeneity.

⁵Ibid. See also, Uchenna Ezech, ‘Nigeria is a Unitary State, Says Agbakoba’ *The Guardian* (3 October 2016) <<https://guardian.ng/news/nigeria-is-a-unitary-state-says-agbakoba/>> (accessed 19/6/2017).

⁶ Indeed, public disenchantment with Nigeria’s centralist power distribution paradigm contributed to the ill fated secession of Eastern Nigeria from the rest of the federation to form the sovereign state of Biafra in 1967. The secession subsequently led to a brutal thirty months civil war from 1967 to 1970. An account of the Biafran secession and civil war as well as the remote and immediate causes of this can be found in A.H.M Kirk Greene, *Crisis and Conflict in Nigeria vol.2*. (London: Oxford University Press, 1971) pp 1-145. See also C.Odumegwu Ojukwu, *Biafra vol.2* (New York: Harper & Row, 1969) pp 7-9; Richard A. Joseph, *Democracy and Prebendal Politics in Nigeria* (New York: Cambridge University Press, 1987) pp 184-185; Bayo Oluwasanmi, ‘Nigeria Breakup Imminent, Oduduwa Republic Inevitable’ *Sahara Reporters* (22 February 2017) <<http://saharareporters.com/2017/02/22/nigeria-break-imminent-oduduwa-republic-inevitable-bayo-oluwasanmi>> (accessed 6/6/2017); Stella Iyayi, ‘Biafra: The Story of another Call for Nigeria’s Breakup’ *Daily Trust* (4 June 2017) <<https://www.dailytrust.com.ng/news/general/biafra-the-story-of-another-call-for-nigeria-s-break-up/200424.html>> (accessed 18/7/2017).

⁷ *AG of the Federation v. AG of Abia State and 35 Ors*, [2002] Vol.16 WRN 1-132 at p.68. See also S.A. Akintoye, *Emergent African States: Topics in Twentieth Century African History*, (London: London Group Ltd, 1976) pp.3; 15.

⁸ Obafemi Awolowo, *Thoughts on the Nigerian Constitution* (Ibadan: Oxford University Press, 1966) p.162.

In the last five decades however, Nigeria has been governed and administered like a homogeneous unitary state. The political system has remained highly centralist in character, with successive constitutions allocating to the central government, virtually all the significant powers of the federation. Buoyed by this warped constitutional architecture, the central government has consistently arrogated to itself, the sole power to dictate how the federal system should be administered. Such is the centralization of powers that has hallmarked Nigeria's federal system during this period that the state and local governments are, in reality, no more than slavish appendages of the central government.

This thesis is principally concerned with the division of powers and fiscal resources entrenched in the extant 1999 constitution of Nigeria which has, for more than a decade, been the subject of intense and acrimonious controversy. Since its undemocratic formulation and promulgation by military fiat on the eve of Nigeria's transition to civil rule in 1999, the 1999 constitution has faced a barrage of criticisms from several scholars, political leaders, and ethnic organizations who decry its illegitimacy, and its entrenchment of a centripetal allocation of powers and resources in favour of the central government.⁹

In this thesis, I argue that the division of powers and fiscal resources entrenched in the 1999 constitution is absolutely unsuitable for an ethnically diverse federation like Nigeria. It significantly undermines democratic governance, impinges on the autonomy of the state and local governments, fosters the domination of minority ethnic groups by the larger ones, and completely negates the very essence of federalism. It is, in short, the very antithesis of federalism.

Suggestions on the appropriate approach that should be adopted to address Nigeria's problematic federal structure have been varied and wide ranging. They range from the

⁹ See for instance, Ben Nwabueze, *Constitutional Democracy in Africa* (Ibadan: Spectrum Books Limited, 2003) p.64; pp.79-89. See also Rotimi Suberu, 'Managing Constitutional Change in the Nigerian Federation' (2015) 45(4) *Publius* 552; Abayomi Ojo, 'Bisi Akande: Blame Recession on 1999 Constitution' *Independent* (22 May 2017) <<http://independent.ng/bisi-akande-blame-recession-1999-constitution>> (accessed 6/6/2017).

potentially dangerous argument for confederation¹⁰ to the anarchist solution being canvassed by those who prefer the outright dissolution and dismemberment of the federation.¹¹ In short, there is, at present, a cacophony of approaches most of which fail to fundamentally, realistically, comprehensively, coherently or accurately address the problems associated with the existing centralist division of powers and resources among the levels of government in Nigeria. This, precisely, is the gap which this thesis intends to fill.

My major argument in this thesis is that the solution to Nigeria's problematic federal arrangement is neither confederation nor a break-up of the country as being suggested in some quarters. What is required to correct the country's defective power distribution structure is the abrogation of the existing constitutional division of powers and the adoption of a federal division of powers that genuinely prioritizes the diversity of Nigeria but nevertheless safeguards her unity. Such an arrangement is only to be found in a truly democratic federation, the kind proposed in this thesis.

Further to the above, I advocate a symbio-democratic federal constitutional framework that peremptorily rests on covenant, cooperation, and non-centralization of powers as its animating principles. I argue that in an ethnically diverse federation like Nigeria, the constitutional division of powers and fiscal resources among the levels of government must be covenanted by the people(s) that make up the component parts of the federation, in order to guarantee its legitimacy. In essence, the federal arrangement must be overwhelmingly subscribed by the people and bear their joint imprimatur. The federal constitution, in which the division of powers and resources is entrenched, must be a people's constitution, drawn up, adopted and overwhelmingly ratified by the people through a genuinely inclusive and democratic constitution making process.

¹⁰Henry Umoru, 'We Need Confederation or Loose Federation- Tunji Braithwaite' *Vanguard* (16 April 2014) <<http://www.vanguardngr.com/2014/04/need-confederalism-loose-federation-tunji-braithwaite/>> (accessed 19/7/2017); Semiu Salami, 'Agbakoba Advocates Confederalism as Solution to Nigeria's Problems' *Newmail* (10 January 2015) <<http://newmail-ng.com/agbakoba-advocates-confederalism-solution-nigerias-problems/>> (accessed 19/6/2017).

¹¹ Bayo Oluwasanmi 'Nigeria Break-up Imminent, Oduduwa Republic Inevitable.' *Sahara Reporters* (22 February 2017) <<http://saharareporters.com/2017/02/22/nigeria-break-imminent-oduduwa-republic-inevitable-bayo-oluwasanmi>> (accessed 6/6/2017).

Considering that the 1999 constitution of Nigeria was unilaterally formulated by the military and autocratically foisted on the Nigerian people, it stands to reason that the division of powers and fiscal resources entrenched in it does not reflect the will of the people. It is not an expression of their covenant. And, as such, it is illegitimate. This illegitimacy cannot be remedied by piecemeal legislative amendment of the 1999 constitution as one scholar has suggested.¹² To adopt a mere “legislative amendment” approach in resolving the problematic power distribution paradigm entrenched in the 1999 constitution is to indirectly endorse the fraud perpetrated by the military framers of the constitution when they unilaterally formulated it.

The 1999 constitution rests on a grossly faulty foundation. And as Lord Denning famously averred in a celebrated English case¹³ “you cannot put something on nothing and expect it to stay there. It will collapse.”¹⁴ The 1999 constitution and the division of powers and fiscal resources entrenched in it suffer from a fundamental legitimacy deficit that is only remedied by an outright abrogation of this constitution and its replacement with a truly democratic constitution birthed through a genuinely inclusive constitution making process and containing a division of powers and resources that genuinely reflects what the peoples of Nigeria have jointly and overwhelmingly covenanted. This must form the starting point in any attempt to address the existing centralist division of powers and resources among the levels of government in the Nigerian federation.

But it is not enough for the division of powers and fiscal resources to reflect the will of the people. It must also reflect their diversity and enhance their ability to actively participate in their own governance. For a federation of peoples with different economic needs, different political and cultural orientations, and different worldviews, the division of powers and resources must be so structured as to guarantee to the federating units, genuine autonomy over their internal affairs. This requires that the division of powers should be non-centralized. It should be guided by the need to, as far as is practicable, clearly guarantee to the state and local governments, powers over matters of local interest

¹² Professor Suberu argues for a gradualist and piecemeal legislative amendment of the 1999 constitution until the defects associated with the constitution are rectified. See Rotimi Suberu, (note 9 supra) pp 566-568.

¹³ *McFroy v. UAC Ltd* [1962] A.C 152.

¹⁴ *Ibid.*

while limiting the powers of the central government to matters that transcend regional boundaries and those that affect the entire federation generally.

For Nigeria, the foregoing would require a re-assignment of most of the powers currently allocated to the central government, under the existing constitutional arrangement, to the state and local governments under a new democratic constitution. I advocate a non-centralized arrangement that is more genuine and more reflective of Nigeria's diversity than those suggested by other scholars in that in addition to the autonomy proposed for the constituent states of the federation, I also advocate the constitutional assignment of certain powers accompanied by appropriate autonomy to the local governments as a third tier of government. Not only would this greatly help to bring government as close to the people as possible, it would also help to stem the tide of inter-ethnic and inter-tribal political rivalry and conflict that have plagued Nigeria for several decades.

In addition to the foregoing I also advocate a clearer delineation of the powers assigned to each level of government by canvassing a change in the existing constitutional technique of power sharing to allow for separate and distinct legislative lists for each level of government. The technique of power sharing entrenched in the 1999 constitution allocates powers and fiscal resources to the levels of government through the "exclusive" and "concurrent" legislative lists. The exclusive legislative list is a catalogue of matters in respect of which the central government alone may exercise legislative powers.¹⁵ The concurrent legislative list, on the other hand, itemizes matters over which the central and state governments may concurrently exercise legislative powers.¹⁶ However, where a state legislation is inconsistent with a legislation of the central government on the same matter, the central government's legislation prevails¹⁷ regardless of whether or not it addresses the peculiar needs of the hapless state.

In addition, the concurrent legislative list often engenders confusion as to which level of government ought to exercise which powers, a problem that is often exploited by the central government to unilaterally arrogate more powers than necessary to itself. The

¹⁵ Part I Second Schedule, 1999 Constitution of Nigeria.

¹⁶ Part II Second Schedule, 1999 Constitution of Nigeria.

¹⁷ Section 4(5), 1999 Constitution of Nigeria.

technique of power sharing advocated in this thesis seeks to obviate these problems by clearly and unambiguously allocating powers to the levels of government through three distinct and separate legislative lists, namely federal, state, and local government legislative lists. This will help to remove doubts as to which level of government ought to exercise legislative or executive power in respect of any particular matter. Residual powers, that is, powers in respect of matters not itemized under any of the three legislative lists, are assigned to the state governments under the proposed arrangement.

Finally, although under the federal framework advocated in this thesis, each level of government is expected to operate autonomously, this does not prevent cooperation among the levels of government. Cooperation is very important for the effective functioning of modern federations. Under the proposed federal framework, the levels of government are expected to work together through common institutions and mutual arrangements to promote their own individual interests and those of the federation. An example of such cooperative arrangements is the proposed joint management of the National Fiscal Commission by the levels of government. A further example is seen in the proposed fiscal equalization arrangement that will see the levels of government assisting each other to meet individual financial needs while maintaining the federation's financial equilibrium and stability.

What I advocate in this thesis is thus a non-centralized, covenant driven federal framework in which covenant, cooperation and non-centralization of powers are peremptory principles from which there should be no derogation. I argue that to derogate from these principles in the context of Nigeria is to rob the federalism of its very essence, a condition that portends grave dangers for the peace, sustenance and stability of the Nigerian federation.

1.1. A BRIEF STATEMENT OF THE PROBLEM

The 1999 constitution of Nigeria, which is the existing *grundnorm* of the country's legal order, is widely defined by its centralist character. In fact, it has been derisively referred

to as “a blueprint of unitarism.”¹⁸ The centralist nature of the constitution is most noticeable in the intergovernmental division of powers set out in it. Under this arrangement, executive and legislative powers are inordinately and overwhelmingly concentrated in the central government. Even in matters over which the federal and state governments may concurrently exercise executive and legislative powers, the central government is constitutionally empowered to override state legislation that do not conform with central government legislation on the same matter(s).¹⁹

The position of local governments is even more precarious under the constitution, for even though the constitution recognizes local government as a third tier of government, certain provisions of the constitution seem to tie their existence, sustenance and functionality to the federal and state governments,²⁰ a situation that often undermines the ability of the local governments to function effectively, and one which often creates enormous inter-ethnic and inter-tribal crisis in Nigeria’s multi-ethnic and multi-tribal society.

Further evidence of the constitution’s centralization of powers is seen in the nature and character of the Fiscal Commission established to, among other things, allocate centrally collected revenue among the levels of government in the federation. Not only is this Commission constitutionally empowered to exclusively and centrally determine the criteria and formula for revenue allocation among the levels of government without any genuine participation of the state and local governments in its decision making processes, its membership is discretionally determined by the President of Nigeria,²¹ thus making the Commission itself prone to the political influence and manipulation of the central government, for, as Dicey warns us, “wherever there is discretion, there is room for arbitrariness.”²²

¹⁸ Ekeng A. Anam-Ndu, ‘Renewing The Federal Paradigm in Nigeria: Contending Issues And Perspectives’ in Aaron T. Gana & Samuel G. Egwu eds., *Federalism in Africa- Framing the National Question*, vol.1 (Africa World Press Inc, 2003) p.51.

¹⁹ See footnotes 15,16, and 17 above.

²⁰ Section 7(1)-(6) 1999 Constitution of Nigeria.

²¹ Section 31(b) of Part I Third Schedule of the 1999 Constitution.

²² A.V Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1959) p.188.

Considering the very sensitive nature of the work of this Fiscal Commission and the fact that every part of Nigeria is affected by its decisions, one would have expected a more democratic approach to the appointment of its membership and the discharge of its functions. The reverse is however the case under the 1999 constitution. The implication of this is that the Commission can unilaterally take fundamental and far-reaching policy decisions that are favourable to the central government but detrimental to the interests and aspirations of the state and local governments.

Perhaps the most problematic indicator of the highly centralized nature of Nigeria's federalism is the fact that the division of powers and fiscal resources entrenched in the country's 1999 constitution was centrally conceived, centrally designed and unilaterally imposed on the entire federation by military authorities on the eve of the country's transition to civil rule in 1999.²³ The 1999 constitution was unilaterally framed and promulgated into law by the military establishment and its tiny clique of civilian collaborators. Despite the fact of the country's diversity, Nigerians were not genuinely consulted, neither were their opinions genuinely sought on the nature and character of the constitution. Contrary to the impression created by the framers of the constitution in the decree promulgating it and in its preamble therefore, the 1999 constitution is not an act of the Nigerian people. It is not a people's constitution. And since this constitution is not a genuine articulation of the will of the peoples of Nigeria, the division of powers and fiscal resources entrenched in it cannot and should not be regarded as a reflection of the collective will and aspiration of the peoples of Nigeria.

The three problems identified above are the major markers of the centralist character of the power distribution arrangement set out in the 1999 constitution. They form the main focus of this thesis. As we shall see in chapter four of the thesis, apart from the fact that it stifles the democratic right of the constituent units of the federation to determine their own destinies and manage their own affairs, the division of powers and fiscal resources entrenched in the 1999 constitution promotes the domination and subjugation of minority ethnic groups by the larger ethnic groups. And it undermines the efficient provision of public services and welfare in the state and local governments.

²³ The Constitution was decreed into existence via Decree No 24 of 5May 1999.

When it is considered that the undemocratic and insensitive nature of the existing federal framework has been the cause of so much inter-ethnic conflict and agitations for secession in the last five decades, the urgent need for a radical overhaul of this framework becomes very clear indeed.

1.2. RESEARCH QUESTIONS

This research work is aimed at addressing two principal questions:

- (a) To what extent is the existing constitutional framework for the division of powers and fiscal resources among the levels of government in Nigeria consistent with the idea of federalism?

- (b) How can this constitutional framework be restructured to align it with the idea of federalism, and enable the constituent units of the Nigerian federation to manage their own internal affairs without jeopardizing the unity and stability of the federation?

1.3. OBJECTIVE OF THE RESEARCH AND METHODOLOGY

The main objective of this research is to proffer cogent and practical solutions to Nigeria's problematic division of powers and fiscal resources by devising a counter-hegemonic federal framework that is covenant driven and non-centralized; one that genuinely acknowledges Nigeria's ethnic diversity and caters to the imperative of regional autonomy without undermining the unity of the federation.

In devising this framework, I will commence with a theoretical and historical discussion that is aimed at identifying and establishing the fundamental attributes that have clearly underpinned the idea of federalism from the earliest times till now. Establishing these fundamental attributes would enable me to later identify gaps in Nigeria's extant federal system when I discuss that federal system in chapters 4 and 5.

To identify the fundamental attributes that have underpinned the idea of federalism from time immemorial, I will examine and discuss classical and contemporary scholarship on

the subject. I will also discuss and compare the evolution, growth and character of federal practice in the older and contemporary federal systems. Apart from the Achaean League, the United Dutch Provinces, and the Swiss confederation, all of which shall be included for their obvious historical significance as forerunners of federalism in the modern sense, the comparative discussion will also focus on established federal systems like Canada, and Germany, as well as federal systems that have similar histories or similar political trajectories with Nigeria, such as Ethiopia, South Africa and the United States.

For instance, the Nigerian presidential and federal system of government is supposedly modeled on that of the United States of America (USA), yet, very important elements of the federal idea that are found in the American federal system are conspicuously missing in the Nigerian version. This makes the USA very important in any comparative discussion relating to Nigeria. Canada's ethnically diverse federal system and Germany's unique system of cooperative federalism provide deep insight into federalism's dynamic character. A discussion of federal constitutional practices and paradigms in South Africa and Ethiopia will be included in view of the fact that these two countries are ethnically diverse African federations like Nigeria. And, like Nigeria, the two countries have a troubling history of centralization. But both have been democratized and have adopted federal-type political systems that are specially designed to cater to their political and socio-cultural diversities. The allocation of powers in both countries provides instructive perspectives on how to strike a balance between unity and diversity in heterogeneous African societies.

Having identified the fundamental attributes of federalism from the theoretical, historical, and comparative discussion described above, I will then carry out a detailed and critical analysis of the nature and implications of the power distribution framework set out in the 1999 constitution of Nigeria with a view to establishing whether the extant federal framework in Nigeria reflects these fundamental attributes. The framework entrenched in previous constitutions of Nigeria will also be analyzed and discussed to reinforce the argument that Nigeria has had a most troubling history of centralized government occasioned by colonialism and military rule, and the current "federal" arrangement is in fact a continuation of the old order. In essence, the existing "federal" arrangement in

Nigeria is, in fact, a centralist colonial and military legacy foisted on the country by force. And it has been sustained by coercion. Not only will this analysis help to comprehensively establish the defective character of the existing division of powers and fiscal resources in Nigeria, it will also highlight the urgent need for its abrogation and replacement with a new federal framework.

I will then propose a federal framework anchored on the three fundamental attributes of federalism identified in this thesis, to wit, covenant, cooperation and non-centralization of power. In designing this framework, I will take into consideration the peculiarities of the Nigerian State, including its heterogeneity.

In the course of the work relevant policy reports, legal texts, constitutions, newspaper articles and newspaper interviews, journal articles and the case law of the Nigerian courts will be analyzed and discussed to strengthen the arguments made in this thesis and enrich the federal framework proposed in the thesis. In the discussion of the Nigerian federal system, much reliance is particularly placed on newspaper reports, articles and interviews, because the debate on the country's federalism is still ongoing and there is, as yet, no detailed or comprehensive scholarly work on federal restructuring in Nigeria. In fact, this is a gap which this thesis is set to fill.

1.4. THE SIGNIFICANCE OF THE RESEARCH

This research comes at a most auspicious time when the clamour for a change in the extant constitutional division of powers and fiscal resources among the levels of government in Nigeria appears to have reached a tension-inducing crescendo. However, as explained earlier in this chapter,²⁴ many of the alternatives already proffered by scholars, political leaders, ethnic groups, and political commentators fail to comprehensively, realistically, or articulately address the real problems associated with the existing power distribution paradigm in Nigeria. These alternative suggestions range from an advocacy of confederation to a preachment of complete dissolution of the federation and a break up of Nigeria into smaller independent countries.

²⁴ See section 1 of this chapter.

This thesis argues that the solution to the problematic division of powers and fiscal resources entrenched in the highly controversial 1999 constitution of Nigeria is not confederation or a dismemberment of the federation, as being suggested by some scholars and ethnic organizations. The solution is to reconstruct Nigeria's federal arrangement by adopting the symbio-democratic federal framework advocated in this thesis. This is a counter-hegemonic federal framework that peremptorily rests on covenant, cooperation and non-centralization of powers as its defining principles. It is a federal constitutional framework that will facilitate state and local government autonomy within the ambit of a united federation. This framework provides the best guarantee of unity in diversity for Nigeria.

The thesis thus makes a significant contribution to the ongoing federal debate in Nigeria. It provides future constitution makers with a viable alternative to the existing monolithic, conservative, and fundamentally flawed "federal" arrangement.

1.5. AN OVERVIEW OF THE CHAPTERS

I begin by surveying and discussing the classical and contemporary literature on the subject of federalism especially as it relates to the division of powers and fiscal resources among levels of government. Discussions on federalism cannot and should not be restricted to the division of powers among levels of government alone. Such discussions must also embrace and capture the financial arrangements and resources that support the exercise of power in a federal polity, for as Hamilton put it in *The Federalist*, "money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution."²⁵

A discussion on the division of powers in a federation without a simultaneous consideration of the fiscal arrangements and resources that support and sustain the

²⁵ Alexander Hamilton, James Madison & John Jay, *The Federalist* No.xxx (London: J.M Dent & Son Ltd, 1970) p.143.

exercise of power is, in my view, sterile and pointless indeed. What is power without money? Indeed, power without finance is, in reality, no power. The Americans demonstrated this in the course of framing the 1789 federal constitution of the United States (US). So important and so fundamental was the subject of finance to the constitution's framers that six chapters of "*The Federalist*" were specially devoted to a consideration of it.²⁶ The discussion of federalism in this thesis thus embraces both the division of powers, and the financial arrangements that support the exercise of power.

In the course of examining the literature on the subject of federalism, I discuss the history and nature of the subject as well as what scholars have written on it. This is the focus of chapter two. My aim in chapter two is to attempt a clarification of the concept of federalism, identify gaps and misconceptions in the existing literature and perspectives on Nigerian federalism, and set the background for subsequent discussion of the subject matter of this thesis.

My main argument in chapter two is that although there is no generally accepted definition of federalism, a deductive analysis of the literature, and an examination of the history of federal practice and arrangements indicate that there is indeed an 'idea of federalism' which furnishes the 'irreducible minimum' principles that are very vital to a federal system of government. These principles are covenant, cooperation, and non-centralization of powers. I argue that the division of powers and fiscal resources in a federal system ought to conform to the idea of federalism as articulated above. In essence, such division of powers and fiscal resources should be covenanted, it should engender cooperation, and it should facilitate and sustain non-centralization of powers.

Next I extensively analyse the history and evolution of federalism in Nigeria. This is the subject matter of chapter three. The historical analysis will commence with the 1914 amalgamation of several ethnic nations to form the Nigerian State. It will examine the nature of power distribution under successive constitutions during the colonial period and the subsequent thirty year military era, and end with a discussion of the constitutional division of powers and fiscal resources in the period immediately preceding the framing

²⁶ Ibid pp 142-175, (No xxx-xxxvi)

and promulgation of the 1999 constitution. My main argument in this chapter is that considering the formation of the Nigerian federation from previously existing independent, distinct, and dissimilar political entities, the diversity of the federation ought to be recognized and protected in the constitution through a democratic division of powers and fiscal resources among the levels of government. However, as the analysis in the chapter shows, Nigeria has a highly problematic history of centralization.

Nothing particularly shows the disregard for Nigeria's diversity like the centripetal division of powers and fiscal resources entrenched in the extant 1999 constitution of the country. An examination of this problematic power distribution arrangement forms the subject matter of chapter four. Here I critically examine the division of powers and fiscal resources among the levels of government in the Nigerian federation with a view to assessing its suitability for an ethnically diverse federation like Nigeria and its consistency with the idea of federalism. I argue that not only is this division of powers unsuitable for an ethnically diverse federation like Nigeria, it is absolutely inconsistent with the idea of federalism, and thus unacceptable. It fosters dictatorship and undermines democratic governance. And unless this imbalance is urgently addressed, it will invariably tear the federation apart and set the West African sub region on a path of irreversible chaos.

Next I strongly argue for a complete departure from the existing federal arrangement, and its replacement with a symbio-democratic federal framework that peremptorily prioritizes covenant, cooperation and non-centralization of powers as the animating principles of the Nigerian federal system of government. As already explained in section 1.0 above, covenant in this context indicates "agreement" of the component parts of the federation to the organizing principles of the federal polity. It presupposes an inclusive and democratic process of determining and ratifying the principles which should guide the operation of the federal system. Without this, the political system cannot be realistically federal in the true sense of the word. In addition to covenant, the division of powers in an ethnically diverse federal system should, as much as possible, be guided by the need to guarantee to the component parts of the federation, autonomy and control over their internal affairs, especially matters that most closely concern them. Non-centralization of powers must be

emphatically and unequivocally entrenched as an overarching policy in the constitution of an ethnically diverse federation. Not only will it foster democratic governance, it will also help to protect the rights of minority ethnic groups, and drastically stem the inter-ethnic tensions that are often latent in ethnically diverse societies.

Finally, in addition to covenant and non-centralization of powers, cooperation should be institutionalized as a way of promoting and protecting the unity of the federation. As the constituent units of the ethnically diverse federation cooperate to foster their joint and individual interests, the unity and stability of the federal system is enhanced and preserved. The federal constitution must therefore establish and encourage common and inclusive institutions of governance that will engender cooperation among the component parts of an ethnically diverse federation.

I argue that these three principles – covenant, cooperation and non-centralization of powers- are peremptory principles of federalism. In essence, not only do they constitute ‘irreducible minimum’ attributes of genuine federalism, there should be no derogation from them, for such derogation will corrupt and defeat the very essence of federalism. This perspective, that is, the peremptoriness of covenant, cooperation and non-centralization of powers, has not been sufficiently or coherently explored and articulated in the Nigerian federalism literature before now. It is therefore a significant contribution to the ongoing debate on federalism in Nigeria and if adopted, it will help to protect the democratic rights and public welfare of the component parts of the Nigerian federation while contributing greatly to her unity and stability.

Further to the federal framework proposed and articulated in this thesis, I make specific proposals for constitutional and policy changes in Nigeria. This is the focus of chapter six which is also the concluding chapter of the thesis. First, I argue for a complete abrogation of the 1999 constitution of Nigeria, in which is contained the problematic division of powers and fiscal resources discussed in this thesis. I propose the replacement of this problematic constitution by a truly democratic constitution. I argue that a democratic constitution is identified not only by its democratic content but also by the democratic nature of the process that births it. Thus, I propose a democratic constitution making process that consists of three different but mutually reinforcing stages. The first is the

setting up of a constitution drafting committee that will collate public opinion on the new constitution and then prepare a draft constitution on the basis of this public opinion. The second stage is the rigorous and thorough discussion and adoption of the draft constitution by a specially elected constituent assembly representing every part of Nigeria. The last stage of the constitution making process is the conduction of a referendum for a public endorsement and ratification of the new constitution. I argue that only an inclusive and thorough process like the one just outlined will suffice in the production of a democratic constitution for Nigeria.²⁷ Only such a process will guarantee that the division of powers and fiscal resources entrenched in the constitution is a reflection of the joint covenant of the Nigerian people. Previous constitution making processes in Nigeria have been solely and exclusively managed by the central government and its allies, and are thus undemocratic. The constitution making process recommended in this thesis will thus be a complete departure from the existing practice.

Apart from birthing the constitution through a democratic process, the division of powers and fiscal resources in the constitution must also be structured in a way that ensures that the levels of government in the federation are imbued with autonomy in respect of their internal affairs. Thus under the division of powers and fiscal resources proposed in this thesis, most of the matters currently itemized under the exclusive legislative list of the central government are re-assigned to the state and local governments.

I also propose a change in the technique for sharing powers among the levels of government in order to prevent the federal (central) government's dictatorial interference in the affairs of the state and local governments. In this connection I propose that powers should be clearly shared among the levels of government through three distinct legislative lists, namely federal list, state list and local government list. This will help to prevent unnecessary interference in the affairs of the state and local governments. It will also prevent the central government's incessant encroachment on the powers of the state and local governments. This mode of sharing power will reduce the tensions and conflicts that have characterized intergovernmental relations in Nigeria thus far and will promote true

²⁷ This process is extensively discussed in chapter six.

democratic governance. In addition, the arrangement outlined above will help to entrench non-centralization of powers as a prime policy of the Nigerian federal system.

Finally, I also advocate that legislative/executive autonomy should, as far as is practicable, be concomitantly accompanied by significant fiscal autonomy. Legislative/executive autonomy will be worthless unless it is accompanied by sufficient fiscal autonomy to ensure that state and local governments are, as far as possible, self-sustaining, and not obsequiously dependent on the federal government for their sustenance. Not only will this help to ensure that the state and local governments are able to effectively manage their internal affairs, it will also help to enhance accountability, experimentation, and innovation in individual state and local governments. In addition, it will encourage healthy competition among them. In chapter six, I advocate a division of fiscal powers and resources that will conduce to the autonomy of the state and local governments without jeopardizing the overall fiscal stability and equilibrium of the federation.

In concluding the introduction, I should mention that unlike the ad-hoc and piecemeal treatment of the subject in much of the literature on Nigerian federalism, the division of powers and fiscal resources proposed and advocated in this thesis, offers a clear and comprehensive solution to Nigeria's 'federal problem' and has the potential to rectify the 'power imbalance' that has threatened the corporate existence of the Nigerian state for several years. It is expected that the adoption of and adherence to the federal framework proposed in this thesis will help to stem the tide of conflict, especially the inter-ethnic rivalry as well as the separatist and secessionist agitations that have plagued the Nigerian federation over the last few decades. It will also help to facilitate and achieve the "unity in diversity" goal of the federation.

CHAPTER 2

FEDERALISM: HISTORY AND SCHOLARSHIP

INTRODUCTION

Federalism has had a long and checkered history.¹ As an institutional arrangement for government, the practice of federalism dates back to the remotest antiquity.² As a theory, federalism's many aspects have been the subject of rigorous scholarship since the medieval period.³ Yet its contemporary relevance is not in doubt.⁴ The topicality of federalism is today evidenced by the vast collection of contemporary literature specifically devoted to the subject.

One possible explanation for this deluge of academic interest in federal theory is the renowned utility of federalism as a tool of social engineering in ethnically diverse societies where inter-regional and intergovernmental tensions often threaten to rupture the very fabric of the State.⁵ A direct result of the surge in contemporary federalism scholarship however, is the noticeable proliferation of federal perspectives amid an

¹ See generally, George Anderson, *Federalism: An Introduction* (Oxford University Press, 2008) pp 8-12; Sobei Mogi, *The Problem of Federalism*, Vol 1 (George Allen & Unwin Ltd; London, 1931) pp 21- 418; Daniel J. Elazar, *The American Partnership- Intergovernmental Co-operation in the Nineteenth Century United States* (University of Chicago Press, 1962) pp 11-24.

² Sobei Mogi traces the practice of federalism back to the days of the biblical Israelites when the Israeli nation was a federation of twelve tribes. See Sobei Mogi (ibid at p.21). Like Mogi, Daniel Elazar also traces the earliest origins of federalism to the covenantal tradition in biblical Israel. For more on this, see Daniel J. Elazar, *The Covenant Tradition in Politics* (New Brunswick: Transaction Publishers, 1995) pp 75-92. See also Ronald L.Watts, *Comparing Federal Systems* (McGill Queen's University Press, 2008) p.2. Some other scholars trace the history of federalism to the era of ancient Greece when several forms of federal union were designed by the Greek *poleis* or city-states. See for instance Hans Beck and Peter Funke 'An Introduction to Federalism in Greek Antiquity' in Hans Beck and Peter Funke eds., *Federalism in Greek Antiquity* (Cambridge University Press, 2015) pp 2-3.

³ For instance, by 1603, German Jurist, Johannes Althusius' had published his magnum opus *Politica Methodice Digesta*. See Johannes Althusius, *The Politics of Johannes Althusius* transl. Frederick S. Carney (London: Eyre & Spottiswoode 1964) pp 1-201.

⁴ Ronald L.Watts (note 2 supra) pp 4-7. In Maxwell A. Cameron and Tulia G.Falletti's article 'Federalism and the Subnational Separation of Powers' 2005 35(2) *Publius* 245, the authors estimate that "forty percent of the world's population live in countries that can be considered or claim to be federal," a claim that is supported by George Anderson (note 1 supra) at p.1 and Ronald L. Watts (note 2 supra) at p.5. The above underscores the contemporary relevance of federalism and the need for more critical research on federalism as a governance model.

⁵ Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism- A Reader* (New York: Palmgrave Macmillan, 2005) p.5; George Anderson (note 1 supra) at pp 12-13.

elusive universally accepted definition of the subject. Indeed, as we shall later see in this work, there are currently as many conceptualizations of federalism as there are scholars and theorists.

In this chapter, I trace the history and evolution of federalism as a form of government, and attempt a critical discussion and analysis of major classical and contemporary writings on the subject. Leading philosophers, scholars and political thinkers have commented and written extensively on the subject. And, as we shall see, federalism has existed in various forms at different times in world history. For instance, the formation of the Achaean League, the Swiss Confederation, the United Dutch Provinces and the United States of America represent major epochs in the historical evolution of federalism. These above mentioned instances of federal-type arrangements are included in the following discussion for their historical significance as forerunners of federalism in the modern sense. The discussion also includes the Canadian, Ethiopian and South African federal systems each of which is ethnically diverse like Nigeria and thus worthy of comparative study. Additionally, like Nigeria, Ethiopia and South Africa have a troubling history of centralization but both countries have transformed into federal democratic systems. They offer instructive perspectives on federalism in heterogenous African societies. The German federal system occupies a special place in the pantheon of well established federations, and is included in the discussion below for its unique cooperative approach to federal government. Cooperation, as explained in this chapter, is an indispensable attribute of federal government. The defining characteristics of each of the above mentioned historical and contemporary instances of federal union are examined and discussed in this chapter.

This chapter reveals that although scholars do not agree on a universal definition of federalism, there are nevertheless certain elements of the idea of federalism that are implicit in classical and contemporary conceptualizations of federalism. Three of these elements- covenant, cooperation and non-centralization of powers- are particularly fundamental to federalism in ethnically diverse societies like Nigeria. And as I later argue in chapter five of this thesis, so intrinsically basic are these three elements to the idea of federalism in ethnically diverse societies that derogation from them will detract from the

very essence of federalism. Succinctly put therefore, they are peremptory principles of federalism from which there should be no derogation. A major argument of this thesis is that the ‘federal validity’ or ‘federalness’ of governance and institutional arrangements in ethnically-diverse federal states should be peremptorily contingent on their anchorage in “covenant,” “cooperation” and “non-centralization of powers.”

2.1 History and Evolution of Federalism.

A convenient starting point for any discussion on federal evolution is the formation, in the Hellenistic era, of the Achaean confederation comprising the Greek city states of ancient Peloponnesus. In his detailed account of the two phases of this union, classical Greek Historian, Polybius describes the ‘voluntary’ nature of membership in the first Achaean League and the ‘equality’ and ‘liberty’ which characterized relations among member city-states in the first and second existences of the League.⁶

In particular, Polybius effusively extols the ‘democratic’ spirit that hallmarked government in the second Achaean League and argues that this was a major attraction that lured other Greek city states to subsequently join or remain within the League. While the paramount goal of the League was the security of the member city-states from Macedonian invasion and oppression, an objective to which all members were resolutely pledged, the formation of the League was also aimed at stemming the tide of inter-city violence commonplace in ancient Greece.⁷ One scholar, in fact, describes the Achaean project as the Hellenic era’s “attempt to protect the Poleis (*city-state*) from empires and tyrant hegemony.”⁸

⁶Polybius, *The General History of Polybius in Five Books*, translated from the Greek by Mr. Hampton (London, MDCCLVI 1756) pp 148-152. See also Cinzia Bearzot, ‘Ancient Theoretical Reflections on Federalism’ in Hans Beck and Peter Funke eds., (note 2 supra) at pp 507-508.

⁷ Polybius,(note 6 supra) at pp.152; 154; 170. Similarly, Freeman, in his detailed history of federal arrangements in Greece and Italy, describes the perpetual state of violence in which Ancient Greece was enmeshed, a condition that spurred a resort to the formation of leagues to provide protection for individual cities. See Edward A. Freeman, *History of Federal Government in Greece and Italy*, 2nd ed. (London: Macmillan and co, 1893) p.42.

⁸ M. Rostovtzeff, *The Social and Economic History of the Hellenistic World*, vol 1 (Oxford: Clarendon Press 1941) p.36, quoted in S.Rufus Davis *The Federal Principle-A Journey Through Time in Quest of a Meaning* (London: University of California Press, 1978) p.34.

Giving a succinct summary of the League's structure, Rufus Davis writes that its principal features included "common citizenship, division of competences between the League and the constituent cities, a central legislature and full time executive, central control of war and peace as well as foreign affairs, autonomy of the constituent cities in all matters but war and peace, equal representation of each city in the central assembly, and the permanence of the treaty which created the league."⁹ The autonomy of each of the cities making up the League over local matters within its own territory is buttressed by Freeman who in his own detailed portraiture of the League, avers that the Achaean cities were indeed not mere municipalities. They were commonwealths in their own right with full local powers while the government of the League tended to matters regarding external diplomatic relations and such other issues of general importance to the League.¹⁰ A more recent account of Achaean federalism strongly supports the narrative that members of the league retained their autonomy while conceding powers in respect of common interests to the League's central authority.¹¹

Regarding fiscal matters and fiscal relations within the league, Ehrenberg writes that the League government "had the supreme right of coinage, but in addition there was often coinage by member states, though always of one and the same standard."¹² And "the league seldom relied on fixed quotas from the member states, but rather on taxes levied directly on the citizens, whether regular or called for at special occasions."¹³ On the other hand, member *poleis* of the League "retained the right to collect local taxes and to administer their own markets..."¹⁴ And their ability to borrow funds to finance local initiatives was largely unfettered.¹⁵ Essentially therefore, the Achaean League was organized in a way that fostered the unity of the cities (*poleis*) but nevertheless preserved their individual integrity and autonomy. The political, organizational and fiscal structure

⁹ S.Rufus Davis (note 8 supra) at p.27.

¹⁰ For a more detailed account of the federal nature of the Achaean League, see Edward A. Freeman (note 7 supra) at pp 170-251, especially pp 197-243.

¹¹ Athanasios Rizakis, 'The Achaean League' in Hans Beck and Peter Funke eds., (note 2 supra) at p.128.

¹² Victor Ehrenberg, *The Greek State* (London: Methuen & Co Ltd, 2nd ed, 1969) p128.

¹³ Ibid.

¹⁴ Emily Mackil 'The Economics of Federation in the Ancient Greek World' in Hans Beck and Peter Funke eds., (note 2 supra) at p.502.

¹⁵ Ibid, pp.501-502.

of the League must have influenced what became obtainable in the American federal system established later in the 18th century.

We see from the description given above of the League that some of the same values that influenced the American founders- democracy, equality, liberty- were manifestly present in the Achaean League. And just like the American federal system was originally founded to secure the liberty of its members, the Achaean League was similarly established to secure and protect its member city-states. The members committed themselves to jointly secure their borders against enemy invasion and protect their common economic interests while preserving the right of each member to superintend its own internal affairs.

Just like the Achaean League, a desire to secure the freedom and protection of member cities was the driving force behind the alliance of the three Swiss cantons, “Uri, Schwyz and Nidwalden” in August 1291.¹⁶ The alliance later grew to include Lucerne, Zurich, Glarus, Zug and Bern in the mid thirteenth and early fourteenth centuries. The Swiss alliance progressively expanded with more members joining until 1848 when the (con)federal constitution of Switzerland was drawn up.¹⁷ The aim of the (con)federation according to the Constitution was “to insure the independence of the country against foreign power; to maintain tranquility and order in the interior; to protect the liberty and rights of the confederates and to protect the common welfare.”¹⁸

Again, like the Achaean League, an elaborate scheme of division of competences was outlined in the 1848 Constitution of the Swiss Confederation which sought to ensure that the balance of power between the federation and the cantons was in line with the aims and aspirations of the cantons. Thus while the central government retained powers necessary to preserve the aims of the federation, the constitution guaranteed to the

¹⁶ William H. Riker, *Federalism- Origin, Operation and Significance* (Little, Brown & Company, 1964) p. 34. See also Ursula K. Hicks, *Federalism: Failure and Success* (The Macmillan Press Limited, 1978) p.157. See the text of the Charter establishing this alliance at http://www.lexilogos.com/declaration/suisse_federal_charter.htm (accessed 30/07/2016).

¹⁷ The detailed history of the Swiss federation compiled by Ursula Hicks is worth reading for a proper understanding of the evolution of this federation. See Ursula K. Hicks (note 16 supra) at pp 156-168

¹⁸ Article II, Swiss Constitution of 1848.

Cantons, power in respect all other matters.¹⁹ Although, the Swiss Constitution has undergone a number of revisions over the years, it has retained the basic federal structure established by the 1848 constitution.²⁰

Features of the Achaean and old Swiss alliances described above were also manifest in the union founded by the Dutch provinces, and that founded by the American colonies under the Articles of Confederation in the sixteenth and eighteenth centuries respectively. Both unions were essentially established as defense mechanisms aimed at confronting and obliterating imperialism.²¹ And similarity between the two unions is most marked by the degree of autonomy enjoyed by their federating units.²²

Unlike the arrangements established by the Achaean League and the 1848 Swiss constitution however, the central governments established by the Union of Utrecht and the Articles of Confederation were much less powerful than the federating units.²³ In fact, save for the common defense of the unions, their central bodies were not empowered to do much else.²⁴ Boogman describes the United Dutch Provinces after 1650 as a “confederation of states” whose central government existed as an agency of the confederating states.²⁵ In the case of the American colonies, such was the near impotence of the Continental Congress, the central body established by the Articles of

¹⁹ Ursula K. Hicks (note 16 supra) at p.156. See also Andre Bachtiger and Jurg Steiner, ‘Switzerland’ in Ugo M. Amoretti and Nancy Bermeo eds., *Federalism and Territorial Cleavages* (The John Hopkins University Press, 2004) p.32. The scheme of division is contained in Articles VI- XL of the Swiss constitution 1848.

²⁰ The Swiss constitution was wholly revised in 1874 and 1999. But these revisions did not fundamentally alter the basic structure established by the 1848 constitution. The 1848 constitution has in fact “remained the basis of the Swiss government” for several decades. For more on the history of the Swiss federal system, see Ursula K. Hicks (note 16 supra) at pp 156-168.

²¹ The United Dutch Provinces was a union formed in reaction to Spanish imperialism while the Union of the American colonies under the Articles of confederation was created to confront British imperialism. For a comprehensive account of the federal arrangement formed by the United Dutch Provinces, see J.C Boogman, ‘The Union of Utrecht: Its Genesis and Consequences’ in J.C Boogman and G.N Van der Plaet eds., *Federalism: History and Current Significance of a Form of Government* (The Hague: Martinus Nijhoff, 1980) pp 5-35. For a history of federalism in America, see Michael Burgess, *Comparative Federalism: Theory and Practice* (London: Routledge, 2006) pp 50-75; William Miller, *A New History of the United States*, 3rd ed (London: Granada Publishing Ltd, 1968) pp 96-102.

²² See the text of the Articles of Confederation at <http://avalon.law.yale.edu/18th_century/artconf.asp> (accessed 08/09/2016); See also the text of the Union of Utrecht of January 1579 at <<http://www1.umassd.edu/euro/resources/netherlands/20.pdf>> (accessed 08/09/2016).

²³ S. Rufus Davis (note 8 supra) at p.75.

²⁴ See the text of the Articles of Confederation at note 22 supra; See also the text of the Union of Utrecht of 23rd January 1579 at note 22 supra.

²⁵ J.C Boogman (note 21 supra) at p.24.

confederation, that it had no independent source of revenue. Its revenue was sourced from the federating colonies many of which treated the obligation to provide such funding as discretionary.²⁶ Ultimately, the weak central governments created by the Union of Utrecht and the American Articles of Confederation, as highlighted above, proved to be the undoing of both unions and ultimately led to their premature demise.²⁷

The ‘unworkability’ of the American Articles of Confederation led to its replacement with a constitution that gave significant and meaningful autonomy to the American states but also guaranteed to the central government, powers sufficient for its effective functioning. This new constitution, which came into force in 1789 contains a list of functions exercisable by the central government but empowers the state governments to perform all other governmental responsibilities.²⁸ In addition, under this constitution, funding for the central government is, unlike what obtained under the 1781 Articles of confederation, not dependent on the magnanimity of the state governments, but on taxes directly levied on individual citizens and corporate bodies in the United States.²⁹ The 1789 constitution, in effect, embodies a federal arrangement “articulated in a single constitutional system, of two distinct governments, national and state, each acting in its own right, each acting directly on individuals, and each a qualified master of a limited domain of action.”³⁰ The political arrangement created by the 1789 constitution has been described as the first manifestation of “federalism in the modern sense.”³¹

Not only did the founding fathers of America create a unique political arrangement, unparalleled in history, they also set down a political paradigm that would be copied by other federal states in future. For instance, unlike most of the previous alliances and leagues that existed prior to the modern federal arrangement founded by the Americans in

²⁶ David Brian Robertson, *Federalism and the Making of America* (London: Routledge, 2012) p.21. Other defects of the American Confederation under the 1781 Articles of Confederation were outlined by Edmund Randolph who was one of the participants at the Philadelphia Convention that birthed the 1789 constitution of the US. Summed up, they all point to the Continental Congress’ lack of any real power. For more on this, see Michael Burgess (note 21 supra) at pp 57-58.

²⁷ See J.C Boogman (note 21 supra) at pp 5-36. See also William H. Riker (note 16 supra) at pp 9-10.

²⁸ See Article 1(8) of the US Constitution at (National Archives, ‘The Constitution of the United States: A Transcription’) <https://www.archives.gov/founding-docs/constitution-transcript> (accessed 08/09/2016).

²⁹ Ibid.

³⁰ S.Rufus Davis (note 8 supra) p.114.

³¹ Sobei Mogi (note 1 supra) at p.21.

1787, the federating parties and the central government were set up to exist side by side as distinct entities within the same national space. The new US federal arrangement was not structured like that of the United Dutch Provinces which was essentially a security alliance under which the participating Provinces merely ceded enough power to the central body they created for the purposes of their joint security but retained their separate status as independent states.

By the political arrangement set out under the 1789 constitution of the US, America effectively created a new conception of the word ‘federal.’ The term had been used loosely before then to refer to most forms of alliances or leagues. With the new US constitution however, the old conception of ‘federal’ as loose ‘alliances or leagues’ gradually faded into oblivion. Such alliances or leagues came to be regarded as ‘confederation’ while the word ‘federal’ also gradually became associated with the new political arrangement set out in the 1789 constitution of the United States.³² Federalism in the modern sense can therefore be rightly said to have originated from the 1789 constitution of the United States.³³

The quality of the 1789 constitution of America is marked by the values of democracy, equality, and liberty embedded in it. A particular indicator of this is the division of powers set out in the constitution. The constitution assigns power over matters common to the union to the central government while all other matters are left for the state governments.³⁴ This was a compromise arrangement between those who wanted a much stronger central government for America and those who wanted the absolute independence enjoyed by the states under the previous Articles of Confederation.³⁵ The compromise arrangements were worked out and sealed during several days of lengthy debates and negotiations by the American people at the Philadelphia constitutional convention and the subsequent ratifying conventions in the various State Assemblies.³⁶

³² Michael Burgess (note 21 supra) at pp.55-56; p 64.

³³ Ronald L.Watts (note 2 supra) at p.2.

³⁴ See the text of the constitution at note 28 supra.

³⁵ Michael Burgess (note 21 supra) at pp 60-65.

³⁶ Records of the proceedings of the Philadelphia Convention are available at <https://archive.org/stream/secretproceedin00convgoog#page/n32/mode/2up> (accessed 13/6/2017).

In Canada, the federal arrangement dates back to 1867 when, by the British North American Act (BNA) of that year, Canada, Nova Scotia and New Brunswick formed “a union of four provinces,”³⁷ Ontario, Quebec, Nova Scotia, and New Brunswick.³⁸ Importantly, the Act’s preamble expresses the “desire” of the provinces to be “federally united” into one country. Subsequent additions to the union have now made Canada a federation of ten provinces.³⁹ From relatively humble beginnings, the Canadian federal system has evolved to become one of the most decentralized federations in the world, with the Provinces having broad authority in a significant number of policy fields. For instance, the provinces have broad powers of taxation, they have significant borrowing powers, they own and manage public lands within their domains, and they have extensive management powers in the exploration, conservation, exploitation and development of non-renewable natural resources found within their territories.⁴⁰

Indeed, section 92A(4) of the Canadian constitution empowers the legislature in each province “to make laws in relation to the raising of money by any mode or system of taxation in respect of non renewable natural resources and forestry resources in the province...” However, it must be pointed out that the decentralist character of Canadian federalism is balanced by the federal government’s exclusive legislative competence in fields such as the regulation of trade and commerce, currency and coinage, taxation for the purposes of the federation, and borrowing of money for the purposes of the federation.⁴¹ Canadian decentralization is also balanced by the country’s well developed system of inter-governmental cooperation and coordination which is evident in a number of policy fields. For instance, although provinces have broad authority in the area of revenue generation, there is often an imbalance between the revenue available to most provinces and the quantum of social services and other projects they are constitutionally required to provide for their constituents. To address this problem, federal spending power is often used to provide funding in policy fields that are ordinarily under the

³⁷ Rainer Knopff and Anthony Sayers, “Canada” in John Kincaid and G. Alan Tarr (eds), *Constitutional Origins, Structure, And Change in Federal Countries*, Vol.1, (McGill-Queen’s University Press, 2005) p.105.

³⁸ Ibid. See also Richard Simeon and Martin Papillon, “Canada” in Akhtar Majeed et al (eds), *Distribution of Powers and Responsibilities in Federal Countries*, Vol. 2 (McGill-Queen’s University Press, 2006) p.93.

³⁹ Ibid.

⁴⁰ See Sections 92 and 92A Constitution Act 1867.

⁴¹ Section 91 Constitution Act 1867.

jurisdiction of the provinces. This is of course done with the consent and cooperation of the concerned province(s).⁴² In addition, Canada's federal system is characterized by a well developed fiscal equalization system which is designed to "reconcile equality with autonomy" by ensuring that fiscal decentralization does not exacerbate fiscal inequality among the provinces.⁴³

Intergovernmental cooperation and coordination is more pronounced in Germany and Austria. In Germany for instance, although the federal government exercises broad legislative competence in a wide array of policy fields, implementation or execution of federal legislation is largely the responsibility of the Lander (regional or state governments).⁴⁴ This is not to say that the Lander are without any form of legislative competence of their own. In fact, the German Basic Law outlines a number of policy fields in which both federal and Land governments may exercise concurrent legislative authority. Among these are the public ownership of land and natural resources, agriculture, labour matters, maritime and coastal shipping, public welfare, mining, banking, industry, trade and commerce *etcetera*.⁴⁵

The German constitution also encourages cooperation between the federal and Land governments in the field of "educational planning,...promotion of research institutions ...research projects of supra-regional importance, criminal police work, protection of free democratic basic order, security of the federation or of a Land..."⁴⁶

In the area of finance, the German federal government is exclusively empowered to legislate in respect of "custom duties and fiscal monopolies,"⁴⁷ while the Lander is empowered to exercise legislative jurisdiction over "local taxes on consumption and

⁴² See Richard Simeon and Martin Papillon (note 38 supra) at p.105. See also, George Anderson, (note 1 supra) p.39.

⁴³ Section 36 of the Constitution Act 1982.

⁴⁴ See Article 83 of the Basic Law 1949. See also Ronald L. Watts (note 2 supra) p.35. A similar arrangement is also seen in the Austrian federal system where legislation is considerably centralized, but the nine Lander play a role in the administration and implementation of federal legislation. See Ronald L. Watts (supra) p.34. As in Germany, the Federal Government's predominant lead role in the Austrian federal system is perhaps explained by the homogenous character of the country. For more on this perspective, see Jan Erk, "A Federation without Federalism" 2004 34(1) *Publius* 1-20.

⁴⁵ Basic Law 1949, Article 74.

⁴⁶ *Ibid*, Articles 91b and 73(10).

⁴⁷ *Ibid*, Article 105(1).

expenditures” as long as similar taxes have not been imposed by a federal legislation.⁴⁸ In effect, while revenues from “customs duties, highway freight tax, tax on capital transactions,” as well as “income and corporation surtaxes” accrue to the federal government,⁴⁹ other taxes like the “property tax, inheritance tax, motor vehicle tax, beer tax, tax on gambling establishments, and such other taxes as do not accrue to the federation” accrue to the Lander.⁵⁰ Revenue generated from “income taxes, corporation taxes, and turnover taxes” are expected to “accrue jointly to the federation and the Lander”⁵¹ The intergovernmental allocation of revenue outlined above is designed to ensure that both levels of government are armed with significant revenue to carry out their constitutional responsibilities.

Tax administration is mostly within the jurisdiction of the Lander.⁵² However the federal government is exclusively empowered to administer custom duties, fiscal monopolies and taxes on consumption regulated by federal law.⁵³

To bridge fiscal disparities that may result from differences in the fiscal capacities or revenue raising abilities of the Lander, the German constitution, like its Canadian counterpart, establishes a system of fiscal equalization to ensure that “financially weak Lander” are able to meet “their general financial needs”⁵⁴

One further point must be made with respect to German federalism, as discussed above. While it may be correct to argue that the German federal system is not as non-centralized as those of the United States or Canada, it is nevertheless true that the regional governments (Lander) in Germany are not mere appendages of the German federal government. The Land governments in Germany are, in fact, key actors in the German federal system. Apart from their key role in the implementation of federal legislation, they also play a very influential role in federal legislation through their membership of

⁴⁸ Basic Law 1949, Article 105(3).

⁴⁹ Ibid, Article 106(1).

⁵⁰ Ibid, Article 106(2).

⁵¹ Ibid, Article 106(3).

⁵² Ibid, Article 108(2).

⁵³ Ibid, Article 108.

⁵⁴ Ibid, Article 107(2).

the Bundesraat.⁵⁵ But, the most remarkable and enduring legacy of German federalism is its implicit and explicit preachment of cooperation as a cardinal cornerstone of federalism, a lesson which the South Africans seems to have imbibed, as demonstrated by the explicit entrenchment of inter-governmental cooperation in the extant constitution of South Africa.⁵⁶

Like Germany, although the South African constitution establishes a strong national government, the provincial governments are not mere appendages of the national government. This is evident in the sheer quantum of matters which are within the legislative competence of the provinces.⁵⁷ Among other things, the broad authority of the provinces allows them to legislate in respect of agriculture, education, health services, housing, policing, public transport, welfare services, provincial planning, provincial amenities, as well as provincial roads and traffic.⁵⁸ In the area of finance, although the constitution clearly gives the national government a lead role in the raising of revenue, and associated legislation,⁵⁹ the constitution nevertheless establishes broad principles for the sharing of national revenue. Among other things, the legislation for the sharing of national revenue can only be enacted after due consultation with the provincial governments and the Fiscal Commission established by the constitution.⁶⁰ And such legislation must take into consideration “the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them.”⁶¹ It must also take into consideration the “fiscal capacity and efficiency of the provinces and municipalities,”⁶² and the need to bridge “economic disparities within and among the provinces.”⁶³ The implication of the above is that even though the National

⁵⁵ See Hans-Peter Schneider, “The Federal Republic of Germany” in Akhtar Majeed et al (eds), *Distribution of Powers and Responsibilities in Federal Countries*, Vol. 2 (McGill-Queen’s University Press, 2006) pp 127-128.

⁵⁶ See Sections 40 & 41 Constitution of South Africa 1996 (as amended)

⁵⁷ Schedule 4 of the Constitution outlines the “functional areas of concurrent national and provincial legislative competence.” Schedule 5 outlines the “functional areas of exclusive provincial legislative competence.”

⁵⁸ Ibid.

⁵⁹ Section 228, Constitution of South Africa 1996 (as amended).

⁶⁰ Ibid, section 214(2).

⁶¹ Ibid, section 214(2)(d).

⁶² Ibid, section 214(2)(e).

⁶³ Ibid, section 214(2)(g).

Government is saddled with the role of fiscal coordination, the South African constitution does not envisage fiscally subservient provincial governments. The constitution makes adequate financial empowerment of the provinces and municipalities, a cardinal principle of the system of government in South Africa.

In Ethiopia, another multi-ethnic African country, the regional governments (state governments) are even more powerful than the South African provinces. The constitution itself makes this very clear in its allocation to each State Government, the power to “establish an administration that best advances self-government,”⁶⁴ and the authority to exercise “all powers not given expressly to the Federal Government alone or concurrently to the Federal Government and the States.”⁶⁵ The implication of this is that while the Federal Government exercises legislative authority in the broad areas of defence, foreign policy, monetary policy, inter-state trade and commerce, and the formulation of basic national standards for education, health and sundry services,⁶⁶ the State Governments possess broad legislative authority in all other matters, a condition that makes the States, major wielders of power in the Ethiopian federal system.

In fiscal matters, the Federal and State Governments both have access to significant tax revenue. For instance, while the Federal Government is understandably empowered to collect and administer “custom duties, taxes and other charges on imports and exports”⁶⁷ as well as “federal stamp duties”⁶⁸ and “taxes on monopolies”⁶⁹ among other taxes. The State Governments are constitutionally empowered to levy and collect “income taxes on employees of the State and of private enterprises.”⁷⁰ In addition to a range of other taxes,⁷¹ the constitution also assigns, to the States, “profit and sale taxes on trading activities within their territory.”⁷² Most importantly, the States are empowered to levy

⁶⁴ 1995 Constitution of Ethiopia, Article 52(2)(a).

⁶⁵ Ibid, Article 52(1).

⁶⁶ Ibid, Article 51.

⁶⁷ Ibid, Article 96(1).

⁶⁸ Ibid, Article 96(9).

⁶⁹ Ibid, Article 96(8).

⁷⁰ Ibid, Article 97(1).

⁷¹ The full range of State taxes is outlined in Article 97 of the Constitution.

⁷² 1995 Constitution of Ethiopia, Article 97(4).

and collect taxes, royalties and land charges on mining activities within their territories.⁷³ The latter is potentially a huge source of revenue for the States. The federal arrangement in Ethiopia is, in essence, designed to create strong and fiscally empowered regional governments that are able to cater to the needs of their constituents without surrendering their authority to the federal government.

The foregoing discussion succinctly highlights some of the most salient features of the earliest 'federal' arrangements from the Achaean League of the Greek city-states of ancient Peloponnesus to the Union of Utrecht consisting of the United Dutch Provinces. It also describes the alliances of the Swiss cantons which eventually culminated in the 1848 Swiss Confederation. Similarly, the discussion examines the evolution of federal government in the United States from its very uncertain beginnings in the 1781 Articles of Confederation to the more closely knit and stronger federal political arrangement under the 1789 constitution. The discussion also examined important features of the Canadian, German, Austrian, South African, and Ethiopian federal systems.

Our discussion thus far reveals certain fundamental elements or attributes of federalism. The first is that in none of the instances of federalism discussed above was the federal union formed with the principal aim of obliterating or undermining the autonomy or relevance of the federating parties or constituent units. While, in each case, power was shared among at least two levels of government, the central government and the regional governments, the regional governments either retained significant powers of self government or played major roles in the federal arrangement. In none of the instances of federalism examined above was the regional government obsequiously subservient to the central administration or inconsequential in the federal arrangement. Even when the Americans took a decision, at the Philadelphia constitutional convention, to review the structure of the political arrangement established by the 1781 Articles of Confederation, the new federal arrangement devised by them did not deleteriously detract from the autonomy of the States. Rather, it clarified and protected this autonomy. And in Germany and South Africa where the Federal or National Government plays a dominant role in public governance, the Lander or Provincial Governments are not mere appendages of the

⁷³ Ibid, Article 97(8).

federal government. In fact the latter play very significant roles in the cooperative federal arrangement in those two countries.

In essence, what is implied by the foregoing is that implicit in these federal arrangements is the idea that the federating parties or constituent units may not be deprived of their autonomy or participation in matters that most closely concern them, that is, their internal affairs. Non-centralization of powers accompanied by appropriate autonomy largely underlined each of these federal arrangements.

The second is that in most of the federal arrangements discussed above, the union or alliance was established by covenant or agreement. For instance, ancient Greek tradition regarded treaties or covenants as sacred. Alliances or leagues were formed and established in ancient Greece through the instrumentality of sacred treaties between the alliance or league partners.⁷⁴ The Union of Utrecht that founded the United Dutch Provinces was similarly a treaty or covenant signed by the confederating parties. The three Swiss Cantons that formed the earliest Swiss confederation in 1291 established their union on “a pact of mutual assistance, a covenant....solemnly sworn by thirty three representatives..”⁷⁵ The federal arrangements in Ethiopia and South Africa were products of covenantal pacts made by the federating parties after extensive negotiations in the 1990s.⁷⁶ And both the American Articles of Confederation and the subsequent federal constitution of 1789 were ‘expressions’ of the Americans’ covenant⁷⁷ with each other on how they wished to be governed.

Daniel Elazar, in his compelling quartet on the history and character of “the covenant tradition in politics” has explained the covenantal origin of the American federation,⁷⁸ and the significance of the American constitution as an expression of the American people’s covenant. According to Elazar, the founding fathers of America “saw constitution making as a way of...covenanting or compacting together in order to create

⁷⁴ Kurt A. Raaflaub, ‘Forerunners of Federal States: Collaboration and Integration through Alliance in Archaic and Classical Greece,’ in Hans Beck and Peter Funke (note 2 supra) at pp 434-446.

⁷⁵ Daniel Elazar, *The Covenant Tradition in Politics* Vol.IV (New Brunswick:Transaction Publishers, 1998) p.177-179.

⁷⁶ This is discussed in chapter five

⁷⁷ Daniel Elazar (note 75 supra) p.228.

⁷⁸ *Ibid* vol.I (New Brunswick:Transaction Publishers, 1995) p.xiii.

civil instruments designed to carry out the promises⁷⁹ or principles of the American Declaration of Independence. For Elazar, “a constitution involves the implementation of a prior covenant- an actual effectuation or translation of a prior covenant into an actual frame or structure of government.”⁸⁰

“Covenant” according to Elazar “delineates the system’s moral foundations, offers mechanisms for constructing the institutional system’s frame of government, and suggests a behavioural dynamic to shape the system’s socio-economic basis.”⁸¹ Expatiating on this point, he writes that “the moral basis of the constitution refers to the generally accepted ideas about how people in a particular polity should live. It includes the conception of justice that is held to be the guiding standard of the polity, the picture of the good quality in the minds of the citizens, plus other opinions about what kinds of political and social actions are right and good. The socio-economic basis of the constitution refers to the ways people actually live. It includes such things as class structure, ethnic composition, type of economy, and the actual distribution of power...The frame of government refers to the institutions and structures of government itself, including the document (or collection of documents) that sets out the institutions of government, establishes their powers and limits those powers, and indicates who shall govern and how the governors shall be chosen.”⁸²

The import of the foregoing is that the organizing principles of government, the society’s preferred socio-economic model, and the moral foundation of the polity should be determined through a covenantal “process of constitution making” that “involves a convention of the partners to the pact, or their representatives...There has to be a formal consenting among the partners whether individuals or polities.”⁸³ In essence, the federating parties or confederates must consent to their union and the principles and ideas underpinning it via an inclusive constitution making process. This consent must be expressly, unreservedly and unambiguously given. It cannot be given otherwise.

⁷⁹Ibid pp 28-29.

⁸⁰ Ibid.

⁸¹ Ibid, p 30.

⁸²Ibid, p.29.

⁸³ Ibid (vol.4) pp 227-228.

Implicit in the term “federalism” itself, is the idea of covenant, for the word federal “is derived from the latin *foedus* which means covenant.”⁸⁴ Covenant is implicit in all the historical examples of federal polities examined and discussed above. From the Achaean federal system to the Union of Utrecht, and the Swiss and American federations, covenant, as expressed in the agreement of the federating parties or confederates to form a union and be guided by certain principles, was evident. Elazar, particularly singles out the American and Swiss federations as “the best examples of constitution as covenant.”⁸⁵

A third attribute of the federal systems discussed above is ‘cooperation’. In each of them cooperation was indeed implicit. And in Germany and South Africa, cooperation was, in fact, explicitly written into the constitution. The very act of union itself is cooperative in nature and entails all that cooperation implies. The Achaean League was a cooperative arrangement instituted principally for defence, so were the United Dutch Provinces, the original confederation of the Swiss Cantons, and the initial American confederation. Of course the degree of cooperation differed from polity to polity, but cooperation was nonetheless a fundamental part of these unions for none of them could have existed without some form of cooperation or the other. In fact, although the 1789 constitution of America is often described as instituting a system of dual federalism which perhaps does not entail or encourage cooperation, this notion has been disproved as fallacious. In his detailed and extensive assessment of the actual working of the constitution since inception, Daniel Elazar has shown that the American federal system has indeed always been cooperative right from the time of the founding fathers.⁸⁶

In summary therefore, three main characteristics discernible in the federal political systems examined above, and relevant to this thesis, include (i) non-centralization of powers (ii) covenant and (iii) cooperation. As we shall see below, although other elements of the federal idea have featured in the writings of scholars, theorists and jurists, these three characteristics have remained predominantly implicit in the array of extant federal theories, thus making them important and fundamental attributes of federal government.

⁸⁴ Ibid vol.1 (New Brunswick: Transaction Publishers, 1995) p 26.

⁸⁵ Daniel Elazar (note 38 supra) at p 228.

⁸⁶ Daniel J. Elazar (note 1 supra) pp 1-325.

2.2 Federalism Scholarship: Voices from the North and South

The literature on federalism is vast and extensive. Its fundamental principles and principal tenets have been the subject of intense commentary and inquiry from time immemorial. In fact, as far back as the sixteenth century, German Jurist and scholar Johannes Althusius had published his famous *Politica Methodice Digesta*, which, among other things, articulated the philosophy that subsequently earned him fame as “the father of modern federalist thought.”⁸⁷ Apparently influenced by 16th century Calvinist advocacy of “association” among Republics as well as religious bodies for the purposes of defense and other common concerns, Althusius formulated and developed a “doctrine of symbiotic association..in response to Jean Bodin’s centralizing philosophy of sovereignty.”⁸⁸

Bodin, in his famous magnum opus, *La Republique*,⁸⁹ espouses a statist conception of political organization characterized by a marked centralization of political power. Put succinctly, Bodin’s theory suggests that society’s order and stability are better secured by an absolute monarchy which is also the undisputed repository of state sovereignty.⁹⁰ Althusius proffers a counter-perspective. For Althusius, sovereignty ultimately belongs to the people and only they can alienate or delegate the exercise of it.⁹¹ In other words, sovereignty truly resides with the people and the state only exercised power on behalf of the people. This in fact is a central point in Althusius’ treatise.

Defining his concept of political organization, Althusius declares that “politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them, whence it is called ‘symbiotics.’”⁹² For him, “the subject matter of politics is... association, in which the symbiotes pledge themselves each to the other, by explicit

⁸⁷ Stanford Encyclopedia of Philosophy, ‘Federalism’ <<https://plato.stanford.edu/entries/federalism/>> (accessed 14/6/2017).

⁸⁸ Johannes Althusius (note 3 supra) p.viii.

⁸⁹ *Six Books of the Commonwealth*

⁹⁰ Jean Bodin, *Six Books of the Commonwealth*, transl. M.J Tooley (Oxford: Blackwell, 1967) pp 25-49.

⁹¹ Johannes Althusius (note 3 supra) pp. 5; 10; 68.

⁹² Johannes Althusius(note 3 supra) p.12.

or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life.”⁹³

Carl Friedrich describes Althusius’ ‘symbiotic association’ as “the community of men living together and united by real bonds which a contract of union, expressed or implied, institutionalized.”⁹⁴ “What Althusius undertook to do,” writes Friedrich “was to interpret all political life in terms of the *pactum*, the bond of contractual union. Beginning with the family as such a natural and co-organic entity, he suggested that on successive levels of political community those who live together in order and harmony and whom he called ‘symbiotes’ are united by a pact, expressed or implied, to share things in pursuit of common interests and utility. The village was thus, for Althusius, a federal union of families, as was the guild; the town a union of guilds; the province a union of towns and villages; the kingdom or state a union of such provinces.....The key to this concept of federalism is that on all levels the union is composed of the preceding lower level.”⁹⁵

In Althusius’ political society, when cities, provinces, and regions come together, they form a universal symbiotic association, the bond of which is “consensus” and “trust” among the “members of the commonwealth.”⁹⁶ With regard to ‘trust,’ Althusius’ echoed Plato’s counsel that “trust is the foundation of society and the bond of concord among the different members of a commonwealth, while lack of trust is its plague.”⁹⁷ Trust among the members of this commonwealth is thus essential for its survival.⁹⁸

Althusius described his commonwealth as a confederation. And for him, confederation can be partial or complete. When it is partial, the federating parties reserve their respective sovereign rights but delegate some powers of administration to a central body which oversees certain matters of mutual concern on their behalf.⁹⁹ On the other hand, when it is complete, the federating parties integrate under a single state entity and invest

⁹³ Ibid.

⁹⁴ Ibid p.ix.

⁹⁵ Ibid p.ix-x.

⁹⁶ Ibid p.62.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid p.84.

this entity with sovereignty to exercise it on their behalf but the federating units are the actual owners of that sovereignty.¹⁰⁰

In modern parlance, Althusius' description of 'partial confederation' typifies what is obtainable in a confederation while his characterization of 'complete confederation' supposedly indicates federation. At the heart of Althusius' idea of political society is 'association.' It is this idea of 'association' that forms the nucleus of his 'symbiotics'- a corporatist theory that emphasizes the benefits of synergy born of union.

Very clearly, Althusius conception of political society which is apparently federal in character contains the three attributes of the federalism earlier highlighted in this chapter. The predication of his commonwealth on the "pactum" which Carl Friedrich describes as a "bond of contractual union"¹⁰¹ in which "the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life,"¹⁰² is indicative of covenant as discussed earlier in this chapter. The federating or uniting parties in Althusius commonwealth largely retain their integrity and autonomy, thus the commonwealth is non-centralizing. And the very fact of "association" which is very central to Althusius' theory of politics connotes cooperation. Without doubt then, Althusius' *symbiotics* corroborates the assertion made earlier in this chapter that covenant, cooperation and non-centralization of powers, are fundamental attributes implicit and inherent in the idea of federalism.

A major problem with Althusius' conception of political society, though, is its predominant predication on corporatism. The exercise of rights and the enjoyment of benefits in Althusius' commonwealth is the preserve of the primary associations themselves and not the individuals that make up these primary associations. Sovereignty, for instance, belongs to the primary associations that form Althusius' commonwealth in their capacity as corporate entities. It is thus not 'popular sovereignty' as we know it.

¹⁰⁰ Ibid.

¹⁰¹ Ibid p. ix.

¹⁰² Ibid p.12.

This was what compelled Patrick Riley to impugn Althusius' federalist credentials, categorizing him as a mere medieval constitutionalist instead.¹⁰³

Applied to a modern federation, Althusius' conception of political society can create problems of exclusion by de-emphasizing the political relevance of individual members of the state. The modern federation is not simply a relationship between the central and regional governments, but an arrangement that includes and recognizes the political participation and contribution of individual citizens as well. In other words, the political actors in the modern federal state include 'individual citizens' in addition to the 'levels of government.'

The 1789 constitution of the United States which, as we saw above, blazed the trail of federalism in the modern sense, commences with "we the people", and not "we the states." This is a pattern now replicated in the constitutions of most modern federations. It is the "people," jointly and severally, and not just the federating states as corporate entities, that are the repository of the sovereignty of the modern federation.

I will consider other implications of Althusius' theory of political society in chapter five. For now, it is pertinent to turn to the postulations of other scholars on the subject of federalism, especially its central tenets.

In his *Spirit of the Laws*, Montesquieu, an original advocate of small republics,¹⁰⁴ urges small republics to form political alliances in order to secure their individual and collective interests. Montesquieu's original preference for small independent republics was premised on his belief that the rights of individual citizens were better protected in small territories where their interests were not adversely jeopardized by the tyranny of the majority.¹⁰⁵ According to him, "in a large republic there are large fortunes, and consequently little moderation in spirits.....the common good is sacrificed to a thousand

¹⁰³ Patrick Riley, 'Three 17th Century German Theorists of Federalism: Althusius, Hugo and Leibniz' (1976) 6(3) *Publius* pp.31-32. It must be added that it is perhaps too "reductionist" to deny Althusius' influence in modern federal thought. Althusius' conception of political society as consisting of "autonomies" was an important element in the federal theories of subsequent scholars. Autonomy of the federating units is an important component of any federal construct. For this, it is perhaps not out of place to indeed regard Althusius as a major forerunner of federalism as we know it today.

¹⁰⁴ Anne M. Cohler et al eds, *Montesquieu: The Spirit of the Laws* (Cambridge, 1989) p 124.

¹⁰⁵ *Ibid.*

considerations, it is subordinated to exceptions; it depends upon accidents. In a small one, the public good is better felt, better known, lies nearer to each citizen; abuses are less extensive there and consequently less protected.”¹⁰⁶ But Montesquieu soon realizes the inherent limitations and inadequacies of small republics. “If a Republic is small,” he writes, “it is destroyed by a foreign force...”¹⁰⁷ He cites the interesting example of the biblical “Canaanites” who, according to him, “were destroyed because they were small monarchies that had not confederated and did not have a common defense.”¹⁰⁸ A small republic, argues Montesquieu, is unlikely to possess sufficient military sophistication to protect it from external aggression. As such, he advocates the aggregation of small Republics under a confederation large enough to protect each of the federating parties.¹⁰⁹

These small territories, according to him, can associate with each other, without surrendering their individual sovereignty, to form larger political entities capable of securing their individual borders and harnessing their joint potentials.¹¹⁰ Federalism, according to Montesquieu is thus “an agreement by which many political bodies consent to become citizens of the larger state that they want to form.”¹¹¹ For him, the federal state is a “society of societies” which “enjoys the goodness of the internal government of each of the federating units; and with regard to the exterior, has, by force of the association, all the advantages of large monarchies.”¹¹²

Montesquieu’s use of the word ‘federal’ for what would, in modern parlance, be called ‘confederal’ was in keeping with the predominant tradition of the medieval period. I pointed out earlier that until the word ‘federal’ came to be colloquially associated with the system of government established by the 1789 constitution of the United States, that word was used to describe any political arrangement that involved the coming together of two or more different political entities in furtherance of their joint interests. Much of the classical federalism literature thus tended to use ‘federal’ and ‘confederal’ interchangeably.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid p 131.

¹⁰⁸ Ibid p 132.

¹⁰⁹ Ibid p.131.

¹¹⁰ Ibid pp 131-132

¹¹¹ Ibid p 131

¹¹² Ibid pp 131-132.

An integral aspect of Montesquieu's political philosophy is his separation of powers theory which prohibits the concentration of executive, legislative and judicial powers in the same hands in order to prevent tyranny.¹¹³ The concept of checks and balances which is a direct offshoot of this theory is now considered indispensable in federal political arrangements. The doctrine of separation of powers, as well as other political ideas espoused by Montesquieu, no doubt, made significant impression on the framers of the 1789 constitution of America and significantly influenced the nature of the federal arrangement instituted under that constitution.¹¹⁴

As with Althusius', Montesquieu's federal theory affirms the summation I made earlier in this chapter that covenant, cooperation and non-centralization of powers are inherent in and essential to the idea of federalism. By encouraging union among small republics, Montesquieu implicitly recognizes cooperation as crucial to any federal arrangement, and by alluding to the retention of autonomy by the federating parties,¹¹⁵ Montesquieu confirms that his federal polity is a non-centralized one.

The pantheon of classical thinkers in the mould of Althusius and Montesquieu includes J.J Rousseau who is widely known for his contractarian idea of society as enunciated in his 1762 classic, *Contrat Social*.¹¹⁶ Rousseau employs this contractarian philosophy in his argument for a "confederative" Europe which, according to him, was the solution to the wars and conflicts ravaging the continent in the 17th century. Rousseau's thoughts on the "confederative form of government" are most aptly captured in "*A Project for Perpetual Peace*,"¹¹⁷ his abridgement of St. Pierre's scheme of peace for Europe. In it, Rousseau passionately urges on the leaders of Europe, the need to adopt confederation as a means of securing the defense and economic interests of the continent.¹¹⁸

¹¹³ Ibid p 157.

¹¹⁴ The influence of Montesquieu in the federal vision of the founding fathers of America is evident in Madison's article in The Federalist No. XLVII. See Alexander Hamilton, James Madison & John Jay, *The Federalist* (J.M Dent & Sons, 1970) pp 245-251.

¹¹⁵ Anne M. Cohler et al eds, Montesquieu (note 66 supra) p 132.

¹¹⁶ Jean-Jacques Rousseau, *The Social Contract and Discourses*, transl. G.D.H. Cole (Everyman Library, 1973).

¹¹⁷ J.J Rousseau, *A Project for Perpetual Peace* (London: M. Cooper, 1761) pp 1-40.

¹¹⁸ Ibid, pp 16-40.

This confederation, according to Rousseau, would be established by a contract endorsed by the various States of Europe who would all retain their respective sovereignties while delegating the task of securing the continent to a central government. The contract would be subjected to periodic reviews with the consent and participation of all the federating parties. Like Montesquieu, Rousseau argues that this confederation at once confers the advantage of both small and large states.¹¹⁹

Rousseau enunciates a number of attributes which his proposed confederation of Europe must possess. First, the contracting parties must “establish among themselves a *perpetual and irrevocable alliance*,”¹²⁰ from which no contracting party may be able to “detach” itself at will.¹²¹ Second, the form of government and the procedure for running the confederation should be clearly outlined and instituted. Third, the confederation shall ‘guaranty’ to each contracting party its sovereignty in matters which are not expressly delegated to the confederation. Fourth, the confederation must possess coercive and enforcement powers to quash any rebellion, and fifth, the confederation shall have the power to review the alliance periodically with the consent and in the interest of its members.¹²²

The five guidelines outlined above form the framework of Rousseau’s confederative European government. The scheme of government proposed by Rousseau above partially resembles the scheme of government now established by the European Union. Rousseau can, in fact, be described as one of the earliest architects of the European Union project.

Just like Rousseau, Immanuel Kant in his essay on *Perpetual Peace* argues for a ‘compact’ among independent states for the purpose of securing a peaceful co-existence among them. His advocacy of confederation, like the ones proposed by the political thinkers discussed above, has peace as its ultimate objective. He counsels that a compact be established among independent state entities or nations with the aim of facilitating international peace. In Kant’s scheme of confederation, the confederating states retain

¹¹⁹Ibid pp 18-20. For more on Rousseau’s federalism, see also: Patrick Riley, ‘Rousseau as a theorist of National and International Federalism,’ 1973 3(1) *Publius* pp 5-18.

¹²⁰ J.J Rousseau Ibid p.19.

¹²¹ Ibid, p.18.

¹²² Ibid, pp 18-21.

their independence and sovereignty while pursuing mutual peace by voluntarily agreeing “to observe lawfulness.”¹²³ By “lawfulness”, Kant implies the obligation of each of the confederating states to refrain from embarking on a course of action that may jeopardize the peace of her neighbour(s) or the peace of the confederation. The confederation is chiefly based on mutual agreement among its members to eschew violence and embrace international peace.¹²⁴ This is why he calls it “*foedum pacificum*.” Like others before him, Kant argues that an international federation of this nature will guaranty the physical and economic security of the federating parties.¹²⁵

A major difference between Kant’s federal thought and those of Althusius, Montesquieu, and Rosseau is that while the federal theories of the latter three envisage a central administration to drive the goals of the union, Kant’s federalism does not contemplate a physical central administration as such. Rather, the confederation is driven by agreement among the confederates to pursue peace and eschew violence. By mutual understanding, authority is thus conferred on all of them, jointly or severally, to ensure the peace of each other.

An appraisal of the discussion thus far will reveal a common thread in the federal theories of the Philosophers and Thinkers examined above. Although, the three elements of covenant, cooperation and non-centralization of powers feature prominently in the federal ideas of these classical thinkers, their notion of federalism rests very deeply on ‘delegation,’ that is, the ceding, by independent political entities, nations or states, of minimal authority to a central body mainly for the purpose of securing their defense interests. As pointed out earlier in this chapter, this was in fact the dominant federalism model up till the early 18th century when federalism was revolutionized by the Americans. As we have seen above, under this notion of federalism espoused by the classical political philosophers, the (con)federating parties always retained their autonomy and sovereignty, surrendering only enough powers to enable the central government or administration to perform its duty of securing the confederation against

¹²³ Patrick Riley, ‘Federalism in Kant’s Political Philosophy,’ 1979 9(4) *Publius* p.60.

¹²⁴ *Ibid.*

¹²⁵ W. Hastie, ed, *Kant’s Principles of Politics including his Essay on Perpetual Peace*, (Edinburgh: T & T. Clark, 1891) pp 88-100. For more on Kant’s Federal Philosophy, see Patrick Riley (note 85 supra) pp 43-64.

foreign aggressors. Federal unions formed through such arrangements were thus heavily dominated by the confederates, leaving the central government with little or no real power.

It was this notion of federalism that informed the political arrangement entrenched in the 1781 Articles of Confederation in America. But, as we know, this arrangement, burdened by an ineffective central government, failed to truly unite the American States, a situation that spurred American leaders to later devise an alternative federal arrangement. The problem with the confederative political arrangement is its unsuitability for political communities that want a stronger bond. Where there is a need for unity as opposed to separateness, confederation may not be the ideal political arrangement. This was the kernel of Alexander Hamilton, James Madison, and John Jay's arguments in the *Federalist*.¹²⁶ It was also a major factor that influenced several other American leaders in their support for a new federal arrangement.¹²⁷

Unlike what obtained under the Articles of Confederation, the federal philosophy espoused by the *Federalist* entailed power sharing and division of powers between two autonomous levels of governments, each with sufficient authority to perform its constitutionally assigned functions. The *Federalist* advocated a non-centralized political arrangement under which the central government attends to foreign relations and matters common to the union while all other matters are constitutionally assigned to the states. According to Madison, under the new federal scheme "the powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce...The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state."¹²⁸

¹²⁶ See for instance Alexander Hamilton, James Madison & John Jay (note 76 supra) at pp 1-12

¹²⁷ Edmund Randolph, Virginia's delegate to the Pennsylvania Convention highlighted five main defects of the political arrangement under the Articles of Confederation that made it difficult for the Continental Congress to truly unite the American States. See Michael Burgess (note 21 supra) at pp 57-58.

¹²⁸ Alexander Hamilton, James Madison & John Jay (note 76 supra) No. XLV, p.237.

Importantly, the central government under the arrangement advocated by *The Federalist* is, unlike the practice under the Articles of Confederation, not subservient or inferior to the state governments. The new central government proposed in *The federalist* derives its power, not from delegation from the states but directly from the constitution. And it is able to act directly on the citizens, unlike what obtained under the Articles of Confederation when it could only relate with the states and not the individual citizens.¹²⁹

The ideas espoused by *The Federalist* were the same ones eventually enshrined in the 1789 constitution of America. The system of government set out in that constitution blazed a trail that would soon be replicated in the federal arrangements subsequently instituted by other countries in later years. This new federal system, with a more integrated structure, as against the loose alliances of the classical period, became known as federation while the previous classical-era arrangements came to be known as ‘confederation.’¹³⁰

It must be noted however that although the federal system established by the 1789 constitution of the United States is more integrated than the political arrangement under the Articles of confederation, it cannot by any stretch of the imagination be described as “centralized federalism” as William Riker persistently asserts in his major work on the subject.¹³¹ As shown in Madison’s statement quoted above, the federal system created by the American founding fathers via the 1789 constitution was never intended to create a centralized political arrangement. If anything, what was done at Philadelphia in 1787 was to endow the central government with enough powers to enable it unite the country and secure its borders while guaranteeing the powers and autonomy of the states in all other matters. It is certainly stretching the language to refer to this as centralized federalism. What the 1789 constitution created was a non-centralized federation thought to be more suitable to cater to the peculiar circumstances of the United States. Though the new political system was a total departure from the confederation that preceded it, it was, nevertheless, not a centralized federation as Riker appears to suggest.

¹²⁹ Ibid, Nos. XLI–XLV, pp 203-238.

¹³⁰ Michael Burgess (note 21 supra) pp 54-66.

¹³¹ William H. Riker (note 16 supra) pp 16;24

Scholars regard both ‘federation’ and ‘confederation’ as species of federalism. In essence, the term ‘federal’ is regarded as a generic name for a political family which includes not only federation and confederation but also other manifestations of federalism, such as ‘consociation,’ ‘condominium,’ ‘federacy,’ and ‘associated states.’¹³²

My concern in this research is with ‘federation’ as a constitutional arrangement, for this, I believe, is the best arrangement for a country like Nigeria. Following its introduction in the United States in the 18th century, federation as a political arrangement has been replicated in other parts of the world.¹³³ And a number of scholars have subsequently endorsed this arrangement as the best form of federal government. Sir Kenneth Wheare was particularly emphatic in his characterization of America as the best example of a federal government.¹³⁴ “The federal principle,” writes Wheare, “is the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.”¹³⁵ According to Wheare, this federal principle is distinctly discernible in the United States’ constitution which “establishes an association of states so organized that powers are divided between a general government which in certain matters...is independent of the governments of the associated states, and, on the other hand, state

¹³² Daniel Elazar has elaborately described each of these federal arrangements. According to him consociation is “a non-territorial federation in which the polity is divided into permanent transgenerational religious, cultural, ethnic or ideological groupings known as “camps”, “sectors”, or “pillars” federated together and jointly governed by coalitions of the leaders of each.” A condominium, according to Elazar, is “a polity ruled jointly by two external powers in such a way that the inhabitants of the polity have substantial internal self-rule.” As for federacy “it is an arrangement whereby a larger power and a smaller polity are linked asymmetrically in a federal relationship in which the latter has substantial autonomy and in return has a minimal role in the governance of the larger power. Resembling a federation, the relationship between them can be dissolved only by mutual agreement.” According to Elazar, typical examples of this include the relationship between Puerto Rico and the United States of America, as well as that between Bhutan and India. Lastly, an associated state is defined as “an asymmetrical arrangement similar to a federacy but like a confederation in that it can be dissolved by either of the parties under pre-arranged terms.” For more on this, see Daniel Elazar, *Federal Systems of the World: a handbook of federal, confederal, and autonomy arrangements*, 2nd ed. (Harlow: Longman Group, 1994), p. xvi.

¹³³ The Forum of Federations records that there are around 25 federal countries in today’s world. Together, these countries account for “40 percent of the world’s population.” See Forum of Federations: ‘Countries’ at <<http://www.forumfed.org/countries/>> (accessed 17/6/2017).

¹³⁴ K.C Wheare, *Federal Government* (London: Oxford University Press, 1963) pp 1-3. Indeed, Wheare writes that “any definition of federal government which failed to include the United States would be...condemned as unreal.” See p.1.

¹³⁵ Ibid p.10.

governments which in certain matters are, in their turn, independent of the general government.”¹³⁶

In advancing his “coordinate and independent” theory of federalism, Wheare was perhaps influenced by Freeman who had, years earlier, argued that the perfect form of the “federal ideal” is one in which the central government is “coordinate with the state governments, sovereign in its own sphere, as they are sovereign in their own sphere.”¹³⁷ Each of the federating parties in a federal government, argues Freeman, “must be wholly independent in those matters which concern” it only.¹³⁸ Expatiating on this point Freeman adds that the independence of each of the federating parties must be exercised “not as a matter of privilege or concession from any higher power, but as a matter of absolute right, by virtue of its inherent powers as an independent commonwealth.”¹³⁹ Essentially, Wheare’s ‘federal principle’ and Freeman’s ‘federal ideal’ are one and the same in substance. Both express a bias for absolute independence of all the parties to a federal government as well as absolute independence of the levels of government. In addition both are hinged on equality of the levels of government and equality of all the federating parties.

At first glance, a major problem that may arise with the ‘coordinate and independent’ federal theory proposed by Wheare is the suggestion seemingly implied in it that in a federal system of government, the central and regional governments must perhaps operate uncooperatively, each looking out to protect its ‘independence’ and ‘sovereignty.’ Thus, for instance, in matters constitutionally assigned to the regional governments, this theory could be taken to imply that all decisions and all actions connected therewith should be exclusively designed and implemented by the regional governments with perhaps no assistance or help from other levels of government. The same could supposedly apply to matters constitutionally assigned to the central government. Such matters could, by virtue of this theory, be taken to be within the province of the central government exclusively without any aid or assistance from the regional governments.

¹³⁶ Ibid p. 2

¹³⁷ Edward A. Freeman (note 7 supra) at pp 8-9.

¹³⁸ Ibid, p.2.

¹³⁹ Ibid.

In the 21st century, this view of federal government would appear rather unrealistic, impracticable and unduly rigid. It is indeed doubtful that in an increasingly interconnected world, a regional government existing side by side with the central government and other regional governments within the same federation can operate almost in isolation, designing and implementing its own policies completely independent of other governments.

A closer look at Wheare's treatise on *Federal Government*, however, shows that Wheare was not in any way averse to cooperation within a federation. He should therefore not be accused of advocating separatism. Indeed, Wheare recognizes the significance of cooperation, especially in fiscal relations between the levels of government in a federation. From his study of three federations,¹⁴⁰ he concludes that "federal governments" actually possess "a high degree of adaptability."¹⁴¹ And the levels of government can indeed "work together in such a way that neither is completely independent of the other, though each is exercising its own independent powers, as allotted to it by the constitution."¹⁴² In essence, cooperation is not forbidden or foreclosed in Wheare's federalism. Rather he concedes that it is the "cooperative tendency in federal government which provides its most helpful prospect."¹⁴³

Surely, the effective and efficient provision of public goods and services in a federation or any part thereof may require some form of inter-governmental cooperation or the other. This is more so when fiscal resources are limited, as they often are, and free movement of persons, goods and services takes place unhindered, as is often the case, across the federation. Cooperation is, in such circumstances, a crucial element in the smooth operation of the federal system of government. In any case, the federal arrangement established by the 1789 constitution of the United States which Wheare and Freeman uphold as the best expression of federal government,¹⁴⁴ has, in practice, tended to be more cooperative than uncooperative.¹⁴⁵ In sum, Wheare and Freeman's federal

¹⁴⁰ The United States, Canada and Australia. See K.C Wheare (note 94 supra) at pp 93-144.

¹⁴¹ Ibid, p.235.

¹⁴² Ibid, p.243.

¹⁴³ Ibid.

¹⁴⁴ Ibid, p.1; Edward A. Freeman (note 7 supra) at p.5.

¹⁴⁵ Daniel Elazar (note 1 supra) p.1.

theory, coupled with their acknowledgment of the political arrangement instituted in the 1789 constitution of the United States as “the most perfect development of the federal principle,”¹⁴⁶ evidences their espousal of the central principles of covenant, cooperation and non-centralization of powers implicit in that political arrangement.

Dispersed all over Wheare’s theory are traces of A.V Dicey’s federal theory which Wheare himself describes as “lucid and penetrating,” and eulogizes as “the classic discussion of federalism.”¹⁴⁷ Wheare’s views on federalism are thus not essentially different from those expressed by Dicey some years earlier. Dicey acknowledges “compact” or covenant as an important building block in any federal arrangement. According to him, the federating states must be actuated by a “very peculiar sentiment...a desire to unite.”¹⁴⁸ They must willingly subscribe to a compact contained in a “written constitution” outlining “a variety of terms which have been agreed to, and generally after mature deliberation, by the states which make up the confederacy.”¹⁴⁹ Dicey adds that this constitution must be supreme in the sense that governmental actions must derive their legal validity from it. The constitution must also be rigid to prevent its amenability to manipulation.¹⁵⁰

Like Wheare, Dicey argues that the federal system of government entails the allocation of powers between a central nationwide government and “independent” states.¹⁵¹ This is the same description of federalism espoused by Professor Ben Nwabueze of Nigeria, an apostle of the “Whearean” school, who defines federalism as “an arrangement whereby powers and resources within a country are shared between a national, countrywide government and a number of regionalized governments in such a way that each exists as a government separately and independently from the others...”¹⁵²

¹⁴⁶ To the United States, Freeman adds the Achaean League as another perfect example of the federal principle. See Edward A. Freeman (note 7 supra) p.5.

¹⁴⁷ K.C Wheare, (note 94 supra) at p.247.

¹⁴⁸ A.V Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co Ltd, 1959) p.141.

¹⁴⁹ *Ibid*, p.146.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*, p.144.

¹⁵² Ben Nwabueze, *Constitutional Democracy in Africa*, Vol.1.(Ibadan:Spectrum Books Limited, 2003) p.59. See also B.O Nwabueze, *Federalism in Nigeria Under the Presidential Constitution* (London: Sweet & Maxwell, 1983) p.1. Apart from Nwabueze, many other Nigerian scholars and leaders also espouse the

While I acknowledge that these scholars may have merely used the term “independent” in a loose sense to signify the autonomy of the state or regional governments, and not to categorize them as hermetic entities needing no interaction with other levels of government, care must always be taken to expressly clarify this point in the literature. The use of the adjective “independent” to describe the states of a federation is both misleading and unhelpful. It is also potentially risky. It is misleading and unhelpful because, as explained earlier in our discussion of Wheare’s theory, it conveys the impression that the individual states are hermetic entities, self-sufficient and impervious to interaction or partnership with other level(s) of government. It fails to, or does not sufficiently acknowledge the reality of cooperation or interdependence as a cardinal pillar of federal government in modern federations. It is risky because protagonists of separatism may take advantage of this confusion to advance, and perhaps enforce their ideologies, no matter how warped. Such are the pitfalls inherent in the indiscriminate and unqualified use of the word ‘independent’ to describe the constituent states of a federation.

The levels of government in a federation cannot operate hermetically. The existence of these federations is anchored on the plinth of interdependence or cooperation. Interdependence or cooperation, no doubt, is a necessary element of modern federal government.

Wheare’s conceptualization of federalism as a relationship between “coordinate” levels of government is another controversial element of his federal thesis. Criticizing this postulation, Michael Reagan, in *The New Federalism*, argues that the United States constitution itself recognizes the relative superiority of the federal government in the federal arrangement by rendering invalid any state law that is inconsistent with the letter and spirit of the federal constitution.¹⁵³ Reagan further argues that “as a matter of

Wherean ‘coordinate and independent’ federal theory. See Aaron T. Gana, ‘Federalism and the National Question in Nigeria: A Theoretical Exploration’ in Aaron T. Gana & Samuel G.Egwu *Federalism in Africa* Vol 1 (Africa World Press Inc, 2003) p.18. See also A.G Adebayo, *Embattled Federalism- History of Revenue allocation in Nigeria*, (New York: Peter Lang, 1993) p.5; Mike I. Obadan and I.B. Bello Imam, ‘Intergovernmental Relations in Nigeria: Financing National Development’ in J. Isawa Elaigwu, *Fiscal Federalism in Nigeria- Facing the Challenges of the Future* (Adonis & Abbey Publishers Ltd, 2008) p.123.

¹⁵³ This is stated in Article 6(2) of the US Constitution. See Michael Reagan, *The New Federalism* (New York: Oxford University Press, 1981) p.8.

political theory” it is “dubious” to assert that “there can be a nation in which there is no institutionalized final authority.”¹⁵⁴

Truly, in most federations today, the balance of power is almost invariably tilted in favour of the central government. But this, in many cases, is necessitated by the uniting role that the central government plays in the federation in addition to functions specifically assigned to it under the constitution- functions which often transcend regional boundaries. The issue, therefore, is not whether the central government is superior to the regional governments. In fact, the word ‘superior’ is inappropriate in this context. The central government is not superior to the regional governments but it may be slightly more powerful for the reason highlighted above. The real problem arises where the balance of power among the levels of government is so disproportionately tilted in favour of the central government as to make the regional governments, mere appendages of the central government, in which case the country can no longer be rightly called federal but unitary.

It is in this regard that Michael Reagan’s preachment of central government superiority in a federal system is untenable. There must be a difference between a unitary and a federal government. In a federation, no level of government is superior to the other. By virtue of the functions assigned to each level of government under the constitution, one may be slightly more powerful than the other. However, this is because such powers are necessary for the effective delivery of its functions and not because that level of government is inherently superior to the other(s).

Contrary to Reagan’s advocacy of central government superiority in a federation, Professor Ben Nwabueze of Nigeria has argued that the autonomy of each level of government in a federation precludes its subordination or inferiority to any other level of government. For Nwabueze, “the autonomy of each government, which necessarily presupposes its separate existence and independence from the control of the other government, is essential to the federal arrangement...”¹⁵⁵ And this “autonomy requires that each government must exist, not as an appendage of another government, but as an

¹⁵⁴ Michael Reagan, *ibid.*

¹⁵⁵ B.O Nwabueze (note 114 *supra*) at p.1.

autonomous entity in the sense of being able to exercise its own will in the conduct of its affairs, free from direction by another government.¹⁵⁶ He adds that “federalism presupposes that the national and regional governments should stand to each other in a relation of meaningful independence resting upon a balanced division of powers and resources. Each must have powers and resources sufficient to support the structure of a functioning government able to stand on its own against the other.”¹⁵⁷

Nwabueze’s view of federalism and federation is supported by Ronald Watts who additionally argues that federalism is an “advocacy of multi-tiered government combining elements of shared rule and regional self-rule” which “is based on the presumed value and validity of combining unity and diversity i.e, of accommodating, preserving and promoting distinct identities within a larger political union.”¹⁵⁸ Elsewhere, he writes that “federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes, together with autonomous action by constituent units of government for purposes that relate to maintaining their distinctiveness, with each level directly responsible to its own electorate.”¹⁵⁹ For him, “the essence of federalism is the value of perpetuating both union and non-centralization at the same time.”¹⁶⁰ He then clarifies his concept of federation. According to him, federation is a political arrangement between “at least two orders of government, one for the whole federation and the other for the regional governments,”¹⁶¹ in which there is “a formal constitutional distribution of legislative and executive authority” in a way that ensures “genuine autonomy” for each level of government.¹⁶²

Watts’ vision of federation also envisages “intergovernmental collaboration” among the levels of government especially in “those areas where governmental responsibilities are shared or inevitably overlap,” and a “supreme written constitution” which may only be

¹⁵⁶ Ibid.

¹⁵⁷ B.O Nwabueze, Ibid p.2. See also Ben Nwabueze, (note 114 supra) at p.149.

¹⁵⁸ Ronald L. Watts, (note 2 supra) at p.8.

¹⁵⁹ Forum of Federations, ‘Introduction to Federalism’ <<http://www.forumfed.org/federalism/introduction-to-federalism/>> (accessed 19/6/2017).

¹⁶⁰ Ronald L. Watts, (note 2 supra) at p.8.

¹⁶¹ Ibid,p.9.

¹⁶² Ibid.

amended with the “consent” and approval of the “constituent units” of the federation.¹⁶³ If, in the view of Watts, the federal constitution may only be amended with the approval and consent of the federation’s constituent units, it is logical to infer that he also espouses the view that the constitution may only be formulated and adopted with the consent and approval of the constituent units.

Watts’ federal perspective finds support in George Anderson’s characterization of federalism as a political system consisting of “at least two orders of government,” bound by a “written constitution” which distributes “legislative” and “fiscal powers” among them in a way that ensures “some genuine autonomy for each order” of government.¹⁶⁴

Some scholars have recently gone beyond federalism’s traditional focus on power sharing among levels of government, to include the dispersion of power and authority among both state and non-state actors. In the European Union (EU) literature, for instance, the last two decades have seen increasing focus on the concept of Multi-Level Governance (MLG), an idea widely used by EU scholars to rationalize or explain the “unraveling” of the “Central State” in Europe, as seen in the increasing role of sub-national governments and non-state actors in the governance process across the continent.¹⁶⁵

MLG has been defined as “a process of political decision making in which governments engage with a broad range of actors embedded in different territorial scales to pursue collaborative solutions to complex problems.”¹⁶⁶ The governments referred to in the above definition include “federal”, “provincial”, “territorial”, and “municipal” while the “broad range of actors” used in the definition include non-state actors such as “umbrella organizations,” “citizen groups,” and “think-tanks,” “interregional commissions,” “chambers of commerce,” “inter-city agencies,” socio-cultural associations, among

¹⁶³ Ibid.

¹⁶⁴ George Anderson, (note 1 supra) at p.3.

¹⁶⁵ Lisbet Hooghe and Gary Marks, “Unraveling the Central State, But How? Types of Multi-Level Governance,” 2003 97(2) *The American Political Science Review* 233-234. See also Christopher Alcantara and Jen Nelles “Indigenous People and The State in Settler Societies: Toward a More Robust Definition of Multi-Level Governance” 2013 44(1) *Publius* 186; Simona Piattoni, “Multi-Level Governance: A Historical and Conceptual Analysis” 2009 31(2) *Journal of European Integration* 165.

¹⁶⁶ Christopher Alcantara and Jen Nelles (note 165 supra) p.185.

others.¹⁶⁷ Apart from Europe, the concept has also been used to explain evolving governance architectures in North America, especially Canada, and the United States.¹⁶⁸

In their thought provoking discussion on the subject, Christopher Alcantara and Jen Nelles argue that federalism is not a “variant” or “form” of MLG but there can be “instances” of MLG in federal systems.¹⁶⁹ This perspective is different from that of Hooghe and Marks who appear to conceive of federalism as a form of MLG,¹⁷⁰ even though they agree that MLG could also entail the involvement of non-state actors in governance.¹⁷¹

As we know, federalism traditionally focuses on the allocation of powers among levels of government. Federalism, in the traditional sense, must be distinguished from MLG, as conceptualized in the EU literature, which emphasizes the inclusion of other spheres of authority, besides governments, in the matrix of governance. In the operation of a federal system, a government may choose to engage in MLG by collaborating with other (non-state) actors in order to achieve specific aims. But this does not translate the entire federal system into a MLG. As suggested by Alcantara and Nelles above, It is perhaps more appropriate to talk of particular instances of MLG in federal systems than equate federalism with MLG.

Although scholars are divided on the precise boundaries of MLG,¹⁷² there is sufficient concurrence, in the literature, on its key attributes of interdependence, cooperation, negotiation, and non-hierarchical interaction between a broad range of state and non-state actors across multiple jurisdictions.¹⁷³ With these key attributes, MLG, in federal systems, can help to facilitate governments’ engagement with the public and ensure effective public participation in governance. While interdependence, cooperation, and

¹⁶⁷ Ibid. See also Lisbet Hooghe and Gary Marks (note 165 supra) pp. 237-238.

¹⁶⁸ For instance, Christopher Alcantara and Jen Nelles have done a detailed portraiture of multi-level governance in the context of indigenous-settler relations in Canada. See Christopher Alcantara and Jen Nelles (note 165 supra) pp 183-204. See also Martin Papillon, “Adapting Federalism: Indigenous Multi-Level Governance in Canada and the United States” 2012 42(2) *Publius* 289-306; Lisbet Hooghe and Gary Marks, (note 165 supra) pp 237-238.

¹⁶⁹ Christopher Alcantara and Jen Nelles, *ibid*, p.188.

¹⁷⁰ Lisbet Hooghe and Gary Marks, (note 165 supra) p. 236

¹⁷¹ *Ibid*, p.237.

¹⁷² Christopher Alcantara and Jen Nelles (note 165 supra) p.185.

¹⁷³ *Ibid* p.191.

negotiation, are already crucial in the operation of federal systems, MLG, with its additional focus on non-state actors, has the potential to ensure the democratic involvement of a wider network of actors in the running of federal systems.

Thus far, I have done a review of some perspectives on federalism, a subject that still has no universally accepted definition. However, as I have attempted to show above, despite the lack of a common definition of the subject, there are nevertheless certain fundamental principles that appear to feature explicitly or implicitly in the various federal perspectives examined above. They are covenant, cooperation, and non-centralization of powers, as earlier mentioned and discussed in this chapter. These three, covenant, cooperation, and non-centralization of powers are fundamental principles that are implicitly inherent in the idea of federalism. And as I will argue in chapter five, they are peremptory principles of federalism from which there should be no derogation.

In the next section, I will examine what scholars have said about financial arrangements in federations, since the main subject of this thesis is division of powers and fiscal resources in Nigeria.

2.3 Federalism in Relation to Finance

There is perhaps no subject as tension-inducing and controversy laden as the issue of financial arrangements in federations. It is a subject that has engaged the attention of analysts and scholars for decades.¹⁷⁴ Indeed, finance was a major bone of contention during the debates that preceded the promulgation of the 1789 constitution of the United States, compelling Alexander Hamilton to devote six long papers of *The Federalist* to the subject.¹⁷⁵

It would be recalled that under the 1781 Articles of Confederation of the United States, the central government had no independent source of revenue. Its revenue was sourced from the original thirteen American states many of which did not consider it obligatory to honour fiscal requisitions from the central government, the clarity of the Articles of

¹⁷⁴ George Anderson, *Fiscal Federalism: A Comparative Introduction*, (Oxford University Press, 2010) p.v.

¹⁷⁵ Alexander Hamilton et al, (note 76 supra) No xxx-xxxvi. Pp 142-169.

Confederation on this point notwithstanding.¹⁷⁶ The central government was thus pushed into the uncertain position of relying exclusively on the magnanimity of the states for its sustenance. Not only did this situation render the central government under the Articles of Confederation ineffective, it ultimately precipitated the fall of the Articles itself into desuetude.¹⁷⁷

Hamilton, in *The Federalist*, criticized the system of federal finance under the Articles of Confederation¹⁷⁸ and vigorously argued for a new federal financial arrangement under which the central government would be empowered to “raise its own revenues” by directly levying taxes on the people of the United States without infringing the right of the states to similarly levy taxes within their domains.¹⁷⁹ Hamilton’s advocacy of such a division of fiscal powers among the central and state governments was made amid strident criticisms of the idea by those who preferred to maintain the fiscal supremacy of the states over the central government, fearing that a fiscally empowered central government would ultimately seek to overwhelm and undermine the states.¹⁸⁰ Hamilton dismissed these fears by arguing that the proposed constitution was sufficiently protective of states’ fiscal autonomy as to discourage future central government interference or encroachment.¹⁸¹

Hamilton’s arguments, as well as those of other federalists, prevailed in the long run and the constitution of 1787 that was subsequently promulgated made ample provision for both federal and state fiscal autonomy.

The constitution’s policy of separate and autonomous revenue generation for both levels of government was a reflection of the federal arrangement envisaged for the United States by the framers of the 1787 constitution. According to Hamilton, this federal arrangement was designed to ensure that the “state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act,

¹⁷⁶ Ibid, No xxx p.144. Under the Articles of Confederation, the central government raised revenues through requisitions and quotas addressed to the States.

¹⁷⁷ Ibid, p.143.

¹⁷⁸ ibid pp 143-144.

¹⁷⁹ Ibid p.144.

¹⁸⁰ John Kincaid, ‘The Federalist and V. Ostrom on Concurrent Taxation and Federalism’ (2014) 44(2) *Publius* p.278.

¹⁸¹ Alexander Hamilton et al (note 76 supra) *The Federalist* No xxx-xxxiv pp 142-162.

exclusively delegated to the United States.”¹⁸² In effect, the states were to retain their power over matters not exclusively assigned to the federal government in the constitution. And implied in the ‘sovereignty’ of the states was autonomy in the exercise of their constitutionally assigned functions as well as protection from external interference.

Flowing from the federalists’ idea of autonomy in the exercise of powers among the levels of government, was the imperative of autonomy in the raising of revenue to perform constitutionally assigned functions. Hamilton put it succinctly when he declared that “a government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.”¹⁸³ And since “revenue is as requisite to the purposes of the local administrations as to those of the Union...It is as necessary that the State governments should be able to command the means of supplying their wants, as that the national government should possess the like faculty in respect to the wants of the Union.”¹⁸⁴

The policy of autonomy in the raising of revenue implicit in the US constitution is thus a reflection of the federal orientation espoused by the American founding fathers, and entrenched in the founding document of the United States- the constitution.

In the modern epoch however, federations differ in the extent of fiscal powers and fiscal autonomy assigned to and exercised by each level of government? For instance, in his treatise on federal government, K.C Wheare, found that in the federations he studied,¹⁸⁵ the central government tended to exercise fiscal powers that somewhat outweighed those exercised by the regional governments. Wheare realized that amid scarce fiscal resources, the regional governments in these federal systems had to rely on significant financial

¹⁸² Ibid, No xxxii p.152.

¹⁸³ Ibid, No xxxi p.149.

¹⁸⁴ Ibid.

¹⁸⁵ These were Australia, Canada, the United States, and Switzerland. KC Wheare, (note 94 supra) at pp 109-116.

support from the central government in order to carry out their constitutionally assigned functions.¹⁸⁶

As a result of its fiscal supremacy and the concomitant dependence of the regional governments on it for funding, the central government, in the federations studied by Wheare, was able to dabble into fields originally assigned to the regional governments. In many cases funding for social services was provided to the regional governments along with conditions that made it difficult, if not impossible, for the regional governments to insist on their autonomy in the provision of such social services.¹⁸⁷

Wheare is not alone in this observation. Ronald Watts, in a more recent discussion on allocation of fiscal powers in federations, writes that “a common characteristic of the allocation of fiscal powers in nearly all federations is that the majority of major revenue sources have been assigned to the federal government. Even where some tax fields are shared or placed under concurrent jurisdiction, the federal governments tend to predominate because of the federal power to pre-empt a field of concurrent jurisdiction and because of provisions limiting the range of tax sources, both direct and indirect, that regional governments have been assigned.”¹⁸⁸

The relative fiscal supremacy of the federal government in most federations, according to Watts, has meant that regional governments which are, in most cases, comparatively less fiscally endowed, have had to rely on federal financial assistance in order to effectively provide social services in their domains.¹⁸⁹ And this reliance on federal aid has in some instances enabled the central government’s incursion into areas that are originally within the constitutional jurisdiction of regional governments.¹⁹⁰

The above notwithstanding, it must be stated that while it is, in fact, not abnormal for the central government to occasionally offer financial assistance or support to the regional governments, the implications of excessive central government dominance in the fiscal sphere, and excessive reliance of the regional governments on fiscal subventions from the

¹⁸⁶ Ibid.

¹⁸⁷ Ibid, p.113.

¹⁸⁸ Ronald L. Watts (note 2 supra) at p.96.

¹⁸⁹ Ibid, pp 100-101.

¹⁹⁰ Ibid, p.100.

central government can be dire indeed. Not only can it lead to the dictatorship of the central government, as it has in Nigeria, for instance, it can also rob federalism of its very essence. It is crude oxymoron for fiscal relations in a supposed federation to be so dominated by the central government as to render the regional governments perpetually subordinate to it or dependent on it for their survival. There must be a difference between a unitary state and a federation.

In ethnically diverse federations where the regions are often bound to have different economic, social, cultural, and political, interests, it is particularly impolitic to concentrate fiscal powers in the hands of the central government to the detriment of the regional governments. Fiscal arrangements in an ethnically diverse federal state must be so structured as to ensure that each regional government is fairly able to raise and access sufficient revenue to finance its constitutionally assigned responsibilities without becoming subordinated to or overly dependent on the central government in the process.

Although the need for regional governments to have access to sufficient revenue to perform their constitutionally assigned responsibilities is recognized in the literature,¹⁹¹ there is often insufficient clarity and a divergence of opinion as to the appropriate approach for achieving this objective. While some scholars favour a strong coordinating role for the central government in the fiscal sphere,¹⁹² others favour a decentralized approach that enables regional governments to exercise significant fiscal autonomy.¹⁹³ The traditional fiscal federalism approach generally favours fiscal decentralization especially where economic and social needs vary across the regions of a federation and the regional governments are able to efficiently provide local public goods and services in addition to efficiently mobilizing and collecting taxes.¹⁹⁴ The central government, according to this approach, should only be concerned with “macro-economic

¹⁹¹ Maria Escobar-Lemmon, 'Fiscal Decentralization and Federalism in Latin America' (2001) 31(4) *Publius* 25. K.C.Wheare, (note 94 supra) at p.93; Alexander Hamilton et al (note 76 supra) at p.149.

¹⁹² Adebayo Adedeji, *Nigerian Federal Finance*, (London: Hutchinson Educational Ltd, 1969) p.261.

¹⁹³ Maria Escobar-Lemmon, (note 144 supra) pp 23; 25. Barry R. Weingast, 'The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development,' (1995) 11(1) *The Journal of Law, Economics & Organization* 1-28.

¹⁹⁴ Wallace E. Oates, 'An Essay on Fiscal Federalism' (1999) 37(3) *Journal of Economic Literature* 1120-1128.

stabilization, income redistribution,”¹⁹⁵ and the provision of “national public goods” whose utility transcend regional boundaries.¹⁹⁶ But these are “general guidelines” only, and are not to be regarded as “firm principles.”¹⁹⁷

The several approaches available only show that there is no universally correct model of federal finance. Federal financial arrangements must be adapted to suit specific contexts. Each federation must design its fiscal arrangements to meet its peculiar social, political, cultural and economic exigencies. In ethnically diverse federations for instance, unless financial arrangements conform to social and political expectations or address socio-political exigencies, they may turn out to be counter-productive or conflict-inducing.

As we shall later see in chapter four, in the particular case of Nigeria, fiscal arrangements have, for decades, consistently discountenanced the federation’s diversity and the age-long clamour for genuine self government in the regions of the country. Rather, fiscal centralization has remained a policy at the heart of successive constitutions of the country. In addition, financial arrangements that concern the entire federation have been mostly determined by the central government without any genuine consultation with the state and local governments or the people of Nigeria. In essence, little or no attention is paid to the need to ensure that the federation’s fiscal arrangements reflect the public will.

I argue in this thesis that fiscal arrangements in a federation must be designed to accommodate the diverse social and political interests of the people. This is more so when the federation is ethnically diverse in character and there is popular demand for genuine regional self government. Basic fiscal arrangements must be covenanted and endorsed by the people. Fiscal arrangements must reflect the socio-economic diversity of the country. And fiscal arrangements must not be designed to concentrate fiscal authority in the central government as has been the case in Nigeria.

¹⁹⁵ Ibid p.1121.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid, p.1122.

Conclusion

The federal system of government is a unique political instrument for social engineering in ethnically diverse societies. This much has been acknowledged by scholars and political leaders for centuries, and has provoked a profusion of academic literature on the subject since the 16th century.

The discussion in this chapter has examined classical and contemporary perspectives about federalism from the Hellenistic era to the modern epoch. The discussion reveals that federalism has been practiced from the time of the Leagues of the city-states in ancient Greece. One of such Leagues, the Achaean confederation, according to Polybius' extensive portraiture of it, was particularly renowned for the democratic values it promoted and the federal precedent it established, a precedent that may have influenced the founders of the American federal system in the early part of the eighteenth century. From the accounts of scholars like Ehrenberg, and Rufus King, we see that the Achaean league was characterized by a democratic division of powers between a central government that was mainly concerned with foreign policy and security, and constituent cities that had full autonomy over their internal affairs. In essence, the League was structured in a way that fostered unity among the member cities but nevertheless preserved their individual integrity.

The preoccupation of the central government with foreign policy and security was a common practice in most of the medieval-era leagues and alliances, most of which were specifically created as security mechanisms to protect their members against external aggression. Thus while the Achaean League was principally formed as a protective bulwark against Macedonian aggression, the 16th century confederation of the United Dutch Provinces was created to ward off Spanish imperialism. And the 1781 Articles of Confederation was signed by the American colonies to secure their independence from British colonial rule. This explains why only few powers, bordering on defense and foreign policy, were delegated to the central governments under these confederative arrangements while the confederates retained their internal sovereignty and autonomy.

In the case of the American confederation however, this arrangement ultimately proved inefficient and unworkable. The quest for greater unity and coordination among the original thirteen American states led to the Philadelphia convention that produced a new political arrangement in 1787 and a new constitution that came into force in 1789. The new constitutional arrangement established by the 1789 constitution of the United States is particularly unique for its trail blazing status as the archetypal model of federalism in the modern sense. It set a bench mark against which many scholars have assessed subsequent federal arrangements.

While most of the leagues and political associations that preceded the 1789 US constitutional arrangement were mainly security and foreign relations arrangements that ceded only minimal powers to the central government, the 1789 constitution of America created a stronger central government and endowed it with requisite political and fiscal authority to enable it play an effective uniting role in the new federation. This, however, did not deleteriously detract from the political and fiscal autonomy of the states in respect of their own internal affairs.

Just like the United States, the Canadian and Ethiopian federal systems are characterized by strong central and regional governments that play key roles in major policy fields, and are sufficiently fiscally empowered to carry out the functions that are constitutionally assigned to them.

The German and South African federal arrangements are characterized by strong central governments that work cooperatively with regional governments to achieve the goals of the country and cater to the needs of their respective constituencies. And as explained above, although the central governments in these two countries play dominant roles in their respective federal arrangements, the regional governments are not mere appendages of the central government. Rather, the regional governments are active players in the federal system through the significant functions specifically assigned to them under the constitution, and their cooperative work with the central government. The Austrian federal system is considerably more centralized due to the very dominant role of the central government in the federal system, but, as in Germany, this somewhat centralist

character of the Austrian system is mitigated by the active role played by the regional governments in implementing federal legislation.

Finally, the Canadian and German federal systems operate fiscal equalization arrangements that help to ensure that less fiscally endowed regions are able to provide comparable quality of local public services to their constituents.

Following this comparative analysis of the above mentioned federal systems, the discussion subsequently considered the works of several constitutional and political scholars of note on the subject of federalism. From Johannes Althusius' 16th century corporatist constitutional theory to Montesquieu's confederation of small states, as well as Rousseau and Kant's advocacy of confederation as an instrument of international peace, the division of powers favoured by these scholars is one that is structured to allow federating parties retain their sovereignty and autonomy while delegating minimal powers to the central government to enable it carry out the aims of the confederal arrangement.

Subsequent federal scholarship however tended to favour the American federal model as expounded by Alexander Hamilton, James Madison and John Jay in *The Federalist* and established in the 1789 constitution of America. Leading the pack of scholars in this tradition was Oxford don Professor K.C Wheare whose work was influenced by earlier postulations of Dicey and Freeman on the subject. For Wheare, in a federation, power relations between the central government and constituent states are not characterized by a subordination either of them to the other, but rather by a division of powers among the two of them as "coordinate and independent" governments. Each government, argues Wheare, exercises unfettered autonomy in respect of those matters assigned to it in the constitution.

More recent federalism scholarship such as those of Ronald Watts, Daniel Elazar, George Anderson, Michael Burgess, John Kinkaid, Ben Nwabueze and others describe federations in similar terms. For many of these scholars, the federation is a power sharing arrangement between at least two levels of government in which each level of government exercises autonomy in the fields constitutionally assigned to it.

The survey done, in this chapter, of federalism scholarship and practice, show quite clearly that although there is as yet no universally accepted definition of federalism, there is indeed an idea of federalism, in which is implicit certain principles that are very fundamental. These principles are covenant, cooperation and non-centralization of powers.

Right from the alliances and leagues of the Hellenistic era, all through to the time of the American federal innovation in the eighteenth century and many subsequent federal arrangements, federal arrangements have been sealed by agreement or covenant. The federal arrangement cannot be imposed, neither can it be forced. Parties to it must agree on the specific principles and policies on which it is predicated. In particular, the specific guidelines for sharing powers and fiscal resources must be jointly covenanted by the federating parties and the people that make up the federation. In fact, the importance of covenant to federalism is underscored by the latin word "*foedus*" from which the term "federal" is derived. Foedus in Latin means "covenant," "treaty" or "agreement."

Covenant also presupposes cooperation, for without cooperation, there can be no covenant. Covenanting parties in a federal arrangement must cooperate with each other to make the arrangement effective. Cooperation therefore is an important principle implicit in the federal idea.

Finally, implicit in the idea of federalism, as seen in the federalism scholarship and practice examined in this chapter, is the principle of non-centralization of powers. In none of the federal arrangements discussed above was the federal system established with the aim of centralizing powers or establishing the dictatorship of the central government. And in none of the federal theories discussed in this chapter is the federal arrangement regarded as centralizing. Rather, the predominant perspective is that the federal system of government is non-centralizing. In other words, overwhelming concentration of powers and resources in the central government is anathema to the federal system of government. It is the very antithesis of federalism.

The principles of covenant, cooperation and non-centralization of powers are inherent in the idea of federalism, and they should form part of any federal construct. The failure of

the Nigerian federal system to reflect these principles in the allocation of powers and fiscal resources is the main subject of this thesis. Nigeria's defective federal arrangement is not a recent problem. It is a problem that dates back to the country's colonial and military eras. It is, in short, a colonial *cum* military legacy that has stunted the "unity in diversity" vision of the nationalists that fought for Nigeria's liberation from colonial rule. A proper understanding of Nigeria's history and the role this history played in shaping the current 'federal crisis,' is thus necessary as a background to the subsequent discussion of the subject matter of this thesis. It is to that history that I now turn in the next chapter.

CHAPTER THREE

NIGERIA: A TROUBLED HISTORY OF CENTRALIZATION

Introduction

Debates about Nigeria's federal system of government have, for decades, revolved around the constitutional division of powers and fiscal resources among the levels of government in the federation.¹ It is not difficult to imagine why this is the case. Issues relating to the allocation of powers and fiscal resources are notoriously controversial in federations.² Most countries operating the federal system of government have historically had to contend with the difficult tensions often associated with power allocation among central and regional governments. Such tensions are usually not unrelated to the nature of such allocations, how decisions on such allocations are taken, and the nature of the institutions to manage such allocations.³ Indeed some scholars have argued that the inter-governmental division of powers and fiscal resources is often the main problem of federalism.⁴ In the case of Nigeria, it is indeed a highly contentious problem given the country's ethnically diverse character and the acrimonious struggle for power and fiscal resources by the ethnic groups since the country got her independence from Britain in 1960. Yet, it is a problem that must be squarely addressed considering its

¹ See generally the discussions in Augustine A. Ikein ed, *Oil, Democracy, and The Promise of True Federalism in Nigeria* (University Press of America, 2008) pp 1-484. See also T.Y Danjuma, 'Revenue Sharing in Nigerian Federalism,' in J. Isawa Elaigwu, P.C. Logams and H.S Galadiman, *Federalism and Nation Building in Nigeria: The Challenges of the 21st Century* (Abuja: National Council on Intergovernmental Relations, 1994), pp 87-115; Adebayo Adedeji, *Nigerian Federal Finance- Its Development, Problems and Prospects* (Hutchinson Educational Ltd, 1969).

² Ronald L. Watts, *Comparing Federal Systems* (McGill-Queen's University Press, 2008), p.96. See also George Anderson, *Fiscal Federalism: A Comparative Introduction* (Oxford University Press, 2010) p.v

³ It was a major issue, for instance, in the debates leading up to the promulgation of the 1787 constitution of the United States. Hamilton, in fact, dedicated the whole of *Federalist* XXX-XXXVI to this issue. See Alexander Hamilton, James Madison & John Jay (London: J.M Dent & Sons Ltd, 1970) pp 142-175.

⁴ See A.H Birch, *Federalism, Finance and Social Legislation* (Oxford University Press, 1957) p. xi. See also K.C Wheare, *Federal Government*, (Oxford University Press, 1963) p.93.

implications for the “political legitimacy, political stability and future of the federation itself.”⁵

The tensions and controversies over the centralist division of powers and fiscal resources entrenched in the extant 1999 constitution of Nigeria⁶ can only be adequately understood against the background of the country’s socio-political history, for, as will be shown in this chapter, the seeds of the current impasse are buried somewhere very deep in the nation’s history. This history thus provides the background for my discussion of the subject matter of this thesis in subsequent chapters. The history is particularly important for two major reasons. First, it highlights the unilateralist, centralist and hegemonic history of constitution making in Nigeria since the country’s formal creation by colonial authorities in 1914, and thus explains one of the principal reasons why the tensions over the division of powers and fiscal resources entrenched in successive constitutions have been intractable even after Nigeria gained her independence from Britain in 1960. Second, as I will later show, implicit in this history itself is a pointer to what appears to be the most appropriate solution to the current imbroglio over division of powers and fiscal resources in the Nigerian federation.

Thus, in this chapter, I provide a historical analysis of Nigeria’s federal evolution, highlighting the country’s pre-colonial make-up as a collection of distinct, separate and independent empires, kingdoms, city-states and communities with different cultures, languages, orientations and peculiarities. The discussion details how these stark differences were ignored in the forceful colonial amalgamation of these distinct entities to form the Nigerian state in 1914. As shown in the chapter, the seeds of the current centralized state structure in Nigeria were sown during the colonial and post-colonial era as the colonial authorities and their military successors unilaterally authored successive constitutions and incrementally strengthened central government control over powers and fiscal resources.

Unilateralism and centralization have, for decades, been employed as instruments of governance in Nigeria despite the country’s character as an agglomeration of different

⁵ Michael Burgess, *Comparative Federalism-Theory and Practice* (London:Routledge, 2006) p. 149.

⁶ The 1999 constitution is the current constitution of Nigeria.

ethnic nations separated by language, culture, economic needs, and political orientation.⁷ Today, Nigeria is, without doubt, a caricature of a federation, a crude distortion of federalism.

What follows is not intended to be an exhaustive history of Nigeria. I have highlighted and discussed only those aspects of the nation's history that are relevant for a proper understanding of the context in which the subject matter of this thesis is treated.

3.1. Pre-Colonial Era- Era of Kingdoms, Empires and City-States

Nigeria, as we know it today, with its physical boundaries and land-marks, is essentially a colonial creation.⁸ There was nothing like 'Nigeria' prior to the arrival of Europeans on the shores of West Africa in the late 14th century. What we had, scattered all over the territory now called Nigeria, were well established empires, kingdoms, city-states, townships and villages most of which had already attained some level of political and cultural sophistication by the time the first set of Europeans arrived.⁹

In his well-researched monograph on pre and post-colonial history of Africa, eminent historian, Professor Banji Akintoye, reveals that several politically independent African empires and kingdoms had, in fact, been in existence long before the advent of colonialism.¹⁰ For instance, the 'Kanem-Bornu' and 'Old Oyo-empires' had, for centuries, existed in what is now known as Northern and Southern Nigeria respectively.¹¹ Apart from these, old kingdoms such as the 'Sokoto Caliphate', was already well established in what is now North-Western Nigeria before colonialism took root in

⁷ Nigeria's ethnic groups "are diverse in their origins, and speak different languages. In many respects, their cultural patterns, political, institutional, social standards, and customary usages differ very widely." Obafemi Awolowo, *Thoughts on the Nigerian Constitution*, (Ibadan: Oxford University Press, 1966) p.162.

⁸ O.I Odumosu, *The Nigerian Constitution: History and Development* (London: Sweet & Maxwell, London 1963) p.5.

⁹ See the pronouncement of the Supreme Court of Nigeria on this point in *AG of the Federation v. AG of Abia State and 35 Ors*, [2002] Vol.16 WRN 1-132 at p.68. According to the Court, "until the advent of the British colonial rule in what is now known as the Federal Republic of Nigeria (Nigeria for short), there existed at various times sovereign states known as emirates, kingdoms, and empires made up of groups in Nigeria. Each was independent of the other with its mode of Government indigenous to it. At one time or another, these sovereign states were either making wars with each other or making alliances on equal terms. The position existed throughout the land now known as Nigeria." See also O.I Odumosu, *Ibid*.

¹⁰ Akintoye writes that the old Ghana, Mali, Songhai, Mandinka and Tukolor empires predated the advent of colonialism. See S.A. Akintoye, *Emergent African States- Topics in Twentieth Century African History* (London: London Group Ltd, 1976) p.3; 15.

¹¹ *Ibid*, p.3.

Nigeria.¹² There were also the numerous city-states of the Niger-Delta which were not dissimilar to the ancient Greek city states of yore in size, population and social organization. The pre-colonial histories of these empires, kingdoms, and city-states, according to Akintoye, were characterized by different, distinct, and significantly developed social, political and economic traditions.¹³

Akintoye's account of Nigeria's history tallies with those of several other first rate African scholars and students of African History. For instance, Professor Akinjogbin's vivid portraiture of the Old Oyo Empire and the other kingdoms which together constituted the pre-colonial Yoruba country shows that these were organised assemblages of peoples, each with an efficient traditional system of government peculiar to it.¹⁴ Similar descriptions have been used by other African and Asian scholars to emphasize the social, cultural and political organization of many African societies prior to colonial adventurism on the continent.¹⁵

The accounts of these African and Asian scholars have been buttressed and given credence by western historians and researchers who travelled extensively in Africa in the nineteenth and early twentieth centuries and who have since documented their observations and findings on Africa's history. Two of such scholars, Margery Perham and Michael Crowder, are particularly noted for their vivid portraiture of the ancient landmarks and peoples of the continent. For instance, Perham wrote about the "political and cultural sophistication" of Northern Nigeria's "ancient Hausa states, with their walled red cities, crowded mosques, literate mullahs, large markets, numerous crafts in metal and leather, far-ranging traders, and skilled production of a wide variety of crops."¹⁶

¹² Ibid.

¹³ Ibid p.15

¹⁴ I.A Akinjogbin, 'The Oyo Empire in the 18th Century,' (1966) 3(3) *Journal of the Historical Society of Nigeria* p.451.

¹⁵ For instance, see Professor Akin Mabogunje's detailed description of the peoples, tribes, kingdoms and empires of pre-colonial West Africa in Akin Mabogunje, 'The Land and Peoples of West Africa' in J.F Ade Ajayi & Michael Crowder eds., *History of West Africa*, Vol 1. (London:Longman Group Limited 1976) pp 15-29. See also Nehemia Levtzion, 'The Early States of the Western Sudan to 1500' in J.F Ade Ajayi & Michael Crowder eds., Ibid, pp 114-149. Other accounts of pre-colonial societies in Africa are fully set out in. F Ade Ajayi & Michael Crowder ed., *History of West Africa*, Vol 1. (Longman Group Limited: London, 1976) pp 1-601

¹⁶ Margery Perham, *Lugard, The Years of Authority* (London and Glasgow: Collins Clear-Type Press:1960) pp 33-34.

Drawing on the writings of 18th century European explorers of Africa,¹⁷ Perham adds that the Hausa states were famous for “their organized trade and wide contacts, their custom of supplying housing, food and escort to travellers, and their capacity to breed individuals of high character and intelligence.”¹⁸

Perham’s views are echoed in Michael Crowder’s 1962 classic *The Story of Nigeria*. According to Crowder, who spent several years teaching African history in Nigerian Universities, pre-colonial Nigeria had “a number of great kingdoms that had evolved complex systems of government independent of contact with Europe. Within its frontiers were the great kingdom of Kanem-Borno, with a known history of more than a thousand years; the Sokoto Caliphate which for nearly a hundred years before its conquest by Britain had ruled most of the savannah of northern Nigeria; the kingdoms of Ife and Benin, whose art had become recognized as amongst the most accomplished in the world; the Yoruba empire of Oyo, which had once been the most powerful of the states of the Guinea coast; and the city-states of the Niger Delta, which had grown partly in response to European demands for slaves and later palm-oil; the largely politically decentralized igbo-speaking peoples of the south-east, who had produced the famous Igbo-Ukwu bronzes and terracottas; and the small tribes of the Plateau, some of whom are descendants of the people who created the famous Nok terracottas.”¹⁹

Dutch Historian, Thea Buttner agrees with Crowder. In her commentary on “the economic and social character of pre-colonial states in tropical Africa,”²⁰ Buttner writes that prior to the advent of colonialism, “many peoples of Tropical Africa (varying in locality) attained a relatively high standard of development which, by every measure, compared favourably with that of other peoples....In the course of several thousand years of its history, Tropical Africa knew important state formations with a high level of cultural attainment which overcame the Neolithic phase as early as the first millennium

¹⁷ They include the Scottish explorers, Walter Oudney and Hugh Clapperton; Cornish explorer Richard Lander; English explorer, Dixon Denham and German Explorer Heinrich Barth. Perham specifically cited ‘D. Denham, H. Clapperton and W. Oudney, *Travels and Discoveries in North and Central Africa in 1822, 1823, and 1824* (1831), vol. iv. See Margery Perham *ibid*.

¹⁸ *Ibid*, p.33.

¹⁹ Michael Crowder, *The Story of Nigeria* (London: Faber and Faber, 1978) p.11.

²⁰ Thea Buttner, ‘The Economic and Social Character of Pre-Colonial States in Tropical Africa,’ (1970) 5(2) *Journal of the Historical Society of Nigeria* pp 275-289.

of our era and which exercised an impact on and determined, the subsequent social development of the peoples of Africa.”²¹

It is thus very clear, from the foregoing accounts of African and western Historians who have done extensive and detailed research on African history, that discernible political and social organization on the continent did not start with the arrival of Europeans. Social, cultural and political sophistication of the peoples of Africa, in fact, predated the continent’s contact with Europeans.

The foregoing survey of historical accounts of pre-colonial Africa is necessary to dispel the notion created by some writers and scholars who, in a bid to justify colonialism and its attendant centralization and monopoly of power in Africa, have argued that Africa was devoid of any form of history prior to European arrival on the continent. Indeed, desperate attempts were made by these scholars to brand pre-colonial Africa as an enclave of barbarians and primitive beings who were incapable of rational and civilized existence.²² That was perhaps what Joseph Conrad sought to do with his very controversial *Heart of Darkness* which portrayed pre-colonial Africa as “pre-historic” and “unearthly.”²³

Conrad is not alone in this undisguised racist approach to African history. Georg Hegel in his *Philosophy of History* described Africa as “unhistorical.” Africa, according to Hegel “is no historical part of the world; it has no movement or development to exhibit. Historical movements in it...belong to the Asiatic or European world.”²⁴ But it was the Oxford Historian Hugh Trevor-Roper who delivered the *coup de grace*. In a series of television lectures he delivered in the early 1960s, Trevor-Roper argued that “perhaps in the future, there will be some African history to teach. But at present there is none, or

²¹ Ibid, p.276.

²² Thea Buttner refers to this as the “colonial-historical mentality and approach.” See Thea Buttner, Ibid.

²³ Joseph Conrad, *Heart of Darkness and Other Tales*, revised edition (Oxford University Press, 2008) pp 138-139. Professor Chinua Achebe has done a fitting riposte to Conrad in his satirical essay ‘An Image of Africa: Racism in Conrad’s Heart of Darkness’ <<http://kirbyk.net/hod/image.of.africa.html>> (accessed 27/6/2017).

²⁴ Georg Wilhelm Friedrich Hegel, *The Philosophy of History*, (New York: Dover Publications Inc, 1956) p.99.

very little: there is only the history of Europeans in Africa. The rest is largely darkness....And darkness is not a subject for history.”²⁵

We now know that Conrad, Hegel and Trevor-Roper were mistaken in their understanding of Africa and its history. Evidence compiled by serious researchers and travellers confirm to us that not only were many pre-colonial African societies well organized and politically astute, they in fact had their own forms of civilization.²⁶

What remains to be said is that the erroneous or deliberate perception of pre-colonial Africa as an enclave of barbarians and savages who were incapable of rational thought and political organization must have contributed to the administrative approach adopted by the colonialists in Africa from the early part of the nineteenth century to the early part of the twentieth century.²⁷ As we shall see in the next section, perhaps in their bid to provide ‘civilized’ administration to the ‘savages’ and ‘barbarians,’ the colonialists forcefully lumped together many dissimilar ethnic nationalities, many of which already had a history of mutual warfare and antagonism, and imposed on them a single centralized government. Thus was the foundation of centralized governance, as well as separatist agitations, inter-ethnic rivalry, suspicion and hatred, all of which remain the hall mark of political and social life in Nigeria, laid.

3.2. Colonial Era- Lugard’s Amalgamation and the Seeds of Centralization

Much has been written already on the historic ‘scramble’ for the African continent by the European powers, a process which began at Berlin in 1884/1885 and went on over a

²⁵Catherine Lynette Innes, *The Cambridge Introduction to Postcolonial Literatures in English* (Cambridge University Press, 2007) p.47.< <https://0-doi-org.pugwash.lib.warwick.ac.uk/10.1017/CBO9780511611339>> (accessed 27/6/2017).

²⁶ Professor Akintoye writes that “the view that pre-colonial Africa had no culture and no history is false. The European officials, scholars and missionaries who popularised this image of Africa were ignoring the evidences of rich African cultures- in political, economic and social organisations, in art, music and manners- which were all over Africa for them to see.” See S.A Akintoye, (note 11 supra) p.15. .

²⁷ According to Professor Kenneth Dike, an eminent Nigerian Historian, it is possible that “in the colonial era African History was deliberately slanted and distorted to justify the European presence on the continent...the assumed lack of African history so widely advertised in the literature.....was to prove that the African has no history and therefore subhuman. Everything was done to use history to bolster imperialism.” See K. Onwuka Dike, ‘African History Twenty Five Years Ago and Today’ *Journal of the Historical Society of Nigeria* (1980) 10(3) pp 14-15

period of ten years.²⁸ The ‘scramble’ culminated in a series of ‘take-overs’ which, according to Keltie, enabled the “most civilized powers of Europe” to parcel out amongst themselves “the bulk of one barbarous continent.”²⁹

Details of the partitioning process have been recorded elsewhere.³⁰ What is important for the purposes of this research is the effect this mid-nineteenth century partitioning of the African continent has had on the peoples and traditional societies of Africa. Nothing highlights the tragic consequence of the partitioning than the words of an Official of the then British Government who, in recounting how the Nigeria-Cameroon border was drawn, stated that “in those days, we just took a blue pencil and a ruler, and we put it down at Calabar, and drew a line to Yola....I recollect thinking when I was sitting having an audience with the Emir [of Yola] , surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.”³¹ Earlier in 1890, Lord Salisbury, former British Prime Minister, had, after an Anglo-French convention convened for the purpose of sharing indigenous African territories among the two super powers, declared that “we have been engaged in drawing lines upon maps where no man’s foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.”³²

It was this arbitrary restructuring of the African continent, done without the consent of the societies and peoples whose lives were directly affected by the restructuring, that laid the foundation for the culture of unilateralism and the centralization of state power that appear to have become the hall mark of governance across Africa in general and Nigeria

²⁸ The most authoritative and detailed of these is perhaps John Scott Keltie’s “*The Partition of Africa*” which was first published in 1895. See John Scott Keltie, *The Partition of Africa* (Cambridge University Press, 1895). See especially pp 207-281; See also Sir Charles Lucas, *The Partition and Colonization of Africa* (Oxford: Clarendon Press, 1922); J.D. Hargreaves, ‘Towards a History of the Partition of Africa’ (1960) 1(1) *Journal of African History* pp 97-109; Daniel De Leon, ‘The Conference at Berlin on the West African Question’, (1886) 1(1) *Political Science Quarterly* pp 103-139; Michael Crowder (note 19 supra) p.150.

²⁹ John Scott Keltie, (note 28 supra) p.1.

³⁰ See, for instance, John Scott Keltie *ibid*, pp 207-281.

³¹ This British Official was quoted in J.C Anene, *The International Boundaries of Nigeria, 1885-1960: The Framework of an Emergent African Nation* (Harlow: Longmans, 1970) p.3. See also Dakas C.J. Dakas, ‘The Role of International Law in the Colonization of Africa: A Review in Light of Recent Calls for Re-Colonization’ (1999) 7(1) *Africa Yearbook of International Law* p. 106.

³² Lord Salisbury was quoted in J.C Anene, *Ibid*. See also Dakas C.J. Dakas, *Ibid* p. 106.

in particular. The partitioning that officially commenced at the Berlin conference of 1884/1885 and was consolidated over the next ten years marked the beginning of several acts of colonial ‘appropriations’ and ‘take-overs’ that gradually but assuredly robbed many hitherto independent African communities of their autonomy and identity.

In the process, strikingly different ethnicities hitherto separated by language, culture, religion, social orientation, and politics were cobbled together under new political arrangements that were bound to generate inter-ethnic strife. Nobel Laureate, Professor Wole Soyinka put it succinctly when he said “...at the Berlin Conference, the colonial powers...met to divvy up their interests into states, lumping various peoples and tribes together in some places, or slicing them apart in others like some...tailor who paid no attention to the fabric, color or pattern of the quilt he was patching together.”³³

In the case of Nigeria, this lumping together, facilitated by colonial conquests, continued well into the 1890s and early 1900s and culminated in the famous amalgamation of the Northern and Southern territories of Nigeria in 1914. Both territories had been separately administered by Britain before 1914.³⁴

The 1914 amalgamation of Northern and Southern Nigeria is noteworthy for two major reasons. First, like the partitioning of Africa itself, the scheme of amalgamation was designed and implemented solely by the colonial authorities through Sir Frederick Lugard, the colonial Governor of Nigeria. The plan, scheme and mode of amalgamation were entirely the work of Lugard.³⁵ No attempt whatsoever was made to consult or gain the consent of the peoples and territories that formed the object of this amalgamation. The amalgamation was unilaterally conceived, unilaterally designed, and forcefully imposed on the ‘natives.’ Indeed, “Nigeria”, the new name given to the amalgamated territories was coined by Miss Flora Shaw, a Briton who later became the wife of Sir

³³ Quoted in Dakas C.J. Dakas, *Ibid*, p. 105.

³⁴ For more on the series of colonial conquests and unilateral appropriation of territory that preceded the 1914 amalgamation, see O.I Odumosu, (note 8 supra) pp 5-10. See also A.G Adebayo, *Embattled Federalism- History of Revenue Allocation in Nigeria, 1946-1990* (Peter Lang Publishing Inc, New York, 1993) pp 13-14.

³⁵ F.D Lugard, *Nigeria: ‘Report on Amalgamation of Northern and Southern Nigeria, and Administration, 1912-1919,’* (London: H.M.S.O, 1919) p.1-8. See also Margery Perham, (note 17 supra) p.411.

Lugard, the colonial Governor of Nigeria.³⁶ The unilateral manner in which the amalgamation scheme was conceived and implemented essentially set the tone for the colonial policy of centralization that followed in later years. As we shall see in the discussions in chapter four, this policy of centralizing state power is now fully entrenched in Nigeria's body politic.

The 1914 amalgamation is also remarkable for cobbling together more than 250 large ethnicities each of which had its own distinct identity, economic orientation, political traditions, and religious culture. The arbitrariness of the amalgamation, done without any regard for history, ethnicity, and culture, set the stage for the ethnic rivalry, strife and bigotry which have characterized inter-ethnic relations in Nigeria ever since. In a bid to ensure their individual survival, regain their autonomy, and preserve their identities and dignities, Nigeria's many ethnic groups have remained locked in a spirited but acrimonious struggle for power and ascendancy.

The foregoing account of Nigeria's pre-colonial history up till and including the 1914 amalgamation of the northern and southern territories of what is today called Nigeria, has now established two important facts. First, pre-colonial Nigeria was not an enclave of unsophisticated, socially unorganized, and politically naive barbarians, as some scholars and writers would have us believe. Indeed, as we saw above, the many ethnic nations that were scattered all over the territory now called Nigeria were distinct and independent entities that had attained varying levels of political sophistication prior to the advent of colonialism. The "barbarous pre-colonial continent" narrative is a deception that was mainly deployed to justify colonialism and the centralization of state power it engendered across Africa, a problem that has persisted till date.

A second fact established by the discussion thus far is that, like the unilateral partitioning of the African continent by the super powers in the 19th century, the amalgamation of the northern and southern territories of the land space now called Nigeria, in 1914, was unilaterally conceived and implemented by the colonial authorities without any consultation with the peoples of the amalgamated territories. Their opinions were neither

³⁶ See Margery Perham, *ibid* p.11.

sought nor considered important. Such was the unilateralist and centralist nature of the amalgamation.

As we shall see below, this policy of unilateralism and centralism despite the diversity of Nigeria, was to continue throughout the colonial era. Sadly, it has also persisted in the post colonial era despite the so called “federal” status of the country. The unilateral method used in adopting successive Nigerian constitutions and the centralist division of powers and fiscal resources in these constitutions lend credence to this assertion. In the next few paragraphs, I briefly examine each of these constitutions and the nature of power and fiscal allocation set out in them. This is aimed at setting a proper background for our discussion, in chapter four, of the nature of the current 1999 constitution of Nigeria and the centralist division of powers and fiscal resources entrenched in it. It is to these matters, then, that I now turn.

3.2.1. Constitutional Developments 1914-1960

If the amalgamation of the Northern and Southern territories to form Nigeria was arbitrarily and unilaterally done, the system of government established by the 1914 colonial constitution further entrenched unilateralism and centralism as instruments of governance. Under that constitution, the Colonial Governor of Nigeria was invested with sweeping powers to exercise executive and legislative powers throughout the length and breadth of the new country, subject only to the authority of the British Crown.³⁷ Government Departments such as the “Railways, Military, Audit, Treasury, Posts and Telegraphs, Judicial, Legal and Survey” as well as Customs were directly under the control of the colonial Governor.³⁸ The budgets for these Departments, and the revenues derived from them were centrally administered by the Governor.³⁹ The Governor was assisted in his duties by a retinue of colonial officers whose roles were merely advisory as the Governor retained the right to act unilaterally if the occasion demanded it. Such

³⁷ See B.O Nwabueze, *A Constitutional History of Nigeria* (London: C.Hurst & Company, 1982) pp 35-39. See also, O.I Odumosu, (note 9 supra) pp 12-14.

³⁸ Sir Udo Udoma, *History and the Law of the Constitution of Nigeria* (Lagos: Malthouse Press Limited, 1994) p.48.

³⁹ A.G Adebayo, (note 34 supra) p.15; Adebayo Adedeji, *Nigerian Federal Finance- Its Development, Problems and Prospects* (Hutchinson Educational Ltd, 1969) p.29

was the magnitude of the Governor's power over the entire colony under the 1914 constitutional arrangement.

A major highlight of the 1914 colonial administrative arrangement was the establishment of the Nigerian Council which the Governor set up as "a means of developing 'an intelligent public opinion' concerning the administration of Nigeria."⁴⁰ The Council was made up of the Governor himself and several other colonial officers in addition to six Africans handpicked by the Governor. These six Africans were regarded as unofficial members of the council.⁴¹ However, the Council had no executive or legislative powers. Its decisions or recommendations were not binding on the Governor who was at liberty to completely ignore such recommendations.⁴² In short, the Council's role was merely deliberative and advisory.⁴³

Considering the structure and composition of the Council as well as its *modus operandi*, as described above, it is not clear what sort of "public opinion" on the affairs of Nigeria could have been developed by an advisory body whose membership consisted mainly of foreign colonial officers. The six Nigerians who were members of the council were unofficial members, and the legal instrument that set up the Council clearly gave precedence to the official members over and above the unofficial members.⁴⁴ How could foreign colonial officers who, for the most part, rarely mingled with the 'natives' be expected to effectively assess and collate genuine public opinion about colonial administration in Nigeria? The hypocrisy of the 'Nigerian Council' arrangement is further exposed when it is considered that the Governor was, in any case, not bound to accept or act upon whatever was discussed or recommended at meetings of the Council. This is very clear from the express wording of the legislation that set up the council which stated that "no resolution passed by the Council shall have any legislative or executive authority, and the Governor shall not be required to give effect to any such

⁴⁰ Udo Udoma, (note 38 supra) p.47.

⁴¹ Section 4, *Nigerian Council Order in Council*, 1913.

⁴²Section 17, *Nigerian Council Order in Council*, 1913. See also O.I Odumosu, (note 8 supra) p.13; B.O Nwabueze, (note 37 supra) pp 38-39; Udo Udoma (note 38 supra) pp.47-48.

⁴³ In fact, the preamble to the Nigerian Council Order in Council 1913 described the council as "an advisory and deliberate" body.

⁴⁴ Section 11, *Nigerian Council Order in Council*, 1913.

resolution unless he thinks fit and is authorised to do so.”⁴⁵ Such was the extent of the centralization of state power under the 1914 constitutional arrangement.

As the administrative and governance structure illustrated above shows, the Nigerian State established pursuant to the 1914 amalgamation of the Northern and Southern territories was essentially a unitary political entity structured to facilitate maximum colonial control over the peoples and societies of Nigeria. The new state was not designed to encourage genuine participation of the people in the governance of their country, neither was it intended to sincerely cater to their interests. In fact, like similar colonial projects elsewhere on the African continent, the creation of Nigeria by the amalgamation of different ethnic groups and nationalities was mainly aimed at furthering the trade and expansionist policies of the colonial authorities. This, it was thought, was best achieved by concentrating political and fiscal authority in the hands of the colonial Governor who was the representative of the British crown in the country. Thus began a political tradition of centralization which was to endure for decades and which has continued unrelentingly in the post-colonial era.

Describing the system of administration under the 1914 constitutional arrangement, a former Justice of the Supreme Court of Nigeria, Sir Udo Udoma, metaphorically writes that “...during the period...the Africans who were the wearers of tight shoes had no voice in how the shoes were made or altered. [Colonial] administrators constituted themselves Judges in their own cause: as so called experts, they alone thought out problems; formulated projects with a view to the solution of such problems; and all these without reference to the majority of the African population.”⁴⁶

Such disregard for the African population was brazenly exhibited when, as part of the 1914 amalgamation scheme, the colonial authorities merged the finances of Northern and Southern Nigeria in a bid to stimulate economic growth in Northern Nigeria with revenues derived from its more prosperous Southern neighbour.⁴⁷ For years before the amalgamation, Southern Nigeria with its booming trade and fertile soil had established

⁴⁵Section 17, *Nigerian Council Order in Council*, 1913.

⁴⁶ Sir Udo Udoma, (note 38 supra) p.48.

⁴⁷ Adebayo Adedeji, (note 39 supra) p.27.

itself as an economically prosperous region while its predominantly Muslim Northern neighbour, inhibited from significant economic activity by religion and culture, struggled to remain afloat economically.⁴⁸ The amalgamation was thus viewed as an opportunity to inject into the North, funds sourced from the South.⁴⁹ But significant and consequential as this policy was, the southerners were not consulted or even notified.⁵⁰

Considering the age long history of war and animosity between Northern and Southern Nigeria, much of which pre-dated the advent of colonialism, one would have expected that a policy of this magnitude, with significant implications, would have been approached with greater circumspection, regard being had to the importance of securing the understanding and approval of the native population and leaders of the two regions. Consultation was however completely ignored.⁵¹ Rather, the colonial authorities proceeded to centralize the country's fiscal system. Revenues generated throughout the country were centrally collated and disbursed on the basis of need or as the colonial authorities deemed fit.⁵²

In the circumstance, this unilateral and insensitive approach to governance was bound to further reinforce the age-long enmity between the North and the South with the latter viewing the former as reaping where it did not sow.

Two things are now clear from the above analysis of the 1914 amalgamation. First is the motive for amalgamation. Second is the mode of amalgamation. As regards the former we have already seen that apart from the expansionist agenda of the British Empire, the need to use the wealth of Southern Nigeria to stimulate and sustain economic growth in

⁴⁸Adebayo Adedeji, Ibid, p.27; A.A Lawal, 'The Politics of Revenue Allocation in Nigeria: The Early Phase, 1900-1935' (1983-1984) 9(1 & 2) *Journal of the Historical Society of Nigeria*, pp 51-53.

⁴⁹ Michael Crowther, (note 19 supra) pp.196; 198.

⁵⁰G.N Uzoigwe, 'Federalism Versus Centralism' in Adebayo Oyebade ed., *The Foundations of Nigeria: Essays in Honour of Toyin Falola*, (Africa World Press Inc, 2003) p.184.

⁵¹ Ibid.

⁵² Adebayo Adedeji, (note 39 supra) p.29. See also S. Phillipson, *Administrative and Financial Procedure Under the New Constitution: Financial Relations between the Government of Nigeria and the Native Administrations* (Lagos: Government Printer, 1946) pp 6-8; F.D. Lugard, (note 35 supra) p.8. Although Lord Lugard claimed that he was principally concerned with fashioning a fiscal system under which "the disposal of revenue" would "benefit the country as a whole without creating jealousy or friction....", the fact that he did not consult the Southerners before embarking on the policy of using funds generated from the south to stimulate economic growth in the North did generate bitter friction between the South and the North.

Northern Nigeria was a prime motivation behind amalgamation. As we shall see in chapter four, the situation is not significantly different today as revenues derived from oil exploration and exploitation in the Niger Delta in Southern Nigeria is what the entire country depends on, despite the existence of arable land for agriculture, as well as exploitable natural/mineral resources in every other part of Nigeria. As regards the mode of amalgamation, unilateralism was the method adopted by the colonial authorities to actualize this amalgamation scheme. The native population and leaders of the two regions were not consulted despite the significant implications of the scheme.

The 1914 political and administrative arrangements set a centralist precedent that was to hallmark governance throughout much of the colonial and post-colonial era. It may therefore not be incorrect to say that the culture of centralization of powers and fiscal resources which is a major problem of Nigeria today, and which forms the subject matter of this thesis, actually has its roots in the country's colonial history. Centralization of state power and resources, a culture alien to traditional African societies,⁵³ is a colonial legacy introduced, imposed and bequeathed to Nigeria by colonialists who were not actuated by any genuine interest in the welfare of the Nigerian people.

Former Premier of Northern Nigeria, Sir Ahmadu Bello aptly captured this point in his biography. According to him, "the colonial master who ruled Nigeria introduced a system of unitary government not for the present or future unity or well-being of all the indigenes of the country but for his own administrative convenience. Lord Lugard and his amalgamation were far from popular amongst us at that time."⁵⁴

Given the exclusionist character of the administrative arrangements set out under the 1914 constitution as discussed above, public outcry against the system was bound to occur. This eventually took the form of critical activism by Nigerian Nationalists under the auspices of the West African National Congress.⁵⁵ Not only did the Nationalists

⁵³ Robert O. Collins and James M. Burns, *A History of Sub-Saharan Africa* (Cambridge University Press, 2014) p. 295.

⁵⁴ Sir Ahmadu Bello quoted in S.K Panter-Brick, *Nigerian Politics and Military Rule: Prelude to the Civil War*, (The Athlone Press, 1970) p. 211.

⁵⁵ A major aim of the West African National Congress was to campaign for increased participation of Africans in the governance of their countries. See O.I Odumosu, (note 8 supra) p.14.

deprecate the 1914 arrangements, they trenchantly insisted on increased participation of Nigerians in the management of their country's affairs.⁵⁶

Thus in 1922, the colonial administration in Nigeria, under the new leadership of Governor Hugh Clifford, introduced minimal reforms via a new constitution formulated and promulgated by the British Parliament for Nigeria.⁵⁷ Unlike the 1914 constitution which established an administrative system made up entirely of expatriate colonial officers and unelected Nigerians under the absolute leadership of the colonial Governor, the 1922 constitution established, for the first time, a legislative council for the whole country and provided for the election of four Nigerians to this council.⁵⁸ However, the fact that only four Nigerians were allowed to represent just two communities, Lagos and Calabar, out of the hundreds of communities scattered throughout the country, says a lot about how truly representative the Legislative Council was. In addition, the four Nigerians elected to the Legislative Council were actually regarded as unofficial members of the Council⁵⁹, which in effect made their opinions or votes in the council subordinate to those of the official members who were British colonial officers. In view of the above, the 1922 constitution cannot be said to be much better than the 1914 constitution considering that participation of Nigerians in the governance of their country under both constitutions was in fact significantly negligible.

Another difference between the political and administrative structures established by the 1914 and 1922 constitutions is that unlike the Governor-dominated legislative system established under the former, the legislative system created by the latter required the colonial Governor to make laws for "the peace, order and good government of Nigeria", with the advice and consent of the Legislative Council.⁶⁰ But although this was, in principle, an improvement on the arrangement under the previous 1914 constitution, in reality however, the consent of the Legislative Council in respect of laws introduced by

⁵⁶Ibid, pp 14-15. See also Michael Crowther (note 19 supra) p.208.

⁵⁷ *The Nigerian (Legislative Council) Order in Council*, 1922.

⁵⁸ Section 4, *Nigerian (Legislative Council) Order in Council*, 1922. The Legislative Council replaced the ineffective Nigerian Council which was abolished forthwith. The Four elected members were 3 from Lagos and 1 from Calabar. This shows that the elected members were in actual fact representing only two of the hundreds of communities in Southern Nigeria. See B.O Nwabueze, (note 37 supra) p.40.

⁵⁹ Section 4, *Nigerian (Legislative Council) Order in Council*, 1922.

⁶⁰ Ibid, section 24.

the Governor⁶¹ was, as one constitutional scholar put it, “a mere formality, given always as a matter of course,”⁶² as the Council was predominantly made up of officials personally appointed by the Governor and “bound to vote as directed by him.”⁶³

Another feature of the 1922 constitution was that unlike the Legislative Council which, at least, had few Africans in it, the Executive Council established for Nigeria by the constitution was exclusively made up of colonial expatriate officers acting as advisers to the colonial Governor who was the sole policy maker for the country. He was, however, not bound to heed the advice of this Executive Council, neither was his discretion in policy matters fettered by any constitutional requirement for accountability to the Council.⁶⁴

As regards the finances of the country, budgets and revenues remained centrally administered, as before, during this period. In fact, Professor Adedeji who has done an extensive review of the fiscal system operated by Nigeria during this period argues that it was an era of ‘complete fiscal centralization’.⁶⁵

It is thus clear, from the foregoing, that although the governance arrangements under the 1922 constitution appeared to indicate a slight improvement on the 1914 arrangement, there was in reality no fundamental or radical difference in the nature of governance under the two systems. Apart from the fact that both constitutions were conceived, formulated and promulgated into law by the British Parliament without any input from indigenous Nigerians, centralization of state power was, in fact, a principal feature of the two constitutions. The executive powers of the country, and to a large extent the legislative powers, were solely vested in the colonial Governor whose exercise of those powers was, for the most part, discretionary and even arbitrary. In addition, the fiscal system was completely centralized during this period.⁶⁶ Indigenous Nigerians, for whom legislation and executive policies were made during this period, were not allowed to play any significant role in government, neither were they consulted in the governance of their

⁶¹ B.O Nwabueze, (note 37 supra) p.39.

⁶² Ibid, p.40.

⁶³ Ibid.

⁶⁴ B.O Nwabueze, (note 37 supra) p.41.

⁶⁵ Adebayo Adedeji, (note 39 supra), pp 29-30.

⁶⁶ Ibid,p.33.

own affairs. Thus, this period was, according to one scholar, an era of “complete subordination.”⁶⁷ It was an era of full-fledged centralization. The political system in Nigeria retained this centralized character until 1945.

Expectedly, like the 1914 constitution before it, the 1922 constitution became the subject of vitriolic attacks by the nationalist movement which had by this time expanded to include newly formed Nigerian political parties. There was a loud clamour for self-government, democracy and devolution of powers to enable Nigerians participate actively in the management of their own affairs.⁶⁸ It was clear that the 1922 constitution, with its centralist character, could no longer be relied upon to cater to the divergent interests of the several ethnic groups comprising the Nigerian state. British colonial policy in Nigeria had to change.

The first major move towards change came in 1945 when the colonial Governor’s proposals for a new constitution were submitted to and ratified by the British Parliament.⁶⁹ This new constitution came into effect in 1947 and is now colloquially referred to as the ‘Richards Constitution,’ after Sir Arthur Richards, the colonial Governor that was responsible for its introduction.⁷⁰ Though the new constitution was an improvement on the 1922 constitution in that a few more Nigerians were elected into the Central Legislature,⁷¹ and Regional Councils⁷² were established for each of the three Regions into which Nigeria had by then been divided,⁷³ the nature of the Executive Council remained virtually unchanged. And the colonial Governor was still the head of the Central Legislature. The Regional Councils, consisting mostly of tribal Chiefs, were merely consultative assemblies with no real legislative power of any sort. While these

⁶⁷ B.O Nwabueze, (note 37 supra) p.35.

⁶⁸ Professor Odumosu has documented an account of the nationalist activism which became fervent during this period. See O.I Odumosu, (note 8 supra) pp 27-39.

⁶⁹ *Ibid* p.43.

⁷⁰ See the Nigeria (Legislative Council) Order in Council, 1946.

⁷¹ *Ibid*, section 8(1).

⁷² *Ibid*, sections 33(1); 34(1) and 35(1).

⁷³ Nigeria was divided into Northern, Eastern and Western Regions in 1939.

Regional Councils could advise the Governor on any matter concerning the Regions, the Governor was not constitutionally bound to heed their counsel.⁷⁴

In the Central Legislative Council, the colonial Governor was the originator of virtually all bills and he could effectively exercise a veto on any bill initiated in the Council without his consent.⁷⁵ In addition, the Governor could enact a law without the Council's contribution if he considered it necessary and expedient to do so.⁷⁶ Most importantly, although the annual estimates of expenditure for each Region was expected to be presented by the Governor to the Regional Councils for their advice and recommendations, the Governor was not bound by such advice or recommendation, and could in fact reject them.⁷⁷ Appropriation of funds for the Regions was thus discretionarily undertaken by the colonial Governor.⁷⁸

In fact, under the 1946 constitutional arrangement, the guiding principles adopted for the allocation of centrally collated revenues to the regions were unilaterally determined by an expatriate Fiscal Commissioner, Sir Sydney Phillipson who was appointed for that purpose by the colonial Governor. Records show that, in undertaking this important task, Philipson consulted mainly with expatriate colonial officers.⁷⁹ Nigerians who would be directly affected by the revenue allocation policy were not consulted, neither was their input sought. In short, like the practice under previous constitutions, decisions on the 1946 fiscal policy were centrally taken and arbitrarily imposed on the entire country. Not surprisingly therefore, the principles recommended by Philipson for the allocation of revenues to the regions, namely 'even progress' and 'derivation',⁸⁰ were not enthusiastically received by many Nigerians who felt that the application of these principles would significantly undermine their socio-economic interests. This could have been avoided if the colonial government had availed itself of the views and opinions of

⁷⁴ See Sections 51-53 of the *Nigeria (Legislative Council) Order in Council* 1946. See also B.O Nwabueze, (note 37 supra) pp 42-46; O.I Odumosu, (note 8 supra) pp.43-48.

⁷⁵ Section 22, *Nigeria (Legislative Council) Order in Council*, 1946. See also Section 27(2).

⁷⁶ Ibid, section 26(1) . B.O Nwabueze, (note 37 supra) p. 43; O.I Odumosu, (note 8 supra) p.45-46.

⁷⁷ Sections 52(1); 52(3) and 52(4) of the *Nigeria (Legislative Council) Order in Council*, 1946.

⁷⁸ Ibid, section.52(8). See also O.I Odumosu, (note 8 supra) p.46.

⁷⁹ See S. Phillipson, *Administrative and Financial Procedure Under the New Constitution: Financial Relations between the Government of Nigeria and the Native Administrations* (Lagos, Government Printer, 1946) pp 1-2.

⁸⁰ Ibid, p.20.

Nigerians on the sensitive issue of revenue allocation before coming out with the new fiscal policy.

Thus, the nature of political governance under the 1946 Richards constitution was not essentially different from what obtained under previous colonial constitutions. While that constitution slightly increased public involvement in certain aspects of governance, real political power still resided in the colonial Governor and not the peoples of Nigeria. The form of Government under this constitution was still essentially unitary, even if there was in fact some measure of administrative devolution to the Regions.⁸¹ The role of the Regional Councils during this era was, as we have seen, mainly advisory.

The limitations of the 1946 constitution, like the ones before it, did not endear it to Nigerian nationalists who mobilized and campaigned against it vigorously.⁸² The two principal flaws of the constitution, from all indications, included its evident lack of legitimacy, considering its formulation, adoption, and promulgation by the British Parliament without any consultation with the peoples of Nigeria,⁸³ and its failure to establish a truly inclusive system of government under which Nigerians could be actively and effectively involved in the management of their own affairs.⁸⁴ These flaws, as we have seen, had, in fact, been the hallmark of Nigeria's legal order up till this time as the 1914 and 1922 constitutions, as shown above, were similarly drafted and promulgated unilaterally by the British Parliament without the input of Nigerians, and power was, in like manner, exclusively concentrated in the hands of the colonial Governor under both constitutions.

Given the controversy that dogged the 1946 Richards constitution, it is not surprising that the colonial authorities subsequently initiated measures aimed at engendering a more

⁸¹ Ibid, p.152.

⁸² A.G Adebayo, (note 35 supra) p.22. See also O.I Odumosu, (note 8 supra) p.71.

⁸³ Indeed this point was vehemently raised by the National Congress of Nigeria and the Cameroons (NCNC), a Nigerian political party at the time. The Party decried "the unilateral way the whole proposals (for the constitution) were prepared without consulting the people and natural rulers of the country..." See Michael Crowther, (note 20 supra) p.225. See also Obafemi Awolowo, (note 7 supra) pp 5-6.

⁸⁴ O.I Odumosu, (note 8 supra) pp 48-52. See also Nnamdi Azikiwe, 'A Speech delivered in the Legislative Council at Lagos on August 21, 1948, supporting a motion for increased political responsibility for Nigeria' in Nnamdi Azikiwe, *Zik- A Selection from the Speeches of Nnamdi Azikiwe* (Cambridge University Press, 1961) pp 106-107; Obafemi Awolowo, *The People's Republic* (Oxford University Press, 1968) p.36.

liberal political arrangement. The change came with the appointment of Sir John Macpherson as colonial Governor of Nigeria in 1948 following the departure of Sir Arthur Richards. Macpherson eventually introduced a new constitution in 1951. Unlike the unilateralism that characterized the formulation of previous constitutions however, the process that produced the 1951 Macpherson constitution was somewhat inclusive. Consultations were made and meetings were held with Nigerians by the colonial authorities.⁸⁵

But as with subsequent constitution making processes up till the end of the colonial era, these consultations primarily involved the Nigerian elite which consisted of top politicians from the three largest ethnic groups in the country.⁸⁶ And, other than its consideration by the Central legislative Council and the Regional Houses of Assembly comprising top politicians, the final text of the constitution was not subjected to a referendum or any other form of popular affirmative action involving Nigerians from all ethnic groups in the country as would be expected of a democratic constitution. This perhaps marked the beginning of the creation of a class of privileged Nigerian politicians who, in the process, imbibed the unilateralism of the colonial era and subsequently continued this practice in the post-colonial Nigeria.

One would have expected that in a country like Nigeria, made up of several hitherto independent and distinct ethnic groups, separated by language, culture, political orientation and economic needs, a process as important as constitution making would invariably involve the participation of Nigerians from all these groups. Yet this has never really been the case in Nigeria. This culture of exclusion, first conceived and practiced in the colonial era, and perfected in the post-colonial period, has, for decades, remained the main albatross of political life in the country.

As regards financial arrangements made pursuant to the 1951 constitution, a marked improvement over the 1946 arrangements is discernible. Unlike the unilateral approach adopted by Sir Sydney Phillipson in formulating and recommending the 1946 fiscal arrangements, the Fiscal Commission appointed in 1951 to advise on revenue allocation

⁸⁵ O.I Odumosu, (note 8 supra) pp 56-65.

⁸⁶ Ibid, pp 73-76.

in the country did make genuine efforts to consult with the leaders of the regions. But again, these consultations were not on a scale wide and inclusive enough to prevent further protests by regions that felt marginalized in the ensuing fiscal configuration.⁸⁷

More importantly, and perhaps most unfortunately, the Fiscal Commission that undertook this important assignment had no Nigerian member. Its three members were expatriates.⁸⁸ In addition, although the fiscal system introduced following the report of the 1951 fiscal commission strengthened the finances of the regions a little better than what obtained under previous fiscal arrangements, fiscal policy was still centrally managed and dictated.⁸⁹ For instance, under the new fiscal arrangement, although the regions were allowed to levy and retain the proceeds of few insignificant taxes,⁹⁰ the central government nevertheless retained the power to fix the rates of these taxes.⁹¹ Apart from these taxes, the only other main source of income for the regions under the 1951 financial arrangements were ad-hoc grants, based on actual expenditure, from the central government.⁹² In actual fact therefore, fiscal power, during this period, was still largely vested in the central government.

The foregoing notwithstanding, the 1951 constitution did make significant changes to the country's political configuration. For instance, in response to the demands made by leading indigenous politicians across the country for a federal system of government, the 1951 constitution established Regional Houses of Assembly with actual legislative

⁸⁷ According to Prof Adebayo who has conducted extensive research into the history of revenue allocation in Nigeria, a total of 95 persons were consulted by this Commission. Of this 95, 48 were actually expatriate colonial officials while the other 47 mainly consisted of Nigerian traditional rulers. In its Report, the commission recommended 'independent revenue', 'derivation', 'need' and 'national interest' as revenue allocation principles for the distribution of centrally collected taxes to the regions. See A.G Adebayo, (note 35 supra) pp 46; 49; 67.

⁸⁸ The members of the 1951 Fiscal Commission were "Dr J.R Hicks FBA, Fellow of Nuffield College Oxford; Mr D.A Skelton, Assistant Deputy Minister of Trade and Commerce to the Government of Canada and Sir Sydney Philipson" who was also the Architect of the 1946 Fiscal arrangements. This commission is famously known as the Hicks-Philipson commission of 1951. See Adebayo Adedeji (note 39 supra) p.72.

⁸⁹ Adedotun Philips, 'Nigeria's Federal Financial Experience' (1971) 9(3) *The Journal of Modern African Studies* p.397.

⁹⁰ The 1951 fiscal arrangement empowered the regions to levy taxes on entertainment and sale of motor spirit. However, most of the significant taxes remained within the jurisdiction of the central government. See Adebayo Adedeji, (note 39 supra) p.84.

⁹¹ *Ibid*, p.87.

⁹² *Ibid*, p.107.

powers over certain matters.⁹³ This represents a marked departure from what obtained under the 1946 constitution where the so called Regional Councils merely acted in advisory capacity. Perhaps, the most important innovation introduced by the 1951 constitution was the predominant inclusion of elected representatives of the various parts of the country in the central and regional governments.⁹⁴ Again this was a significant improvement over the 1946 constitution under which, unelected colonial officials and native authority personnel appointed by the colonial Governor dominated both levels of government.

Despite the huge leap forward made by the 1951 Macpherson constitution however, the constitution was not without its fundamental flaws. The most significant of these, apart from those already highlighted above, was the power conferred on the central government by the constitution to, if it deemed it appropriate, block or quash a regional legislation, even if such legislation had been properly passed by the regional legislature.⁹⁵ Indeed a regional legislation could only be duly enacted with the express approval of the central government.⁹⁶ In essence, although it made important concessions to the Regions, the 1951 constitution still retained significant centralist streaks that made it unacceptable as a governance framework for an ethnically diverse country like Nigeria.

Agitations for greater devolution of power to the Regions soon erupted.⁹⁷ The “reactionary nature” of the 1951 Macpherson constitution and the financial arrangements established under it was roundly denounced.⁹⁸ One public figure cynically remarked that “..if the Richards constitution was the same old poison in a different bottle, the Macpherson Constitution is the same old bottle with a different label.”⁹⁹ Such was the

⁹³ See s.91 of the Nigeria Constitution (Order) in Council 1951.

⁹⁴ B.O Nwabueze, (note 37 supra) p.46; O.I Odumosu, (note 8 supra) p.65

⁹⁵ O.I Odumosu, (note 8 supra) p.66. See also sections 96-97 of the Constitution (Order) in Council 1951.

⁹⁶ Ibid.

⁹⁷ See for instance Dr Nnamdi Azikiwe’s speech at the fourth Annual Convention of the National Council of Nigeria and the Cameroons which took place at the Lagos City Auditorium on August 17, 1952 in Nnamdi Azikiwe, (note 84 supra) pp 83-84. The Northern and Western Region governments also protested what they regarded as the unfairness of the financial arrangements made pursuant to the 1951 constitution. While the North wanted an increase in the block grants allocated to it under that arrangement, the west protested the failure of the central government to fully apply the principle of derivation in the allocation of revenues to the regions. See A.G Adebayo, (note 35 supra) pp 59-62.

⁹⁸ Nnamdi Azikiwe, (note 84 supra) pp 112-113.

⁹⁹ Ibid.

disenchantment with the 1951 constitution that some local politicians made a strong case for a confederal arrangement that would see the regions exercise power over practically all matters except defence, external affairs, and customs which would be overseen by a central non-political body.¹⁰⁰

The colonial administration itself came to realize the need for the transfer of more powers to the regions in order to ensure that each region exercised, as much as possible, full control over its own internal affairs without interference from the central government. Sir Oliver Lyttleton, the then Secretary of State for the Colonies captured this sentiment succinctly when he said: “Recent events have shown that it is not possible for the three Regions of Nigeria to work together effectively in a federation so closely knit as that provided by the present constitution. Her Majesty’s Government in the United Kingdom, while greatly regretting this, consider that the Constitution will have to be redrawn to provide for greater regional autonomy and for the removal of powers of intervention by the Centre in matters which can, without detriment to other Regions, be placed entirely within regional competence...”¹⁰¹

The Secretary of State’s remarks quoted above show that, by this time, it had become abundantly clear to the colonial authorities that Nigeria could no longer be administered as a unitary state, given its multi-ethnic character and the perpetual struggle among the country’s ethnic groups for power, resources, ascendancy and relevance.

A conference was subsequently convened by the Colonial Secretary in London from 30th July to 22nd August 1953 to discuss a suitable political arrangement for Nigeria. It was at this conference that a truly federal arrangement characterized by significant and substantial regional autonomy was first officially devised for the country. Conscious of the futility of governing an ethnically diverse society with a unitary constitution, Nigerian leaders present at this conference unanimously opted for a federal arrangement characterized by significant regional autonomy.¹⁰²

¹⁰⁰ O.I Odumosu, (note 8 supra) pp 91-92.

¹⁰¹ House of Commons Debate, 5th series, 515, 21 May, 1953, cols.2263-2264, cited in Donald S. Rothchild, ‘Towards Unity in Africa,’ *Washington Public Affairs Press*, 1960, p.159.

¹⁰² O.I Odumosu, (note 8 supra) pp 95-101.

A follow up conference was later held in Lagos where decisions reached at the London conference were endorsed and their details worked out.¹⁰³ Agreements reached at the London and Lagos conferences of 1953 were subsequently incorporated into a new constitution which came into force in 1954.¹⁰⁴

The 1954 constitution was a significant improvement on the previous 1951 constitution. For instance, under the 1954 constitution, the regional legislatures were not required to submit legislation duly passed by them to the central government for approval. A regional legislation, under the new dispensation, effectively became law upon its due passage by the relevant regional legislature.¹⁰⁵

A major highlight of the 1954 constitution was the division of powers among the levels of government entrenched in it. Matters common to the entire federation were assigned to the central government while powers for effective self government of the regions were assigned to the regional governments. Thus, matters such as “external relations, immigration and emigration, naturalization of aliens, defence and atomic energy, customs and foreign exchange, banking and public debt, mining, postal services, telephones and telegraphs, and central broadcasting”¹⁰⁶ were assigned to the central government exclusively. The constitution also specified matters over which both the central and regional governments could concurrently legislate. These included “statistics, labour, insurance, research, water-power, national parks, industrial development, and the establishment of certain professional qualifications.”¹⁰⁷ Matters not included in the exclusive and concurrent legislative lists above were reserved for the regional governments.¹⁰⁸ This division of powers among the levels of government clearly vested significant powers in the regional governments. It was exactly what Nigeria’s leading

¹⁰³ Ibid, p 102.

¹⁰⁴ The 1954 constitution is colloquially called ‘Lyttleton Constitution’ after Mr Oliver Lyttleton, the Colonial Secretary who presided over the London and Lagos conferences that birthed the new constitution.

¹⁰⁵ Donald S. Rothchild (note 101 supra) p.160.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

politicians had clamoured for and agreed upon at the various constitutional conferences that preceded the promulgation of the 1954 Constitution.

However, although the 1954 Constitution enabled substantial transfer of powers and fiscal resources to the regional governments and significantly increased the participation of Nigerians in the governance of their own country, the central government still retained jurisdiction over the most lucrative taxes in addition to the power to fix the rates for taxes levied throughout the country even where such taxes were constitutionally reserved for the regions.¹⁰⁹ In addition, the financial arrangements made pursuant to the 1954 constitution were, in fact, solely recommended by an expatriate, Sir Louis Chick, who was appointed to undertake the task by the British Secretary of State.

Like other Fiscal Commissions before it, there is no evidence to show that the Chick commission consulted widely with Nigerians from the several ethnic groups in the course of his assignment. Not surprisingly therefore, the principle of ‘derivation’ recommended by Chick for the allocation of centrally collected taxes to the regions was not well received by some regional governments which felt that full application of ‘derivation’ as the main factor in the allocation of centrally collected tax revenues would serve to “accentuate regional disparity in wealth and resources,” thus making the rich regions richer and the poor regions poorer, a condition which could foster jealousy and disunity.¹¹⁰

The above notwithstanding, it must be acknowledged that the 1954 constitution was a significant improvement on previous constitutions before it. For the first time in the history of Nigeria, it established central and regional governments with autonomous powers assigned by the Constitution. In most cases, each level of government could

¹⁰⁹ Adebayo Adedeji, (note 39 supra) p.120.

¹¹⁰ A.G Adebayo (note 35 supra) p 81. See also Adebayo Adedeii, Ibid, p.118. Further reviews of the federal financial arrangements were carried out in 1957 and 1964. This review commissions were headed by Sir Jeremy Raisman and Dr K.J Binns respectively. Like the previous fiscal commissions before them, members of these fiscal commissions were mainly expatriates. And they carried out only limited consultations, mostly with government officials. Both commissions essentially recommended the following guiding principles for the allocation of centrally collected tax revenue to the regions: “preservation of continuity in government services; the minimum responsibilities which a government has to meet by virtue of its status as a government; population as a broad indicator of need, since this determines the scale of services each government has to provide; and the balanced development of the federation.” See Adebayo Adedeji, (note 39 supra) pp.132;244; A.G Adebayo, (note 35 supra) p.125.

exercise discretion in the exercise of its powers, and none was regarded as subordinate to the other. Most importantly, the autonomy of the regional governments and the assignment of powers over local matters to them ensured that government was closer to the people, and Nigerians in each region could actively participate in the governance of their own affairs.

However, Nigeria, at this time, still remained under colonial rule. Further conferences were thus held in London in 1957, 1958, and 1960 to press for internal self-government and independence throughout Nigeria. The end result was the independence constitution of 1960 which established self-government for Nigeria and further reinforced the powers of self government and autonomy already granted the regions under the preceding 1954 constitution.¹¹¹

What must be noted about the conferences, consultations and discussions that preceded the promulgation of the 1954 and 1960 constitutions, however, is the quality of participation at the conferences. Like the process that midwifed the 1951 Macpherson constitution, participants at the 1953, 1957, 1958 and 1960 constitutional conferences were majorly drawn from the leadership of the three dominant political parties at the time.¹¹² And decisions taken at the conferences were not in any way submitted for review and ratification by the generality of Nigerians. Instead, the decisions were incorporated into the new constitutions and promulgated into law by the British Parliament.

Essentially, therefore, the constitutions produced at the end of these conferences can be regarded as elitist governance arrangements devised by top Nigerian politicians under the supervision of the colonial authorities. Thus while it is true that the 1954 and 1960 constitutions ignited significant changes in the nature and character of governance in Nigeria, and in fact signified the sort of federal arrangement preferred and agreed upon by Nigerian leaders at the time, they were not essentially different from the 1914, 1922, 1946 and 1951 constitutions in the elitist approach adopted in their formulation, as

¹¹¹ O.I Odumosu, (note 8 supra) pp.111-134.

¹¹² See for instance the list of those that took part in the 1957 constitutional conference in London in 'Report by the Nigerian Constitutional Conference Held in London in May and June 1957' (London: H.M.S.O, 1957). See also Donald S. Rothschild, (note 101 supra) pp159; 165-166.

evidenced by the involvement of only the leadership of the political class in the constitution making process, and the promulgation of these constitutions by the British Parliament instead of the Nigerian Parliament

This disregard for popular affirmation of constitutional arrangements was to become a recurring decimal in subsequent constitution making processes in Nigeria. Centralization of the constitution making process has been one of the greatest governance problems in Nigeria ever since. When a constitution making process is not broad based and inclusive, the division of powers and fiscal resources entrenched in the ensuing constitution cannot be said to truly reflect popular interest, properly so called. And when a constitution does not represent popular interest, its democratic credential is severely undermined.

The 1960 constitution was revised in 1963 to reflect the new status of Nigeria as a republic.¹¹³ Other than this minor alteration of the 1960 constitution to reflect the country's change of status, the 1963 constitution was essentially the same in content and style as the 1960 constitution. Substantial powers of self government were assigned to the regional governments and their autonomy remained mostly unfettered, but the approach employed in formulating the 1963 constitution was precisely similar to the exclusivist approach employed in the formulation of the 1960 constitution.

3.3. The Military Era: Re-Centralization of State Power

In the foregoing discussion, Nigeria moved from being a highly centralized state in the aftermath of the 1914 amalgamation to being a significantly decentralized state after the official introduction of federalism in 1954. From 1960 to 1966, the regional governments wielded significant constitutional powers and were largely autonomous in the exercise of those powers.

¹¹³ Under the 1960 constitution, the Queen of England was still Nigeria's Head of State despite the country's independence from Britain in October 1960. But this changed in 1963 when the governance of Nigeria came under the full control of Nigerians.

The 1954 to 1966 era was remarkable for reversing the centralization of the colonial era and for bringing government closer to the people. Indigenous regional governments were empowered to promote the interests of people in the local communities.

However, the gains recorded under the 1954, 1960, and 1963 constitutions, in terms of the assignment of significant powers of self government to the regions, were demolished on the 15th of January 1966, when in the early hours of that day, a military coup d'état carried out by a group of young military officers effectively terminated civil democratic rule in Nigeria.¹¹⁴ From then on, and for the next thirty-three years,¹¹⁵ a policy of power-centralization was ruthlessly and firmly pursued by the military. What played out during the more than three decades of military rule in Nigeria was like a rehash of the governance paradigm of the 1914-1945 colonial era. As we know already, that era was one of extreme centralization with little or no allowance for democratic expression. What we had between 1914 and 1945 was full blown unitarism as against the federalist bent of the 1954-1966 era.

It was to this unitary past that the military intervention of 1966 led Nigeria. Governance under the successive military administration was by decree, the constitution having been suspended. The existing regions of the federation were unilaterally divided into smaller states during this period by the military authorities.¹¹⁶ Ostensibly, this fragmentation of the former regions into smaller regions (called states) was aimed at bringing government closer to the people. In reality however, it would appear that this was indeed a ploy by the military authorities to weaken other centers of power in the federation by reducing the numerical and economic strength of each of the newly created states, a situation which was expected to keep the new states perpetually subordinate to and dependent on the central government for their survival and sustenance.

¹¹⁴ The story of the coup d'état and the events leading to it is eloquently discussed in Michael Crowder, (note 20 supra) pp 259-269. See also B.O Nwabueze, (note 37 supra) pp 161-162.

¹¹⁵ There was a brief return to civil rule from 1979 to 1983. However, another coup d'état in 1983 overthrew the civilian administration and reinstated military rule until 1999.

¹¹⁶ Ignatus Akaayar Ayua and Dakas C.J. Dakas, 'Federal Republic of Nigeria' in John Kincaid and G. Alan Tarr eds., *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queens University Press, 2005) p.253.

The vision of the military was to create an omnipotent and monolithic central government from which other governments in the country would take instructions and to which other levels of government would be no more than mere appendages. This became quite clear from the Unification Decree which was promulgated by the military authorities soon after seizing power in 1966. The aim of this Decree was to impose a unitary agenda on the entire country.¹¹⁷ Although this Decree ultimately collapsed due to the widespread outcry that greeted it,¹¹⁸ it nevertheless revealed to all Nigerians, the centralist mindset of the military.

Thus, although Nigeria continued to be called a federation during this period, the country had in reality become a unitary entity with the so-called ‘states of the federation,’ no more than ‘slavish appendages’ of the central government. Such was the total and complete control exercised by the central government over the states during the military era.¹¹⁹

During this era, the allocation of governmental powers became increasingly centralized till practically all powers that had been reserved for the regional governments under the 1960 and 1963 constitutions were transferred to the central military government. The legislative and executive powers of the entire country became the exclusive preserve of the Central Military Government since the federal and regional legislatures that existed under the previous civilian era had ceased to exist under the military.¹²⁰

In addition to the above, fiscal arrangements during the military era were, as could be expected, centralized. In fact, between 1968 and 1977, the military authorities in Nigeria unilaterally reviewed the revenue allocation system four times without setting up any advisory commission, as had been done prior to the 1966 coup.¹²¹ Fiscal policy was

¹¹⁷ Michael Crowder, (note 19 supra) p.269.

¹¹⁸ Ibid

¹¹⁹ See Prof. Nwabueze’s discussion of the nature and character of the system of government established during the military in B.O Nwabueze (note 37 supra) 1982) pp.205-232.

¹²⁰ Ibid. See also W.O Alli, ‘The Development of Federalism in Nigeria: A Historical Perspective’ in Aaron T. Gana & Samuel G. Egwu eds., *Federalism in Africa vol.1* (Africa World Press Inc, 2003) pp 83-84.

¹²¹ Adedotun O. Philips, ‘Managing Fiscal Federalism: Revenue Allocation Issues’ (1991) 21(4) *Publius* p.104. See also J. Isawa Elaigwu, ‘The Challenges of Federalism in Nigeria: An Overview’ in J. Isawa Elaigwu ed., *Fiscal Federalism in Nigeria- Facing the Challenges of the Future*, (Adonis & Abbey Publishers Ltd, 2008), p.22. For a more comprehensive account of the financial arrangements during the military era, see A.G Adebayo, (note 35 supra) pp 123-151.

centrally determined and centrally dictated such that by 1997, the fiscal system had become absolutely centralized. Commenting on this point in a 1997 paper, eminent Economist, Professor Adedotun Philips stated that:

“..The federal (*central*) government dominates the fiscal system. This arises from the lopsided revenue structure which ensures that an annual average of over 90 percent of overall government revenue is collected by the federal government alone, whilst it accounts for about 75 percent of total expenditure in Nigeria. A vital contributory factor is that prolonged military rulership of Nigeria has virtually destroyed the constitutionally-stipulated federal system and substituted a unitary, monolithic structure. Consequently, State and Local Governments are virtually insignificant in the fiscal system. Over the years, till date, budgetary administration has been characterised by....loss of autonomy by State and Local Governments in making expenditure decisions....The federal financial system has been progressively distorted over the years...Thus, upfront appropriation of revenues by the Federal Government has now become an annual practice, resulting in the retention by the Federal Government of a disproportionate share of federally-collected revenue and the undue reduction of revenues which ought to accrue to State and Local Governments.”¹²²

The above graphic description, by Professor Phillips, of Nigeria’s fiscal system during the military era lends credence to our earlier assertion that military rule in Nigeria was in effect a return to and continuation of the centralism of the colonial era. Such was the centralization of financial arrangements under the military during this era that the states of the federation were consistently dependent on the central government for more than 70 percent of their revenue, a situation similar to what obtained during the colonial era.¹²³

A particularly problematic issue with fiscal arrangements throughout the colonial and military eras was that principles for allocating centrally collected revenues among the regional governments were mostly devised without any significant consultation with the peoples of Nigeria.¹²⁴ Even when fiscal commissions were constituted by the central military government to advise on financial arrangements for the federation, the fiscal commissions mostly consisted of expatriate economists or Nigerian financial experts who often had only very little interaction with the people and who were only accountable to the central government. It is therefore not surprising that the fiscal policies and revenue

¹²² Adedotun O. Phillips, *Nigeria’s Fiscal Policy, 1998-2010*, NISER Monograph Series No 17, 1997 p.3.

¹²³ A.G Adebayo, *Embattled Federalism*, (New York: Peter Lang, 1993) p.147.

¹²⁴ *Ibid*, p.170.

allocation principles recommended by these commissions were often condemned and rejected by the people.¹²⁵

Disregard and contempt for the culture of public consultation by the Nigerian political elite is one of the major reasons for the widespread public disenchantment with Nigeria's federal system today. The tendency for the central government to unilaterally take important decisions on the allocation of powers and revenue, two issues that affect every part of Nigeria, without exhaustively consulting with the Nigerian people, is a major flaw of the current 'federal' arrangement.

As we have seen above, the history of Nigeria's so called federalism is replete with unilateralism, centralism and undemocratic practices, all of which are inconsistent with and antithetical to the idea of federalism.

The autocratic and undemocratic nature of military rule in Nigeria from 1966 to the mid 1990s precipitated a long and sustained struggle against dictatorship and a loud clamour for a return to democratic rule throughout the 1980s and 1990s. Ethnic organizations, non-governmental organisations, and individual Nigerians vigorously campaigned against the absolutism of the military and its attendant erosion of democratic values.¹²⁶

And so it was that in 1999, after decades of pressure from pro-democracy civil society organizations, the military authorities hurriedly handed over power to a civilian government. However, in the process of doing this, they also handed over another elitist constitution that was not debated, adopted or popularly ratified by the Nigerian people. Rather, the constitution was hurriedly drawn up by a committee unilaterally set up by the then military President of Nigeria and promulgated into law by a decree,¹²⁷ thus effectively making the military authorities, and not the people of Nigeria, the source of the constitution's authority. Since the people of Nigeria, drawn from the constituent units of the federation were not genuinely involved in making the 1999 constitution, the

¹²⁵ Ibid, pp 123-151.

¹²⁶ A detailed account of this struggle, and the nature of the military rule that occasioned it, has been documented by Professor Kunle Amuwo. See Kunle Amuwo, 'Transition as Democratic Regression' in Kunle Amuwo et al eds., *Nigeria During the Abacha Years: The Domestic and International Politics of Democratization* (Ibadan: Institute Francais de Recherche en Afrique, 2001) pp 1-56. Also available online at <<http://books.openedition.org/ifra/632>> (accessed 12/8/2017)

¹²⁷ Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 1999.

division of powers and resources set out in the constitution cannot be said to reflect the will of the Nigerian people. It cannot be said to be an expression of their joint covenant. It is this, and the constitution's insensitive concentration of powers and fiscal resources in the central government, despite the ethnically diverse character of the Nigerian state, that form the subject matter of this thesis. These are the issues I shall examine in the next chapter.

Conclusion

In this chapter, I examined the history of constitutional arrangements in Nigeria, especially as they pertain to the allocation of powers and fiscal resources. I commenced by establishing that Nigeria was formed through a series of colonial 'mergers' and 'takeovers' of native ethnic groups that began in the early 19th century and culminated in the grand amalgamation of Northern and Southern Nigeria in 1914.

Prior to amalgamation, many of these ethnic groups had existed as separate, distinct and independent entities with different cultures and languages as well as different political and economic traditions for centuries. In fact, most of them had attained very high levels of traditional political sophistication by the time the first set of colonialists arrived the shores of Africa. Painstaking research conducted and documented over many years by African and Western historians now confirms this. This revelation is important in light of the often bandied narrative that Africa had no history and culture before the advent of colonialism. As argued in this chapter, this narrative was perhaps deliberately propagated in order to justify colonialism and its legacy of power centralization in many African countries in the 18th, 19th and 20th centuries.

With the foregoing established, I proceeded to trace the history of power allocation in Nigeria through three different stages in the country's evolution. The first stage, from 1914 to 1945, was a period of extreme centralization of political and fiscal powers. During this period, executive and legislative powers were vested in the colonial Governor of Nigeria who also doubled as the representative of the British crown in the country. Constitutional documents produced during this period were unilaterally crafted by the colonial Governors, ratified by the British Parliament, and coercively imposed throughout

Nigeria. The people of Nigeria were not allowed to participate in the governance of their own country during this period. In the few instances when few Nigerians had some form of opportunity to do this, their roles were merely advisory and not binding on the colonial authorities. The 1914 to 1945 era was thus a period of absolute centralization.

The second stage from 1946 to 1965 saw an incremental relaxation of colonial hold on the affairs of Nigeria and the eventual independence of Nigeria from colonial rule. Nigerians became more involved in political governance during this period with more powers incrementally devolved to the regional governments which now had more Nigerians as members. Yet, the constitutions promulgated during this period were not products of popular participation, for although the colonial authorities had by this time introduced consultation into the constitution making process, these consultations were predominantly done with top Nigerian politicians, most of who were members of the country's largest ethnic groups. The implication is that minority ethnic groups were often left out in these consultations. In the same manner, fiscal arrangements devised pursuant to the various constitutions were often based on recommendations made by expatriate colonial officers who had done little or no consultation with ordinary Nigerians. Not surprisingly, these fiscal arrangements were always unacceptable to Nigeria's ethnic groups whose aspirations were often at variance with the said financial arrangements.

The third stage from 1966 to 1999 saw a complete reversal of the incremental devolution witnessed during the 1946 to 1965 period. Nigeria had by this time come under full blown military rule. From 1966, the military steadily and meticulously pursued a policy of centralization. Executive powers including fiscal authority were concentrated in the central military government at this time and the state and local governments were indeed no more than mere slavish appendages of the central government. The centralization policy of the military is now heavily reflected in the extant 1999 constitution of Nigeria which the military hurriedly and unilaterally put together on the eve of the return to civil rule and promulgated via a decree. As chapter four below will show, this 1999 constitution and the power allocation arrangement contained in it have been a source of bitter controversy since it does not genuinely reflect the wishes and aspirations of the Nigerian people, and it denies the state and local governments the power to effectively

manage their own internal affairs. In short, the constitution is not significantly different in character and content from the centralist constitutions of the colonial and military era.

For now, it is enough to say that two things are easily discernible from the foregoing discussion. First, power distribution arrangements in Nigeria have had a long and troubling history of centralization. This policy of centralization was forged in the crucible of colonialism and subsequently nurtured and reinforced on the altar of military rule. In essence, the centralist nature of the division of powers and fiscal resources in Nigeria today is a colonial *cum* military legacy that has corrupted the very soul of Nigeria's federalism. It has entrenched and fostered a centralist perspective of federalism by institutionalizing the hegemony of the central government.

Second the peoples of Nigeria have, for most of Nigeria's history, been effectively excluded from participating in the determination of how they are governed. As we have seen in this chapter, allocation of powers and fiscal resources have, for long, been centrally determined and foisted on the component parts of the federation and their peoples. Consequently, agitations for greater participation in government, transfer of powers to the constituent units of the federation, fiscal autonomy, and resource control, which have come to be identified with Nigeria in the last few decades, are manifestations of popular disenchantment with the constitutional and political status quo. These agitations are reactions to a dysfunctional and illegitimate 'federal' constitutional architecture.

Any attempt to address these agitations must therefore commence with a radical departure from the "centralist federal philosophy" entrenched in the 1999 constitution, and the introduction of constitutional reforms to reflect and entrench a new federal philosophy. This, I shall do in chapter five. But first, a look at the division of powers and fiscal resources under the extant 1999 constitution as well as the arguments for and against it is necessary to put current concerns about Nigeria's federal system in clearer perspective. This forms the subject matter of chapter four.

CHAPTER FOUR

DIVISION OF POWERS AND FISCAL RESOURCES UNDER THE 1999 CONSTITUTION OF NIGERIA

INTRODUCTION

In chapter three, I mentioned that the nature of the current constitution of Nigeria (the 1999 constitution) is not significantly different from that of previous constitutions. It entrenches a political system that inordinately guarantees the political and fiscal hegemony of the federal (central) government over and above the other levels of government in the federation. Nigeria, under the 1999 constitution, has, in fact, been described as “a centralized federation with strong unitary elements.”¹ Such is the power and control wielded by the federal government under the existing constitutional arrangement, that the state and local governments are, in reality, no more than its inconsequential appendages.

The most striking and contentious features of the 1999 constitution include the highly centralized division of powers and fiscal resources entrenched in it,² and the exclusionist approach employed in formulating this division of powers and fiscal resources. Both issues have been the subject of acrimonious controversy since the country’s return to civil rule in 1999.

In this chapter I argue that the non inclusion of the people of Nigeria in the determination of the division of powers and fiscal resources entrenched in the 1999 constitution, and the

¹ J. Isawa Elaigwu, ‘The Federal Republic of Nigeria,’ in Aktar Majeed (et al) eds., *Distribution of Powers and Responsibilities in Federal Countries* (McGill Queen’s Press, 2006) p.217. Similar comments have been made by others. See for instance Ignatius Akaayar Ayua and Dakas C.J. Dakas, ‘Federal Republic of Nigeria,’ in John Kincaid and Tarr, G. Alan eds., *Constitutional Origins, Structure, and Change in Federal Countries*, (McGill-Queens University Press, 2005) pp 250-251; Abiola Sanni, ‘True Federalism: A Panacea to the Economic Crisis in Nigeria’ (7th Prince Bola Ajibola Annual Lecture Series, Magna Curia Chambers of the Obafemi Awolowo University Ile Ife, 2016) pp 2-3; Ladipo Adamolekun, *I Remember* (Ibadan: Safari Books Ltd, 2016) p.301.

² See appendix, Table 1 below.

constitution's concentration of powers and fiscal resources in the central government, represent the very antithesis of federalism. And this arrangement is absolutely unsuitable for an ethnically diverse society like Nigeria. The division of powers and fiscal resources entrenched in the 1999 constitution undermines democratic governance, promotes central government dictatorship, facilitates the domination of minority ethnic groups by the larger ethnic groups, and threatens the corporate existence of Nigeria. And unless it is urgently restructured through an inclusive constitution making process, the inter-ethnic conflict and violence that have attended this anomaly in the last few years will continue unabated.

In what follows, I highlight and discuss the salient attributes of the existing division of powers and fiscal resources as well as the justification often claimed for it. In particular, I undertake an extensive critique of this power distribution framework with a view to assessing its suitability for a multi-ethnic state like Nigeria and its compatibility with the idea of federalism.

I commence by discussing the two contentious features of this division of powers and fiscal resources that are relevant to this thesis. These include the manner of its formulation, and its centralist allocation of competencies and revenues. These two features are chosen for the controversy and tension they have jointly and severally generated since the promulgation of the 1999 constitution.

In section 4.2, I discuss and examine the argument often advanced as justification for the centralized division of powers and fiscal resources in the constitution. As we shall see, so convinced are the advocates of centralization in the rectitude of their cause that they apparently never bother to assess its suitability for an ethnically diverse and heterogeneous society whose component parts not only have different needs, interests, cultures, and socio-political orientations, but are also desirous of autonomy in the management of their affairs. Section 4.3 is dedicated to critically assessing this centralized division of powers and resources, its suitability for multi-ethnic Nigeria, and its compatibility with the idea of federalism.

It is envisaged that the discussion in this chapter will furnish the content for the subsequent chapters on a new constitutional framework for the division of powers and fiscal resources among the levels of government in Nigeria.

4.1. Two Problems of the Existing Power Distribution Framework

It is widely recognized that the most controversial, divisive and acrimonious issue in Nigeria's federalism today is the centralized division of powers and fiscal resources entrenched in the extant 1999 constitution.³ For our purposes in this thesis, two salient problems associated with the existing power distribution arrangement are of particular interest. These include (a) the exclusionist approach employed in devising this division of powers and fiscal resources; and (b) the inordinate concentration of powers and fiscal resources in the federal (central) government.

As we shall see in the following paragraphs, the two problems highlighted above are jointly indicative of the highly centralist character of Nigerian federalism. They are also distinctive markers of the centralist orientation that influenced the entrenchment of this power distribution regime in the 1999 constitution of Nigeria by the framers of that constitution. I will now consider each of these problems in turn.

4.1.1. Approach Employed in Devising the Existing Power Distribution Framework.

Any discussion of the problems associated with the division of powers and fiscal resources set out in the 1999 constitution must, for the sake of clarity and completeness, be preceded by a discussion of the approach utilized in devising this division of powers. And this must in turn be preceded by a discussion of the approach employed in formulating and adopting the 1999 constitution itself. This discussion is important

³ See generally, Ekeng A. Anam-Ndu, 'Renewing The Federal Paradigm in Nigeria: Contending Issues And Perspectives' in Aaron T. Gana & Samuel G. Egwu eds., *Federalism in Africa- Framing the National Question*, vol.1, (Africa World Press Inc, 2003) p.51. See also J.Isawa Elaigwu ed., *Fiscal Federalism in Nigeria- Facing the Challenges of the Future*, (London: Adonis & Abbey Publishers Ltd, 2008), p.iv; Akpan H. Ekpo, 'Fiscal Federalism in Nigeria: The Challenges of the Next Decade' in J.Isawa Elaigwu ed., *ibid*, p.85; Olubayo Oluduro *et al* 'Revenue Allocation and Resource Control in Nigeria' (2009) 1(2) *Lead City University Journal*, p.400; Abiola Sanni, (note 1 supra) pp 2-3; Ladipo Adamolekun, (note 1 supra) p.301; Ben Nwabueze, *My Life and Work* vol.3 (Ibadan: Gold Press Limited, 2014) pp 19-20; Wumi Iledare and Rotimi Suberu 'Nigeria' in George Anderson ed., *Oil and Gas in Federal Systems* (Oxford University Press, 2012) pp 232-234.

because the legitimacy of the division of powers and fiscal resources entrenched in the constitution is contingent on the legitimacy of the constitution itself.⁴

As earlier mentioned in chapter 3, the promulgation of the 1999 constitution was done by military fiat.⁵ Its formulation, including the determination of its fundamental principles was exclusively done by military commanders and their civilian acolytes on the eve of the country's return to civil rule in 1999.⁶ There was no constituent assembly to discuss proposed constitutional principles, neither was there any referendum to affirm the contents of the proposed constitution. The entire constitution making process was centrally conceived, centrally designed and centrally executed.⁷ Although a so called 'Constitution Debate Committee' was appointed by the military authorities to produce the new constitution, this committee was not representative of the Nigerian people.⁸ Members of the Committee were handpicked by the military and accountable only to the military.⁹ The draft constitution they produced was centrally ratified by the military authorities after unilateral amendments had been made to it by the Provisional Ruling Council, the highest organ in the military hierarchy.¹⁰ In effect, the 1999 constitution is not and cannot be regarded as an 'original act of the people,' properly so called. The use of the phrase "we the people" in the preamble to the constitution is certainly misplaced and misleading, for "the people" were not part of the arbitrary process that produced the constitution.¹¹

⁴ According to Professor Ihonvbere, "the process of constitution making is critical to the strength, acceptability and legitimacy of the final product" Julius O. Ihonvbere 'How to Make an Undemocratic Constitution: The Nigerian Example' (2000) 21(2) *Third World Quarterly* 346.

⁵ The constitution was promulgated via the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 5 May 1999.

⁶ Julius O. Ihonvbere, (note 4 supra) p.351. See also Ignatius Akaayar Ayua and Dakas C.J. Dakas, (note 1 supra) p.250.

⁷ FT Abioye, 'Constitution-Making, Legitimacy and Rule of Law: A Comparative Analysis,' (2011) 44(1) *The Comparative and International Law Journal of Southern Africa*, pp.72-73. See also Julius O. Ihonvbere (note 4 supra) pp.346;351.

⁸ Tunde I. Ogowewo, 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy,' (2000) 44(2) *Journal of African Law* p.144.

⁹ Ibid

¹⁰ Ibid.

¹¹ Professor Isawa Elaigwu captured this point adequately when he argued that the 1999 constitution "suffers a crisis of ownership because, when it was created, there was not even a pretense of general public participation." J. Isawa Elaigwu, 'The Federal Republic of Nigeria' in Aktar Majeed (et al) eds. (note 1 supra) p.213.

Buttressing this point in volume 1 of his *Constitutional Democracy in Africa*, Professor Ben Nwabueze succinctly argued that “the 1999 constitution, with its unitary character” cannot lay any claim to being “an act of the people” as would be expected of a constitution.”¹² Quoting Thomas Paine who, in his *Rights of Man*, had declared that “a constitution is not the act of a government, but of a people constituting a government,” Professor Nwabueze argued that “the 1979 and 1999 constitutions were made by the Federal Military Government, a government of absolute power...seized by force or threat of it from the Nigerian people....The people had no hand.... in the making or enacting of either of those constitutions.”¹³

“A constitution,” writes Nwabueze, “is an act of the people if it is made by them either directly in a referendum or through a convention or constituent assembly popularly elected for this specific purpose, subject or not to formal ratification by the people in a referendum.”¹⁴ For him “the making of a constitution in this context refers to the act by which its substantive content, particularly the system of government, and the relations of governmental structures *inter se* and with the individual is determined and adopted....If the substantive content of a constitution is freely agreed and adopted by the people either in a referendum or through a constituent assembly popularly elected for the purpose, then it is their act”¹⁵

It follows, from the foregoing, that the 1999 constitution is not “an act of the Nigerian people,” properly so called. Its pretension to legitimacy is significantly attenuated by its non-rootedness in the will of the people, for a key factor in the legitimacy of a constitution is its predication on the will of the people and its genuine articulation of their aspirations. This presupposes the active involvement of the people in its making. A constitution’s character as ‘an act of the people’ is a significant condition of its legitimacy. A constitution cannot genuinely lay any claim to legitimacy without the

¹² Ben Nwabueze, *Constitutional Democracy in Africa* vol.1 (Ibadan: Spectrum Books Limited, 2003) p.64. See also Julius O. Ihonvbere (note 4 supra) p.352; FT Abioye, (note 7 supra) p.73.

¹³ Ben Nwabueze, *Ibid.* Note that the 1999 constitution is almost a replica of the 1979 constitution. Like the 1999 constitution, the 1979 constitution was also promulgated into law by the military. Professor Elaigwu has written that “without adequate consultation, the 1979 constitution was ‘renovated’ and dusted off to create the 1999 constitution.” J. Isawa Elaigwu (note 1 supra) p.213.

¹⁴ B.O Nwabueze, *The Presidential Constitution of Nigeria* (C. Hurst & Company London, 1982) p.1

¹⁵ *Ibid.*

people's participation in its formulation.¹⁶ For a multi-ethnic society like Nigeria, the 1999 constitution making process was an arbitrary exercise apparently designed to foist a pre-determined unitary and centralist agenda on the Nigerian people.

Since the 1999 constitution is not an act of the Nigerian people, it certainly stands to reason that the division of powers and fiscal resources set out in it cannot be said to reflect the express will of the Nigerian people, but those of a predatory and hegemonic ruling class. If the 1999 constitution is illegitimate, the division of powers and fiscal resources set out in it is doubly illegitimate for it is then an illegitimate power sharing arrangement entrenched in an illegitimate constitutional document.

One of the principal reasons for the widespread public disenchantment with the division of powers and fiscal resources set out in the constitution is that it is not a true reflection of the will of the overwhelming majority of the Nigerian people. The 1999 constitution and the division of powers and resources set out in it, is, in actual fact, alien to the Nigerian people and thus incapable of commanding their "loyalty, obedience and confidence."¹⁷ Any attempt to address the problems associated with the division of powers and fiscal resources in the constitution must therefore commence with a rectification of the constitution's legitimacy deficit. I shall return to this point in chapter five.

In the next few paragraphs, I discuss the other problem associated with the constitution's power distribution framework, to wit, its entrenchment of a highly centralized division of powers and fiscal resources. To this and other issues I now turn.

4.1.2. Centralized Allocation of Powers and Fiscal Resources in the 1999 Constitution

Another controversial feature of the 1999 Constitution is its entrenchment of a highly centralized division of powers and fiscal resources in favour of the federal (central)

¹⁶ Julius O. Ihonvbere (note 4 supra) p 346. See also FT Abioye (note 7 supra) pp 72-73; Ignatius Akaayar Ayua and Dakas C.J. Dakas, "Federal Republic of Nigeria," in John Kincaid and Tarr, G. Alan eds., (note 1 supra) p.248; B.O Nwabueze (note 14 supra) p.5; Tunde I. Ogowewo (note 8 supra) 138-139.

¹⁷ According to Professor Nwabueze, "the legitimacy of a constitution is concerned with how to make it command the loyalty, obedience and confidence of the people." See B.O Nwabueze (note 14 supra) p.4.

government. Under this Constitution, powers and fiscal resources are shared among the levels of government through the instrumentality of two legislative lists, namely the exclusive legislative list, and the concurrent legislative list. Both lists are attached as schedules to the Constitution. Residual powers in respect of matters not itemized under the exclusive or concurrent legislative lists are reserved for the States. The constitution also sets out a list of functions assigned to the local governments.¹⁸

The Exclusive Legislative List is an overwhelmingly long catalogue of sixty-eight matters over which the central government alone may exercise legislative and executive powers. Included in this list however, are matters that should ordinarily be within the legislative jurisdiction of the state or local governments because of their strong connection with the internal affairs of these governments. For instance, election to the offices of Governor and Deputy Governor of a State; election to the Houses of Assembly of the States; local policing and other local security services; mines and minerals in the states; census in the states of the federation; local aviation; regulation of local political parties; judiciary of the states; formation, annulment and dissolution of marriages in the States; incorporation and regulation of companies in the states; registration of business names in the states; as well as wireless broadcasting and television, are some of the matters itemized under the Exclusive Legislative List.¹⁹

The Concurrent Legislative List is a relatively shorter catalogue consisting of twelve different matters over which both federal and state governments may concurrently exercise legislative powers. Included in this list are matters such as university, technological and post-primary education; agriculture; electric power; archives; scientific and technological research; trigonometric, cadastral, and topographical surveys; and statistics.²⁰ But the power of the state governments to legislate in respect of matters in the concurrent legislative list is circumscribed by a provision of the constitution which makes the validity of a state legislation in any of such matter(s) contingent on its consistency

¹⁸ Fourth Schedule, 1999 Constitution. See also figure 2 in the appendix to this chapter.

¹⁹ Sections 4(2) & (3), 1999 Constitution. The Exclusive Legislative List is set out in Part 1 of Schedule 2 of the 1999 constitution. See Table 1 in the appendix to this chapter for a full itemization of the matters contained in this list.

²⁰ Sections 4(7) (a) & (b), 1999 Constitution. The concurrent list is set out in Part 2 of Schedule 2 of the 1999 constitution. See Table 1 in the appendix for a full itemization of the matters contained in this list.

with federal government legislation on the same matter(s).²¹ The implication of this is that the legislative jurisdiction of the states in such matters is effectively excluded or subject to the overriding authority of the federal government whenever the federal government comprehensively legislates in respect of such matters.

Thus, not only is the federal government empowered to exclusively legislate and exercise executive powers in respect of matters such as local policing, state elections, census in the states, mines and minerals located within the territory of states, and state judiciary, all of which should ordinarily be within the jurisdiction of the states, it can also preempt or override state legislation in respect of matters in the concurrent legislative list.

In actual fact, the federal government is the dominant power wielder in respect of most matters in the concurrent legislative list. For instance, agricultural development and policy, a matter within the concurrent legislative list, and one that is of direct interest to the local townships and rural communities, is effectively dictated by the federal government from its base at the federal capital city of Abuja.²² Same goes for electric power,²³ University education as well as scientific and technological research.²⁴ The federal government predominates in all the above mentioned fields.

Some residual matters that are exclusively assigned to the states, under the constitution, have also been known to be unilaterally appropriated by the federal government without the consent of the States. For instance the federal government has of late taken over a significant part of primary education policy through its Universal Basic Education Program.²⁵ And although, primary education is a residual matter reserved solely for the States, the consent of the states was not sought and received before this interference by

²¹ Section 4(5), 1999 Constitution.

²² Agricultural policy throughout Nigeria is mostly dictated by the Federal Ministry of Agriculture Abuja. See Federal Ministry of Agriculture Abuja <<http://fmard.gov.ng/about/>> (accessed 15/5/2017).

²³ The National Electricity Regulatory Commission, and the Power Holding Company of Nigeria, both of which are federal agencies, regulate and administer electricity generation and distribution throughout Nigeria. See <<http://www.nercng.org/>> (accessed 15/5/2017).

²⁴ The National Universities Commission, an agency of the federal government regulates university education throughout Nigeria in spite of the fact that University education is within the concurrent legislative list. See <<http://nuc.edu.ng/about-us/>> (accessed 15/5/2017).

²⁵ Universal Basic Education Program <https://ubeconline.com/> (accessed 15/5/2017).

the federal government.²⁶ Healthcare policy and development, also a residual matter, is in practice, dominated by the federal government.

The federal government's arbitrary incursion into fields that exclusively belong to the lower levels of government, and its excessive dominance in fields that are within the concurrent legislative list violate the principle of autonomy of the levels of government which is a cardinal tenet of federalism. Autonomy, in this context implies unfettered discretion in the exercise of executive and legislative authority over matters assigned to the states under the Constitution. It implies the ability of each state to, as far as is practicable, take charge of matters pertaining to its own territory.²⁷ "The separate and autonomous existence" of each level of government and "the plenary character" of the powers assigned to it on specific matters by the constitution, necessarily imply that "the exercise of those powers is not to be impeded, obstructed or otherwise interfered with by the other government while acting within its own powers."²⁸

The existing constitutional framework for the division of powers and resources impinges on the ability of each state of the federation to exercise effective and efficient control over its own internal affairs and determine its own destiny. This frustrating inability of the states to effectively manage their internal affairs is a major reason for many of the ethnic and intergovernmental conflicts that have dogged Nigerian federalism since the country's return to civil rule in 1999.

The autonomy of the constituent states of a federation is a cardinal principle of federalism that has garnered tremendous traction over the years. The Supreme Court of Nigeria has also pronounced on its importance in a long line of cases.²⁹ Its significance as a principle

²⁶ See J. Isawa Elaigwu, 'Federal Republic of Nigeria' in Akhtar Majeed et al eds., (note 1 supra) p.229.

²⁷ According to Yash Ghai, autonomy allows "ethnic or other groups claiming a distinct identity to exercise direct control over affairs of special concern to them...Federalism" is "characterized by constitutional entrenchment of autonomy." Yash Ghai, 'Ethnicity and Autonomy: A Framework For Analysis' in Yash Ghai ed., *Autonomy and Ethnicity, Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2000) pp 8-9.

²⁸ Ben Nwabueze (note 12 supra) p.93.

²⁹ Pronouncements were made *obiter* on the imperative of state autonomy in the following Supreme Court cases, *The Attorney General of Bendel State v. The Attorney General of the Federation*, SC.108/1982 per Uwais JSC p.23 paras D-F; *Attorney General Ogun State v. Attorney General Federation* SC. 53/1981 per Udoma JSC p.55 paras B-F; *Attorney General of Abia State v. Attorney General of the Federation* (2006) 7SC (Pt 1) 51 at 72-74.

of federalism lies not only in its necessity for effective and efficient regional governance but also in its potential to act as a formidable check on the arbitrary exercise of power by the federal government. Its utility as a potent means of curtailing the excesses of the federal government makes it an indispensable asset in any federation.

Tragically, save for its passing pronouncements on the subject in a number of cases,³⁰ the Judiciary has had limited influence on the federal system of government in Nigeria. Although the role of the Courts in judicial review is well established in the Nigerian constitution,³¹ and the Courts would have been in a position to greatly enhance federalism by giving judgments or making pronouncements that give effect to the autonomy of states in specific cases and in relation to specific issues, judicial review in this context is constrained by two principal factors. First, the courts in Nigeria are expected to interpret the constitution as it is, not as it should be. This was emphasized in the well known case of *Olawoyin v. Commissioner of Police* where the Court held, *inter alia*, that “the function of the Court is to answer the questions referred to it by interpreting the constitution as it stands..”³² Thus, in Nigeria, even when the court is minded to give effect to federal tenets, its power to do this is constrained by the highly centralized division of powers set out in the constitution. The Court cannot give a decision that is clearly at variance with the actual division of powers contained in the constitution. The courts can only affirm state autonomy in cases where the constitution clearly and unambiguously confers autonomy on the states in respect of specific matters.

Second, unless specific issues concerning the division of powers set out in the constitution are brought before the courts, the courts cannot pronounce on those issues *suo motu*. The courts can only pronounce on issues properly brought before them by concerned parties.³³ As such, questions on the division of powers set out in the constitution can only be determined by the Nigerian Courts when such questions are specifically formulated for the Courts to answer. The debate on Nigerian federalism has been mostly conducted outside the courtroom- at conferences, town hall meetings, the

³⁰ See note 29 above.

³¹ Section 6(6)(a)&(b) 1999 Constitution of Nigeria.

³² [1961] 2 All NLR 203 at 215. See also, PA Oluyede, *Cases and Materials on Constitutional Law in Nigeria* (University Press Plc, Ibadan 2003) p.454.

³³ *Sule Sanni v. Durojaiye Ademiluyi* (2003) 4 SCM 145.

media, and village gatherings. The influence of the Nigerian judiciary on the federal system of government in Nigeria has thus tended to be limited.

The overall implication of the 1999 constitution's division of powers among the levels of government is that the federal government is the actual custodian and repository of power in the federation. The state and local governments are, in reality, no more than powerless appendages of the federal government. This power distribution paradigm reflects the military and centralist orientation of the constitution's framers. It has, in fact, been argued that the division of powers under the 1999 constitution is "aimed more at protecting a military past than shaping a democratic future."³⁴ It would be recalled from the discussion in chapter three that a major problem associated with military rule in Nigeria prior to 1999 was its marked centralization of powers. The centralist policy of that era and its attendant centripetal monopoly of power were transferred to the 1999 constitution by the military framers of the constitution.

Along with the centralization of powers described above, there is also a simultaneous centralization of fiscal resources and fiscal authority under the 1999 constitution. Among other things, the constitution invests the federal government with authority to exclusively exercise legislative and executive powers over issues such as "borrowing of monies within or outside Nigeria for the purposes of the federation or of any state."³⁵ The federal government is also exclusively empowered to oversee trade and commerce, including the registration of companies and business names in all parts of Nigeria.

In addition, virtually all the significant and productive taxes of the federation including stamp duties; taxation of incomes, profits and gains; corporation tax; petroleum profits tax; oil royalties; fees and licenses; customs and excise duties; export duties; as well as personal income tax, are within the exclusive or dominant control of the federal government.³⁶

³⁴ Asiwaju Bola Ahmed Tinubu, 'Democratic Consolidation in Nigeria: Issues, Challenges and Prospects' *TNV News* 31 May 2009 <<https://www.thenigerianvoice.com/news/9501/democratic-consolidation-in-nigeria-issues-challenges-and.html>> (accessed 27/7/2017).

³⁵ See Part 1 of Schedule II of the 1999 constitution.

³⁶ See Parts 1 and 2 of the 2nd schedule to the 1999 constitution. See also Part 1 of the Schedule to the Tax and Levies Act of Nigeria.

The constitution does not specifically assign any tax power to the states. The local governments are however constitutionally empowered to collect and manage a number of insignificant fees, rates and levies, the most significant of which is the tenement rates on privately owned houses.³⁷

The constitution establishes a ‘Federation Account’ into which all revenues of the federation, including proceeds from all taxes collected throughout the country, are deposited and later shared among the levels of government.³⁸ From this account, vertical and horizontal sharing of revenue is done according to an allocation formula solely formulated by the federal government.³⁹ This allocation formula assigns 56 percent of the centrally generated tax revenue to the federal government while 24 percent and 20 percent are allocated to the thirty six (36) states of the federation and the seven hundred and seventy four (774) local governments respectively.⁴⁰

The 24 percent allocation due to the States is distributed among the thirty six states using certain allocation criteria outlined in the constitution. These are “population, equality of States, internal revenue generation, land mass, terrain, and population density.”⁴¹ The distribution of the 20 per cent allocation among the seven hundred and seventy four local governments is similarly done using the same criteria listed above.⁴²

However, as mentioned in chapter three, apart from the fact that some of these revenue sharing criteria were arbitrarily entrenched in the constitution and have been arbitrarily used for revenue allocation in Nigeria since the colonial and military eras without any serious consultation with the constituent states of the federation, the criteria themselves have been notoriously controversial due to strong disagreements about their precise value or exact quantification.

³⁷ See the Fourth Schedule to the 1999 Constitution. See also figure 2 of the appendix to this chapter.

³⁸ Section 162(1) 1999 constitution.

³⁹ The existing revenue allocation formula was first formulated in 1992 by the military administration of General Ibrahim Babangida and was modified via an executive order of President Obasanjo in May 2002.

⁴⁰ Section 1 Allocation of Revenue (Federation Account e.t.c) Act 1992 as amended in 2002.

⁴¹ Section 162(2) 1999 constitution.

⁴² Ibid.

For instance, population has been a very controversial issue in Nigeria since the colonial era.⁴³ Indeed, there has never been any generally accepted census figure in the history of Nigeria.⁴⁴ Census, a matter within the exclusive legislative list, has been centrally undertaken by the federal government since Nigeria's independence. Its central management makes it susceptible to manipulation by the majority ethnic groups that are usually in control of the federal government. Historically, population figures have been widely disputed by minority ethnic groups who accuse the majority ethnic groups of manipulating the figures to favour themselves in revenue sharing.⁴⁵

Other revenue sharing criteria such as "land mass" and "terrain" are vague terminologies that are not clarified by the constitution. The vagueness, opacity, inexactitude, imprecision and controversy associated with these criteria provide a compelling case for their review and possible replacement with clearer and more transparent revenue sharing approaches that have been jointly agreed by the constituent units of the federation.

The above represents Nigeria's existing fiscal architecture. Clearly, the intention of the constitution's framers was to concentrate control of the federation's fiscal resources in the federal government, and thus guarantee its financial supremacy and hegemony *vis a vis* the other levels of government. The ability of the states and local governments to generate their own revenue and manage their own affairs is, by this arrangement, severely constrained, since they are forced to rely on and work with the fiscal subventions they periodically receive from the federal government.

4.1.2.1. Power in Respect of Mines and Minerals

⁴³ S.A Aluko, "How Many Nigerians? An Analysis of Nigeria's Census Problems, 1901-63" (1965) 3(3) *The Journal of Modern African Studies*, pp 371-372.; 391-392

⁴⁴ See generally S.A Aluko, "How Many Nigerians? An Analysis of Nigeria's Census Problems, 1901-63" 1965 *The Journal of Modern African Studies*, 3(3) 371-372.; 391-392. See also Adeline Idike A and Eme Okechukwu, "Census Politics in Nigeria: An Examination of 2006 Population Census" 2015 9(3) *Journal of Policy and Development Studies*, pp 47-68 <https://www.arabianjbm.com/pdfs/JPDS_VOL_9_3/4.pdf> (accessed 2/7/2017).

⁴⁵ Sandra Yin 'Objections Surface Over Nigeria's Census Results' (Population Reference Bureau, 2007) <<http://www.prb.org/Publications/Articles/2007/ObjectionsOverNigerianCensus.aspx>> (accessed 16/5/2017). Tom Mbeke Ekanem, 'Nigeria Census, The Untold Story' <<http://nigeriaworld.com/articles/2006/mar/211.html>> *Nigeria World* 21 March 2006 (accessed 16/5/2017); 'Population Census in Nigeria' <<http://nigerianobservernews.com/2014/12/population-census-in-nigeria/#.WRtt4LeGPIU>> *The Nigerian Observer* (9 December 2014) (accessed 16/5/2017).

Thus far, I have discussed the controversial and undemocratic centralization of powers and fiscal resources under the 1999 constitution. This discussion will however be incomplete without a further discussion of the centripetal assignment of one power that graphically typifies Nigeria's highly centralist political arrangement. This is the power to manage and legislate in respect of mines and minerals throughout the federation. It is pertinent to specially highlight and discuss this for one major reason; no other matter has generated the magnitude of conflict, acrimony and nationwide agitation that the exclusive assignment of this power to the federal government has induced since the return of Nigeria to civil rule in 1999.

Since 1999, violent militancy has become commonplace in the Niger Delta,⁴⁶ the region of Nigeria where the hydrocarbon deposits that fetch Nigeria more than "90 percent of export earnings and over 70 percent of government revenues"⁴⁷ are located. The Niger Delta militancy is part of a nationwide clamour for a reassignment of the power over mines and minerals to the states in order to enable each state of the federation to exercise effective control over the exploration and exploitation of natural and mineral resources located within its territory.⁴⁸

The agitation for 'resource control' in the Niger Delta, in fact, predates 1999. As far back as 1990, the Ogoni Bill of Rights had been drawn up and published by the people of Ogoni land in the Niger Delta. Among other things, the Bill declared the right of the Ogoni people to "political autonomy," and the right "to the control and use of a fair

⁴⁶ Brendan DeMelle, 'Delta Boys: Powerful Documentary Chronicles Niger Delta Oil Struggle' *HuffPost* (16/12/2012) < http://www.huffingtonpost.com/brendan-demelle/delta-boys-documentary_b_1971133.html> (accessed 3/7/2017); Ufo Okeke-Uzodike & Victor Ojajorotu, "Oil, Arms Proliferation and Conflict in the Niger Delta of Nigeria" *AJCR*/2006/2 ,<<http://www.accord.org.za/ajcr-issues/%EF%BF%BCoil-arms-proliferation-and-conflict-in-the-niger-delta-of-nigeria/>> (accessed 3/7/2017).

⁴⁷ These are 2016 figures. See 'Nigeria, Executive Summary' at <<https://www.export.gov/apex/article2?id=Nigeria-Executive-Summary>> (13/7/2016) (accessed 2/7/2017).

⁴⁸ 'FG Must Allow States to Develop Natural Resources- Ambode' *Vanguard* (25/8/2016) <<http://www.vanguardngr.com/2016/08/fg-must-allow-states-develop-natural-resources-ambode/>> (accessed 3/7/2016); Success Nwogu, 'Constitution Preventing States from Exploring Minerals- Ahmed' *Punch* Newspapers July 10 2017 <<http://punchng.com/constitution-preventing-states-from-exploring-minerals-ahmed/>> (accessed 10/7/2017).

proportion of Ogoni economic resources for Ogoni development.”⁴⁹ The preamble to this Bill of Rights emphasized that colonialism forced the Ogonis into the Nigerian union and that they have benefited nothing from this union. It specifically pointed out that the Ogoni people were not adequately represented in federal institutions, they lacked health, education and other social facilities including electricity and pipe borne water. And their people were unemployed.⁵⁰ Importantly, the preamble accused the federal government of transferring “Ogoni wealth exclusively to other parts of the Republic.”⁵¹ The Ogoni Bill of Rights is still prominently displayed on the website of the Movement for the Survival of the Ogoni people (MOSOP),⁵² a testament to the ongoing topicality of the issues raised in it and the commitment of the Ogoni people to the realization of their desire for political and fiscal autonomy.

It was, however, the Kaiama Declaration of the Ijaw people of the Niger Delta in 1998 that seriously drew public attention to the Niger Delta struggle for resource control. Following the precedent already set by the Ogoni Bill of Rights, the Kaiama Declaration emphasized that “all lands and natural resources (including mineral resources) within the Ijaw territory belong to the Ijaw communities.”⁵³ The Declaration decried the “socio-political, economic, cultural and psychological deprivations” the Ijaw people were suffering and demanded that the Niger Delta people be allowed full “self-government and resource control.”⁵⁴

In spite of this loud clamour for regional control of mineral resources however, the framers of the 1999 constitution nevertheless proceeded to exclusively assign power over mines and minerals to the federal government.⁵⁵ The implication of this is that even though the mineral oils and resources are located within the territory of the states, the power to manage and legislate in respect of their exploration and exploitation shall be

⁴⁹ Urhobo Historical Society, ‘Ogoni Bill of Rights Presented to the Government and People of Nigeria’ November 1990 < <http://www.waado.org/nigerdelta/RightsDeclaration/Ogoni.html> > (accessed 23/2/2017).

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² <<http://mosop.org/>> (accessed 10/04/2016).

⁵³ Ijaw Youths of the Niger Delta, ‘Kaiama Declaration’ 11 December 1998 <http://www.unitedijaw.com/kaiama.htm> (accessed 23/2/2017).

⁵⁴ Ibid. See also Karl Maier, *This House Has Fallen* (London: Penguin Press, 2000) p.127.

⁵⁵ See the Exclusive Legislative List in the 1999 constitution.

exercised solely and exclusively by the federal government. This is notwithstanding the fact that the lands under which these mineral resources are located are actually ancestral lands that had belonged to indigenous communities several centuries before the creation of Nigeria by British colonialists in the 19th century.

The exclusive exercise of this power by the federal government is the cause of the widespread militancy, tension and conflict in the Niger Delta today. The leaders and people of the Niger Delta have steadfastly rejected this constitutional arrangement which they regard as an encroachment on their autonomy, that is, their right to exercise discretionary control over their territory and their natural resources.

Ethnic associations, civil society groups, political leaders and social commentators have consistently condemned the constitution's exclusive assignment of the power to control mineral resources to the federal government. For instance, Bola Tinubu, former Governor of Lagos State has argued that the exercise of power by States over resources located within their territories is "a fundamental characteristic of true federalism." According to him, the states of the federation "are crying for devolution. They are tired of a federal government which prospers from their poverty. They want a change. They want to control their resources. They want to control their destinies...Over-centralization of powers and resources is the greatest bane of the Nigerian polity today."⁵⁶ He consequently argued for a transfer of "ownership, control and development of all natural, solid mineral and agricultural resources to the states."⁵⁷

The views expressed above are no different from those expressed at a grand conference of the people of the Niger Delta in December 2009. At that conference, the Bayelsa state government emphatically declared that the people of Bayelsa, a state in the Niger Delta, wanted constitutional recognition of "absolute control and ownership of the resources of

⁵⁶ Asiwaju Bola Ahmed Tinubu, 'Federalism and Political Restructuring in Nigeria: The Case for Resource Control' <<http://asiwajubolatinubu.com/archives/news/2004/04/01/20040401N01.html>> (accessed 23/10/2016).

⁵⁷ Asiwaju Bola Ahmed Tinubu, 'Managing Nigeria's Pluralism for Peace and National Development' *Sharpedgenews.com* (18November2011)<http://www.sharpedgenews.com/index.php?option=com_k2&view=item&id=4578:managing-nigeria-s-pluralism-for-peace-and-national-development&Itemid=641> (accessed 13/8/2017).

the state...and the state's retention of hundred percent of the revenue accruing from such resources.”⁵⁸

Arguing in a similar vein in May 2015, Aminosari Dokubo, the leader of the Niger Delta People's Volunteer Front (NDPVF), a militant group operating in the Niger Delta, declared that the main agenda of his group was to facilitate the secession of the Niger Delta from the rest of Nigeria unless the states of that region were allowed to exercise total control over their resources. Among other things he declared:

“our struggle indeed is about our collective freedom from a false and forced colonial union that has remained divided and unintegrated. It is about our being conferred with a slave status and seen as a conquered people who must exist at the mercy of the overlords and supremacist class...That is why we must now stand up like the Scottish to determine our going forward...and reject our oppressors. Let us state very emphatically that...our minimum expectation and demand as a people is and remains 100 percent control of our resources or nothing.”⁵⁹

And in August 2017, popular Niger Delta activist, Sam Ebolo emphasized that

“Niger Deltans should be given the chance to control their resources. That is the only justice that can guarantee our peaceful co-existence as a people living in this country”⁶⁰

The struggle for autonomy in the Niger Delta is in part fueled by the perception that revenues derived from oil exploitation in the Niger Delta, a minority region located in Southern Nigeria, is largely used to fund infrastructure development in the more

⁵⁸ Jimitota Onoyume, ‘When the South-South voted for fiscal federalism,’ *Vanguard* (19 December 2009) <<http://www.vanguardngr.com/2009/12/when-south-south-voted-for-fiscal-federalism/>> (accessed 27/7/2015).

⁵⁹ Nicholas Ibekwe, ‘We will Resume Our Struggle if Buhari Draws First Blood-Asari Dokubo.’ *Premium Times* (18 May 2015) <<http://www.premiumtimesng.com/news/top-news/183195-we%E2%80%8Bll-resume-our-struggle-if-buhari-draws-first-blood-asari-dokubo.html>> (accessed 14/07/2015). See also Eromosele Ebhomele, ‘Resource Control: Asari Dokubo Threatens Northerners,’ *PM News* (17 July 2014) <<https://www.pnewsnigeria.com/2014/07/17/resource-control-asari-dokubo-threatens-northerners/>> (accessed 14/07/2015).

⁶⁰ Matthew Omonigho, ‘To Achieve Peace, S-South Region Must Control Oil Resources- N’Delta Activist, Sam Ebolo,’ *Daily Post* (16 August 2017) <http://dailypost.ng/2017/08/16/achieve-peace-s-south-region-must-control-oil-resources-ndelta-activist-sam-ebolo/?utm_source=DailyPost+Newsletter&utm_campaign=1a19944a2d-Todays_headlines&utm_medium=email&utm_term=0_7c25dc3ce6-1a19944a2d-219870077> (accessed 18/8/2017).

populous parts of Nigeria, while the Niger Delta itself wallows in extreme poverty and squalor.⁶¹ It would be recalled from the discussion above that population is one of the major factors used in revenue sharing in Nigeria.

Important as the agitation for regional control of mines and mineral resources is however, we must not lose sight of the fact that it is part of a wider struggle for comprehensive regional autonomy in Nigeria. Thus, efforts to reform Nigeria's federalism must be holistic. Such efforts must not be limited to addressing the issue of power over mines and minerals alone, it must comprehensively address the flawed character of the existing political and fiscal arrangement as a whole and seek to fashion out a division of powers and fiscal resources that is truly consistent with the idea of federalism and the wishes of the Nigerian people.

The clamour for regional autonomy has never been more strident than it has been in recent years. For instance, in 2014, the Yoruba people in South Western Nigeria demanded for "a restructuring of the Nigerian federation into regional autonomy, or an outright dissolution of the federation."⁶² This was not a new demand. A similar demand had been made by Yoruba leaders and traditional rulers in 2005. In their 2005 Yoruba Agenda, they emphasized that "with regard to all matters of economy, internal security and social responsibilities, the Yoruba yearn to be autonomous."⁶³ They also declared that the Yoruba region "shall have control over its destiny and shall be the master of its internal affairs."⁶⁴

Thus far, the foregoing discussion on the allocation of powers and fiscal resources under the 1999 constitution portrays Nigeria's federal system as highly centralized and highly undemocratic. The discussion also shows a general public disenchantment with this power distribution arrangement. It must be stated that this highly problematic division of

⁶¹ Karl Maier (note 50 supra) pp.115-116. See also the Ogoni Bill of Rights (note 45 supra).

⁶² Ayo Okulaja, 'National Conference: South West Leaders to Push for Yoruba Agenda' *Premium Times* (12 February, 2014) <<http://www.premiumtimesng.com/news/155066-national-conference-south-west-leaders-push-yoruba-agenda.html>> (accessed 11/04/2016).

⁶³ 'The Yoruba Agenda of January 2005,' *Nigerian Muse* (11 October 2010) <<http://www.nigerianmuse.com/20101011091938zg/sections/general-articles/the-yoruba-agenda-of-january-2005/>> (accessed 28/7/2017).

⁶⁴ Ibid.

powers and fiscal resources in the 1999 constitution is a direct consequence of the unilateral formulation of the constitution by a tiny clique of military adventurers and their civilian collaborators on the eve of the return to civil rule in 1999. A more inclusive and democratic constitution making process would have afforded the Nigerian people the opportunity to put forward and thoroughly debate proposals for a more acceptable division of powers among the levels of government. It would have afforded the various parts of Nigeria the opportunity to negotiate and agree among themselves, the power distribution framework that would best serve their collective interests. And this would have certainly prevented the adoption of the centralist division of powers that now hallmarks the 1999 Constitution.

As we shall see below, the centralist distribution of powers in the 1999 constitution is also reflected in the nature of the Fiscal Commission established by the constitution to undertake the very sensitive and important task of managing revenue allocation among the levels of government in the federation.

No doubt, the major problem of Nigeria's federal system, as it stands today, is its centralist character and orientation, especially its conception of political power as the preserve of an elitist and hegemonic ruling class. This, we have seen, is evidently manifest in the concentration of powers in the federal government, and the tendency for important decisions affecting the federation and all its constituent units to be taken unilaterally by the federal government without consulting with or securing the consent of other levels of government or the Nigerian people.

4.1.2.2 Centralized Fiscal Commission

As noted in Section 4.1.2 above, a further instance of centralization of power under the 1999 constitution is seen in the nature of the Revenue Mobilization, Allocation and Fiscal Commission (RMAFC), established by the constitution to monitor and manage inter and intra-tier allocation of revenue among the levels of government in the federation. The Commission is also charged with the task of periodically reviewing and devising revenue allocation criteria and formula for the entire Federation.⁶⁵ The National Assembly, an

⁶⁵ Section 32 of the Third Schedule to the 1999 constitution.

organ of the federal government, is constitutionally charged with ultimately ratifying or modifying whatever revenue allocation policy is devised by the commission.⁶⁶

However, as sensitive and important as the constitutional responsibility of this Commission is, the Constitution invests the President of the federation with exclusive and discretionary power to appoint its members.⁶⁷ The constituent units of the federation have no constitutional say in who becomes a member of the Commission despite the fact that the important work of the Commission has significant implications for the fiscal survival of every part of the federation, and revenue allocation among the levels of government has always been one of the most contentious issues in inter-governmental relations in Nigeria.

The constitution's exclusive assignment of the power to appoint members of the Commission to the President renders the Commission susceptible to political pressure and manipulation as the President, who is the appointing authority, could use his discretionary power of appointment to fill the Commission with his cronies and political acolytes who would be amenable to his control and direction. Indeed, a major danger of having the President exercise such wide discretionary powers in respect of appointments to the Commission is the possibility of having a pliant Fiscal Commission that could connive with the federal government to undermine or shortchange the state and local governments by devising revenue allocation policies that will consistently foster the fiscal and political hegemony of the federal government.

One other problem with RMAFC is its *modus operandi*. Nothing in the constitution obliges the Commission to consult with or invite the participation of the state and local governments, as well as the people of Nigeria in its decision-making processes. Yet, its decisions or recommendations have significant and far-reaching consequences for these sub-national governments.

The point being made here is that the Commission, as established by the 1999 constitution, is highly susceptible to the control and manipulation of the federal

⁶⁶ Section 162 (2) & (3) 1999 constitution.

⁶⁷ Section 31b of the Third Schedule to the 1999 constitution.

government. It is thus not essentially different from previous fiscal commissions established during the colonial and military eras. It will be recalled, from our discussion in chapter three, that the *ad hoc* fiscal commissions set up during the colonial and military eras were similarly centrally controlled and exclusively managed.

A fiscal commission set up to take important and consequential decisions regarding financial arrangements for an ethnically diverse federation ought to be constitutionally obligated to consult widely in order to ensure that its decisions on the federation's fiscal arrangements genuinely reflect the wishes of the diverse peoples that make up the federation. A fiscal commission that takes decisions unilaterally is certainly not the ideal institutional design for a heterogeneous federation like Nigeria.

The flaws identified above in the nature of RMAFC, that is, the unilateral mode of appointing its members by the President of the federation, and the unilateral manner in which the Commission could actually carry out its duties under the constitution, despite the sensitive nature of its work, make the Commission susceptible to political manipulation, corruption and inefficiency. We shall discuss this in greater detail in Chapter five.

Thus far, the discussion in this chapter reveals a Nigerian power distribution architecture that is strikingly conservative and centralist in character. Its defining features, as discussed above, strongly suggest that the framers of the 1999 constitution were deliberately determined to concentrate political and fiscal powers in the hands of the federal government and make the state and local governments completely dependent and reliant on the federal government for their survival.

What were the reasons for the adoption and entrenchment of this approach by the framers of the constitution? How has this approach fared in welding together a country marked by ethnic and socio-cultural diversity? And what are the arguments against this approach? I turn to these issues in the next section.

4.2. Justification for the Centralist Approach; The “Unity and Stability” Argument

A major argument often advanced for the centralized division of powers and fiscal resources in Nigeria is that of “unity and stability.”⁶⁸ Protagonists of this argument create the impression that the unity and stability of Nigeria is best promoted and preserved by concentrating the most significant powers of the federation in the hands of the federal government which, in their view, is in the best position to deploy power fairly among the constituent units of the federation, and thus ensure that no part of the country lags behind the others in terms of development. This approach, it is claimed, will forestall unhealthy rivalry among the constituent units of the federation and thus help to promote Nigeria’s unity as well as its political and economic stability.⁶⁹

But how tenable is the “unity and stability” argument? How cogent is it as justification for centralization in a multi-ethnic and heterogeneous society like Nigeria? And how well has centralization actually promoted or helped in achieving unity and stability in Nigeria? These are the questions which protagonists of the “unity and stability” argument appear to often overlook or deliberately ignore.

The “Unity and stability” argument first gained currency in the aftermath of the ill-fated 1966 military coup d’etat,⁷⁰ but became particularly pronounced in the wake of the Nigerian civil war (1967-1970), following perceptions that Eastern Nigeria was emboldened to declare its secession from Nigeria because of the substantial powers and

⁶⁸ This was one of the main arguments used by the colonial authorities for the amalgamation of Nigeria and the centralization of power during the colonial era. See F.D Lugard, *Report on the Amalgamation of Northern and Southern Nigeria, and Administration*, (London: H.M.S.O, 1919), p.8. During the subsequent years of military rule in Nigeria, the military authorities and their civilian collaborators frequently justified the centralization of powers and fiscal resources by alluding to the need to keep Nigeria together as one nation. This for instance was the rationale behind the so-called unification decree 34 of 1966 which expressly abolished federalism in Nigeria and replaced it with a unitary political arrangement. And considering that the 1999 constitution itself was bequeathed to the country by the military, it is easy to discern the rationale for the centralist character of the constitution.

⁶⁹ This was the major argument of Professor Adebayo Adedeji in his book, *Nigerian Federal Finance*. Adebayo Adedeji, *Nigerian Federal Finance*, (Hutchinson Educational Ltd, 1969) pp 252-265. See also F.D Lugard, (note 64 supra) p.8. It was also the main argument of the military and their civilian collaborators in support of the centralized power structure entrenched in successive constitutions of Nigeria since the first military coup in 1966.

⁷⁰ A Unification Decree (Decree 34 of 1966) was issued by the military administration of General Aguiyi Ironsi in 1966. The Decree sought to abolish Nigeria’s federal structure and replace it with a unitary state in the belief that a unitary state would better enhance unity in Nigeria. See Ignatius Akaayar Ayua and Dakas C.J. Dakas, (note 1 supra).

fiscal resources available to regional governments under the 1963 constitution.⁷¹ General Yakubu Gowon, the then Head of the country's military government alluded to this in a broadcast he made at the end of the civil war.⁷² According to him, "under the old (1963) constitution, the regions were so large and powerful as to consider themselves self-sufficient and almost entirely independent. The federal government which ought to give lead to the whole country was relegated to the background."⁷³ Consequently, it was thought that in order to prevent future secessionist attempts, the country's political stability and unity should be secured by investing the federal government with more powers *vis a vis* the regional governments.⁷⁴ Several powers hitherto exercised by the regional governments were subsequently transferred to and vested in the federal government over the next few years.⁷⁵

Decree 1 of 1966, the first law promulgated by the military following the coup d'état of that year was in fact very emphatic in its arrogation of the powers of the entire federation to the federal military government. The Decree guaranteed the power of the federal government to "make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever."⁷⁶ It further prohibited the Military Governors assigned to each state of the federation from making any law without the consent of the federal government.⁷⁷ With a law like this, the military was sure of achieving its vision of ensuring the unity and stability of the Nigerian federation.

A Revenue Allocation Commission set up by the Federal Military Government in 1968 succinctly captured the "unity and stability" philosophy underlining the policies of the federal government when it said:

"we believe that fiscal arrangements in this country should reflect the new spirit of unity to which the nation is dedicated.....It is in the spirit of this new found unity that we

⁷¹ Michael Crowder, *The Story of Nigeria* (London: Faber & Faber 1978) p.271. See also J. Isawa Elaigwu, (note 1 supra) p.211.

⁷² General Yakubu Gowon's broadcast, 26th May 1968, cited in J. Isawa Elaigwu, *Ibid.*

⁷³ *Ibid.*

⁷⁴ Ignatius Akaayar Ayua and Dakas C.J. Dakas, (note 1 supra) p.245. See also A.G Adebayo, *Embattled Federalism* (New York: Peter Lang, 1993) p.128-129; J. Isawa Elaigwu, (note 1 supra) p.220.

⁷⁵ J. Isawa Elaigwu, *Ibid.*

⁷⁶ Section 3, Decree 1 1966, Federal Republic of Nigeria.

⁷⁷ Section 4, Decree 1 1966, Federal Republic of Nigeria

should view all the sources of revenue of this country as the common funds of the country to be used for executing the kinds of program which can maintain this unity”⁷⁸

Powers and fiscal resources which were hitherto regional were consequently brought under the jurisdiction of the federal government. The aim was to ensure, as much as possible, the political and financial supremacy of the federal government *vis a vis* the state governments in order to keep the country politically and economically united and forestall future secessionist activities, among other reasons.⁷⁹

Unfortunately, the ‘unity and stability’ argument for centralization has, since then, remained a cardinal influence in successive constitutional arrangements in Nigeria. Professor Ben Nwabueze who was, at the time of drafting the 1979 constitution, an advocate of federal government dominance, but who has since denounced that approach, has given a revealing insight into why and how the federal government was invested with all the significant powers of the federation under the 1979 constitution. According to him:

“Everybody in the Constitution Drafting Committee was so overwhelmed with this feeling, this patriotic feeling that we needed unity and the most effective way to achieve unity of the country was by having a very strong central government. Most of us in the committee shared that idea at the time. Chief Williams shared it because of the patriotism in us and we wanted a united Nigeria, we felt we could achieve unity by having a strong central government. Then, what did we do to achieve our misguided objective? We took away 50 per cent of the items on the concurrent list and gave it to the centre. We felt that by doing this, we were establishing unity. We did not stop at that. We looked at the residual matters, these are matters exclusive to the states, we took a large part of it, more than 30 percent and close to 50 percent; we took it away from the states and gave to the centre. And the result is the almighty federal government. But what we discovered was that instead of producing unity, we produced disunity because of the intensity of the struggle to control the centre, and the misuse or abuse of the power. The intensity of the struggle and the abuse of the power is so much. It is not just the political power that was concentrated at the centre, much of the money also went to the centre...Too much money at the centre increased the struggle for the control of the centre and the incidence of abuse.”⁸⁰

⁷⁸ I.O Dina, et al, ‘Report of the Interim Revenue Allocation Committee,’ cited in A.G Adebayo, (note 70 supra) p.134.

⁷⁹ A.G Adebayo, Ibid, pp 128-134. See also Ignatius Akaayar Ayua and Dakas C.J. Dakas, (note 1 supra) p.245; J. Isawa Elaigwu (note 1 supra) p.220.

⁸⁰ Ben Nwabueze, My Life and Work in the Search for a New, Better and United Nigeria, vol.3 (Ibadan: Gold Press Limited, 2014) p.21. Here Professor Nwabueze was quoting from the interview he granted to the Vanguard News paper on the 22nd of March 2013.

Turning to the power allocation structure under the current 1999 constitution, Nwabueze goes on to argue that:

“the marked imbalance in the power and financial relations between the federal and state governments originated in the 1979 constitution and the belief among its makers, since belied by experience, that a concentration of powers and financial resources in the federal government would bring about national unity and progress. The lesson from that experience shows that an over-strong national government increases the intensity of the competition for its control, with a consequent undermining of national unity and stability. It also increases the incidence of corruption and the perversion of power, with a consequent undermining of progress.”⁸¹

In actual fact, the unity argument did not emerge for the first time in 1979 as suggested by Professor Nwabueze in the statement quoted above. Rather, as earlier mentioned in this chapter, it antedated 1979. As far back as 1966, the military authorities and their civilian acolytes had invoked the same ‘unity and stability’ argument while issuing the so called “unification decree” to abolish federalism and merge together the administration and finances of all parts of Nigeria, with the aim of foisting a unitary political arrangement on the entire country.⁸² The 1966 Decree was designed to “force unity on Nigerians”⁸³ by ignoring ethnic identity and de-emphasizing diversity. As would be expected, the promulgation of this Decree turned out to be a huge political misadventure. The inter-ethnic violence that greeted its enactment led to the collapse of the military junta that conceived the idea, and ultimately compelled the termination of the unification (unitary) policy.⁸⁴

⁸¹ Ben Nwabueze (note 12 supra), p.80.

⁸² Decree 34 of 1966 (also known as Unification Decree). See also Ademola Yakubu, ‘Trends in Constitution Making in Nigeria,’ (2000) 10 *Transnat’I L & Contemp. Probs* p.443. Section 1 of this Decree stated that “Subject to the provisions of this Decree, Nigeria shall on 24th May 1966...cease to be a Federation and shall accordingly as from that day be a Republic of Nigeria, consisting of the whole of the territory which immediately before that day was comprised in the Federation.”

⁸³ Julius O. Ihonvbere, ‘The Nigerian State as Obstacle to Federalism’ in Aaron T. Gana & Samuel G. Egwu ed., *Federalism in Africa* vol 1 (Africa World Press Inc, 2003) p.202.

⁸⁴ W.O Alli, ‘The Development of Federalism in Nigeria: A Historical Perspective’ in Aaron T. Gana & Samuel G. Egwu ed., (note 79 supra) p.80. See also Michael Crowther, (note 67 supra) p.269; J. Isawa Elaigwu (note 1 supra) p. 208; Ignatius Akaayar Ayua and Dakas C.J. Dakas, (note 1 supra) p.244; Ademola Yakubu, ‘Trends in Constitution Making in Nigeria’ (2000) 10 *Transnat’I L & Contemp. Probs* p.443.

After the civil war in 1970, the “unity and stability argument” was exhumed and again deployed in justifying the policy of centralization that the military authorities subsequently introduced and established over the next three decades.

As we have seen in the statements credited to Professor Nwabueze above, the ‘unity and stability’ sentiment evidently influenced the power distribution framework entrenched in the 1979 constitution, and the subsequent 1999 constitution. This power distribution framework is designed to establish and entrench the political and financial hegemony of the federal government in the supposed hope that this would enhance its capacity to keep Nigeria together in ‘unity’ as one indivisible country.⁸⁵

The foregoing indicates that the centralist approach to governance in Nigeria is hinged on the perception that Nigeria’s political and economic stability as well as the country’s unity or oneness are contingent on a centripetal governance paradigm that establishes and entrenches the dominance of the federal (central) government over the other levels of government in the federation.⁸⁶

The main protagonists of centralization in Nigeria today are former military rulers and their erstwhile civilian collaborators, most of who have found their way back into government in the current political dispensation. For this group, the political and economic stability of Nigeria necessitates “a strong and interventionist central government” that would “keep the country together and provide leadership in development.”⁸⁷ Constitutional division of powers must therefore be structured to ensure that policies of government throughout the federation are mostly determined centrally and executed uniformly.⁸⁸

However, the centralist approach to federal governance raises more questions than answers in the context of a multi-ethnic and diverse country like Nigeria. In fact, as I

⁸⁵ Habu S. Galadima, ‘Division of Powers and Responsibilities (Including Tax Powers) in Nigeria’ in J. Isawa Elaigwu ed., *Fiscal Federalism in Nigeria- Facing the Challenges of the Future*, (Adonis & Abbey Publishers Ltd, 2008) p.61. See also, J. Isawa Elaigwu, (note 1 supra) p. 220.

⁸⁶ J. Isawa Elaigwu, (note 1 supra) p.221.

⁸⁷ Ibid, p.232.

⁸⁸ Ibid, p.221.

discuss below, the glaring defects of this approach and the potential problems associated with it make its adoption by the framers of the 1999 constitution untenable.

4.3. Critique of the Centralist Approach

4.3.1. Distorted Idea of Unity

A major problem with the centralist approach to federal governance in Nigeria is its predication on a distorted and problematic idea of unity. Its fixation on homogeneity and uniformity despite the glaring evidence of the country's pronounced diversity, betrays a flawed understanding of the Nigerian state and its complex history.

Unity cannot be foisted on a multi-ethnic society, neither can it be decreed into existence. Unity is an ideal that evolves and crystallizes over time. Even then, the quality of unity in an ethnically diverse society will always be determined by that society's willingness to acknowledge diversity. It is this recognition and accommodation of diversity that imbues genuine unity with its pristine sublimity. As oxymoronic as it sounds, unity and diversity are not mutually exclusive categories in a society with diverse cultures, beliefs, orientations, and needs, if the right approach is adopted and deployed.

A 'unity at all cost' approach, pursued with a strategy of exclusion will always be counter-productive in Nigeria's ethnically diverse milieu. The bane of the current approach, in my estimation, is its failure to sufficiently acknowledge Nigeria's history and diversity in terms of the needs, economic interests, political aspirations, culture, and religious orientation of its constituent units.

An approach that fails to recognize the constituent units of the federation as significant stakeholders in policy formulation and essentially denies them any meaningful ability to independently actualize their political aspirations, in a bid to create an artificial semblance of unity and stability, is certainly bound to produce the opposite effect. The assumption underpinning the adoption of the centralist approach to federal governance in Nigeria is thus certainly flawed and faulty.

Rather than produce unity and stability, the centralist approach to federal governance has the potential to create several problems for the Nigerian State. One of these, as Professor

Nwabueze pointed out above, is the unhealthy competition for the power(s) at the centre. Others include the inefficient and ineffective provision of public goods and services in the state and local governments of the federation, and the susceptibility of centralized governance to fraud, opacity and manipulation. These and other potential problems that would be discussed below are capable of creating disunity, conflict, and instability in Nigeria. They indicate that the centralist approach to federal governance is often fraught with potential pitfalls and short-comings that render it untenable as a viable governance model for Nigeria. I will now examine each of these issues in turn.

4.3.2. Unhealthy Competition for Power.

In the checkered history of Nigeria, a major problem associated with the centralist approach is its tendency to encourage unhealthy competition for power at the centre. The concentration of powers and fiscal resources at the centre has, for decades, incentivized an unhealthy scramble among the constituent units of the federation for political offices at the centre.⁸⁹ This scramble for political offices at the centre is often fueled by the widely held belief that the ethnic groups from which the key leaders of the central government emerge automatically gain access to unrivalled political and financial patronage over and above other ethnic groups.⁹⁰ Conversely, ethnic groups that are unable to win elections or secure important political offices at the centre are invariably marginalized fiscally and politically.⁹¹

This belief, which is often reinforced by actual instances of nepotism and ethnic favoritism perpetrated by leaders of the central government,⁹² propels a frenetic struggle for ascendancy among the ethnic groups. It instigates rancorous competition among them for the power and fiscal resources concentrated at the centre.⁹³ Indeed, it is often a major

⁸⁹ See Professor Nwabueze's statement above (note 76).

⁹⁰ It should be noted that in Nigeria, the ethnic groups are territorially concentrated. Each state in Nigeria is made up of an ethnic group and a number of tribal communities that are socially linked to each other.

⁹¹ Attahiru Jega, 'Fiscal Federalism: Towards Coping with and Resolving Future Challenges' in J. Isawa Elaigwu ed., *Fiscal Federalism in Nigeria- Facing the Challenges of the Future* (Adonis & Abbey Publishers Ltd, 2008), p.118. In many cases, the marginalized groups are the minority ethnic groups.

⁹² For instance, allegations of nepotism have been leveled against the current Buhari administration in Nigeria. See John Alechenu, 'Nepotism in Buhari's Government, the Worst in Nigeria's History- Junaid Mohammed' *Punch* (23 July 2016) <<http://punchng.com/nepotism-buharis-govt-worst-nigerias-history-junaid-mohammed/>> (accessed 18/5/2017); See also Julius O. Ihonvbere, (note 79 supra) p.200.

⁹³ Ben Nwabueze, (note 76 supra) p.21.

cause of bitter inter-ethnic rivalry marked by political assassinations, campaigns of ethnic hatred, electoral malpractices, bribery and corruption. Competition for the highest offices in the country is often considered a matter of life and death among the country's ethnic groups and among politicians. Indeed, a former President of Nigeria once declared that winning an election was, for him, his ethnic group, and his political party, "a do or die affair."⁹⁴

Prof Claude Ake captured this point impeccably when he wrote that interactions among the ethnic groups in Nigeria are "essentially relations of raw power in which right tends to be co-existent with power and security depends on the control of power. The struggle for power... is everything and is pursued by every means."⁹⁵

Writing in the same vein, another scholar declares that "Nigerian politics is largely a struggle for the privatization of the State to the benefit of personal or sectional interests. Since election outcomes in Nigeria greatly determine access to power and to the enormous resources controlled by the state (*in this case the central government*), electoral contests often extend beyond the electoral space and are conducted in ways that undermine the rule of law. In this way, elections are inevitably akin to war, and therefore, prone to manipulation and violence."⁹⁶

The import of the foregoing is that in Nigeria, the idea that centralization fosters unity is not supported by the available evidence. Instead, centralization has been a source of division and rancour, driving wedges between ethnic groups and threatening the corporate existence of the country. Rather than establish unity and stability, centralization in Nigeria has accentuated age-long ethnic differences and has pitched ethnic groups against each other as they compete for the power and wealth concentrated in the central government.

⁹⁴ Kolawole Larewaju, 'Nigeria: Obasanjo Explodes- April Polls Do or Die Affair for PDP' *AllAfrica* (February 11 2007) <<http://allafrica.com/stories/200702110015.html>> (accessed 15/02/2017).

⁹⁵ Claude Ake, quoted in Karl Maier (note 50 supra) p. xv.

⁹⁶ Nwachukwu Orji, 'Nigeria's 2015 Election in Perspective,' <https://www.researchgate.net/publication/270162171_Nigeria's_2015_Election_in_Perspective> (accessed 15/2/2017). (italics mine).

4.3.3. Impediment to Effective and Efficient Local Governance

Apart from its tendency to foster disunity and unhealthy competition for power, centralization also carries with it the tendency to impede or constrain effective and efficient provision of public goods and services at the sub-national levels of government. For instance, states and local governments are more likely to be better informed about the needs of their constituents, and are thus in the best position to devise suitable policies to meet these needs.⁹⁷ Federal dominance in policy making, as a result of the centralized allocation of powers and financial resources in the constitution, may hamper the efficient and effective provision of some public goods and services in local communities, since federal policy makers may not be sufficiently familiar with the exact needs of particular local communities.⁹⁸ It may thus not be uncommon to see local communities that are having to grapple with federal programs, policies or projects that are ineffective, inefficiently executed, or completely out of sync with local aspirations.

A typical example of this in Nigeria is the centralized provision of security and policing functions throughout the country. Under the constitution, the federal government is assigned the power to exclusively legislate and provide police services in every part of the country.⁹⁹ Policing in the local communities is a service that may be better provided by the state or local governments who know the security issues and needs of their constituents better than a federal government whose seat is in the federal capital territory. The high level of insecurity in Nigeria may not be unconnected with this illogical and impolitic centralization of police services.

⁹⁷ Wallace E. Oates, "An Essay on Fiscal Federalism", *Journal of Economic Literature* (1999) 37(3) p. 1123. See also Robin Boadway and Anwar Shah, *Fiscal Federalism- Principles and Practice of Multi-order Governance*, (Cambridge University Press, 2009) p.69; Ben Lockwood, 'The Political Economy of Decentralization,' in Ehtisham Ahmad and Giorgio Brosio, *Handbook of Fiscal Federalism* (Edward Elgar, 2006) p.33; Pranab Bardhan, 'Decentralization and Development' in Ehtisham Ahmad and Giorgio Brosio, *Handbook of Fiscal Federalism*, (Edward Elgar, 2006) pp.206-207.

⁹⁸ Wallace E. Oates, *Ibid*.

⁹⁹ See Item 45 on the Exclusive legislative List in Part I of the Second Schedule to the 1999 constitution.

4.3.4. Impediment to Local Initiative and Creativity

As already shown in this chapter, the existing federal arrangement in Nigeria is characterized by centralization of public services and a high dependence on fiscal transfers from the federal government to the state and local governments.¹⁰⁰ But from all indications, federal fiscal transfers are often grossly inadequate to enable states and local governments perform their constitutional obligations.¹⁰¹ Many state governments have complained that fiscal transfers from the federal government are barely sufficient to pay salaries of state workers, talk less of funding infrastructure development and social service delivery.¹⁰² As a result, they are unable to fulfill their constitutional obligations to their constituents. Many of them constantly struggle to keep up with salary commitments.¹⁰³

Centralization of public services and fiscal resources has created a culture of “fiscal laziness” among the state and local governments and has tended to discourage creativity in regional policy making and revenue generation, since all states and local governments are guaranteed some fiscal transfers from the federal government every month.¹⁰⁴ The federal government in turn generates the bulk of its revenue from the sale of crude oil in

¹⁰⁰ Fiscal transfers from the federal government account for about 80 percent of revenues in many states of the federation. See ‘Nigeria Governor’s Forum : Internally Generated Revenue of Nigerian States- Trends, Challenges and Option October 2015’ <<http://www.nggovernorsforum.org/phocadownload/Reports/Scoping%20Study%20on%20Internally%20Generated%20Revenue%20of%20Nigerian%20States%20Trends%20Challenges%20and%20Options.pdf>> (accessed 6/7/2017).

¹⁰¹ Dayo Johnson, ‘Mimiko Seeks Review of Revenue Allocation Formula, *Vanguard* (26 April 2016) <<http://www.vanguardngr.com/2016/04/mimiko-seeks-review-revenue-allocation-formula/>> (accessed 09/11/2016); Omoh Gabriel, ‘18 States Cant Pay Workers Salaries’ *Vanguard* (15 June 2015) <<http://www.vanguardngr.com/2015/06/18-states-bankrupt-cant-pay-workers-salaries/>> (accessed 09/11/2016); Sani Tukur, ‘Buhari Meets Nigerian Governors Today, Bailout for States on the Cards’ *Premium Times* (23 June 2015) <<http://www.premiumtimesng.com/news/headlines/185540-buhari-meets-nigerian-governors-today-bailout-for-states-on-the-card.html>> (accessed 10/12/2016).

¹⁰² Gbenga Olarinoye, ‘There is no Money to Rely on From Federal Allocation- Aregbesola’ *Vanguard* (29 November 2015) <<http://www.vanguardngr.com/2015/11/there-is-no-money-to-rely-on-from-federal-allocation-aregbesola/>> (accessed 10/12/2016). See also Akinwunmi Taylor, ‘Ogun State Federal Allocation Has Dropped by 60%- Amosun’ *Today* (18 November 2015) <<https://www.today.ng/news/nigeria/39621/ogun-states-federal-allocation-has-dropped-by-60-amosun>> (accessed 10/12/2016).

¹⁰³ Victor Ahiuma Young, ‘Bleak May Day: 26 States’ Workers Owed Salaries’ *Vanguard* (1 May 2016) <<http://www.vanguardngr.com/2016/05/bleak-may-day-26-states-workers-owed-salaries/>> (accessed 09/11/2016).

¹⁰⁴ A non-centralized federal system on the other hand may encourage experimentation and creativity in the areas of local policy making and revenue generation. See Wallace E. Oates, (note 93 supra) p.1132.

the Niger Delta. Thus, the entire country depends on the oil in the Niger Delta, when, in fact, each state of the federation can potentially generate substantial revenue for itself from responsible taxation, agriculture, and the exploitation of its own mineral resources. Table 3 below shows that every state in Nigeria is naturally endowed with one mineral resource or the other from which it can potentially raise substantial revenue to finance development projects and provide public goods and services within its territory.

4.3.5. Impediment to Local Accountability and Fiscal Prudence.

Apart from the deleterious effect that centralization might have on local policy and fiscal creativity, centralization could also constitute a disincentive to local accountability. In a political milieu where the constitution assigns to the federal government practically all the significant powers and fiscal resources of the federation, and the state and local governments depend on, and are guaranteed, regular fiscal transfers from the federal government, there may be no incentive for local political leaders to be politically and financially accountable to their constituents. In essence, federal dominance of the political and fiscal spheres may dis-incentivize political and financial accountability at the state and local levels of government. Non performing local leaders may blame their own irresponsible or abysmal performance in office on federal incompetence or insufficient fiscal transfers from the federal government.

And since the states and local governments know that they are guaranteed some form of fiscal subvention from the federal government every month, the incentive for prudent and responsible spending is removed. This can result in embezzlement of public funds or wasteful and indulgent expenditure. Such wasteful spending of scarce financial resources and criminal embezzlement of public funds have, in fact, been commonplace under the current political dispensation in Nigeria.¹⁰⁵ Since they are not responsible for generating the revenue that they expend, many state governors and local government chairmen have had no trouble engaging in profligate spending and embezzlement of funds meant for financing projects in their constituencies.

¹⁰⁵ Charles Kumolu, 'Revealed: How State Governments Waste Money ' *Vanguard* (28 January 2017) <http://www.vanguardngr.com/2017/01/revealed-state-governments-waste-money/> (accessed 6/7/2017). See also Nozi Okonjo Iweala, *Reforming the Unreformable- Lessons from Nigeria* (London: MIT Press, 2012) pp 81-82.

4.3.6. Arbitrariness in the exercise of Federal Powers.

Centralization of powers and resources also tends to facilitate arbitrariness in the exercise of the powers of the federal government. For instance, in a political environment like Nigeria where a state or local government's access to federal patronage is often dependent on the State Governor or Local Government Chairman's membership of the federal ruling party, states or local governments controlled by opposition parties may encounter significant obstacles in their bid to secure the provision of centrally administered public goods or financial resources for their constituents.

Two areas in which this sort of federal arbitrariness is often manifest in Nigeria are in the disbursement of federal grants in aid, and in the exercise of the borrowing powers of the federation. It is well known that two alternative sources of funding for the states are public loans, and federal grants-in-aid. But these may often be inaccessible to state and local governments controlled by opposition political parties because access to these financial instruments is tightly and centrally controlled by the federal government. Constitutionally, the disbursement of federal grants-in-aid to sub-national governments is at the federal government's discretion,¹⁰⁶ a condition that renders the administration of the grants prone to the vagaries of politics. The implication of this is that state and local governments controlled by opposition political parties may be unable to secure fair access to the grants.

Similarly, state governments that are constantly critical of policies of the federal government, and are thus perceived to be political 'enemies' of the federal government, may also be arbitrarily denied the grants for political reasons. In fact, the federal government has, on a number of occasions, deliberately denied states controlled by opposition political parties of revenues that are even rightfully and legally theirs.¹⁰⁷ If the

¹⁰⁶ Section 164(1), 1999 constitution.

¹⁰⁷ Rotimi Ojomoyela 'Fayose Accuses FG of Withholding Ekiti Allocation' *Vanguard* (15 February 2017) <http://www.vanguardngr.com/2017/02/fayose-accuses-fg-withholding-ekiti-allocation/> (accessed 16/2/2017). Also In 2004, the federal government unilaterally withheld statutory financial allocations belonging to local government councils in Lagos state. This was later declared unconstitutional by the Supreme Court of Nigeria. See *Attorney General of Lagos State v. Attorney General of the Federation* S.C.70/2004.

federal government could do this in respect of funds that legally belong to the states, it is certainly capable of doing worse in respect of funds that are disbursed at its discretion.

A recent instance of discriminatory disbursement of federal grants was the exclusive allocation of ecological funds for the maintenance of the environment to states controlled by the ruling party while opposition or “unfriendly” states “got nothing.”¹⁰⁸ According to the Governor of Kaduna State who subsequently chaired the committee that investigated the disbursements of the funds “...what President Jonathan did was to take N2bn each from the Ecological Fund and gave to some PDP states. Any PDP state that was not his friend...didn’t get. And all the..opposition parties (*states*)...got nothing.”¹⁰⁹

In the same vein, exclusive federal control of the borrowing powers of the entire federation implies that states cannot access bank loans for major capital projects or the provision of public services without the approval of the federal government. As in the case of federal grants-in-aid, the ability of states to access loans may be adversely affected by politics. The potential impact of an abuse of exclusive federal control of borrowing powers is captured in statements credited to the Governors of Lagos and River States as recently as March 2015 and December 2013 respectively. According to the Lagos Governor;

“Today the Honourable (*federal*) Minister for finance...has stopped Nigerian banks from funding state governments..., as if the needs of the people for roads, healthcare, drugs, education and security has stopped. She has insisted that in spite of individual appraisals of each bank by their credit committees, all state request for funding by banks must be approved by her Ministry. To the best of my knowledge, she has not granted any of the requests submitted to her for approval.....”¹¹⁰

The Rivers State Governor was even more direct. While lamenting the inability of his State to access a World Bank loan for the provision of portable water for the people of

¹⁰⁸ Olalekan Adetayo and Olaleye Aluko ‘NEC Accuses Jonathan of Sharing Ecological Funds to PDP States’ *Punch* (26 May 2017) <http://punchng.com/nec-accuses-jonathan-of-sharing-ecological-fund-to-pdp-states/> (accessed 26/5/2017).

¹⁰⁹ Ibid.

¹¹⁰ Ben Ezeamalu, ‘Okonjo-Iweala blocks banks from funding states- Fashola’ *Premium Times* (March 18 2015) <http://www.premiumtimesng.com/regional/ssouth-west/178664-okonjo-iweala-blocks-banks-from-funding-states-fashola.html> (accessed 18/5/2017).

the State as a result of an alleged refusal by the federal minister of finance to approve the loan, the Governor declared in frustration that;

“the (federal) Minister of finance.....is using her position to undermine the safety and health of the people of Rivers State.....The people who are dying and deprived of the potable drinking water are Rivers people who don't have water in their homes....But the (federal) Minister of finance has refused to release (*approve*) it (*the loan*). They want Rivers people to die.”¹¹¹

It is instructive to note that the two Governors quoted above were opposition Governors at the time of making these statements. The foregoing shows that excessive centralization, the type that exists in Nigeria, may facilitate the arbitrary exercise and abuse of power, and undermine the effective and efficient delivery of local public goods and services. And this may adversely affect the quality of life available to citizens in the states and localities.

4.3.7. Susceptibility of Centralization to Fraud, Opacity and Manipulation

A further problem with Nigeria's centralized power distribution architecture is its susceptibility to fraud and mismanagement. In Nigeria, the federal government has been known to make arbitrary and illegal withdrawals from the Federation Account which is jointly owned by the federal and state governments without consulting with the states. For instance, in 2008, it was discovered that Nigeria's Federal Ministry of Finance had unilaterally diverted excess profits made from the sale of crude oil into a special account unilaterally created by the federal government without any consultation with the state governments. The federal government had then proceeded to make unilateral withdrawals from this special account (called Excess Crude Account (ECA)).¹¹²

Further unilateral withdrawals were subsequently made from this account, ostensibly to fund projects initiated by the federal government. A suit filed at the Supreme Court by

¹¹¹ The Punch Newspaper, Nigeria, 'Amaechi wants Okonjo-Iweala probed over Rivers' Loans,' *Punch* (3 December 2013). (parenthesis mine). <www.punchng.com/news/amaechi-wants-okonjo-iweala-probed-over-rivers-loans/> (accessed 7/7/2015).

¹¹²Daily Post Staff, 'States Await Supreme Court on Excess Crude, Federation Account Suit' *Daily Post* (29 November 2011)<<http://dailypost.ng/2011/11/29/states-await-s%E2%80%99court-on-excess-crude-federation-accounts-suit/>> (accessed 11/11/2016).

the 36 States of the federation against the central government in 2008 challenging the constitutionality of the ECA and the unilateral diversion of revenues into it by the central government has suffered several setbacks at the court for political reasons and is yet to be decided.¹¹³

The setting up of the ECA and the diversion of revenues into it by the federal government without the consent of the state and local governments is clearly unconstitutional. Section 162(1) of the 1999 constitution is very clear on the compulsoriness of depositing all revenues of the federation in the Federation Account which belongs to the entire federation. According to that section of the constitution “the Federation shall maintain a special account to be called “the Federation Account” into which shall be paid all revenues collected by the government of the Federation...”¹¹⁴ “All revenues” in this context certainly includes surplus revenues made from crude oil sales by the federation. As a result, such revenues should, as a matter of law, be paid into the Federation Account and subsequently shared among the levels of government.

The Excess Crude Account and all such extra-constitutional fiscal arrangements are unknown to the Nigerian constitution and thus clearly illegal. Even if an account like the ECA must be set up, an amendment of section 162(1) of the 1999 constitution will have to be effected with the consent of the state and local governments of the federation. And the management of such an account will have to be the joint responsibility of the federal, state and local governments. This is what is expected under a federal system of government.

The arbitrariness of the federal government in relation to the ECA, as described above, further raises serious questions about the tenability and suitability of Nigeria’s centralized political and fiscal structure as an appropriate governance arrangement for the country. It raises questions about the compatibility of the country’s centralized political and fiscal arrangements with the federal system of government.

¹¹³ Tobi Soniyi, ‘No End in Sight to Resolving Dispute Over ECA as S’Court Adjourns Suit to October 18’ *Thisday* (9 March 2016) < <http://www.thisdaylive.com/index.php/2016/03/09/no-end-in-sight-to-resolving-dispute-over-eca-as-scourt-adjourns-suit-to-oct-18/>> (accessed 11/11/2016).

¹¹⁴ See Section 162(1) 1999 constitution.

The susceptibility of Nigeria's centralized political and fiscal system to manipulation and fraud is further underscored by recent revelations regarding massive looting and misappropriation of funds belonging to the entire federation by operatives of the federal government.¹¹⁵ As these revelations show, the country's centralized political structure has, for several years, aided corruption and graft at the federal level to the detriment of the sub-national governments and their constituents.

Thus, as the discussion in the last few paragraphs reveals, there are significant problems associated with the adoption of a centralized 'federal' system in Nigeria. Many of these problems have negative implications for the country's democracy as well as its survival as a corporate entity. A ruling political party controlling all the levers of political and fiscal power at the centre can conveniently utilize this advantage to harass, victimize and muzzle opposition political parties and opposition states, as shown above.

In particular, the federal (central) government can use its enormous political and fiscal powers to arbitrarily dispense patronage to those states and ethnic groups that support its policies to the detriment of those that are openly in opposition. Important social amenities can be deliberately withheld from those states and ethnic groups considered 'hostile' to the federal government.

The concentration of political and fiscal powers in the federal government has, for several decades, fostered a culture of reckless struggle for power among the country's ethnic groups, with each group battling to 'capture' power at the centre. Politics is perceived as a 'war' to be won, a 'do or die affair.' Those who lose out in this 'war' often threaten to secede from the federation. In many cases, these are the minority ethnic groups located in some states of the federation. They often lack the numerical and political strength to

¹¹⁵ See for instance ongoing revelations regarding the dubious withdrawals of huge sums of money running into billions of Naira from the Central Bank of Nigeria by top operatives of the federal government and the diversion of these monies into private accounts of these operatives. Soni Daniel et al, 'Arms Probe: Dasuki Faces 47 Count Charge in 3 Courts' *Vanguard* (16 December 2015) <<http://www.vanguardngr.com/2015/12/arms-probe-dasuki-faces-47-count-charges-in-3-courts/>> (accessed 11/11/2016); Michael Eboh, 'NEITI Audit Reports: NNPC's Many Sins' *Vanguard* (18 June 2016) <<http://www.vanguardngr.com/2016/06/neiti-audit-reports-nnpcs-many-sins/>> (accessed 11/11/2016); Toni Orilade and Aisha Gambari, 'Unbelievable!!! EFCC Traces N47.2 Billion, \$487.5 Million to Ex-Minister Diezani Alison-Madueke' *Premium Times* (8 August 2017) <http://www.premiumtimesng.com/news/headlines/239620-unbelievable-efcc-traces-n47-2billion-487-5million-ex-minister-diezani-alison-madueke.html> (accessed 14/8/2017).

'capture' power at the centre. Thus frustrated with a 'federal' system that seems structured to ensure their perpetual marginalization, they resort to violent secessionist struggles and other forms of ethnic conflicts.

The import of the discussion thus far is that centralization of powers in Nigeria has created a problematic federal system that stifles democratic governance, establishes the dictatorship of the federal government, entrenches inefficiency, kills local creativity, encourages opacity and corruption, promotes arbitrariness, and threatens the very existence of the federation itself. The problems associated with centralization calls for a dismantling of the existing hegemonic 'federal' system and its replacement with a more democratic, sensitive, responsive and inclusive federal arrangement.

In short, there is an urgent need to restructure the division of powers among the levels of government in Nigeria. But what should be the nature of this restructuring? How should it be done? And what should it entail? These and other issues form the subject matter of chapter five.

Conclusion

In this chapter, I discussed the highly centralized division of powers and fiscal resources entrenched in the 1999 constitution of Nigeria as well as the supposed justification for this arrangement. As discussed in the chapter, the constitution establishes a federal system that is abnormally characterized by a high degree of centralization. This centralization manifests itself in two principal ways. The first is the manner in which the division of powers among the levels of government, as entrenched in the 1999 constitution, was conceived, framed, adopted and promulgated. This directly implicates the framing, adoption and promulgation of the 1999 constitution of Nigeria itself.

As discussed above, the 1999 constitution was exclusively conceived, exclusively framed, exclusively adopted and exclusively promulgated by military fiat. The people of Nigeria were neither consulted nor involved in the making of the constitution. As such, the constitution lacks the legitimacy required to command loyalty to and support for it. It is not an original act of the people, as expected of a constitution. Thus, everything contained in the constitution, including the division of powers and fiscal resources

entrenched in it, cannot be said to genuinely reflect the will of the Nigerian people as jointly and solemnly agreed by them. In short, the 1999 constitution and the power distribution arrangement set out in it cannot be regarded as an expression of the people's covenant.

The second marker of centralization in the 1999 constitution is the centripetal concentration of powers and fiscal resources in the federal government despite the ethnically diverse character of the Nigerian federation and the age-long clamour for autonomy by the constituent units. So centralized is the division of powers and resources in the constitution that matters that are of local interest and which ordinarily ought to be within the executive and legislative competence of the state and local governments are assigned to the federal government. In addition, the constitution allows the federal government to pre-empt or override the state governments in the exercise of powers that are within the concurrent jurisdiction of both levels of government.

The centralist character of the 1999 constitution is further evident in the unilateralism that characterizes the operation of the fiscal system established by it. The constitution assigns to the federal government wide powers and discretion in the management of the fiscal system to the exclusion of the state governments. Yet, policy decisions in relation to the fiscal system often have significant implications for the lower levels of government. An instance of such unilateralism is seen in the constitution's grant of discretionary power to the President of the federation to unilaterally appoint members of the country's Fiscal Commission (RMAFC), and the absence of a constitutional provision mandating the Fiscal Commission to consult widely before taking important policy decisions that have significant implications throughout the federation.

A major argument often adduced in support of Nigeria's centralized "federal" arrangement is the need to preserve the country's unity and stability. As shown in the chapter however, centralization has in fact done more to engender disunity and instability in the country. The concentration of powers and fiscal resources in the federal government has only served to intensify the unhealthy scramble for the control of the federal government. The result is a bitter and acrimonious rivalry among the ethnic groups, as each struggles to secure its own share of the "national cake." The struggle for

power is often characterized by political assassinations, political marginalization, inter-ethnic conflicts, and bare-faced criminal activities, and secessionist threats. Such is the degree of instability brought on by a rigid adherence to centralization under the 1999 constitution.

Apart from the instability it fosters however, other arguments against centralization of powers and resources discussed in this chapter include centralization's tendency to undermine local autonomy, the tendency of centralization to foster arbitrariness in the exercise of federal powers, the tendency of centralization to impede efficient local governance and local creativity, the tendency of centralization to serve as a disincentive to local accountability, and its tendency to foster fraud, inefficiency, manipulation and opacity in the exercise of federal powers. All of these make centralization unsuitable for an ethnically diverse federation like Nigeria.

In summary, the central argument advanced in this chapter is that the division of powers entrenched in the 1999 constitution is undemocratically centralized, highly defective and grossly inefficient. This division of powers is completely antithetical to the idea of federalism. It facilitates the hegemony and dictatorship of the federal government and the simultaneous marginalization and subjugation of the sub-national governments. And, for an ethnically diverse society, the existing framework for the division of powers is unsuitable and untenable. The challenge, therefore, is to restructure the constitutional division of powers in Nigeria, replacing the existing arrangement with one that truly conduces to the goal of 'unity in diversity'. How should this restructuring be done? What should be the nature of the new power distribution arrangement? What values should hallmark the new arrangement? Theorizing this alternative federal framework forms the subject matter of chapter five.

TABLES**Table 1: Exclusive and Concurrent Legislative Lists as set out in the 1999 constitution of Nigeria.**

Exclusive Legislative List	Concurrent Legislative List
(1) Accounts of the Government of the Federation, and of offices, courts, and authorities thereof, including audit of those accounts	Antiquities and monuments
(2) Arms, ammunition and explosives	Archives and Public records
(3) Aviation, including airports, safety of aircraft and carriage of passengers and goods by air	Electricity and electric power stations
(4) Awards of national titles of honour, decorations and other dignities	Censorship of cinematographic films
(5) Bankruptcy and insolvency	Scientific or technological research
(6) Banks, banking, bills of exchange and promissory notes	Statistics
(7) Borrowing of monies within or outside Nigeria for the purposes of the Federation or of any State.	Trigonometrical , cadastral and topographical surveys
(8) Census, including the establishment and maintenance of machinery for continuous and universal registration of births and deaths throughout Nigeria. maintenance of machinery for continuous and universal registration of births and deaths throughout Nigeria	University education, post-primary education, primary, technological education and professional education
(9) Citizenship, naturalisation and aliens	
(10) Commercial and Industrial monopolies, combines, and trusts	
(11) Construction, alteration and maintenance of such roads as may be declared by the National Assembly to be Federal trunk roads	
(12) Control of capital issues	

(13) Copyright	
(14) Creation of States	
(15) Currency, coinage and legal tender	
(16) Customs and excise duties	
(17) Defence	
(18) Deportation of persons who are not citizens of Nigeria	
(19) Designation of securities in which trust funds may be invested	
(20) Diplomatic, consular and trade representation	
(21) Drugs and poisons	
(22) Election to the offices of President and Vice- President or Governor and Deputy Governor and any other office to which a person may be elected under this constitution, excluding election to a local government council or any office in such council	
(23) Evidence	
(24) Exchange control; Export duties	
(25) External affairs	
(26) Extradition	
(27) Fingerprints identification and criminal records	
(28) Fishing and fisheries other than fishing and fisheries in rivers, lakes, waterways, ponds and other inland waters within Nigeria	
(29) Immigration into and emigration from Nigeria	
(30) Implementation of treaties relating to matters on this list	

(31) Incorporation, regulation and winding up of bodies corporate, other than co-operative societies, local government councils and bodies corporate established directly by any law enacted by a House of Assembly of a State; Insurance; Labour, including trade	
(32) Insurance	
(33) Labour, including trade unions, industrial relations, conditions, safety and welfare of labour	
(34) Industrial disputes	
(35) Prescribing a national minimum wage for the federation or any part thereof. and industrial arbitration	
(36) Legal proceedings between Governments of States or between the Government of the Federation and Government of any State or any other authority or person	
(37) Maritime shipping and navigation	
(38) Meteorology	
(39) Military (Army, Navy and Air Force, including any other branch of the armed forces of the Federation)	
(40) Mines and minerals, including oil fields, oil mining, geological surveys and natural gas.	
(41) National parks being such areas in a State as may, with the consent of the Government of that State, be designated by the National Assembly as national parks	
(42) Nuclear energy	
(43) Passports and visas	
(44) Patents, trade-marks, trade or business names, industrial designs and merchandise Marks.	
(45) Pensions, gratuities and other like benefit payable out of the Consolidated Revenue Fund or any other public funds of the Federation	

(46)Police and other government security services established by law	
(47)Posts, telegraphs and telephones	
(48)Powers of the National Assembly, and the privileges and immunities of its members	
(49)Prisons	
(50) Professional occupations as may be designated by the National Assembly;	
(51)Public debt of the Federation; Public holidays; Public Relations of the Federation	
(52) Public service of the Federation including the settlement of disputes between the Federation and officers of such service; quarantine; Railways; Regulation of political parties	
(53) Service and execution in a State of the civil and criminal processes, judgements, decrees, orders and other decisions of any court of law outside Nigeria or any court of law in Nigeria	
(54)Stamp duties;	
(55)Taxation of incomes, profits and capital gains, except as otherwise prescribed by this constitution	

<p>(56) The establishment and regulation of authorities for the federation or any part thereof (a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution, (b) to identify, collect, preserve or generally look after ancient and historical monuments and records and archaeological sites and remains declared by the National Assembly to be of national significance or national importance, (c) to administer museums and libraries other than museums (e) to prescribe minimum standards of education at all levels and libraries established by the Government of a State, (d) to regulate tourist traffic, and (e) to prescribe minimum standards of education at all levels.</p>	
<p>(57) The formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto</p>	
<p>(58) Trade and commerce, and in particular (a) trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, (b) establishment of a purchasing authority with power to acquire for export or sale in world markets such agricultural produce as may be designated by the National Assembly, (c) inspection of produce to be exported from Nigeria and the enforcement of grades and standards of quality in respect of produce so inspected, (d) establishment of a body to prescribe and enforce standards of goods and commodities offered for sale, (e) control of the prices of goods and commodities designated by the National Assembly as essential goods or commodities, and (f) registration of business names</p>	

(59)Traffic on Federal trunk roads	
(60)Water from such sources as may be declared by the National Assembly to be sources affecting more than one state	
(61)Weights and measures	
(62) Wireless broadcasting and television other than broadcasting and television provided by the Government of a State, allocation of wavelength for wireless, broadcasting and television transmission	
(63)Any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of the constitution	
(64) Any matter incidental or supplementary to any matter mentioned elsewhere in this list.	

Source: Parts I and II, Second Schedule 1999 constitution

Table 2

Functions of Local Governments

- (a) The consideration and the making of recommendations to the state commission on economic planning or any similar body.
- (b) Collection of rates, radio and television licenses.
- (c) Establishment and maintenance of cemeteries, burial grounds and homes for the destitute or infirm.
- (d) Licensing of bicycles, trucks, canoes, wheel barrows and carts.
- (e) Establishment, maintenance and regulation of slaughter houses, slaughter slabs, markets, motor parks and public conveniences.

- (f) Construction and maintenance of roads, streets, street lightings, drains and other public highways, parks, gardens, open spaces, or such public facilities as may be prescribed from time to time by the House of Assembly of a state.
- (g) Naming of roads and streets and numbering of houses.
- (h) Provision and maintenance of public conveniences, sewage and refuse disposal.
- (i) Registration of all births, deaths and marriages.
- (j) Assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a state.
- (k) Control and regulation of outdoor advertising and hoarding; movement and keeping of pets of all description; shops and kiosks; restaurants, bakeries and other places for sale of food to the public; laundries; licensing, regulation and control of the sale of liquor.
- (l) Participation in the government of a state as respects (i) the provision and maintenance of primary, adult and vocational education; (ii) the development of agriculture (iii) the provision and maintenance of health services (iv) such other functions as may be conferred on a local government council by the House of Assembly of the state.

Source: Fourth Schedule, 1999 constitution.

Table 3. States and their Mineral/Natural Resources.

S/N	State	Mineral/Natural Resources
1	Abia	Gold, Lead/Zinc, Limestone, Oil/Gas, Salt
2	Abuja	Cassiterite, Clay, Dolomite, Gold, Lead/Zinc, Marble
3	Adamawa	Bentonite, Gypsum, Kaolin & Magnesite
4	Akwaibom	Clay, Lead/Zinc, Lignite, Limestone, Oil/Gas, Salt,
5	Anambra	Clay, Glass-sand, Gypsum, Iron-ore, Lead/Zinc, Lignite, Limestone, Phosphate/Salt
6	Bauchi	Gold, Cassiterite (tin-ore), Columbite, Gypsum, Wolfram, Coal, Limestone, Lignite, Iron-ore, Clay
7	Bayelsa	Clay, Gypsum, Lead/Zinc, Lignite, Limestone, Manganese, Oil/Gas, Uranium
8.	Benue	Barite, Clay, Coal, Gemstone, Gypsum, Iron-ore, Lead/Zinc, Limestone, Marble & Salt
9	Borno	Bentonite, Clay, Diatomite, Gypsum, Kaolin,
10	Cross-river	Barite, Lead/Zinc, Lignite, Limestone, Manganese, Oil/Gas, Salt, Uranium
11	Delta	Clay, Glass sand, Iron-ore, Kaolin, Lignite, Marble, Oil & Gas
12	Ebonyi	Gold, Lead/Zinc, Salt
13	Edo	Bitumen, Clay, Dolomite, Phosphate, Glass-sand, Gold, Gypsum, Iron-ore, Lignite, Limestone, Marble,
14	Ekiti	Feldspar, Granite, Kaolin, Syenite, Tatum
15	Enugu	Cold, Lead/Zinc, Limestone
16	Gombe	Gemstone and Gypsum
17	Imo	Gypsum, Lead/Zinc, Lignite, Limestone, Marcasite, Oil/Gas, Phosphate, Slat
18	Jigawa	Butyles

19	Kaduna	Amethyst, Aqua Marine, Asbestos, Clay, Flosper, Gemstone, Gold, Graphite, Kaolin, Hyanite, Mica, Rock, Crystal, Ruby, Sapphire, Sihnite, Superntinite, Tentalime, Topaz, Tourmaline
20	Kano	Gassiterite, Copper, Gemstone, Glass-sand, Lead-Zinc, Pyrochinre, Tantalite
21	Katsina	Kaolin, Marble and Salt
22	Kebbi	Gold
23	Kogi	Cole, Dolomite, Feldspar, Gypsum, Iron-Ore, Kaolin, Marble, Talc & Tantalite
24	Kwara	Cassiterite, Columbite, Feldspar, Gold, Iron-Ore, Marble, Mica, Tantalite
25	Lagos	Bitumen, Clay, Glass sand, Oil/Gas
26	Nasarawa	Amethyst, Barytex, Barite, Cassiterite, Chalcopyrite, Clay, Columbite, Coal, Dolomite/Marble, Feldspar, Galena, Iron-Ore, Limestone, Mica, Salt, Sapphire, Talc, Tantalite, Tourmaline, uartz, Zireon
27	Niger	Gold, Lead/zinc, Talc
28	Ogun	Bitumen, Clay, Feldspar, Gemstone, Kaoline, Limestone, & Phosphate
29	Ondo	Bitumen, Clay, Coal, Dimension stones, Feldspar, Gemstone, Glass sand, Granite, Gypsum, Kaolin, Limestone, Oil/Gas
30	Osun	Columbite, Gold, Granite, Talc, Tantalite, Tourmaline
31	Oyo	Aqua Marine, Cassiterite, Clay, Dolomite, Gemstone, Gold, Kaolin, Marble, Silimonite, Talc, Tantalite
32	Plateau	Barite, Bauxite, Betonite, Bismuth, Cassiterite, Clay, Coal, Emeral, Fluoride, Gemstone, Granite, Iron-ore, Kaolin, Lead/Zinc, Marble, Molybdenite, Phrochlor, Salt, Tantalite, Columbite, Tin, Wolfram
33	Rivers	Clay, Glass-sand, Lignite, Marble, Oil & Gas.
34	Sokoto	Clay, Flakes, Gold, Granite, Gypsum, Kaolin, Laterite, Limestone, Phosphate, Potash, Silica, Sand & Salt

35	Taraba	Lead/Zinc
36	Yobe	Soda Ash, Tintomite
37	Zamfara	Coal, Cotton and Gold

Source: Federal Ministry of Youth Development, Nigeria¹¹⁶

¹¹⁶ Federal Ministry of Youth Development <<http://www.youthdevelopment.gov.ng/index.php/nigeria/2013-12-19-03-40-31/natural-resources>> (accessed 29/4/2017).

CHAPTER FIVE

A SYMBIO-DEMOCRATIC FEDERAL FRAMEWORK

INTRODUCTION

The division of powers and fiscal resources in the 1999 constitution is overwhelmingly and inordinately centralized. It fosters the federal government's dominance of the political space and severely constrains the participation of the state and local governments in meaningful public governance. The highly centripetal character of this power distribution arrangement is antithetical to the idea of federalism and grossly ill-suited for a multi-ethnic federation of diverse peoples with varied interests, needs, cultures and political orientation. It stifles democratic participation, fosters opacity and corruption, constrains local experimentation, inhibits healthy regional competition, and negatively impacts regional development. As discussed in chapter four, this dysfunctional division of powers and fiscal resources has continued to fuel strident agitations for change across Nigeria. No doubt, the time has come for a fundamental review of the existing constitutional framework for division of powers and resources in Nigeria.

In this chapter, I identify and argue for alternative approaches to problems associated with the existing constitutional framework for the division of powers and resources in Nigeria. The alternative approaches proposed in this chapter are inspired by the recognition that existing approaches, as set out in the 1999 constitution of Nigeria and discussed in chapter 4, are predicated on a fundamentally flawed conception of the federal system of government. My main aim in this chapter, therefore, is to fundamentally address the problems associated with the division of powers set out in the 1999 constitution by undertaking a theoretical reconstruction of Nigeria's federalism. In essence, in this chapter I will re-conceptualize federalism in Nigeria. As will be shown in the following paragraphs, for a multi-ethnic federal state like Nigeria, federalism is capable of accommodating a more liberal conceptualization shorn of the rigid conservatism that hallmarks existing approaches.

The discussion in this chapter is structured as follows. Section 5.1 briefly summarizes the problems inherent in the existing institutional framework, and sets the background for the discussions that follow in sections 5.2 and 5.3. In Section 5.2, I outline the symbio-democratic federal framework developed and proposed in this thesis as an alternative to the centralist ‘federal’ arrangement entrenched in the 1999 constitution of Nigeria. In Section 5.3, I set out and discuss specific proposals for constitutional reform based on this symbio-democratic federal framework.

5.1. The Problems of the Existing Power Distribution Arrangement Briefly Summarized.

A critical appraisal of the centralist approach to “federal” governance in Nigeria, as clearly depicted in the 1999 constitution, and discussed in chapter four, will immediately reveal an exclusionist thread running through this approach. As discussed in chapter four, this approach prioritizes the federal government’s monopoly of legislative and fiscal powers and seeks to foster and strengthen its dominance of the federal system. It aims at institutionalizing the hegemony of the federal government and facilitating the perpetual subjugation of the federation’s constituent units by significantly constraining their participation in governance. In short, this approach is reactionary and ill-suited to meet the exigencies of federal democratic governance in multi-ethnic Nigeria.

Apart from the unilateralism and exclusionism shown in the centralized formulation of the 1999 constitution, one other thing is evidently decipherable from our earlier discussion in chapter four, the allocation of powers and resources among the levels of government is overwhelmingly skewed in favour of the federal government, and insensitive to the democratic and developmental aspirations of the state and local governments. For instance, powers, which by nature and necessity should be within the legislative and executive jurisdiction of the state and local governments because of the direct significance of such powers for development and democratic participation in the

state and local governments, have been assigned to the federal government under the 1999 constitution.¹

According to a recent World Bank data, 52 percent of Nigerians live in the country's rural communities.² Many of these communities lack basic infrastructure. And most of them suffer from neglect.³ They feel the heat of under-development and bear the brunt of dysfunctional and misplaced policies occasioned by centralized as opposed to local development planning. They are adversely affected when state and local governments, which are closer to them and better informed about their local needs, are unable to provide suitable social services to them either because the power to provide such services have been constitutionally assigned to the federal government or the state and local governments are severely constrained as a result of limited financial resources available to them.

There is thus a compelling need for the state and local governments to exercise a greater stake in the federal system. As we saw in chapter four, the state and local governments wish to be allowed to exercise untrammelled control over their internal affairs. They wish to be involved in formulating and managing the basic fiscal policies of the federation since these policies significantly affect them and their communities. They also wish to have greater access to financial resources sufficient enough to support their constitutionally assigned functions. In short, they wish to be in a position to exercise control over their own destinies and those of their communities. Their inability to achieve these ends under the current federal arrangement is the direct cause of the seemingly intractable nationwide agitations for constitutional change and the violent conflicts that often attend such agitations.⁴

On the other hand, as evident in the underlining philosophy of the 1999 constitution, the military framers of this constitution apparently believed that a centralized political

¹ See Appendix, figure 1 in chapter 4.

² The World Bank, Rural Population (% of total Population, 2016) <<http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS>> (accessed 17/11/2016).

³ Nigeria's Renewal- Delivering Inclusive Growth in Africa's Largest Economy (2014 Report on Nigeria by the Mckinsey Global Institute) <<http://www.mckinsey.com/global-themes/middle-east-and-africa/nigerias-renewal-delivering-inclusive-growth>> pp 17-18; 33; 44-47 (accessed 17/11/2016).

⁴ I discussed all these in detail in chapter 4.

system, characterized by a centralist allocation of powers and fiscal resources, was the best way to keep Nigeria together as a single corporate entity. For proponents of this perspective, the unity and stability of the federation require a strong central government exercising maximum control over the political and fiscal system.

In chapter four, I argued that while unity in a multi-ethnic federation is desirable and indeed important, the conception of unity that informed the division of powers and fiscal resources set out in the 1999 constitution is fundamentally flawed. Unity in a multi-ethnic federation cannot be decreed into existence as the framers of the 1999 constitution apparently intended to do. Unity in an ethnically diverse federation can only materialize from a sustained process of political association that nevertheless recognizes diversity and difference.

The question that remains however is how to reconcile the two tendencies discussed above? How can we ensure that, as much as possible, federal political and fiscal arrangements in Nigeria bear the imprimatur of the Nigerian people, reflect their aspirations, and genuinely cater to their needs without upsetting or jeopardizing the country's unity, as well as its economic equilibrium and stability? How can we ensure that the national economy remains properly coordinated without stifling development in the constituent units of the federation? How can we guarantee national political and economic stability as well as satisfaction of regional aspirations without centralizing power or pandering to separatist tendencies? In short, how should Nigeria's federal political and fiscal architecture be structured to ensure the country's unity without discountenancing its diversity? These are the questions I propose to answer in this chapter.

5.2. A Symbio-democratic Theory of Federalism.

As discussed above, a major problem with the division of powers and fiscal resources entrenched in the 1999 constitution is its predication on a fundamentally flawed centralist conception of federalism. Apart from its view of the federal government as the dominant custodian and repository of power in the federation, this perspective of federalism pays scant attention to the need to significantly engage the federation's constituent units in the

governance of the federal system. As a multi-ethnic federation deeply characterized by diversity, this neglect remains a major source of conflict in Nigeria. It is a neglect that erroneously portrays federalism as a cloistered construct, disconnected and detached from its socio-political milieu.

My framework for addressing the problems associated with the division of powers and fiscal resources in the 1999 constitution of Nigeria is inspired by the above-mentioned neglect and deprivation. This framework is defined by three principal ideas. First, I will argue that the division of powers and fiscal resources in a multiethnic federation must, for its legitimacy, reflect the interests and wishes of the people. This implies that not only should the constitutional division of powers and fiscal resources bear the people's imprimatur, it must also genuinely reflect their aspirations.

A key aspect of this legitimacy is the predication of the federation's division of powers and fiscal resources on the will of the people. Constitutional division of powers and fiscal resources must reflect what the people have jointly covenanted. Democratic participation of the people in the determination of how powers and fiscal resources should be constitutionally distributed among the levels of government must be constitutionally guaranteed. In short, the agreement or covenant of the people on division of powers and fiscal resources should be a fundamental component of any federal construct.

Second, the division of powers and resources must be structured in a way that enables state and local governments of the federation to exercise significant control and autonomy over their internal affairs. The division of powers and fiscal resources must be structured in a way that takes government closer to the people, especially those in the localities and rural communities. This would, in the case of Nigeria, entail a constitutional reassignment of powers and a concomitant reallocation of fiscal resources in order to empower state and local governments to take on functions that directly impact their immediate communities. The arrangement leverages on the relative proximity of the state and local governments to the local communities, a factor which will enable local policies to truly reflect local needs, since states and local governments are better placed to identify, understand, and cater to local needs.

This arrangement is however without prejudice to the need for the federal government to, for instance, provide national public goods and services that cut across regional boundaries, or the possible need for synergy and cooperation between the levels of government to provide certain services for their constituents, or the possible need for richer governments in the federation to cooperatively assist in augmenting the finances of less endowed ones. Thus, while recognizing the need to assign more powers and autonomy to the state and local governments to enable them manage their internal affairs, this arrangement nevertheless allows the levels of government to team up to cooperatively provide beneficial services to each other in the overall interest of the federation.

What all of the foregoing implies is that the division of powers and fiscal resources in the federation should be designed to enhance state and local government autonomy within the framework of a united federation. And this division of powers and fiscal resources must be clearly set out in a democratically crafted constitution that has binding force on all persons and governments, and contains appropriate safeguards that compel adherence to the defining tenets of this framework.

Thus, three things are strongly implicated by the constitutional framework for division of powers and fiscal resources proposed in this thesis. These are covenant, cooperation and non-centralization of powers. As we have seen, the proposed framework emphasizes the need to ensure that constitutional division of powers and fiscal resources, including the principles and conditions underlying such division, bears the sanction and approval of the people. In essence it must reflect what the people have agreed. It must evidence what they have jointly **covenanted**.

The framework also promotes the constitutional assignment of more autonomous powers to the state and local governments to enable them manage their internal affairs. It takes government closer to the people and enhances the people's participation in government. It assigns to the state and local governments, powers which are reasonably necessary to guarantee them genuine internal self government without jeopardizing the unity and stability of the federation. In essence, the framework entrenches **non-centralization** of powers.

Lastly the framework emphasizes the democratic participation of the constituent units of the federation in the management and operation of common institutions and programs, especially those that impact the entire federation. Such joint endeavour is an instance of **cooperation** among the constituent units to promote their individual interests and those of the federation. Cooperation, in this sense, can be vertical between the federal, state and local governments as in when the federal government collaborates with a state or local government to provide targeted funding, loan facilitation or technical support in order to enhance the provision of certain public goods and services by that state or local government to its constituents.

Cooperation can also be horizontal as in when state or local governments that are contiguously located team up to jointly provide public goods and services to their constituents or when financially buoyant state or local governments give up part of their own wealth to augment the revenue available to poorer states or local governments via the system of fiscal equalization.

The framework is thus one of mutually beneficial coexistence among the constituent units of the federation by covenant, cooperation and non-centralization of powers as defined above. It is, in short, an advocacy of symbio-democratic federalism. The term “symbio-democratic” is a derivative of ‘symbiotic’ and ‘democratic’, two terms that capture the core essence of this proposed framework. The term ‘symbiotic’ is an adjective derived from the word ‘symbiosis.’ The Compact Oxford English Dictionary defines ‘symbiosis’ as “a relationship between different people or groups that is beneficial to both.”⁵ The term is given a broader definition in the Cambridge online dictionary. There, ‘symbiosis’ is described as “a relationship between people or organizations that depend on each otheror a relationship between two types of animal or plant in which each provides for the other the conditions necessary for its continued existence.”⁶ In short, symbiosis stresses interdependence and cooperation, both of which are important to the federal political and fiscal system being proposed in this thesis.

⁵ Catherine Soanes and Sara Hawker ed., *Compact Oxford English Dictionary* 3rd edition (Oxford University Press, 2005) p.1049.

⁶ Cambridge Dictionary Online, <http://dictionary.cambridge.org/dictionary/british/symbiosis> (accessed 16/7/2015).

The word “democratic” on the other hand is derived from “democracy” which places significant premium on “the people.” The word “democracy” is from the Greek words “*demos*” which translates into “people” in English, and “*kratos*” which means “rule” or power in English.⁷ Read together, “*demokratia*”⁸ from which democracy is derived would therefore mean ‘people power’ or ‘rule of the people’ in English. Participation of the people in their own government is widely regarded as a fundamental attribute of democracy. And participation of the people in their own government is a fundamental element of the federal political and fiscal framework proposed in this thesis.

Lastly the word ‘federal,’ as we saw in chapter two, is derived from the latin word *foedus* which means ‘covenant’ or ‘treaty.’⁹ Covenant is in turn defined as “agreement.”¹⁰ What this implies, as discussed in chapter two, is that covenant is not only inherent in the idea of federalism, it is integral and basic to it. Federal political and fiscal arrangements must be predicated on the joint covenant or agreement of the people. The division of powers and fiscal resources cannot be imposed or foisted on the people. It must be informed by the overwhelming will of the people.

Put succinctly therefore, the symbio-democratic federal system, for our purposes, is a mutually beneficial federal relationship between political entities or groups of political entities. This relationship is driven by covenant, and it is non-centralized in order to preserve the distinctness and autonomy of the levels of government involved in the federal arrangement. The theory of symbio-democratic federalism, as conceived in this thesis, is predicated on the idea that to attain the goal of unity in diversity in ethnically diverse federations, constitutional division of powers and fiscal resources must have ‘covenant,’ ‘cooperation’ and ‘non-centralization of powers’ as its defining principles.

At the heart of the concept of symbio-democratic federalism is the notion that, so basic, integral and fundamental are covenant, cooperation and non-centralization of powers to

⁷ Encyclopaedia Britannica <<https://www.britannica.com/topic/democracy>> (accessed 14/8/2017).

⁸ Ibid.

⁹ Online Etymology Dictionary, <<http://www.etymonline.com/index.php?term=federal>> (accessed 03/12/2016). See also Daniel J. Elazar, *The Covenant Tradition in Politics*, Vo.1 (London: Transaction Publishers, 1995) p.26.

¹⁰ English Oxford Living Dictionaries Online <<https://en.oxforddictionaries.com/definition/covenant>> (accessed 03/12/2016).

the idea of federalism that derogation from anyone of them will detract from the its very essence. They are, in essence, peremptory principles of federalism from which there should be no derogation. It is this peremptoriness of ‘covenant,’ ‘cooperation’ and ‘non-centralization of powers’ in relation to the idea of federalism, that gives symbio-democratic federalism its originality and uniqueness. And it is this conception of federalism that provides, for us, the best guarantee of unity in diversity in ethnically diverse federations.

In conceptualizing symbio-democratic federalism, I recognize that Johannes Althusius had in his 16th century *magnum opus*, *Politica Methodice Digesta*, propounded his association theory of politics in which he broached the idea of ‘symbiotics’ as “the art of associating men for the purpose of establishing, cultivating, and conserving social life among them...”¹¹ In his theory, Althusius’ conceives of a political society built through its primary associations and resting on their consent.

These ‘primary associations,’ according to Althusius include several ‘villages,’ ‘towns,’ ‘cities’ and ‘provinces’¹² which together form a ‘universal association’ or ‘commonwealth.’¹³ In essence, it is these primary associations that constitute the building blocks of the universal association or commonwealth. Through their associations, the towns, cities and provinces, “pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life.”¹⁴

In other words “by the bond of an associating and uniting agreement,”¹⁵ the symbiotes, that is, the towns, cities, provinces, *etcetera*- “communicate among themselves whatever is appropriate for a comfortable life of soul and body.”¹⁶ For Althusius therefore, the symbiotes are “participants or partners in a common life.”¹⁷ By propounding his association theory, Althusius constructs a conception of political society in which the

¹¹ Johannes Althusius, *The Politics of Johannes Althusius*, transl. Frederick S. Carney (London: Eyre & Spottiswoode., 1964) p.17.

¹² For a detailed description of these associations see Johannes Althusius (note 9 supra) pp 34-60.

¹³ *Ibid*, p.61.

¹⁴ *Ibid*, p.12.

¹⁵ *Ibid*, p.13.

¹⁶ *Ibid*, p.14.

¹⁷ *Ibid*, p.14.

associating entities retain their individual identities while agreeing with each other to ensure ‘harmonious exercise of social life’ in the ‘commonwealth.’

Stimulating and attractive as Althusius’ conception of political society is however, there are significant differences between his conception of political society and mine. First, Althusius’ theory is heavily influenced by his Calvinist background as seen in his reverent attribution of legal primacy to the Decalogue and natural law as well as his insistence on the conformity of secular laws to the two tables of the Decalogue and natural law or the law of reason.¹⁸ Second, Althusius’ conception of sovereignty is not popular sovereignty as we know it and as conceived in this thesis, since the members of his political society do not include individuals but are mainly the primary associations that successively form his hierarchical tree of private and public associations. And it is to these associations as corporate bodies that Althusius attributes sovereignty.¹⁹ In essence, Althusius espouses a corporatist conception of sovereignty.

The above mentioned attributes of Althusius’ political theory, that is his Calvinist attachment to the Decalogue and his corporatist conception of sovereignty, are not implicit or explicit in the theory of symbio-democratic federalism as conceived in this thesis. But his ideas of ‘association,’ ‘consent,’ and “mutual communication of what is good,” no doubt, make him a veritable forerunner of federalism in the modern sense.

Turning back to our symbio-democratic federal framework, it is at this juncture necessary to do a summary of what has been said so far about this framework. I argued above that in an ethnically diverse federation like Nigeria, the goal of unity in diversity is better served when constitutionally entrenched division of powers and fiscal resources is peremptorily based on covenant, peremptorily anchored on cooperation, and peremptorily non-centralized as already defined above. The decision on how powers and fiscal resources should be distributed among the levels of government cannot be unilaterally taken and imposed by the federal government. Such decision must be taken in consultation with the constituent units and peoples of the federation. On such decisions, there must be agreement on as wide a scale as possible so as not to leave anyone in doubt

¹⁸ Ibid, pp. 69-76.

¹⁹ Ibid, p.65.

as to what the prevailing will of the people is on the matter. In essence, such decisions must be genuinely covenanted.

Additionally, the federal arrangement must be such that the levels of government can cooperate with each other in the provision of public goods and services to their respective constituents in a way that promotes public welfare and harmonious social existence in the federation. Vertical and horizontal inter-governmental interactions must thus be framed to enhance such cooperation. Lastly, power and autonomy in matters of local interest should be assigned to the state and local governments. This will help to take government closer to the people, and ensure that government policies genuinely reflect the aspirations of the local people. It will also encourage popular participation in government.

The foregoing is a succinct articulation of the symbio-democratic conception of federalism. It is a counter-hegemonic construct that is particularly most suited for ethnically diverse federations as a framework for forging unity in diversity.

In the next few paragraphs, I will elaborate on the scope of this federal framework by discussing how, in practice, the symbio-democratic federal framework can be used to ensure that the division of powers and fiscal resources in Nigeria do not reflect and enhance the hegemonic interests of the federal (central) government, but the collective aspirations and welfare of all stakeholders in the Nigerian federal project. In essence, I will highlight and discuss the institutional reforms necessary for the effectuation of a federal architecture that accommodates popular participation and diversity without endangering national unity.

5.3. The Symbio-Democratic federal framework- Proposals for Constitutional Reform

5.3.1 Abrogation and Replacement of the 1999 constitution

Any attempt to address the problems associated with Nigeria's existing division of powers and fiscal resources must commence with a radical change in the country's current constitution. As already explained in chapter four, the current constitution cannot lay any claim to legitimacy as it did not emerge through any democratic process. The

central tenets and basic principles of the constitution were not decided by the people of Nigeria, neither were its finer points popularly agreed. The constitution was bequeathed to the nation by the military, and its promulgation into law was effected by fiat.²⁰ It stands to reason therefore that the division of powers and fiscal resources set out in this undemocratic constitution cannot, realistically, be said to genuinely represent the true wishes of the people of Nigeria. In essence, the existing constitutional division of powers and fiscal resources among the levels of government in the Nigerian federation is not owned by the Nigerian people. It is not an expression of the people's covenant.²¹

To bear the mark of legitimacy and reflect what has been covenanted by the people, the division of powers and fiscal resources in the constitution must bear the imprimatur of the people of Nigeria. The people must unanimously endorse and approve the constitution's division of powers and fiscal resources. The most acceptable way to do this in a democratic society is to ensure that the Constitution that contains this division of powers and fiscal resources is itself birthed through a process that entails extensive negotiations and consultations among the people of Nigeria. And ultimately, the people of Nigeria must jointly covenant to be bound by the constitution that emerges through this bargaining and consultative process.

Nigerians from the thirty six states of the federation must willingly subscribe to the Constitution that serves as the basis of the country's federal arrangement. In other words, the Constitution itself must be a direct expression of the people's covenant. It must be publicly acknowledged as the evidence of their joint subscription to the guiding principles of the country's federal system.

The 1789 Constitution of the United States (US), the model upon which the Nigerian presidential system of government is purportedly based, is the classic expression of a public covenant.²² The Constitution was a product of intense negotiations.²³ The text of

²⁰ See the discussion on this in chapter 4.

²¹ The idea of the federal constitution as an expression of the people's covenant or compact is also discussed by Daniel Elazar in the fourth of his four volume work on the covenantal tradition in politics. See Daniel J. Elazar, *The Covenant Tradition in Politics*, volume IV (New Brunswick: Transaction Publishers, 1998), p 228.

²² Daniel J. Elazar *Covenant Tradition in Politics*, vol.1 (New Brunswick: Transaction Publishers, 1995) p.xiii.

the Constitution was prepared and intensely debated at a specially convened Constitutional Convention attended by delegates from the federating American states.²⁴ Notably, the subject of division of powers and fiscal resources was hotly debated due to widespread concerns that the political and fiscal autonomy which the federating states had enjoyed for several years would be eroded under the new Constitution.²⁵ But the public discussions, negotiations, and debates which preceded the promulgation of the Constitution into law allowed the parties to reach amicable compromises and concessions. The final text of the constitution was later ratified through popularly elected conventions in the States' assemblies.²⁶

“The significance of the adoption of the US constitution” writes Professor Ben Nwabueze “...lies partly in the novel principles, ideas, and the frame of government enshrined in it, but more perhaps in the democratic process by which it was adopted- through a National Convention in Philadelphia and State ratifying conventions. In the result, the republic was anchored upon a solid moral foundation resting on the will and consent of the people- on “a voluntary social compact...established by peaceful debate” rather than by imposition by an imperial sovereign or a dominant ruling group within the country.”²⁷

It is its anchorage in the will and consent of the people that makes the constitution of the United States an expression, an articulation of the binding covenant of the American federation. The constitution outlines the basic political, institutional and fiscal arrangements which the American people voluntarily and overwhelmingly subscribed to.

In Africa, there are excellent examples of how constitutions have been used to express the people's covenant and enrich the democratic process in Uganda, Ethiopia, Eritrea and South Africa. The promulgation of the 1995 Constitution of Uganda, for instance, was

²³ Michael Burgess, *Comparative Federalism, Theory and Practice* (Oxon: Routledge, 2006), p.55. See also Ben Nwabueze, *Constitutional Democracy in Africa* vol.1 (Ibadan: Spectrum Books Limited, 2003), p.11; B.O Nwabueze, *Ideas and Facts in Constitution Making* (Spectrum Books Limited, Ibadan 1993) p.9.

²⁴ Alexander Hamilton, James Madison, & John Jay, *The Federalist* (London: J.M Dent & Sons, 1970) pp v-vi. See also Michael Burgess, (note 23 supra) p.55.

²⁵ To underscore the intensity of the arguments and discussions, Hamilton and Madison dedicated a total of twelve chapters of the *Federalist* to the subject. See Alexander Hamilton, James Madison, & John Jay, *The Federalist* xxx-xxxvi; xli-xlvi, (London: J.M Dent & Sons Ltd, 1970) pp 142-169; 203-238.

²⁶ Ibid, p. vi. See also National Archives, America's Founding Documents www.archives.gov/exhibits/charters/constitution_history.html. (accessed 20/10/2016).

²⁷ Ben Nwabueze, *His Life, Works and Times*, vol.2 (Ibadan: Gold Press Limited, 2013), p.359.

preceded by a seven-year period of consultations and negotiations. The constitution making process was marked by unprecedented popular participation.²⁸

As part of the constitution making process, a committee of experts was set up to prepare a draft constitution after travelling throughout the country to collate the views of the people over a two- year period. The draft constitution was then subjected to another round of intense debates and later promulgated into law by a constituent assembly popularly elected for that purpose.²⁹ Notably, the constituent assembly consisted of elected representatives of the various communities and interest groups in Uganda.³⁰

It must be added that like Nigeria, Uganda had experimented with three other constitutions before the 1995 constitution.³¹ These previous constitutions failed largely because, as in Nigeria, they were documents put together by the political elite without the people's input. Accordingly, the said constitutions failed to reflect the people's aspirations, apart from being out of sync with the socio-political realities of the Ugandan nation at the time.³² The democratic constitution making process that culminated in the promulgation of the 1995 constitution was thus a radical departure from the political tradition that prevailed in Uganda prior to that time.

A similar process took place in Eritrea in the early 1990s following the country's independence from Ethiopia. There, by a government proclamation,³³ a Constitutional Commission was established to "draft a constitution on the basis of wide ranging public debate on the matter and through expert consultations."³⁴ The draft of the proposed

²⁸ Benjamin J. Odoki 'The Challenges of Constitution Making in Uganda,' in J. Oloka-Onyango ed., *Constitutionalism in Africa- Creating Opportunities, Facing Challenges* (Fountain Publishers, 2001) p.263.

²⁹ Ibid, p.267.

³⁰ Ibid, p.263.

³¹ These were the 1962, 1966 and 1967 constitutions. Ibid, p.266. See also our discussion on the nature of previous Nigerian Constitutions in chapter 3.

³² Benjamin J. Odoki (note 26 supra) p.264.

³³ Proclamation No.55/1993. See Bereket Habte Selassie, 'Constitution-Making in Eritrea: Democratic Transition through Popular Participation,' in J. Oloka-Onyango ed., "*Constitutionalism in Africa- Creating Opportunities, Facing Challenges*," (Fountain Publishers, 2001) p. 244.

³⁴ Bereket Habte Selassie, *ibid*, p.234. See also James C.N. Paul, 'Ethnicity and the New Constitutional Orders of Ethiopia and Eritrea' in Yash Ghai ed., *Autonomy and Ethnicity- Negotiating Completing Claims in Multi-Ethnic States*, (Cambridge University Press, 2000) p. 188-190.

constitution was then debated by an elected constituent assembly which promulgated the new constitution into law in May 1997.³⁵

Like Uganda and Eritrea, the promulgation of the 1996 constitution of South Africa was preceded by an elaborate consultative process which, among other things, included a series of public participation programs primarily aimed at creating public awareness about the constitution making process.³⁶ A popularly elected Constitutional Assembly was thereafter saddled with the task of producing a new Constitution for the country. After extensive deliberations, the final draft of the Constitution was ratified by an overwhelming majority (87 percent) of the Constitutional Assembly. An innovation in the South African example was the requirement for a certification of the new constitutional text by the country's Constitutional Court. The requirement of certification was to ensure that the text of the new Constitution complied with certain principles which the South African people had earlier agreed should be the guiding beacons of the new Constitution. Eventually, the constitutional court certified the new constitution in December 1996 and it was promulgated into law later that month by President Mandela.³⁷

Ethiopia's 1995 Constitution was also the product of an extensive process of debates, consultations and negotiations. The process commenced with the establishment of a Constitutional Commission in 1993. The Commission was charged with coordinating the drafting of the Constitution as well as the associated public debates, presentations, and numerous seminars that were organized to educate the public on the fundamental principles of the proposed constitution.³⁸ The draft constitution prepared by the Commission was submitted to a Constituent Assembly specifically elected for the purpose of debating and promulgating the final text of the Constitution.³⁹ The

³⁵ Bereket Habte Selassie, *Ibid*, p. 244.

³⁶ Heinz Klug, 'South Africa's Experience in Constitution-Building,' (April 12 2011). University of Wisconsin Legal Studies Research Paper Series Paper No. 1157. Available at SSRN: (<http://ssrn.com/abstract=1808168> (accessed 6/7/2015.)) Pp 13-14.

³⁷ *Ibid*, pp 13-16. See also Eghosa E. Osaghae, 'South Africa and the Federalist Logic' in Aaron T. Gana & Samuel G. Egwu ed., *Federalism in Africa* (Africa World Press Inc, 2003) p.226.

³⁸ Tsegaye Regassa, 'The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice.' (2010) 23(1) *Africa Focus* pp 100-101. See also James C.N. Paul (note 34 supra) pp. 188-190.

³⁹ James C.N. Paul, *Ibid*, pp. 188-190.

constitution making process was designed to make the constitution a people's document reflecting popular opinion on how government in Ethiopia should be organized.⁴⁰

Demands for a people driven constitution making process was also very loud in Zambia from the early 1990s up to 2007 when the Government of that country set up a National Constitutional Conference with very broad membership composed of representatives from all sections of the country as well as Non-Governmental Organizations (NGOs), trade unions, the Legislature, other democratic institutions and the academia. The National Conference which was set up via the "National Constitutional Conference Act 19" of 2007, was statutorily mandated to, *inter-alia*, examine, debate and adopt proposals to alter the constitution.⁴¹

The foregoing shows that popular participation in the constitution making process is not an alien concept in Africa. In an ethnically diverse federation like Nigeria, the imperative of genuine popular participation in the process of making and adopting a constitution cannot be over emphasized. It is perhaps the only way to prevent oligarchy or the subjugation of some groups by other groups. Additionally, as mentioned in chapter four, popular participation in the constitution making process fosters fidelity to the Constitution itself. It gives the people a sense of ownership. And it imbues the constitution with the legitimacy required to make it an authoritative document. It makes the constitution an expression of the people's covenant on how they wish to be governed.

As we have seen in the last few paragraphs, popular participation was a common thread in the constitution making process in South Africa, Ethiopia, Eritrea, Kenya and Uganda. Conversely, as we saw in chapters three and four of this thesis, genuine popular participation has never really been a feature of Nigeria's constitution making process. In essence, no constitution, in the history of Nigeria, can be properly and correctly regarded as a true expression of the people's covenant. This, precisely, is why the divisions of

⁴⁰ Professor Nwabueze who acted as Constitutional Adviser to the Government of Ethiopia on the drafting of the new constitution has given an interesting account of the events and circumstances that surrounded the making of Ethiopian constitution. See Ben Nwabueze, *My Life and Work in the Search for a New, Better and United Nigeria*, vol.3 (Ibadan: Gold Press Limited, 2014) pp 27-32.

⁴¹ Melvin L.M Mbaio, 'The Politics of Constitution-Making in Zambia: Where does the Constituent Power Lie?' in Charles Fombad and Christina Murray eds., *Fostering Constitutionalism in Africa* (Pretoria University Law Press, 2010) pp 87-117.

powers and fiscal resources set out in all Nigeria's known constitutions since the 1914 amalgamation, have been controversial. The people of Nigeria never truly participated in negotiating those power distribution arrangements, neither did they overwhelmingly agree to be bound by them. In short, the said power distribution arrangements were never covenanted by the people.

Thus, to gain legitimacy and popular support, the federation's division of powers and fiscal resources must be entrenched in a democratically adopted constitution, the details of which have been subjected to extensive public discussion and debate. Any effort to address the problems associated with Nigeria's power distribution architecture must commence with a deliberate move to produce a "people's Constitution" in the true sense of that phrase. Since the fundamental principles of the federal system, including the division of powers and fiscal resources, are set out in the Constitution, Nigerians must be allowed to design their own constitution through a transparent process characterized by extensive discussions and negotiations to determine, among other things, the nature of the federal system to be adopted by the federation as well as its fundamental principles and tenets- including the division of powers and fiscal resources.

To do what is suggested above, a complete change in the existing constitutional arrangement must be undertaken. The first step in this direction should be the complete abrogation of the 1999 constitution of Nigeria and its replacement with a genuine democratic Constitution. But what is a democratic constitution for our purposes? "A democratic Constitution," writes Professor Nwabueze, is "one approved or adopted by the people either directly at a referendum, or through a Constituent Assembly specially elected and specifically mandated in that behalf."⁴² In essence, it is its predication on the will of the people, as indicated by the people's approval or adoption of it through an inclusive constitution making process, that makes a Constitution truly democratic. A constitution is not democratic merely because it establishes a democratic form of government. It must, in addition to establishing a democratic form of government, represent the will of the people as expressed through a popular referendum or a

⁴² B.O Nwabueze, (note 21 supra) p.9.

Constituent Assembly specifically elected to adopt a constitution on behalf of the people “or a combination of the two”- constituent assembly and referendum.⁴³

A democratic Constitution, as defined above, is a *sine qua non* for political legitimacy in an ethnically diverse federation, for it is through it that indigenes of every part of the federation can truly have a say in how the federation is structured and governed, a condition that compels the people’s loyalty to the Constitution and the federation itself.⁴⁴ In other words, such a democratic constitution “is not only the foundation of the State, with roots anchored in the people, it is also a medium for the people in a Convention...., a Constituent Assembly.... to define and affirm their aspirations to become a nation, to define the purposes, aims and objectives, they, by the Constitution, are creating, and the direction they desire it (the State) to go. The definition and affirmation of aspirations, aims and objectives is not a mere matter of formal or verbal formulation by a legal draftsman but rather an authentic embodiment of the true feelings and sentiments of the people, commanding wide acceptance by the generality of them.”⁴⁵

It is thus a democratic constitution, articulating the prevailing will of the people, that serves as the true expression of their joint covenant. The absence of such a covenant, expressed in a democratic constitution, made, approved and adopted by the people, is a major cause of the widespread disenchantment with the division of powers and fiscal resources set out in the extant 1999 constitution of Nigeria. The Constitution being undemocratic, the division of powers and fiscal resources set out in it is bereft of popular support and legitimacy.

How then can we produce a democratic constitution for Nigeria? How can we put in place a constitution that genuinely reflects the collective will and aspirations of the Nigerian people, and not just those of a select few? In the next few paragraphs, I propose a number of steps that should be followed in order to produce a federal democratic constitution for Nigeria. In doing this I draw on lessons garnered from the constitution making processes of other countries in Africa and outside Africa, as already discussed

⁴³ B.O Nwabueze, (note 38 supra) p.408.

⁴⁴ B.O Nwabueze, *The Presidential Constitution of Nigeria* (London: C. Hurst & Company, 1982), pp 4-5.

⁴⁵ B.O Nwabueze, (note 38 supra), p.9.

above. I also take into consideration the peculiarities of Nigeria as a multi-ethnic federation, and the need to make the constitution making process as inclusive and participatory as possible.

5.3.1.1 Constitution Drafting Committee

The first step in the making of a democratic constitution for Nigeria is for the existing government of Nigeria to set up a broad based Constitution Drafting Committee (CDC) consisting of constitutional experts, as well as professionals and traditional rulers to consult widely with people from every part of Nigeria on the nature and fundamental principles of the proposed constitution. In addition to organizing public debates on the proposed constitution, the committee should be mandated to solicit from Nigerians in all the thirty-six states of the federation, memoranda detailing their vision for the proposed constitution. This committee should then proceed to prepare a draft constitution based on the views expressed by Nigerians during the consultative process. As we have seen above, such a committee of experts was set up to prepare a draft constitution during the political process that birthed the 1995 constitution of Uganda.

In the case of Nigeria however, it is suggested that membership of this committee should not be limited to constitutional experts alone. Because of the importance of the committee's assignment and the need to engage as widely as possible with Nigerians throughout the federation, especially those resident in the rural communities and villages, traditional rulers in each state of the federation should also be members of this committee. Traditional rulers in Nigeria command a lot of respect, loyalty and admiration among urban and rural dwellers. The membership of traditional rulers in the CDC will help to bolster the confidence of the local communities in the entire constitution making process and reassure them that far from being one of the several elitist projects of the federal government, this process requires their input and is ultimately aimed at protecting their interests in the federation. Further particulars of this committee are discussed in my recommendations in chapter six.

5.3.1.2 Constituent Assembly

The draft constitution prepared by the CDC, should be submitted to a Constituent Assembly specially elected for the purpose of debating and adopting the proposed constitution on behalf of the people. The Constituent Assembly should consist of elected representatives of all the existing Local Government Councils in Nigeria. This would help to ensure that every section of the country is fully represented in the constitution making process. The main task of the Constituent Assembly is to thoroughly and exhaustively debate the draft constitution. Such a debate would enable every part of the country, through its representative in the Constituent Assembly, to have a say in the making of the constitution. In the course of debating the draft constitution, the Constituent Assembly may invite anyone or any group of people whose opinion or advice is required in respect of any aspect of the proposed constitution. Such consultative actions will further strengthen the legitimacy of the constitution that emerges through this process. A more detailed discussion on the Constituent Assembly is available in chapter six of this thesis.

5.3.1.3. Referendum

A final draft of the constitution debated and adopted by the Constituent Assembly should then be subjected to a referendum that would involve every Nigerian of voting age. This referendum should be conducted by the Independent National Electoral Commission which is the country's electoral umpire.

Adherence to the constitution making procedure outlined above is perhaps the surest way to ensure that the Constitution genuinely represents the wishes of the Nigerian people. It is the surest way to ensure that the constitution is an articulation of the people's covenant in respect of the country's government. It is certainly the surest way to ensure that the division of powers and fiscal resources set out in the constitution truly reflects the will and agreement of the Nigerian people.

Apart from the expression of public covenant which the federal democratic Constitution represents however, the process of producing the Constitution, characterized as it is by public debates, interactions, negotiations and joint decision making among the people, is

an instance of cooperation among them. With an inclusive and democratic constitution making process, the people are enabled to cooperatively design a constitution that caters to their common good. And as we shall see below, it is not only in the making of a Constitution that the utility of cooperation is discernible. Cooperation is significant in the operation of the federation itself. It is through the cooperation of the people that the common goals of a federation are met. This cooperation towards the attainment of common goals creates and enhances the bond of unity that helps to keep the constituent units of the federation together. Indeed it is in its quality as a catalyst of unity that cooperation finds its most important political relevance. Therein lies the reason for the indispensability of cooperation in an ethnically diverse federation desirous of attaining unity in diversity.

It is now necessary to do a quick summary of our discussion thus far. In the last few paragraphs, I have discussed the need for a symbio-democratic federal system peremptorily based on ‘covenant,’ ‘cooperation’ and “non-centralization of powers” in multi-ethnic Nigeria. I argued that such a federal system is the best political arrangement for engendering unity in diversity in an ethnically diverse federation like Nigeria. I also argued that establishing the symbio-democratic federal system will require a democratic constitution that serves as an expression of the people’s ‘covenant’, reflecting what has been agreed by them as the fundamental objectives, principles and basic framework of the federation.

I outlined the procedure for crafting a democratic constitution that truly articulates the wishes and aspirations of the Nigerian people on how they wish to be governed. I argued that this procedure, characterized as it is by public debates, interactions and negotiations among the people from every part of the federation is an instance of cooperation among them to jointly promote the common good. ‘Cooperation,’ I argued, is an indispensable condition for bringing forth unity in the midst of diversity.

But apart from engaging a democratic process in crafting the constitution, the constitution itself must promote a federal democratic political arrangement. It must entrench a power sharing system that fosters inclusivity and popular participation. The federal framework proposed in this thesis will ensure that power is not concentrated in the hands of a

hegemonic central government but dispersed among all stakeholders in the federation. In other words, rather than the centralized and lopsided allocation of powers and fiscal resources in favour of the federal government under the current 1999 constitution, the symbio-democratic federal framework proposed in this thesis will ensure that power is shared and exercised in a way that enables the constituent units of the federation to effectively manage their own affairs and have a say in how they are governed.

In the following sections of this chapter, I will discuss the need for the legislative lists in the proposed constitution to be structured in a way that ensures that powers over matters of local interest are effectively assigned to the states and local governments as against the assignment of many of such powers to the federal government under the current 1999 constitution. I will also discuss the need for the establishment of a new fiscal commission for the entire federation. I will make proposals regarding how this important commission should be structured and managed to ensure that it is not susceptible to pressure and manipulation from the federal government, as is the case under the current 1999 constitution. Finally I will set out proposals on how to ensure that the states and local governments, as well as the general public have a say in the policies and decisions of the commission.

5.3.2. Non-centralization of Powers.

The measures proposed above for instituting a democratic constitution will not amount to much if, in the constitution itself, the division of powers and fiscal resources among the levels of government is not structured to ensure that state and local governments are effectively in charge of their internal affairs or matters that most closely concern them. As discussed in chapter four, a major problem of the 1999 Constitution is its lopsided allocation of powers in favour of the federal government.⁴⁶ A number of functions which, by nature, should ordinarily be within the jurisdiction of the state and local governments are within the jurisdiction of the federal government under the constitution. Thus, matters like policing and other security services in the states; elections in the states, labour matters in the states; air, rail and water transportation in the states; incorporation and

⁴⁶ See the full discussion of this problem in chapter 4.

regulation of companies in the states; insurance; mines and minerals in the states; regulation of traffic in the states; census in the states of the federation; regulation of local political parties; judiciary of the states; formation, annulment and dissolution of marriages in the states; registration of business names in the states; as well as wireless broadcasting and television, are exclusively assigned to the federal (central) government under the exclusive legislative list in the constitution.⁴⁷ The implication is that the federal government exclusively and centrally carries out these functions throughout the federation.⁴⁸

I also pointed out in chapter four that even under the concurrent legislative list which sets out matters that are simultaneously within the legislative jurisdiction of the federal and state governments, the federal government is effectively vested with overriding powers in respect of the functions mentioned in the list. Section 4(5) of the Constitution stipulates that “if any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall, to the extent of the inconsistency, be void.” Thus, for instance, although matters like education, agriculture, electricity provision, elections to local government councils, are within the concurrent legislative list, with the implication that power in respect of these matters can be exercised by either the federal or state government, the implication of section 4(5) of the constitution is that a state cannot make any law in respect of any of these matters where federal legislation has comprehensively covered such a matter, except the state law is in total conformity with federal law on the matter.

This raises two questions. What happens where a state needs to enact a law which, though inconsistent with an existing federal law, is nevertheless essential to meet some peculiar need of the state? For instance, what happens where, in a bid to design its local policies on agriculture to meet the peculiar needs of its local farmers or the food production needs of its constituents, a state enacts a law that is inconsistent with an existing federal legislation? Clearly, going by the provision of section 4(5) of the 1999

⁴⁷ See Part 1 of the second schedule to the 1999 Constitution.

⁴⁸ Sections 4(2) & (3) 1999 Constitution.

constitution, the state law in question will be void *ab initio*. This is despite the fact that agriculture, being on the concurrent legislative list, the state government, just like the federal (central) government, is also empowered to make laws on agricultural development. Under the existing power distribution arrangement, the state government's policies on agriculture must conform to those of the federal government even if the federal government's policies are unfair, unrealistic or unsuitable for the state in question.

The same goes for a situation where a state government, desirous of adapting its policies on university education to meet its own peculiarities or needs, enacts a law which is inconsistent with a federal law on the same matter. Under the 1999 constitution, such a state law will be void to the extent of its inconsistency with the federal law. It does not seem to matter whether the federal law is inadequate or unable to address the peculiar needs of the state in question.

Secondly, what happens where a state law already exists on a matter in the concurrent legislative list, and a federal law is subsequently enacted which is clearly at variance with the already existing state law? Will the state law be void for its inconsistency with the subsequent federal law? Section 4(5) of the 1999 constitution would seem to suggest so. The constitution is silent on what happens if the inconsistent state law predates the federal law. Under the existing arrangement, the significant factor in determining the validity of a state law seems to be its consistency or inconsistency with a federal law on the same subject. The date on which the state law was made appears to be inconsequential. And it does not seem to matter whether the earlier state law was designed to meet specific needs of the state in question. Such is the lopsidedness, unfairness and defectiveness of the power allocation structure under the 1999 constitution. The configuration of power in respect of matters in the concurrent legislative list makes it possible for the federal government to arrogate more than enough powers to itself or even encroach on the authority of the states. In actual fact, as mentioned in chapter four, the federal government predominates in most of the matters itemized in the concurrent legislative list.

In some cases, the concurrent legislative list also creates confusion and lack of clarity on who should be constitutionally responsible for a particular field. For instance, primary

education is a matter listed in the concurrent legislative list, but it is listed in a way that suggests that the power is reserved for the state governments.⁴⁹ However, since the constitution empowers the federal government to legislate “on any matter in the concurrent legislative list,”⁵⁰ the federal government has effectively taken over legislation in respect of primary education in Nigeria through its Universal Basic Education policy which is aimed at establishing a uniform primary education program for the whole of Nigeria.⁵¹

The foregoing indicates that the concurrent legislative list is a potential instrument of centralization, usurpation and oppression. It has, in reality, served to broaden the scope of the powers assigned to the federal government well beyond that which it already possesses under the exclusive legislative list, thus making the federal government the dominant and indisputable repository of power in the federation.

The centralist structure of the legislative lists set out in the 1999 constitution is certainly defective and unsuitable for a multi-ethnic federal state like Nigeria with diverse interests, needs and peculiarities. Matters such as policing in the states; the election of State Governors, their Deputies, and state legislators; the Judiciary of the states; regulation of local political parties; mines and minerals in the states; intra-state transportation; intra-state regulation of traffic; secondary education; tertiary education; tertiary healthcare, etcetera are internal affairs of states, and they ordinarily ought to be within the jurisdiction of the state governments.

Apart from this, matters such as primary education, agriculture, and primary healthcare are matters which should ordinarily be within the jurisdiction of the local governments considering that agriculture, education and health care are matters that typically impact the rural communities in profound ways. Agricultural activities in Nigeria, for instance, largely take place in the rural communities.

Being the closest to the local communities, the states and local governments are better placed to know the nature and type of education, healthcare and agriculture schemes that

⁴⁹ See item 30 on the concurrent legislative list.

⁵⁰ Section 4(4)(a) 1999 constitution.

⁵¹ See section 1 of the Universal Basic Education Act, 2004.

best suit their respective communities. This is especially true of primary and secondary education, as well as primary healthcare. The same can be said of a matter like local policing which, arguably, can be more efficiently provided by the state and local governments acting jointly or severally. States and local governments are more likely to know their local communities and their specific needs better than a central government that is far away. They are thus better positioned to assess local security needs and devise homegrown and community focused strategies to cater to those needs. Indeed, there is a general consensus in the literature that the relative proximity of regional or local governments to the townships and local communities make them better placed to provide certain public goods and services more efficiently to these communities.⁵²

As shown above, the division of powers and fiscal resources under the 1999 constitution is so overwhelmingly skewed in favour of the federal government that the state and local governments are, in reality, no more than ordinary appendages of the federal government, a condition that clearly contradicts the idea of federalism. The centralist character of the extant power allocation structure and its unsuitability for an ethnically diverse Nigeria, calls for a radical departure from the existing power distribution arrangement, and its replacement with a power distribution arrangement that is truly consistent with the idea of federalism.

Ideally, the federal government ought to be concerned only with matters that jointly pertain to the entire federation while the state and local governments focus on their respective internal affairs. An example of this sort of arrangement is seen in the extant constitution of the United States of America (US). Under that constitution, power is shared among the levels of government via the instrumentality of only one legislative list

⁵² See for instance, Akpan H. Ekpo, 'Fiscal Federalism in Nigeria: The Challenges of the Next Decade,' in J. Isawa Elaigwu ed., *Fiscal Federalism in Nigeria- Facing the Challenges of the Future* (Adonis & Abbey Publishers Ltd, London, 2008) p.95. See also Ben Lockwood, 'The Political Economy of Decentralization' in Ehtisham Ahmed and Giorgio Brosio ed., *Handbook of Fiscal Federalism* (Edward Elgar Publishing Limited, UK, 2006) p.33; Pranab Bardhan, 'Decentralization and Development' in Ehtisham Ahmed and Giorgio Brosio ed., *Handbook of Fiscal Federalism* (Edward Elgar Publishing Limited, UK, 2006), p. 201; Robin Boadway and Anwar Shah, *Fiscal Federalism* (Cambridge University Press, 2009) p.69; Wallace E. Oates, 'An Essay on Fiscal Federalism,' 1999 37(3) *Journal of Economic Literature*, p.1143.

which sets out the powers exclusively assigned to the federal government.⁵³ All other matters not specifically assigned to the federal government are assigned to the states.⁵⁴

In one of his *Federalist* papers, Madison explains the logic that informed the division of powers under the US constitution. According to him, the powers assigned to the US federal government under the constitution were expected to be “exercised principally on external objects, as war, peace, negotiation, and foreign commerce... The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.”⁵⁵ The division of powers in the US constitution is thus such that “the powers delegated by the...constitution to the federal government are few and defined” while “those which are to remain in the State governments are numerous and indefinite.”⁵⁶ In essence, the framers of the US constitution were conscious of the need to preserve the right of the states to manage their internal affairs without undue interference from the federal government.

The clear delineation of the powers assigned to the US federal government and the states was designed to prevent confusion as to who should exercise what power. It was also designed to forestall any undue encroachment on the powers reserved to the state governments or any attempt to undermine their autonomy. The US Supreme Court buttressed this when it said that “the preservation of the states, and the maintenance of their governments, are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”⁵⁷

⁵³ Article 1(8) United States Constitution <<https://www.archives.gov/founding-docs/constitution-transcript>> (accessed 22/1/2017)

⁵⁴ See the tenth amendment to the US Constitution. According to this amendment “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” ‘The Constitution of the United States, The Bill of Rights and all Amendments’ <<http://constitutionus.com/>> (accessed 1/8/2017).

⁵⁵ James Madison, *Federalist* ‘No XLV’ in Alexander Hamilton, James Madison & John Jay (note 22 supra) p.237.

⁵⁶ Ibid

⁵⁷ *Gregory v. Ashcroft* 501 U.S. 452 (1991) per Justice O’ Connor, quoting Chief Justice Chase in *Texas v. White*, 74 U.S. 700 (1869).

The autonomy of the American states with respect to their internal affairs has been emphasized in the jurisprudence of the US Supreme Court,⁵⁸ And although a number of other decisions⁵⁹ of the Court have tended to expand federal powers through a broad interpretation of the so called commerce clause,⁶⁰ these decisions have not deleteriously detracted from the philosophy of state autonomy originally enshrined in the US constitution.⁶¹

Just like the U.S Constitution, the 1995 Constitution of Ethiopia clearly sets out the powers that are assigned to the federal government and stipulates that “all powers not given expressly to the federal government alone, or concurrently to the federal government and the states are reserved to the states.”⁶²

A look at the powers assigned to the federal government in Ethiopia shows that like the US, the federal government is mainly saddled with defense, external matters, and the setting of basic minimum standards for programs and projects throughout the country.⁶³ The states, on the other hand, are constitutionally assigned all other significant legislative and executive powers of government. Thus, for instance, each state is allowed to run its own police force. Each state effectively controls its own land and natural resources.⁶⁴ And the power to legislate in respect of education, health and agricultural programs are effectively within the jurisdiction of the states since they are not among the powers assigned to the federal government. In fact, a major aim of the Ethiopian federal system

⁵⁸ See for instance, *United States v. Lopez* 514 U.S. 549 (1995); *United States v. Morrison* 529 U.S. 598 (2000); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* 531 U.S. 159 (2001).

⁵⁹ See for instance *Gonzalez v. Raich* 545 U.S. 2005. See also *Perez v. United States* 402 U.S. 146 at 151 (1971); *Wickard v. Filburn* 317 US. 111 at 128-129 (1942).

⁶⁰ Article 1(8)(3) of the US Constitution. This clause empowers the US federal government (through the Congress) to “regulate commerce with foreign nations, and among the several States, and with the Indian Tribes...”

⁶¹ In fact, in *United States v. Lopez* (note 58 supra), the Court quoted, with approval, its earlier warning in *NLRB v. Jones & Laughlin Steel Corporation* 301 U.S. 1 at 37 (1937) that the scope of inter-state commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace upon inter state commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” The court, per Chief Justice Rehnquist then held that Congress can only exercise its inter-state commerce power in respect of an intra-state economic activity, where such activity “substantially affects “inter-state commerce.

⁶² Articles 51 & 52(1), 1995 Constitution of Ethiopia.

⁶³ *Ibid*, Article 51.

⁶⁴ *Ibid*, Article 52.

is to establish a system of administration that “best advances self government” for the states.⁶⁵

In the US and Ethiopian constitutions examined above, there is clarity in the division of powers among the federal and state governments. And a major policy of those constitutions is non-centralization. Both constitutions are designed to, as much as possible, guaranty the autonomy of the regional governments in those matters that are internal to them. This sort of arrangement is very important and useful in ethnically diverse federal countries where the people of each region or province have different cultural beliefs, political orientations, social needs, and religious practices. Ethiopia for instance is an ethnically diverse country, and the frame of government established by the country’s 1995 Constitution is informed by the “almost unprecedented ethnic, racial and religious diversity”⁶⁶ of the country. At the time of making the 1995 constitution of Ethiopia, it was felt that the diversity of the country and the distinctness of each of the constituent units should be given expression by effectively empowering the states for internal self government. Prior to 1995, the battle for regional self government in Ethiopia had been bitterly fought by way of ethnic armed insurrection against the country’s centralist dictatorship.⁶⁷

There is no doubt that the conflicts bedeviling most of the multi-ethnic states of Africa are attributable to the several inter-ethnic competitions for power going on in these countries. Ethnic diversity is more pronounced, more consequential, and more deeply rooted in Africa than other parts of the world. As I argued in chapter three, the indiscriminate and reckless lumping together of hitherto independent and culturally distinct African communities, empires, and kingdoms during the colonial era led to the emergence of African States in which ethnic groups, in a bid to retain their identities and relevance, struggle for self-government. This is the reality of Africa. And although western scholars often struggle to understand or appreciate this, it is nevertheless Africa’s most evident reality. Federalism, the type that allows genuine political and fiscal

⁶⁵ Ibid, Article 52 (2)(a).

⁶⁶ Ben Nwabueze, (note 38 supra) p.27.

⁶⁷ Ibid, pp.27-29.

autonomy in the constituent units of a federation, is the answer to Africa's numerous conflicts. It is the future of peace in Africa.

In Nigeria, there is an urgent need to assign to the state and local governments, power and autonomy in respect of matters which directly concern them. The Nigerian federal system should aim at empowering the state and local governments to manage their respective internal affairs without any external interference or encumbrance, while reserving matters of general or common interest for the central government to administer centrally. The federal system should not seek to unduly empower the central government to the detriment of the state and local governments.

However, for the non-centralization paradigm advocated above to be effective, reassignment of functions to the state and local governments must also be accompanied by a concomitant reallocation of revenue and fiscal authority to these tiers of government. Fiscal arrangements among the levels of government would thus have to be specially configured to reflect and accommodate the increase in the functions constitutionally assigned to the state and local governments.

5.3.2.1. A Restructuring of the Legislative Lists

To forestall incidents of encroachment on the powers of the states by the federal government as earlier discussed in this chapter, and to prevent the confusion that the concurrent legislative list may from time to time induce, as already discussed in this chapter, this thesis proposes the abolition of the concurrent legislative list and advocates the replacement of the current technique of power sharing with one that clearly spells out the legislative competences of each level of government, while reserving residual powers to the States.

Thus instead of sharing power among the levels of government through the exclusive and concurrent legislative lists, as we have it under the 1999 constitution, it is proposed that three legislative lists be set out in the new constitution. These are the federal list, the state list, and the local government list. Each of these legislative/administrative lists should clearly and unambiguously spell out the legislative powers assigned to each level of government under the constitution. Power in respect of residual matters, that is, those

matters that are not listed under the federal, state, or local government lists should be assigned to the state governments. The constitution should also contain a provision granting autonomy to each level of government in the exercise of the powers assigned to it.

The non-centralization of powers, and the accompanying power sharing technique advocated above will help to achieve a number of significant objectives. First, it will help to whittle down the excessive powers vested in the federal government under the 1999 constitution, thus breaking that government's hegemony and ending its decades-long subjugation of the state and local governments. Second it will help to take government closer to the people, such that community needs and aspirations are promptly and efficiently met, and local people can actually participate in the making of policy decisions that affect their daily lives. These are important goals that make non-centralization of powers in the form advocated above compelling indeed.

Third, as mentioned in chapter four, non-centralization of powers, as advocated above, will help to promote experimentation, creativity, accountability, and healthy competition among the levels of government. Each state and local government in the federation will be able to develop policies that suit its immediate constituency. In designing and implementing policies, each state will be able to take into consideration the peculiar culture, traditions and needs of its people. States and local governments will be free to experiment with policies and projects until they know what works best for their people. And states and local governments will be able to learn from each other. A policy that is working well in a particular state might be adopted and tested in another state. Lastly, healthy competition will be induced among the state and local governments in the overall interest of the country's economy.

Importantly, with significant state and local government autonomy, political leaders in the state and local governments will be compelled to be more accountable to their people, since they know that their constituents will hold them directly accountable for the quality of governance in their constituencies and may vote them out during state and local government elections if they fail to perform. It is easier for people in the townships and rural communities to hold local leaders accountable for governance since these local

leaders are closer to them than officials and leaders of the central government who may have no incentive to provide quality governance considering that the local people may not be able to directly influence their elections.

In addition to the foregoing, the power sharing technique proposed above will conduce to clarity in the constitutional division of powers and resources, and put an end to the dictatorship of the federal government which has, for long, been facilitated through the so called “concurrent legislative list.” Although the “concurrent legislative list” is in use in the constitutions of some other federal countries,⁶⁸ it is important to ask whether, in the case of Nigeria, it has been helpful in any way? A country’s legal and constitutional policies must be tailored to suit its peculiarities and address its challenges. I have shown above that, in the experience of Nigeria, the concurrent legislative list has been most unhelpful and problematic. It has helped to facilitate centralization of powers by broadening the scope of powers available to the federal government under the constitution, thus entrenching the federal government’s dictatorship and hegemony. Abolishing it, as proposed, will significantly contribute to stemming the tide of centralization so far experienced in Nigeria’s federal system.

5.3.2.2. What does Autonomy Portend?

A question that needs to be addressed at this point is what autonomy in the exercise of constitutionally assigned powers, as advocated above, portends for the federal, state and local governments? Does autonomy imply independence, in terms that suggest total exclusivity in the socio-economic and political activities of each of the three levels of government? In other words, are the three levels of government to operate in watertight compartments, sequestered from each other, and completely impervious to social intercourse with each other? Put succinctly, does autonomy, in this sense, entail isolation or non-interaction?

Clearly, no single level of government, in a country like Nigeria with limited human and fiscal resources, can be self-sufficient. Indeed, scholars agree that in all modern federations, cooperation and interdependence among the levels of government in the

⁶⁸ For instance, South Africa. See Part A Schedule 4 Constitution of South Africa 1996.

delivery of public goods and services are in fact inevitable.⁶⁹ According to Professor Nwabueze, “federalism conceives the national and state governments in the relation of mutually complementary parts of a single governmental mechanism. It demands of them co-operation with one another in order to promote the welfare of the nation through their combined powers.”⁷⁰ Such cooperation, argues Nwabueze, is fostered through interaction among the levels of government in “pursuit of common economic, social and political purposes and interests.”⁷¹

Thus, for instance, a state government may choose to work with the federal government to provide a public good or service for its constituents. Under such a cooperative arrangement, the state may, for instance, conceive of, and design, an electricity project for its constituents while the federal government could support this project by way of special grants or loan facilitation. A group of states or local governments may also enter into cooperative arrangements in pursuit of similar economic or social goals. They may “take joint action on common problems, operate joint ventures, or establish linkages in various areas.”⁷² Autonomy is thus not a bar to cooperation. And cooperation does not necessarily detract from autonomy if cooperative arrangements are appropriately structured and managed. Cooperation is very important in an ethnically diverse federation like Nigeria that is beset by latent centrifugal forces.

I believe that cooperation in multiethnic federations is the glue that keeps society together. The South African constitution recognizes this by stipulating the specific “principles of cooperative government and intergovernmental relations” that must be adhered to by the levels of government.⁷³ Among other things, the South African constitution mandates the levels of government to promote cooperation by “fostering

⁶⁹ Ronald L. Watt, ‘Federalism and Diversity in Canada’ in Yash Ghai ed., *Autonomy and Ethnicity – Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2000), p.43-44; Ronald L. Watts, *Comparing Federal Systems* (McGill-Queens University Press, 2008), p.117-120; Richard Simeon, ‘Constitutional Design and Change in Federal Systems: Issues and Questions,’ (2009) 39(2) *Publius* 247; Joseph F. Zimmerman, ‘Cooperative Federalism in the Twentieth Century,’ 2001 31(2) *Publius* 15-30.

⁷⁰ B.O Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (London: Sweet & Maxwell, 1983) p.356.

⁷¹ Ben Nwabueze, (note 38 supra) pp 428-429.

⁷² Eghosa E. Osghae, ‘Interstate Relations in Nigeria,’ (1994) 24(4) *Publius* 85.

⁷³ Sections 40 & 41, South African constitution 1996.

friendly relations, assisting and supporting one another, informing one another of and consulting one another on matters of common interest, coordinating their actions and legislation with one another, and adhering to agreed procedures.”⁷⁴ All of these go to show the importance attached to cooperation in that constitution. The Nigerian constitution could incorporate similar principles as a way of encouraging comity and respect for mutual cooperation among the levels of government in the federation.

5.3.2.3. Arguments Commonly Raised Against Regional Autonomy

A. Secession

We must now turn to two major arguments often raised against non-centralization of powers and grant of autonomy to sub-national governments in federations generally and Nigeria in particular. The first is the oft-repeated “danger” of secession allegedly posed by regional autonomy.⁷⁵ The belief is that, with sufficient power and fiscal resources at its disposal, a state government, for instance, might become emboldened to go it alone and declare its secession from Nigeria at the slightest provocation.

Persistent ethnic tensions amid threats of secession in Nigeria often help to reinforce this belief. In fact, I mentioned in Chapter four that one of the reasons for the aggressive drive to centralize power in Nigeria after the three year civil war (1967-1970) was the belief that Eastern Nigeria’s declaration of secession from Nigeria was made possible because under the 1963 constitution of Nigeria, which was the supreme law of the land at the time of the civil war, the regional governments wielded substantial powers and had access to substantial revenue.

There is no doubt that the threat of secession or disintegration is still a major challenge in Nigeria. But this challenge is not peculiar to Nigeria. Secessionism is latent in many federations. In fact, the Ethiopian constitution contains a clause indicating the right of the constituent units of the Ethiopian federation to secede.⁷⁶ Yet, despite the obvious threat or

⁷⁴ Ibid, section 41(1)(h).

⁷⁵ As we saw in chapter four, this is an argument often used by proponents of centralization in Nigeria, especially the military politicians and their civilian collaborators.

⁷⁶ See Article 39(1) of the 1995 Constitution of Ethiopia.

challenge of secession or secessionism, many of these federations have not disintegrated. It appears that the threat of secession in Nigeria is not so much a possible consequence of non-centralization of powers or regional autonomy as the inability of the country's federal government to creatively and genuinely construct bridges of unity across ethnic divides in order to cement the federal bond. As discussed in earlier in this thesis,⁷⁷ the failure to construct such bridges of unity was one of the major factors that precipitated the ill-fated secession of Eastern Nigeria from Nigeria in 1967.

In their book on self-government in autonomous regions, Yash Ghai and Sophia Woodman argue that autonomous regions can be kept within a country by a combination of institutional techniques that consistently encourage cooperation and bonding among the regions of the federation. Such techniques include the encouragement and facilitation of popular participation in the common institutions of the National Government, fostering a culture of consultation and negotiation among the regions as well as the entrenchment of these values in the constitution in order to imbue them with permanence and immutability.⁷⁸

I have already advocated the adoption of these values in our discussion in this chapter. They are further discussed below. What remains to be emphasized is that consistent adherence to these values in inter-ethnic and inter-governmental relations will foster a sense of loyalty to the federation as a whole and will help to significantly reduce secessionist sentiments and secessionist threats. It will also help to promote and enhance unity. The threat of secession should therefore not be used as an excuse for centralization. Rather, conscious efforts should be made to adopt measures that foster unity without centralizing power.

What advocates of centralization fail to realize is that centralization is not the antidote to secessionism. Centralization has, in fact, failed to quell secessionist and separatist agitations in Nigeria. For instance, as we saw in chapter four, such agitations have been

⁷⁷ See chapters three and four.

⁷⁸ Yash Ghai and Sophia Woodman eds., *Practicing Self-Government* (Cambridge University Press, 2013) pp 465-472..

ongoing in the Niger Delta⁷⁹ and have become more strident in recent times as seen in the resurgence of the demand for the secession of Eastern Nigeria from the rest of the country.⁸⁰ As discussed in chapter four, recent agitations are actually fuelled by a resentment of the centralist character of the Nigerian federal system. It is clear therefore that centralization will not settle the problem of secession. Since these secessionist agitations stem from a desire for political and fiscal autonomy, a combination of approaches that foster unity while guaranteeing the autonomy of state and local governments is more likely to help in extirpating the fire of secession and separatism. The federal framework proposed in this thesis and outlined in this chapter provides the required combination of approaches necessary to address the problem of secession.

B. Financial Corruption

Apart from the threat of secession discussed above, a second argument that may be advanced against autonomy to sub-national governments is the alleged proneness of the lower level governments to corrupt practices, especially financial crimes.⁸¹ The belief underpinning this is that entrusting lower levels of government with greater powers and higher revenues would provide these governments with the opportunity to corruptly use increased powers and revenues to further the private interests of local leaders and politicians.

No doubt, corruption is a major problem in Nigeria. But it is a general problem whose tentacles are spread across all levels of government. Corruption in Nigeria is not confined to the lower levels of government. And it is illogical to insinuate that the state and local governments are the only ones susceptible to corrupt practices. A careful survey of the

⁷⁹ In addition, see Conor Gaffey, 'Niger Delta Avengers Threaten Secession from Nigeria' *Newsweek* (6/10/2016) <<http://www.newsweek.com/niger-delta-avengers-threaten-secession-nigeria-468722>> (accessed 1/8/2017).

⁸⁰ Rantimi Jays Julius Adeoye, 'Nationhood and the Struggle for Biafra' *Africa is a Country* (4 July 2017) <<http://africasacountry.com/2017/07/nationhood-and-the-struggle-for-biafra/>> (accessed 1/8/2017). See also Max Siollun 'Nigeria is Coming Apart at the Seams' *Foreign Policy* (8 February 2016) <<http://foreignpolicy.com/2016/02/08/nigeria-is-coming-apart-at-the-seamsbiafra/>> (accessed 1/8/2017).

⁸¹ Benjamin Neudorfer and Natascha S. Neudorfer, 'Decentralization and Political Corruption: Disaggregating Regional Authority' (2015) 45(1) *Publius* 27-28; Robin Boadway and Anwar Shah, *Fiscal Federalism- Principles and Practice of Multiorder Governance* (Cambridge University Press, 2009) pp 517-520; 531-534; Etisham Ahmad and Giorgio Brosio ed., *Handbook of Fiscal Federalism* (Edward Elgar, 2006) pp 478-481; 490-493.

corruption cases prosecuted so far by the country's anticorruption agencies, the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC) show that officials and political office holders across the federal, state and local governments have been indicted and prosecuted for financial crimes since the inception of these two commissions.⁸² Any attempt to justify centralization of powers and fiscal resources on the ground that state and local government autonomy may foster corruption will thus be unreasonable, at least in the case of Nigeria.

Perhaps what is needed is a more comprehensive, impartial, and robust approach to anticorruption initiatives across all levels of government in Nigeria. One way of doing this is to strengthen the country's anticorruption agencies and reposition them for more effective service delivery. A way to do this is to genuinely secure the independence of these two agencies. The EFCC and the ICPC are often perceived to be instruments in the hands of the President of the federation to harass and intimidate his real and perceived political enemies across the country while corrupt persons who are close associates of the President are seldom indicted or investigated by the anticorruption agencies.⁸³ Several incidents in Nigeria's recent history appear to lend credence to this perception.⁸⁴ Only a truly independent anticorruption agency, completely impervious to the undue influence of the President of the federation and the ruling political party, can genuinely fight corruption across all levels of government in Nigeria. One way of securing the independence of the two agencies is to divest the President of the unilateral power to appoint and remove members of these two Commissions and vest this power jointly in the Nigerian Senate and the President. Thus the President of Nigeria should only appoint or remove members of the two commissions with the consent and approval of the Nigerian Senate.

⁸² For details, see "Economic and Financial Crimes Commission" <<https://efccnigeria.org/efcc/news?start=10>> (accessed 2/12/2016). See also 'Independent Corrupt Practices and Other Related Offences Commission' <<http://icpc.gov.ng/cases/>> (accessed 2/12/2016).

⁸³ Preye Kuro Inokoba and Weleayam Tina Ibegu, "Economic and Financial Crime Commission (EFCC) and Political Corruption: Implication for the Consolidation of Democracy in Nigeria" 2011 13(4) *Anthropologist* pp 288-289 <http://www.krepublishers.com/02-Journals/T-Anth/Anth-13-0-000-11-Web/Anth-13-4-000-11-Abst-Pdf/Anth-13-4-283-11-647-Inokoba-P-K/Anth-13-4-283-11-647-Inokoba-P-K-Tt.pdf> (accessed 3/12/2016); Wale Odunsi, 'Buhari is like Obasanjo, he using EFCC To Crush Opponents' *Daily Post* (20 October 2015) <http://dailypost.ng/2015/10/20/buhari-is-like-obasanjo-he-using-efcc-to-crush-opponents-adebanjo/> (accessed 3/12/2016).

⁸⁴ Preye Kuro Inokoba and Weleayam Tina Ibegu, *Ibid*.

The power to remove members of the two commissions before the completion of their tenure should only be exercised if it is absolutely necessary, such as, for instance, where a member of any of the commissions has been found guilty of verifiable gross misconduct. With their independence guaranteed and the tenures of office their members secure, the commissions will be better positioned to prosecute their anticorruption mandates without fear or favour.

The recommendation made above for tackling corruption is certainly not water-tight. Corruption is a huge problem in Nigeria. It is a hydra-headed monster that has plagued the country for decades. Regrettably, there is no easy solution to it. There will always be a need to devise new and innovative ways to consistently tackle corruption. It is a challenge that the federation and its constituent units will need to take up and jointly address. It will need the constant cooperation of all levels of government and all Nigerians to address. It is a daunting task, but with sincerity of purpose, it can be done.

5.3.3. Need for an Inclusive and Democratically Structured Fiscal Commission.

As we saw in chapter four, the 1999 constitution establishes a permanent fiscal commission, the Revenue Mobilization Allocation and Fiscal Commission (RMAFC), to, among other things, undertake the very important task of periodically reviewing the principles and formula for vertical and horizontal allocation of centrally collected tax revenue among the levels of government. It is also saddled with the equally important task of “monitoring accruals to and disbursements of revenue from the Federation Account.”⁸⁵

While the idea of a permanent fiscal commission is indeed a welcome development, considering that previous fiscal commissions of this nature were *ad-hoc*, the nature of the commission and its *modus operandi* are very important in view of their potential impact on the fairness, transparency and efficiency of the commission. For our purposes in this chapter, the nature of the commission is defined by the mode of appointing its members, the nature of its membership and the spread of that membership. The *modus operandi* of the commission refers to the commission’s method of operation. As we shall see in the

⁸⁵ Section 32(a) & (b), Part 1, Third Schedule, 1999 constitution of Nigeria.

next few paragraphs, there are a number of problems with the nature, structure and *modus operandi* of the Commission that make it unsuitable for a multi-ethnic federation like Nigeria. I now turn to these issues.

5.3.3.1. Method of Appointing Members of the Commission

A clear evidence of the commission's susceptibility to the federal government's overwhelming control is seen in the method of appointing the commission's members, which has not much to commend it. It will be recalled from the discussion in chapter four that the power to appoint members of the commission is heavily skewed in favour of the federal government with the President of the federation exercising unlimited discretion in the matter.⁸⁶

The wide discretionary power exercisable by the President in the appointment of the commission's members, is prone to nepotism, favouritism, cronyism, corruption and other forms of abuse. As a result, there is the danger of having this important commission peopled with the President's relatives, cronies and party acolytes who may be amenable to manipulation and political pressure from him and the federal government. The nature of politics in Nigeria and the awesome unilateral powers vested in the President under the constitution make it difficult to rule this possibility out. Anyone who is familiar with Nigeria's politics of patronage knows that the President's power to unilaterally appoint members of the commission renders the commission prone to external manipulation and political pressure.

How can this problem be addressed? How can the commission be made as genuinely inclusive as possible and shielded from external manipulation? There are examples of African countries where fiscal commissions established to perform functions similar to that of Nigeria are structured to avoid a concentration of power in the federal government. For instance, in South Africa, the constitution obliges the President to make

⁸⁶ Section 31(b) of Part 1 the Third Schedule to the 1999 constitution of Nigeria.

appointments to the fiscal commission only after due consultation with the Regional Premiers and Local Governments.⁸⁷

The Ethiopian example is even more remarkable. In Ethiopia, the principles and formula for the allocation of revenues that jointly belong to the levels of government is determined by the House of Federation, a body composed of the “representatives of Nations, Nationalities and Peoples” of Ethiopia.⁸⁸ This makes it difficult for the central government in that country to unilaterally appropriate the power to make fiscal policy for the promotion of its own interests.

Nigeria needs an even more radical approach than the South African and Ethiopian approaches described above because of the ethnic tensions that are constantly threatening to dismember the country on account of revenue allocation. A genuinely inclusive fiscal commission will give people from all parts of the federation a sense of belonging and ensure that decisions on revenue allocation and the principles governing it are jointly owned by the federation and its peoples. It will also enhance cooperation and unity among the people as they cooperatively design fiscal policies that serve the interests of the federation and its constituent units.

Cheryl Saunders captured the point succinctly when she stated that “the participation of the federated regions, as regions, in central institutions is an element in the design of all federations. It helps to provide the glue for the federated State, balancing the dynamics of self-rule. In symbolic terms, it acknowledges the shared ownership of the state. For practical purposes, it enables the needs and perspectives of the constituent parts of the state to be fed into decisions made at the centre.”⁸⁹

In the case of Nigeria, the first step that should be taken in order to make the commission as inclusive and representative as possible is to make membership of the commission genuinely broad in order to ensure that every part of the federation is represented in the commission. A way to achieve this goal is to have a stipulation in the new constitution

⁸⁷ Section 220 (1); 221(1)(b)(c); Section .221(1A)(a)(b), Constitution of South Africa 1996.

⁸⁸ Article 62(7), Constitution of Ethiopia 1995.

⁸⁹ Cheryl Saunders, ‘Devolution, Federation, Constitution. From Here to Where?’ Paper presented at the 2015 Sir David William Lecture at the Faculty of Law, University of Cambridge, 27 February 2015.

requiring that membership of this commission should be drawn from all the thirty six states of Nigeria. In essence, in addition to a representative of the central government, each of the states should have a nominee in the Commission. And rather than the country's President monopolizing the power of appointment to the commission, as is the case under the 1999 Constitution, the nominee of each state in the commission should be nominated by the state Governor after due consultation with the State's House of Assembly.

The House of Assembly of a state is the state's legislative body, and it consists of the representatives of all the local government councils in the state. By stipulating that the representative of each state in the commission should be nominated by the state Governor after due consultation with the state's House of Assembly, the constitution would ensure that such a person genuinely represents the state in the commission.

The proposed method of appointing the members of the commission is unlike the existing arrangement that allows the President to select anyone that catches his fancy from each of the states- a condition that makes the commission susceptible to manipulation and pressure from the federal government, since "he who pays the piper dictates the tune." A member of the commission who has been unilaterally appointed to that position by the President may feel beholden to the President. He may find himself under pressure to show 'loyalty' to the President, and he may be unable to resist any attempt by the federal government, whose head is the President, to manipulate the decisions of the commission.⁹⁰ Such is the danger of assigning to a single person, the sole authority and discretion to appoint members of a commission that is considered very significant to an entire federation. Dicey warned us, in his *Law of the Constitution*, that "wherever there is discretion, there is room for arbitrariness."⁹¹ This is a point that should not be taken lightly.

As earlier stated, In addition to the sense of belonging that the proposed mode of appointment to the fiscal commission would give to each state of the federation, it will afford every section of the federation the opportunity of participating in the formulation

⁹⁰ Instances of this abound in Nigeria's rent driven political system.

⁹¹ A.V Dicey, Introduction to the Law of the Constitution, p.188.

of important fiscal policies of the federation, especially the determination of revenue allocation principles and the formula for revenue allocation. In addition to this, it will significantly curtail the vulnerability of the commission to pressure and manipulation from the federal government and ensure that the work of the commission is genuinely carried out in the interest of the entire federation.

5.3.3.2. Consultation

It would be recalled that a major problem identified in chapter four about the *modus operandi* of the existing commission is that nothing in the 1999 constitution makes public consultation with the people of Nigeria, a mandatory or significant part of the commission's decision making process. Yet, the commission's decisions, policies and recommendations on the federation's fiscal architecture carry far-reaching and significant implications for economic development throughout Nigeria.

In chapter three, I argued that a major cause of the age-long conflict over revenue allocation among the levels of government is the exclusionist character and exclusionist *modus operandi* of many of the fiscal commissions established by the federal government before 1999. These commissions were often solely made up of so called 'financial experts' who were solely appointed by the federal government and answerable to the federal government only. These "financial experts" often made very limited or no public consultation in the course of their work. The fiscal policies introduced by these "financial experts" were thus often out of sync with the wishes and aspirations of the Nigerian people. The exclusionist approach employed by these *ad hoc* fiscal commissions meant that fiscal policies affecting every part of Nigeria were exclusively determined by the federal government and then foisted on the state and local governments. Such an approach was bound to induce widespread disaffection. And, as we saw in chapter three, it, more often than not, did.

Regrettably, RMAFC under the 1999 constitution is not radically different from the previous fiscal commissions in this regard. The Commission is not constitutionally mandated to carry out any form of public consultation in the process of performing its functions. The implication of this is that the commission can take far-reaching and

important decisions without interacting with the people who would be affected by its policies. Like its predecessors therefore the existing commission stands the risk of formulating policies that are out of sync with prevailing socio-economic realities and the wishes and expectations of the people.

It would thus be necessary to have a provision in the new constitution mandating the commission to consult widely with the Nigerian people in the course of its work. This can be done through public hearings and debates as well as town hall meetings convened specially to obtain the views of the people on specific fiscal policies. Consulting with Nigerians in the various urban and rural communities is a useful way of obtaining their frank views on proposed fiscal policies or getting feedback on existing fiscal policies. This would help to ensure that the commission takes the views of the people into consideration when deciding on significant fiscal matters like revenue allocation, for instance. All of the foregoing will help to ensure that the federation's fiscal system is genuinely and inclusively shaped by Nigerians from every part of the country and not just by an elite club of oligarchs.

5.3.3.3. Broadening the Scope of the Commission's Work

In addition to all that has been discussed and proposed so far in respect of the fiscal commission, there is a need to broaden the commission's constitutional mandate to bring within the scope of its work, the exercise of certain fiscal powers that have, over time, been unilaterally exercised and abused by the federal government. One of such fiscal powers is particularly important and its management should not be left solely in the hands of the federal government. This is the borrowing powers of the federation which is exclusively assigned to the federal government under the 1999 Constitution.⁹²

It would be recalled from the discussion in chapter four that many state governments have decried the federal government's abuse of its exclusive control over the borrowing powers of the federation. In chapter four, I discussed the susceptibility of this power to abuse. In particular, i discussed how the exclusive exercise of this power by the federal

⁹² See s.164 of the 1999 constitution and Item 7 under Part 1 of the Second Schedule to the 1999 constitution.

government can be manipulated to deliberately deprive state and local governments, especially those controlled by opposition parties, the opportunity to access financing for development. Yet loans are very important sources of development revenue for the constituent units of a federation. There is thus a need to ensure that lower levels of government are able to fairly access loan facilities to finance development projects in their domains.

In order to promote transparency and fairness in the approval of requests by states and local governments for internal or external loan transactions, it is proposed that control over this matter should be taken over by the fiscal commission whose membership, as proposed above, is expected to be broad, and more likely to be impervious to the bias, partiality, political pressure, manipulation and fraud which the federal government is often prone to. This would help to curtail the arbitrariness often exhibited by the federal government in the exercise of this power and enable a much fairer and more transparent exercise of this power by the fiscal commission instead.

5.4. A Commission on Federalism

Having set out different proposals for the reform of Nigeria's power distribution architecture above, it is important that the new constitution should also establish a Commission on Federalism to monitor, encourage and advocate compliance with the federal values advocated in this thesis. This commission should be mandated to conduct periodic appraisal of intergovernmental power relations and government-citizen relations to assess compliance with the federal values of covenant, cooperation, and non-centralization of powers. The commission should also issue regular reports which will form the basis of its advocacy work to encourage compliance.

The advocacy work of the commission should be conducted through bespoke seminars, conferences, and workshops aimed at enlightening government leaders, civil servants, and the general public on the need to adhere to the federal principles established by the constitution.

This commission is urgently needed considering that public governance in Nigeria has for long been conducted along centralist lines. Sustained vigilance, re-orientation, and

advocacy is needed to ensure that the federal framework proposed in this thesis is consistently adhered to in the interest of the federation.

Conclusion

In this chapter, I have outlined an alternative federal constitutional framework for the division of powers and fiscal resources among the levels of government in the Nigerian federation. The chapter itself is a follow up to chapter four which critically appraised the power distribution arrangements set out in the 1999 Constitution of Nigeria. As shown in that chapter, a major problem associated with the existing constitutional framework for the division of powers and fiscal resources in Nigeria is the approach employed in devising and adopting it. Any discussion of this point must however be preceded by a consideration of the approach employed in framing, adopting and promulgating the 1999 Constitution itself since this problematic division of powers and fiscal resources is contained in that Constitution.

As discussed in chapter four, the 1999 constitution of Nigeria, like other Nigerian constitutions before it, is not a 'people's constitution' in the true sense of that phrase. The Constitution was unilaterally framed, unilaterally adopted and unilaterally promulgated into law by military fiat on the eve of Nigeria's return to civil rule in 1999. In making this Constitution, the people were not consulted, neither were their opinions sought. The Constitution was, in essence, centrally conceived, centrally designed and arbitrarily foisted on the Nigerian people.

It stands to reason therefore that the division of powers and fiscal resources set out in this undemocratic constitution cannot be said to reflect the wishes and aspirations of the Nigerian people. A direct consequence of the unilateral formulation of the division of powers and resources set out in the 1999 Constitution is that this power distribution architecture is highly centralized and inordinately skewed in favour of the federal government to the detriment of the state and local governments.

The framers of the 1999 Constitution were clearly actuated by a determination to invest the federal government with monopoly of power despite the heterogeneous character of the Nigerian State. This power distribution arrangement was inspired by a centralist conception of federalism, characteristic of the military framers of the constitution. But, as I argued in chapter four, this perspective of federalism only serves to create and entrench the hegemony and dictatorship of the federal government and a simultaneous subjugation of the state and local governments, a situation that is clearly antithetical to the idea of federalism.

Any attempt to address the problems associated with the centralist division of powers and fiscal resources contained in the 1999 constitution must therefore commence with a reconceptualization of Nigerian federalism.

In constructing a new federal framework for Nigeria in this chapter, I argued for a radical departure from the undue centralism and unilateralism that hallmark the current federal arrangement. I proposed a federal system rooted in the will of the people, solicitous of their welfare and animated by their cooperation. Such a model of federalism finds expression in my symbio-democratic federal framework, anchored in covenant, cooperation, and non-centralization of powers. Covenant, as used in this framework, indicates genuine agreement among the people as to the character of the federation, the fundamental principles of government, and the nature of power relations among the levels of government. Cooperation indicates joint action among the people or the levels of government to facilitate public welfare and enhance the unity of the federation. And non-centralization of powers implies the curtailment of the federal government's dominance of the polity by assigning power over matters that are primarily of local interest to the state and local governments.

So basic and essential are covenant, cooperation and non-centralization of powers to the idea of federalism in multi-ethnic societies that they must now be regarded as peremptory principles of federalism from which there should be no derogation, as derogation from any of them will significantly defeat the very essence of federalism in such societies. This is the core idea underpinning the symbio-democratic federal framework proposed in this thesis. The symbio-democratic federal framework, as conceived in this thesis, is a

counter-hegemonic construct for limiting the powers of the federal government, halting its hegemony and curtailing its arbitrariness. It provides the best guaranty for forging unity in diversity in a multi-ethnic federation like Nigeria.

A number of constitutional reforms are outlined in the chapter to reflect the proposed symbio-democratic federal arrangement. First, it is argued that any attempt to address the problems associated with division of powers and fiscal resources among the levels of government in Nigeria must commence with an abrogation of the existing 1999 constitution and its replacement with a new one that genuinely reflects the wishes and aspirations of the Nigerian people on how legislative and fiscal powers should be allocated among the levels of government.

In essence, whatever power distribution arrangement is finally entrenched in the constitution must reflect what the people have willingly and voluntarily covenanted among themselves. Achieving this would require a constitution making process that is inclusive. Popular participation of Nigerians from every section of the country must hallmark the process. As part of the constitution making process, the thesis advocates the setting up of a Constitution Drafting Committee consisting of constitutional experts, professionals, and traditional rulers to collate the views of Nigerians across the country and prepare a draft constitution on the basis of those views. The draft constitution should then be submitted to an elected Constituent Assembly consisting of representatives from every part of Nigeria. After extensive debates, negotiations, concessions and compromises on the draft, a final draft of the constitution prepared by the constituent assembly should be subjected to a referendum involving all Nigerians of voting age who will ratify the constitution as the document articulating the covenant of the Nigerian people on how they wish to be governed. This is the way to ensure that governance arrangements enshrined in the constitution, including division of powers and fiscal resources are an expression of what has been genuinely covenanted by the people.

Second, division of powers and fiscal resources in the proposed constitution should radically depart from the centralism entrenched in the current 1999 constitution of Nigeria. I proposed that allocation of powers and fiscal resources under the new constitution should be guided by the need to have matters that are primarily of local

interest within the executive and legislative jurisdiction of the state and local governments while the federal government oversees matters that are of general interest to the federation and those that transcend state boundaries.

Power over local matters will need to be assigned to the states and local governments to allow such matters to be more efficiently superintended. Each level of government should also be allowed to exercise autonomy in matters constitutionally assigned to it. However, the assignment of new powers to the states and local governments under the new constitution must be accompanied by a concomitant reallocation of revenue and fiscal resources to them to ensure that each level of government has access to financial resources reasonably sufficient to support its constitutionally assigned powers.

To make the allocation of powers under the new constitution clear and unambiguous, and to prevent the federal government's encroachment on the powers of the state government, as has been experienced under the 1999 constitution, I proposed the replacement of the existing technique of power sharing with one that clearly sets out the powers assigned to each level of government under the constitution while reserving residual powers to the state governments.

Thus instead of having two legislative lists, namely the exclusive legislative list and the concurrent legislative list, as is the case under the existing 1999 constitution, I proposed the entrenchment of three legislative lists in the constitution, namely, "federal list", "state list", and "local government list." Each legislative/administrative list should clearly and unambiguously set out the powers assigned to each level of government. This will ensure that each level of government operates only within the limits set for it by the constitution. It will prevent the encroachment of the federal government on the powers of the state and local governments. Residual powers in respect of matters not itemized in the three legislative lists should be exercised by the state governments. Each level of government should also exercise unfettered autonomy in respect of matters assigned to it in the relevant legislative list.

Autonomy of the levels of government is however not a bar to cooperation among them. Cooperation can take place between the federal, state and Local Governments. For

instance, the federal government may provide grants or technical support to a state or local government to augment its finances or support the provision of specific social services. Cooperation can also take place between the states or local governments *inter se*. This can, for instance, happen when a group of states or local governments team up to jointly provide targeted social services to their constituents. It can also happen when wealthy states give up part of their wealth to augment the finances of fiscally weak states via the system of fiscal equalization. As the levels of government cooperatively work towards promoting the public welfare, unity within the federation is enhanced and strengthened.

Third, I proposed that the constitution should establish a Fiscal Commission to, among other things, review, periodically, the criteria and formula for the allocation of those tax revenues that are centrally collected, among the levels of government in Nigeria. But unlike what obtains under the 1999 constitution, I argue for a more democratic and inclusive composition of the commission's membership. Membership should be genuinely drawn from all the states of the federation to ensure that every state of the federation has a say in how centrally collected tax revenue is shared among the levels of government. And considering the importance and sensitivity of the commission's mandate, members of the commission should be nominated, not by the President of the federation, as is the case under the 1999 constitution, but by the state Governors acting in concert with their respective Houses of Assembly.

I also proposed that a clause be inserted in the Constitution to mandate the Commission to consult widely and directly with the Nigerian people before taking definite decisions on the criteria and formula for allocation of centrally collected tax revenue. The measures proposed above, namely, inclusive membership; nomination of members by the State Governors in concert with their respective Houses of Assembly, as against the current discretionary appointment of members by the President of the Federation; and wide public consultations in the commission's decision making processes, will ensure that the very important decisions of the commission truly reflect the wishes and aspirations of the Nigerian people. In addition, the unity of the country will be enhanced, as members of the

commission and the general public cooperatively deliberate and agree on the very important issues associated with revenue allocation.

Finally I proposed the establishment, by the constitution, of a Commission on Federalism to monitor, advocate and encourage consistent compliance with the federal principles advocated in this thesis, namely covenant, cooperation, and non-centralization of powers. I argued that this commission is urgently needed considering that the centralist perspective of federalism has, for long, taken root in Nigeria. And it would take sustained vigilance, and consistent advocacy to instill in the public psyche the federal values advocated in this thesis.

The proposals for policy and constitutional reform made above show that covenant, cooperation and non-centralization of powers as conceived in this chapter are fundamental instruments for addressing the problems associated with Nigeria's centralized "federal" system. They are important instruments for preventing centralization of powers and ensuring that the Nigerian people truly have a say in how the federal system is structured and how powers and fiscal resources are distributed among the levels of government. In short, they are important instruments for limiting the powers of the federal government and curtailing the arbitrariness and dictatorship that have hallmarked Nigeria's federal system for decades.

CHAPTER SIX

CONCLUSION: A SYMBIO-DEMOCRATIC FEDERAL CONSTITUTIONAL FRAMEWORK AND INSTITUTIONAL RECOMMENDATIONS

INTRODUCTION

Thus far in this thesis, I have established that one of the most controversial constitutional issues in Nigeria today is the highly centralized nature of the country's federalism as depicted by the centralist division of powers and fiscal resources among the levels of government in the federation. The power distribution framework entrenched in the extant 1999 constitution of Nigeria is overwhelmingly skewed in favour of the federal (central) government, and significantly undermines the ability of the state and local governments to manage their internal affairs and determine how they wish to be governed. The discussions in chapters three and four show that this problematic and insensitive power distribution arrangement has, for several decades, been a major source of acrimonious ethnic unrests and secessionist agitations across Nigeria.

Although questions of power distribution are notoriously thorny in most federations, they are particularly contentious and acrimonious in Nigeria due to the country's multi-ethnic character and the constant struggle for power, survival and ascendancy among the ethnic nationalities that make up the Nigerian federation. Public debates on Nigeria's federalism and the constitutional division of powers and fiscal resources often evoke passion and induce tension.¹ As discussed in chapter four, such is the sensitivity of the power distribution problem in Nigeria, that it has frequently ignited separatist and secessionist agitations across the country.²

¹ For instance, during a political conference in 2005, delegates from the Niger Delta region of Nigeria staged a walk-out on the conference when their demand for the power to control the exploitation and exploration of mineral resources in their region was rejected at the conference. See E.K Clark, 'The Niger Delta Question: The Imperatives for Peace and Progress' in Augustine A. Ikein et al ed., *Oil, Democracy, and the Promise of True Federalism in Nigeria* (University Press of America, 2008) p.202.

² See Chapters 3 and 4 for the discussion on the Eastern Region's declaration of the 'Sovereign Republic of Biafra' in the late 1960s, as well as subsequent secessionist and separatist agitations since then. See also

A main argument emphasized in this thesis is that the extant constitutional division of powers and fiscal resources among the levels of government in Nigeria is absolutely unsuitable for an ethnically diverse federation like Nigeria. It fosters central government dictatorship and stifles genuine democratic governance. It also enhances the domination of smaller ethnic groups by the larger ones. The constitution's problematic division of powers is however a reflection, and thus a symptom of a much bigger problem, to wit, the fundamentally flawed centralist conception of federalism long espoused and promoted by Nigeria's ruling elite.

To be precise, the power distribution problem is a direct result of the centralist political philosophy foisted on Nigeria, first by the colonialists shortly before independence, and subsequently by the country's military rulers and their civilian collaborators in the post-colonial era.³ In fact, a major argument advanced in chapter three of this thesis is that Nigeria's 'centralized federalism' is a direct legacy of its colonial and military past. Any attempt to reform Nigeria's extant constitutional framework for the division of powers and fiscal resources must therefore commence with a re-conceptualization and reconstruction of Nigeria's federalism. This, amongst others, is what this thesis has sought to do.

In this chapter, I elaborate on my earlier argument⁴ for a symbio-democratic federal arrangement which promotes a non-centralized, covenant-driven constitutional framework for the division of powers and fiscal resources among the levels of government in the Nigerian federation. I also make concrete proposals for institutional reform. Unlike the existing power distribution arrangement which clearly ignores Nigeria's diversity, the framework proposed in this thesis takes into consideration the ethnically diverse character of Nigeria and the need for sub-national government autonomy. It thus serves as a more democratic alternative to the centralist political

Blessing Admin, 'Enough is Enough !!! I Will Spearhead Millions of Igbos, Yorubas, To Break Out and Shut Down Nigeria Before 2019' *Reportersng* (April 2017) <http://www.reportersng.com/2017/04/enough-is-enough-i-will-spearhead.html> (accessed 24/04/2017).

³ This is fully discussed in chapter three of this thesis.

⁴ See Chapter five for an earlier discussion of the Symbio-democratic federal framework proposed in this thesis.

arrangement espoused by the Nigerian elite and entrenched in the 1999 constitution of Nigeria.

For the sake of clarity, I commence by briefly setting out the problems associated with the division of powers and fiscal resources entrenched in the 1999 constitution of Nigeria. As discussed in chapters four and five, these include the arbitrary approach employed in determining this power distribution structure, and the overwhelmingly centralized allocation of powers and fiscal resources among the levels of government in spite of Nigeria's ethnic diversity and the age-long clamour for autonomy by the constituent units of the federation. Setting out the problems at the beginning aids a clearer understanding of the major issues addressed in this thesis. It also helps us to understand why an alternative constitutional framework for the division of powers is needed, and why this thesis is particularly important at this critical juncture in Nigeria's political history.

Next I set out and expatiate on the symbio-democratic federal framework proposed in this thesis and earlier discussed in chapter five as an alternative to the extant centralist federal framework in Nigeria. This framework is characterized by three key principles, namely covenant, cooperation and non-centralization of powers. I argue that to be meaningful, federal arrangements in ethnically diverse federal states must be covenanted. This implies that the basic principles of the federal system must be agreed by all the parties involved in the federal arrangement. The framing and promulgation of the federal constitution in such an ethnically diverse society cannot and must not be the exclusive preserve or prerogative of the elite or a privileged section of society. All parties to the federal arrangement must jointly frame the constitution. They must jointly decide the nature of power relations within the federation. And they must jointly decide how the federal system should be operated. In essence, the constitution must be an expression of their covenant. It must be an articulation of what they have jointly agreed or covenanted.

In addition, the federal constitution must enhance cooperation among the constituent units of the multi-ethnic federation in order to foster unity. It must also emphasize non-centralization of powers, which must be accompanied by autonomy for the lower levels of government. Power must not and should never be concentrated in the central

government. Rather, the constitution of an ethnically diverse federal state must, as far as is practicable, be structured to ensure that regional governments are significantly in control of their own internal affairs. I argue that the three principles outlined above, namely covenant, cooperation and non-centralization of powers are so basic and so essential to the idea of federalism in multi-ethnic societies that they must be regarded as peremptory principles from which there should be no derogation. This is the symbio-democratic conception of federalism. Federalism in this sense is used broadly to embrace its political and fiscal aspects.

Having articulated a new federal perspective, different from the centralist political perspective that clearly underpins the division of powers and fiscal resources in the 1999 constitution, I then proceed to propose concrete institutional reforms to reflect the non-centralized, covenant-driven symbio-democratic federal framework for the division of powers and fiscal resources proposed in this thesis.

6.1. Problems of the Extant Power Distribution Arrangement.

As emphasized in chapter four, the division of powers and fiscal resources in the 1999 constitution is particularly problematic for two main reasons.⁵ First, as was the case with previous constitutions of Nigeria,⁶ it was centrally determined without any significant consultation with or active participation of the Nigerian people. In fact, the entire 1999 constitution, in which this division of powers and resources is entrenched, was itself promulgated into law by military autocrats without the active participation of the people in its formulation.⁷ By implication therefore, the division of powers and fiscal resources in the 1999 constitution cannot be said to genuinely reflect the will of the Nigerian people. Rather, it is an arrangement apparently designed and structured to foster the hegemony and dictatorship of the federal (central) government.⁸

⁵ See chapter four of this thesis for a full discussion of these problems.

⁶ These are the 1914, 1922, 1946, 1951, 1954, 1960, 1963 and 1979 constitutions.

⁷ The 1999 constitution was decreed into existence as a schedule to Decree 24 of the Federal Military Government in 1999.

⁸ In fact, the military framers of the 1999 constitution appear to have unilaterally formulated the 1999 constitution with the deliberate aim of perpetuating their grip on the Nigerian state even under subsequent civilian administrations. Since the return to civil rule in 1999, the military elite has been able to “install” its members and surrogates as Presidents of Nigeria. For instance, retired General Olusegun Obasanjo ruled

Second, the division of powers and fiscal resources entrenched in the 1999 constitution is overwhelmingly, and perhaps immorally, skewed in favour of the federal government. So lopsided is this arrangement that legislative powers which should ordinarily be within the exclusive province of the state and local governments are invariably assigned to the federal government under the constitution.⁹ The effect of this insensitive and dysfunctional division of powers is the literal elevation of the federal (central) government to the status of an overlord, and the concomitant subjugation and pauperization of the state and local governments, a situation that has, for years, engendered ethnic unrests and regional instability.¹⁰

Third, the Fiscal Commission established by the 1999 constitution to monitor accruals to the Federation Account and coordinate vertical and horizontal allocation of revenues among the levels of government is heavily centralized. Apart from the wide latitude and discretion conferred on the President of Nigeria in the appointment of members of the Commission, there is nothing in the constitution that obliges the Commission to consult with all sections of the country in the conduct of its constitutionally assigned responsibilities, despite the far reaching impact its decisions have throughout the federation. The implication of the above is that the President can, in fact, legally fill the Commission with his political acolytes, relatives and cronies, who would unflinchingly do his bidding. This potentially renders the Commission prone to the political influence and manipulation of the federal government. And, since the Commission is not

from 1999-2007; Alhaji Umar Yaradua, a brother to retired General Yaradua succeeded President Obasanjo and ruled from 2007-2010; Yaradua was succeeded by President Goodluck Jonathan, who was sponsored and installed by retired General Obasanjo. Jonathan ruled from 2010-2015. The incumbent President is retired General Muhammadu Buhari. President Buhari also ruled Nigeria as military head of state from 1983 to 1985. Since its introduction, the 1999 constitution has facilitated the centralist vision of its military authors and has helped to consolidate their hold on the country.

⁹ See a more comprehensive discussion of this in chapter four of this thesis. The assignment of powers among the levels of government is contained in Parts 1 & II of the Second Schedule to the 1999 constitution. It is also set out in figure 1 of the appendix in chapter four.

¹⁰ For instance, the recent resurgence of violent agitations for a breakaway of South-Eastern Nigeria to form the “sovereign state of Biafra” is an expression of discontent with the current power distribution structure in Nigeria. Similar manifestations of such discontent are evident in the militancy in the Niger Delta in South-South Nigeria, the boko-haram crisis in North Eastern Nigeria, and the agitations for the creation of Oduduwa Republic in South-Western Nigeria. These regional and ethnic conflicts are symptomatic of deep regional resentment of the centralist division of powers and fiscal resources in the 1999 constitution. For more on this see J. Isawa Elaigwu, ‘The Challenges of Federalism in Nigeria: An Overview’ in J. Isawa Elaigwu ed., *Fiscal Federalism in Nigeria- Facing the Challenges of the Future* (Adonis & Abbey Publishers Ltd, 2008) pp 33-36.

constitutionally mandated to engage in public consultations in the execution of its duties, it can unilaterally take decisions on sensitive issues such as the criteria and formula for revenue allocation among the levels of government in the federation, both of which are touchy issues that have, for several years, consistently generated acrimonious controversy nationwide.¹¹

The three issues raised above collectively highlight the highly centralized character of the Nigerian federal system. In fact, chapters three and four of this thesis conclusively show that Nigeria's federal system has, for several decades, been held down by a centralist conception of federal governance, as initially espoused by the colonial rulers of Nigeria in the early part of the twentieth century and subsequently reinforced by their military and civilian successors in later years. In other words, "federal" governance in Nigeria has for several years been conducted within a framework that is highly centralist in character. This centralist 'federal' framework, as we have seen, is characterized by unilateralism, exclusionism, and hegemony. It favours the dictatorship of the federal government and subverts the democratic autonomy of the state and local governments.

6.2. A Symbio-Democratic Federal Constitutional Framework

In chapter five, I argued for an alternative framework for Nigeria's federalism. This alternative framework must be one that takes into consideration the country's diversity, and the need to secure significant self-government and autonomy for the constituent units of the federation. It must be one that views the relationship between levels of government as a partnership rather than a master-servant serfdom. And it must be one that prioritizes popular participation and adherence to the will of the people as fundamental elements of federal governance.

This alternative federal framework is a symbio-democratic federal constitutional arrangement predicated on the principles of covenant, cooperation and non-centralization of powers. It is a non-centralized, covenant-driven framework anchored on the

¹¹ The existing revenue allocation principles are population, equality of states, internal revenue generation, land mass, terrain, population density. There is also a limited application of the principle of derivation in respect of allocation of revenues derived from the exploitation of natural resources. See Section 162(2) 1999 constitution.

philosophy that covenant, cooperation and non-centralization of powers are so fundamentally essential to the idea of federalism in ethnically diverse societies that these three principles must be regarded as peremptory principles, from which there should be no derogation.

6.2.1 Covenant.

Covenant essentially indicates “agreement.” Covenant or agreement should be a cornerstone of federalism in ethnically diverse federations like Nigeria. As discussed in chapter two of this thesis, the term ‘federal’ is itself a derivative of the latin word “*foedus*” which literally implies “covenant” or “agreement of alliance.”¹² “*Foedera*” was a term used colloquially to describe the ancient leagues and alliances of the Greek city-states, most of which were the products of solemn covenant or agreement among the federating city-states.¹³ In the modern era, the federal system established by the 1789 constitution of the United States, which is often held up as the progenitor of modern federalism,¹⁴ is a product of covenant secured through an inclusive and deliberative constitution making process involving the active participation of the original thirteen American states. The same goes for the federal arrangements established by the various Swiss constitutions since 1848.¹⁵ The above underscores the historical significance of covenant or agreement as an intrinsically basic component of federalism. It signifies the integrality of covenant to the very idea of federalism.

In an ethnically diverse federal state, covenant is indeed very crucial in legitimizing the federal arrangement. The federating units and their people must covenant or agree to cohabit under the federal system. They must consciously and overwhelmingly subscribe

¹² See Daniel J Elazar, ‘The Themes of a Journal of Federalism,’ (1971) 1(1) *Publius* p.4. See also Daniel J. Elazar, *American Federalism: A View from the States* (Thomas Y. Crowell Company, 1966) p.vi; S.Rufus Davis, *The Federal Principle- A Journey Through Time in Quest of a Meaning* (University of California Press, 1978) p.3.

¹³ S. Rufus Davis, *Ibid*, p.14; 23.

¹⁴ Sobei Mogi, *The Problem of Federalism* (London: George Allen & Unwin Ltd, 1931) p.21; Ronald L. Watts, *Comparing Federal Systems* (McGill-Queen’s University Press, 2008) p. 29; George Anderson, *Federalism: An Introduction* (Oxford University Press, 2008) p.8.

¹⁵ Rufus Davis gives an excellent description of this process in S. Rufus Davis (note 12 supra) pp 76-99. Also, in volume IV of his *Covenant Tradition in Politics* Daniel Elazar highlights the covenantal foundation of the American and Swiss Constitutions. See Daniel Elazar, *The Covenant Tradition in Politics*, Vol.4 (Transaction Publishers, 1995) pp.227-228; pp 202-203.

to the constitutional division of powers and fiscal resources in the federation. And they must agree to be bound by the law(s) setting up the federation. A federation cannot be decreed into existence, neither can its organizing principles be arbitrarily dictated. The legitimacy of the federal arrangement and its defining principles is inexorably and fundamentally hinged on the covenant or agreement of the people that constitute the federating units. Such is the significance of covenant as a basic principle of federalism in multi-ethnic federations.

The covenant or agreement of the federating parties regarding the terms of the federal arrangement must be articulated in a constitution that bears the imprimatur of the people and carries their approval. Such was the case in the United States in 1787 when delegates from the American States exhaustively debated the form of government for their country and subsequently submitted a draft constitution reflecting what was agreed by the delegates, to the state assemblies for their ratification.¹⁶

Such was the case also with the making of the 1996 constitution of South Africa. There, the constitution making process was elaborate and inclusive. It involved the active participation of all ethnic groups in South Africa. The draft of the constitution was extensively debated by a popularly elected constitutional assembly and was subsequently popularly ratified. Similar constitution making processes involving active popular participation and ratification preceded the promulgation of the 1995 constitution of Uganda, the 1997 constitution of Eritrea, and the 1995 constitution of Ethiopia.¹⁷ In each of these African states, the constitution making process was elaborate, inclusive, and animated by popular participation and ratification, thus ensuring that the ensuing constitution, in each case, was a comprehensive articulation of what had been painstakingly and solemnly agreed or covenanted by the people as the terms of their joint existence as a nation.

As we have already seen in chapters three and four, the ‘federal’ arrangement in Nigeria has, for decades, been plagued by a marked absence of covenant or agreement as to the

¹⁶ ‘History: The US Constitution’ <<http://www.history.com/topics/constitution>> (accessed 18/4/2017).

¹⁷ See Chapter 5 for the full discussion on the constitution making processes in South Africa, Ethiopia, Eritrea, and Uganda.

terms and conditions governing this arrangement. We know, from our discussion in those two chapters, that no constitution in Nigeria's history has ever truly reflected the will and aspirations of the generality of Nigerians. The country's constitutions from 1914 to 1999 have been arbitrarily formulated and imposed on the Nigerian people, first by the colonialists and subsequently by their military and civilian successors. The divisions of powers and fiscal resources entrenched in these constitutions have thus, never truly reflected the will of the people of Nigeria.

According to Richard Simeon, "the necessity for broad involvement of citizens in constitutional processes is central to democratic politics...In a fundamental sense, the constitution belongs to them. Only if they are engaged in the process are they likely to feel committed to the values and objectives embedded in the constitution itself. In new and developing democracies, especially extensive processes of citizen engagement and public education are essential. Excluding citizens by negotiating the constitution among elites, behind closed doors, may well provoke a citizens' revolt...Without public involvement, constitutional changes are likely to be regarded as illegitimate, and hence defeated, or to be ignored and subverted once they are in place."¹⁸

Simeon's advocacy of genuine public engagement in the constitution making process is especially important for federations made up of different ethnic nationalities with different interests, cultures, needs and worldviews. In such federal climes, only a thoroughly popular constitution making process will engender public fidelity or loyalty to the constitution and its principles.

The 1999 constitution of Nigeria has so far failed to command the support of a highly skeptical citizenry which views the constitution as an alien document foisted on it by a ruling class that is actuated by a maniacal obsession for power. Thus, an important starting point in the rectification of the dysfunctional and insensitive power distribution paradigm entrenched in the 1999 constitution is the complete abrogation of the existing constitution and its replacement with a people's constitution, formulated and designed by

¹⁸ Richard Simeon, 'Constitutional Design and Change in Federal Systems: Issues and Questions,' (2009) 39(2) *Publius* 252

the people and bearing a true reflection of their collective aspirations. The people must be allowed to decide how powers and fiscal resources should be distributed among the levels of government. They must be allowed to decide how the federal arrangement should be structured. In short, the constitution and the division of powers and fiscal resources contained in it must be owned by the people. The letter and spirit of the constitution must reflect what has been covenanted by the people, and not the will of the ruling elite as has, for decades, been the case in Nigeria.

For this to happen, the constitution making process must be popular. It must involve the active participation of the people, and the final text of the constitution must be popularly ratified. This does not in any way preclude the possibility of engaging professional experts to advise on technical provisions of the constitution. But the ultimate decision as to the content of the constitution should lie with the people that make up the constituent units of the federation.

6.2.2. Non-Centralization of Powers.

Apart from a covenanted division of powers and fiscal resources, a second attribute of the federal constitutional framework proposed in this thesis is non-centralization of powers. By this, I mean non-concentration of powers in the central government. In particular, powers which are of local interest, that is, those which pertain to the internal affairs of the state and local governments should be specifically assigned to these governments instead of allocating such powers to the central government. I argued in chapter four that the division of powers and fiscal resources in the 1999 constitution is overwhelmingly and inordinately tilted in favour of the federal (central) government.

Such is the lopsidedness of this arrangement that the power to legislate in respect of matters of local interest like local policing, agriculture, primary education, primary health-care, local labour matters, state elections, local air, rail and water transportation, which should ordinarily be within the province of the state or local governments are either exclusively assigned to the central government or subject to its overriding authority. The same goes for fiscal powers and other forms of revenue raising powers which, as shown in chapter four, are overwhelmingly assigned to the federal government.

This power distribution paradigm, I argued, portends negative implications for democratic governance and regional development. It stifles the ability of the state and local governments to manage their own affairs and cater to their own socio-economic interests. Essentially, it undermines the ability of the state and local governments to experiment with and formulate policies to suit the peculiar needs of their people. In addition, it fosters the domination of ethnic minority groups by the larger ones since the larger ethnic groups are, by virtue of their population, better placed to win federal elections and thus more likely to be in control of the enormous powers of the federal government. It also creates room for conflict and political instability since dissatisfied and disaffected ethnic groups will often resort to violence to register their disapproval of the *status quo*, a problem that has been experienced in Nigeria since the promulgation of the 1999 constitution.

A major argument of this thesis therefore is that rather than the centralist power distribution arrangement entrenched in the 1999 constitution, powers over matters of local interest should be assigned to the states and local governments while the federal government should concentrate on external affairs and matters that are of general interest to the entire federation. This implies that the federation's division of powers and fiscal resources should be restructured to ensure that state and local governments are significantly in charge of their own internal affairs. Not only does this enhance local autonomy, an important attribute of federalism, it also helps to ensure that government policies in respect of local matters are specially adapted to meet local needs and interests.¹⁹ Due to its proximity to the people in the townships and rural communities, a state or local government is more likely to be conversant with local needs and interests than a federal government that is far away.²⁰ A state or local government is thus better able to prioritize and optimally allocate scarce resources to meet such local needs.²¹

¹⁹ George Anderson, *Fiscal Federalism: A Comparative Introduction* (Oxford University Press, 2010) p.10.

²⁰ Wallace E. Oates, 'An Essay on Fiscal Federalism' (1999) 37(3) *Journal of Economic Literature* p.1123. See also Maria Escobar-Lemmon 'Fiscal Decentralization and Federalism in Latin America' *Publius* (2001) 31(4) 25.

²¹ Wallace E. Oates, *ibid.* See also Iwan Barankay and Ben Lockwood, 'Decentralization and the Productive Efficiency of Government: Evidence from Swiss Cantons' in Etisham Ahmad and Giorgio Brosio eds., *Effective Federalism and Local Finance* (Edward Elgar Publishing Limited, 2011) p.470.

More importantly, the constitutional assignment of power in respect of matters of local interest to the state and local governments carries with it the potential to enhance the accountability of local leaders to their constituents, since the local people know who to hold responsible for lackluster local governance and maladministration. This enables the people to easily vote out incompetent or corrupt state or local governments during elections. The demands of political accountability induced by non-centralization of powers will help to spur state and local governments to effectively deliver on their campaign promises.

Finally, non-centralization of powers has the potential to enhance healthy competition and experimentation among the state and local governments.²² With significant powers of self government in the hands of state and local governments, there is greater freedom to experiment with a variety of local policies, thus enabling each government and its people greater choice in the selection of suitable local policies.²³ The late Justice Louis Brandeis of the US Supreme Court corroborated this view in *New State Ice Co v. Liebmann* when he said “it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.”²⁴ It must be quickly added that, in this particular case, Brandeis was referring to the US “federal system” in which the states play a substantial role in their own internal governance. An inference that is decipherable from the above quoted pronouncement of Justice Brandeis in the *Liebmann* case is that with experimentation, what works in a particular state or local government may also be tried in other states or local governments with similar or even better results.

Besides the benefits derivable from experimentation however, non-centralization of powers can also encourage healthy competition among states and local governments. It affords the electorate the opportunity to compare the performances of their own state or local government with that of cognate or contiguous state or local governments having similar powers and fiscal resources. The knowledge that its electorate can draw such

²² George Anderson, (note 20 supra) p.7.

²³ Wallace Oates calls this ‘laboratory federalism.’ See Wallace E. Oates, (note 20 supra) p. 1132.

²⁴ 285 US 262 (1932) <<https://supreme.justia.com/cases/federal/us/285/262/case.html>> (accessed 3/8/2017). This case is also cited in Wallace E.Oates (note 20 supra) p.1132.

comparisons can serve as a performance incentive to a state or local government, compelling it to work hard to provide efficient and effective public goods and services to its own constituents in order to avoid their negative judgment. This also serves to impel government's accountability to the electorate.²⁵

The arguments outlined above make a strong case for a radical departure from the centralist division of powers and fiscal resources entrenched in the 1999 constitution, and its replacement with a non-centralized division of powers and resources, such that substantial powers over matters of local interest are constitutionally assigned to the lower levels of government. However, the assignment of powers and fiscal resources to the levels of government should not be left to be exclusively and centrally determined by federal government appointed "technical" or "economic" experts, as has been done in the past.²⁶ While the views of experts and scholars may be taken into consideration, the ultimate decision as to the powers and fiscal resources to be constitutionally assigned to each level of government should be made by the people of Nigeria themselves during the constitution making process, as earlier discussed.

6.2.3. Cooperation.

A question that was raised and addressed in chapter 5 regarding the power distribution framework proposed in this thesis is whether the assignment of specific functions to a level of government implies that power in respect of those functions are to be exclusively exercised by that level of government without any interaction with other levels of government? In other words, are levels of government expected to operate in water-tight compartments without any contact with other levels of government? Are the levels of government in a federation "independent" from each other in terms that essentially import self-sufficiency and hence non-interaction or non-engagement with other governments? This question is pertinent in light of some scholar's blanket and indiscriminate use of the word "independent" to describe the levels of government in a

²⁵ Robin Boadway and Anwar Shah, *Fiscal Federalism- Principles and Practice of Multi-Order Governance*, (Cambridge University Press, 2009) pp 498-502.

²⁶ In Chapter 3, I discussed instances where *ad hoc* fiscal commissions were set up by the federal government to determine the assignment of powers and fiscal resources to the various levels of government.

federation.²⁷ For instance, in defining his *federal principle*, K.C Wheare argues that it is the “method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and *independent*.”²⁸ Wheare’s characterization of federalism as a division of powers between “independent” governments creates the impression that these governments operate in isolation of each other. His definition, at first glance, appears to attribute some sort of omnipotence to the levels of government such that each is able to carry on without any need for the other.

Wheare’s apparent portraiture of federalism as entailing a division of powers among ‘independent’ governments appears to have found fertile ground in Nigeria, with scholars and politicians adopting his definition almost wholesale and without question.²⁹ For instance, Professor Ben 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 regionalized governments in such a way that each exists as a government separately and independently from the others...”³⁰

It is doubtful whether “independent” is the appropriate terminology to employ in depicting the nature of the levels of government in a federation. While I have indeed argued that the autonomy of the levels of government is crucially important for a genuine federation to exist in an ethnically diverse society, it must be emphasized that this autonomy does not connote independence in terms that import omnipotence, non-interaction, exclusivity or non-engagement. Indeed, in a socio-economic milieu often beset by scarcity of human and fiscal resources, no federation can truly survive without some degree of interdependence or cooperation among the governments. Autonomy connotes discretion in the exercise of constitutionally assigned power, untrammelled by

²⁷ See for instance K.C Wheare, *Federal Government*, 4th edition (Oxford University Press, 1963), p.10. See also B.O Nwabueze, *Federalism in Nigeria Under the Presidential Constitution* (London: Sweet & Maxwell, 1983) p.1; Ben Nwabueze, *Constitutional Democracy in Africa*, Vol.1, (Ibadan: Spectrum Books Limited, 2003) p.59.

²⁸ K.C Wheare, *Ibid*

²⁹ Aaron T. Gana, ‘Federalism and the National Question in Nigeria: A Theoretical Exploration’ in Aaron T. Gana and Samuel G. Egwu, *Federalism in Africa* (Africa World Press Inc, 2003) p.18.

³⁰ B.O Nwabueze, *The Presidential Constitution of Nigeria* (London: C.Hurst & Company, 1982) p.37. See also B.O Nwabueze, (note 27 supra) p.1.

unnecessary and uninvited interference or intrusion from external quarters.³¹ It does not suggest independence in terms that import non-interaction or non-engagement with other levels of government. There is a need to always clarify and emphasize this especially in the literature on Nigerian federalism if we are not to unwittingly encourage or propagate separatism.

In a multi-ethnic federation, the assignment of a function to a level of government does not preclude interaction with other levels of government in the performance of that function. In essence, the fact that a particular function is within the jurisdiction of a level of government does not foreclose the possibility of cooperation between that level of government and another government in the execution of that function. Although Wheare claims to have gotten the inspiration for his “coordinate and “independent” concept of federalism from the system of government established by the 1787 constitution of the United States, another scholar has rigorously shown that, in practice, the US system of government has, in fact, always been cooperative in character.³²

Cooperation among the levels of government in the performance of constitutionally assigned functions is an important element in contemporary federal practice. If anything, the reality of scarcity of resources, both human and fiscal, often make cooperation inevitable. So important is cooperation in modern federalism that it is doubtful whether the federal system of government can be effectively practiced without some appreciable degree of intergovernmental cooperation.

For instance, a state government that is constitutionally saddled with the provision of education within its jurisdiction may be unable to implement its education policies without the assistance of other governments due to its limited financial resources. Even

³¹ Yash Ghai defines it as “the ability of a region or community to organize its affairs without interference from the central government or neighbouring regions or communities.” See Yash Ghai ‘Nature and Origins of Autonomy,’ in Yash Ghai and Sophia Woodman eds., *Practicing Self-Government* (Cambridge University Press, 2013) p.5. Another scholar defines autonomy as “the freedom of choice that a sub-state unit in a federation has in order to make its own policy according to its values, interests and preferences, and to resist central government policies that it finds inimical.” See Richard Simeon and Luc Turgeon, ‘Seeking Autonomy in a Decentralized Federation’ in Yash Ghai and Sophia Woodman eds., *Practicing Self-Government* (Cambridge University Press, 2013) p. 33.

³² Daniel J. Elazar, *The American Partnership* (The University of Chicago Press, 1962) pp 1-325. Wheare himself later on acknowledges the inevitability and indispensability of cooperation in a federal system of government. See K.C Wheare (note 27 supra) p.243.

where financial resources are available, the state in question may lack the requisite personnel or technical expertise for effective delivery of some service(s) connected with the performance of that function. In such situations, assistance or cooperation from another government in the provision of the service(s) will be ultimately beneficial to the state concerned and its constituents. In executing its policies throughout the country, the central government may also need to rely on the lower levels of government to assist it in providing local personnel or facilities for its work across the country.

A further instance of cooperation is when levels of government representing the constituent units of a federation jointly participate in running and managing common institutions, that is, institutions that are established to perform functions that benefit the entire federation. Cooperation, in this sense, gives the constituent units of the federation a say in how matters that jointly affect them are administered. It prevents arbitrariness and fosters cooperative synergy among the constituent units in the overall interest of the federation.

In multi-ethnic federations, cooperation has the added utility of enhancing unity. When levels of government cooperate in the provision of services to their constituents or for the benefit of the entire federation, the solidarity or fellow-feeling fostered through such cooperative endeavours helps to promote and cement the unity of the multi-ethnic federation. Cooperation, then, is a fundamental and necessary catalyst of unity in an ethnically diverse federation.

Cooperation must however be distinguished from undue and uninvited interference. In a federation, a level of government may not interfere in the affairs of another level of government without the latter's consent or acquiescence. Cooperation must be based on consent. It cannot be forced, neither can it be imposed or foisted. It must be built on the active acquiescence of the cooperating governments.

It is apposite, at this juncture, to briefly summarize our discussion thus far in this section of the thesis. Thus far, I have argued that in ethnically diverse federations like Nigeria, the very fact of diversity calls for a power distribution arrangement that is non-centralized and covenant driven. It calls for a division of powers and fiscal resources that

is genuinely democratic, one that recognizes the constituent units of the federation as significant stakeholders in the federal political system. Essentially, it demands a division of powers and fiscal resources that is preemptorily anchored in covenant, cooperation and non-centralization of powers as defined in this thesis. Such a power distribution arrangement is non-negotiable if the federation is to be stable and shielded from ethnic insurgency, the type that is fast becoming commonplace in many parts of Africa, especially Nigeria.

In the following sections of this thesis, I propose specific constitutional reforms to implement the power distribution framework proposed in this thesis.

6.3. ACTUALIZING THE SYMBIO-DEMOCRATIC FEDERAL FRAMEWORK- INSTITUTIONAL AND POLICY RECOMMENDATIONS

6.3.1. PROMULGATION OF A NEW CONSTITUTION

A major argument that has so far been emphasized in this thesis is that the existing division of powers and fiscal resources among the levels of government in Nigeria suffers from a fundamental legitimacy deficit. This is so because the 1999 constitution in which this division of powers and resources is entrenched is itself not a people's constitution, properly so called. As discussed in chapter four and reiterated above, the 1999 constitution was promulgated as a schedule to Decree Number 24 of 5 May 1999. The constitution was prepared and promulgated into law without any genuine popular participation. The people of Nigeria were not consulted, neither were their opinions sought on the content of the constitution. In short, the constitution was arbitrarily framed and foisted on the Nigerian people. The content of the constitution, including the division of powers set out in it can therefore not be regarded as the will of the people of Nigeria. It is not an expression of what the people have jointly agreed or covenanted.

The lack of legitimacy associated with the constitution's division of powers has been a major source of conflict since 1999. To address this problem therefore, the legitimacy of the 1999 constitution itself must be fundamentally addressed. This calls for the abrogation of the 1999 constitution and the drafting and promulgation of a new

constitution that genuinely reflects the wishes and aspirations of the Nigerian people. The new constitution must be produced through a process entailing broad popular consultation and participation. In order to ensure this I propose the measures outlined and discussed below.

6.3.1.1 CONSTITUTION DRAFTING COMMITTEE.

The constitution making process should be kick-started with the setting up of a broad based and inclusive Constitution Drafting Committee (CDC) to sensitize the people, collate public opinion, and prepare the draft of a new constitution based on the collated public opinion. The CDC should be set up by the President of Nigeria. Three things are particularly important with respect to this Committee, namely, its membership, its terms of reference, and its *modus operandi*.

(A) Membership: considering the significance of its work, the nature of the CDC's membership is important. The membership should be such as is capable of inspiring public confidence in the constitution making process. It should cut across the constituent units of the federation and it should include people who are knowledgeable in constitutional matters as well as those who can mobilize the people for active participation in the process. In light of this, I propose that the CDC should be made up of the following people:

- (i) A Chairman who should be a serving or retired Justice of the Supreme Court of Nigeria.³³
- (ii) Thirty six constitutional law experts, one from each of the thirty six states of the federation, and nominated by the Nigerian Bar Association (NBA)³⁴
- (iii) Traditional Rulers in each of the local government areas of the federation.

The reason for proposing a Judge of the Supreme Court as the Chairman of the CDC is not far-fetched. A Judge of the Supreme Court is most likely to be knowledgeable and experienced in constitutional matters by virtue of his legal and judicial training, as well as

³³ The Supreme Court is Nigeria's Apex Court. See Section 230 1999 Constitution.

³⁴ The Nigerian Bar Association is the Professional body of Lawyers qualified to practice in Nigeria.

by reason of having presided over the resolution of several constitutional disputes in the course of his career.³⁵ In addition, by his or her training and experience, a Supreme Court Judge is most likely to possess the requisite temperament for leading and presiding over the important affairs and proceedings of a committee like the CDC. Appropriate temperament, knowledge and experience are important qualities that must be possessed by whoever will head the Constitution Drafting Committee.

Apart from the Chairman of the CDC who shall be a Judge of the Supreme Court, the Nigerian Bar Association (NBA) should nominate to the CDC, thirty six persons, one from each state of the federation, who are experts in constitutional matters. The NBA is the professional body of legal practitioners in Nigeria. The body is in a position to know those who are sufficiently versed, knowledgeable and experienced in the field of constitutional law and associated matters to serve as members of the CDC. The nomination of a person from each of the thirty states of the federation by the NBA is to ensure that every state of the federation has a sense of belonging in the authorship of a draft constitution for Nigeria. This will ultimately help in giving every part of the country a sense of ownership in the constitution making process.

Finally, membership of the CDC should also be extended to traditional rulers in every part of the country. The role of traditional rulers in the CDC would mainly be to help sensitize and mobilize their people to participate in the various debates and public consultations that would be organized by the CDC. All over Nigeria, and indeed in many parts of Africa, traditional rulers are highly revered and respected. And they often command the loyalty and support of their people in ways that government leaders and other politicians can only dream of. It is well known for instance that the Emirs in the northern part of Nigeria are several times more influential than the Politicians. The same goes for Kings in the southern part of Nigeria. The membership of traditional rulers in the CDC will thus help to galvanize and inspire public confidence in the constitution making

³⁵ By convention, persons appointed to the Supreme Court bench in Nigeria would have spent several years performing judicial functions at the High Court and Court of Appeal. Constitutionally, a person cannot be appointed to the Supreme Court bench unless he or she “is qualified to practice law in Nigeria and has been so qualified for a period not less than fifteen years.” See Section 231(3) 1999 constitution. In practice, persons appointed to the Supreme Court bench are usually well over fifteen years at the Bar at the time of their appointment.

process. The traditional rulers will help to galvanize public support for the process and give people the confidence to publicly contribute to the debates and consultations arranged by the CDC in the course of its assignment. This will in turn ensure that the draft constitution prepared by the CDC reflects popular opinion.

(B) Terms of Reference: Apart from the issue of membership of the CDC, another important matter is its terms of reference. The CDC should be mandated to perform the following functions:

- (i) Engage in wide public consultations to determine a suitable constitutional framework for Nigeria.
- (ii) Collate public opinion on a new constitution for Nigeria.
- (iii) Prepare a draft constitution on the basis of the collated public opinion.
- (iv) Perform such other functions as are incidental to and necessary for fulfilling the mandate of the CDC as outlined in (i) to (iii) above.

(C) Modus Operandi: A third issue that is as important as the membership of the CDC and its terms of reference is its mode of operation. The Committee should be mandated to engage very widely with the public in the course of carrying out its assignment. As discussed in chapters three and four, a major problem with the 1999 constitution and the constitutions before it is that those constitutions were made without adequate consultation with the people. The CDC should therefore make every effort to genuinely engage with the people through a combination of several public engagement and enlightenment mechanisms such as public debates, seminars, conferences, town hall meetings, community assemblies, and consultations with community leaders in order to stimulate the interest of the people in the political process and obtain their views on how the federal arrangement should be structured.

The committee should travel round the country to consult with people in the townships, villages and rural communities on what should be contained in the proposed constitution, especially how power and fiscal resources should be

divided among the levels of government. The traditional rulers, being members of the CDC, should assist in mobilizing and sensitizing the people, especially those residing in the rural communities, to actively participate in the public meetings, debates and conferences.

A broad based public sensitization and public engagement process conducted in the manner outlined above will help to ensure that the draft constitution eventually prepared by the CDC genuinely reflects public opinion on what shape the Nigerian federal system should take. In particular, it will ensure that the division of powers and fiscal resources outlined in the draft constitution represents the prevailing public sentiment on the subject.

6.3.1.2. THE CONSTITUENT ASSEMBLY

The second leg of the constitution making process should be the election of a Constituent Assembly (CA) with a membership that is representative of every part of the federation. The aim of convening the Constituent Assembly is to exhaustively consider and debate the draft constitution prepared by the CDC. This is the phase during which arguments and counter-arguments regarding the draft constitution would be thoroughly discussed and concessions and compromises made. The debates and proceedings of the Constituent Assembly will strengthen the democratic process and ultimately enhance the legitimacy of the proposed constitution. I propose that the following steps should be taken in setting up the Constituent Assembly.

(A) Enactment of the Constituent Assembly & Referendum Act

The first step in setting up the Constituent Assembly should be the enactment of a law to legalize it and provide for a public referendum to ratify the final draft of the constitution debated and adopted by it. The law setting up the CA should provide for its composition, its duration, and the public ratification of the draft constitution through a referendum. The proposed law for setting up the Constituent Assembly and providing for a referendum should be introduced as a Bill in the two Houses of Parliament and passed into law.

(i) Composition of the Constituent Assembly

Membership of the Constituent Assembly should be as broad based as possible. And it should be by election. Every part of the country should have elected representatives in the Assembly. The best way to do this is to base membership of the Assembly on local government areas. As we know there are thirty six states in the federation. But within each state, there are local government areas that are delineated according to tribal groups and ethnic communities.³⁶ Basing membership of the Constituent Assembly on local government areas will thus ensure that every ethnic community or tribal group in the country is represented in the Assembly. And this will in turn ensure that the final draft of the constitution produced by the Constituent Assembly reflects what has been jointly or predominantly agreed upon by elected delegates from every part of Nigeria.

The Chairman of the Constituent Assembly should be a retired Justice of the Supreme Court of Nigeria who is well versed in constitutional matters and whose comportment and temperament is well suited for leadership of this important body. By his training and experience, a retired Justice of the Supreme Court is well placed to moderate and direct the proceedings of the Constituent Assembly.

A Secretary should also be appointed for the Constituent Assembly. He or she could be a legal practitioner of many years standing. Preferably, he should not be less than ten years at the Nigerian Bar.

The Chairman and Secretary of the Constituent Assembly should be appointed by the President of the federation and these appointments should be subject to confirmation by the Nigerian Senate. This will ensure that the appointees truly merit the appointments and nepotism or cronyism is not allowed to corrupt the constitution making process.

Apart from the Chairman and Secretary who should be appointed by the President as outlined above, all other members of the Constituent Assembly should be elected by their local constituencies via an electoral process conducted by the State Independent Electoral Commission (SIEC) in each state of the federation.³⁷

³⁶ There are 774 local government areas listed in the 1999 constitution.

³⁷ Each State of the Federation has a State Independent Electoral Commission (SIEC) which conducts elections into local government councils. Since membership of the Constituent Assembly will be based on

(ii) **Duration of the Constituent Assembly.**

The proceedings of the Constituent Assembly should not exceed six months from the day of its inauguration. This period would allow enough time for the Assembly to thoroughly debate the draft constitution submitted to it by the CDC, break out into sub-committees to discuss specific aspects of the constitution, receive advice from consultants and technical experts, prepare, and adopt the final version of the draft constitution.

(iii) **Referendum.**

The final version of the draft constitution, as prepared by the Constituent Assembly should be submitted to the government of the federation who should cause it to be printed and widely circulated throughout the country in order to enable Nigerians in every nook and cranny of the country to assess the draft constitution and form their opinion on its contents in readiness for a nationwide referendum to either ratify or reject the draft constitution.

The Independent National Electoral Commission which is the country's apex electoral body should conduct the referendum which should take place not more than six months after the submission of the draft constitution to the President of Nigeria by the Constituent Assembly. A two third majority "yes" vote at the referendum should imply popular approval of the constitution. The referendum is aimed at ensuring that the constitution is popularly subscribed and endorsed by the overwhelming majority of Nigerians from every part of the federation.

It is a broad democratic constitution making process like the one proposed above, undergirded by popular participation, and reinforced by popular affirmation through a referendum, that will give the ensuing constitution its covenantal character, and legitimacy.

local government areas, and since the SIECs are already familiar with local government elections, the SIECs are better placed to conduct elections into the Constituent Assembly.

(iv) **Entry into Force of the New Constitution**

The approval of the people for the new constitution as conveyed through the referendum notwithstanding, the new constitution should not enter into force until the expiration of the tenure of the current public office holders. These include the President, Vice President, Legislators, Governors, Deputy Governors, *etcetera*. The reason for this is that the current set of public office holders were elected under and in accordance with the 1999 constitution which is the existing constitution of Nigeria. Immediate entry into force of the new constitution with its new provisions, new power relations and new framework for distribution of powers, may thus create avoidable confusion. To stave off such confusion, the new constitution should not enter into force until the expiration of the tenure of the present public office holders. Considering that the tenures of the current public office holders ends in 2019, it is legally expedient that the new constitution adopted by the Constituent Assembly and approved by the people through the referendum should enter into force or become operative at the end of the current political dispensation in 2019.

Thus far, I have discussed the processes that should be followed to establish a democratic constitution that reflects the popular will on how the Nigerian federation should be structured and how power and fiscal resources should be distributed among the levels of government. The establishment of a Constitution Drafting Committee, the convening of a Constituent Assembly, and the conduction of a referendum as canvassed above are mechanisms aimed at encouraging and fostering popular participation in the constitution making process, thus ensuring that the constitution that emerges through this process is the constitution of the Nigerian people, designed and wholly owned by them.

Where a federal constitution is produced through a genuine democratic process like the one outlined above, it is safe to conclude that the content of the constitution, including the division of powers and resources, is a genuine reflection of the will of the people, an expression of what they have jointly covenanted, an articulation of their joint vision for the federation. Thus, a most fundamental step in the rectification of the anomaly and dysfunction of the existing division of powers and fiscal resources among the levels of government in Nigeria is the enactment and promulgation of a democratic constitution

which, among other things, entrenches a power distribution arrangement that has been covenanted by the people. This is a most important proposal for reform of the existing power distribution framework. Every other reform proposal must be predicated on this.

6.3.1.3. Rotimi Suberu's Gradualist Theory of "Incremental Constitutional Change"

A question that may be raised in respect of the proposal made above for the enactment and promulgation of a new constitution is whether a simple legislative review of the 1999 constitution is not to be preferred to the wholesale promulgation of an entirely new constitution for Nigeria. A related question is whether a piecemeal, minimalist or gradualist legislative review of the constitution is not to be preferred to this thesis' advocacy of an entirely new constitution formulated and promulgated through a popular process.

One scholar who appears to have recently raised these questions is Professor Rotimi Suberu. Suberu argues that only a piecemeal or "incremental" approach to constitutional change, as opposed to a "once and for all" wholesale abrogation and replacement of the existing constitution, can realistically produce the desired changes in the Nigerian federal system. According to him "incremental constitutional change and non-constitutional renewal, including benign constitutional transgressions and creative legislative and judicial interventions, offer the most feasible path to federal accommodation and development in Nigeria in the absence of national consensus on the desirability and modality of wholesale, mega-constitutional reform."³⁸

Suberu's method of implementing his "incremental" change includes, "incremental" amendment to the existing constitution by the country's parliament; piecemeal amendments to existing legislation by the federal parliament; judicial interventions; and what he calls "constitutional infidelity" which, according to him, refers to occasional acts of defiance by "political elites or others" against the existing constitution.³⁹

In essence, Suberu's theory of constitutional change is an advocacy of gradualism in constitutional engineering. The problem with Suberu's approach is that it is, in reality, an

³⁸Rotimi Suberu, "Managing Constitutional Change in the Nigerian Federation" (2015) 45(4) *Publius* 552.

³⁹ *Ibid*, pp. 566-571.

escapist approach that fails to squarely address the root cause of the current problematic and controversial federal arrangement in Nigeria. Although Professor Suberu acknowledges Nigeria's "tradition of constitutional illegitimacy"⁴⁰ as seen in its "history of undemocratic constitutional engineering...in which constitution-making processes were largely dominated by unelected colonial or military authorities, with very little popular participation"⁴¹ and the "hurried, exclusionary, and opaque manner in which the military Provisional Ruling Council (PRC) promulgated"⁴² the 1999 constitution, it is curious that he nevertheless recommends an elitist and largely undemocratic "incremental change" approach as the best means of rectifying this "tradition of constitutional illegitimacy."⁴³

⁴⁰ Ibid, p.555.

⁴¹ Ibid.

⁴² Ibid.

⁴³ This is the same problem with Professor Jawad's argument for a mere legislative "amendment" of the "American imposed" constitution in Iraq. Jawad acknowledges that a constitution "should not be imposed by an outside power..." but "drafted, discussed and approved by the people concerned...and contain what they desire." He also argues that the constitution making process initiated during the American occupation of Iraq was exclusionary and manipulated by the American occupiers. And the so called referendum that purportedly approved the imposed constitution in 2005 was flawed in many respects. It is therefore curious that inspite his acknowledgement of the largely flawed and arbitrary nature of the constitution making process in Iraq, including the evident lack of prior detailed and broad-based public discussion of the draft constitution before the 'referendum,' Professor Jawad nevertheless recommends a parliamentary "consensus" on constitutional amendment as the solution to Iraq's constitutional crisis. Apart from the fact that his theory fails to elaborate on how such a "consensus" is to be achieved in a deeply divided Iraqi parliament dominated by certain ethnic groups, it must be pointed out that such "consensus," if it could be achieved at all, will at best be elitist as long as detailed and elaborate public discussion of what should be contained in the constitution by every segment of the population, as recommended by me in this thesis, is jettisoned. See Saad N. Jawad "The Iraqi Constitution: Structural Flaws and Political Implications." *LSE Middle East Centre Paper Series/* 01 Novemeber 2013 pp 4-23. A related problem is seen in Andrew Arato's so-called "post-sovereign" constitution making process, a process that may, in fact, be susceptible to elite manipulation. Arato's post-sovereign constitution making process emphasizes a two-stage arrangement under which an interim constitution is prepared by an unelected body and a permanent constitution is subsequently drawn up by an "elected parliamentary assembly." See Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq*, (Columbia University Press, 2009) p.62. See also Andrew Arato, "Post-Sovereign Constitution Making and Its Pathology in Iraq" *New York Law School Law Review* Vol.51 2006/2007 p.540; Andrew Arato, *Post-Sovereign Constitution Making: Learning and Legitimacy*, (Oxford: Oxford University Press, 2016) pp 300-301. The problem with Arato's Constitution making paradigm is that the making of the permanent constitution is "constrained" by rules entrenched in the interim constitution, a condition that may limit the ability of the parliamentary assembly, even when it is truly representative, to freely design the permanent constitution without pre-established encumbrances that may be inimical to the social wellbeing of the people and the country. It is my contention, in this thesis, that a truly democratic constitution making process must not be left solely in the hands of parliamentarians or other government functionaries. A democratic constitution making process must be broadly inclusive, involving the participation of every segment of society. And the constitution that ensues from this process must significantly reflect the wishes and aspirations of every part of the country.

The illegitimacy of the 1999 constitution cannot be wished away, neither can it be ignored. Suberu's advocacy of mere legislative review of the constitution will not cure the constitution of its illegitimacy. The illegitimacy of the 1999 constitution is a fundamental defect that renders it absolutely unacceptable in an ethnically diverse federation like Nigeria. It is true that Section 9 of the 1999 constitution empowers the National Assembly⁴⁴ to "alter" any of its provisions subject to certain conditions stipulated in that section of the constitution. However, what the Nigerian federation needs is not a gradualist and 'incremental' legislative amendment of the 1999 constitution, but an entirely new constitutional arrangement predicated on the will of the people and genuinely reflecting their aspirations. And nowhere in the 1999 constitution is the National Assembly empowered to draft and adopt an entirely new constitution.

Amending a constitution and formulating a new constitution are two different things, and they entail two different processes. The former requires a legislative procedure carried out in accordance with the existing constitution. The latter is more fundamental in nature and far reaching in effect. It requires a complete abrogation of the existing constitution and the adoption of a novel framework. The significance of the process requires that the people who are the ultimate repository of the country's sovereignty be directly involved. It is not a matter to be lightly esteemed. What is needed to address the illegitimacy of the 1999 constitution is something more radical, something more profound in its effect than a mere legislative amendment. The 1999 constitution suffers from a fundamental and debilitating crisis of legitimacy that is cured only by its replacement with an entirely new constitutional arrangement covenanted by the people and founded on their will. Any other approach different from the outright formulation and promulgation of a new democratic constitution can only be cosmetic. Such an approach will turn out to be an exercise in futility as it will not suffice to assuage the widespread disenchantment with the illegitimacy of the 1999 constitution and the power distribution arrangement entrenched in it.

⁴⁴ The National Assembly is Nigeria's Parliament made up of an upper legislative house called the Senate and a lower legislative house called the House of Representatives.

To be genuinely democratic in character, the drafting and adoption of a new constitution for Nigeria must be done through an inclusive and broad based process that involves public participation on a scale wide enough to include the engagement of every ethnic or tribal community in present day Nigeria. The National Assembly, as presently constituted does not directly represent all ethnic and tribal communities in Nigeria. To leave the formulation of a new federal framework or the drafting and adoption of a new constitution in the hands of the National Assembly therefore is to disenfranchise or marginalize remote minority communities and render them voiceless in the constitution making process.

What is needed to birth a truly democratic constitution therefore is a process that involves a broadly inclusive Constituent Assembly made up of representatives of the various local government areas or municipalities that genuinely represent all shades of interest in the Nigerian federation. This implies that the Constituent Assembly must not only be broadly constituted, its members must be directly elected by the communities they represent. Considering the multi-ethnic character of the Nigerian federation, only a constitution produced by such a broadly constituted Constituent Assembly and ratified at a referendum specially convened for the purpose, can make any pretension to legitimacy. And by extension, only a division of powers and fiscal resources entrenched in such a democratic constitution can be said to truly reflect the public will.

Apart from the above, many Nigerians view the present set of national legislators with utmost distrust, a fact which Professor Suberu himself acknowledges.⁴⁵ Many of them are perceived to be part of the elitist club of corrupt power mongers that originally conspired to impose the 1999 constitution on the people.⁴⁶ It is thus doubtful if any constitution review or constitutional amendment process solely managed by these legislators will ever be acceptable to the Nigerian people, many of who are anxious to see a new constitutional order in the country. This buttresses the fact that only a constitution making process initiated by and genuinely owned by the ordinary people of Nigeria from every part of the country can produce a constitution that is popularly acceptable. That process,

⁴⁵ Rotimi Suberu, (note 38 supra) p.568

⁴⁶. The National Assembly consists of several of the erstwhile military administrators and their civilian acolytes that unilaterally formulated the 1999 constitution and imposed it on the people.

as discussed above, will entail the setting up of a broadly representative Constitution Drafting Committee to produce a draft constitution, a broadly constituted Constituent Assembly to debate and adopt the draft constitution, and a popular referendum to ratify it.

Suberu's other recommendations, to wit judicial intervention, and occasional defiance of the constitution, are equally unrealistic or unsuitable for the reason given above. They fail to address the legitimacy question. No amount of judicial activism or elite "constitutional infidelity" will produce a people's constitution or a division of powers and resources that genuinely reflect the people's will. It is the people themselves that can do this through a genuinely popular process, the type that is proposed in this thesis.

Professor Suberu hinges his "incremental constitutional change" advocacy on an alleged "absence of national consensus on the desirability and modality of wholesale, mega-constitutional reform."⁴⁷ He cites the inability of participants at the 2014 national conference to agree on a number of issues as evidence of his alleged "absence of national consensus."⁴⁸

First, it must be stated that the so-called national conference organized by the federal government of Nigeria in 2014 cannot, by any standard, be described as a popular conference genuinely convened to discuss and address Nigeria's political problems. As Suberu himself acknowledged, the participants at the conference were not elected by the Nigerian people.⁴⁹ Rather they were carefully selected by the federal government and were accountable to the federal government alone.

Besides, not every part of the country was represented at the conference. Most of the participants were people in the country's elite upper class. Most of them had held public offices at the federal level, and a good number of them were actually complicit in the illegal and illegitimate imposition of the problematic 1999 constitution on the people of Nigeria.⁵⁰ It is perhaps a fallacy of hasty generalization to regard whatever disagreements took place among these few members of Nigeria's elite upper class as a definitive

⁴⁷ Rotimi Suberu, (note 38 supra) p.552.

⁴⁸ Ibid, pp. 572-575.

⁴⁹ Ibid, p.573.

⁵⁰ A quick scan of the delegates to the conference confirms this.

evidence of a lack of consensus among Nigerians on how to fix the problems of the federation. The 2014 national conference was an elite affair. It was organized by the elite, for the elite. The conference has, in fact, been publicly discredited as a jamboree designed to further the political interests of its organizers.⁵¹ The participants at the conference were certainly not representing the generality of Nigerians at the conference since they were neither elected nor selected by the communities that constitute the Nigerian federation. It is therefore incorrect to assert, as Professor Suberu did, that there is an absence of national consensus on the mode of constitutional change in Nigeria. To say that, at this stage, is highly speculative, for we cannot know this for sure until we take concrete democratic steps to actually prepare a new constitution.

Another question that may be raised in relation to the proposal made in this thesis for a new constitution popularly ratified through a referendum is what happens if there is an overwhelming rejection of the constitution at the referendum? The answer to this question is that it is very unlikely that this would happen considering that every clause in the draft constitution would have been thoroughly debated at the sessions of the Constituent Assembly. And since each local government area in the country, and by extension, each tribal or ethnic group is expected to be represented in the Constituent Assembly, it is safe to conclude that the final draft constitution that would be presented to the public at the end of the proceedings of the Constituent Assembly would apparently reflect the views of every part of Nigeria. It is therefore unlikely that the draft constitution would be overwhelmingly rejected at the referendum.

However, in the unlikely event that the draft constitution is actually rejected at the referendum, or the Constituent Assembly is even unable to agree on a draft constitution, the only way forward is to go back to the drawing board, intensify inter-group negotiations, concessions, and compromises, and go through the constitution making process all over again until a new federal constitution that is generally acceptable to the overwhelming majority of Nigerians emerges. The point being made in all of the above is that a genuinely popular constitution making process is non-negotiable in the quest for a

⁵¹ ‘Okurounmu Goofed on Jonathan’s Confab, Tinubu- Ajomale’ *The Sun* (29 April 2017) <http://sunnewsonline.com/okurounmu-goofed-on-jonathans-confab-tinubu-ajomale/> (accessed 26/5/2017).

suitable constitutional division of powers and fiscal resources in Nigeria. Anything short of this is a recipe for further chaos and public discontent in Nigeria.

Set out in Figure 1 below is a proposed model Bill for an Act to establish a Constituent Assembly and provide for a referendum to adopt and ratify the proposed new constitution. As already stated above, the Bill would have to be passed into law by the two Houses of the National Assembly and receive presidential assent.

Figure 1

**(I) A BILL FOR AN ACT TO ESTABLISH A CONSTITUENT ASSEMBLY
TO ADOPT A NEW CONSTITUTION FOR NIGERIA AND PROVIDE
FOR A PUBLIC REFERENDUM TO APPROVE THE NEW
CONSTITUTION AND RELATED MATTERS**

WHEREAS the Constitution of the Federal Republic of Nigeria 1999 is the existing supreme law of the Republic, having emerged as a schedule to Decree 24 enacted by the Federal Military Government of Nigeria on 5 May 1999.

AND WHEREAS there have been persistent calls for a new constitution made by the people of Nigeria themselves through a Constituent Assembly specially elected for that purpose and a referendum to stamp the constitution with public approval

AND WHEREAS the National Assembly of Nigeria considers it in the public Interest to make a law providing for the establishment, composition And conduct of the above mentioned Constituent Assembly and Public referendum

BE IT THEREFORE ENACTED by the National Assembly of the Federal Republic of Nigeria as follows:

PART 1- ESTABLISHMENT AND COMPOSITION OF THE CONSTITUENT ASSEMBLY

Establishment of the Constituent Assembly 1. There is hereby established a Constituent Assembly to debate
And adopt a new constitution for Nigeria

Composition of the Constituent Assembly- 2(1) The Constituent Assembly shall consist of members elected from each of the existing local government areas in the federation.

(2) Further to subsection 1 of this paragraph, one person shall
Be elected to represent each local government area in the
Constituent Assembly.

(3) There shall be a Chairman for the Constituent Assembly
Who shall be a serving or retired Justice of the Supreme
Court of Nigeria.

(4) There shall be a Secretary for the Constituent Assembly
Who shall be a legal practitioner qualified to practice in
Nigeria and who has been so qualified for not less than ten
years.

(5) The Chairman and Secretary of the Constituent Assembly
Shall be appointed by the President of the Federal
Republic of Nigeria in consultation with the Nigerian
Senate.

- Qualification for membership of the Constituent Assembly-** 3(1) A person shall be eligible for election to the Constituent Assembly provided he is not less than twenty one years old at the time of the election.
- (2) The provision of subsection 1 of this paragraph notwithstanding, a person shall not be eligible for election to the Constituent Assembly if
- (a) He is a convicted felon
 - (b) He is of unsound mind
 - (c) A court of law has declared him unfit for public office
 - (d) He is a member of the Police or armed forces.
- Official Procedure at deliberations of the Constituent Assembly-** 3. The procedure to be followed by the Constituent Assembly at its deliberations shall be decided by the members at its first sitting.
- Duration** 4. Proceedings of the Constituent Assembly shall not exceed six months from the date of its inauguration.
- Publication and circulation of the draft constitution** 5. At the end of its proceedings the Constituent Assembly shall submit to the President of the federation certified copies of the draft constitution for publication and circulation to members of the public.

PART 2- REFERENDUM.

- Conduction of a referendum** 6(1).The Independent National Electoral Commission shall conduct a referendum to ratify the Draft Constitution already debated by the Constituent Assembly at a date and time to be

decided by the Commission, provided that the date shall not exceed six months after the submission of the Draft Constitution to the President of Nigeria by the Constituent Assembly

(2) Every Nigerian shall be qualified to vote at the referendum provided he/she is at least eighteen years old at the time of the referendum.

(3) Upon a two third majority “Yes” vote at the referendum, the Draft Constitution shall, subject to subsection 4 below, become the supreme law of the Federal Republic.

(4) Notwithstanding the provision of paragraph 3 above, the Draft Constitution shall not enter into force before the expiration of the tenure of existing public office holders on 29th May 2019.

Citation

7. This Act may be cited as the Constituent Assembly and Referendum Act.

6.3.2. Non-centralization of Powers.

As earlier discussed, a major problem with the division of powers and fiscal resources in the 1999 constitution, apart from its lack of legitimacy, is its overwhelming lopsidedness in favour of the federal government. I discussed this extensively in chapter four and I also expatiated on it in section 6.1 above. The kernel of my argument on this subject is that this division of powers and resources is antithetical to the idea of federalism, and absolutely unsuitable for an ethnically diverse society like Nigeria, a country made up of different peoples with different economic interests, different cultures, and different political orientations.

I proposed the restriction of the federal government's powers to matters which are of general concern to the entire federation while states and local governments should be allowed to exercise power and autonomy in respect of their own internal affairs. In essence, the division of powers in the new constitution should be principally guided by the need to, as far as is practicable, guaranty the autonomy of the state and local governments in respect of their internal affairs. I also proposed greater clarity in the constitutional division of powers in order to ensure that the federal government does not take advantage of any ambiguity in the division of powers to arrogate more powers than necessary to itself, a problem that has repeatedly recurred with the use of the concurrent legislative list under the current constitution. Basically, the power distribution model that I propose in this thesis is one predicated on non-centralization, and it is marked by clarity.

To facilitate this power distribution model, I proposed a change in the existing technique of power distribution. Specifically I proposed the abrogation of the use of exclusive and concurrent legislative lists for power distribution and their replacement with federal, state and local government legislative/administrative lists. Thus instead of distributing powers among the levels of government through the exclusive, and concurrent legislative lists as is currently the norm under the 1999 constitution, I make the novel proposition that, under the new constitution, power should be more clearly distributed through three distinct legislative lists namely federal, state and local government legislative lists, with the powers of the federal government restricted to matters that generally concern the entire federation, and residual powers assigned to the states.

In accordance with the above, I modify the legislative lists set out in the 1999 constitution and propose that the constitutional division of powers among the levels of government should be restructured as follows and attached as a schedule to the new constitution;

6.3.2. A. Division of Legislative and Administrative Powers

Part I

Federal Government Legislative List

“Accounts of the federal government; Arms, ammunitions and related matters; federal aviation and matters connected therewith; Award of honours to deserving persons by the federal government; Bankruptcy and insolvency; Banking services, promissory notes and bills of exchange; Matters connected with citizenship, naturalization and aliens; Federal roads; Copyright; coinage and legal tender; currency; Customs and excise duties; Census in the federal capital territory; Defense of the entire federation; Diplomatic, consular and trade representation for the federation; Election to the offices of President, Vice President and members of the National Assembly; Inter-state electricity and establishment of electric power stations; Exchange control; Export duties; Foreign Affairs; Extradition; Immigration and emigration; Implementation of treaties concerning matters on the federal list; Incorporation, regulation and winding up of companies; Labour in respect of federal workers; meteorology and associated matters; matters relating to nuclear energy; Passports and visas; federal police; National Assembly matters; Federal Prisons; Public Relations of the federation; Public Service of the Federation; Inter-state Railways; External trade and inter-state trade and commerce; Traffic on federal roads; federal government owned wireless broadcasting and television; Any other matter which is within the legislative jurisdiction of the National Assembly under this constitution; Any matter arising from or connected with any matter in this list.”

Part II

State Government Legislative List

“State aviation and matters connected therewith; Registration of state voters and election to the offices of the Governor, Deputy Governor, State Legislators, Local Government Chairman and Councilors; Insurance; Labour in respect of State Workers; Mines, Minerals and natural resources; State Police, Powers of the State Houses of Assembly, and the privileges and immunities of their members; State Prisons; Professional

occupations; State census; Public holidays; Public service of a State; Regulation of local political parties; Intra-state trade and commerce; Registration and regulation of business names; Censorship of films; Wireless broadcasting and television; State antiquities and monuments; Archives and records of a State; Construction and maintenance of state roads; Electricity and establishment of electric power stations within a State; Secondary and Tertiary health care and associated matters; Secondary and tertiary education; agricultural policy; Scientific and technological research; Matters concerning trigonometrical, cadastral and topographical surveys; Any other matter which is within the legislative jurisdiction of a House of Assembly under this Constitution; Matters arising from or connected with the matters mentioned in this legislative list; All other matters not listed under the federal, state or local government legislative lists.”

Part III

Local Government List

“Primary, adult and vocational education; Primary health; Agriculture; Radio and television licensing; Establishment, superintendence, and maintenance of cemeteries, burial grounds and homes for the destitute or infirm; Licensing of various modes of rural transportation including bicycles, canoes, wheel barrows, trucks, and carts; Labour in respect of local government workers; Establishment, superintendence and regulation of slaughter houses, slaughter slabs, markets, motor parks and public conveniences; Construction and maintenance of local roads, streets, street lightings, drains and other public highways, local parks, community gardens, open spaces, or other public facilities as may be prescribed from time to time by the local government council; roads and street naming and house numbering; public conveniences with regard to their provision and maintenance, disposal of sewage and refuse; births and deaths registration; tax on privately owned houses or tenements; Regulation and supervision of local Shops and Kiosks; Regulation and supervision of local Restaurants, bakeries and eateries; Regulation and supervision of Laundries; Registration and regulation of marriages; Licensing, regulation and monitoring of the sale of alcohol.”

6.3.2. B. Division of Fiscal Powers

It is not enough to reassign functions among the levels of government as outlined above. Such reassignment of functions must be accompanied by a concomitant reassignment of fiscal powers and fiscal resources to ensure that each level of government is able to autonomously carry out its constitutionally assigned functions. Allocation of fiscal resources has always been very controversial and contentious in most federations.⁵² Indeed one scholar has argued that “the problem of finance is the fundamental problem of federalism.”⁵³ In Nigeria, it has, for decades, been a major source of ethnic conflict and secessionist agitation. As discussed in chapter four, virtually all the significant fiscal powers and resources of the Nigerian federation are concentrated in the federal government.⁵⁴

A frequently cited argument for the conservative and centralized allocation of fiscal resources in successive Nigerian constitutions is the often claimed need to guarantee unity, economic stability, and balanced economic development throughout the federation.⁵⁵ Indeed this argument is as old as the Nigerian state itself. It would be recalled, from our discussion in chapter three, that Lord Lugard, Nigeria’s first colonial Governor General had latched on to the same “balanced economic development” and “unity” arguments in rationalizing his 1914 amalgamation of Northern and Southern Nigeria and the simultaneous centralization of their finances.⁵⁶

However, no one in Nigeria’s chequered history has championed the cause of centralized fiscal arrangements for the federation the way Professor Adebayo Adedeji, Nigeria’s

⁵² As we know, it was in fact a highly contentious matter during the process that led up to the promulgation of the 1789 constitution of the United States, prompting Alexander Hamilton to devote six papers of *The Federalist* to the subject. See *The Federalist* xxx-xxxvi, in Alexander Hamilton, James Madison & John Jay, *The Federalist* (J.M Dent & Sons Ltd, 1970) pp 142-175. See also George Anderson, *Fiscal Federalism: A Comparative Introduction* (Oxford University Press, 2010) p.v.; J. Isawa Elaigwu, ‘The Challenges of Federalism in Nigeria’ in J. Isawa Elaigwu ed, *Fiscal Federalism in Nigeria*, (Adonis & Abbey Publishers Ltd, 2008), p. 42; Philip Usman, ‘Resource or Revenue Sharing in Nigeria’ in J. Isawa Elaigwu ed, *ibid*, p.67.

⁵³ A.H Birch, *Federalism, Finance and Social Legislation* (Oxford University Press, 1955) p.xi.

⁵⁴ See this discussion in chapter four of this thesis.

⁵⁵ See Chapters three and four for this discussion

⁵⁶ See this discussion in chapter three of this thesis.

former Minister of Economic Planning, has. Adedeji contends that a high degree of fiscal centralization is required if Nigeria is to achieve the goals of public finance. These goals according to him include balanced economic development, and the promotion of economic stability, among others. He argues that the mentioned goals can only be effectively achieved if the central government is the undisputed custodian and manager of fiscal power.⁵⁷

In furtherance of his fiscal centralism thesis, Adedeji advocates the concentration of tax authority and borrowing powers in the federal government.⁵⁸ Most importantly, Professor Adedeji advances two broad criteria for revenue allocation among the levels of government in the federation. These include the need to satisfy “(i) the fiscal needs of the federal (central) government, having regard to its resources and functions; and (ii) the need to ensure the financial integrity of Nigeria through the financial stability of the centre.”⁵⁹

In effect, what Adedeji’s thesis implies is that the allocation of fiscal powers and resources among the levels of government should be contingent on the paramount need to ensure the fiscal supremacy and security of the federal government which will in turn use the enormous fiscal resources at its disposal to ensure balanced economic development and unity throughout the country.

Adedeji’s fiscal philosophy, which has been heavily relied on by the federal government for decades, is perhaps the most vocal and controversial advocacy for fiscal centralization ever made in the history of Nigeria. Its controversial character is marked by its bluntness and audacity considering the sensitive and tension-inducing nature of fiscal allocation in Nigeria. Yet his centralist theory, when viewed from the perspective of Nigeria as an ethnically diverse federal state, is fundamentally flawed and problematic. Indeed in advancing his theory, Adedeji seems to have ignored the reality of Nigeria’s diversity and its federal status.

⁵⁷ Adebayo Adedeji, *Nigerian Federal Finance* (Hutchinson Educational Limited, 1969) p.153.

⁵⁸ *Ibid*, pp 157-219.

⁵⁹ *Ibid*, p.261.

The financial aspect of a federal system cannot be considered apart from its socio-political realities. To do this is to stand reason on its head. Yet, this precisely is what Professor Adedeji appears to have done. In determining the appropriate fiscal architecture for a federation, it is impolitic to focus solely on economic correctness. The history of a people, their social and political orientation, and the extent of their diversity are as important, if not more important, than the obsessive need to conform to economic theories or standards.

In propounding his fiscal centralism thesis, Professor Adedeji harps on the need to secure Nigeria's unity and economic stability.⁶⁰ But it is a truism that economic stability cannot be achieved or sustained without social and political stability. Unity and economic stability cannot be built on ethnic or tribal insurgency. In fact, as I have already shown in chapters four and five of this thesis, rather than facilitate unity and economic stability, political and fiscal centralism, the type which Professor Adedeji so vociferously advocates, has tended to promote instability, anger, acrimonious rivalry, and economic sabotage across Nigeria. We need not look too far to see the evidence of this. The Niger Delta insurgency, the renewed agitation for the secession of South-East Nigeria, and the virulent boko-haram crisis in North-Eastern Nigeria are pungent contemporary manifestations of national instability brought on by the angry resistance of different ethnic nationalities to Nigeria's "centralist federalism". They are undeniable pointers to a nation at war with itself.

Adedeji's fiscal centralism preachment appears to proceed on the flawed assumption that the federation will always be managed by a benevolent, humane, fair and transparent central government which would always distribute revenues fairly and spread development evenly. But experience has shown that this has, in fact, never been the case. Indeed, a cursory survey of Nigeria's political history will reveal that the central government has almost always been hijacked by powerful political interests from the majority ethnic groups who use the enormous powers and fiscal resources available at the centre to entrench themselves and their cronies in power while feeding fat on the

⁶⁰ Ibid p.3.

country's resources.⁶¹ The fiscal centralism approach has thus proved unworkable and impolitic in the Nigerian context. Its facilitation of a culture of corruption among federal politicians and its insensitivity to the socio-political reality of Nigeria as an ethnically diverse federal state made up of people with different economic interests, different economic needs, and different political orientation are fundamental flaws that render it untenable in the Nigerian context.

Thus, while it is true that economic stability should be an important factor in the determination of fiscal arrangements in a federation, it must be pointed out that economic stability is not necessarily achieved by fiscal centralism as Professor Adedeji and other adherents of fiscal centralism would have us believe. In fact, fiscal autonomy for the state and local governments is much more likely to enhance the overall economic stability of a country like Nigeria if it is combined with appropriate safeguards.

The advantages of state and local government fiscal autonomy for a federation like Nigeria are enormous. As discussed in chapter four, when states and local governments generate their own revenue, not only is federalism enhanced because their political autonomy is enhanced, they are also compelled to be accountable to their constituents and prudent with their finances. On the other hand, when states and local governments do not have to raise their own revenue but rather rely on monthly subventions from the federal government, as is the case in Nigeria, the incentive for wasteful expenditure, and financial corruption in the state and local governments is heightened. Fiscal autonomy for sub-national governments carries the potential to impose on these governments financial discipline that will discourage frivolous expenditure and constrict the space for financial corruption.

A centralized fiscal architecture for a federation like Nigeria kills initiative at the state and local government levels. With fiscal centralization, the experimentation and innovation which would have been embraced by the state and local governments, as a result of the need to creatively raise their own revenues, are almost certainly jettisoned.

⁶¹ The powers concentrated in the central government have been mostly used to enrich public office holders at the federal level. This is very evident in the high number of mind boggling incidences of corruption, especially financial crimes committed by federal public servants throughout Nigeria's history. Recent examples of this are listed in chapters four and five.

Most importantly, as already discussed in this thesis, the concentration of fiscal powers and resources in the central government has, over the years, encouraged or induced an unhealthy struggle among the constituent units of the federation for the power and wealth at the centre. For decades, the power and wealth of the federal government and the patronage which it is thereby enabled to dispense, have made the struggle to control it a 'matter of life and death' among the federating units. Those who lose out in this struggle often resort to ethnic violence or secessionist agitation. Fiscal centralization has therefore tended to keep the federation and its constituent units perpetually glued to an endless cycle of inter-ethnic violence, rivalry, and mutual suspicion, all of which portend grave danger to the continued stability and viability of the federation.

All of the issues outlined above make fiscal centralization unattractive for the Nigerian federation. It is a cardinal argument of this thesis that fiscal autonomy for the levels of government remains the best option for Nigeria in light of the country's history, its ethnically diverse character, and the perennial demand for autonomy by the constituent units of the federation.

However, while fiscal autonomy for the levels of government is desirable and should indeed be vigorously pursued, it is equally important to guard against fiscal instability by ensuring a reasonable degree of fiscal stability throughout the federation. This suggests the adoption of a combination of tax assignment and revenue sharing arrangements that will foster fiscal autonomy for the levels of government while shielding the federation from general fiscal instability.

I would therefore argue that in the determination of appropriate financial arrangements for the Nigerian federation, the need for national economic stability must be complemented by three other factors (i) the need for each level of government to have adequate financial resources to support its constitutionally assigned functions, (ii) the need for each level of government to, as far as is practicable, generate and manage its own fiscal resources, and (iii) the need for each level of government to derive significant benefits from revenues generated within its territory. By implication, in addition to the desirability of national economic stability, financial sufficiency and appreciable fiscal

autonomy for each level of government should, as far as is practicable, guide the determination of the appropriate fiscal arrangements for Nigeria. A way must be found to strike a balance between these criteria.

In the next few paragraphs, I make specific recommendations for the fiscal autonomy proposed in this thesis for the levels of government, while recommending measures to preserve the stability of the federal fiscal system. To do this, I will start by considering each of the main taxes currently assigned to the federal government under the 1999 constitution with a view to recommending its retention by the federal government or its reassignment to the state or local governments. I will then consider the use of appropriate fiscal equalization measures to address fiscal imbalances that may occur as a result of the reassignment of tax powers among the levels of government.

6.3.2 B.1. Proposed Fiscal Arrangements

It is my argument in this thesis that as against their wholesale assignment to the federal government under the 1999 constitution, the personal income tax and the petroleum profits or resource tax, should be specifically assigned to the state governments while the property tax should be clearly assigned to the local governments. This is without prejudice to other taxes which each of these governments may wish to levy and collect within its own jurisdiction, so long as such other taxes do not compromise the fiscal stability of the federation.

Petroleum/Resource Tax: Tax on petroleum profits/natural resources should be levied and collected by the government in whose territory the petroleum or natural resource is located. The issue of resource tax has been a particularly contentious one in Nigeria since the 1960s. As shown in chapter four the insurgency, militancy and ethnic crisis in the Niger Delta region of Nigeria is principally due to the local population's aversion for the federal government's absolute control and appropriation of the tax on petroleum profits.

Under the current arrangement, the federal government levies and collects the petroleum profits tax and gives 13 percent of the revenue derived from this tax to the Niger Delta

region in whose territory the hydrocarbon deposits are located while sharing the rest among itself and the other states of the federation.

This arrangement has been roundly rejected by militant ethnic groups in the Niger Delta states which have continued to insist on absolute control over the exploration and exploitation of the hydrocarbon resources located within their territory.⁶² The plight and demand of the Niger Delta is understandable. The region bears the brunt of the environmental pollution that often accompanies oil exploration activities in the region. Fishing and farming, the major sources of livelihood of the people of the region have been deleteriously affected by frequent incidences of oil spillage, gas flaring and acid rain with the result that hunger and poverty is pronounced and widespread in the area.⁶³

Also pollution of the environment continues to compromise the health and wellbeing of the local residents. Most importantly, as a result of oil exploration activities in the Niger Delta and the relocation of high earning employees of the International Oil Companies to the area, the cost of accommodation, business activities, and social services in the area is often very high with attendant negative impact on the local indigenes most of who are poor and unemployed.⁶⁴

In addition to the above, reliance of the federal government and other states of the federation on the revenues derived from Niger Delta crude oil has fostered a culture of fiscal complacency throughout the federation. Despite the presence of other exploitable and potentially profitable natural/mineral resources in virtually every state of the federation,⁶⁵ the federal government and the other states have relied almost solely on revenues generated from the petroleum profit tax in the Niger Delta,⁶⁶ thus fueling the perception that money that should have been used for developing the Niger Delta and

⁶² Wumi Iledare and Rotimi Suberu, 'Nigeria' in George Anderson ed., *Oil and Gas in Federal Systems* (Oxford University Press, 2012) p.246.

⁶³ D.S.P Alamiyeseigha, 'The Environmental Challenge of Developing the Niger Delta' in Augustine A. Ikein et al eds., *Oil, Democracy, and The Promise of True Federalism in Nigeria*, (New York: University Press of America, 2008) pp.254-255. See also, Macleans A. Geojaja and Steve Azaiki, 'Poverty and Insecurity in the Niger Delta' in Augustine A. Ikein et al eds, *ibid*, pp 151-152; Wumi Iledare and Rotimi Suberu, (note 61 supra) pp 243-246.

⁶⁴ *Ibid*.

⁶⁵ See Table 3 in Chapter four.

⁶⁶ Wumi Iledare and Rotimi Suberu, (note 61 supra) p.241.

improving the quality of life of its local residents, is arbitrarily siphoned away and used to fund development and luxurious living elsewhere. Apart from the 13 percent which is given to it in accordance with the so called principle of derivation, the Niger Delta which bears the brunt of oil exploration derives no other form of financial benefit from the exploitation of oil within its territory.

More importantly, the country's heavy reliance on revenues from oil exposes it to price fluctuations in the international oil market, and hence the failure or refusal to broaden income generation in the states through economic diversification (or the exploration of other sources of income) exposes the entire country (including all the states) to price fluctuations in the international oil market, thus giving room for economic uncertainty and instability. Indeed, the Nigerian economy went into recession in 2016 as a result of very low oil prices in the international market.⁶⁷ This has severely affected the finances of many states and local governments, as seen in their inability to pay worker's salaries for several months.⁶⁸ The country's sole focus on oil has not allowed for a diversification of the economy. Despite the enormous potentials in agriculture and the availability of commercially viable mineral/natural resources in virtually every state in Nigeria,⁶⁹ the federal government and the states and local governments predominantly rely on revenues derived from oil in the Niger Delta for their sustenance.⁷⁰

In view of the above, and in accordance with some of the guidelines already proposed in this thesis for the assignment of fiscal resources among the levels of government, namely the need for regional governments to derive significant benefit from fiscal resources generated from their territory, and the need for regional governments to generate and manage their own resources, I propose that the petroleum/natural resource tax be assigned to the state governments. The states should have total control over the

⁶⁷ 'Falling Oil Prices: How Are Countries Being Affected?' *BBC News* (18 January 2016) <<http://www.bbc.co.uk/news/world-35345874>> (accessed 5/8/2017). See also Charlie Mitchell, 'Oil Price Fall is Main Reason for Tough Times in Nigeria' *Financial Times* (26 September 2016) <<https://www.ft.com/content/3a47381a-7371-11e6-bf48-b372cdb1043a>> (accessed 5/8/2017).

⁶⁸ John Alechenu, '27 States Have Difficulties Paying Salaries' *Punch* (25 March 2016) <<http://punchng.com/27-states-have-difficulties-paying-salaries-buhari/>>(accessed 5/8/2017). See also Ivana Kottasova, '5 Countries Crushed by Oil Price Collapse' *CNN Money* (30 December 2015) <<http://money.cnn.com/2015/12/30/investing/oil-prices-countries-suffering/index.html>>(accessed 5/8/2017)

⁶⁹ See Table 3 in chapter four for a list of minerals available in the states of the Nigerian federation.

⁷⁰ Wumi Iledare and Rotimi Suberu (note 61 supra) p.241

exploration and exploitation of natural/mineral resources located within their territories. Such control will include how exploration and exploitation licenses are allocated and how profits derived from such natural/mineral resources are taxed. This, I believe, is the best way to put a permanent end to the perennial “resource control” crises that has plagued Nigeria for several decades.

Apart from helping to end the seemingly intractable resource control crisis in the Niger Delta, empowering the states of the federation to levy and collect natural/mineral resources tax will help to obliterate the current culture of heavy reliance on oil revenue, a culture which has made many states fiscally lazy since they are guaranteed a fraction of the oil revenue derived from the Niger Delta every month. A culture of near total reliance on easy oil revenue from the Niger Delta also incentivizes fiscal irresponsibility and militates against fiscal accountability in the states and local governments, since it is easy to dissipate unearned money on wasteful expenditure.

Attempts are often made to justify the current exclusive assignment of petroleum profit tax to the federal government by arguing that it is the only significant source of income for the country and its decentralization will engender fiscal inequality, in that, there would be a disproportionate concentration of wealth in the Niger Delta States compared to other states.⁷¹ This argument however fails to acknowledge the fact that Nigeria is enormously endowed with several other huge deposits of mineral/natural resources scattered all over the country. There is indeed no part of Nigeria that is not endowed with one potentially profitable natural/mineral resource or the other.⁷² These other mineral resources have remained untapped and unutilized because easy money comes from the oil in the Niger Delta.

Apart from natural/mineral resources, agriculture is also a potential source of huge income for each of the state and local governments of the federation. In fact, prior to the discovery of crude petroleum oil in Nigeria, agriculture was the major source of income for every part of Nigeria. The regional governments made enormous income from the

⁷¹ Nurudeen M. Abdallah, ‘Confab: Northern Delegates Explain Opposition to Resource Control’ *Daily Trust* (2 May 2014) <https://www.dailytrust.com.ng/news/general/confab-northern-delegates-explain-opposition-to-resource-control/45262.html> (accessed 5/8/2017).

⁷² See Table 3 in Chapter four.

sale and export of cocoa, groundnut, palm oil and other cash crops in the late 1950s and early 1960s.⁷³

The abandonment of agriculture as a major source of income for the regions occurred following the discovery of crude oil in the Niger Delta,⁷⁴ and the incursion of the military into the politics of Nigeria in the late 1960s. Realizing the enormous wealth derivable from the export of crude oil, the military jettisoned agriculture and focused on oil. They neglected the groundnut pyramids in Northern Nigeria, and abandoned the cultivation of cocoa and palm oil in Western and Eastern Nigeria respectively. They instead focused on the easy revenue derivable from the oil export in the Niger Delta. And in order to secure exclusive control over the oil in the Delta and the revenue derivable from it, they centralized control over oil exploration and oil exploitation activities throughout the country.

The point being made above is that the oil in the Niger Delta is not the only potential source of income in Nigeria. As Table 3 in chapter four shows, apart from the enormous potentials of agriculture as a source of significant revenue for every part of Nigeria, every state in Nigeria has reserves of potentially profitable but unexploited mineral/natural resources that could generate substantial revenue for it. The parasitic reliance on oil revenue is no longer acceptable and must be eschewed. In essence, fiscal autonomy for the states, as proposed in this thesis, should suffice to push every state in Nigeria in the direction of fiscal self-reliance. Where fiscal imbalances occur as a result of some states' inability to generate sufficient revenue to meet their constitutional responsibilities, such imbalances can be addressed through a carefully designed and bespoke fiscal equalization scheme.

As already argued therefore the power to levy and collect mineral/natural resources tax should be assigned to the state governments. The current arrangement under which the

⁷³Farming in Nigeria (Agriculture Nigeria Online Hub) <<http://agriculturenigeria.com/research/introduction/history-of-agriculture-in-nigeria>>(accessed 5/8/2017). See also Adam Robert Green, 'Agriculture is the Future of Nigeria' *Forbes* (8 August 2013) <<https://www.forbes.com/sites/skollworldforum/2013/08/08/agriculture-is-the-future-of-nigeria/#2320d0516d96>> (accessed 5/8/2017).

⁷⁴ Ibid.

central government exercises full control over natural resources tax and gives just 13 percent of the revenue from that tax to the state(s) in whose territory the mineral/natural resource is located in accordance with the so called principle of 'derivation' is fundamentally flawed. This arrangement is an instrument of exploitation and oppression. It is an arrangement designed to perpetually entrench the hegemony of the central government by making the states permanently dependent on it for their sustenance.

The argument of some political leaders for a mere increase in the "derivation" percentage from the constitutionally established 13 percent to 25 percent or 50 percent⁷⁵ is in principle not different from the status quo. The argument for a mere increase in the percentage of resource tax revenues payable to producing states by the federal government is an escapist proposal that fails to recognize and address the root cause of the violent agitations in the Niger Delta.

The Niger Delta struggle is about control of resources. It is the struggle of a people to wrest control of their land and natural resources from the suffocating control of a distant and insensitive central government that is only interested in making money from their resources without any care for their welfare. It is about the desire of a people to control and regulate their own affairs without any intrusion from external parties. It is about their desire for self-government and autonomy, an autonomy they had enjoyed for several centuries before the advent of colonialism and its attendant merger of different ethnic groups under the same roof. The Niger Delta crisis involves the struggle of a people against an exploitative centralist arrangement that is seemingly designed to perpetually ensure their political and fiscal emasculation.

To address the injustice of the current exploitative arrangement, there must be a radical departure from the status quo. Each state of the federation should be allowed to exercise unfettered and untrammled control over its natural/mineral resources. The tax on revenues that accrue from the exploitation of these natural resources should be appropriated and managed by the producing state itself. There are precedents for regional

⁷⁵ See for instance E.K Clark, "The Niger Delta Question: The Imperatives for Peace and Progress" in Augustine A. Ikein et al eds., *Oil, Democracy, and the Promise of True Federalism in Nigeria*, (University Press of America, 2008) p.203.

control of resource tax in other ethnically diverse federations. For instance, in Ethiopia, an ethnically diverse African country with a history similar to that of Nigeria, the states play a major role in levying and collecting taxes on “income derived from mining operations, and royalties and land rentals on such operations.”⁷⁶ The same obtains in Canada where each province is constitutionally empowered to “exclusively” legislate in respect of “non-renewable natural resources” within its territory. The control which the Canadian provinces exercise over their natural resources includes the power to levy and collect taxes in respect of such resources.⁷⁷

An assignment of the power to levy and collect mineral/natural resources tax to the constituent states of the Nigerian federation will spur all the states into action and encourage each state to responsibly pursue the exploitation of its own resources, generate revenues from them, and manage these revenues responsibly. It will aid the diversification of the Nigerian economy. It will encourage healthy competition among the states, and the federation will be the better for it. Importantly, it will significantly reduce the suffocating and overbearing control wielded by the federal government in the federal system. And by extension, it will drastically reduce the inter-ethnic struggle for the control of the federal government.

Personal Income Tax: Each state of the federation should collect and administer personal income tax from its workers and residents. A federal statute should set a uniform personal income tax rate for the entire country in order to prevent unnecessarily wide disparities in the tax rate across the country. But the collection of the tax and its administration should be vested in each state government who must then ensure that proceeds from the tax is shared between the state government and the local/municipal governments within the state according to a criteria clearly set down in a law of the concerned state. The Personal Income Tax is a high yield tax base that can provide a reliable source of revenue to finance development projects and provide public goods and services in the state and local governments. The federal government may also collect and administer its own personal income tax, but this should be directed at federal government

⁷⁶ See Article 97(8) Constitution of Ethiopia 1995.

⁷⁷ See Sections 92A and 92A (4)(A) Constitution of Canada 1982.

workers and residents of the federal capital territory. Regional control of the personal income tax is not uncommon in a number of other ethnically diverse federal states. For instance, provincial or regional governments are allowed to levy, collect and use the personal income tax in Ethiopia.⁷⁸ In Brazil and Canada, the tax is concurrent, so provinces and regions are also allowed to levy and administer the income tax.⁷⁹

Property Tax: Being an immobile tax, the property tax is a natural candidate for local taxation.⁸⁰ In fact the trend in most federations is to reserve this tax for the local governments. This is the trend in federations like Canada, Australia and the United States.⁸¹ It is also the practice in South Africa.⁸² The property tax, when properly managed and harnessed can be an excellent source of revenue for the local governments. For instance, the property tax has been known to account for approximately three-quarters of the revenues of local governments in the United States.⁸³

Customs duties, Export Tax, and Company Income Tax: The administration of certain taxes is traditionally assigned to the federal government in most federations. For instance, in most federal countries, customs duties and export taxes are usually within the exclusive jurisdiction of the federal government.⁸⁴ This is to enable the federal government secure “an effective internal customs and economic union”⁸⁵ for the country. The federal government is in the best position to efficiently levy and administer these taxes in order to achieve this goal. The efficiency argument also supports the assignment of the company income tax to the federal government as companies often carry out their operations across state or regional boundaries within a federation and could fall victim of multiple taxation if state or local governments are allowed to levy the company income tax. On the ground of efficiency therefore, the above mentioned taxes should be assigned to the federal government as it is more likely to be able to efficiently levy and administer

⁷⁸ Article 97, Constitution of Ethiopia 1995.

⁷⁹ George Anderson, (note 20 supra) pp 33-34.

⁸⁰ Robin Boadway and Anwah Shah, (note 26 supra) p.188. Wallace E. Oates, ‘Local Property Taxation: An Assessment’ in Etisham Ahmad and Giorgio Brosio, *Effective Federalism and Local Finance*, Vol.2 (Edward Elgar Publishing Limited, 2011) p.202.

⁸¹ George Anderson, (note 20 supra) p.41.

⁸² Section 229, South African Constitution.

⁸³ Robin Boadway and Anwah Shah (note 26 supra) p.188.

⁸⁴ Ronald L.Watts, *Comparing Federal Systems*, 3rd edition (McGill-Queen’s University Press, 2008) p.96.

⁸⁵ Ibid.

them by setting uniform rates for them across the country and superintending their collection and management.

However since the custom duty and export tax are levied on goods coming into or going out of Nigeria generally, and the company income tax is levied on companies whose transactions and trade activities often cut across regional boundaries, the revenues raised from these taxes belong to the entire country and should be vertically and horizontally shared among the federal, state and local governments using a carefully computed revenue allocation formula which will take into consideration the functions assigned to each level of government under the constitution and the estimated financial costs of performing those functions.

The horizontal inter-state and inter-local government revenue sharing should be done using the criteria of “population” and “revenue raising capacity” of each state or local government. Apart from the fact that these two criteria are fair indicators of the financial need of each state, they are also easily ascertainable if diligence is employed in measuring them. For instance the population of each state can be ascertained by a census conducted by the state itself but independently witnessed and verified by external assessors. The revenue raising capacity of each state can be ascertained by a consideration of the range and volume of tax revenues and other internal and external sources of finance available to it. Using population and fiscal capacity as the major criteria in the sharing of revenue affords a much better guaranty of certainty, fairness, and transparency than the 1999 constitution’s additional use of such vague, opaque and controversial revenue sharing criteria as “terrain,” and “landmass”⁸⁶

The determination of the appropriate revenue allocation formula and the revenue allocation criteria should be done by the country’s Fiscal Commission.

Borrowing Powers: Under the 1999 constitution, the borrowing power of the federation is exclusively vested in the federal government. But as discussed in chapter four, this power has been abused over time. The federal government could in fact use this power to intimidate and oppress minority states, or state and local governments controlled by

⁸⁶ See section 162(2) 1999 constitution.

opposition political parties, as the experiences of some state governments have shown.⁸⁷ Yet, the ability of a government to raise loans and other instruments of financial support is very crucial to the success of that government in the performance of its constitutionally assigned responsibilities. It is therefore very important that this power is carefully managed to prevent its use as an instrument of political oppression, and ensure that all levels of government have a reasonable chance of utilizing it as an alternative means of raising financial capital.

However, there is also the need to effectively control public borrowing in order to prevent economic instability which may occur if states or local governments are left on their own to borrow within and outside the country as they deem fit. Indeed some states may engage in indiscriminate borrowing and wasteful spending, and thus accumulate excessive or unmanageable debt. Heavy indebtedness by a state or local government may induce economic crisis in that state or local government and create ripple effects in other states. For instance, economic crisis in a particular state may precipitate mass migration across its borders into other states with the result that basic amenities and social services in these other states may become overstretched and inadequate to meet the demands of their own constituents.

In the administration of public borrowing therefore, there is a need to strike a balance between the desirability of fair access to financial instruments by the state and local governments and the need to forestall national economic instability. I will argue that instead of the current arrangement under which the federal government controls state and local governments' access to internal and external loans, the fiscal commission established by the new constitution, whose membership will consist of nominees of the states of the federation and the federal government, should be saddled with the responsibility of managing the access of the levels of government to internal and external loans.

Two things will most likely be accomplished if the approval process for federal, state, and local government loan transactions is managed by the fiscal commission. First, the process of approving state and local government loan transactions will be rescued from

⁸⁷ See the allegations of bias and high-handedness leveled against the federal government by the Governors of Rivers and Lagos states respectively in chapter 4.

the stranglehold of the federal government and will thus become more transparent and fair. Second, the process will benefit from rigorous and transparent peer review which will ensure that approval for government borrowing is given only when truly necessary. It will also ensure that approval is given subject to transparent conditions that are designed to ensure that borrowing by the levels of government does not compromise the economic stability of the federation. Saddling the fiscal commission with this responsibility as proposed above will most likely inspire the confidence of the state and local governments in the approval process and thus put an end to the vicious cycle of bias, political manipulation, and opacity that has characterized the existing arrangement for several years.

6.3.2. B.2. Fiscal Equalization

A major criticism that is often advanced against fiscal autonomy for sub-national governments in federations is its alleged tendency to induce regional fiscal inequality and instability.⁸⁸ Where states and local governments are allowed to freely exercise autonomy in generating their own revenue, goes the argument, huge fiscal disparities among the states and local governments may inevitably occur and defeat the need for economic balance or fiscal equality/equity among the constituent units of the federation⁸⁹. This is an argument often used by protagonists of fiscal centralization to justify their ideological position.⁹⁰

Yet the demand by various ethnic groups in the Nigerian federation for political and fiscal autonomy for the federating units remains loud and urgent. This demand cannot be ignored. A way must therefore be found to mitigate any difficulties that may arise as a result of financial disparities induced by the non-centralization of fiscal resources/fiscal autonomy. One tested way of doing this is to design an effective system of fiscal equalization to ensure that fiscal disparities are not so pronounced as to distort or compromise the country's fiscal equilibrium, and constituent units of the federation are able to provide comparable levels of public goods and services for their constituents

⁸⁸ Robin Boadway, 'Intergovernmental Redistributive Transfers: Efficiency and Equity' in Etisham Ahmad and Giorgio Brosio eds, *Handbook of Fiscal Federalism* (Edward Elgar Publishing Limited) p.358

⁸⁹ Ibid.

⁹⁰ Ibid.

regardless of their financial strength.⁹¹ Fiscal equalization is redistributive in character and may thus help to prevent equity problems that may arise in a non-centralized federation.

Equalization has, for decades, been used to address vertical and horizontal fiscal imbalances among levels of government, though the exact form of equalization varies from federation to federation.⁹² Indeed there is no standard model of equalization. Federal states which utilize equalization arrangements have had to adapt such arrangements to suit their peculiar needs.⁹³

In view of this thesis' proposal of fiscal autonomy for the levels of government in Nigeria, I propose that Nigeria should adopt an equalization system that constitutionally requires a percentage of centrally collected tax revenues to be set aside for equalization purposes. Thus, a constitutionally specified percentage of tax revenues collected by the federal government from customs duties, export tax, and company income tax should be deposited in an equalization fund set up and maintained by the country's Fiscal Commission. From this fund, the Commission can periodically make fiscal transfers to state and local governments with weak revenue raising capacity in order to augment their finances. Management of the equalization scheme by the Fiscal Commission will make it relatively transparent and open, while giving every fiscally weak state and local government a fair chance of accessing the fund regardless of its political affiliation or leaning.

The details of the equalization arrangement should be set out in a National Equalization Act, but the basic principles as proposed above should be enshrined in the constitution.

The division of powers and fiscal resources advocated thus far in this thesis will ensure that states and local governments are indeed autonomous and fully in control of their internal affairs. It will help to curb the dictatorship and hegemony of the federal government. It will also enhance the participation of the people of each state and local government in their own government. Finally, it will provide a better opportunity to have

⁹¹ Ronald L. Watts, (note 83 supra) p.108.

⁹² Ibid, pp 110-111. See also George Anderson (note 20 supra) p.62.

⁹³ Ronald L. Watts, Ibid.

local policies adapted to meet local aspirations, and also compel local leaders to be politically and fiscally accountable to their constituents. In short, the division of powers and fiscal resources proposed above offers a bespoke solution to Nigeria's infamous power allocation problem.

6.3.2.1. Common Arguments against Non-Centralization of Powers and Autonomy for State and Local Governments.

A. Corrupt Practices by Officials of Sub-National Governments

An argument that may be raised against autonomy for state and local governments is its alleged tendency to encourage and facilitate financial crimes at the state and local government levels since the non-centralization of powers and fiscal resources will translate to an increased availability of revenue to these lower levels of government. The idea is that with increased revenues, state and local government officials will have enhanced opportunities to engage in financial crimes and corruption.⁹⁴

This assertion is problematic in the sense that it impliedly assumes that centralized governance is immune to and shielded from corrupt practices. Available evidence, in the case of Nigeria, however points to the contrary. In chapter five, I pointed out that statistics from the two anticorruption agencies in Nigeria, the EFCC and the ICPC, demonstrate that financial corruption has been a major problem in Nigeria for several years, and its occurrence is not restricted to the state and local governments alone. Public office holders and officials at all levels of government have been complicit in corrupt practices since the return to civil rule in 1999.⁹⁵

It is thus pointless to embrace centralization of powers and fiscal resources in a bid to prevent corruption at the sub-national levels of government. In fact Nigeria's recent history shows that corrupt practices have been more prevalent among officials of the federal government.⁹⁶ This implies that corruption in Nigeria is not a regional problem. Rather it is a systemic problem that is best tackled by the adoption and deployment of innovative anti-corruption and monitoring strategies that facilitate early detection of

⁹⁴ Robin Boadway and Anwar Shah, (note 26 supra) pp 517; 531-534.

⁹⁵ See the discussion on this point in chapter five.

⁹⁶ See chapter five for this discussion.

corrupt practices, discourage corruption, and make it unattractive. In addition, it is also important to muster the right political will to genuinely confront this social malaise. A way to do this is to reposition and strengthen the country's existing anticorruption agencies by guaranteeing their independence from political actors. When the anticorruption agencies are able to do their work without fear or favour, incidences of impunity that have characterized the system for decades will drastically reduce or even fade into oblivion.

As discussed in chapter five, the appointment and removal of the leadership of the two anticorruption agencies, the EFCC and the ICPC, should be made by the President of Nigeria only with the approval of the country's National Assembly. Even then, removal of the leaders of the two agencies should only be contemplated on grounds of gross misconduct or physical inability to carry out the responsibilities of the office. With their independence and security of tenure guaranteed, the leaders of these agencies will be encouraged to take the bull by the horn and boldly investigate and prosecute corrupt public office holders and politicians, no matter how highly placed they are. The current system under which the President of the federation is empowered to discretionarily dismiss or remove leaders of the anticorruption agencies is itself a recipe for corruption as the President may, for political reasons, use his position to influence the anti-corruption campaign of the two agencies whose leaders will be under pressure to comply in order to save their jobs. This has in fact been the case in Nigeria since 2003.⁹⁷

Apart from guaranteeing the independence of the two anticorruption agencies as discussed above, the office of the Auditor General at the federal and state levels should be detached from the Presidency and Governors' offices respectively and made completely independent and autonomous in order to allow the Auditor General to carry out his/her audit responsibilities without fear or favour. As with the case of the leadership of the anticorruption agencies, the appointment or removal of the Auditor General should be made by the President or Governor, as the case may be, only with the approval of the federal or state parliament.

⁹⁷ See this discussion in chapter five.

The Auditor General should be constitutionally mandated to submit yearly audit reports to the federal or state parliament, as the case may be, for its information or action. Where the President, Vice President, State Governor or Deputy Governor is found culpable of financial crime, this should be a ground for his impeachment by the concerned Parliament, and subsequent prosecution by the Police. Where any other federal or state government official is found culpable, this should be a ground for his or her prosecution by the Police.

In the case of the local governments, the Auditor's appointment or removal should be made by the Local Government Chairman in conjunction with the Local Government Councillorship which is the legislative arm of the local government. The Auditor should be constitutionally mandated to submit to the Councilors, annual audit reports on the account of the local government for their attention and action. Where the Local Government Chairman is found culpable of financial crime, this should be a ground for his impeachment by the Councilors, and subsequent prosecution by the Police. Where any other local government official is deemed culpable, this should be a ground for his prosecution by the Police.

While the anticorruption measures discussed above are not meant to be exhaustive, they will certainly go a long way in checking the menace of official corruption throughout the country. The important point to note is that no political arrangement will automatically curb corruption. Whether the favoured political arrangement is centralization or non-centralization, corruption can only be addressed if effective institutional measures as well as adequate checks and balances, and the right political will, are in place to tackle the menace.

B. Secession or Political Instability

A second argument that may be raised against sub-national government autonomy is its alleged tendency to facilitate or encourage political instability or secession.⁹⁸ Indeed, as

⁹⁸This is an argument that has been used ad nauseam by successive military regimes and their civilian collaborators in Nigeria for several years. No doubt it was a factor that influenced the centralist political arrangement set out in the 1999 constitution. See Ignatius Akaayar Ayua and Dakas C.J. Dakas, 'Federal Republic of Nigeria' in John Kincaid and G. Alan Tar r eds., *Constitutional Origins, Structure, and Change*

discussed in chapter four, the fear of secession was a major driving force behind the adoption of centralization as a frame of government by the military authorities in the aftermath of the Nigerian civil war in the late 1960s. It was thought that the only way to prevent a recurrence of Biafra's attempted secession was to centralize power as much as possible. This fear of secession is a major factor responsible for the culture of centralization that has persisted in Nigeria till date.

From all indications however, centralization has, in fact, fuelled the desire for secession among Nigeria's ethnic groups over the years. This is evident in the resurgent agitation for the breakaway of the Igbo ethnic group in South-Eastern Nigeria to form the so called sovereign state of Biafra. It is also evident in the violent agitation of militant groups in the Niger Delta for secession or self government.⁹⁹ Centralization has therefore not solved the secession imbroglio. If anything, it has exacerbated it. The problem of secession is, in fact, better addressed by conceding significant political and fiscal autonomy, as proposed in this thesis, to the state and local governments in Nigeria. As we saw in chapter four, militant ethnic groups in the Niger-Delta have, for instance, insisted that unless the region is allowed substantial powers of self government, they would resort to a violent secession from the Nigerian federation. It is the argument of this thesis therefore that the way to forestall the much feared secession is to ensure that substantial powers of self government and autonomy are assigned to the state and local governments while putting in place measures that will encourage cooperation and unity in the federation. Such measures, for instance, should include the democratic and joint participation of all levels of government in the common institutions of the federation.

In any case, secession is a potential reality in any federation. In recent times, there have been secessionist agitations in California, United States.¹⁰⁰ Scotland is in the process of

in Federal Countries (Montreal: McGill-Queens University Press, 2005) p.251. See further discussions on this point in chapters 4 and 5.

⁹⁹ In chapter 4, I discussed these agitations and cited several examples of them.

¹⁰⁰ Jeff Daniels, 'California Secession Movement Starts Gathering Petition Signatures, *CNBC* (27 January 2017) <<http://www.cnn.com/2017/01/27/california-secession-movement-starts-gathering-petition-signatures.html>> (accessed 4/4/2017).

seeking a second independence referendum,¹⁰¹ and Britain itself is set to exit the European Union.¹⁰² Secession is indeed provided for in the federal constitution of Ethiopia.¹⁰³ There is thus nothing strange about the possibility of secession in a federation. In an ethnically diverse federation like Nigeria, the antidote to that possibility is not centralization. Rather what is required is a dexterous balancing of regional/local autonomy with measures that will foster cooperation and unity among the constituent units of the federation, as proposed in this thesis. With such an arrangement, secession will gradually become unattractive and unnecessary.

C. Absence of Capacity at the State and Local Government Levels.

A third argument that may be raised against non-centralization of powers, and autonomy for state and local governments is that these sub-national governments may not possess the requisite administrative or infrastructural capacity to adequately provide certain public goods and services or discharge certain responsibilities even when such are of regional or local interest, that is, even when such functions pertain to the internal affairs of the state or local governments.

This reasoning is essentially defeatist. It impliedly seeks to advocate or justify centralization by hiding behind a supposed lack of administrative or infrastructural capacity at the sub-national levels of government. If centralization is adopted as a frame of government for this reason, the state and local levels of government may never be able to provide public goods and services on their own. They will remain permanently incapacitated and dependent on the federal government for their sustenance.

On the other hand, with more powers and fiscal resources assigned to the state and local governments, these levels of government will be forced to acquire the appropriate infrastructure and secure the appropriate administrative and managerial competence to

¹⁰¹ Severin Carrell, 'Scottish Parliament Votes for Second Independence Referendum,' *The Guardian* (28 March 2017) <<https://www.theguardian.com/politics/2017/mar/28/scottish-parliament-votes-for-second-independence-referendum-nicola-sturgeon>> (accessed 4/4/2017).

¹⁰² Anushka Asthana, Heather Stewart and Peter Walker, 'May Triggers Article 50 with Warning of Consequence for UK,' *The Guardian* (29 March 2017) <<https://www.theguardian.com/politics/2017/mar/29/theresa-may-triggers-article-50-with-warning-of-consequences-for-uk>> (accessed 4/4/2017).

¹⁰³ Article 39(1) Constitution of Ethiopia 1995.

perform the functions assigned to them under the new constitution. A “learning by doing”¹⁰⁴ approach will, over time, secure to the state and local governments, the administrative and managerial experience and competence required to perform their functions effectively and meet the needs of their constituents. The state and local governments should therefore be allowed to “learn by doing” until they are able to competently carry out new constitutional responsibilities assigned to them.¹⁰⁵ This approach is much better than centralization which will only perpetually weaken the state and local governments and render them perpetually reliant on the federal government, a condition that significantly undermines their autonomy.

6.3.2.2. The National Fiscal Commission

A third point discussed in chapter four about the division of powers and resources in the existing constitution is the centralized nature of the Fiscal Commission established by the constitution to oversee, among other things, the allocation of revenues raised from centrally collected taxes among the levels of government. The Commission is also saddled with the task of determining from time to time, the criteria and formula to be used in allocating such revenues. But as discussed in chapter four, this commission is prone to undue political influence due to the wide discretionary powers constitutionally conferred on the President to appoint its members. The commission is also not constitutionally obliged to consult with the constituent units of the federation in the execution of its duties, despite the fact that its decisions have far reaching implications for every part of the country.

In chapter five, I argued that provisions should be inserted in the proposed new constitution to truly guarantee the inclusivity of the country’s Fiscal Commission. First, I argued that instead of the current arrangement that allows the President to solely appoint the members of the Commission, this power should be shared between the federal government and the states. Each state of the federation should be allowed to nominate its representative to the Commission. The federal government should also nominate a

¹⁰⁴ Pranab Bardhan , ‘Decentralization and Development’ in Ehtisham Ahmad and Giorgio Brosio, (note 87 supra) p.206.

¹⁰⁵ Ibid.

representative. This would ensure that every state of the federation is genuinely represented in the Commission. The Chairman of the Commission should be jointly elected by the members of the Commission.

The foregoing apart, the Commission should also be constitutionally mandated to consistently engage in wide public consultations throughout the country especially when preparing new revenue allocation formula or when deciding on new criteria to be used in allocating revenue among the levels of government in the federation. The criteria and formula for revenue allocation among the levels of government are sensitive issues that have proved to be controversial and acrimonious over time. It is undemocratic and counter-productive to leave the power to decide these issues solely in the hands of the Commission. Public consultations with citizens, traditional institutions, and civil society organizations will enrich the legitimacy of decisions ultimately reached by the Commission on these issues.

Apart from the commission's duty to determine the criteria and formula for revenue allocation however, the commission should also be constitutionally empowered to manage government borrowing, as well as the federation's fiscal equalization arrangement as proposed earlier in this chapter. As already discussed, the main reason for proposing the assignment of these functions to the fiscal commission is to ensure fairness and transparency in their management. Since all the levels of government are represented in the commission, decisions taken by the commission will be deemed to bear their joint imprimatur and endorsement. This eliminates the possibility of opacity, bias, and cronyism that may result if these processes are left solely in the hands of the federal government as is the case under the 1999 constitution.

Restructuring the Fiscal Commission, as proposed above, will no doubt strengthen the democratic process in Nigeria. Not only will it ensure that every part of Nigeria is genuinely represented in the fiscal commission that decides the important and sensitive issues of revenue allocation, fiscal equalization, and government borrowing, it will also ensure that decisions of the commission truly reflect the wishes of the constituent units of the federation, thus enhancing the legitimacy of such decisions. In addition, it will

enhance cooperation among the constituent units of the federation and among the levels of government.

One of the major causes of national unrest in Nigeria's recent history is the perceived imposition of fiscal policies that are completely at variance with the wishes and aspirations of the constituent units of the federation. An inclusive and democratically structured fiscal commission will however help in defusing tension and stemming the tide of these unrests.

In view of the foregoing, I propose that the provisions of the new constitution regarding the fiscal commission should be structured as follows:

National Fiscal Commission (NFC)

1. There shall be established for the federation a National Fiscal Commission.
2. The National Fiscal Commission shall consist of the following members:
 - (a) A Chairman, and
 - (b) One member representing each State of the Federation and nominated by the Governor of that State in conjunction with the House of Assembly of the State and
 - (c) One member representing the Federal Capital Territory and nominated by the President of the Federation in conjunction with the Senate of the federation.
3. The Commission shall have power to –
 - (a) Monitor the accruals to and disbursement of revenue from the Federation Account.
 - (b) Design appropriate formula and principles for revenue allocation among the levels of government in the federation.

- (c) Review revenue allocation formula and principles at five year intervals in order to ensure their conformity with changing realities, provided that in carrying out such reviews, the Commission shall consult widely with State and local governments, traditional rulers, community leaders, and other civil society organizations.
- (d) Manage the federation's fiscal equalization arrangement.
- (e) Manage internal and external borrowing by the levels of government in the federation.
- (f) Perform such other functions as are necessary to give effect to sections 2(a), (b), (c), (d) and (e) above.

6.4. Commission on Federalism.

Having set out different proposals for the reform of Nigeria's power distribution architecture above, it is important that the new constitution establish a Commission on Federalism to monitor, encourage and advocate compliance with the federal principles of covenant, cooperation and non-centralization of powers as defined in this thesis. This Commission will conduct periodic appraisal of compliance with these three tenets in the country's intergovernmental relations and produce regular reports which will form the basis of its advocacy work.

The main focus of the Commission's advocacy work is to encourage compliance with the three cardinal principles of the symbio-democratic federal framework proposed in this thesis, that is, covenant, cooperation and non-centralization. The advocacy work of the Commission will be conducted through bespoke seminars, conferences, and workshops aimed at enlightening government leaders, civil servants, and the general public on the need to adhere to these federal tenets.

This Commission is urgently needed considering that public governance in Nigeria has for long been conducted along centralist lines. Sustained vigilance and re-orientation is needed to ensure that the symbio-democratic federal framework and the constitutional

reforms proposed in this thesis are consistently adhered to in the interest of the federation.

The provisions of the Constitution establishing the Commission should be structured as follows;

Commission on Federalism

1. There shall be established for the federation, a Commission on Federalism which shall

Comprise the following members

 - (a) A Chairman
 - (b) Six other members representing the six geo-political zones of Nigeria
 - (c) Members of the Commission shall be appointed by the President in conjunction with the Senate.

2. The Commission shall perform the following functions
 - (a) Monitor, encourage and advocate compliance with federal principles in Nigeria
 - (b) Issue periodic reports on public compliance with federal principles in Nigeria.

3. The advocacy work of the Commission shall be carried out through seminars, conferences and lectures.

The aim of the federal constitutional framework proposed in this thesis and outlined thus far in this chapter is to abolish centralization of powers in Nigeria by curtailing the powers of the federal government, and imbuing the component parts of the federation with the power to manage their own internal affairs and determine their own destinies. It is in essence aimed at entrenching a division of powers and fiscal resources that facilitates genuine democratic governance throughout the federation. Only a framework

such as the one so far advocated in this thesis will conduce to unity, peace and stability in the Federal Republic of Nigeria.

6.5. Alternative Political Arrangements and their Workability

At this juncture, it is important to examine other political arrangements that have been suggested as alternatives to the existing centralist political arrangement in Nigeria. The first is an argument for a breakup of Nigeria into smaller independent countries.¹⁰⁶ The second is an argument for a confederation instead of a federation.¹⁰⁷

The first alternative is as problematic as it is dangerous for the peace and stability of Nigeria and the West African sub-region. Breaking up or dismembering Nigeria at this stage of her checkered history, as Bayo Oluwasanmi,¹⁰⁸ has advocated, carries with it ominous challenges that may be extremely difficult to resolve or grapple with. These challenges may ultimately throw the entire West African sub region into chaos and war. It may indeed trigger a chain reaction, the end of which no one can conclusively predict. First, with a break up, as being advocated, there will be border disputes which may prove very difficult to resolve. Africa itself has a long history of bitter and acrimonious border disputes. A break up of Nigeria into different countries may immediately trigger an unhealthy and long-drawn scramble among the ‘newly independent countries’ for territory, a condition that may lead to protracted war and inter-ethnic clashes.

Second, a breakup will create intractable problems about ownership, retention and disposition of properties. There are Nigerians that have businesses and properties in parts of Nigeria where they are not indigenes. Retaining their interests in and claim to such properties may well turn out to be challenging, just as issues of citizenship, immigration, and residency are bound to create their own peculiar problems. All of these may create

¹⁰⁶ Bayo Oluwasanmi, ‘Nigeria Break-Up Imminent, Oduduwa Republic Inevitable’ *Sahara Reporters* (22 February 2017) <<http://saharareporters.com/2017/02/22/nigeria-break-imminent-oduduwa-republic-inevitable-bayo-oluwasanmi>> (accessed 27/5/2017).

¹⁰⁷ Ahkabue, ‘Nigeria as a Confederation’ *Vanguard* (24 August 2010) <<http://community.vanguardngr.com/profiles/blogs/nigeria-as-a-confederation>> (accessed 20/8/2017). See also Henry Umoru, ‘We Need Confederalism or Loose Federation- Tunji Braithwaite’ *Vanguard* (26 April 2014) <<http://www.vanguardngr.com/2014/04/need-confederalism-loose-federation-tunji-braithwaite/>> (accessed 7/8/2017)

¹⁰⁸ Bayo Oluwasanmi (note 105 supra).

intractable crisis that will perpetually keep the entire West African sub-region in a state of war. A break up of Nigeria into smaller countries may thus not augur well for the people of present day Nigeria. The uncertainties associated with such a project make it unappealing and unattractive.

The same goes for a confederation. A confederation arrangement will most likely throw up the same issues which a breakup of the country might induce. This is because in a confederation, the confederating parties are individually sovereign with total control over all matters except perhaps some aspects of foreign relations which are delegated to a weak central agency that acts on their behalf. The same issues of border ownership, citizenship, immigration, economic protectionism, proprietary interests in real estate, and separatism are bound to show up. These are issues that are capable of creating inter-group tension and unending regional conflict. Under a confederation, the tendency for secession is greater for there is little binding the confederating parties together. The uncertainties associated with a confederation arrangement in a country like Nigeria are thus too real to ignore.

What Nigeria needs at this stage of her history is not confederation or a breakup of the country. Nigeria has come a long way since the advent of colonialism brought several different groups together under one roof. Over the years, there have been inter-ethnic marriages, individuals have set up businesses in parts of Nigeria where they are not indigenes, individuals have bought properties in parts of Nigeria where they are not indigenes, and people have taken up residence in parts of Nigeria where they are not indigenes. There is so much that binds Nigeria and Nigerians together as a nation. At this stage of the country's history, it is absolutely impolitic to leave the relative safety of "one Nigeria" for the grave uncertainties associated with confederation or disintegration.

It is true that the present structure of the Nigerian federation is problematic. It is true that the constituent units of the federation are disenchanted with the division of powers and fiscal resources entrenched in the 1999 constitution. But the answer is not centralism, unitarism, confederation or disintegration. The solution is a better structured federation under which all ethnic groups in Nigeria can cooperatively cohabit without sacrificing the autonomy, identity, uniqueness or aspirations of each. That structure is found in the non-

centralized, covenant driven symbio-democratic federal framework proposed in this thesis. It is a federal system in which the citizens have a say in how the federal system is structured, and the state and local governments have significant powers of self government without compromising the unity and stability of the federation.

6.6. ADVOCACY FOR FURTHER RESEARCH

A. Detailed Revenue Sharing Formula

Although this thesis has proposed that revenues raised from the centrally collected taxes, that is, customs duties, export tax, and the company income tax, should be vertically and horizontally shared among the levels of government, the percentage of the centrally pooled revenue to be allocated to each level of government will need to be determined. The procedure and methodology for computing the exact percentages that should go to each level of government, is for financial experts and economists working with the National Fiscal Commission to unravel. Such research will however effectively complement this thesis.

B. The Symbio-democratic Federal Framework as an Instrument of Conflict Resolution on the African Continent?

The Symbio-democratic federal constitutional framework for the division of powers and fiscal resources as devised in this thesis may prove very useful in addressing inter-ethnic and intergovernmental conflicts in other parts of Africa. As is very well known, many African States are ethnically diverse, and many are beset with problems similar to those found in Nigeria. Centralization and privatization of State power, both of which are colonial legacies, have been endemic in Africa for several decades despite the continent's very pronounced diversity. Inter-ethnic and fratricidal conflicts which today litter the African continent are, in many cases, directly linked to the struggle for power. Ethnic groups take up arms against each other in a bid to further ethnic or regional quests for power, dignity and relevance. A political framework that guarantees to each ethnic group significant control over its own affairs may prove to be very instrumental in achieving peace and stability on the African continent. The symbio-democratic federal framework,

as defined in this thesis, carries the potential to help in addressing some of the age-long power struggles and conflicts that have held Africa hostage since the advent of colonialism.

The challenge however is determining whether and how the symbio-democratic federal constitutional framework proposed in this thesis is applicable to the political milieu in other parts of Africa. Within each African country there are different cultures and traditional practices. The degree of political and cultural sophistication of sub-national units varies from country to country. Similarly there are differences in the degree of power struggle, and the extent of linguistic, cultural, economic and religious diversity within each African country. These factors are all very important in determining the suitability of symbio-democratic federalism, as defined in this thesis, for each African country and the extent to which it can be applied. They are also important in determining the degree of non-centralization that is appropriate within each country. Further research is needed to make these determinations in the context of other multi-ethnic countries on the African continent.

Further research in this regard will be very useful in guiding policy makers, public office holders, and civil society on the suitability of the framework proposed in this thesis for their countries. It will also help to clarify the relevance of federalism as a framework for political governance on the African continent as a whole. Hopefully, research on these issues will commence and proceed expeditiously in the nearest future.

CONCLUSION

In this Chapter, I have made specific proposals for concretizing the symbio-democratic federal constitutional framework proposed in this thesis for the division of powers and fiscal resources in Nigeria. This framework is especially suited for an ethnically diverse society like Nigeria. It is peremptorily predicated on covenant, cooperation and non-centralization of powers. Essentially, this implies that the division of powers and fiscal resources among the levels of government must be covenanted or agreed by the people. It must imbue the component parts of the federation with powers to manage their own

affairs. And it must engender cooperation among the levels of government. In other words, it must genuinely facilitate non-centralization of powers.

What this implies for Nigeria is that rather than the existing constitutional arrangement which was centrally determined and foisted on the people of Nigeria, Nigerians must be allowed to democratically determine how powers and fiscal resources should be distributed among the levels of government. This should be done through a constitution making process that has the production of a democratic constitution as its ultimate aim. I outlined a number of steps that should be taken to achieve this. First is the setting up of a Constitution Drafting Committee whose duty shall be the collation of public views and opinion, and the preparation of a draft constitution. Next is the convening of a Constituent Assembly to debate and adopt the draft constitution prepared by the Constitution Drafting Committee. The last stage of the constitution making process is the subjection of the draft constitution already adopted by the Constituent Assembly to a referendum at which the people shall either endorse or reject the constitution. If adopted, the new constitution becomes the people's constitution articulating, among other things, the division of powers and resources jointly favoured by them. Only then can the constitution be regarded as an expression of the people's covenant.

A constitution that is formulated, adopted, and promulgated by the government without public participation cannot lay any claim to being a people's constitution. To be worthy of that appellation, not only must the people be involved in its making, it must genuinely reflect their wishes and aspiration. The division of powers and fiscal resources in the extant 1999 constitution of Nigeria does not genuinely reflect the public will. It is tainted by a legitimacy deficit that can only be cured by a new power distribution structure entrenched in a new federal democratic constitution.

Suggestions that the legitimacy deficit of the power distribution architecture entrenched in the existing 1999 constitution can be remedied by embarking on an incremental, piecemeal legislative amendment of the constitution fail to fundamentally address the problem. The point is that the entire 1999 constitution itself suffers from a legitimacy deficit that cannot be cured by a mere legislative amendment by the nation's Parliament. No amount of legislative amendment can change the status of the 1999 constitution as an

illegitimate framework foisted on the Nigerian State by the military in 1999. Only a new constitution, formulated by the people themselves through an open democratic process, and genuinely articulating their wishes and aspirations, including their favoured power distribution model, will suffice.

In addition to formulating the new constitution through a genuine democratic process, the ethnically diverse character of the Nigerian federation, as well as the age-long demand for local autonomy by the constituent units of the federation, make it imperative for the division of powers and fiscal resources among the levels of government to be characterized by non-centralization, accompanied by appropriate autonomy. Nigeria cannot afford the centralist political arrangement foisted on it by a section of the Nigerian elite under the 1999 constitution. As we have seen in this thesis, the 1999 constitution entrenches a highly centralized power distribution arrangement that fosters the hegemony of the central government and establishes its dictatorship in relation to the other levels of government. This centralist power distribution model is not a recent phenomenon. In fact most Nigerian constitutions, since the colonial era, have been characterized by centralized allocation of powers and resources to the detriment of the federation's constituent units.

The colonial authorities and their military and civilian successors who institutionalized this centralized power distribution model predicated their stance mainly on the need to foster national unity and balanced economic development throughout the federation. It was thought that centralization would engender national cohesion and prevent disintegration. Rather than foster unity however, the centralized division of powers and fiscal resources has, over the years, induced an unhealthy struggle for the power and fiscal resources at the centre. Those who lose out in the power struggle often resort to violence and secessionist agitations. Thus instead of preventing disintegration, centralization has in fact done more to provoke it over the years. And unless the existing power distribution arrangement is urgently restructured, the federation itself may unravel in the nearest future.

In this chapter, I have proposed a new division of powers and fiscal resources that is different from that set out in the 1999 constitution and previous constitutions before it in

two different ways. First, in place of the existing technique of distributing powers and fiscal resources among the levels of government through the exclusive and concurrent legislative lists, I propose the adoption of a clearer division of powers and fiscal resources through the instrumentality of three distinct legislative and administrative lists, to wit, the federal, state, and local government lists.

This technique of distributing powers and fiscal resources through the instrumentality of the federal, state and local government legislative lists obliterates the possibility of centralization which the use of the “concurrent legislative list” under the existing arrangement may advertently or inadvertently facilitate. The concurrent legislative list in the 1999 constitution sets out the powers which both the federal and state governments may concurrently exercise. However the constitution adds a caveat- the state governments cannot legislate in respect of a matter on the concurrent legislative list if the central government has comprehensively legislated in respect of that matter. In effect, in addition to the federal government’s exclusive superintendence over matters itemized under the already over-bloated exclusive legislative list, the federal government can potentially exclude the legislative competence of state governments in respect of matters itemized in the concurrent legislative list by comprehensively legislating in respect of those matters. It does not seem to matter if such legislation does not conform to the wishes and aspirations of the states of the federation on those matters. Once the federal government comprehensively legislates in respect of such matters, the state governments may no longer legislate in that regard. This potentially empowers the federal government to arrogate more powers to itself and further establish its dictatorship over other levels of government. In short, it potentially facilitates centralization through the backdoor.

It is thus my argument in this thesis that a delineation of governmental functions using three distinct legislative lists, that is the federal, state and local government lists will effectively engender clarity and certainty in the division of powers and fiscal resources, while preventing federal encroachment on the powers of the other levels of government.

Second, I proposed a re-distribution of legislative powers among the levels of government such that rather than the highly centralized allocation of powers under the existing constitution, the state and local governments should, as far as is practicable, be

imbued with autonomous powers over their internal affairs while leaving the federal government with powers in respect of matters that are of general concern to the federation. Residual powers in respect of matters not listed in any of the three lists should be reserved for the state governments.

I also advocated a restructuring of the federation's fiscal arrangements such that rather than the concentration of fiscal powers and resources in the federal government, as is the case under the extant 1999 constitution, significant fiscal powers and resources should be assigned to the state and local governments to enable them perform their constitutionally assigned responsibilities unhindered. In essence, non-centralization of fiscal powers, along with requisite fiscal autonomy for the levels of government should be a principal factor in the allocation of fiscal powers and resources. Apart from customs duties, export tax, and company income tax, which, for reasons of efficiency, may have to be mandatorily collected by the federal government and shared among the levels of government, the power to raise and administer a significant number of other taxes should be assigned to the state and local governments. In particular, each state should be constitutionally empowered to raise and administer its own personal income tax, and natural resources tax, while the collection and administration of the property tax should be left to the local governments.

With this arrangement, each level of government will be enabled to autonomously generate and manage its own fiscal resources. This will help to reduce state and local governments' reliance on the central government for sustenance and survival, and thus greatly curtail the excessive dominance and dictatorship of the central government in the federation. It will also help to transform Nigeria from an oil-dependent economy to a diversified economy as the states and local governments device ways of generating revenue from agriculture and other natural/mineral resources located in their territories. Finally, the proposed arrangement will help to enhance fiscal discipline and prudence in the state and local governments.

The thesis also proposes that horizontal fiscal imbalances and equity issues that may arise as a result of the fiscal arrangements proposed in this thesis should be remedied through a system of fiscal equalization that utilizes a constitutionally stipulated percentage of

centrally collected tax revenues to augment the finances of fiscally disadvantaged states and local governments.

In addition to all of the foregoing I also proposed the establishment, by the proposed new constitution, of a National Fiscal Commission (NFC) consisting of representatives of the federal and state governments, and with a structure, scope of work, and *modus operandi* different from the existing fiscal commission established by the 1999 constitution.

This thesis proposes that the NFC should be saddled with the responsibility of periodically reviewing the federation's criteria for allocating revenue among the levels of government. It should also be saddled with the responsibility of allocating revenues centrally raised from customs duties, export tax, and company income tax, among the levels of government in the federation. In addition, it should be responsible for managing government borrowing, and administering the equalization scheme proposed above for augmenting the finances of fiscally weak state and local governments.

As argued in the thesis, the existing Commission is prone to the federal government's influence and control in that the President of the federation possesses wide discretionary powers, under the constitution, to unilaterally appoint members of the Commission. The Commission is also prone to unilateral decision making in that despite the potential impact of its decisions on all states of the federation, there is nothing in the constitution that makes public consultation an important aspect of its decision making processes.

In proposing the establishment of the NFC under the proposed new constitution therefore, I recommended a different mode of appointing members of the Commission. Under the new arrangement, this thesis proposes that each state of the federation should be represented in the Commission by a person nominated by the Governor of the state acting in concert with the House of Assembly of that state, while the Federal Capital Territory should be represented by a person nominated by the President acting in concert with the Senate of the Federal Republic of Nigeria.

In addition, I proposed that in taking its decisions regarding the appropriate formula and criteria for the allocation of centrally collected tax revenues among the levels of government, the Commission should be constitutionally mandated to consult widely with

members of the public, including state and local government officials, traditional rulers and civil society organizations. I also proposed that the Commission should be mandated to review the revenue allocation formula and criteria at five year intervals.

All of the foregoing will ensure that all the states of the federation are genuinely involved in the work of the commission and its decisions truly reflect the wishes and aspirations of the people of Nigeria. This is very important in view of the significance of the Commission's work.

The proposed structure of the Commission will also encourage and facilitate cooperation between the states of the federation on the one hand, and between the states and the federal government on the other. Participation of the levels of government in common institutions of the federation facilitates cooperation. And it is this sort of cooperation that in turn facilitates and engenders unity.

Critics of non-centralization, as defined in this thesis, are often quick to point to its potential to facilitate or encourage secession. They often attempt to justify their preference for centralization on the ground that it fosters unity and cohesion while forestalling disintegration. However, as noted in this thesis, rather than facilitate cohesion, centralization in Nigeria has done more to provoke secessionist agitations since the country got her independence from Britain in 1960. Till date, ethnic agitations for secession are ongoing in various parts of the country because of the concentration of powers and fiscal resources in the federal government. The demands of the various militant and ethnic groups in the country show that only genuine non-centralization of powers, accompanied by appropriate autonomy for state and local governments, can stem the tide of secessionism that is currently threatening to overwhelm the federation. A federal constitutional framework that prioritizes non-centralization of powers along with state and local government autonomy is thus a *sine qua non* for Nigeria's stability.

Another criticism that may be leveled against regional political and fiscal autonomy is its alleged potential to facilitate financial corruption at the lower levels of government. As argued in this chapter however, there is nothing in the corruption statics so far published by Nigeria's anticorruption agencies, the EFCC and the ICPC to suggest that corrupt

practices have been restricted to the lower levels of government. In fact, since the advent of civil rule in 1999, federal government officials and federal public office holders have been more complicit in corrupt practices than officials of the state and local governments.

Centralization is thus not the solution to the problem of corruption. Corruption in Nigeria is not a regional malaise. It is a national problem that requires concerted effort to combat. In Nigeria, one way of combating the corruption scourge is to reposition the existing anticorruption agencies in order to make them more effective. This can be done by genuinely guaranteeing the independence of the agencies and granting their officials, security of tenure in order to enable them perform their functions without fear or favour. In addition to this, greater political will to tackle corruption must be demonstrated by parliamentarians, anti-corruption agencies, and the police to ensure that corrupt public office holders are not only removed from office but diligently prosecuted in order to serve as a deterrent to potential perpetrators of financial crimes.

Finally the thesis proposes that a Commission on Federalism be established by the constitution to monitor, encourage and advocate compliance with the federal tenets of covenant, cooperation and non-centralization of powers proposed in this thesis. The need for such a Commission is urgent in light of the long years of centralist political governance in Nigeria and the perverse political culture it has established. It will take consistent monitoring, encouragement and advocacy to get the federal values advocated in this thesis well entrenched in the public psyche and the political system. The proposed Commission on Federalism will hopefully help to achieve this objective.

Further research is particularly needed to examine how the symbio-democratic federal constitutional framework proposed in this thesis can be applied in the context of other multi-ethnic African States. Africa is plagued by civil wars and other forms of intra-state conflict, most of which are caused by ethnic struggles for power and autonomy. The constitutional framework for the division of powers and fiscal resources proposed in this thesis potentially offers a means of addressing these conflicts. The suitability and applicability of this framework to specific African countries will however depend on several factors including the political and cultural sophistication of sub-national units, the degree of power struggle, and the extent of linguistic, cultural, economic and religious

diversity in each country. These are issues that will need to be investigated in the specific context of each country. But non-centralization which is the central theme of this framework is certain to be very key in addressing conflict in most of the multi-ethnic states of Africa. Ascertaining the appropriate degree of non-centralization for each country, using the factors mentioned above, should form the subject of further research in this field.

The non-centralized, covenant-driven federal framework proposed in this thesis provides the best political option for an ethnically diverse and complex country like Nigeria. It is certainly much better than the centralist political framework entrenched in the existing constitution of Nigeria. It is also preferable to the confederation arrangement or dissolution of the federation that have been suggested by others as alternatives to the extant political arrangement in Nigeria. As argued in the thesis, at this advanced stage of Nigeria's history, confederation, or dissolution of the federation will most certainly plunge the entire West African sub-region into an endless cycle of war, chaos, confusion, and untold hardship, all of which can be avoided if the non-centralized, covenant driven symbio-democratic federal framework proposed in this thesis is accepted and adopted.

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