

# **NIGERIA: THE UNFINISHED FEDERAL PROJECT**

## **EIGHTH JUSTICE IDIGBE MEMORIAL LECTURE**

**Delivered by**

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Nigeria,

Founder and First Dean, Faculty of Law,  
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**On**

**Wednesday, April 30, 2008**

**At**

**Akin Deko Auditorium  
University of Benin,  
Benin City, Nigeria.**

**BIOGRAPHICAL DATA ON THE LATE  
JUSTICE (CHIEF) CHUKWUNWEIKE IDIGBE**  
*(OFR, CON)*  
*IZOMA OFASABA,*  
*JUSTICE SUPREME COURT OF NIGERIA*

### **FAMILY BACKGROUND:**

The Honourable Justice (Chief) Chukwunweike Idigbe, (O.F.R., C.O.N.) the Izoma of Asaba was born on the 12th day of August 1923 at Kaduna in the present Kaduna State to Chief Ignatius A. O. Idigbe and Mrs. Christiana M. Idigbe (both deceased and devout Christians of the Catholic Faith). His father, Chief Ignatius A. O. Idigbe, from the Umuodanjo family of Umuaji quarter in Asaba, Delta State is one of the two children of Obi Idigbe the titled grandfather of Justice Idigbe by his grandmother Mrs Punuka Idigbe. Mrs. Christiana Idigbe is from the Okonjo/Okonweze family of Umueze quarters in Asaba. His father Chief Ignatius Idigbe was a Produce Officer in the then Produce Marketing Board and in recognition of his contribution to the development of Asaba and in securing employment for many indigenes he was conferred the Olinzele title of Ogene of Asaba. A staunch member of Action Group, Chief Ignatius Idigbe was nominated a member of the Western House of Chiefs representing Asaba Division at Ibadan. Apart from Chukwunweike, he also had the following children:- Onuoha, Ekwi, Koso, Ogo, Joe, Josephine and Okwudili.

**EDUCATION:**

Justice (Chief) Chukwunweike Idigbe started his education at Saint Mary's Catholic School, Port Harcourt between 1928 and 1936. In 1937 he proceeded to the popular and prestigious Christ The King College (C.K.C.) Onitsha for his secondary education which he concluded in 1940. From 1943 to 1946 His Lordship was at Kings College, University of London, where he obtained an LL.B. (London) (2nd Class, Upper Division) and carted away the Campbell-Foster Prize in Criminal Law and Procedure in 1946. Within the same period, he enrolled at the Middle Temple (Inns of Court, London) and was called to the Bar in January 1947.

**PROFESSIONAL CAREER:**

On the return of His Lordship in 1947 he was received by the people of Asaba with One Hundred gun salute and several days of feasting. He soon settled to private legal practice in Warri, Delta State. His practice however covered most of the former Western and Eastern regions and at the time of the Western African Court of Appeal he frequently went to Accra to argue cases and when the Federal Supreme Court was created he made numerous appearances there. The WACA and FSC Law Reports are a testimony to this fact. In fact it once happened that after His Lordship appeared before the then Duffus, J. at the Ikeja High Court and had just left the Court the Hon. Justice Duffus could not hold his loud remark to the hearing of the Lawyers in

Court that "there goes the best lawyer in Western Region". The Lawyers in Court on that occasion still attest to this event.

In recognition of his hard work and dedication as was customary in those days, Justice Chukwunweike Idigbe was appointed a High Court Judge on 22nd May 1961 after 14 years of successful private practice. As he often recalled, such an appointment in those days was an honour which he could not refuse though it meant abandoning an otherwise lucrative private practice. Just three years after, he was elevated to the Supreme Court on 10th April 1964 and as was the practice then, in March 1966 he was seconded to the then Mid Western Region as the Chief Justice. However with the civil war in 1967 His Lordship ceased to be a judge as he was caught on the other side, that is, Biafra.

Upon the cessation of hostilities in 1970 Justice Chukwunweike Idigbe was unemployed and was not given back his judgeship. He had to sell most of the properties he acquired in Warri during his private practice in order to train his numerous brothers, sisters, children and other relations. However in 1972, he secured a partnership in a firm of legal practitioners, Irving and Bonnar & Co., a position he held until 1975 when he was reappointed a Judge of the Supreme Court of Nigeria. The immediate family was of course opposed to his accepting the reappointment considering his past experience and the lack of financial inducement in government employment. Of this he said "If I am being

reappointed at a time when other people are being retired, retrenched or dismissed, then, it is a recognition of my worth by the government, an honour which I cannot refuse for any financial or other consideration". Soon after his re-emergence in the Supreme Court, Justice Idigbe was appointed the Chairman of the Land Use Committee set up to review the land tenure system in Nigeria and make recommendations. The work of that Committee led to the promulgation of the Land Use Act of 1978 which made sweeping changes in the land tenure system of the country and is presently incorporated as part of the 1979 Constitution of the Federal Republic of Nigeria. The Guardian Editorial of September 17th 1983 entitled "Homage to a fine Jurist" sums up the performance of His Lordship on the Bench. It says inter alia

*"Justice Idigbe's death is an irreparable loss for reasons of his unique example. For instance, his enormous contributions at the Supreme Court to the development of our law are indisputable. An erudite and principled Judge who delighted in legal arguments the late Judge wrote, in his ten years in the Court, some of the most lucid and tidy judgments to be found in the book. It is perhaps not an accident, as records of our Law Reports will show, that the judgment he wrote, both as a High Court Judge and also at the Supreme Court, are*

*some of the most frequently cited by lawyers. Even his own peers at the highest Court of the land deferred to him and acknowledged his quickness of perception. And when Mr. Rotimi Williams (S.A.N.), spoke of Idigbe's 'unrivalled capacity to get quickly to the heart of the matter or matters in debate,' he spoke for many at the bar who were endeared to this brilliant jurist".*

#### **NATIONAL AWARD:**

In recognition of his services to the nation Justice Chukwunweike Idigbe was conferred with the national awards of the Officer of the Federal Republic (O.F.R.) in 1980 and the Commander of the Order of the Niger (C. O.N) in 1981.

#### **RELIGION AND SOCIALS:**

Though a devout Christian of Catholic Faith, Justice Chukwunweike Idigbe like his father was very traditional. He often prided himself in the fact that since he returned home in 1947 he has never spent any Christmas vacation and new year outside Asaba, his hometown and that he has only missed spending one Easter in Asaba during the same period. He was outgoing and soon was a focal or rallying point for most Asaba indigenes and he used his influence to bring peace and progress amongst Asaba people. It was for this that he was appointed

a member of the "Olinzele" (ruling council) of Asaba with the title "Izoma of Asaba" in 1977.

His hobbies were reading, golf piano playing, collection of classical music and travelling. He was no doubt one of the finest piano players in Nigeria though unfortunately his job did not give him enough time for it.

His Lordship was married to Winifred Ofunneamaka Ogbolu on the 19th November, 1949. He has six children (five sons and one daughter) namely Victor, Obioha, Uche, Anthony, Amechi and Ifeanyi. Two of his sons Obioha and Anthony are lawyers.

He died on 31st July 1983 at Cromwell Hospital London after a brief illness.

## **PROFILE OF THE LECTURER:**

*(PROFESSOR I. E. SAGAY, SAN)*

Professor Itsejuwa Esanjumi SAGAY, S.A.N. was born on 20th December, 1940 in Ibadan, Nigeria.

He attended the University of Ife, Ile-Ife, Nigeria (now Obafemi Awolowo University) from 1962 to 1965 and graduated with a Bachelor of Laws (LL.B.) Honours Second Class Upper Division in 1965. He won the National Scholarship for the Best Performance in the University (LL.B.) Law Examination (1963 – 1966). Thereafter, he proceeded to the Nigerian Law School, Lagos, Nigeria for his professional training as Barrister-in-Law (B.L.) from 1965 to 1966. At the Law School, he also distinguished himself by winning two prizes namely, the Sweet and Maxwell Publishers Prize for the Best Performance in Revenue Law in the Nigerian Bar Examinations, 1966 and the Willoughby Prize for the Best Overall Performance in the Nigerian Bar Examinations, 1966. He was called to the Nigerian Bar as Barrister and Solicitor of the Supreme Court of Nigeria on 22nd July, 1966.

Still in search of knowledge, Professor Sagay proceeded to the King's College, Cambridge University, Cambridge, England from 1966 to 1970 for his Masters and Doctor of Philosophy (Ph.D.) degrees in Law. He obtained the Master of Laws (LL.M.) in 1968 and the Ph.D. Degrees in 1968 and 1970 respectively in International Law. He also obtained the Certificate of The Hague Academy of

International Law in 1976. Professor Sagay who is also a Fellow of the Institute of Arbitrators of Nigeria since 2002, was conferred with the dignified rank of Senior Advocate of Nigeria in 1998.

Professor Sagay was a Lecturer in Law at the University of Ife, Ile-Ife from 1970 where he taught several areas of the Law. He became a Professor of Law at the University of Ife in 1979 and was the Dean of the Faculty of Law of that University between 1981 and 1982. Professor Sagay was in the University of Benin, Benin City as a Professor of Law from October 1982 to 1996. He was the first Dean of the Faculty of Law, University of Benin, Benin City from 1982 to 1986. He left the University of Benin for greener pastures in full professional legal practice and, at present, he is the Managing Partner, Itse Sagay & Co. Legal Practitioners and Consultants, Surulere, Lagos, Nigeria.

Professor Sagay is well published. He is the author of several local and international learned publications consisting of books, monographs, learned articles, seminar/workshop / conference papers in a variety of legal issues and subjects. His books and other publications are widely circulated, patronized and read.

Professor Sagay holds a number of Legal and Consultancy Appointments including United Nations Consultant on Namibia, Colonialism, and Racial Discrimination (1984); Consultant to the Organisation of African Unity and the United Nations Development Programme (UNDP) on the O.A.U. Protocol on Free Movement of Persons, Rights of

Residence and Establishment, under the 1990 African Economic Community Treaty. (1991 – 1992); Appointed Consultant for the Revision of Nigerian Minerals Law, by the Nigerian Federal Ministry of Petroleum and Mineral Resources. (1993); Counsel to Nigeria in the Cameroon/Nigeria Boundary Case, before the International Court of Justice (ICJ) 1994; Appointed Member, Board of Trustees and Governing Board, Negotiation and Conflict Management Group (NCMG), Nigeria, 1996; Consultant to USAID and the Office of Transition Initiative, 1998 – 2000; Mediator, Nigerian Security Minting and Printing Company/Former Workers, Mediation 2002-2003; Member, Delta State Think Tank on Development, 1999 – 2007; Chairman, Delta State Forum for the Review of the 1999 Constitution; Member, National Political Reform Conference, 2005.

Professor Sagay is also a member, trustee or Fellow of several professional bodies including Solicitor and Advocate, Supreme Court of Nigeria; Body of Senior Advocates of Nigeria; The International Law Association; The Nigerian Society of International Law; The Nigerian Bar Association; Trustee and Member of Governing Board, Negotiation and Conflict; Management Group, Nigeria; Fellow, Institute of Chartered Arbitrators, (Nigeria).

Professor Sagay is married with children.

## PREAMBLE

The Idigbe Lecturer series was established by Chief Gani Fawehinmi, the great crusader for human rights, democracy and the rule of law, by a letter dated 11th June 1984, written to me as Dean, Faculty of Law, University of Benin. His reasons for establishing the lecture and a prize for the best graduating student every year, is contained in this letter, which I now quote:

*I established Idigbe Memorial Lectures to immortalize the name of one of the most unique Judges of all times. IDIGBE stands out in Nigeria's Legal System as one of its greatest and most eminent Jurists. His intellectual prowess is undisputably affirmed. His penchant for unraveling difficult and most intricate points of law and facts is outstanding and inimitable. His mastery and use of English Language in the expatiation of his reasoning is romantically simple but seductively gripping with magnetism. His religious dedication to research on virtually every legal issue is stupendous as it is gargantuan. He was a truthful and honest Judge. He lived for Law and died for Justice – the quintessence of all his judgments.*

The first two Idigbe Lectures, on my invitation, were given by the Hon. Justice Kayode Eso on Thursday, 31st January 2008 and Justice Chukwudifu

Oputa on Friday, 28th November, 1986. Eso's Lecture was entitled "The Nigerian Grundnorm" and Oputa's was "Human Rights in the Legal and Political Culture of Nigeria". Both occasions were, of course, huge successes, establishing the University of Benin as an appropriate forum for making original and ground-breaking, even controversial proposals on a major legal subject.

I then had to leave the University. Since then many other brilliant and exciting Idigbe Lectures have been given here, illuminating difficult and complex issues in the law.

So it gives me exceptional pleasure to be here today, following the footsteps of legal giants in honoring a colossus of the Nigerian Supreme Court, Hon. Justice Chukunweike Idigbe. I thank the Vice-Chancellor, the Dean, Faculty of Law and my Colleagues at the Faculty for this singular honour.

The Topic I have chosen for this lecture is, "Nigeria: The unfinished Federal Project". I have chosen it because I strongly believe, that apart from the scourge of corruption, the stubborn and determined refusal of the Political Ruling Class in Nigeria to recognize, honour and implement the covenant of the Founding Fathers of Nigeria, to institute and practice strict, true and real Federalism, is responsible for our backwardness in social and economic development, for our failure to imbibe a culture of democracy and the rule of law, and of course the re-occurring crises in the Nigerian Political System.

# **NIGERIA: THE UNFINISHED FEDERAL PROJECT**

## **1. Origins of Federalism**

The idea and practice of linking separate and distinct political and national communities for the purpose of achieving common objectives is an ancient one, dating from the period of the ancient Greeks. Federalism developed as a response to the need to link separate political communities together (i) in order to pursue effectively, objectives unattainable alone, (ii) but without submerging individual identities into the new alliance. The most common objectives of such alliances were either the overthrow of an oppressor city or to present a common defense against a common and larger aggressor.

In ancient Greece for example, attempts were made to form leagues, particularly in the 3<sup>rd</sup> and 4<sup>th</sup> centuries B.C. The same applies to city states in mediaeval, Italy, but these tended to be short lived.<sup>1</sup> The years 323-146 BC, for example, were characterized by the formation of coalitions (Leagues) among the Greek states of which the purpose was to offer a united front

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<sup>1</sup> See generally, Stephen Woodard "The Simple Guide to the Federal Idea", in *Federalism & Politics* in Ventotene papers of the Altiero Spinelli Institute for Federal studies, 1995.

against the menace of their Northern neighbour, Macedonia.

The first successful establishment of a durable federal or confederal association of formerly independent political communities was the founding in 1291 of the Union of the "Waldstätte" - three forest cantons of Switzerland. This group constituted a perpetual alliance for:

- i) the settlement of disagreements amongst themselves by arbitration;
- ii) the punishment of crime
- iii) the resort to law rather than violence and
- iv) mutual defense.

The alliance grew rapidly in the 14<sup>th</sup> century and was firmly established by the 15<sup>th</sup> century. It gradually progressed into a loose federation under its constitution of 1848, which itself was inspired in turn by the American model.<sup>2</sup> The present state of Switzerland which developed from the 1291 union, is composed of 26 autonomous cantons.

The United Provinces of the Netherlands established by the union of Utrecht 1579 and of course the American confederacy of 1774 which became a more tightly knitted federation in 1789, are good examples of the earlier and still surviving federations.

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<sup>2</sup> See Ventotene, *Op. cit*

## 2. Sources of the Terms 'Federal' and 'Federalism'

The term 'Federal' has a Latin origin; Foederatus, meaning "bound by treaty" Foederatus is itself derived from the words foedus meaning "treaty" and fidere: to trust. In his 1795 essay on Perpetual Peace, Kant explained the origins of the word thus:

"Federalism, from the Latin word 'foedus' means contract, pact, treaty or convention; it implies an agreement, thanks to which one or more heads of the family, one or more local communities, one or more groups of communities or states commit in equality, themselves and each other to reach one or more particular objectives."<sup>3</sup>

One phenomenon that is common to all federations, whether ancient or modern is that it is the coming together (voluntarily or by force) of formerly independent entities, to establish a central organization to **serve** their common purposes. This central organization can vary from a common services agency to a powerful government controlling vast resources with a plenitude of wide ranging powers. But for it to remain a federal set up,

the federating units must remain autonomous and supreme in those areas reserved for their exercise of authority.

Indeed, as long ago as 1795, Immanuel Kant compared the indispensable characteristics of federalism with those of unitarism as follows:

"In substance, the federal system is the opposite of administrative centralism, a system which characterizes ... the Unitarian democracies .... In a federation, the competences of the central authority are limited. ... On the contrary, in the centralized governments, the competences of the supreme authority multiply, become larger and more direct, and the supreme organ is finally empowered to intervene in the affairs of the region, the community and each individual citizen. From this derives the oppression of centralism, under which disappear not only the regional and communities' liberties, but also those of the individual and of the nation."

## 3. Federalism as a Variable Arrangement.

Federations dot the five continents of the world, and although unitary states are

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3 Taken from Stephen Woodard *Op. cit*, p.7.

more in number, federations are a significant minority. Also in terms of population, the federations tend to have large populations, of different nationalities and ethnic backgrounds.

There are currently about 25 federations populated by about two billion people out of just over five billion worldwide. Some of these federations are developed (1<sup>st</sup> world) countries whilst others are underdeveloped third world countries like Nigeria. Some like Russia, India, Canada, Australia and the U.S.A., span entire continents, and have immense populations, whilst others are very small in size and population. In this category are the Comoros (just over half a million people) and St. Kitts and Nevis (42,000 people). Some are well established federations, like the U.S.A., 1789, Switzerland, 1848, Canada, 1867 and Australia 1901 whilst others are either relatively new or are unstable like Nigeria, which is yet to achieve the type of federalism that is appropriate to its over 300 national and ethnic groups.

Finally some federations, e.g., Switzerland are loose, giving the federating units considerable autonomy and limiting the powers of the central government, whilst others, like Nigeria, have powerful centres and relatively weak states.

However, it must be emphasized that although federations may vary in their

Constitutions in terms of the comparative powers of the central as against the regional or federating unit, federalism has a minimum content and a basic definition. It cannot mean anything that a group of Constitution makers says it means, as Niki Tobi, JSC, seemed to suggest in *Olafisoye v. Federal Republic of Nigeria*<sup>4</sup> where he denounced any attempt to define federalism by reference to principles, such as autonomy of the federating units, etc. This is what the learned Justice of the Supreme Court said in that case:

“Constitutions are named as federal, unitary and confederal, to mention the major ones. A federal government will mean what the constitution writers say it means. And this can be procured within the four walls of the constitution and the four walls only. Therefore a general definition of federalism or federal government may not be the answer to the peculiar provisions of a nation’s constitution which is the **fons et origo** of its legal system.

Ideal federalism or true federalism is different from specific or

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4 [2004] 4 NWLR (Pt. 864) 580, see pp. 647-649.

individual federal constitutions of nations, which may not be able to achieve the utopia of that ideal federalism or true federalism but which in their own sphere are called federal constitutions. I think **Nigeria falls into the latter category or group.** It will therefore be wrong to propagate theories based on ideal or true federalism in a nation's Constitution which does not admit such utopia. I will return to this later.

The point I am struggling to make is that there is no universal agreement as to what is a federalism or a federal government. Definitions of words, including 'federalism' or 'federal government', by their nature, concept or content, are never fully accurate all the time, like a mathematical solution to a problem. Definitions are definitions because they reflect the idiosyncrasies, inclinations, prejudices, slants and emotions of the person offering them. While a definer of a word pretends to be impartial and unbiased, the final product of his definition will, in a

number of situations, be a victim of partiality and bias."

With due respect, his Lordship was wrong. I agree entirely with Professor Nwabueze's response to the above statement, that his Lordship's rationalization simply reduces "federalism" or "federal government" to a concept without a specific meaning: it empties it of all content, for it would mean whatever a particular Constitution, by its provisions, says it is. That would be absurd. "Federalism like any other concept must have some core or basic principle which defines its essence or it does not exist as a constitutional or political concept."<sup>5</sup>

The last time I came across the sort of statement made by his Lordship, was when I read what Humpty Dumpty said in the children's book, *Through the Looking Glass*, by Lewis Carroll.

"'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice 'whether you can make words mean so many different things.' 'The question is,' said Humpty

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5 Nwabueze, *How President Obasanjo Subverted Nigeria's Federal System*, Gold Press Ltd, 2007, p. 65.

Dumpty, 'which is to be the master – that's all.'"<sup>6</sup>

No, "Federalism" cannot mean just what draftsmen or Judges choose it to mean. It has a permanent core meaning which we shall soon come to.

To be fair to Justice Niki Tobi, he made amends (to use the words of Nwabueze) in a later case, *A-G Abia State and Ors v. A-G of the Federation & Ors*<sup>7</sup> when dealing with a case in which the attempt by the Federal Government to take over the allocation of funds and supervision of local government finances from State Governments was challenged.

Niki Tobi, JSC, in the leading judgment, unequivocally acknowledged as an essential of the Nigerian federal system, the autonomy of each government which presupposes its separate existence and independence from the Federal Government. The learned Justice of the Supreme Court went further to state that, the Act which enjoins each State Government to establish a State Joint Local Government Account Allocation Committee, "is clearly against the Federal arrangement in the Constitution" and that "it has traits of unitarism". The Learned Justice held further that the word "monitoring" used in the Act,

"conveys some element of policing the State Governments". In his view, the word means "to watch, to check". In terms of showing the strength of the Federal Government, "it is a very arrogant word that spells some doom in a federal structure".

#### **4. The Central Concept in Federalism**

The deliberate choice of federalism as the only viable and acceptable form of government for Nigeria was a product of the diversity of its peoples, politically, historically, culturally and linguistically and the experience gained from the attempts to create a viable polity out of the forced amalgamation of Northern and Southern Nigeria in 1914.

What then is Federalism? Or to put it in another way, how is a unitary constitution different from a federal constitution? Awolowo has noted that in the case of a unitary constitution, the supreme legislative authority in the state is vested in one government. Whereas in the case of a federal constitution, the supreme legislative authority is shared between the general or central government and the regional, provincial or state governments, all of which are coordinate with and independent of one another in regard to the powers and functions

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<sup>6</sup> See also, *Liverside v. Anderson* [1942] A.C. 206 at 244, 245, per Lord Atkin, dissenting.

<sup>7</sup> (2006) 16 N.W.L.R. (Pt. 1005), 265, p.362 paras. D-E.

expressly or by necessary implication vested in them by the Constitution.<sup>8</sup>

Nwabueze defines Federalism as an arrangement whereby powers within a multi-national country are shared between a federal or central authority, and a number of regionalized governments in such a way that each unit including the central authority exists as a government separately and independently from the others, operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of affairs and with an authority in some matters exclusive of all others. In a federation, each government enjoys autonomy, a separate existence and independence of the control of any other government. Each government exists, not as an appendage of another government (e.g. of the federal or central government) but as an autonomous entity in the sense of being able to exercise its own will on the conduct of its affairs free from direction by any government. Thus, the Central government on the one hand and the State governments on the other hand are autonomous in their respective spheres.<sup>9</sup>

As Wheare put it, “the fundamental and distinguishing characteristic of a federal system is that neither the central nor the regional governments are sub-ordinate to each other, but rather, the two are co-ordinate and independent”<sup>10</sup>. In short, in a federal system, there is no hierarchy of authorities, with the central government sitting on top of the others. All governments have a horizontal relationship with each other. This provides answer to JUSTICE Niki Tobi’s views, supra, on federalism. Indeed as Uwaifo JSC, observed in *A-G of Lagos State v. A-G of the Federation*.<sup>11</sup> “It is a non-controversial political philosophy of Federalism that the Federal Government does not exercise supervisory authority over State Governments”.

The above working definition of federalism, does not exclude some degree of interdependence amongst the two levels of government. One level, for example, the central government may be the collector of revenue for all governments in the federation, (as in Nigeria - see S. 162 of the 1999 Constitution) but as long as the revenue collected belongs to all the governments and there is no discretion in the central government to determine what each government should get and what should be withheld, federalism, is not necessarily

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8 Obafemi Awolowo, *Thoughts on the Nigerian Constitution* 1966, Oxford, p.23

9 See B.O. Nwabueze, *Federalism in Nigeria Under the Presidential Constitution*, Sweet & Maxwell, 1983, p.1

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10 Wheare, *Federal Government*, 4th Ed., Oxford, 1963

11 [2003] 35 WRN 1 at 140, (2003) 12 N.W.L.R. (Pt. 833), 1

jeopardized. In deed in *A-G Federation v. A-G Abia State and 35 Ors*, otherwise known as the Resource Control case, *Ogundare JSC*, reading the leading judgment, stated that by the provisions of Section 162 of the Constitution, the Federal Government become a trustee. "It is the duty of the trustee to render account to the beneficiaries of the trust if, and when called upon."

In *A-G Lagos State v. A-G Federation & Ors*,<sup>12</sup> the Supreme Court held that the Federal Government had no discretion over the allocation of funds accruing to the Federation Account. The Account being jointly owned by the Federal, State and Local Governments, the Federal Government was compelled to pay to each tier of government their entitlements under Section 162(3), mandatorily

Nevertheless it is necessary to observe that the territorial spread of the powers of some federal commissions under the Nigerian Constitution for example, tends to tilt the Nigerian federation towards a decentralized unitary system. Examples include the Independent National Electoral Commission, which has the power to conduct State Gubernatorial and State Houses of Assembly elections,<sup>13</sup> the Nigeria Police Council, whose

fiat runs throughout the country,<sup>14</sup> the National Population Commission, with exclusive powers to conduct a census of Nigeria,<sup>15</sup> and the National Judicial Council with powers to recommend State Judges for appointment and removal.<sup>16</sup>

## 5. Determinants of Federalism

What determines whether a group of independent political communities should come together to set up a central agency, which can develop into a federal government? In the case of Nigeria for example, why did the British colonial power not return the Nigerian nationalities to their individual and independent statuses of the 19<sup>th</sup> century? On the other hand, why did the British or our founding Fathers not accept and institute one unitary government based in Lagos?

In his book *Thoughts on Nigerian Constitution*<sup>17</sup> Obafemi Awolowo, the most consummate student of applied federalism Nigeria has ever known and first Premier of the Western Region of Nigeria, provided an answer with the following pertinent observations:

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14 *Ibid*, 3rd Schedule Part 1(L)

15 *Ibid*, Part 1(J)

16 Part 1 (I)

17 Oxford, 1966, at pp. 48-9

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12 [2005] 2 WRN 1, 69-70. (2004) 18 N.W.L.R. (Pt. 904), 1.

13 3rd Schedule, Part 1(F), 1999 Constitution.

“From our study of the constitutional evolution of all the countries of the world, two things stand out quite clearly and prominently.

First, in any country where there are divergences of language and of nationality - particularly of language - a unitary constitution is always a source of bitterness and hostility on the part of linguistic or national minority groups. On the other hand, as soon as a federal constitution is introduced in which each linguistic or national group is recognized and accorded regional autonomy, any bitterness and hostility against the constitutional arrangements as such disappear. If the linguistic or national groups concerned are backward or too weak vis-à-vis the majority group or groups, their bitterness or hostility may be dormant or suppressed. But as soon as they become enlightened and politically conscious, and/or courageous leadership emerges amongst them, the bitterness and hostility come into the open, and remain

sustained with all possible venom and rancour, until home rule is achieved.”

Awolowo's findings after an empirical study of the workings of constitutions of virtually all the countries of the world was that in any multilingual or multinational society which are identifiable by their distinct territories, the only viable form of government is federalism.

## **6. Nigeria: Why Federalism?**

In analyzing the complex origins and nature of the Nigerian Federation, many writers forget the fact that in the beginning, there was no Nigeria. There were Ijaws, Igbos, Urhobos, Itsekiris, Yorubas, Hausas, Fulanis, Nupes, Kanuris, Ogonis, Gwaris, Katafs, Jukars, Nupes, Edos, Ibibios, Efiks, Idomas, Tivs, Junkuns, Biroms, Angas, Ogojas and so on.

There were Kingdoms like, Oyo, Lagos, Calabar, Brass, Warri, Benin, Tiv, Borno, Sokoto Caliphate (with loose control over Kano, Ilorin, Zaria etc.) Bonny, Opobo etc.

Prior to the British conquest of the different Nations making up the present day Nigeria, these Nations were independent Nation States - and Communities independent of each other and of Britain.

### **(i) Prelude to the creation of Nigerian Federalism**

The bulk of what is now Nigeria became British Territory between 1885 and 1914, although some autonomous Communities were not conquered and incorporated in the protectorate until the early twenties.

Between the 15th and 19th Centuries, European relationship with West African States was trade/commercial in nature, with little or no political undertones. The Europeans depended on the coastal rulers not only for securing trade, but also for the safety of their lives and property. Thus European traders went out of their way to ensure they were in the good books of Native rulers.

It should be noted that the main commodity during this period were human beings. This was the era of slave trade. It was in a bid to protect the lives, properties and trade of British traders that the British Prime Minister, Palmerston, appointed John Beecroft as British Consul in Nigeria in 1849. This was the beginning of peaceable British colonization of the independent nations of what later became Nigeria.

This was followed by:

- gunboat diplomacy for the enforcement of one-sided agreements for the protection of the interests of British traders and
- the signing of the notorious 'protection treaties' which led directly to colonialism.

Meanwhile, the European colonists organized the Berlin Conference, 1885. This was a Conference in which Africa was carved into spheres of influence amongst the European Powers. The aim was primarily to eliminate friction amongst them in their commercial and colonizing activities in Africa. The Nations in the territory now called Nigeria were parceled off to Britain at the Conference.

Based on the protection treaties and the Berlin Conferences, the British in 1885 proclaimed the establishment of a protectorate of the oil rivers, which later became the Niger Delta Protectorate, and subsequently engaged in what can be termed, a serial conquest of Nigerian independent communities, states, kingdoms, etc, between 1886 and 1923.

As various quarrels and disputes arose between British traders or British officials on the one hand, and the Rulers of the States of the Niger Delta on the other hand, the latter's territories were invaded, conquered and colonized, individually.

Some notable incidents include:

- The kidnapping of King Jaja of Opobo - 1886
- 1894 - Nana War - The fall of the Itsekiri (Warri) Kingdom
- 1894-1914 - Push and control of Urhobo and Isoko country; Efunrun (1896), Orokpo

- (1901), Etua 1904; Ezionum (1905), Iyede (1908; Owe, Oleh, Uzoro (1910)
- Igbo and Ibibio land were taken over without war between 1890 and 1905 and only Okrika (1895) Aboh (1896), Aro 1901-2, Ezza (1905), gave the British any resistance.
  - Lagos fell in 1861; Ijebu, 1892; Egba, 1914; Much of the North was under the Sokoto Caliphate in the 19th Century, with the exception of Borno and the middle belt.
    - The Royal Niger Company operated in the North until 1899 when their Charter was abrogated and a protectorate of Northern Nigeria was proclaimed in 1900 to forestall German and French occupation of those territories.
    - The British now engaged in the progressive conquest of the Northern states.
    - Lord Lugard was made High Commissioner of Northern Nigeria in 1899 and British Conquest followed thereafter, in the following order;
      - Bida - 1901,
      - Adamawa - 1901,
      - Bauchi and Gombe - 1902,
      - Zaria - 1902
      - Kano - 1902
      - Sokoto - 1903
    - The fall of Sokoto meant the effective end of the independence of the states of the present North Western Nigeria.

- 1903 - 1906 was a period of British consolidation in the present North. In fact the protectorate of Northern Nigeria had been proclaimed in 1900 before the Northern states were conquered. The Protectorate of Southern - Nigeria was also proclaimed in 1900
- In 1906 the Protectorate of Southern Nigeria was amalgamated with the Colony of Lagos. And in 1914 - the Colony and Protectorate of Southern Nigeria, was merged with the Protectorate of Northern Nigeria.<sup>18</sup>

It is therefore a grave error arising from a fundamental flaw in the historical analysis of Nigeria, to state that Nigeria is a country which started as a unitary state and progressively became federalized.

**(ii) Establishment of Federations: Unitary State to Federal State or Independent States to Federal State?**

The late Justice Atanda Fatai-Williams former Chief Justice of Nigeria, is reported to have made the following statement:<sup>19</sup>

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18 With minor exceptions, virtually all the information in this section is obtained from Obaro Ikime's *The Fall of Nigeria. The British Conquest*, Heinemann, 1977, pp. 3-198.

19 Taken from "Nigerian Federalism in Historical Perspective" in *Federalism and Political Restructuring in Nigeria* p.14, Edited by Kunle Amuwo et all, Spectrum Books 1998.

“Unlike most of the older federations, what we did in Nigeria was like unscrambling scrambled eggs. We started as a unitary state and then opted for a federation afterwards. The problem of Nigeria originally in 1951 - 52 was one of devolution of powers, but when the constitution which was given us by Macpherson broke down we opted for a federal constitution. Very little was known by most of us about the theory of federation at the time. They were always quoting whereas at every constitutional conference. It may well be that if we knew more about the theory at the time, we would have emerged in our effort to provide our people with a federal constitution that took account of all the peculiar circumstances of our country and our peoples.”

In the light of what was stated earlier, Fatai-Williams was clearly under a grave misconception. Nigeria's federalism did not commence in 1954. If one were compelled to put a specific date on it, I would opt for 1885, the year of the Berlin Conference for the carving up of Africa between European

colonial powers. There is nothing like building a federation from top to the bottom; meaning splitting an originally unitary state into federating states.<sup>20</sup> That is an impossibility. All federations must start off with independent communities, states nations, ethnic groups, first coming into an association, either voluntarily, or as in the case of Nigeria by the force of the colonial power or some other irresistible force. What happened was that communities that were brought into a suffocating embrace by the British colonial master for their administrative and financial convenience, decided at the National conference in Ibadan in January 1950 to opt for a truly federal system based on powerful Regions and a weak centre. Thus, the process of federalism was a small step in a reverse process. Fatai-Williams focused on the middle of the process rather than the beginning. The unscrambling of scrambled eggs (echoing Fatai-Williams) occurred long after the scrambling together of eggs laid by different hens, between 1885 and 1914.

Indeed, in 1953, after the political crisis brought about by Enahoro's motion for independence in 1956, which led to the Kano riots, the aggrieved North demanded further unscrambling, in order to bring Nigerian Nations closer to their original form or status of

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<sup>20</sup> See this erroneous notion in *Readings on Federalism* by A.B. Akinyemi, P.D. Cole, Walter Ofonagoro (Eds) 73-74. (1980)

independent and autonomous communities. The Leaders of the North made the following declarations containing the minimum demands for the North to continue as part of Nigeria:

1. "Each region shall have complete legislative and executive autonomy with respect to all matters except the following: defense, external affairs, custom and West African research institutions.
2. That there shall be no Central legislative body and no Central executive or policy making body for the whole of Nigeria.
3. There shall be a Central agency for all Regions which will be responsible for the matters mentioned in paragraph one and other matters delegated to it by a Region.
4. The Central Agency shall be at a neutral place, preferably Lagos.
5. The composition and responsibility of the Central Agency shall be defined by the order-in-council establishing the constitutional arrangement. The agency shall be a non-political body.
6. The services of the railway, air services, posts and telegraphs, electricity and coal mining shall be organized on an inter-Regional basis and shall be administered by public corporations.

These corporations shall be independent bodies covered by the statute under which they are created. The Board of the coal corporation shall be composed of experts with a minority Representation of the Regional government.

7. All revenue shall be levied and collected by the Regional government except customs revenue at the port of discharge by the Central Agency and paid to its treasury. The administration of the customs shall be so organized as to assure that goods consigned to the Region are separately cleared and charged to duty.
8. Each Region shall have a separate public service.!!!"<sup>21</sup>

The diverse character of the nationalities, kingdoms, republics, autonomous communities which constitute the present State of Nigeria, made and continue to make strict federalism inevitable. Even an institution as apolitical, and detached as the Nigerian Supreme Court has taken judicial notice of the diversity of Nigeria's nationalities and their distinct and independent existence before the colonizing force of British imperial power brought them forcefully together under one polity. In a

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21 See *Daily Times* May 22 1953, pp. 1 & 2.

judgment on the conflicting claims of the Nigerian Federal Government and the coastal states, to the Nigeria continental shelf, the Court made the following pronouncement.<sup>22</sup>

“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. This position existed throughout the land now known as Nigeria.

Therefore on purely pragmatic considerations, federalism or even confederalism is the only system of government that can be operated successfully in Nigeria.

The diversity of the Nigerian nationalities and their high level of individual social development and integration is such that basically each is a mini-state in its own right.

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22 *Attorney - General of the Federation v. Attorney - General of Abia State and 35 Others*. See Weekly Reports of Nigeria, [2002] Vol. 16 WRN 1-312 at p.68. Emphasis added.

According to Awolowo, these factors of diversity in culture, language, social and political history and organization are:

“natural and automatic generators of centrifugal forces and tendencies. They tend to induce in the ethnic groups concerned a strong and burning desire for separate existence from one another. They are factors which, if they had not been restrained and skillfully canalized by the British, would have led to the emergence of several independent sovereign states in the place of the ONE NIGERIA we now have.”<sup>23</sup>

## **7. Key Characteristics for the Operation of Federalism**

As Stephan Dion, then President of the Canadian Privy Council and Minister of Intergovernmental Affairs has observed,<sup>24</sup> democracy is indispensable to federalism. The two are a pair of concepts which lead, one to the other. Every federation experiences an on-going dialectic between the autonomy of its components and the solidarity that unites them. In his observation

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23 Awolowo, *Thoughts on Nigerian Constitution*, p. 25.

24 “Federalism and democracy: the Canadian Experience”, an address dated 14 April 2000 at Winnipeg in Manitoba.

on democracy and federalism, he propounds that:

“Without democracy, genuine federalism is impossible. To be sure, there have been dictatorships or totalitarian regimes that have claimed to be federations. Some still exist today. But genuine federalism presupposes the respect of a division of constitutional powers between two orders of government. If all the political powers in the country is in fact under the control of a single party, it is difficult for the federative form of the state to be anything more than a façade. It is within a democracy that federalism finds its true meaning.”

Those who have lived in or observed developments in Nigeria under military or civilian dictatorship do not need to be convinced about this truism. We all know, for example, that the military operate a single and central command system. There can be no federalism in a military government. We have also found out to our chagrin, the same applies in a civilian dictatorship.

Apart from various individual decrees, the very first decree issued by every

successive military regime usually destroys the foundations of federalism. Thus sections 3 and 4 of Decree No. 1 of 1966 stated as follows:

- “1. The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.
2. The Military Governor of a Region:
  - a) Shall not have power to make laws with respect to any matter included in the Exclusive Legislative List; and
  - b) Except with prior consent of the Federal Military Government, shall not make any law with respect to any matter included in the Concurrent Legislative List.
3. Subject to subsection (2) above and to the Constitution of the Federation, the Military Governor of a Region shall have power to make laws for the peace, order and good government of that Region.”

Thus, the first Federal Military Government, completely undermined the federal status of Nigeria by giving itself the power to make laws for the peace, order and good government for the whole of Nigeria with respect to any matter whatsoever. It is as if the regions or later, states, did not exist. The matter was taken to the extreme in the Abacha era, when by Decree 12 of 1994, the

Federal Military Government declared itself as being established "with absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof (including, of course, all the States) with respect to any matter whatsoever."

Clearly therefore, there can be no federalism in a military government. What is equally becoming obvious is that the 1999 Constitution concentrates and accumulates so much power in the hands of the President, that a President with an authoritarian and despotic tendency will exercise those powers dictatorially as in a typical military regime.

Next, the importance of solidarity between the federating components and the central agency cannot be over emphasized. Without such solidarity, a federation will collapse inevitably. In Stephan Dion's quintessential words of wisdom:

"In a federal system, the state is made up of two orders of government, each possessing powers circumscribed by the Constitution, and because of this, respect for the Constitution becomes the object of mutual surveillance. Each order of government can go to the courts if it believes that the other is infringing on its jurisdiction, which provides citizens with additional

protection against abuses of power.

The principle of solidarity strikes me as much an integral part of federalism as the principle of autonomy. Indeed, while each order of government, each federated entity, is autonomous, it is not so that they may ignore each other. Rather, it is so that each, with its own characteristics and capitalizing fully on its potential, can better help the others. All the governments of a federation are interdependent and must work together for their citizens, over and above their political, regional or other differences. The ideal of federalism is the very opposite of internal separatism, it is genuine solidarity. Here again, it represents an enrichment of democracy.

Federalism, as the plural quest for common action that respects the autonomy of all parties, and as a learning process of negotiation and conflict resolution, presupposes a large dose of tolerance. It necessitates an ongoing practice of pluralism

and cultivates democratic values.”

Federalism therefore has unique characteristics and requires unique qualities in those who seek and are entrusted with the responsibility of operating it. As Professor Cheryl Saunders observed in a paper delivered in Abuja under the auspices of the Nigerian Institute of Advanced Legal Studies in 2005,

“Federalism calls for at least two spheres of government within the same polity, each with its own institutions, between which authority to govern is divided. Each sphere deals directly with people, organized nationally or in constituent units, and each has constitutional autonomy within its own areas of responsibility. Such a system demands certain qualities of those who operate within it: an acceptance of limited power; a willingness to work within a constitutional framework; respect for others with whom powers is shared. These qualities, which underpin the effective application of the federal principle, may benefit

the operation not only of the partners to the federal bargain but of other more local spheres of government as well, whether or not they enjoy explicit constitutional protection.”

## **8. Defects and Anomalies of Nigerian Federalism**

### **(A) *True Federalism: The 1960 and 1963 Constitutions***

One important feature of the 1960 Constitution is the extensive powers granted the Regions, making them effectively autonomous entities and the revenue arrangements which ensured that the regions had the resources to carry out their immense responsibilities.

Under the 1960 and 1963 Constitutions, a true federal system made up of strong States or Regions and a Central or Federal Government with limited powers, was instituted. Both the 1960 (Independence) Constitution and the 1963 (Republican) Constitution were the same. The only differences were the provisions for ceremonial President (1963) in place of the Queen of England (1960) and the judicial appeals system which terminated with the Supreme Court, (1963) rather than the judicial Committee of the British Privy Council (1960).

The following Features, which emphasised the existence of a true federal system composed of powerful and autonomous Regions and a Centre with limited powers are worth noting.

- i) Each Region had its own separate Constitution, in addition to the Federal Government Constitution.
- ii) Each Region had its own coat, separately from the Federal Government.
- iii) Each Region established its own separate semi-independent mission in the U.K. headed by 'Agents - General'

Thus, apart from items like, Aviation, Borrowing of moneys outside Nigeria, Control of Capital issues, Copyright, Deportation, External Affairs, Extraction, Immigration, Maritime Shipping, Mines and Minerals, Military Affairs, Posts and Telegraphs, Railways, all other important items were in the concurrent list, thus permitting the Regions equal rights to legislate and operate in those areas. The most significant of these included Arms and Ammunition, Bankruptcy and Insolvency, Census, Commercial and Industrial Monopolies, Combines, and Trusts, Higher Education, Industrial Development, the regulation of Professions, Maintaining and Securing of Public Safety and Public Order, Registration of Business Names, and Statistics.

It is important to observe that anything outside these two lists was a residual matter, and therefore exclusively a matter for Regional jurisdiction. Other features indicative of the autonomous status of the Regions included:

- i) Separate Regional Judiciaries and the power of the Regions to establish, not only High Courts, but also Regional Courts of Appeal.
- ii) The Regions had their own separate electoral commissions for Regional and Local Government elections. However, the Chairman of the Federal Electoral Commission was the statutory Chairman of the State Commission.
- iii) The Revenue Allocation system under the 1963 Constitution was strictly based on derivation.

It will be observed that Mines, Minerals, including Oil fields, Oil mining, geological surveys and gas were put in the exclusive legislative list in the 1960 and 1963 Constitutions. This was a carry over from the provisions of the 1946 Minerals Act, under which the Colonial Government gave itself the exclusive ownership and control of all minerals in Nigeria. This was understandable under a Colonial Regime whose objective was the exploitation of the colonised peoples, but certainly not acceptable in an independent country constituted by

autonomous Federal Government and Regions. It is therefore not surprising that what was lost by placing mines, minerals, oil fields etc. in the Exclusive Legislative List, was regained by the very strict adherence to the principle of derivation in the revenue allocation formula, particularly, the allocation of the proceeds from mineral exploitation.

*(a) Resource Basis of the Regions*

The Regional Constitutions, in the 1960 and 1963 Constitutions described each Region as "a self-governing Region of the Federal Republic of Nigeria".<sup>25</sup> To buttress the self-governing status of each Region, adequate provisions were made to guarantee the economic independence of the Regions, thus avoiding the hollowness of a declaration of self-governing status totally undermined by economic dependence. Moreover, consistently with the Federal character of the country i.e. a country of many nations, the basis of revenue allocation was strictly derivative.

Section 140 of the 1963 Constitution which made provision for the sharing of the proceeds of minerals including mineral oil, stated that "there shall be paid by the Federal Government to a Region, a sum equal to fifty percent of the proceeds of any royalty

received by the Federation in respect of any minerals extracted in that Region and any mining rents derived by the Federal Government from within any Region." For the purposes of this section, the continental shelf of a Region was deemed part of that Region.

By Section 136(1) 30% of general import duties, were paid into a distributable pool for the benefit of the Regions. With regard to import duties on petrol, diesel oil and tobacco, the total sum of import duty collected less administrative expenses, were fully payable to the Region for which the petrol or diesel oil or tobacco was destined. A similar provision was made for excise duty on tobacco.

With regard to produce i.e., cocoa, palm oil, groundnuts, rubber and hides and skin, the proceeds of export duty were shared on the basis of the proportion of that commodity that was derived from a particular Region.

As noted above, the derivative bases of the allocation of revenue and the proportionate share of such proceeds that went to the Region it originated from, clearly buttressed the operating base of true Federalism.

*(b) Summary of Revenue Allocation 1960/1963 Constitutions Based on Derivative Principle.*

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25 Preamble of each Constitution

- i) Minerals including mineral oil: 50% of proceeds to all Regions from which they were extracted. S. 140 (6)
- ii) 30% went into the distributable pool (for all the regions including the producing region)
- iii) 20% for the Federal Government.
- iv) 30% of import duties went into the distributable pool.
- v) Import duty on Petrol and diesel consigned to any Region was refundable to that region.
- vi) This applied to excise duty on tobacco

It can thus be seen that although the 1960 Constitution did not provide for the ownership and control of mineral resources by the producing State or community, the entitlement of the producer State to 50% of the proceeds, and a share in another 30% with the Federal Government being entitled to only 20%, was a true reflection of the derivative principle which is the economic indication of true federalism.

**(B) Subversion of Federalism: The 1979 and 1999 Constitutions**

With the military take-over in January 1966, centralisation of governmental powers, followed centralisation of command. General Gowon who was military Head of State from August 1966 to July 1975 was mainly

responsible for this development. It was under Gowon's government that the Regions, later States, became systematically emasculated.

The 1979 and 1999 Constitutions, maintained the trend towards centralization, even though they were made "by the people" for the operation of a democratic and federal system of government. Thus instead of the 45 items in the Exclusive Legislative list as in the 1960/63 Constitutions, there were 66 items in the 1979 Constitution and 68 in the 1999 one. Basic State matters like (i) drugs and poisons, (ii) election of State Governors and State Houses of Assembly (iii) Finger print identification and criminal records (iv) Labour and trade Union matters, (v) meteorology, (vi) Police, (vii) Prisons, (viii) Professional Occupations, (ix) Stamp duties (x) taxation of incomes, profits and capital gains, (xi) the regulation of tourist traffic, (xii) registration of business names, (xiii) incorporation of companies (xiv) Traffic on Federal Truck roads passing through States, (xv) Trade and Commerce and census, were transferred from the concurrent to the exclusive List.

"The complete exclusion of a State Government from all of these areas is a significant change indeed, for it takes away completely the initiative which, in the past,

the Regions undertook in some of these matters.”<sup>26</sup>

## 9. 1999 – 2007: Federalism Atrophied

The eight-year tenure of General Olusegun Obasanjo, brought with it, the worst season of relentless and sustained assault on federalism Nigeria has ever experienced. These include: (i) interference in the management of the financial affairs of state governments, (ii) misuse of the EFCC and ICPC, (iii) interference in States’ local government affairs, (iv) the removal of State Governors, using federal Agencies (Bayelsa, Plateau, Ekiti) or using a combination of the police and political henchman, (Oyo, Anambra), (v) illegal declaration of a state of emergency. (v) Suspension of allocation of Local Government funds to Lagos, Bayelsa and Ekiti States.

### **(i) Obasanjo’s Total Intolerance of Federalism**

As everyone knows General, later, President Obasanjo had no patience, time or inclination for Federalism. Whilst this attitude was forgivable during his first-coming as a military dictator, it was clearly intolerable and unacceptable, during his tenure as a democratically elected President of a

Constitutional democracy. His carry-over contempt for federalism is accurately portrayed by Nwabueze in his new book as follows:

“The subversion by President Obasanjo of the federal system established by the Constitution consists in very significant part of a deliberate policy matched by actions to degrade the status of the States and their Governors and to bolster up that of his Federal Government as the sole repository of the country’s sovereignty. As far as President Obasanjo is concerned, the States and their Governors exist only as instrumentalities of the Federal Government and subject to its direction, just as in the days of the Federal Military Government (FMG), invested with supreme, absolute and all-encompassing power.

His attitude towards the State Governors as his subordinates, rather than as heads of autonomous governments – a carry-over from the days of his tenure as the Head of the FMG from 1976 to 1979 – is reflected in his insistence that State Governors

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<sup>26</sup> See also Nwabueze, *How President Obasanjo Subverted Nigeria’s Federal System supra*, p. 415.

must inform him, or perhaps even obtain his permission, before traveling abroad, implying a relation of subordination, the subjection of the Governors and the State Governments to his authority. They now also require the permission of the Economic and Financial Crimes Commission (EFCC), a Federal Government agency, before traveling out of the country."

Indeed, Obasanjo viewed himself in all his grandeur as the Colonial Governor-General of Nigeria, with State Governors, a little better than his vassals. Hence, on a visit to Anambra State in 2006, he parted Governor Peter Obi on the back and said, "You are my agent in Anambra State". This was never challenged or corrected.

### **(ii) Removal of State Governors**

Perhaps, the most blatant display of naked violation of the Constitution, by Obasanjo, is his removal or attempted removal of State Governors which Nwabueze describes, as coups d' etat! The method used by Obasanjo was simple and brutal. The EFCC moves into the State of the targeted Governor in full force. It arrests all the State legislators and takes them away for detention in Lagos or Abuja. Whilst in detention they are

offered incentives to sign already prepared notices of impeachment of the victim Governor. Once sufficient signatures are obtained, the Legislators are ferried under armed guard back into their State capital and taken straight to the House of Assembly, already secured by heavily armed police or military personnel. Once inside the Chambers of the House, they follow a tightly prepared script, involving a compromised Chief Judge who pursuant to a resolution of the captured legislators, appoints a pre-selected panel of partymen with the single mandate of finding the Governor guilty of misconduct. Without giving the Governor any hearing, the panel finds him guilty as charged, and the hostage legislators are rushed in again to accept the report. In 5 minutes, its all over, the Governor is removed and by a strange coincidence, the EFCC is there on standby to arrest the ex-Governor and take him away to detention.

This is exactly what happened in Bayelsa, and in Plateau States, except that Dariye slipped quietly away whilst the EFCC was playing its power games to remove him. In Anambra State, Obasanjo actually used an Assistant Inspector-General of Police to arrest the Governor and compel him under duress to sign a letter of resignation. In Oyo State, the strong man of Ibadan, Lamidi Adedibu, was the one used in the purported removal of the Governor in a beer parlour. The removal

of Governor Fayose of Ekiti State followed the same script, except that the ambitions of the Speaker of the State House of Assembly and that of the Deputy Governor, to be the Acting Governor, clashed and resulted in a distortion involving equally compromised and shameless members of the Judiciary.

**(iii) Declaration of Emergency**

The declaration of a state of Emergency by the Obasanjo Federal Government in Plateau and Ekiti States, were prime illustrations of Obasanjo's gross subversion of Nigeria's federal system. Not only did Obasanjo fail to comply with the conditions precedent for the declaration of a State of Emergency, even if the declarations were valid, the exercise of power under the declaration was grossly ultra vires the Federal Government, unconstitutional and illegal.

A state of emergency can only be declared if as stated in section 305 (3); (a) the Federation is at war, or (b) in imminent danger of invasion, or involvement in a State of War, or (c) there is actual breakdown of law and order and public safety in the Federation or any part thereof to such an extent as to require extra ordinary measures to restore peace and security, or (d) a clear and present danger of (c) above, or (e) there is a disaster or natural calamity affecting a community or part of it, or (f) threat to the

existence of the Federation, or (g) request by a State Governor for such a declaration over his or her state, as a result of a situation similar to (c) and (e) above.

The infringements of the Constitution in the two declarations of emergency, are legion. In the first place, the factual situation that must exist as a condition precedent, did not exist. There was no breakdown of public order and public safety at any time in Plateau or Ekiti States, "to such an extent as to require extraordinary measures to restore peace and security". Infact, the whole tenor of section 11 of the Constitution, (which is the section containing **all** the powers exercisable during an emergency) shows that an emergency declaration is intended to be a cooperative endeavour between the Federal Government and a state Government whose organs, Governors, House of Assembly and Judiciary, are fully functioning. Section 11(2) provides that nothing in that section should preclude a House of Assembly from making laws in respect of the maintenance and securing of public safety and public order, etc, in an emergency, just like the National Assembly. Section 11(4) prohibits the National Assembly from performing the work of a State House of Assembly, as long as the House can hold a meeting and transact business. The same section prohibits the National Assembly from removing a Governor from office at any time.

No where is power conferred on anyone to suspend a Governor or House of Assembly.

The Emergency Powers Act 1961 on which the Federal Government belatedly purportedly relied on, as an afterthought for their powers, is no longer in existence. It had been repealed and marked 'deleted' 'spent' under the 1990 Laws of Nigeria. Altogether, the two declarations of emergency by Obasanjo, were unconstitutional, illegal, null and void. It is a great set-back for democracy, the rule of law and federalism, that the Supreme Court dodged responsibility when Plateau State brought a suit to challenge the validity of the emergency declaration and regulation made under it. It is a sad episode in Nigeria's Constitutional history that the Obasanjo regime got away with such gross acts of illegality and emasculation of federalism.

#### **(iv) Anti-Federalism Laws**

Two Bills, one actually passed into law and the other still a Bill, were presented by the Obasanjo Government to the National Assembly for enactment into Law. These are the Monitoring of Revenue Allocation to Local Governments Act 2005 and The Fiscal Responsibility Bill which was not passed into Law.

The Monitoring of Revenue Allocation to Local Governments Act put the Federal

Government in a position to take over the supervision and control of statutory allocations to local governments completely.

The Act compels each State to (i) establish a body to be known as State Joint Local Government Account Committee, (ii) provides the membership (which must be composed of a State's Commissioner for Local Government (Chairman), Commissioner for Revenue, Mobilization, Allocation and Fiscal Commission – a non-existent office in States, Chairmen of Local Government Councils, a representative of the Federal Government's Accountant-General, etc.

This federally imposed and composed committee was to ensure prompt payment into the State Joint Local Government Account by the State Government, ensure that the funds are distributed in accordance with the provisions of the Constitution under any law made on that behalf by the State House of Assembly, monitor the payment distribution to ascertain the actual amount paid to each local government, render monthly returns of its work to the Federation Account Allocation Committee, "which shall scrutinize them and in turn render quarterly accounts through the Federal Government's Accountant-General to the National Assembly".

The Federal Government's Auditor-General was at the end of each financial

year to report to the National Assembly stating “how the monies allocated to each state for the benefit of the local government councils within the state ... were spent.”

This Act also empowered the Federal Government to deduct from the allocation of funds due to a state, any amount equivalent to what the State failed to pay to its local government councils in the previous year.

As Justice Niki Tobi correctly observed, in the judgment of the Supreme Court nullifying it, the Act in effect was an attempt to abolish federalism and establish Nigeria as a unitary state. The Act is clear illustration of the underlying mental attitude of the Obasanjo Government that the money in the Federation Account is Federal Government money which it doles out to State and Local Governments out of its sheer generosity.

In other words, the Federal Government was incapable of distinguishing between Federation Account, which belongs to the Federal Government, States and Local Governments and the Federal Government Account or Federal Government Consolidated Revenue fund, which belongs to the Federal Government.

It is incredible that a law like this could have been proposed and passed, inspite of (i) the clear provisions of the constitution (Sections 5, 8 and 162) and the federal character of Nigeria, (ii) the clear decisions of

the Supreme Court in (a) *A-G of Ogun State & Ors v. A-G Federation & Ors*<sup>27</sup> that the Federal Government cannot, by law or otherwise confer functions or impose duties on State Governments and their Functionaries, and (b) *A-G Abia State v. A-G Federation & Ors* [2002] 6 NWLR (Pt. 763) 264 at p. 422, that local government councils, are agencies of the States and that the Federal Government has no power or authority in local government affairs. In the Ogun State case, Udo Udoma, JSC, said:

“On the basis of the provisions of the Constitution, and having regard to the autonomy of the State, and realizing that the Governor is bound only to enforce all laws constitutionally made by the State House of Assembly, ... I am satisfied that neither the National Assembly nor the President has the constitutional power to impose any new duty on the Governor of a State. Such an imposition would normally meet with resentment and refusal to perform for the enforcement of which there is no constitutional sanction.”

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27 [1982] 3 NCCR 583

The other anti-federalism bill presented by the Obasanjo Government to the National Assembly, but which was not passed, was the Fiscal Responsibility Bill. Apart from arrogating to the Federal Government, contrary to Section 4 of the Constitution, the right to legislate for all tiers of government which it defined as "Federal, States and Local Government", the Bill goes on to impose extensive and detailed rules about budget preparation, budget content, preparation of estimates, execution of appropriation law, revenue collection, remittance, etc.

In other words, the Federal Government, which is empowered by the Constitution to make law only for its own accounts was now enlarging this to include the accounts, and audits of States and Local Governments. The Bill vests in the Office of the Federal Accountant-General responsibility for the publication of general standards for the consolidation of public accounts and for the consolidation of the accounts of all Governments in the Federation and their publication in the mass media.

The Bill then goes on to establish a Body called the Fiscal Responsibility Council to enforce its provisions.

This Bill whose constitutional basis for unlimited power, is supposedly derived from the non-binding, non-justiciable Fundamental

Objectives and Directive Principles of State Policy in chapter 2 of the Constitution, is totally illegal, unconstitutional, null and void.

Other steps towards the abolition of the Federal system of Nigeria in the last 9 years include, the unilateral withholding of the local government funds of some states which the Supreme Court declared unconstitutional and illegal, because the allocation of funds as provided for in the Constitution (Section 162) is mandatory, leaving no room for the exercise of any discretion<sup>28</sup> and the creation of the so called Excess Crude Account, in which the funds of all the 36 States and 774 Local Governments, were being forcibly retained and withheld, contrary to Section 162(3) which mandatorily requires any amount standing to the credit of the Federation Account to be distributed immediately "among the Federal and State Governments and the Local Government Councils in each State".

A suit has been filed to challenge this act of illegality by the Abia and Lagos State Governments, with all the other 35 States joined as Defendants.<sup>29</sup>

## 10. Conclusion

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<sup>28</sup> *Lagos State v. A-G Federation* [2005] 2 WRN 1.

<sup>29</sup> (i) *A-G Abia State* (ii) *A-G, Lagos State v. A-G Federation and 35 Ors* SC 81/2006 and SC 124/2006, consolidated.

It is clear from what has been stated above, that Nigeria is a long way from ideal federalism or even true federalism. Space constraint does not permit me the luxury of making any detailed recommendations for a return to true federalism. Even so, a few suggestions are in order.<sup>30</sup>

- 1) There should be a complete return to the 1963 provisions on Revenue Allocation which was based chiefly on derivation thus –
  - (i) Derivation 50%
  - (ii) Distributable pool 30%
  - (iii) Federal Government 20%

Also the provision of S.140(6) in the 1963 Constitution, that for the purpose of derivation, a continental shelf is deemed to be part of the Coastal State, should be restored.

- 2) All the subject matter that were transferred from the Concurrent Legislative List in 1979, should go back to the concurrent list.
- 3) Electricity, Census, Labour should definitely be in the concurrent list.
- 4) It will also be imperative to repeal section 44(3) of the Constitution. Item 39

of the Exclusive Legislative List gives the Federal Government the sole and exclusive power to legislate on mines, minerals including oil fields, oil mining, natural gas etc.

Ironically, this is confirmed under section 44(3) which itself is contained in Chapter four, the chapter on Human Rights. After providing in Section 44(i) that no property shall be compulsorily acquired in any part of Nigeria except in a manner and for the purposes prescribed by a law that requires prompt payment of compensation and gives the owner of the property right of access to court for the determination of his interest in the property and the amount of compensation he is entitled to, the Constitution immediately contradicts itself by excluding the human and property rights of minerals (oils and solid) producing communities of Nigeria, in their natural resources by stating that, notwithstanding the human and property rights provisions of section 44(1) and (2), the entire properties in and control of minerals, mineral oils and natural gas in under or upon land, upon territorial waters and Exclusive Economic Zone of Nigeria, is vested in the Federal Government. This provision under the Human Rights Chapter,

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<sup>30</sup> A list of my proposed legislative list is attached to this paper. It is taken from the Delta State presentation as the Political Reform Conference, 2005.

expropriates the properties of the mineral producing areas, a 100%. This subsection is a most insensitive and contemptuous disregard for the rights of the people of the oil producing States in their own natural resources.

- 5) Also in view of the weak positions of the States in relation to the Federal Government, the 6 Zones should now be given Constitutional recognition with specific Institutions, offices and powers. The following subject matter are suggested for Zonal Authorities in addition to an Assembly and a Chief Executive to be called the Coordinator.

#### **LEGISLATIVE LIST (Zonal)**

1. Co-ordination and Liaison with the Federal Government.
2. Creation of States and review/amendment of State boundaries.
3. Environment (erosion, pollution, wildlife, forestry, flora and fauna, landmass, water mass and beaches)
4. Infrastructure (inter-state roads, electric power, water, etc)
5. Judiciary (Zonal Court of Appeal)
6. Zonal Police."

As Professor Nwabueze correctly stated in his recent work on Nigerian Federalism, "With the decentralization of powers to the regional governments and the consequent reduction in the powers exercisable centrally, the national government cannot become an instrument of total domination, so that the question of who controls it can be expected to excite less conflict and bitterness than if all powers are concentrated at the centre."<sup>31</sup>

I would even be so bold as to suggest that the Niger Delta crisis would simmer down to a considerable degree with the restoration of true federalism.

However, in addition to these Constitutional changes, we must, above all, abandon the unitary/imperial mindset. Politicians must accept that (i) they operate in a system of limited power; (ii) they must be willing to work within the constraining Constitutional framework and (iii) they must respect others with whom power is shared in a federal system.

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31 *How President Obasanjo Subverted Nigeria's Federal System*, p. 392

If we follow this path, all the benefits and advantages of federalism will follow.

I thank you all.