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Overview

As one of the world's most deeply divided countries, Nigeria perennially has sought to redesign constitutional institutions to contain inter-group conflict. The struggle to stabilize Nigeria's fragmented society has seen wide-ranging institutional experiments, including civilian and military rule, centrifugal and centralized federalisms, presidential and parliamentary systems, and various institutions for restraining the legendary political corruption at the heart of the country's disintegrative ethno-political conflicts.

This chapter analyzes the background, procedures, structures, and aftermath of Nigeria's constitutional transformation under military auspices from a relatively decentralized, parliamentary federation of four ethnic regions to a centrist, presidential, 36-state, federalism. There was a momentous constitutional transition over nearly thirty years of military rule from 1966 to 1999, with a brief civilian interregnum during the Second Nigerian Republic (1979-83), during which the military created a strong central government. The military dominated the constitutional transition process, despite the cooptation of civilian drafting committees and constituent assemblies. Despite the resilience and ingenuity of the military's constitutional legacy, significant challenges have developed since the return of civilian rule, reacting against the military's non-participatory procedures, centrist structures, and relatively weak investment in critical institutions of restraint. These challenges, which have often come under the rubric of "political restructuring" and a quest for democratic "true federalism," have spawned a relentless constitutional politics, underscoring the permanent or continuous nature of Nigeria's constitutional transition.

TABLE 1: NIGERIA'S CONSTITUTIONAL DEVELOPMENT,
1914 TO DATE

Name/Year of Constitution	Constitution-Making Authority	Major Feature(s)
Constitution of the Colony and Protectorate of Nigeria, 1914	Colonial	Amalgamated the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria, into a single colony
The Hugh Clifford Constitution, 1922	Colonial	Consolidated unification with predominantly appointed Legislative Council for the whole country, but with jurisdiction largely in Southern Nigeria.
Arthur Richards Constitution, 1946	Colonial	Brought Northern Nigeria under the Legislative Council, members of which included nominates of Regional Councils of the Northern, Western and Eastern groups of provinces into which Nigeria had been divided in 1939.

John Macpherson Constitution, 1951	Colonial	Quasi-Federal with three regions given defined independent legislative powers; introduced elected majorities in the Central and Regional Legislatures.
Oliver Lyttelton Constitution, 1954	Colonial	Thoroughgoing Federal System, with specified powers to the Central Government, and residual Powers to the three regions.
Constitution of the Federation of Nigeria, 1960.	Colonial	Independent Federal Parliamentary Country of the British Commonwealth.
Constitution of the Federal Republic of Nigeria, 1963	Civilian	Nigerian President as ceremonial Head of State replaced Queen; ended judicial appeals to UK; created fourth region in Mid-West
Constitution of the Federal Republic of Nigeria, 1979	Military	American-style Presidential Federal Model with 19 states.
Constitution of the Federal Republic of Nigeria, 1989	Military	Modified Presidential Federal System, including mandatory two-party system, 21 states, and greater local government autonomy.
Constitution of the Federal Republic of Nigeria, 1995	Military	Additional modifications, including elaborate ethnic power sharing, greater decentralization, 30 states, 13 percent resource revenue minimum for producing states, return to multi-parties.
Constitution of the Federal Republic of Nigeria, 1999	Military	Basically restored 1979 Constitution, but with 36 states and the 13 percent derivation principle.
Constitution of the Federal Republic of Nigeria, 1999 (as amended)	Civilian	Modest amendments to 1999 Constitution, including electoral reforms and entrenchment of the National Industrial Court.

SOURCE: Adapted from Ben O Nwabueze, *A Constitutional History of Nigeria* (C Hurst and Company 1982).

Background

Nigeria's constitutional evolution (see Table 1) can be demarcated into three broad phases as follows. First, over the period from 1914 until independence, the British "amalgamated" Nigeria into one single colonial entity, gradually transforming the new state into a parliamentary federation of three major ethnic regions. This British legacy unraveled shortly after Nigeria gained independence in 1960 with the collapse of the First Nigerian Republic in a bloody military coup in 1966 and the subsequent outbreak of the Nigerian civil war (1967-70).

Second, during 1966-1999, Nigeria's military rulers transformed the country's constitutional institutions in response to the failure of the First Republic and the outbreak of civil war. Three mega-constitutional changes defined this transition:

- a change from a federal territorial structure with a small number of large constituent regions to one with a large number of relatively small states;
- a huge expansion in the powers and resources of the central government and a corresponding reduction in the autonomy of subnational units; and,
- a shift from a parliamentary system of government to a presidential structure. Additionally, the military sought to create agencies for restraining the political malfeasance at the roots of the country's instability.

Finally, the period since 1999 is the longest phase of civilian rule in Nigeria's constitutional history. It has seen governmental, civic and ethno-regional bodies immersing themselves in multifaceted and contentious constitutional politics in a bid to reform or restructure the military's centrist and allegedly undemocratic constitutional legacy. Nonetheless, the basic elements of this legacy (multiple states, centralized federalism, presidential governance, and the quest for credible agencies of restraint) have remained intact.

Nigeria's constitutional odyssey reflects a constant struggle to manage the country's extraordinary ethnic, regional and religious diversity. With three major ethnic groups (the Hausa-Fulani, Ibo, and Yoruba), hundreds of smaller ethnic communities, and approximately equal numbers of Christian and Muslim adherents, British-created Nigeria is among the most ethnically diverse countries in the world. In order to hold Nigeria together during a colonial era of growing socio-economic modernization and ethnic mobilization, the British spearheaded various constitutional reform conferences that culminated in the grant of independence to Nigeria as a Westminster-style parliamentary federation of three major ethnic regions in 1960.

Nigeria's First Republic (1960-66), however, proved unviable. The extensive postmortems on the Republic have implicated at least four institutional factors, namely, the unbalanced federal territorial structure, the subversive power of large regional units vis-à-vis the central government, the fragmentation and weakness of the central political executive in the face of this regional divisiveness, and the fragility and paucity of institutions that could restrain manipulations of political power.

A flagrant defect of the First Republic's federalism was the size of the predominantly Muslim Northern Region, which was larger and more populous than the two southern, predominantly Christian, regions (the Eastern and Western administrations) combined. This created a classic "dual power situation" (with the "core" Northern Region usurping and rivaling the central government), deepened ethnic insecurity and anxiety, and encouraged ethno-secessionism.¹ The fact that the North

¹ Henry E Hale, 'Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse' (2004) 56 (2) World Politics 165.

was poorer and less modernized than the South aggravated this structural defect, highlighting the tension between the political hegemony of the north and the socio-economic primacy of the south.

Another flaw of the federal system was that it denied a measure of self-government to Nigeria's minority ethnic communities, including the Kanuri, Nupe, Tiv, Igala, Jukun, and the Ilorin-Kabba Yoruba in the Northern region; the Edo, Urhobo, Ijaw, Itsekiri, and the Western Igbos in the West; and the Ibibio, Annang, Efik and Ijaw in the East. These groups, which constituted approximately one-third of the population of each region, alleged "political repression, socio-economic discrimination, and even cultural extinction by the majority groups."² Consequently, they spearheaded intense and sometimes violent statehood movements, including agitations for Middle Belt and Bornu states in the North, for Calabar-Ogoja-Rivers (COR) state in the East, and for Mid-West state in the West. Although northern and eastern politicians in control of the federal government successfully schemed to create the Mid-West in 1963 in a bid to dismember and weaken the opposition-controlled Western Region, they firmly resisted the excision of minority states from their own regions, thereby leaving the country's minority problems substantially unresolved.

Having so few regional units, which prevented the fluidity, flexibility, or crosscutting regional alliances that would have flowed from multiple regional actors, also undermined Nigeria's pre-military federalism. Instead, national politics polarized around a succession of bitter inter-regional conflicts over the control of central and regional governments. These fierce struggles culminated in the Western regional election fiasco of 1965, which directly precipitated the first military coup in January 1966.

The instability inherent in the federal territorial structure was compounded by the considerable constitutional powers of the regions, which reflected the strong inter-regional suspicion and contending ethnic nationalisms that led to the establishment of the federal system in 1954. The regions controlled all matters of internal policy and administration (including education, agriculture, health, public works and secondary roads), and were assigned revenue sources (income tax, and the return to them on a derivation basis of major federally collected export, import, and mining taxes) designed to give them "maximum financial independence."³ In addition, the regions were empowered by the fact that they became internally self-governing before the federation as a whole, by the concentration of talented indigenous personnel in the regional administrations (where career prospects were brighter due to early regional indigenization programs), by the regional character of the leading political parties, and by the absence of strong, united, or coherent political leadership at the federal level.

Indeed, one of the most widely criticized features of the First Republic was the perceived "lack of decisiveness and drive at the center" arising from the dual, collegiate, structure of the federal parliamentary executive.⁴ In particular, the federal government was debilitated by a public clash of ethno-political interests between President Nnamdi Azikiwe and Prime Minister Tafawa Balewa over the composition of the federal government (with President Azikiwe unsuccessfully seeking to prevent the reappointment of Balewa as prime minister following controversial federal elections in 1964), over the control of the armed forces, and over the constitutional future of the federation.

The greatest source of instability in the First Republic was, however, the intense premium on the control of political power and the absence of strong countervailing institutions to prevent personal, factional or sectional abuses of power. In an underdeveloped political economy like Nigeria, where access to political power is the primary avenue to affluence and influence for groups and individuals, political competition can become intensively destructive, and overwhelm and consume institutions like the judiciary and electoral administration that are designed to regulate the struggles for power. But the

² Larry Diamond, 'Class, Ethnicity, and the Democratic State: Nigeria, 1950-66' (1983) 25 (3) *Comparative Studies in Society and History* 457, 474.

³ John P Mackintosh, *Nigerian Government and Politics* (Northwestern University Press 1966) 31.

⁴ *ibid* 64.

constitutional arrangements of the First Republic lacked effective mechanisms to strengthen or insulate such potential institutions of restraint. Instead, the First Republic was degraded and destabilized by the politicization, manipulation or enfeeblement of major nonpartisan institutions like the judiciary, electoral administration, local police forces, and even the military, as ethno-political factions struggled violently for political power at national and subnational levels. Unrestrained by a rule of law or independent oversight institutions, political competition in the First Republic morphed into a succession of political shenanigans and electoral frauds "that heightened ethnic and regional polarization, intensified political violence and intolerance, and heavily eroded the popular legitimacy" of the Republic.⁵

The flaws in the constitutional institutions of the First Republic partly reflect pitfalls in the procedures by which those institutions were constituted. The institutions were fashioned in a succession of constitutional conferences between the British colonial authorities and a rising, but tiny and ethnically fragmented, nationalist elite. These processes generally privileged the preferences of "the British [colonial] Government... and the desires of Nigerian politicians," with hardly any influences from "such places as the United States or neighboring French colonial territories" or, more importantly, from the wider Nigerian population.⁶ The catastrophic levels of electoral manipulation and political corruption and repression that were perpetrated by politicians of the First Republic reflected and compounded this lack of constitutional legitimacy. The overthrow of the Republic by the military in January 1966, therefore, enjoyed support from "a broad section of the population, which welcomed the coup in an effusive outpouring of joy and relief."⁷

Period of Constitutional Engagement: Military Rule and the Reconstruction of Nigeria's Constitutional Architecture

Plagued itself by chronic ethnic conflict and political corruption, and featuring eight different military heads of state (all but two of whom were northerners), the Nigerian military responded to the collapse of the First Republic and the subsequent outbreak of civil war with milestone political reforms. Essentially, the military sought to reshape the Nigerian polity in accordance with its own centrist institutional structures and vision. Yet, confronted with the irrepressible diversity of Nigerian society, the military governed largely in a conciliatory rather than coercive fashion, incorporating into its governance many benign features that helped soften its inherent unitary authoritarianism. The military government, for instance, continued a civilian policy of recruiting the military organization on the basis of equitable inter-regional or inter-state quotas, which helped moderate domination of the military by the more populous northerners, who had relatively limited competitiveness in non-military sectors, but played disproportionate roles in coups.

Successive military administrations also committed to maintaining the federal structure, following violent reactions to the 1966 unitary scheme of the first military administration under General Johnson Aguiyi-Ironsi. In addition, the soldiers legitimized their rule as a corrective intervention designed to lay the foundations for the transition back to democratic rule. Consequently, they permitted some multiparty politics, albeit often with restrictions and late into the military's tenures, as an important feature of the re-democratization process. What is more, they consistently coopted civilian

⁵ Larry Diamond, 'Nigeria: The Uncivic State and the Descent into Praetorianism' in Larry Diamond, Juan J Linz, and Seymour Martin Lipset (eds), *Politics in Developing Countries: Comparing Experiences with Democracy* (Lynne Rienner Publishers 1995) 424.

⁶ Mackintosh (n 3) 17.

⁷ Diamond, 'Nigeria' (n 5) 427.

bureaucrats and politicians as advisers, ministers, commissioners, members of committees or investigatory panels, and constitution drafters.

The military's constitution-making procedures were originally implemented during the making of the 1979 Constitution and were largely replicated subsequently in the eighties and nineties. They had five basic elements:

- (1) ***Articulation of an unambiguous centrist constitutional vision:*** The military set the broad parameters of Nigeria's post-civil war constitutions. As enunciated with particular bluntness and clarity by heads of state like Generals Murtala Mohammed and Ibrahim Babangida, these included a closely regulated system of national (rather than ethnic) political parties, presidential government, a centralized and multi-unit federalism, an ethnically inclusive central government reflecting the "federal character" or ethnic diversity of the country, and a rejection of grand radical ideological philosophies like socialism.⁸
- (2) ***Elaboration of the military's vision by civilian technocrats:*** The military entrusted the elaboration of its centrist vision to groups of academics, lawyers and other technocrats, who translated it into constitutional documents. During 1975-76, a 49-member Constitution Drafting Committee (CDC) drafted the 1979 Constitution, which provided the template for subsequent military-initiated constitutions in 1989, 1995 and 1999. The CDC, which included at least two members from each of the then twelve states, comprised both "learned members in disciplines [with] direct relevance to constitution-making [and] eminent Nigerians with some experience in constitution-making," all of whom "were committed to a strong federal authority."⁹ Following the collapse of the Second Republic, successive military administrations constituted similar technocratic constitution review bodies, including the 17-member Political Bureau of 1985, the 46-member Constitution Review Committee in 1987, and the 22-member Constitution Debate Coordinating Committee (CDCC) of 1998. Despite occasional voices of dissent, these Committees mostly produced constitutional proposals in accordance with the military's specifications or centrist vision.
- (3) ***Attempted legitimization of the military's vision through representative assemblies:*** Reflecting its formal commitment to democratization, the military sought to give broad legitimacy to its constitutional blueprints through directly or indirectly elected constituent assemblies. Comprising a total of 232 members in 1977-78, 567 delegates in 1988, and 369 members in 1994-95, these assemblies were tasked with debating and ratifying constitutional blueprints produced by the military's constitutional technocrats. However, the limited powers of these assemblies were underscored by their more or less explicit designation as advisory or deliberative (rather than sovereign) bodies, by the injection of several military appointees into the assemblies, by the selection of the leadership of the assemblies by the military, and by the restrictions (so-called "no go areas") that the military often placed on the deliberative freedoms of the assemblies.
- (4) ***Preservation of the military's constitutional sovereignty:*** Most important, the military reserved to itself final authority to approve, reject, or amend any decisions made by constitutional drafting or debating bodies. In 1978, 1989 and 1995, for example, the military made significant amendments to constitutions approved by constituent assemblies. In 1999, the

⁸ Keith Panter-Brick, 'The Constitution Drafting Committee' in Keith Panter-Brick (ed), *Soldiers and Oil: The Political Transformation of Nigeria* (Frank Cass and Company 1978); Rafiu Akindele, 'The Constituent Assembly and the 1989 Constitution' in Larry Diamond, Anthony Kirk-Greene and Oyeleye Oyediran (eds), *Transition Without End: Nigerian Politics and Civil Society Under Babangida* (Lynne Rienner Publishers 1997).

⁹ Murtala Mohammed, 'Address to the Opening Session of the Constitution Drafting Committee of 18 October 1975' reproduced in *Constitution of the Federal Republic of Nigeria 1979* (Reprinted by New Nigerian Newspapers Limited, Kaduna 1981) 125; Brian Smith, 'Federal-State Relations in Nigeria' (1981) 80 (320) *African Affairs* 355, 366.

military dispensed with a constituent assembly altogether and, acting on the CDCC's advice, simply amended and updated Nigeria's 1979 constitution, promulgating it as the 1999 Constitution.

- (5) ***Rigid constitutional entrenchment and irreversibility of the military's institutional legacy:*** A relatively rigid constitutional amendment formula (involving ratification of any constitutional changes by concurrent legislative supermajorities at federal and regional levels) has been a broadly supported feature of Nigeria's constitutional settlement since the First Republic. But the military, while suspending constitutional niceties for much of its rule and restructuring the federation largely unilaterally, supported both the restoration of a rigid constitution amendment formula as well as an expansion in the subjects included in Nigeria's post-military constitutions. In 1978, for instance, the military decided to elevate two of its policies, the Land Use Decree and the National Youth Service Programs, from mere statutory decree-laws into provisions entrenched in the forthcoming 1979 Constitution.

It is therefore understandable that Nigeria's current constitutional framework has elicited the criticism that it was fashioned and imposed by the military, rather than by the people or their representatives.¹⁰ This critique has resonated powerfully because of the often-comprehensive (and entrenched) nature of the changes that the military made to the country's territorial structure, federal distribution of powers, central executive and legislature as well as institutions of horizontal democratic accountability or oversight.

Territorial Reorganizations

The military implemented five rounds of territorial reorganizations during its reign, increasing the number of federal sub-units from only four regions at the end of the First Republic in 1966 to 12 states in 1967, 19 in 1976, 21 in 1987, 30 in 1991, and 36 states in 1996. In addition, the soldiers relocated the capital of the federation from the Yoruba-dominated, southwestern Nigerian city of Lagos to Abuja, an ethnically more neutral area in the center of the country.

The 1967 reorganization was announced by the military administration on the eve of civil war without any public consultations. While it subdivided the dominant Northern Region into six different states, the reorganization was primarily designed to undercut the imminent secessionist bid of the Ibo-dominated Eastern Region, which was split into three new states. Of the three states, the Rivers and South Eastern states were established for oil-bearing minority non-Ibo communities, thereby leaving the Ibo-based East Central state landlocked and without significant oil deposits. Although it failed to prevent the Eastern Region's proclamation of itself as an independent Republic of Biafra and the outbreak of civil war, the 1967 reorganization decisively decapitated the secessionist Republic, ensuring federal victory in the war.

Unlike the 1967 restructuring, which responded specifically to ethnic minority demands and was mostly unpopular among major ethnicities, subsequent state reorganizations were undertaken in response to intense agitations by majority and minority ethnic communities in large part to take advantage of the enormous distributive advantages associated with forming a state. Indeed, since the 1967 reorganization, federal revenues and other economic and political benefits (federal educational institutions, ministerial appointments, bureaucratic positions) have been allocated largely on an equal basis among the states. Thus, a major ethnic group like the Ibo, which resisted balkanization into smaller states in the sixties, came vociferously to support new state creation in order to enhance its relative

¹⁰ Tunde Ogowewo, 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' (2002) 44 (2) *Journal of African Law* 135.

shares of federal resources. Ibos bemoan the fact that the Ibo-based Southeast geopolitical zone has only five states as against six states in the Yoruba southwest and seven states in the Hausa-Fulani northwest. Such calls for new state creation led the military repeatedly to fragment, proliferate and, invariably, weaken constituent states.

The military explicitly repudiated the ethnic principle as a basis for reorganization. The principle was considered inconsistent with subdividing big ethnicities into smaller states (and reducing disparities in the population sizes of states), with the multiplicity and fluidity of Nigerian ethnic identities, and with the military's overriding emphasis on national unity. Indeed, in 1976 the military decreed that the names of the states were not to have any ethnic or regional connotations.¹¹

The non-democratic processes of the military's state creations facilitated its exaggerated repudiation of ethnicity. The 1963 creation of the Mid-West in the First Republic was the only one that followed prescribed constitutional procedures, including ratification by national and sub-national legislatures and by plebiscite in the area of the proposed state. All subsequent reorganizations were undertaken more or less unilaterally by military regimes, albeit often in response to very vigorous statehood agitations.

The military's first territorial reorganization in 1967 was imposed hurriedly in response to Biafra's imminent secession. On the other hand, the 1976 state creations followed the recommendations of a civilian panel, though the military significantly modified the panel's proposals regarding the regional distribution, ethnic composition and administrative capitals of new states. The 1987 and 1991 reorganizations were not preceded by special panels or hearings, but responded to political dissatisfaction with previous state creations. Finally, the military imposed the 36-state structure in 1996 without reference to—or publication of—the recommendations of a recently established civilian Committee on State and Local Government Creation.

Overall, state reorganizations have enhanced access by subnational groups to federal economic and political patronage, while ending the flagrant structural imbalance inherent in the predominant size of the old northern region, assuaging ethnic minority insecurities, and fragmenting each of the three major ethnic groups into multiple states. The reorganizations minimized the disparities in the populations of the states, reduced inter-group tensions by fragmenting some of the more culturally heterogeneous or politically conflicted states, and also enhanced the powers of the central government.

Centralization of Constitutional Functions and Fiscal Resources

The military's flagship decree empowered the "Federal Military Government to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever."¹² Essentially, successive military administrations, with the exception of the Ironsi government, maintained the formal constitutional status of the country as a federation, while shifting powers and resources massively to the center. This shift was greatly abetted by the unified command structure of the military, as well as by the emergency created by civil war, the enhanced credibility of the central government after its victory, and then the dramatic post-war expansion in centrally collected revenues.

Throughout its rule, the military enacted several decree-laws that encroached on previously subnational powers and resources, and it then entrenched these new competencies in the constitutions it bequeathed to the civilian administrations. A comparison of the legislative lists of the pre-military 1963 Constitution and the 1979 Constitution shows the extent of this centralization. Sixteen subjects

¹¹ Rotimi T Suberu, *Federalism and Ethnic Conflict in Nigeria* (United States Institute of Peace 2001) 91.

¹² *ibid* 31.

that were concurrent to both federal and regional governments in 1963 were made exclusively federal in 1979. The transferred subjects include: arms, bankruptcy, censuses, commercial and industrial monopolies, drugs and poisons, fingerprints and criminal records, labor, prisons, professional occupations, quarantine, business registration, regulation of tourism, traffic on trunk roads, public holidays, regulation of political parties and the execution of federal civil and criminal processes. New items, such as the enforcement of directive principles and fundamental objectives of public policy, were added to the exclusive federal list in 1979 for the first time; this list grew to 67 items from 45 under the 1963 Constitution.¹³

The 1979 Constitution and its successors further reinforced centralization by how they constructed concurrent powers over public safety, electoral laws, local governance, and revenue allocations. For example, although “public safety and public order remain a concurrent matter...the principal instrument for maintaining and securing them—the police and the armed forces—are centralized in the federal government, without the concession made to the regional governments by the 1960/63 Constitutions to establish local police forces on a provincial basis.”¹⁴

Similarly, the Federal Government is given lead responsibility for electoral laws, while state legislatures are restricted to “making laws with respect to elections to a local government council in addition to but not inconsistent with any law by the National Assembly.”¹⁵ Moreover, states constitutionally cannot effect changes in the boundaries of their local governments without ratification by the National Assembly. In essence, although state governments continue to enjoy extensive powers over local elections, finances and administration, the constitution now empowers the federal government to regulate local governance, which was a purely residual subject for regional governments under the pre-military regime.

Fiscally, Nigeria's current constitution gives both federal and state governments the legislative powers to allocate public revenues, but it consolidates the most important revenues into a Federation Account, which is to be divided by the National Assembly vertically and horizontally among federal, state and local governments. In addition, the federal government not only levies and redistributes the Value Added Tax (VAT), which replaced the subnational sales tax in 1993, but also legislates on the rates and bases of key taxes that are collected and retained by the states, including personal income tax. Overall, Nigeria's subnational governments depend for an average 90% of their revenues on unconditional, constitutionally mandated, transfers from the Federation Account and other federally redistributed revenues.

Vertically, the Federation Account is currently distributed in the proportions of 48.50%, 26.72%, 20.60%, 4.18% to the federal government, states, local government, and federally controlled special funds, respectively. Horizontally, the Constitution requires that a minimum of 13% of natural resource revenues be paid upfront to the resource-bearing areas on a derivation basis. The general allocations to the subnational governments are then statutorily distributed among the states and among the localities on the basis of the following principles and accompanying weights: equality, 40%; population, 30%; social development needs, 10%; land mass and terrain, 10%; and internal revenue generation effort, 10%.

The 13% derivation principle emerged from a “consensus agreement” at the 1994/95 Constitutional Conference in response to persistent violent agitations for subnational resource control in the oil-rich Niger Delta. Yet, given the dependence of all governments on redistributed oil revenues,

¹³ Constitution of the Federal Republic of Nigeria 1963, Sch, pt I, Exclusive Legislative List; Constitution of the Federal Republic of Nigeria 1979, sch 2, pt I, Exclusive Legislative List.

¹⁴ Ben O Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Books 1992).

¹⁵ Constitution of the Federal Republic of Nigeria 1979, sch 2, pt II, Concurrent Legislative List, Item E; Constitution of the Federal Republic of Nigeria 1999, sch 2, pt II, Concurrent Legislative List, Item E.

the application of the derivation rule has spawned profound distributional distortions and disparities, with nine southern oil-producing states typically receiving over half of total revenue transfers to the states, even though they account for less than one-fourth of the population.¹⁶

The preponderant weight for inter-unit equality and population in the general horizontal sharing formula, on the other hand, dates back to 1969, when the military imposed both principles as a straightforward formula for sharing revenues among newly created states “without resort to special commissions of inquiry or constitutional convention.”¹⁷ Overall, these horizontal distribution arrangements focused the attention of most subnational governments on revenue sharing, rather than on autonomous revenue generation, thereby reinforcing the centrist agenda of the military.

The political and fiscal over-centralization of Nigeria effectively meant that the residual powers retained by state governments would “be determined largely by what the Federal Government voluntarily chooses to leave to the states.”¹⁸ With such centralization, however, the military and its advisers also addressed the deep-seated fears of ethnic and regional domination at the center and in the states by introducing the celebrated constitutional principle of federal character, which requires the composition and conduct of the federal government and other public agencies to reflect the diversity or “federal character” of the country. Essentially, this “encouraged many Nigerians to view federalism not as a principle of non-centralized democratic government, but as simply a guarantee of ethnic and religious group representation in the institutions of government, no matter how centralized.”¹⁹ The federal character principle would apply to the composition of the federal cabinet, ministries, departments, agencies, commissions and armed forces, the state governments, the political parties and to the procedures for electing the federal and state chief political executives in Nigeria’s new America-style presidential system.

Presidentialism

In an explicit rejection of Nigeria’s parliamentary experiment in the First Republic, and consistent with a predilection for strong presidential political chief executives in other African countries, the military concluded in 1975 that the country required an “executive presidential system of government in which the president and vice-president are directly elected and brought into office in a manner that reflects the federal character of the country.”²⁰ The election formula that was adopted after protracted constitutional debates required a successful presidential candidate to win a plurality of votes nationally plus a quarter of the votes in at least two-thirds of the states and in the Federal Capital Territory. Similarly, a successful gubernatorial candidate must win the highest number of votes plus at least one-quarter of votes in two-thirds of the local government areas in the state.

There was confusion regarding the procedure to be followed if these requirements were not met. The current formula for president provides for a run-off election between the candidate with the highest number of votes and the one among the remaining candidates with a majority of votes in the highest number of states. If neither candidate in the run-off meets the requirements for election, they will have a second run-off with the same requirements. If this still fails to produce a winner, the candidates will meet in a final run-off election, with the presidency or governorship going to the

¹⁶ Wumi Iledare and Rotimi Suberu, ‘Nigeria’ in George Anderson (ed), *Oil and Gas in Federal Systems* (Oxford University Press 2012) 239.

¹⁷ Lawrence Rupley, ‘Revenue Sharing in the Nigerian Federation’ (1981) 19 (2) *Journal of Modern African Studies* 257, 264.

¹⁸ Michael Joye and Kingsley Igweike, *Introduction to the 1979 Nigerian Constitution* (Macmillan 1982) 94.

¹⁹ Ladipo Adamolekun and John Kincaid, ‘The Federal Solution: Assessment and Prognosis for Nigeria and Africa’ (1991) 21 (4) *Publius: The Journal of Federalism* 173, 178.

²⁰ Mohammed (n 9) 125.

candidate with a majority of votes. In practice, with the exception of the inaugural presidential election of 1979 (when Shehu Shagari was controversially declared elected as president after obtaining the required one-quarter of votes in slightly less than two-thirds of the then 19 states) no federal or state election has proved inconclusive because of the geographic distribution requirement, which has been remarkably successful in generating strong incentives for the construction of inclusive electoral coalitions.

The debates preceding the ratification of the presidential system in the 1979 Constitution were some of the most vigorous in Nigeria. The military and its supporters in the CDC and 1977 Constituent Assembly defended the choice of a presidential system on the grounds of its presumed compatibility with Nigerian and African indigenous kingship or chieftaincy traditions. It was also argued that the system would provide strong executive leadership, avoiding confrontations like those that plagued the dual executive of the First Republic, and would give the country a pan-Nigerian symbol of unity, deriving from the direct national election and preeminent constitutional status of the presidency.

The presidential system was also defended as more consistent with Nigerian federalism in providing for effective inter-branch separation of powers (including independent judicial review) as well as a strong upper legislative chamber (the Senate) to represent regional interests. This contrasts with the parliamentary system, which typically subordinates the upper chamber to the sovereignty of the popular or lower parliamentary chamber. Finally, the presidential system was promoted for providing for the popular election of the executive, fixed presidential terms of office (a maximum of two four-year terms), and fixed non-discretionary electoral cycles, among other democratizing characteristics.

Skeptics, however, either preferred a return to the parliamentary system of the First Republic or the substantial modification of the presidential system, including a simpler procedure for presidential elections, the possibility of cabinet members coming from the legislature, and formal provisions for the ethno-regional rotation of the presidency.²¹ A common concern was that a presidential system could promote a dictatorial presidency unless adequate restraining institutions were in place.

A corollary of the military's constitutional choice of an executive presidency with broad trans-ethnic electoral support was its ban on ethnic political parties and its insistence on the formation of truly national parties. Indeed, despite its longstanding commitment to political liberalization and democratization, the Nigerian military implemented ethnic party bans more "systematically" than any other African regime, often demonstrating a profound distrust for independent political organizing by Nigeria's ethnically based civilian elites and denying registration to tens of prospective parties for failing to establish a national presence.²² This disapproval of ethnic political parties found its most extreme expressions in the military's suggestion in 1975 that the CDC should explore "means by which [democratic] Government can be formed without the involvement of political parties," and in the subsequent imposition under the 1989 Constitution of a system that limited political competition to only two, government-established, political parties.²³

Under the 1979 and current 1999 Constitutions, and associated electoral laws, political associations, to be officially licensed as parties, are required to reflect the federal character in their names, ideology, leadership, membership, and geographical location and distribution of their national and branch offices. Implementation and verification of these often-contentious party registration

²¹ Federal Ministry of Information, 'Report of the Constitution Drafting Committee, Volumes 1-2' (Federal Ministry of Information 1976); Federal Ministry of Information, 'Proceedings of the Constituent Assembly: Official Report, Volumes 1-3' (Federal Ministry of Information 1978).

²² Matthijs Bogaards, 'Ethnic Party Bans and Institutional Engineering in Nigeria' (2010) 17 (4) *Democratization* 730.

²³ Mohammed (n 9) 124.

requirements has been entrusted to a national electoral commission, one of Nigeria's longstanding, but beleaguered, agencies of restraint.

Agencies of Restraint

An important feature of Nigeria's constitutional transition has been the attempt to redress a perceived defect in the pre-military constitutional framework through the reform or expansion of oversight or "corrective institutions" charged with restraining the country's "cutthroat political competition."²⁴ The 1963 Constitution, for instance, had scrapped the Judicial Service Commission, leaving the Nigeria Police Council, Public Service Commission, Electoral Commission of the Federation, and the Advisory Council on the Prerogative of Mercy as the country's only constitutionally established commissions at the federal level. Furthermore, appointments to these commissions lacked adequate political insulation.

Thus the 1979 Constitution established ten federal councils and commissions, including the civil service, electoral, judicial service, population enumeration and police service commissions as well as the code of conduct bureau and tribunal. Appointments to these commissions were to be more insulated politically in that they were often subject to consultation with the Council of State (comprising the president, governors, and former heads of state and chief justices, among others) and confirmation by the Senate.

By the time of the inauguration of the 1999 Constitution, these constitutionally entrenched federal bodies had increased to fourteen, including the federal character and revenue allocation commissions, and National Judicial Council (NJC). Indeed, the establishment of the NJC marked a milestone in innovating with the design of agencies of restraint in the Nigerian federation. Headed by the chief justice of the Supreme Court and comprising mainly senior judges, the NJC is largely appointed without the involvement of the presidency and has very broad powers. It recommends federal and state judges for appointment (by the respective executives and legislatures) on the basis of nominations received from federal and state judicial service commissions, and also disburses monies for the judiciary and exercises disciplinary control over judges.

This innovative model has inspired other constitutional and statutory initiatives to create or strengthen agencies that could constrain the use of presidential power, or political office more generally, for personal, factional, partisan or ethnic advantage. There has been a strengthening of the operational and budgetary autonomy of the Independent National Electoral Commission (INEC), and the creation of new statutory oversight agencies like the Independent Corrupt Practices Commission, Economic and Financial Crimes Commission, and National Human Rights Commission. However, the failure of these investments in agencies of restraint to transform the corrupt and ethnically fraught nature of Nigerian politics has highlighted contradictions in the military's constitutional legacy.

Outcomes: The Centrifugal Backlash Against the Military's Centripetal Restructuring

To what extent has Nigerian governance under civilian rule conformed to what the military hoped for? Undoubtedly, the military's elaborate constitutional engineering has produced multiple integrative and stabilizing outcomes, helping to avert a recurrence of large-scale ethno-secessionist warfare. The multi-state federal structure, for instance, has "functioned reasonably (even remarkably) well to break up the hegemony of Nigeria's largest ethnic groups, decentralize ethnic conflict, disperse development activity, foster crosscutting cleavages, expose intra-ethnic divisions, facilitate inter-ethnic alliances and in general contain the powerful centrifugal forces inherent in Nigeria's ethnic

²⁴ *ibid* 125.

composition.”²⁵ The fiscal and other advantages of state creation have produced strong movements for the creation of additional states, which have been frustrated to date because of the onerous constitutional hurdles in the way of state reorganizations and broad concerns about the costs of further states proliferation.

Similarly, the military's centralization has endowed the federal government with the political and fiscal resources required to contain various centrifugal challenges to national unity, including Islamic extremism in the Muslim north, resource nationalism in the Niger Delta, and the Ibo-based Biafran restoration movement. At the same time, the devolution of almost half of centrally collected revenues to subnational administrations has tempered centralization and means that these units have become important arenas of political competition, thereby helping to moderate the struggles for the control of the federal presidency.

Meanwhile, the idea of a broadly elected president has come to be adapted to Nigeria's multi-ethnic context, as evident in the development by major national political parties of various creative power-sharing formulas for balancing and rotating the presidency and vice-presidency among regional, religious and ethnic constituencies. What is more, the geographic distribution rules for electing the president and the formal ban on ethnic parties have encouraged the development of inclusive coalitions and national political parties, including the National Party of Nigeria (NPN) in the Second Republic, the Social Democratic Party (SDP) and National Republican Convention (NRC) in the aborted Third Republic, and the Peoples Democratic Party (PDP) and All Progressives Congress (APC) in the Fourth Republic.

The investment in agencies of restraint is arguably the least successful element of the military's constitutional engineering given the persistently lawless and corrupt character of Nigerian politics. The performance of the NJC, in particular, has been underwhelming, failing to control massive judicial and other forms of corruption and to eliminate executive interference in the budgetary and appropriations processes of the courts, while provoking criticisms for concentrating so much power in the chief justice and for eroding subnational control over state-level judicial appointments. Nonetheless, the idea of building strong oversight agencies has become very influential, as evident in recent constitutional reforms that are designed to give the judiciary, electoral commission, and other agencies of restraint budgetary autonomy and considerable political insulation from the executive. Partly as a result of those reforms, the electoral commission in 2015 successfully umpired the first interparty alternation in government at the national level in the country's electoral history.

These accomplishments notwithstanding, Nigeria's current constitutional framework is beset by significant ethnic, regional and religious challenges to its stability. The multi-state structure, for instance, is closely associated with the intensification and proliferation of discriminatory practices against non-indigenes (Nigerians living or born in states outside of their historic, ancestral or indigenous communities). Such discriminatory practices have escalated from the exclusion of non-indigenes from employment and educational opportunities at the state level, to so-called “internal deportations” of beggars and vagrants to their states of origin by state governments like Kano and Lagos. While indigenization practices predated the creation of states, successive state reorganizations have led to a progressive contraction of the territorial space in which a Nigerian could enjoy indigenous status and freedom from discrimination.

Lacking the capacities of the old regions, and funded almost entirely by unconditional federal transfers, Nigeria's current states have functioned more like conduits for the dissemination of corrupt patronage, than as true laboratories of decentralized, democratic governance. They have mostly failed

²⁵ Larry Diamond, 'Issues in the Constitutional Design of a Third Nigerian Republic' (1987) 86 (343) *African Affairs* 209, 210-11.

to use their control of approximately half of federal revenues and direct government spending to complement national macroeconomic reforms, formulate and implement sound economic policies, provide critical infrastructures and services in support of local businesses, and effectively deliver education, health and poverty-alleviating social services.

The governance failures of the multi-state structure cannot be dissociated from multiple pathologies in Nigeria's oil-based revenue allocation system. Aside from its heavy dependence on the redistribution of volatile oil rents via unconditional and unmonitored transfers, the revenue allocation system is vexed by poor intergovernmental policy coordination, the absence of significant incentives for non-oil revenue mobilization, and by weak to non-existent mechanisms for ensuring transparency and accountability in the use of devolved revenues. Other weaknesses of the revenue allocation system include enormous per capita disparities in the inter-state allocations of transfers arising from the application of the derivation and inter-unit equality principles, the disconnection of the derivation funds from the ecological and developmental challenges of the oil-bearing communities, and the vulnerability of federal-local financial transfers to expropriation by state governments. A more generic problem is that the presidentially appointed national revenue commission entrusted with developing and monitoring the implementation of the revenue allocation formula remains a professionally weak, politically emasculated, and virtually redundant bureaucracy

The military's hopes for an ethnically unifying Nigerian presidency have hardly materialized. Rather, electoral contests for the Nigerian presidency have remained one of the major recurrent flashpoints of fierce ethno-political contention and polarization in the Nigerian federation. The first post-military presidential election in 1979, for instance, was tainted by the bitter legal struggle over the interpretation of the presidential election formula. The next presidential election in 1983 was disfigured by widespread electoral fraud that contributed directly to the overthrow of the Second Republic. This was followed by the northern-dominated military's annulment of the result of the 1993 presidential election, won by a southerner for the first time in the nation's history. Although general elections in 2015 produced a relatively peaceful inter-party alternation in the presidency, Nigerian presidential elections typically involve varying levels of ethno-political scheming and melee, including the 2011 elections in which almost a thousand Nigerians were killed in violent ethno-religious post-election protests.

Although their creative informal power-sharing strategies may have helped to moderate ethno-political contention for presidential power, Nigeria's major political parties remain fundamentally weak. Partly because of the military's tight restrictions on party formation processes, Nigerian parties have remained stunted, shallow, faction-ridden, personality-driven institutions lacking internal democracy, viable organizations, coherent policy platforms, robust social bases, or genuine cross-sectional appeal. Rather their main common enterprise remains the doling out of political patronage among fractious ethnically based elites.

The multiple shortcomings of the military's constitutional legacy have produced a groundswell of constitutional agitation for a political restructuring, which has focused specifically on the perceived procedural illegitimacy and centralizing structures of the military's constitutional engineering. Echoing broad public criticisms of the 1999 Constitution, for instance, Emeka Ihedioha, the Chairman of the Constitution Review Committee of the House of Representatives, argued in 2013 that the Constitution is "the product of a military decree and...suffer (s) a legitimacy crisis. Many Nigerians view it with contempt and its opening paragraph..."*"We the People"*...has been described as a lie as there was never a time that Nigerians participated in the making of the Constitution."²⁶ Three perspectives have emerged regarding how this procedural deficit may be rectified.

²⁶ Emeka Ihedioha, 'Keynote Speech' in *The Review of Nigeria's 1999 Constitution: Report of a Consultation with UK Based Nigerians* (Chatham House 2013) 22.

The first perspective, embraced by the federal executive and legislature, reflects a tension between a perceived lack of legitimacy to the 1999 Constitution because of its military authorship and a strong commitment to respect the legal framework that has been bestowed. Thus, this approach seeks procedural legitimacy for the constitution through the implementation of the constitutional amendment formula written into the constitution itself. This requires that a proposal to change the constitution must be approved by not less than two-thirds of all the members of each house of the bicameral National Assembly or by a four-fifths majority of these members if the change concerns the constitutional amendment formula itself or the provisions of the constitution on fundamental human rights, boundary adjustments, and the creation of new states and localities. In addition, all amendments must be supported by resolutions of at least two-thirds of state assemblies.

Despite these onerous requirements, three sets of constitutional alterations, focusing largely on electoral administration reform, were passed by the required majority of federal and state legislatures and ratified by the federal presidency in 2010-11. Subsequently, in 2014, the federal and state legislatures passed a Constitution (Fourth Alteration) Bill, which included modest reforms regarding indigene practices, intergovernmental legislative lists, social welfare rights, local government autonomy, the electoral process, autonomy of oversight agencies, and constitution amendment rules. However, the presidency, citing procedural technicalities and more substantive concerns, declined to assent to the bill, thereby stymying this official path to constitutional change. Nonetheless, during 2016-17, the leadership of National Assembly committed the legislature to revisiting, and adding "fresh inputs" into, the Fourth Alteration Bill, while the federal executive inaugurated a Committee on Constitution and Electoral Reform with a mandate to "evaluate our democratic journey thus far with a view to fashioning out a more enduring system that will serve present and future generations."²⁷

By early 2018, Nigerian state assemblies were deliberating on multiple constitutional amendments recently passed by the National Assembly. Incorporated in separate individual bills rather than consolidated into a single comprehensive bill, these amendments included proposals to curb executive prerogatives, extend or entrench the powers of national and subnational legislatures, guarantee local government autonomy, encourage the political participation of young persons and independent candidates in elections, and improve the independence, powers, credibility and efficiency of key oversight institutions like the electoral administration, police and judiciary. During mid-2018, President Muhammadu Buhari ratified a set of constitutional amendments that enhanced the financial autonomy of subnational legislatures and judiciaries, reduced age requirements for selected political offices (the presidency and membership of the federal house of representatives and state assemblies), and, in general, improved and clarified the country's electoral processes. But he also withheld assent from multiple constitutional alteration bills, including amendments seeking to extend legislative privileges and to curb executive veto and spending powers. Even as proposals like enhanced local government autonomy and curbs on executive powers have been consistently resisted by state governments and federal political executives, respectively, the National Assembly's amendments have been broadly critiqued for not addressing the more radical demands for restructuring, decentralization or true federalism in the country. Nonetheless, the Assembly's initiatives underscore the continuing commitment of Nigeria's national political leadership to a path of incremental constitutional amendments.

A second perspective on constitutional change, supported by leaders of southern Nigerian ethno-regional (Ibo, Niger Delta and Yoruba) movements, proposes the convocation of a Sovereign

²⁷ Fred Itua, 'Constitution Review: National Assembly to Overrule Buhari on Alteration Bill' *The Sun* (Lagos, 9 January 2017); News Agency of Nigeria, 'Ken Nnamani-led Constitution, Electoral Reform Committee Inaugurated' *Premium Times* (Abuja, 4 October 2016).

National Conference (SNC) of diverse ethnic and social groups to make a decision on whether and how the various Nigerian groups would coexist in a restructured Nigerian federation. But the idea of the SNC is severely undermined by its unpopularity in the north (where it is seen as a recipe for the dismemberment of Nigeria); by the relatively poor record of SNCs in most of the Francophone African countries where they were adopted in the nineties; by the absence of any broadly accepted criteria for selecting ethnic and other representatives into the SNC; and by the difficulty of reconciling the sovereignty of the SNC with the authority of an incumbent elected national government.

Many of the aforementioned challenges of the SNC were evident in the travails of the 2014 National Conference, which was convened by the presidency in an attempt to assuage southern demands for the SNC. The National Conference was undermined by its unelected nature, its skewed and unbalanced composition (for instance, Muslims, who constitute approximately half of the Nigerian population, accounted for only 198 of the 492 delegates), its unwieldy, open-ended, mandate, and its establishment without any formal enabling legislation by the National Assembly, which saw the Conference as an attempt to usurp legislative authority. More important, the Conference was vexed by the fault-line between southern decentralist and northern centrist perspectives on federalism, leading to various conflicting and unsustainable proposals, which reinforced criticisms of the Conference as a mere talk shop or a jamboree.

A final perspective, supported most consistently by the Citizens Forum on Constitutional Reform (CFCR—an alliance of Nigerian civil society groups), seeks the ratification of a redrafted or amended Nigerian Constitution by a popular referendum. Influenced greatly by the global rise of a paradigm of participatory constitutionalism, proponents of this third path to constitutional reform have disparaged Nigeria's existing constitution-making methods as shallow, elitist, and restrictive, while advocating for a fully democratic, bottom-up, process-led, people-driven, and participatory approach. While there has been some official receptivity to the call for broader popular participation, the idea of a referendum has not obtained much official traction, presumably because it would further complicate Nigeria's already rigid constitution amending formula.

The post-military era has witnessed considerable contention not only about the appropriate procedures for reforming the military's constitutional legacy, but also the substantive reforms required to nurture a more viable democratic federalism. One common proposal seeks a more competitive and decentralized federalism through the consolidation of the states into between six and 18 autonomous, ethnically based regions. Other proponents of "true" federalism advocate the deletion from the current list of exclusive federal legislative powers of items like prisons, police, evidence, labor, wages, mines and minerals, public holidays, land use, and fundamental socio-economic, political, educational and environmental objectives. They also demand an end to federal interventions in local government, which they contend should be entirely a residual matter for the states.

There are constitutional reform proposals to make the contest for the presidency less ethnically polarizing by constitutionalizing the informal, but widely embraced, rotation and matching of presidential tickets on a regional and/or religious basis; by limiting the president's tenure to a single 4-7 year term; by splitting the federal executive between an executive president and a prime minister responsible to the legislature; or by restoring the parliamentary system of the First Republic.

The most compelling constitutional reform proposals for de-polarizing the struggle for the presidency, however, revolve around the establishment of strong institutional restraints on presidential power. For instance, a presidentially appointed Electoral Reform Committee (ERC) in 2008 called for the nomination and appointment of the board of national electoral commission by the NJC and the Council of State, respectively, rather than by the presidency.²⁸ Similarly, the aborted Constitution (Fourth Alteration) Bill, 2014 included various proposals to enhance the operational and budgetary

²⁸ Federal Republic of Nigeria, 'Report of the Electoral Reform Committee' (Federal Republic of Nigeria 2008).

autonomy of oversight institutions like the revenue allocation commission, security agencies, and offices of auditor-general, attorney-general, and accountant-general of the federation. However, these proposals have met with resistance from the political executive.

In essence, with the exception of the minor constitutional alterations implemented in 2010-11 and in 2018, Nigeria has not achieved any formal change to the military's constitutional legacy. This is not unlike the experiences of other federations with relatively rigid constitutional amendment formulas, including the United States and Canada. Nonetheless, comparative experience suggests that "deliberate constitutional reform is not the only or the most frequent source of change" in federal systems.²⁹ Thus, although countries like Germany, Switzerland, and the United Kingdom have recently accomplished formal constitutional change, federations like Canada, Spain and Australia have witnessed more informal or non-constitutional evolution, adaptation or renewal

Indeed, in the absence of significant formal democratic constitutional change, Nigeria has experienced important non-constitutional development through judicial arbitration, legislative supplementation, and even "constitutional infidelity" or circumventions.³⁰ The states, for instance, have launched judicial challenges against the center's administration of the natural resource revenue allocation system, interventions in local governance, use of national policing powers, and manipulation of subnational electoral processes. While mostly upholding the prerogatives of the center in federal-state constitutional disputes over natural resource control and public security, major rulings of the Supreme Court on local governance and electoral disputes have buttressed states' rights.³¹ Indeed, owing partly to stronger judicial enforcement of revenue allocation laws as well as a reassertion of states rights by newly elected subnational governments, the end of military rule in 1999 witnessed "greater transparency and clarity in important aspects of intergovernmental fiscal relations...and...stricter observance of constitutional provisions on fiscal federalism" leading to "increased revenue flows to subnational governments."³²

Furthermore, in a remarkable use of federal legislative power to enhance subnational resource rights, the National Assembly passed the "Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004," which abrogated the distinction between onshore and offshore oil in the calculation of the 13 % of natural resource revenues constitutionally due to oil-bearing states on a "derivation" or region-of-origin basis. This legislation responded to fierce opposition by the oil-rich states to an April 2002 ruling of the Supreme Court, in *AG Federation v AG Abia & Ors*, that natural resources in Nigeria's continental shelf belong to the federation as a whole and, therefore, cannot be said to be derivable from the adjoining littoral states for revenue allocation purposes.³³

In addition to benefiting from judicial arbitration and legislative supplementation, the states have resorted to creative circumvention of centrist constitutional rules. In the most controversial assertion of states' rights since 1999, for example, twelve northern Muslim states exploited a loophole in the Nigerian Constitution to extend the jurisdiction of Sharia courts from personal to penal matters. Similarly, several states have created so-called Local Council Development Areas (LCDAs) as a way of tinkering with their local government boundaries, thereby sidetracking the Constitution's entrenchment of the country's 774 local government areas. Other examples of constitutional infidelity include the

²⁹ Arthur Benz and Cesar Colino, 'Constitutional Change in Federations: A Framework for Analysis' (2011) 21 (4-5) *Regional and Federal Studies* 381, 382.

³⁰ John Kincaid, 'Constitutional Change in Federal Countries: Comparative Considerations' in Arthur Benz and Felix Knüpling (eds), *Changing Federal Constitutions: Lessons from International Comparison* (Barbara Budrich Publishers 2012) 31-50.

³¹ Rotimi Suberu, 'The Supreme Court and Federalism in Nigeria' (2008) 46 (3) *Journal of Modern African Studies* 451.

³² World Bank, *Nigeria State Finances Study* (World Bank 2003) 43.

³³ Suberu, 'The Supreme Court and Federalism in Nigeria' (n 31) 451-58.

proliferation of various sub-nationally funded or maintained law-enforcement or quasi-police units, the growing formalization of six geo-political zones (three each in the North and South) as a tier of federalist coordination, administration and representation outside of the states and localities, and the informal rotation of the powerful office of the presidency on a north-south and/or Muslim-Christian basis.

Lessons Learned

The Nigerian experience with constitutional transformations under military rule holds multiple lessons for the management of ethno-territorial conflict in deeply divided societies. One key lesson is the potential role that a system of soft authoritarianism, like Nigeria's comparatively liberalized military regimes, can play in designing the constitutional institutions required to sustain relative stability in an ethnically fractured state. Confronted with the imminent secession of the Eastern Region, the military transformed the unwieldy ethno-regional federalism inherited from Britain into a more stable multi-unit system. For all the criticisms of the military's constitutional legacy, the overall impact of the military's political reforms has been to endow the country with a political system approximating many of the features generally associated with a robust federal design, including a relatively large number of constituent states, incentives for national multi-ethnic parties, provisions for inter-segmental representation in the national government, and a strong central administration with capacity to confront threats to national unity.³⁴

A more sobering lesson of the Nigerian constitutional experience relates to the damage that inadequate participatory procedures can inflict on the legitimacy of otherwise sound constitutional designs. For all its efforts to involve civilian elites in the reconstruction of Nigerian political institutions, the military maintained firm control over the country's constitutional future and never once subjected its constitutional engineering to a truly sovereign constituent assembly or to popular ratification in a referendum. This lack of popular participation has engendered significant constitutional agitations in Nigeria in a period where the global ethos of participatory constitutionalism has been widely embraced by many African countries, including Nigeria's direct neighbors like Benin and Niger.

In more substantive terms, the Nigerian experience clearly demonstrates the advantages for stability of having a large number of small constituent states, rather than a small number of large units. Although violent ethnic, regional, and religious conflicts continue to plague Nigeria, the multi-state structure has functioned to disperse and defuse these antagonisms, making them less likely to morph into the kind of large-scale ethno-regional confrontation that produced the Nigerian civil war. Nonetheless, the very fluid, fragmentary, multilayered, and instrumental nature of ethnic identities in the African context greatly facilitated the military's reconfigurations of Nigeria's internal federal boundaries. In situations where ethnic identities are more crystallized and historically and symbolically embedded, such facility with internal territorial configurations may be more difficult to achieve.

The Nigerian experience also illustrates the imperative of balancing shared rule and self rule in deeply divided societies. In their bid to create a strong central government, the military and its civilian advisers implemented policies that moved Nigeria too far in an over-centralizing direction, thereby producing a centrifugal backlash. The elimination of local level police forces and the imposition of a uniform system of local government, for instance, particularly detract from the country's federalist traditions and aspirations. Perhaps the use of more participatory constitutional ratification procedures would have prevented some of the centrist excesses of the military. Much of the current agitation for "true" federalism may be interpreted as less of a wholesale rejection of the military's integrative

³⁴ Rotimi Suberu, 'Federalism in Africa: The Nigerian Experience in Comparative Perspective' (2009) 8 (1) *Ethnopolitics* 67.

strategies than of an attempt to rein in the military's centralization and restore some balance to Nigeria's intergovernmental relations.

Yet another lesson of the Nigerian experience involves the potentially polarizing effects of a strong executive presidency in a deeply divided state. As correctly predicted by scholars like Arend Lijphart, such a powerful position, rather than serving to integrate Nigeria's divided society has fuelled a fierce ethnic, regional and religious competition for political advantage.³⁵ The implication is not to abandon a presidential system, which remains a very attractive choice for developing countries for reasons that have been well enunciated in the Nigerian context. Rather, strong institutions of horizontal accountability are required to restrain presidential powers, to constrain the general propensity to manipulate and corrupt public power for personal and sectional ends in neo-patrimonial contexts like Nigeria, and to promote inter-group security and equity. However, the dysfunction and corruption that have degraded a key independent agency like the NJC suggest that designing and constituting effective oversight institutions will remain an overwhelming challenge in the Nigerian polity.

Finally, the Nigerian experience underscores the continuity and complexity of constitutional transitions in deeply divided, developing, states just emerging from extended periods of authoritarian rule and/or disintegrative internal conflicts. While the basic features of the military's constitutional transformation (multi-state federalism, a strong center, and presidential government) seem inviolable, agitations to adapt this institutional legacy to the imperatives of a post-military, deeply divided, society will persist. This persistence was underlined by President Buhari in his nation-wide new year address in January 2018. On one hand, he controversially critiqued "the ongoing debate about restructuring" Nigeria into a less politically centralized entity, including "shrill cries for a return to the parliamentary system," contending that "our problems are more to do with process than structure." On the other hand, Buhari assured Nigerians that "government is ever receptive to ideas which will improve governance and contribute to the country's peace and stability," conceding that the country's political structures "must periodically be perfected according to changing circumstances and the country's socio-economic developments."³⁶ In essence, Buhari's address represents an endorsement of the modest, incremental, path to constitutional change that is promoted by the National Assembly (discussed earlier in this chapter), as distinct from the more radical agitations for restructuring (or "true federalism") and participatory constitutionalism that are popular with southern Nigerians and with civic organizations, respectively.

Nonetheless, constitutional agitations will continue to focus on reorganizing subnational (especially local-level) territorial boundaries, rebalancing the relative powers and fiscal resources of central and constituent governments, restraining and managing presidential power struggles, extending the frontiers of horizontal accountability as a key ingredient of inter-ethnic security, and promoting popular participation in constitutional reforms. And constitutional politics in Nigeria will continue to invoke and evoke diverse strategies of constitutional change, including demands for wholesale constitutional replacement, the implementation of incremental constitutional amendments, legislative supplementation, judicial arbitrations, and even acts of constitutional infidelity. For the foreseeable future, Nigeria's constitutional transition will remain a work in progress.

³⁵ Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 (2) *Journal of Democracy* 96.

³⁶ "Full Text of Muhammadu Buhari's 2018 New Year Address," *Punch* (Lagos, 1 January 2018).

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CONTRIBUTING ORGANIZATIONS

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