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Restructuring the Nigerian Federation for Proper Functioning of the Nigerian Federalism

Angela E. Obidimma and Emmanuel O.C. Obidimma
Senior Lecturers Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria

Abstract
The basic minimal structures required for a country to lay claims to the practice of federalism include a political system in which there is power sharing under a written constitution with a government consisting of at least two orders: a central or federal government and the governments of the constituent units. Each order of government receives an allocation of financial resources tailored to their specific requirements. Nigeria has been a federal state since 1954, yet even this basic requirement of federalism has not been attained in the Nigerian federalism. This paper discusses the attributes of federalism and the practice of federalism in Nigeria in comparison with the practice in other federal states. It is observed that there are a lot of issues in the practice of federalism in Nigeria, which make the practice far removed from the practice of true federalism. Constitutional amendment as the need arises is part of the typical dynamism of constitutional order to meet the aspirations of a federation. Nigeria is presently going through a constitutional amendment process, which it is hoped will deal with some of the issues in the structure of the Nigerian federalism.

1. Introduction
Federalism is a system of government in which sovereignty is constitutionally divided between a central governing authority and constituent political units.[1] Such power may be shared in various ways; sometimes with a stronger centre, or with a weaker centre often referred to as confederation. Generally a federation is born by the coming together of otherwise independent states to form a central government to whom certain powers are given, while the states retain most of their powers. The coming together could be as a result of the need for defence and desire for independence from foreign powers, hope for economic advantage, some measure of political association between the various federating units prior to the creation of the union, geographical neighbourhood, and similarity of political institutions. Thus according to Lord Haldene, in *Attorney General for Commonwealth of Australia v. Colonial Sugar Refinery Co.*[2] "…The natural and literal interpretation of the word federal confines its appellation to cases in which states, while agreeing on a measure of delegation of powers to a common government, yet in the main continue to preserve their original constitution …"

However, scholars are not agreed on the definition or description of federalism, and it is a fact that one does not decide on the merit of federalism by an examination of federalism in the abstract but rather on its actual meaning for particular societies. Thus William Livingstone stated that the essence of federalism lies not in the constitution or institutional structure but in the society itself. Federal government is a device by which the federal qualities of the societies are articulated and protected. Since the essence of government is to promote the happiness, peace and security of the citizens, federalism provides a sound governmental structure for the resolution of the citizens' problems.

Basically it refers to a division of jurisdiction and authority between at least two levels of government. According to Wheare (the father of federalism) – federalism is an association of states which has been formed for a certain common purpose, but the member states reserve a large measure of their original independence. It is a written constitutional mechanism through which governmental powers, functions and procedures are distributed among the national, state and local governments (3 tiers of governments) or constituent units, ensuring in the process the independence and exclusively defined area of responsibilities for each tier of government.[3] While Nwabueze[4] defines it as

> an arrangement whereby the powers within a of government within a country are shared between a national, country-wide government, and a number of regionalized (that is territorially localised) governments in such a way that each exists as a government separately and independently from the others, operating directly on the persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others.

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[1] http://www.wordnik.com/words/federalism - 6/6/2015
[2] 1914 AC 237 at 252
[3] Obi S Ogene, **Fashioning the Constitution of a Federal Democratic System – Comparative Analyses of Nigeria, Australia, Canada & USA Representative System,** Enugu: CIDJAP Press (2001), p. 25
[4] BO Nwabueze, **Federalism in Nigeria under the Presidential Constitution,** London: Sweet and Maxwell (1983) p. 1

However the Supreme Court of Nigeria in the case of *Federal Republic of Nigeria v. Amache*,[1] was of the opinion that the definitions, meanings, concepts or constituents of federalism must be related to the manner in which it is adopted in any government constitution. They stated; "There is however no universal agreement as to what is federalism. A Federal Government would mean what the constitution says it means and this must be procured within the four walls of the constitution only. Although the word federalism may be knot in the theory of political science, it conveys different meanings in different constitutions as the constitutional arrangement shows in the legislative unit." Much as this position may be true with regards to the practice of federalism, there are still some basic features which must be found in every federal system.

In most instances of federalism there is a single national government – federal government, which exercises its particular powers across the whole country. In addition there are multiple regional governments, often referred to as "provincial" or 'state' governments, which exercise their powers within their particular regional territory. Each level of government usually has its own particular jurisdiction, i.e. areas of public policy in which it and only it, may exercise authority or have the final authority. The federal government will normally have the final authority over national issues such as defense, foreign policy, treaty making etc. the regional government will have power over more regional issues, such as establishing local governments; issuing licences (driver, hunting marriage etc.); providing for public health and safety; primary education; agriculture etc.

The Nigerian Constitution[2] provides that Nigeria shall be a federation consisting of states and a federal capital territory. Section 3(1)[3] further provides that there shall be thirty-six states in Nigeria and went on to list the thirty six states. The Constitution also provides[4] that Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria. This provision is to the effect that the federal state with its entire territory is one and indivisible, and its people form one, indivisible nation. The territorial divisions, known as states exist for the purpose of delimiting the areas within which each regional government is to exercise the powers assigned to it. But their existence does not imply that power is shared between them as geographical divisions with distinct legal identity on the one hand, and the federation on the other, or between their different peoples and the nation. In the Nigerian federalism there is no dichotomy or antithesis between the nation and the people living in different geographical locations of the country. The Supreme Court of the United States underscored the point when it said that "the people of the United States are an integral, not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by state lines for the purposes of state government and local administration".[5]

In a federation the federal and regional governments both derive their powers directly from the Constitution and are therefore independent of each other. They must therefore each work within the area of competence assigned to them by the Constitution. As stated by Nwabueze:[6] "Within the area of competence assigned to it (the federal government) by the Constitution, it has independent and direct authority over the territory, the people and property in each region; it is as such a part of the government of the people, and so entitled to their allegiance." The relatively smaller size of a region the language, cultural and other peculiarities create an impression that the authority of the regional government over its region is superior to that which can be exercised by the federal government over the same region. In other words the authority of the regional government over the territory and people within its jurisdictional boundaries is not in any way superior to or exclusive to that of the federal government. Given the equal right of both, within their respective spheres of competence, to exercise governmental authority over the property, people and territory in the component geographical units of the federal state and to claim the allegiance of the people, there can be no question of a regional government having the right to interfere with the presence of the federal government in the region as by taking over any of its undertakings, assets or by ousting it completely therefrom.[7] The Nigerian Constitution specifically prohibits any encroachment by regional governments upon the federal government sphere of power by providing in section 5(3) that:

> The executive powers vested in a state under subsection (2) of this section shall be so exercised as not to-
>
> (a) impede or prejudice the exercise of the executive powers of the Federation;
>
> (b) endanger any asset or investment of the Government of the Federation in that State; or

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[1] [2004] 14 WRN, 1

[2] S 2(2) 1999 Constitution of the Federal Republic of Nigeria, as amended in 2011 (hereinafter referred to as the 1999 Constitution

[3] 1999 Constitution

[4] Section 2(1) 1999 Constitution

[5] *White v. Hart.*, 13 Wall 646 (1812) at p. 650

[6] BO Nwabueze, **The Presidential Constitution of Nigeria**, London: C Hurst & Co. (Publishers) Ltd. (1982) p. 38

[7] Nwabueze, o*p. cit., p. 38*

(c) endanger the continuance of a federal government in Nigeria.

In a federal arrangement the Constitution makes a clear or formal legislative division of the powers of the respective governments. This feature is so fundamental and so is considered as the take off point or the platform on which federalism in a country is predicated. Thus according to Wheare [1] "I have put forward uncompromisingly a criterion of federal government the delimited and co-ordinate division of governmental functions – and I have implied that the extent to which any system of government does not conform to this criterion, it has no claim to call itself federal." The levels of government in a federal system must therefore be completely separate and independent. This separate and independent levels of government is a key feature of federalism and forms the platform on which other features may stand. Some of these features which we believe, need restructuring to attain a better federal system for Nigeria will be discussed.

2. A Written Constitution

The federal relationship must be established or confirmed through a perpetual covenant of union, usually embodied in a written Constitution that outlines the terms by which power is divided or shared. These Constitutions are distinctive in being not simply compacts between ruler and ruled but involving the people, the general government and the states constituting the federal union.

The Constitution provides for the horizontal and vertical sharing of powers, and defines and specifies the allotment of powers to the various levels or tiers of government. In the words of EA Odike; "The true mark of federalism is that it distributes legislative, judicial and executive power between the federal and the constituent states in a written document called the Constitution."[2]

To ensure the autonomy of each government a written constitution is indispensable to the existence of the federalism, for knowledge of its powers by the tiers or levels of government is fundamental in any federal structure. In support of this Wheare[3] argued that:

> … since federal government involves a division of functions and since the states forming the federation are anxious that they should not surrender more power than they know, it is essential for a federal system of government that there by a written constitution embodying the division of powers, and binding all governmental authorities throughout the federation. From it, all state and federal authorities derive their powers and any actions they perform contrary are invalid….

Through the authority of a written constitution the different tiers and levels of government as well as the different federating units know their extent of authority and jurisdiction and thus avoid encroachment into the areas of others as well as have the basis for defending their actions. In the same vein the different levels and tiers of government etc. are able to challenge encroachment on its own powers. This is made possible by a provision by the Constitution of a supreme arbitration body empowered to resolve disputes and rule on litigious cases involving governments' constitutional powers.

3. Autonomy of each Government

The autonomy of each government, which necessarily presupposes its separate existence and its independence from the control of other government, is essential to the federal government. The autonomy of each government requires not just the legal and physical existence of an apparatus of government – a legislative assembly, governor, courts, ministries and departments etc. Autonomy of the state governments is the defining principle of true federalism, its foundation or bedrock as Hon Justice Kayode Eso, formerly of the Supreme Court has aptly described in *Attorney General of Ogun State and Ors v. Attorney General of the Federation & Ors*[4]**.** The autonomy of the states demands that the federal government should not only keep within the limits of the powers assigned to it by the Constitution (*ultra vires* doctrine) but also that the exercise of such powers as limited should not in its practical effect impede, frustrate, stultify or otherwise unduly interfere with the state governments' management of their affairs or their meaningful functioning as a government, e.g. the management of their finances, the appointment and control of their staff, the award of contracts for the provision of services and other projects, the exercise of other essential governmental functions, like that of law-making or the execution of laws so made – the principle of non-interference with the autonomy of the states, as it is called. Separateness need not

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[1] Referred to in Hearts GA Ofoeze, **Federalism: A Comparative Perspective**. Enugu: John Jacobs Classic Publishers Ltd. (1999) p. 6

[2] EA Odike "Nigeria's Federalism: Myth or Reality " *Abakaliki Bar Journal.* May 2005, pp 83 - 84

[3] Quoted by LO Dare "Perspectives on Federalism" in AB Akinyemi et al (eds) **Readings on Federalism** . Lagos, Nigeria: Institute of International Affairs, (1970) p. 12

[4] (1982) 3 NCLR 583

extend to the entire governmental machinery; certain agencies may be common, for example, the police and the courts. But more than the separate existence of an apparatus of government, separateness also requires that each government must exist, not as an appendage of another government, but as an autonomous entity in the sense of being able to exercise its own will in the conduct of its affairs, free from direction by another government. An arrangement which legally obliges one government to accept direction from another on the conduct of its affairs is not federalism in the true sense of the word. In a federal state, the power sharing arrangement should not place such a preponderance of power in the hands of either the national or the regional government as to make it so powerful that it is able to bend the will of the other to its own. The sharing should be so weighted as to maintain a fair balance between the national and regional governments.

The sharing of legislative and executive powers under the 1999 Constitution does not reflect this fundamental feature of a federal state. In the 1999 Constitution the Exclusive Legislative List contains 68 items all of which are exclusive to the federal government. The first 66 items refer to specific matters. The 67th item is any other matter with respect to which the National Assembly has powers to make laws in accordance with the provisions of this Constitution. The 68th item relates to matters incidental or supplementary to any matter mentioned elsewhere in the list. The Concurrent Legislative List[1] contains 12 items containing 30 sub-divisions. By the sub-divisions the list defines the respective extent of federal and state power in respect of the matters listed therein with the aim of reducing possible conflicts, especially through the application of the doctrine of covering the field. By the sub-divisions a concurrent matter no longer necessarily implies that both the federal and state governments are competent to act over its entire field. In respect of some matters in the list, their competence is respectively restricted to some aspects only of a so-called concurrent matter making such aspects exclusive to the one or the other.

It is obvious that the national or federal government exercise most of the governmental powers in Nigeria to the detriment of the constituent states. Apart from the overwhelming dominance on the items of legislation, the federal government is further given power to make laws with respect to any matters incidental or supplementary to any matter mentioned elsewhere in the exclusive legislative list. Furthermore, the subdivision of the items in the concurrent list made further items exclusive to the federal government; still the doctrine of covering the field operates to give further dominance to the federal government in areas where they can legislate concurrently with the state government. The distribution is further tilted in favour of the federal governments due to the frequent military incursions in the Nigerian political scene and the concentration of the national wealth in the federal government.

The division of judicial powers under the Nigeria federalism as well provided under the Constitution[2] is also tilted in favour of the federation. The two levels of appellate courts in the country – the Court of Appeal and the Supreme Court are both federal. The Supreme Court is not just a constitutional court; it is the highest court on the interpretation and application of all laws in the country, including customary laws and Sharia. To further compound the dominance of the judicial authority by the federal judiciary the 1999 Constitution sets up a National Judicial Council[3] whose power extend to matters concerning both the federal and state judiciary[4] and its membership dominated by members of the federal judiciary.[5]Two things are apparent on a proper analysis of the composition of the National Judicial Council and its terms of reference: (a) It is essentially a Federal Government Institution under almost total dominance of the Federal Chief Justice and (b) It is given responsibility to recommend appointment, discipline and dismissal not only of federal judicial officers but also of all state judicial officers i.e. state judges and chief judges. The National Judicial Council is also empowered to collect, control and disburse moneys, capital and recurrent for the judiciary.[6] With the above position the 1999 Constitution in effect established a federal judiciary for the federation and a quasi – federal judiciary for the states.[7] The Chief Justice of Nigeria dominates the council - apart from being the chairman, he alone is responsible for appointing 14 out of the 23 members, 4 of whom are members by virtue of their office including the Chief Justice himself. The other five members who shall be members of the Nigerian Bar Association are also appointed by him but on the recommendation of the National Executive Committee of the Nigerian Bar Association. Obviously the National Judicial Council as presently constituted is inconsistent with the federal status of the country.

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[1] Part II of the Second Schedule
[2] Constitution of the Federal Republic of Nigeria 1999
[3] Third Schedule, Part 1 Paragraph 1 of the 1999 Constitution
[4] Third Schedule, Part 1 Paragraph 1 (21)(a) – (1)
[5] Third Schedule, Part 1 Paragraph 1 (20)(a) – (1)
[6] Third Schedule, Part 1 Paragraph 1 (20)(e)
[7] IE Sagay, "The Judiciary in a Modern Democracy" IA Ayua et al (ed.), **Issues in 1999 Constitution,** Lagos: Nigeria Institute of Advanced Legal Studies, (2000) p. 109

Admittedly the dual system of Federal and State High Courts is essential to a truly federal set up. However the robust enlargement of the jurisdiction of the Federal High Court by the 1999 Constitution[1] is out of tune with the expected division of judicial powers in a federation. By section 251(1)[2] the Federal High Court retains its exclusive powers in relation to the revenue of the federal government, Admiralty Matters arising from the Companies and Allied Matters etc. as well as all the items contained in the Exclusive Legislative List. This is against the previous position when the State High Courts were competent to adjudicate on matters concerning federal laws and bodies. The Constitution has therefore eliminated the Federal/State cooperation that had existed since the inception of the Federal High Court. Furthermore, section 251(1)(p)(q)(r) further preclude States' High Courts from adjudicating on any matter concerning the administration and control of federal agencies, thereby giving the Federal High Court exclusive jurisdiction over

- the administration of the management and control of the Federal Government or any of its agencies.
- subject to the provisions of this Constitution the operation and interpretation of this in so far as it affects the Federal Government or any of its agencies.
- any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.

The division of judicial powers between the federation and states in Nigeria is a major area of contention and one for further consideration in the federal system. It would be hard to find anything in the subject matters comprising the jurisdiction of the Federal High Court that makes them intrinsically unsuitable for the State High Courts to adjudicate upon. On the other hand, there is nothing intrinsic in a federal system of government requiring that the federating units should not have their own appellate courts.

Autonomy carries with it some notion of equality but it is equality of status as a government. As posited by Nwabueze[3], each government has, by virtue of its independence existence, an equal status as a government with the others, and so entitled to an equal say, though not necessarily equal weight, in the common councils of the federal state. In the nature of things the notion of equality between the national and regional governments can extend no further than this. The national government is necessarily bigger than a regional government in terms of the territorial area over which its powers are exercised. Its powers are exercised over the whole country while those of a regional government are confined to only part of it. Secondly, while a fair balance should be maintained between the powers assigned to each, they cannot be so weighted as to be equal. Matters within their respective competence must necessarily differ in their relative importance, and equality is not determined by how numerous or few are the matters assigned to it. Nor can the resources available to each be made equal. Federalism accommodates a certain amount of inequality in powers and resources between the national and regional governments, so long as any preponderance in favour of one is not such as to reduce the other relatively to virtual impotence.

4. Equality in Powers between the Regional Governments

Since federal relationship is between the national government on the one hand and the state governments on the other, and not between it and each regional government separately, the powers of the regional governments and their relations to the national government should be exactly the same. No regional government should have more or less powers than the others, or be accorded a special position in relation to the national government otherwise the regional governments cannot interact among themselves and with the national government as equal partners. The lodging of greater powers in one regional government would tend to produce in it an attitude of superiority and arrogance towards the others and thus destroy the equilibrium of the system.

There should also not be a marked inequality in population between the regions. For as stated by John Stuart Mill:

> In all federations… some (i.e. federating regions) will be more populous, rich, and more civilized than others. The essential thing is, that there should not be any state so much more powerful (i.e. in terms of population) than the rest as to be capable of vying in strength with many of them combined. If there be such one, and only one, it will insist on being master of the joint deliberations; if there be two, they will be irresistible when they agree and whenever they differ everything will be decided by a struggle for ascendancy between the rivals.[4]

[1] From what it was under the 1979 Constitution
[2] 1999 Constitution
[3] BO Nwabueze, **Constitutional Democracy in Africa**, Vol. 1, Ibadan: Spectrum Books Limited, (2003), pp. 96-97
[4] JS Mill, **Representative Government,** reprinted in **Utilitarianism, Liberty and Representative Government,** Everyman's Library (1910) pp 367 - 368

According to Wheare there should be "some sort of reasonable balance" between the units in area, population and wealth which will "insure that all units can maintain their independence within the sphere allotted to them and that no one can dominate the others."[1] Therefore the essence of federalism is according to James Madison to "control one part of the society from invading the right of another and at the same time sufficiently control itself from setting up an interest adverse to that of the whole society."[2] In the Nigerian federation there was marked inequality in area and population between the federating units as it was structured before the creation of more states in 1967. One of the three constituent regions, the Northern region, encompassed 75 percent of the country's land area and 60 percent of its population, which enabled it to dominate the national government, almost turning it into an extension of itself, and dictating the actions and policies to be pursued.

The situation is not so different under the federal structure in Nigeria today for despite the breaking up of the country into 36 states there is still the northern domination of the government, for almost half of the 36 states are in the north. They therefore continue to dominate the government at the federal level.

5. Financial Autonomy

Financial autonomy is one of the immutable criteria formulated by Professor Wheare with respect to the existence and operation of federal government. He said financial subordination marks an end of federalism no matter how carefully the legal forms may be preserved.[3] It is a cardinal principle of true federalism that the arrangement should not place such preponderance of power and financial resources in the hands of either the national or regional governments as to make it so powerful that it is able to bend the will of the others to its own. Thus in a federal state there should be available to each of the government authorities sufficient financial resources for the functions assigned to it under the Constitution. For if the state authorities for instance find that the services allotted to them are too expensive for them to perform with their limited funds, if they are to call on the federal authority for grants and subsidies to assist them, then they are no longer co-ordinate with the federal government but subordinate to it. Wheare thus argues further "… that both state and federal authorities in federalism must be given the power in the Constitution each to have access to and to control, its own sufficient financial resources. Each must have a power to tax and to borrow for the financing of its own services by itself".[4]
In line with the above Nwabueze opined thus:

> Federalism requires that the national and regional governments should stand towards each other in relation of meaningful autonomy and equality resting upon a balanced division of powers and financial resources. Each must have powers and financial resources sufficient to support the structure of a functioning government able to stand on its own against the other.[5]

Without financial autonomy of the various tiers of government a country cannot rightly claim to be a true federal state.

The sharing arrangement under Nigeria's federal system assigns to the federal government powers and resources overwhelmingly greater than those assigned to the states, thereby depriving the states of any meaningful autonomy in relation to the federal government. The thirty six states structure which brought about the existence of units which are not economically viable being created more for political reasons, further weakened the financial autonomy of states. Most of the state governments are thus reduced to the status of poor relations of an over-powerful federal government remaining (some of them, from the time of their creation) on a permanent lifeline of the federal government. The situation is further compounded by the continuing influence of a hang-over from our military past when the state governments were mere instruments of an all-mighty federal military government.

6. A Mechanism for Division of Powers

For a proper functioning of federalism there should exist in a federal state a technique for division of powers among the different tiers of government. Generally the technique for division of powers is that of enumerated powers and residual powers. For any meaningful division, certain powers must be enumerated and reserved for the respective levels or tiers of government. The enumeration may take various forms. According to Nwabueze[6]

> The enumeration may be made under one list of matters exclusive to either the national or regional governments, or there may be two or even three lists, one for the central government

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1 KC Wheare, **Federal Government** 3rd ed. London: Oxford Press (1953) pp. 50 - 51

2 Quoted in T Mason, **Free Government in the Making**, New York: Oxford University Press, (1965) p. 172

3 KC Wheare quoted in P. Ransom (ed), **Studies in Federal Planning** London: Macmillan Press, (1943) pp 28-31

4 *ibid*

5 BO Nwabueze, **Constitutional Democracy in Africa** Vo1.1 *op.cit.,* p. 80

6 BO Nwabueze, **Federalism in Nigeria under the Presidential Constitution** *op. cit.*, p. 20

> exclusively, one exclusive to the regional governments and another concurrent to both; in addition certain specific matters may be assigned to either one or the other or to both concurrently in other provisions of the Constitution (i.e. outside the legislative lists).

Nwabueze[1] borrowing leaf from Watts[2] further opines that:

> Having one list of matters exclusive to either the national or regional governments and leaving the residue to the other has the advantage of simplicity and eliminates the uncertainty and conflict which necessarily results from a second (i.e. concurrent) list; a third list inevitably adds to such uncertainty and conflict.

However there are advantages of adopting the techniques of concurrent powers which may outweigh the disadvantages of conflict and uncertainty. In Nigeria the enumeration is into exclusive and concurrent lists. The exclusive list contains subject or matters for which only the federal government has the sole authority to legislate on for the whole country. The concurrent list contains subjects or matters on which both the federal and state government are empowered to make laws. The residue not listed is left for the state government to legislate on; however the Constitution further makes direct grants to either tier of government subjects not already enumerated.

7. Creation of Additional Federating Units

The Nigerian federation took off in 1954 as a federation of three units. The three states structure created so much instability as imperilled the continuance of the federation. The original impetus for state agitation and creation derived from ethnic minority opposition to the British-instituted three-region federal structure which secured autonomy and hegemony for the Hausa-Fulani, Yoruba and Igbo majority nationalities in the northern, western and eastern regions respectively.[3]

This was compounded by the fact that one of the three units, the northern region, was bigger in size and population than the remaining two put together and from the majority-minority tribes structure within each region. Save for the rather isolated creation of the mid-west region in 1963, no significant restructuring of the federation was implemented throughout the over ten-year period starting from the formalisation of Nigeria's federal status in 1954 up to the military overthrow of the First Republic in January 1966 – political factors account for this.

Significant changes were made in 1967 by an establishment of a twelve-state framework. Further reorganisations were made in 1976 bringing the number of states in the federation to nineteen. Two new states were further created in 1987, namely Kastina in the North, and Akwa Ibom in the South by General Ibrahim Babangida. The continuing popular pressures for new states resulted in further creation by the Babangida regime of nine additional states in 1991. The 1991 reorganisation created some controversial issues such as; the location of five of the nine states in the North, compounding the problem of inter-regional inequality in the distribution of states. The new thirty states structure consisted of sixteen states in the north against only fourteen in the south. The minorities were similarly short-changed; they had only twelve of the thirty states. Consequently, the reorganisations provoked an unprecedented orgy of protests, demonstrations and arson involving tens of fatalities.[4]

From its outset in November 1993 the Abacha government laboured under severe economic and political pressures. These pressures engendered contradictory perspectives and attitudes towards the issue of state-creation.[5] However, probably due to the deluge of distributive and political pressures emanating from the Nigerian society, Abacha on the occasion of the country's thirty-six independent anniversary on 1 October 1996 announced the creation of six new states – Bayelsa, Ebonyi, Ekiti, Gombe, Nassarawa and Zamfara.

The thirty six states structure provided for in the 1999 Constitution is therefore not immutable as it is itself a product of change having evolved from its original structure of three regions. The increase in the constituent units is predicated on the need to create a balanced federation and protection for minorities in the traditional sense of tribal minorities, as well as for greater territorial diffusion of economic and political power and to bring government nearer to the people and thereby instil in them greater responsibility for the success of

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1 *ibid*

2 RL Watts, **New Federation: Experiments in the Commonwealth**, Oxford: Clarendon Press (1966) pp. 174 - 175

3 Larry Diamond, "Class, Ethnicity and the Democratic State: Nigeria, 1950 – 1966" *Comparative Studies in Society and History* 25 (1983) p. 475

4 RT Suberu, "1991 State and Local Government Reorganizations in Nigeria", *Travaux Et. Documents*, No. 41, 1994

5 Address by General Abacha on the Inauguration of the National Constitutional Conference on 27th June 1994', in Federal Republic of Nigeria, Report of the National Constitutional Conference Vol. 2 (Abuja: National Assembly Press, 1995) p. 8

government, and for development at a quickened pace. Despite the above considerations which still remain valid and relevant today there is need for constitutional restriction on the creation of more states to ensure that no new state is to be created which cannot effectively sustain the apparatus and powers of a state government in a federation characterised by equality between its component units and further that the economic costs of running additional state governments would not impair the overall developmental capacity of the federation.

In the light of the above: that is, the need for increase in constituent units as well as the need for restriction on creation of more states, there is need for a proper balance of these interests in giving provisions as well as restrictions on the creation of states in a federal Constitution. Under the present Nigerian federal Constitution is there a proper balance of these two conflicting interests? Section 8(1)[1] provides that:

> An Act of the National Assembly for the purpose of creating a new state shall only be passed if-:
>
> (a) a request, supported by at least two-thirds majority of members (representing the area demanding the creation of the new state in each of the following, namely -
>
> (i) the Senate and House of Representatives,
>
> (ii) the House of Assembly in respect of the area, and
>
> (iii) the local government councils in respect of the area, is received by the National Assembly;
>
> (b) a proposal for the creation of the state is thereafter approved in a referendum by at least two-thirds majority of the people of the area where the demand for creation of the state originated;
>
> (c) the result of the referendum is then approved by a simple majority of all the states of the federation supported by a simple majority of members of the Houses of Assembly; and
>
> (d) the proposal is approved by a resolution passed by two-thirds majority of members of each House of the National Assembly.

The above provision is tedious, rigid and raises several questions of interpretation. If the provision is interpreted in the order it is given it would mean: - the National Assembly must receive a request supported by two-thirds majority of members representing the area demanding the new states in each of the following; the senate, the house of representatives, the state house of assembly in respect of the area and the local government councils in respect of the area. After this, the proposal for the creation of the state is put to a referendum in the area concerned and approved by at least two-thirds majority of the people of that area. The question raised here is whether the provision "two-thirds majority of the people of the area where the demand for creation of the state originated" means two-thirds of those who voted, two-thirds of the registered voters or two-thirds of the whole population of the area. If the proposal survives up to this stage it is then put before the thirty six states houses of assembly and for it to survive it must be approved by a simple majority of the states. The proposal must then be approved by a resolution passed by at least two-thirds majority of each house of the National Assembly.

The interpretation questions and other difficulties involved in the creation of states seem to make it almost impossible for any creation of states under the constitutional provision. Thus it has been argued that 'the protracted and obstacle-laden process prescribed by this subjection for the creation of new states seem deliberately intended to ensure that new states can only be created under military regimes but never under civil democratic government.[2] Furthermore according to the learned writer the result of these daunting provisions is to effectively suppress the right of self-determination of communities seeking statehood, thereby tying them unwillingly to other communities with whom they are not compatible. The autonomy and self-government associated with federalism are thus stifled, giving rise to resentment and conflicts.[3]

Obviously there is need for a more positive procedure that will accommodate more genuine demands for state creation as the entrenchment in the Constitution of near impossible conditions and the resulting feeling that the door had thereby been permanently closed to further states creation might induce resort to extra-constitutional means. While it is true that the procedure for state creation should not be such as to enable every village, town or clan to become a state, the conditions should be such that the number of states in the country should be amendable to adjustments as the needs and circumstances of the country dictates. This is so, as federalism thrives where a multiplicity of interest groups operate and react on each other producing stability in the polity.

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[1] 1999 Constitution of the Federal Republic of Nigeria

[2] S Odion – Akhaine, **Constitutionalism and National Question**, Lagos: Centre for Constitutionalism and Demilitarisation (CENCOD) (2000), p.50

[3] *Ibid,* p. 51

8. The Structure of Many Autonomous Governments but a Single Constitution

The Nigerian federation is made up of thirty seven autonomous governments – a general government exercising power throughout the country on certain enumerated matters and thirty six other governments localised in geographical divisions known as states and with jurisdiction in matters not assigned exclusively to the general government. A government presupposes or rather implies a constitution by which it is organised and its powers defined.

It is a contradiction for a government whether in a federal or unitary system, to be without a constitution. The very notion of government necessarily implies a constitution and the notion of a constitution from its origin did not exist as something apart and separate from government; it was coeval and entirely integral with, not external or anterior to, government.[1] A constitution as a deliberate creation in written form existing separately from government, something external and anterior to government, and from which government derives its existence, is entirely the invention of the American revolutionaries in the 18th century. Wheare puts it thus;

> Until the time of the American and French Revolutions, a selection or collection of fundamental principles was not usually called "the constitution"… Since that time the practice of having a written document containing the principles of government organisation has become well-established and "constitution" has come to have this meaning.[2]

Though a Constitution in its modern sense as something separate from, and anterior to, government, has acquired other functions, *viz* the guarantee of the freedom of the individual against the government and the declaration of the fundamental objectives of the nation, its primary function remains that of an act by which a state or government is constituted.

Even in its modern sense as something external and anterior to government, a unitary constitution for a federal system of government remains a contradiction in ideas. A federal system, being an arrangement between separate, autonomous governments, it follows that under federalism separate national and regional governments should strictly imply separate constitutions for each government. A single constitution for all the governments both federal and state is a manifest contradiction.

This is implicit in the definition of federalism by the judicial committee of the Privy Council thus "the natural and literal interpretation of the word (i.e. federal), confines its application to cases in which these states, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions.[3] In the older federations for example the United States of America and Australia, states existing under their own separate Constitutions formed themselves into a federal union under a new national government established by a separate Constitution whilst continuing to exist and function as regional governments with their old Constitutions, modified as may be necessary. In essence, the regional governments and their Constitutions pre-date the federal union, and continue to exist after its formation. Federalism is also applied in another sense, which though may be regarded as loose application of the system, is equally predicated upon the separateness and independence of the Constitutions of the federating governments. This occurs when the federating units surrender their original Constitutions and accept new ones, as in the case of Canada – where according to the Judicial Committee of the Privy Council, "self-contained states agree to delegate their powers to a common government with a view to entirely new Constitutions even of the states themselves.[4]

Nigeria however departed from this principle of true federalism, and uses one single Constitution to establish and organise the federal and state governments. The federation of Nigeria differs in its origin from the other federations in the United States, Australia and Canada, as it was formed by a state hitherto under a unitary government, devolving part of its powers to three autonomous regional governments. The uniqueness of this application of the federal concept was pointed out by the drafting committee on the review of the Nigerian Constitution in 1951 thus:

> The federal governments of USA, Canada and Australia have been built on the basis of separate states surrendering to a federal government some of their powers for the benefit of all. The reverse process on which we are engaged – that of the creation of a federal government by devolution – is a political experiment for which… there is no precedent to guide us and we are very conscious of the dangers involved in such an experiment.[5]

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[1] BO Nwabueze, **Constitutional Democracy in Africa,** VoI. 1 *op. cit.,* p. 60
[2] KC Wheare, **Modern Constitutions,** London: Oxford University Press (1966)
[3] *Attorney-General v. Colonial Sugar Refining Co. Ltd.* (1914) A. C. 237 at p. 253
[4] *Attorney-General v. Colonial Sugar Refining Co. Ltd.* (*supra*)
[5] Cited in BO Nwabueze, **Constitutional Democracy in Africa.** VoI. 1 *op. cit.,* p. 62

Thus at the inception of the Nigerian federation by devolution from an existing unitary state, the federal and regional governments were organised and powers and resources shared among them by one common Constitution with no differentiation of any kind. Under that Constitution, the same sections established the organs of both the federal and regional governments and defined their powers.

Under the 1960 independence Constitution, separate Constitutions were established for the federal and for each of the regional governments in separate schedules annexed to the Independence Order-in-Council. This was also the position under the 1963 Nigerian Republican Constitution. The Nigerian Constitutions of 1979 and 1999 reverted to the form under that of 1951 and 1954 with the federal and state governments being governed by one, single constitutional instrument. Under these Constitutions provisions relating to the federal and state governments are segregated in separate parts of the same chapters, while miscellaneous and transitional provisions common to both tiers of government are dealt with together in the same sections, such provisions as those on division of powers, fundamental objectives and directive principles, citizenship and fundamental rights. The form of the 1979 and 1999 Constitutions i.e. the unitary character may not be unconnected with the fact that they do not owe their origin as an act of the people as a Constitution is supposed to be. For according to its famous definition by one of the 18th century American revolutionists, Thomas Paine, in his Rights of Man "a Constitution is not the act of government, but of a people constituting a government". Both Constitutions were made by the Federal Military Government, a government of absolute power, by virtue of sovereignty seized by force or threat of it from the Nigerian people. Therefore, the civilian governments, both federal and state, installed since 29 May, 1999 derive their existence and authority as a government from the military.

9. Supremacy of the Constitution

One of the fundamental features of a federal arrangement is the need for a supreme constitution which binds all persons, government and authorities. In any federal state, the constitution being the source of life and powers of both the central authority and the federating units must be supreme. In the words of Nwabueze

> The independence of each tier of government in a federation implies that the terms of the arrangement especially as concern the division of powers, must be embodied in a constitution that is supreme over both the general and regional governments, and overrides any act done by either of them in violation of those terms, a constitution that binds or obliges the general and regional governments to keep within the terms of the arrangement, and which operates to invalidate any transgression of the limit imposed on the powers of each government. The independence of each tier of government as respects its existence, powers, rights and personnel is a matter which the other is not at liberty to respect or not as it likes.[1]

Quoting Wheare, he further stated that; "If the general and regional governments are to be co-ordinate with each other, neither must be in a position to override the terms of their agreement about the powers and status which each is to enjoy. So far as this agreement regulates their relations with each other, it must be supreme."[2] The constitution which is supreme over both the central government and the federating units overrides any act carried out by either of the governments in violation of the terms contained in the constitution. Most federal constitutions in line with this contain provisions to the effect that any law, whether made by the centre or the constituent units, which provisions contravene or is inconsistent with the provisions or stipulations of the constitution is *ultra vires*, null and void to the extent of its inconsistency with the constitution. The supremacy of the constitution is explicitly provided for in the 1999 Constitution thus "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria";[3] "The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof except in accordance with the provisions of this Constitution;[4] "If any other law is inconsistent with the provisions of this Constitution this Constitution shall prevail and that other law shall to the extent of the inconsistency be void"[5]

In line with the constitutional provision the Nigerian courts have upheld the supremacy of the Constitution in a plethora of cases.[6] In *Ansa & Ors. v. The Registered Trustees of the Presbyterian Church of Nigeria v. Central Bank of Nig. & Others*[7] the Court of Appeal stated that 'by virtue of section 1(1) of the 1999

[1] o*p. cit.* ,p. 21
[2] KC Wheare, **Federal Government** *op. cit.*, p. 55
[3] Section 1(1)
[4] Section 1(2)
[5] Section 1(3)
[6] See for example, *Udenwa v. Uzodinma* (2013) 5 NWLR (Pt 1346) 94, *Lafia Local Government v. Gov., Nasarawa State* (2012) 17 NWLR (Pt. 1328) 94, *NUEE v. BPE* (2010) 7 NWLR (Pt. 1194) 538, *A.-G. Lagos State v. A.-G. Federation* 12 NWLR (Pt. 833) 1
[7] (2008) 7 NWLR (Pt. 1086) 421 at 4466

Constitution, the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. It supersedes any law or statute or enactment. It is the *grundnorm*, the organic and fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the Constitution. And by virtue of section 1(3) of the Constitution if any other law or statute is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law or statute shall to the extent of its inconsistency be void…"[1]

However, it is argued that the Constitution must not only be declared to but must be seen to be supreme. There is need to consolidate on and strengthen the Supremacy Clause as contained in the Constitution by conferring on every Nigerian the express right to go to challenge constitutional breaches in court. Also in addition to the provision of Section 1(2) which prohibits unconstitutional take-over of government, there should be a provision for sanctions for unconstitutional take-over of government. It shall be the inalterable and unavoidable right of the people to punish violators of the constitutional order, and necessity shall not be a defence.[2]

10. Conclusion and Way Forward

The Nigerian federalism obviously falls short of the basic features of a true federal state. This may among other reasons be as a result of the manner in which the Nigerian federation was formed which differs from the manner of formation of other notable federal states like the United States of America, Canada and Australia. The constant military incursion into the government of Nigeria since the formation of the Nigerian federation is another reason why there are several features of unitary government structures in the Nigerian federation. Even under democratic government in Nigeria, especially when the mantle of power is in the hands of former military dictators turned democratic president, a lot of governmental practices tend towards practices under military government and so contradicts and stultifies the practice of federalism in the country.

For a proper functioning of the Nigerian federalism, there is need for a proper restructuring of the federal structure in Nigeria starting from a constitutional amendment that will inculcate the basic requirements of federalism. There should be a proper balance in the sharing of governmental powers, functions and allocation of resources between the federal government and the governments of the federating units to ensure that each of the government of the 36 states of Nigeria is equipped with every paraphernalia of government to be able to stand as an independent autonomous entity as is required for the practice of federalism. Nigeria may also have to borrow leaf from the practices in operation in countries acclaimed as practicing true federalism, such as having separate constitutions for the federal government and the governments of the various 36 states of the federation, upholding the provision for the supremacy of constitution in governmental practices, observing the federal character principle as enshrined in section 14 (3) of the 1999 Constitution in making federal appointments to ensure that the various states of the federation have equal representation in the government at the federal level so as to avoid the domination of any state or some states in the affairs of government.

It is hoped that the extant government of Nigeria will proceed with the constitutional amendment process initiated by the out gone government of President Goodluck Jonathan and through that correct some of the anomalies in the Nigerian federal structure.

[1] See also *Orhiunu v. F. R. N.* (2005) 1 NWLR (Pt. 906) 39 at 55 – 56; *ACB Plc. v. Losada (Nig.) Ltd.* (1995) 7 NWLR (Pt. 405) p. 26

[2] *ibid*

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