

DEALING WITH TERRITORIAL
CLEAVAGES IN CONSTITUTIONAL
TRANSITIONS: THE NIGERIAN
EXPERIENCE

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OVERVIEW/SUMMARY

Since making the transition from military to civilian rule in 1999, Nigeria has faced strong ethno-territorial demands for constitutional accommodation or “true federalism”.

The underlying drivers of this constitutional moment include:

- significant opposition to the dictation and imposition of the 1999 Constitution by the departing military;
- the perceived “unitary federalism” of the constitution;
- the socio-economic and political failures of the Nigerian State;
- the adoption of new ethos of participatory constitutionalism and the legitimization of ethno-secessionist aspirations in some African and non-African countries (Benin, Uganda, Sudan, Ethiopia, eastern Europe, United Kingdom, etc.).

Three more or less internally fragmented and externally divided actors dominate Nigeria's constitutional politics:

- ethnic society
- civil society
- the political /governmental class at national and sub-national levels, which produced three sets of largely ephemeral and ineffective alterations to the 1999 Constitution in 2010-11.

The Nigerian experience illustrates the sheer difficulty of achieving mega-constitutional change in some deeply divided societies, and the imperatives of alternative strategies of political reform and territorial accommodation, including incremental constitutional change and non-constitutional renewal.

BACKGROUND AND CONTEXT

The broad historical, regime and institutional contexts and drivers of Nigeria's constitutional politics can be summarized as follows:

1. Extreme Constitutional Instability, with five British colonial constitutions (1914 Lugard, 1946 Richards, 1951 Macpherson, 1954 Lyttelton, and 1960 Independence Constitutions) and another five post-independence constitutions (1963 Republican, 1979 Second Republic, 1989 Third Republic, 1995 unimplemented post-Third Republic, and 1999 Fourth Republic constitutions).
2. Perceived Constitutional Illegitimacy: None of the Nigerian constitutions can be described as a People's Constitution in terms of being made by a fully sovereign and elected constituent assembly or approved directly in a referendum by the citizenry.
3. A Contentious Federal-Consociation designed to hold together a deeply divided country of 170 million people fragmented into three major ethnic groups, hundreds of smaller ethnicities, approximately equals number of Muslims and Christians and, above all, a centrist-oriented north and a pro-decentralist south.

4. Political Instability and Authoritarianism: Nigeria's constitutional instability also reflects and reinforces the country's regime instability. Since gaining independence in 1960, Nigeria has not established a stable democracy, but oscillated between electoral authoritarian civilian regimes (1960-66, 1979-83, 1999-2014) and military rule (1966-79, 1984-1999). Although the period since 1999 has witnessed the longest period of uninterrupted civilian rule in the nation's history, the country's elections have remained largely un-free and unfair, and electoral reform has emerged as one of the major items on the agenda of constitutional politics.

5. A Failing, Resource-Cursed, State, with environmental pollution in its oil-rich Niger Delta, significant internal refugees displaced by incessant communal violence, jobless economic growth and uneven development between north and south, unresolved group grievances and insurgencies (especially in the Niger Delta and the Muslim northeast), human flight and brain drain, abysmal social provisioning, inefficient policing and security services, and highly fractionalized and polarized elites.

FRAMING THE CONSTITUTIONAL PROCESS

Three more or less parallel constitutional reform processes have been underway in Nigeria since the 1999 transition from military to civilian rule:

1. An official constitutional reform process, involving primarily the federal and state executives and legislatures, which yielded three rounds of alterations to the 1999 Constitution in 2010-11.

2. A Civil Society-led process involving a coalition of more than 100 non-governmental organizations committed to the norm of participatory constitutionalism. This coalition, called the Citizens Forum for Constitutional Reform, produced in 2002 its own Model Constitution of the Federal Republic of Nigeria.

3. A predominantly southern-based ethnic nationalist Constitutional Reform Process: These ethnic nationalities convened a national conference, between October 2005 and August 2006, which crafted a “People’s Draft Constitution.”

TRAJECTORY OF THE CONSTITUTIONAL PROCESS

The following contentious ethno-territorial issues dominate current constitutional reform debates in Nigeria:

1. *The Federal Structure*: There are conflicting proposals to retain the existing 36-state structure, create additional constituent states, or merge the existing states into fewer and stronger regional states.

2. *Fiscal Federalism*: Southern Nigerian critics disparage the current “feeding-bottle federalism,” whereby the constituent states and localities of the federation are sustained almost entirely by centrally collected and redistributed oil revenues and have very little incentives to generate their own fiscal resources. But, especially in the Muslim north, there is strong support for the current system of fiscal centralism, including a significant redistributive economic role for the central government in the interest of national cohesion and integration and equitable inter-regional development.

3. *Local Government*: The funding of the localities from the national oil revenue sharing system and entrenchment of the current 776-local government structure in the federal constitution are regarded as particularly anomalous by proponents of true federalism, who contend that local government should be a residual matter for the states and should not be mentioned in the federal constitution. Advocates of a uniform national local government system, however, urge even stronger insulation of the localities from the constituent states under the federal constitution.

4. *Policing*: The 1999 Constitution establishes a single National Police Force for the entire federation under the regulation of the federal executive and prohibits the formation of any other police organizations. Critics blame the country's rampant insecurity and pervasive lawlessness on the inefficiencies of the single Nigeria Police force, and advocate a return to the decentralized policing of the pre-military era. The issue has divided and polarized the 36 state governors along regional lines, with the 19 northern state governors supporting the current centralized arrangements with minor modifications to increase gubernatorial control of contingents of the police in the states, while their southern counterparts have mostly favored the institution of separate subnational police institutions.

5. *Legislative Lists*: For proponents of true federalism, the placement of 68 items under the federal exclusive legislative list represents a hyper-centralization of power. They particularly advocate the removal from the list of items like prisons, police, evidence, labor/wages, drugs and poisons, mines and minerals, public holidays, railways, regulation of political parties, etc. At the same time, there are legitimate concerns that any drastic reduction or erosion of the powers of the center could compromise the federal government's capacity to maintain national unity and to rein in the separatist and divisive forces that led to a civil war during 1967-70 and still plague Nigeria's fragile multi-ethnic union.

6. Independent Electoral and other Oversight Agencies: The 1999 Constitution establishes several critical oversight institutions and designates them as “federal executive bodies.” These include the Independent National Electoral Commission (INEC), National Judicial Council (NJC), Police Service Commission (PSC), and Revenue Mobilization Allocation and Fiscal Commission (RMAFC). Reformers argue that these institutions lack genuine autonomy in their appointment, direction and funding from a dominant, centralizing, federal executive. At the same time, some of the proposals for enhancing the independence of these oversight agencies, such as the Mohammed Uwais-led Electoral Reform Committee’s proposal for giving the NJC a key role in the appointment of INEC, have raised difficult questions about the appropriate boundaries of the powers of the three governmental branches in Nigeria’s presidential system.

7. *Governmental Systems*: The presidential system has often come under criticism for its concentration of powers in political chief executives, encouragement of divisive, zero-sum factional/sectional competition for political offices, expensiveness, and promotion of the politics of strong men, rather than strong institutions. But supporters of the current presidential system point to the failures of parliamentary rule in the First Republic, claiming that the trouble with Nigeria is not the choice of governmental systems per se, but the warped implementation or corrupt operation of these systems.

8. *Tenure of Political Chief Executives*: A more modest proposal seeks not the abandonment of the presidential system per se, but the redesigning of term limits in order to reduce the acrimonies arising from competition for executive offices in the federation. Especially common are proposals to transform the current tenure of two four-year terms into a single term of 5-7 years.

9. *Residency Rights*: Although the Nigerian Constitution guarantees the rights of every citizen of Nigeria to “reside in any part” of the federation and to freedom from discrimination, other clauses of the Constitution provide for the political representation of members of communities indigenous to the states. The attendant institutionalization of a dichotomy between state indigenes and so-called non-indigenes has promoted political discrimination, socio-economic exclusion, violent intimidation and even threats of expulsion or extinction against non-indigenes. In response to such conflicts, several constitutional reform proposals are being developed both within and outside the National Assembly to guarantee full, non-discriminatory, residence rights to persons who have lived in a state for a specified number of years.

10. *The Constitution Amendment Process Itself*: Under the current Constitution, a proposal to change any constitutional provisions 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 amendment formula itself or the provisions of the Constitution on fundamental human rights, boundary adjustments, and the creation of new states and localities. In both cases, the amendment must be approved by resolutions of the houses of assembly of two-thirds of the states. But there have been proposals to alter these amendment procedures to: allow the National Assembly to replace, rather than simply alter or amend, the Constitution; include a public referendum at the end of the constitution-making process to enhance popular ownership/authorship of the constitution; streamline and clarify the complicated provisions relating to the creation of additional states and localities; and explicitly affirm that presidential assent is not required to give effect to constitutional alterations already passed by the required majorities in the National and State Assemblies.

11. *Indivisibility of the Nigerian Federation:* The 1999 Constitution, section 2 (1) proclaims the country as “one indivisible and indissoluble Sovereign state.” However, many constitutional reformers argue that Nigeria’s unity should be made “negotiable,” not sacrosanct, and that a secession clause should be incorporated into the Constitution.

12. *Secularity of the State:* The current Constitution prohibits the adoption of “any religion as State Religion,” but also includes several clauses supporting public engagement in the promotion of religious educational and judicial institutions. Many Christians want a stricter constitutional affirmation of the secularity of the Nigerian State, while Muslims seek more official recognition for religion, especially Sharia Islamic courts.

13. *National Languages*: The Constitution gives recognition to English, as well as the three major Nigerian languages (Hausa, Ibo, and Yoruba) as languages for conducting the business of the National Assembly. Nigeria's minority communities want the reference to the three Nigerian languages expunged from the constitution.

14. *Status of the Federal Capital Territory*: The administrative and political structure of the Federal Capital Territory of Abuja (which currently consists of one senatorial district, two House of Representatives' constituencies, and six local government areas, as well as a designated federal ministry) is yet to be defined by the required legislation of the National Assembly. However, there are controversial and conflicting proposals to transform the territory into an independent mayoralty, or a separate state.

15. *The Land Use Act and other Constitutionalized Decree-Laws*: There are strong proposals to expunge the Land Use Act and related centrist, military decree-laws from the Constitution.

16. *Other Constitutional Reform Issues*: These relate to proposals to rescind the immunity from criminal prosecution currently enjoyed by political executives, endow traditional rulers with a constitutional role, provide for independent candidacy in elections, enshrine diaspora voting, make the constitutional directives or objectives on socio-economic rights justiciable, transform the bicameral federal legislature into a unicameral structure (to reduce the costs of governance) and formalize the informal, but widely practiced, conventions for ethno-regional rotation and sharing of major political offices.

OUTCOMES OF THE PROCESS

1. The official process of constitutional reform eventually produced three sets of alterations to the Constitution in 2010-11. The alterations included changes to the national electoral calendar (elections are to be held between 150 and 30 days, rather than 60 days, to the expirations of the tenures of affected political incumbents), revised procedures for electoral adjudications, enhanced financial autonomy for the legislature and electoral administration, new guidelines for managing political succession during gubernatorial or presidential absences or indispositions, and the constitutional entrenchment of a national industrial court.

2. But criticisms of the meagerness of the alterations led to renewed efforts in the National Assembly to address unresolved federalist issues (for example, local government, legislative lists, and the constitutional amendment process) in what the Assembly itself has described as a “piecemeal and incremental process” of constitutional reform.

3. In order to enhance the legitimacy and effectiveness of the official reform process there have also been renewed attempts by the federal executive and legislature to broaden participation in the reform process through public hearings, conferences, and proposals for a constitutional referendum. Currently, a presidentially convened, 492-member, National Constitutional Conference is sitting in Abuja.

LESSONS

1. Wholesale constitutional change is difficult to achieve in deeply divided societies like Nigeria, where a constitutional transition from military to civilian rule is widely contested but there is no broad-based, nationwide consensus on major constitutional reform issues.
2. A more pragmatic and feasible path to political reform in Nigeria is piecemeal, incremental constitutional change, even though that path is likely to leave significant constitutional conflicts unresolved.
3. Alongside such incremental constitutional change, non-constitutional renewal (in the form of informal political bargains, judicial arbitration, legislative supplementation, etc.) can function to manage some of the conflicts and cleavages of a deeply divided society.