

Notes for an Address
to the
NIGERIAN BAR ASSOCIATION
Annual Conference

by
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It is a great honour and a humbling experience to address this large and distinguished audience.

The theme of your conference is How Federalism Accommodates Diversity and Strengthens the Constitution. I am not sure if I was brave or foolish in accepting to speak on such a subject to you who know far more about Nigeria than I ever will. What I can offer is some reflections on Nigerian experience of federalism as an outsider with a comparative perspective. This goes to the heart of what the Forum of Federations does. We are a young but very dynamic organization now supported by nine partner countries, including Nigeria. Last year, we sponsored over seventy activities and projects in twenty countries. We promote mutual learning amongst federations and have a very practical orientation that always includes practitioners in our activities. We have become the go-to organization on federalism.

I am excited to be back in Nigeria, after my visit of last October. I have the impression of optimism and a determination to move forward in consolidating your democracy and your federal system. The Forum is delighted with the confidence that is being shown in us by your leaders and I am very much looking forward to meeting again with Vice-President Goodluck Johnathan to discuss our plans.

Your theme of diversity and strength is similar to that of the Fourth International Conference on Federalism, which India hosted in cooperation with the Forum last November. Over 1,300 delegates met to discuss unity in diversity.

Certainly Nigeria, Africa's largest country, is diverse. Your ability to develop a strong, unified federation that reflects your incredible diversity can provide a model and inspiration here in Africa and elsewhere in the world.

Nigeria's federal story, as you know, is a mixed picture so far. There are many in the world who have a very bleak view of Nigeria, but too often they know little and see only the problems, not the progress. While I am sensitive to the problems, I believe there has been much

real progress and that Nigeria will enter its second half century of independence with better prospects than it had fifty years ago.

Nigeria was one of a number of federations that the British created in their retreat from empire: India, Pakistan, Malaysia, the West Indies, Central Africa, East Africa. Canada and Australia are earlier examples. In any case, the post-colonial federations of the fifties and sixties had a very mixed history: three failed entirely, while Malaysia and Pakistan split. Only Nigeria and India endured totally intact, but Nigeria's history was much more troubled than India's.

While both countries had tremendously diverse populations, Nigeria was dealt a much poorer hand than India for a stable federation. Unlike India there was little sense of Nigerian identity. Nigeria in 1960 was reminiscent of Italy in 1867, when Garibaldi famously said, "we've made Italy, now we need to make Italians". Nigeria had little real history as a country. Partly because of this, it had no dominant political party like India's Congress Party, which had deep roots in both cities and villages, planted in the long struggle for independence. It had no charismatic leader like Nehru or Gandhi. Nigeria also had a flawed structure in having only three or four states—one of which was dominant—compared to India's fourteen states where no one state was dominant. Federations with very few states tend to be unstable. As well, Nigeria's early period was characterized by competitive, winner-take-all and highly decentralized politics while India opted for a strongly centralized regime that many called quasi-federal. As you all know, Nigeria's new regime did not hold, and within six years the military took over. Shortly after that civil war broke out.

As if these problems were not enough, Nigeria was soon dealt the great Joker in the pack, as oil became your dominate sector by the 1970s. At the time, it was viewed as manna from heaven that would make the country rich. Of course, now we now know better. We know about the curse of oil, about the distortions and worse that it can bring to a country's economy and politics. In the 1960s and 1970s, newly oil rich countries knew little about these dangers or how to manage them.

Despite Nigeria's poor start, the country has endured. Like the United States, the world's oldest federation, it emerged from a

terrible civil war, deeply scared but still intact. And many lessons had been learned.

Let us now flash forward to today, in 2008. Is Nigeria's political system and federation stronger now than at independence? I would argue unquestionably yes and in a number of ways.

First, the move to 36 states compared to four is a major improvement. I appreciate that some think there are now too many states (while others want yet more), but there is no question that a federal structure based on a large number of similarly sized states creates a much better federal dynamic and healthier politics between and within the large ethnic groups. It has also permitted some smaller ethnic groups to be majorities in their own states and thus to have a greater sense of empowerment. At the same time, it must be admitted that a price federations pay for having a large number of states is a greater degree of centralization.

Secondly, you have made a good progress in Garibaldi's task of building a nationality, of creating Nigerians. Afrobarometer has done extensive public opinion surveys which show that contrary to many myths, Nigeria is not a country simply dominated by ethnic identities. Yes, they are strong and politicians can play on that. But there is a widespread sense of being Nigerian that goes along with ethnic and other identities.

Thirdly, you have moved to contain the old winner-take-all politics that was so corrosive of relations between groups. Your application of the principle of federal character, both formally and informally, in the civil service and in politics has had a huge impact on lowering the stakes of political competition and in making government reflect the diversity of the population. The restructured political parties have also broken the region against region dynamic—or at least tamed and internalized it. Daniel Bach, a careful observer of Nigeria, has written that Nigeria's success in accommodating its diversity permits you to "boast of spectacular and lasting achievements, that even South Africans have been closely monitoring".

Fourth, some key institutions are increasingly playing their constitutional roles. I appreciate this is tricky terrain for an outsider

to comment on, but my impression is that the Supreme Court in particular has shown great balance and judgment in a number of constitutional and electoral cases which have added to its prestige. As well, the Senate's refusal to endorse the three mandates proposal in the last constitutional round was historic. Despite the serious problems of the last elections, they did see the peaceful transition of incumbents in your presidency and two thirds of the governorships.

Thus the accomplishments of your democracy and federation are real. They should not be forgotten or overwhelmed by the problems and challenges that remain.

In my remaining time, I shall make some observations on the current agenda of your politics and federal system. The agenda is very large—in fact, there is a real risk of agenda overload. My good friend Professor Isawa Elaigwu from the University of Jos suggests some of this represents the fizzing of your democracy now that the cork has been let out of the bottle.

I shall speak briefly about four major issues, namely constitutional reform, fiscal federalism, intergovernmental relations, and minority rights. They all relate to the issue of diversity and strength.

Constitutional reform

Let us start with constitutional reform. I understand the lack of full legitimacy of your constitution given its origins. I also understand some of the criticisms of it, in particular its degree of centralization. But as a student of comparative federalism, I must register a word of caution about major efforts to overhaul constitutions, especially when the amending formulas require difficult super-majorities, as yours does.

My own country, Canada, was consumed for a period of thirty years with the idea that our problems were constitutional and would be solved by constitutional change. One major amendment was achieved, but two other major efforts failed—and one of the failures almost led to the breakup of the country. The history of constitutional amendment in Australia and the United States is also characterized more by failure than success. Germany recently

achieved a modest constitutional reform, but it is far from clear that it will succeed with the more difficult second phase, addressing fiscal issues. The European Union, which has some major federal features, is now dealing with a constitutional reform that is off the rails. Of course, some processes of constitutional amendment do succeed: the Chairman of the Forum of Federations, Arnold Koller, led a successful rewriting of the Swiss constitution while he was in government, but the success was closely tied to its relatively modest goals.

I have read accounts of how each major zone in Nigeria has its key bargaining card for a major constitutional round. A fundamental question is whether such a round would produce the necessary bargain.

It is always worth considering the alternative to major constitutional reform. Sometimes there are limited constitutional measures that might win consensus. Other times, there are ways of changing things substantially without touching the constitution. Some of the current problems in Nigeria relate not to the inherent faults in the constitution, but to lack of compliance or enforcement with even broadly accepted provisions.

The functioning of certain federations has changed dramatically with little or no constitutional amendment: Canada and India have become more decentralized, while Australia and the United States have gone in the opposite direction.

So constitutional reform should be embarked upon carefully and alternatives should be considered as well. If I may adapt a famous saying of Canada's longest serving Prime Minister, the approach might be "Constitutional reform if necessary, but not necessarily constitutional reform".

Fiscal federalism

Your fiscal regime is an example of a major issue that may possibly be dealt to a large extent by non-constitutional means. In most federations, the detailed fiscal arrangements change quite regularly, so that the constitution establishes basic authorities and perhaps some principles for revenue sharing, but the details are modified

regularly through non-constitutional means. There is a fair measure of latitude for such an approach in Nigeria.

In Nigeria, fiscal federalism is dominated by petroleum revenues, more than ever with prices well above \$100 a barrel. It engages the politics of federal-state, state-to-state, and inter-ethnic relations. Managing fiscal relations is a key part of managing your diversity.

I referred earlier to the curse of oil and lack of understanding that most countries had in the 1960s about how to deal with oil revenues. They experienced Dutch disease because oil revenues pushed up the currency and made traditional sectors uncompetitive. They ran up debts they could not pay with downswings in oil prices. They had those in power diverting vast sums to personal or narrowly political ends. They ignored local interests and environmental standards in the rush for production. Nigeria knows this story, but you are not alone.

Much has been learned since. I would refer you to the excellent volume, *Escaping the Resource Curse*, by Macartan Humphreys, Jeffrey Sachs and Joseph Stiglitz as a pointer to valuable lessons. I do not have the time to go into those today, but managing vast resource wealth in a federal—as opposed to a unitary—context adds further to the challenge of escaping the resource curse. Federations must sort out the distributional politics of petroleum revenues between the central and various state governments. Oil and gas management in federations has not been studied in a rigorous way, and this is why the Forum of Federations is sponsoring a major comparative project on arrangements in twelve petroleum rich federations. They vary enormously.

The fiscal debate in Nigeria has been coloured by your exceptional degree of dependence on oil revenues and the concentration of production in one part of the country. The Delta has suffered major environmental and health problems and not had economic development commensurate with its petroleum production. The situation there is now further complicated by criminal gangs and armed movements. The problems of the Delta may at one point have been associated with a lack of revenues for the state and local governments, but that has almost certainly changed with high prices.

A few years ago the richest oil producing states had revenues per capita seventeen times higher than the poorest non-oil producing states and that gap is certainly even larger now. This makes Nigeria's fiscal sharing one of the most unequal of any federation.

I believe there is a lot to learn from fiscal experience in other federations, especially those with major resource wealth. Mexico has recently developed an elaborate formula for petroleum revenue sharing amongst federal and state governments as well as with stabilization and savings funds. Russia has also developed such funds and paid a good deal of attention to the impact of petroleum revenues on the larger economy; it provides extra revenue to producing states, but caps this. Brazil and Argentina have both developed fiscal responsibility laws that include both the central and state governments.

While today's oil prices offer a tremendous opportunity to Nigeria, the risks are almost as great. It seems to me that a debate that turns overwhelmingly on who gets what share is essentially sterile and will not serve your needs. Realizing your opportunity requires developing a broad consensus around a policy framework for sound use of oil revenues, including economic and social investments, provisions for savings and stability, as well as for transparent and accountable government. I suggest that a federal framework may actually provide an opportunity, through a system of intergovernmental checks and balances, to advance some of these objectives.

Intergovernmental relations

Developing a broader consensus in Nigeria will require addressing the relatively underdeveloped state of intergovernmental relations in your federal system. Your weak intergovernmental relations reflect long periods of military rule, but also, I suspect, a view of federalism that often put excessive emphasis on water-tight compartments—what many here call “true federalism”. In fact, most federations these days are characterized by significant overlap in functions between governments. They have responded by developing complex networks between federal and state counterparts, from heads of government, to ministers, to senior officials, down to—very importantly—the technical experts. Nigeria has some of this, but it needs more. The

Forum of Federations is working with your Governors' Forum, which has been reactivated since the elections. Your Vice-President chairs the Economic Council with the state governors. But Forum of Federation officials were struck at a workshop with federal and state finance officials by the fact that informal technical discussions were something of a novelty, and one that was greatly appreciated.

Clearly, there is room for much more dialogue and exchange. The natural focus for this, especially given your strong presidency and governorships, would be at the executive level. But given the independence of the legislatures from the executive, there is also a place for some mechanisms to encourage dialogue between legislators at the federal and state levels. I note that Senator Ekweremadu, the Deputy President of the Senate, has said that the Joint Committee on Constitutional Reform will consult extensively with legislative counterparts in the states.

Minority Rights

Minority rights—in particular the rights of religious minorities and of the non-indigene—is the last issue I would like to touch on. Both of these issues could undermine the progress Nigeria has made in developing a Nigerian identity and they will need careful management if the federation is to be strengthened..

You are not alone in trying to settle the appropriate place and boundaries for religious law, and in particular with sharia law. It is an issue in the Muslim federations or quasi-federations of Malaysia, Pakistan, and Indonesia, as well as in non-Muslim federations such as India and my own country of Canada. In Nigeria's case, your constitution forbids the adoption of a state religion at the federal or state levels, but it leaves open the possibility of government's providing certain facilities for religious life. It also entrenches the right to voluntary religious instruction in schools and establishes customary or Sharia courts of appeal for any state requiring them. Thus while your constitution is open to pragmatic arrangements, there are questions whether some states have gone beyond that to effectively establish state religions. This poses major questions regarding the rights of adherents of other religions in those states,

and even, in some cases, regarding the human rights of adherents themselves.

Experience in other federations demonstrates that religious disputes can be especially difficult given their close link to ideology and the claims of many religions to govern civil life. That said, federalism has the flexibility to accommodate different arrangements across a country. Major religious disputes have a way of erupting and then receding, often with compromises that fully satisfy no one. Successful management of them requires a principled approach combined with some pragmatism.

Let me turn to the other major issue affecting minority rights. I have noted the progress Nigeria has made in containing conflict between ethnic communities, in part through the concept of federal character. Many federations have taken measures to promote the representativeness of their institutions or to address disadvantaged groups. In Canada, we work to promote a linguistic balance as well as to advance representation by visible minorities, aboriginals, and women. India has special measures for dalits, who are the former untouchables, as well as for certain tribal peoples. Such programs always involve sensitive issues of balancing merit and representativeness.

The difficult issue here in Nigeria, as you know, is the reservation of many places—in the bureaucracy, in educational institutions, and so on—for people who are indigenous to a state. This has effectively shut out significant communities of so-called settlers who may be deemed to have no affiliation with any state. It fails to recognize Nigeria's character as a country of great internal mobility and undermines the notion of Nigerian citizenship. It can be argued that this type of discrimination violates your constitution's non-discrimination provisions. My understanding is that the federal government has made successive attempts to solve the issue, but has encountered strong resistance from entrenched local interests that benefit from the status quo. While I have no particular suggestion how to approach this problem, I would suggest that it risks undermining some of your real accomplishments in promoting the federal character of Nigeria if it is allowed to fester.

Conclusions

I would like to conclude by repeating how honoured I am to have addressed you today. The Forum of Federations has a strong interest in Nigeria and looks forward to becoming even more active here.

Your conference's theme of diversity and strengthening the federation must also be a constant theme of Nigerian public life. You have already done much to strengthen your federation through the development of a sense of national identity, restructuring the states and your institutions, your embrace of federal character and through the actions of some of your leaders and institutions. While problems remain and managing diversity is always a challenge, my personal judgment is that Nigerians recognize that diversity defines your character and enriches your community. It is fundamental to the strength of Nigeria. I wish you every success.