Constitutional infidelity, or ‘the abandonment of constitutional obligation’, has been described as ‘constitutionally important change that occurs when political elites or others act in disregard or defiance of specific provisions of a constitution or the entire constitution without abrogating the document’.\(^1\) It is a complex, contradictory, and contested concept. In many contexts and for several analysts, constitutional disobedience is essentially perverse or dysfunctional: the antithesis of constitutionalism, a symptom of political underdevelopment, and a recipe for disorder and tyranny.\(^2\) In other contexts or interpretations, however, constitutional infidelity can be more benign and functional: a moral imperative, a politically expedient myth, or a strategy of political reform and development.\(^3\)

This chapter explores the paradoxes and complexities of constitutional infidelity in one of the most politically dynamic states of Africa, a continent where analysts have long chronicled a syndrome of ‘constitutions without constitutionalism’.\(^4\) Specifically, the chapter offers a case study of the varieties, sources, consequences, and challenges of constitutional infidelity in the Nigerian federal system under the 1999 Constitution. It begins by discussing the concept of constitutional infidelity, highlighting contending scholarly perspectives on the concept’s ramifications in political systems in general, and in federal constitutions in particular. Next, the chapter analyses the design of Nigerian federalism under the 1999 Constitution, discussing how the document’s (p. 102) military-initiated
centrist provisions have provided the context and impetus for a prodigious amount of constitutional infidelity.

The chapter’s centrepiece consists of a discussion of five areas of constitutional infidelity involving national revenue allocation, local governance, policing, Islamic Sharia law implementation, and establishment of geopolitical zones. These cases are the most widely discussed and contentious examples of constitutional infidelity in the Nigerian federation since 1999. More importantly, they illustrate nuanced variations on the theme of infidelity, from practices that are egregiously unconstitutional, to more ambiguous behaviour that exists in the twilight zone between constitutionality and unconstitutionality, and to apparently constitutional activities that nevertheless subvert the overall spirit or architecture of the constitution.

The chapter assesses the broader implications of constitutional infidelity for the development and future of Nigerian federalism, before concluding with a summary of main arguments and implications.

2. The Paradoxes of Constitutional Infidelity

The literature on African politics is replete with discussions of a pathological form of constitutional infidelity involving the vulnerability of formal constitutional institutions in contexts plagued by informal neo-patrimonial politics and weak rule of law. In the neo-patrimonial paradigm, endemic political corruption, extensive patron-client networks, and extreme personal rule trump formal liberal-democratic features such as executive term limits, independent judicial review, robust parliaments, federalism, autonomous local governments, and related constitutional constraints on chief executives.⁵

Echoing the thesis that formal institutions are a mere constitutional façade in neo-patrimonial regimes, Dickovick, for instance, argues that African federalisms ‘can hardly matter where institutions themselves have little import … formal institutions are subverted to raw power dynamics … [and] governing authorities are connected to society mainly via informal mechanisms of patronage and clientelism rather than well-institutionalized legal-rational structures’.⁶ However, discussions of Africa’s neo-patrimonial illiberalism and feckless constitutionalism, apart from understating the growing importance of formal institutions on the continent and the complex interactions between formal and informal institutions, offer a partial and narrow perspective on constitutional infidelity, overlooking its more nuanced, benign, and comparative or global dimensions or expressions.

Khiara Bridges, for instance, provides a nuanced analysis of constitutional infidelity in the context of the American debate on abortion rights. Bridges notes the contentious nature of constitutional infidelity, showing how each side in the abortion (p. 103) debate claims fealty to the constitution, while accusing the other side, including official judicial interpreters of the constitution, of infidelity.⁷ As Louis Michael Seidman succinctly puts it: ‘[B]oth progressives and conservatives are content to beat each other around the head and shoulders with charges of constitutional infidelity.’⁸

Despite such contentiousness and ambiguity, however, Bridges claims that the abandonment of constitutional obligation, even when it is done in the name of promoting more normative, constitutionally unrestricted political conversations and settlements, would destroy judicial review, enthrone illiberal majoritarian rule, undermine individual liberty, and create uncertainty or anarchy.⁹

Bridges’ analysis of the ambiguities and risks of constitutional infidelity was partly a riposte to Seidman’s ‘provocative, subversive, and frequently convincing arguments against wholesale fidelity to the constitution’.¹⁰ Seidman contends that the case for constitutional fidelity is far more fragile than usually acknowledged. He asks: ‘Why should anyone ... renounce positions of policy and principle that she favors simply because those policies and principles are inconsistent with the constitution?’¹¹ Seidman shows that, even in the
American context, the foundations of the constitution can hardly be said to be lawful, popular, or inclusive: ‘As historians of ratification have demonstrated, the process was shot through with political shenanigans, systematic suppression of the views of the Constitution’s opponents, misrepresentation, and outright coercion.’

According to Seidman, even if the American constitutional ratification process did not exclude women, African Americans, Native Americans, and most people without property, ‘[i]t is hard to see how a pristine process that perfectly captured the views of 18th century America can bind the very different people who populate the United States today’. Consequently, Seidman concludes that as rigid, hard-to-amend constitutional agreements ‘become increasingly irrelevant to contemporary disputes, it may well be that departures from them, rather than mindless adherence to them, will best produce civic peace’.

Indeed, John Kincaid identifies constitutional infidelity as one of five major ways by which constitutional change or development may occur in a country, the others being constitutional replacement, constitutional amendment, legislative supplementation, and judicial arbitration or reinterpretation. His analysis suggests that constitutional infidelity may provide an invaluable avenue of political adjustment and improvement, especially where formal constitutional change is procedurally prohibitive or symbolically costly, judicial activism is politically injudicious or contentious, and legislative reform is unlikely.

Similarly, Nico Steytler’s collaborative work on concurrent powers in federal systems highlights the phenomenon of de facto concurrency, which is essentially similar to constitutional infidelity. De facto concurrency refers to situations where constituent units encroach on formally exclusive federal powers or, more commonly, where federal government intrudes on exclusive regional space. Steytler highlights three distinct patterns of such infidelity: (1) the evolution of the federal system no longer reflects the (p. 104) original design of the constitution-makers, even though such evolution enjoys judicial affirmation; (2) federal practice is neither clearly unconstitutional or constitutional, but exists in a constitutional twilight zone or legal limbo, which is broadly tolerated by all, rather than constitutionally adjudicated; and (3) federal practice operates outside the constitution, the rule of law, and/or judicial precepts. The Nigerian experience since 1999, it will be demonstrated, spans these variations and nuances of infidelity.

In addition to the above-mentioned variations in perceived deviations from putative constitutionality, two broad points can be distilled from the preceding brief review of the literature on the nature of constitutional infidelity. The first is that constitutional infidelity can assume both perverse and benign forms, entailing politically corrosive as well as constructive practices and consequences. Perverse instances of constitutional infidelity abound. Examples include the propensity for presidencies in countries as diverse as Brazil, Russia, Venezuela, the United States, and Egypt to circumvent institutional constraints on their prerogatives under the constitutional separation of powers paradigm; the American federal government’s non-enforcement for eighty-six years of the Fourteenth Amendment enacted in 1868 to protect African Americans freed from slavery; the ‘silent, informal rewriting’ of the Malaysian constitution in ways that have eroded constitutional guarantees of freedom of religious belief for non-Muslims and for non-conformist or deviationist Muslims; and the failure of the Cameroonian government to establish key institutional checks and balances mandated under the 1996 Constitution, including a parliamentary second chamber or Senate, a council with exclusive responsibility for constitutional adjudication, and new regional and local institutions.

But there are also relatively benign examples of infidelity. Especially germane to the analysis in this chapter are forms of constitutional infidelity that have sought to circumvent over-centralisation and attendant suppression of pluralism in ethnically fragmented societies. In Canada, for instance, the atrophying of the ‘federal government’s powers of reservation and disallowance over provincial laws’ has facilitated ‘the development of a
federal system that is considerably more non-centralized than envisioned by the constitution’.\textsuperscript{18}

Another instructive example comes from Afghanistan, where the development of a system of informal federalism in contradiction to the country’s unitary constitution has enhanced ‘prospects for state building ... by closing the gap between formal constitutional structures and political relations as they are actually practiced’.\textsuperscript{19} Nigeria’s elaborate zoning and rotation of political offices among diverse ethnic, regional, and religious elites is yet another example of a practice that violates constitutional guarantees of free electoral competition and contradicts official attempts to de-emphasise major ethno-regional identities, but has functioned robustly to maintain national stability.

A second broad point is that in decentralised or federal systems, constitutional infidelity often dissolves into confrontations between centripetal and centrifugal forces. In the context of Africa’s fragile experiments in decentralisation, for instance, a widely discussed form of infidelity consists of attempts by central elites to subvert even the limited concessions made to sub-national units under existing constitutional regimes. For instance, Nwabueze extensively documents multiple attempts by Nigeria’s central political executive to subvert the country’s federal system during the two terms of Obasanjo’s presidency from 1999 to 2007. These attempts primarily involved the use of major federal constitutional institutions (e.g., courts, the national assembly, anti-corruption agencies, the police, and electoral commissions) to undermine the constitutional immunity of state governors, to remove state governors, and to interfere in the financial affairs of sub-national governments.\textsuperscript{20} Elsewhere in Africa and the developing world, we find comparable attempts by central authorities to supplant sub-national political autonomy through the manipulation of the centre’s emergency powers, through the rigging of sub-national elections, and through various ‘administrative and financial backdoors’.\textsuperscript{21}

However, a less widely discussed form of constitutional infidelity in Africa involves schemes to expand and extend sub-national autonomy by circumventing current constitutional limitations on such autonomy. Paradoxically, such circumventions can reflect attempts by sub-national governments to exploit or ramp up their limited constitutional autonomy. In other words, existing constitutional choices regarding sub-national governments (SNGs), even in the context of Africa’s centralised neo-patrimonial regimes, have their own evolving and profound influence on the functioning of SNGs. This is because these choices allocate power and influence, generate new and evolving interests, and, thus, modify the incentive structures that local officials and citizens face, thereby influencing what their subsequent actions are likely to be.\textsuperscript{22}

Indeed, despite their relentlessly centrist biases and proclivities, African constitutional structures and political regimes have often formally embraced decentralisation or even federalisation as a framework for promoting local participation, broad-based socio-economic development, and/or ethnic conflict management. As evidenced in the constitutions of such countries as Ethiopia, Kenya, South Africa, and Nigeria, these regimes exhibit many classic attributes of federal or decentralised systems, including constitutional recognition of sub-national authorities, intergovernmental distribution of revenues, mechanisms (such as bicameralism and ethnic power-sharing) for the representation of sub-national units or segments in the national government, institutions for intergovernmental relations, and provisions for judicial review.

Centripetal characteristics, however, dominate and degrade African decentralisation. These reflect not only the state-centric nature of African political economies (with key economic resources and institutional capacities concentrated at the centre) and the top-down, disaggregative, or ‘holding together’\textsuperscript{23} origins of Africa’s federal or decentralised regimes (in which the central state created sub-national units, rather than the other way round), but also a deliberate constitutional policy both to maintain or consolidate central control of

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critical developmental or distributive resources and to suppress potential centrifugal or secessionist challenges to the central state.

The following are among the most conspicuous centripetal characteristics of federalisation and decentralisation in Africa:

- A generous construction of the constitutional powers of the central government, enabling it to intervene broadly in sub-national affairs.
- Concentration of fiscal resources at the central level while sub-national units are sustained by intergovernmental transfers or federal financial hand-outs and bail-outs, rather than own-source revenues.
- Proliferation of sub-national administrative units, creating relatively small, unstable, and unviable units of regional or local government with limited ‘demographic, economic and social coherence’.  

- Promotion of ethnic autochthony or indigene policies, among other economically perverse and corrosive policies. These may undermine the emergence of a robust common national market, thereby precluding the development of the sub-national fiscal, administrative, and intergovernmental capacities often associated with competitive and cooperative models of federalism in countries like the United States, Switzerland, Germany, and Canada.

- Institutional designs that emphasise shared rule or ‘intrastate federalism’. This describes a ‘centralist vision’ of federalism that prioritises the representation of sub-national administrative units and/or ethnicities within the central government, as distinct from self-rule, sub-national autonomy, or inter-state federalism.

- One-party dominant systems, reducing all or most sub-national governments to pliant co-partisans of the central government. These systems often emerge through the centre’s manipulations of sub-national elections or subversion of opposition-controlled sub-national governments.

(p. 107) - The centralisation of the military and security apparatus (including the police in the Nigerian context), which operates largely at the behest of the central political chief executive.

The incorporation of many of these centripetal characteristics into Nigeria’s 1999 Constitution has paradoxically produced bold attempts to challenge centralism through sub-national constitutional infidelity in this combustible, multi-ethnic federation.

3. The 1999 Nigerian Constitution: Overcentralisation and the Roots of Infidelity

The evolution of the Nigerian federation can be divided into two broad phases: (1) a pre-military era (1954–1966), and (2) the period following the intervention of the military in 1966. Like many other ‘holding together’ federations in the developing world, Nigeria’s pre-military federalism included several centrist features. Among these were enormous federal emergency powers (which were deployed with devastating effects against the opposition-controlled Western region in 1962–1963) and extensive central government responsibility for coordinating and supervising national economic development. However, the small number of constituent regional units (three in 1954–1962, and four in 1962–1966), the relatively large (but unequal) sizes of the regions, and the highly regionalised character of the party system, effectively counterbalanced the system’s centrist features. 

To date, the
1954–1966 period is widely celebrated as the sole era of truly decentralised federalism in Nigeria.\textsuperscript{28}

However, following its intervention in politics in 1966, the military comprehensively reconfigured the constitutional architecture of the federation. During two extended phases of military rule (1966–1979 and 1984–1999), the soldiers fashioned a hyper-centralised brand of federalism. The military expanded the scope of federal exclusive and concurrent jurisdictions, concentrated rising oil revenues in the central government, and progressively fragmented the four component regional units of the federation into thirty-six smaller and weaker states. The soldiers also created a nationally uniform local government system as the third (after the centre and the states) tier of the federal system, banned ethno-religious or regional parties, and promoted an imperial federal executive presidential system in place of the more collegiate parliamentary system bequeathed by the British at Nigeria’s independence in 1960.\textsuperscript{29} All of these changes were then institutionalised constitutionally during constitution-making exercises supervised by successive military administrations, which produced new constitutions in 1979, 1989, 1995, and 1999, respectively.

These massive institutional changes were more or less unilaterally dictated by the military. It did not subject any of its constitutional changes to popular ratification (p. 108) via a referendum, and it relegated civilian technocrats and representatives to playing a purely advisory and deliberative, rather than sovereign, role in the constitution-making process. At the same time, all of these changes were constitutionally entrenched, thereby rendering major constitutional amendments virtually unachievable.

The amendment formula, as enshrined in section 9 of the Constitution of 1999, requires that a proposal to change the Constitution 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, or 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. Although several constitutional provisions were amended in 2011 and 2018, the changes involved relatively minor institutional adjustments and did not alter fundamental features of Nigeria’s centralised federalism.\textsuperscript{30}

Reflecting the military’s hyper-centrist constitutional engineering, the sixty-eight specific and incidental powers assigned exclusively to the federal government under the 1999 Constitution, plus twelve additional powers available to the centre under the concurrent list, enable the federal government legitimately to intervene in virtually every matter of public importance.\textsuperscript{31} The actual scope of the residual constitutional powers assigned to the states, therefore, becomes largely a function of what the federal government voluntarily chooses to leave to the states. Consequently, the federal government has intervened massively and directly in such inherently sub-national subjects as local government, housing, basic education, and primary health care. This over-centralisation effectively violates the federalist principle that the division of powers in a federal system should give each order of government at least some important subjects on which it has final say.\textsuperscript{32} Although the Nigerian sub-national governments have final say on some matters (e.g., property taxes, sub-national budgetary decisions, sub-national public service recruitment, or Islamic and customary marriages), these subjects are relatively few, sometimes insignificant, or ultimately susceptible to central intervention or regulation.

Similarly, fiscal centralism, rather than fiscal federalism, better describes the economic architecture of the federation. The extraordinary degree of fiscal overcentralisation in Nigeria is underlined by the overwhelming dependence of all levels (federal, state, and local) of government on centrally collected and redistributed oil revenues, by sub-national governments’ limited tax autonomy and revenue generation, and by the absence of hard
budgetary constraints for sub-national authorities. The perverse effects of this fiscal structure are compounded by a purely distributive, inherently corrupt, and breathtakingly inefficient and uncompetitive approach to fiscal decentralisation. Specifically, while lacking autonomous revenue-raising capacities, Nigerian states enjoy constitutionally guaranteed intergovernmental revenue (p. 109) transfers, extensive expenditure, or autonomous budgetary authority, and freedom from any obligation to coordinate their socio-economic policies with the federal government, leading to extraordinary levels of sub-national financial incoherence, mismanagement, non-transparency, and corruption.\footnote{33}

The pathologies of this fiscal system were underlined by the financial crisis that sub-national governments experienced following a collapse in international oil prices during 2015 and 2016. Unable to pay their public servants or service their public debts, the sub-national governments became practically insolvent, relying on multi-million-dollar bail-outs from the central government to keep afloat. Yet without any significant improvements in their fiscal allocations and financial management practices, the sub-national governments continued to struggle economically, with public servants in twenty-one states being owed four or more months in government salaries by July 2016.\footnote{34}

Administrative centralisation reinforces Nigeria’s constitutional and fiscal centralisation. The country operates a largely unified judicature and a nationally harmonised public service pay and pension system. Although they enjoy considerable independence from the central government in their spending decisions and personnel recruitment and supervision policies, sub-national governments are subject to control by federal constitutional bodies that regulate state gubernatorial and legislative elections, judicial appointments, and remunerations and assets declarations for office holders. This administrative centralisation is compounded by relatively weak institutional, bureaucratic, or management capacities at the sub-national level.

Where Nigeria differs from patterns of centralisation evident in other African federations like Ethiopia and South Africa is the party system. Opposition parties have typically controlled one-third or more of the states in the federation since 1999. More importantly, Nigeria achieved a historic electoral alternation at the federal level in 2015, when the All Progressives Congress (APC), an opposition alliance, defeated the People’s Democratic Party (PDP), in power at the centre since 1999. Adding to Nigeria’s pluralism is the internal fragmentation of the APC and PDP, each of which remains ideologically incoherent, politically fractious, and organisationally decentralised, with significant autonomy for state branches of the national party. Thus, while political centralisation is inherent in the constitutional ban on ethno-regional or religious parties and in the ability of a party in control of the centre to manipulate gubernatorial elections, Nigeria has not succumbed to the type of one-party dominance that has stifled sub-national activism in countries like Ethiopia and South Africa.\footnote{35}

The relative absence of party centralisation in Nigeria’s deeply divided society has facilitated sub-national challenges to the centrist features of the Constitution. These challenges have reinforced broader agitation by civil and political society for a more decentralised and democratically crafted constitution. At the same time, the rigid entrenchment of the Constitution has precluded any successful major amendment to the (p. 110) document, thereby promoting alternative methods of political change and adaptation, including constitutional infidelity.

4. Constitutional Infidelity and Federalism since 1999

Nigeria has witnessed five major instances of federalism-related constitutional infidelity under the 1999 Constitution. These involve the allocation of public revenues, control of local governments, policing, Sharia law implementation, and the promotion of large-scale geopolitical identities. With the exception of constitutional breaches relating to revenue allocation, which largely reflect the central government’s encroachment on the states’ fiscal
rights, these instances of constitutional infidelity have entailed decentralist challenges to Nigeria’s centrist constitutional structure.

4.1 Revenue allocation

The intergovernmental distribution of massive (but volatile and declining) oil revenues and rents is the overriding structural feature of Nigerian federalism. This distributive federalism is constitutionally mandated and statutorily regulated in theory; in practice, it is vexed by multiple violations and irregularities.

Under the 1999 Constitution, the federal government levies and collects the most important public revenues (including mineral, oil, customs, excise, and company taxes), which are then paid into a general distributable pool, namely, the Federation Account. The Constitution requires that a minimum of 13 per cent of natural resource revenues in the Federation Account be paid upfront to resource-bearing areas on a derivation basis. In an apparent act of constitutional infidelity designed to appease restive oil-producing communities, the national legislature in 2004 enacted a law that included a substantial amount of offshore oil revenues in the implementation of the derivation rule. The Supreme Court, in *AG Adamawa State and Others v AG Federation and Others*, upheld the enactment, thereby reversing its earlier ruling, in *AG Federation v AG Abia State and Others*, that natural resources in Nigeria’s continental shelf belong to the federation as a whole and, therefore, cannot be said to be derivable from the adjoining littoral states for revenue allocation purposes.

The Constitution stipulates that the balance of the Federation Account after the 13 per cent derivation payment be shared vertically between the centre, the states, and localities, and horizontally among the sub-national governments. For the purpose of such general revenue-sharing, the National Assembly is constitutionally empowered to enact a sharing formula based on proposals to be submitted periodically to the legislature by the President on the advice of the Revenue Mobilization Allocation and Fiscal Commission (RMAFC).

The Federation Account is currently shared on the basis of a revenue-sharing decree-law inherited and adapted from the military. The law divides the Federation Account vertically in the proportions of 48.50 per cent federal government, 26.72 per cent (p. 111) states, 20.60 per cent local governments, and 4.18 per cent to special funds administered by the centre. Horizontally, the above-mentioned allocations to the states and the localities are distributed using the following principles and accompanying weights: equality (or equal shares to each Nigerian state and locality), 40 per cent; population, 30 per cent; social development needs, 10 per cent; land mass and terrain, 10 per cent; and internal revenue generation (IRG) effort, 10 per cent.

In addition, the sub-national governments receive a significant share of the value added tax (VAT). This tax is levied by the federal government, which retains 15 per cent of the proceeds as administrative costs, while allocating 50 per cent and 35 per cent to the states and localities, respectively. In *AG Lagos State v AG Federation*, the Supreme Court declined to exercise jurisdiction in a legal challenge to the authority of the federal government to levy VAT (which is not included in the federal exclusive or concurrent legislative lists), thereby reinforcing a pattern of judicial avoidance of potentially combustible issues.

Overall, on average, Nigeria’s sub-national governments derive over 70 per cent of their budgets from Federation Account-based transfers, and about 15 per cent and 10 per cent from internally generated revenues and VAT, respectively. The exception to this overwhelming financial dependence is Nigeria’s long-standing commercial capital and
former administrative headquarters, Lagos State, which internally raises more than half of its revenues mainly through the sub-federally administered personal income tax.\textsuperscript{42}

Major irregularities in the implementation of the revenue-allocation system include the federal government’s diversion of federally collected revenues from the Federation Account; distribution of the Account to entities (or special projects’ funds) other than the three orders of government; opaque and arbitrary allocations of the unconstitutional special funds; distortions in the implementation of the horizontal revenue allocation formula; subversion of the fiscal entitlements of local government; and failure to undertake periodic reviews or revisions of the revenue-allocation formula.

The underpayment of federally collected revenues into the Federation Account as well as the diversion of monies in the account to entities or expenditure items not recognised by the Constitution are abuses inherited from the military. While they were in control of the central government, the soldiers displayed ‘open disrespect for existing fiscal regulations, massive informality and a lack of transparency’, including the discretionary use of ‘upfront deductions’ from the Federation Account to ‘reduce the common pool funds available for sharing with other governments’.\textsuperscript{43} Although the scale of these abuses declined significantly following the transition to civilian rule and the revitalisation of judicial oversight in 1999, Nigeria’s revenue allocation continued to be plagued by remarkable constitutional infidelities and statutory irregularities.\textsuperscript{(p. 112)}

Despite the invalidation of the abuses by the Supreme Court in cases such as \textit{AG Federation v AG Abia State and Others}\textsuperscript{44} and \textit{AG Ogun State and Others v AG Federation},\textsuperscript{45} the federal government continued to (1) pre-empt the payment of a substantial amount of federally collected revenues into the Federation Account through the diversion of these revenues to items like the excess crude account and cash calls for joint venture operations of the Nigerian National Petroleum Corporation (NNPC), and (2) allocate revenues in the Federation Account to special funds for the federal capital territory, stabilisation, development of natural resources, ecological emergencies, education, and national petroleum technology development fund. The enormity of these abuses was exposed in a September 2013 letter to the President by the activist governor of the Central Bank, Lamido Sanusi, who reported the ‘non-repatriation to the Federation Account … of $48.9 billion representing 76 per cent of the value of crude oil lifting in 2012 and 2013’.\textsuperscript{46} However, instead of investigating or redressing the alleged irregularity, President Goodluck Jonathan suspended Sanusi from his position as central bank governor:

Similarly, the unconstitutional allocation of Federation Account revenues to the opaquely administered set of special funds persists. According to the states, the funds represent an ‘unconstitutional way of increasing allocation to the Federal Government’:

Their argument was that special projects are not a government and the Constitution requires funds to be shared only between governments. Therefore, the allocation of funds to special funds, which the Federal Government spent according to its discretion, was improper. The manner of disbursement of ecological funds seemed to buttress this point.\textsuperscript{47}

Under Jonathan’s presidency in particular, the special fund for ecological emergencies became a ‘slush fund’ for the corrupt enrichment of various politicians and public officials and for underwriting the partisan agendas of the federal government at the sub-national level.\textsuperscript{48}

The country’s horizontal revenue-sharing practices betray infidelity to some of the fundamental constitutional objectives enunciated in Chapter 2 of the Constitution, including the principles of integration, democracy, and social justice. Under section 162(2) of the Constitution, revenue-allocation legislation is required ‘to take into account’ the following specific horizontal sharing principles: ‘population, equality of states, internal revenue
generation, land mass, terrain, as well as population density’. In theory, the extant revenue-allocation formula includes all of these principles, either directly or indirectly. In practice, however, not only is the inter-equality principle formally assigned a disproportionate weight in the allocation formula, but ‘a large portion of the 20% designated for social development and IRG also gets divided equally (p. 113) among the states’, thereby contributing (along with the derivation rule) to significant per capita disparities in sub-national access to federal transfers.49

Similarly, grants meant for primary schools under the special funds for education ‘are shared on the basis of equality of local governments, that is, all local governments in the country receive an equal amount notwithstanding the number of primary schools it has or its primary school enrolment ... In effect, disbursement is not based on equity but equality, since more funds ... flows to those states with more local councils and fewer schools.’50

The overall effect is to make equality of sub-national units the single-most important factor for the distribution of revenues at the expense of the other constitutionally recognised principles of horizontal revenue-sharing. Aside from contributing to per capita disparities in access to revenues, Nigeria’s horizontal revenue-sharing practices engender intense pressures for the creation of new states and localities since a given sub-unit can greatly enhance its share of federal largesse by being subdivided into more (equally federally funded) administrative units.

Meanwhile, the RMAFC, presidency and National Assembly are failing in their constitutional responsibility to ‘review from time to time the revenue allocation formulae and principles in operation to ensure conformity with changing realities’.51 Since the restoration of civilian rule in 1999, there have been no substantive changes to the revenue-sharing system beyond the implementation of the 13 per cent derivation rule and executive adjustments to the allocation of the controversial and unconstitutional special funds.

The current general revenue-sharing formula has been in force since the last substantive adjustment of the formula under military rule in 1992. Although it is misleading to elevate the constitutional provision that a revenue-sharing act ‘shall remain in force for a period of not less than five years’52 into an expectation that the act ‘will be revised once every five years’,53 failure to pass substantive revenue-sharing legislation since the transition from military to civilian rule in 1999 is odd.

The primary reason for the lack of revenue-allocation review is the unwillingness of the central government to abandon the centrist allocation formula inherited from the military. Indeed, the Obasanjo presidency went to great lengths to frustrate the enactment by the National Assembly of a revised formula designed by the RMAFC to transfer more revenues to the sub-national governments.54 This failure has been abetted by the dysfunctionality and weakness of the RMAFC, which has operated more as a presidential political-patronage institution than as the body of qualified and experienced fiscal experts envisaged by the Constitution.55 Thus, to date, revenue allocation remains highly politicised and economically perverse, functioning as a recipe for corrupt patronage rather than an instrument for economic development or equitable distribution.

The most blatant constitutional violation in the implementation of Nigeria’s fiscal federalism is the virtual abrogation of the fiscal rights of the localities by state governments, which ‘routinely hijack varying proportions of the allocations to local governments from the Federation Account’, while also pre-empting local taxes and failing to fulfil the constitutional obligations of the states to support the localities financially.56 Such subversion of the financial rights of the localities is part of a broader policy of Nigeria’s
states to challenge the constitutional status of the local governments as an independent third order of the federal system.

4.2 Local government

Two divergent models of local governance frame constitutional design and political debates in Nigeria. The first model, favoured by proponents of states’ rights, approximates the approach in older, decentralised federations like the United States, Switzerland, and Canada, where local government is regarded as ‘merely a competence of state/provincial government’. This model finds its most explicit expression in section 7(1) of the Constitution, which gives the states broad powers to legislate ‘for the establishment, structure, composition, finance and functions of [local] councils’.

But the Constitution also accommodates a second model of local governance that was broadly promoted by the military and is still very popular with local government officials. This model is comparable to constitutional policy in newer centralised federations such as Brazil, South Africa, and India, where local governments are constitutionally entrenched as a separate, independent tier of the federal system. Although celebrated as a federalist innovation to deepen local democracy, this model is often criticised for promoting the ‘disempowerment of state government and the resulting intensification of centralizing tendencies’. Indeed, the model has been deployed in Peru, Brazil, and South Africa as a tactical strategy by central governments to strengthen their relative position in the intergovernmental maze by empowering the local level of sub-national government in ways ‘that deliberately counter the interests of the core units of federalism, the states/provinces/regions’.

In accordance with this second model of local governance, the Constitution formally guarantees a ‘system of local government by democratically elected councils’ and empowers the National Assembly to make laws for ‘the procedure regulating elections to a local government council’. It also entrenches the current 774 local government areas (LGAs), provides for the allocation of Federation Account revenues to the localities, and devotes a whole schedule to the ‘functions of local government (p. 115) council’ (e.g., collection of rates, issuance of licences, provision and maintenance of basic public conveniences and infrastructures, and collaboration with the states in the provision of primary education).

However, aided by the dual, contradictory constitutional identity of the local government system, since 1999 the states have effectively reduced the localities to administrative subsidiaries of state governments. In doing so, the states have more or less reversed four elements of the 1999 constitutional settlement on local government: (1) restrictions on the creation of additional local government areas; (2) guarantees of democratically elected local councils; (3) direct transfers of federal revenues to localities; and (4) more generally, the concept of three-tier federalism.

Section 8(3) of the Constitution prescribes the following onerous procedures for creating new local government areas: approval of a request for a new LGA by two-thirds majorities of state legislators and of local councillors representing the area of the newly proposed locality; approval of the proposal for the LGA by a two-thirds majority of the people of the original local government area; and approval of the result of the referendum by (1) a majority of councillors in each of a majority of local councils in the state, and (2) a two-thirds majority of the state’s legislators.

Following this process of local government creation, a state assembly is required by the Constitution to ‘make adequate returns to ... the National Assembly [which] shall make consequential provisions with respect to names and headquarters of ... local government areas as provided in the Constitution’. A Supreme Court majority, in AG Lagos State v AG Federation, ruled that local governments created by the states would remain legal, but
inchoate and inoperative, until formally ratified by the National Assembly and listed in the Constitution. However, given the potential impact that the creation of new local areas could have on the principle of equal federal funding of localities, the National Assembly has refused to ratify any LGAs created by the states.

Ebonyi, Katsina, Nasarawa, Niger, and Lagos were the first states to create new local areas that were not endorsed by the national legislature. Following a threat by the federal executive to withhold federal funding for all local governments in these states, Ebonyi, Katsina, Nasarawa, and Niger abrogated the newly created localities, but Lagos opted to litigate the federal government's action. After the Supreme Court declared the new localities to be inchoate and inoperative, Lagos chose to maintain and operate the new areas, but renamed them local council development areas (LCDAs) because they lack the constitutional recognition required for designation as fully-fledged LGAs.

This practice of creating LCDAs was subsequently adopted in Ekiti, Ogun, and Osun states, among others, while Ebonyi has used the term 'development centres' to designate such centrally unrecognised units of local administration. But, in the words of one analyst:

Does the rebranding of ... inchoate LGAs as LCDAs solve the constitutional problems that bedevil the inchoate LGAs? If the Constitution does not allow a state to create LCDAs, under what authority do they exist and operate? Reverting inchoate LGAs into LCDAs will not suffice because the appellation is unknown to the Nigerian Constitution ... [T]he legal basis of the LCDAs is shaky.

The circumvention of constitutional restrictions on the creation of new localities reflects an influential position in Nigeria that depriving sub-national states of the autonomy to demarcate local government units is an egregious contradiction in a federal system. Indeed, the number of constitutionally recognised and entrenched localities (774) seems remarkably small given the population, size, and diversity of the country. Nwabueze, for instance, bemoans

... the confusion and untidiness created by the unnecessary injection into the Constitution of the provision prescribing the number of local government areas ... their names and headquarters, which is like an excrescence that disfigures the entire federal system; that excrescence should be excised in any future review of the Constitution.

Furthermore, Nwabueze argues that the current constitutionally entrenched LGAs connote 'territory only'; therefore, states are at liberty to establish 'two or more local government councils' as organs of government with legislative and executive functions within any existing local area. This repudiates a Supreme Court opinion, in AG Lagos State v AG Federation, that, under the practice of the Constitution, LGAs and councils are used 'synonymously' and, therefore, should overlap or coincide in their territorial scope.

The states have routinely replaced elected local governments, both in the recognised LGAs and in the controversial LCDAs, with appointed sole administrators, executive secretaries, and caretaker, interim management, or transition committees. In addition, the states have massively manipulated local government elections, or failed to conduct local elections altogether. These abuses have persisted despite a series of decisions by the Supreme Court and the Court of Appeal, in cases such as Honorable Chigozie Eze and Others v Governor of Abia State and Others, AG Plateau State and Others v Goyol and Others, and Adamawa State House of Assembly and Others v Chubado Batti Tijjani and Others, which
invalidated attempts by state governments arbitrarily to truncate or terminate the tenures of elected local councils.

In August 2012, only thirteen states and the federal capital territory of Abuja had elected local government councils. The states have excused their violation of the constitutional mandate for local democracy on various grounds, including the prohibitive (p. 117) costs of conducting local elections and the need to resolve litigation over the composition and/or conduct of the State Independent Electoral Commission, a body established under the Constitution but appointed by state governments, to conduct local elections. In reality, Nigeria’s already weak states are reluctant to share sub-national authority with autonomous localities.

The states have used the loophole of a state joint local government account (SJLA), prescribed under section 162(6) of the Constitution, to undermine the fiscal autonomy of the localities. Although it was intended to be the repository of all federal and state transfers to the localities, the SJLA has become an administrative instrument for states to expropriate funds intended for the localities. The states make numerous ‘deductions’ from federal allocations to their localities in the name of joint projects and other state-directed expenditures. An attempt to end states’ manipulations of the SJLA through the federal Monitoring of Revenue Allocation to Local Government Act 2005, was aborted when the Supreme Court, in *AG Abia State and Others v AG Federation and Others*, ruled that the act breached the constitutional autonomy of the states. This has encouraged the states to continue to expropriate local monies, leaving them with little financial autonomy to design their own budgets or implement their own programmes.

In essence, Nigeria’s constituent states have ‘battered and bastardized’ the constitutional principle of three-tier federalism, as lamented by Olusegun Obasanjo, a former military and civilian president and major architect of the military’s 1976 local government reforms. But the idea of three-tier federalism was initiated by the military and lacks legitimacy among key civilian elites, who have disparaged ‘the ridiculous situation where the federal government creates local governments, enshrines them in the constitution, and allocates resources directly to them’, as claimed by Atiku Abubakar, Obasanjo’s civilian deputy.

Indeed, for Osun State Governor Raufu Aregbesola: ‘[t]he States are the federating units, while the local governments are merely administrative units [and] centers of development in the states. Local governments must not be seen as anything outside the total authority of the states.’ Similarly, according to Ekiti State Governor Kayode Fayemi: ‘what we have are two tiers of government and the local governments remain administrative vehicles of the states. Anything to the contrary is … unacceptable.’

Although they have not treated the local governments well, the states, by reasserting control over the localities, have effectively challenged a controversial, centralising legacy of military rule. Such a bold reassertion of states’ rights over local governance and rejection of three-tier federalism echoes the attempt by the states to reclaim control of another inherently local subject, namely policing.

**(p. 118) 4.3 The police**

The establishment of a unitary police system is one of the most important constitutional legacies of military rule in Nigeria. In response to concerns about the politicisation and manipulation of regionally controlled police forces in the First Republic, the military ‘disbanded’ these forces in 1966 and wrote a single national police structure into the country’s subsequent constitutional documents.
Thus, the 1999 Constitution establishes a ‘Nigeria Police Force’ for the whole country, puts this force under the operational control of an inspector-general of police who is appointed by the federal president, and provides that ‘no other police force shall be established for the Federation or any part thereof’.\textsuperscript{87} The Constitution authorises the governor of a state to give the State Police Commissioner (the centrally appointed operational commander of contingents of the NPF stationed in the state) ‘lawful directions with respect to the maintenance and securing of public safety and public order within the state’.\textsuperscript{88} In a crucial proviso, however, the Constitution stipulates ‘that before carrying out any such directions ... the Commissioner of Police may request that the matter be referred to the President or such Minister of the Government of the Federation’ as the President may authorise.\textsuperscript{89}

Two constitutional institutions are designed to oversee the conduct and composition of the unitary police. The Nigeria Police Council, which includes the President as chairman and the governors as members, is charged with the ‘general supervision’ of the police and advising the President on the appointment of the inspector-general.\textsuperscript{90} The Police Service Commission, which is appointed by the President subject to confirmation by the Senate of the National Assembly, is charged with the appointment and discipline of members of the police force other than the inspector-general.\textsuperscript{91}

Both the council and commission are largely ‘moribund’, effectively leaving the control of the police to the President and his minister of police affairs, while ‘publics and local governments have limited oversight powers’ over the institution.\textsuperscript{92} What is more, with a current strength of about 377,000 for an estimated population of 180 million, the NPF is undermanned. It is also widely denounced as under-equipped, underfunded, undertrained, unaccountable, overcentralised, overpoliticised, corrupt, and, ultimately, complicit in the country’s ongoing epidemic of criminal, communal and political violence.\textsuperscript{93}

The perceived dysfunction or underperformance of the police force has engendered numerous responses and reform initiatives, including ongoing expansion in the size of the force, experimentation with community policing initiatives, a proliferation of private security companies and outfits, and the establishment of a federal civil defense corps, among other supplementary civil-security institutions. But three developments have powerfully undermined the constitutional principle of a unitary police force, as follows.

\textbf{4.3.1 State funding of the Nigerian police force}

Given their broad constitutional responsibility to maintain peace and order in their domains, state governments have consistently come to the aid of the police by giving patrol vehicles, fuel, financial subsidies, communication equipment, armoured personnel carriers, bullet-proof vests, and other crime-fighting equipment to contingents of the force in their jurisdictions. One report ‘found that in some cases state government funding covered at least 50-70\% of police operating costs within the state’.\textsuperscript{94} Indeed, in Lagos State, a multi-million-dollar security trust fund established by the state government is the primary source of funding for the police, with the fund providing 700 vehicles to the state police contingent over an eight-year period, as against only twenty vehicles provided to the contingent from the federal budget.\textsuperscript{95}

Given such a level of sub-national funding for the NPF, it has been argued that the ‘Nigeria Police Force has become a state police’ and that ‘state commissioners of police are more loyal to state governors than the president’.\textsuperscript{96} Nevertheless, the enormous legal authority the centre enjoys over the police, including the ability of the presidentially appointed inspector-general to remove or redeploy state commissioners of police, has led the state governments to adopt alternative strategies for controlling the apparatus of public security in their domains.
4.3.2 Emergence of separate state quasi-police formations and/or state-supported vigilante groups

Several states have ‘set up their own quasi-police forces of uniformed men’ in response to the crisis of policing in Nigeria. Examples include the Lagos State Traffic Management Authority (LASTMA), the Hisbah (or Islamic morality police) in Kano and other Sharia-implementing states, and the proposed Cross River State Homeland Security Service. More commonly, the state governments have supported local vigilante groups that function as ‘alternative community-based security providers’ or ‘voluntary community policing groups’. The Oodua People’s Congress (OPC), a group that combines Yoruba ethnic nationalism with combating crime and vigilantism, for instance, enjoys protection and patronage from the southwestern state governments, even though it is often in open conflict with the police and the federal government. (p. 120) The Igbo-dominated south-eastern state governments of Abia, Anambra, and Imo actively support another vigilante group, the Bakassi Boys. Indeed, the Anambra government has given special legal recognition to the Bakassi Boys by enacting the Anambra State Vigilante Services Law 2000.

The most remarkable state-supported vigilante group is the Civilian Joint Task Force (CJTF), a group of volunteers fighting the Boko Haram Islamist sect with ‘sticks, machetes and locally made guns’, while providing information to the Nigerian security services about Boko Haram members or suspects. In Borno state, the epicentre of the Boko Haram insurgency, the state government pays stipends to nearly 2,000 ‘trained and vetted members’ of the 24,000-member CJTF in the state, while ‘the vast majority continues to volunteer’.

But even with state government support, the vigilante groups are prone to perpetrate systematic human rights abuses, including violent intimidation and extra-judicial executions, thus creating security challenges that highlight the unresolved debates around devolved police powers in Nigeria.

4.3.3 Official proposals for the establishment of state police

Debates around the establishment of state police are a staple of contemporary constitutional reform discourse. In June 2012, the Nigeria Governors Forum, a platform for all thirty-six state governments, ‘identified the increasing need for state police as a strategy for combating the increasing insecurity in the country’. Although the Northern Governors Forum, an association of the nineteen northern state governments, subsequently dissociated itself from the idea, the proposal for a constitutional amendment to allow for state police has remained strong and persistent. Recent endorsements for the idea have come from the 2014 National Constitutional Conference convened by the Jonathan presidency, from the manifesto of the APC, and from Vice-President Yemi Osinbajo.

In essence, the constitutional model of a single police force has been challenged and violated. Although this unitary policing model might be less contentious if the federal government did its job properly and funded the police adequately, there is an apparent dissonance between the model and the imperatives of policing and security governance in a large and diverse society. The dissonance echoes a broader conflict between constitutional centralism and ethno-religious diversity and sub-nationalism in Nigeria, of which the conflict around Sharia implementation remains a prime example.

(p. 121) 4.4 Sharia implementation

Conflicts about the scope of Sharia law implementation have dominated constitutional politics and ethno-religious relations in the Nigerian federation since before independence in 1960. These conflicts assumed seismic dimensions when twelve majority Muslim northern states, beginning with Zamfara in 1999, extended Sharia implementation from largely personal-status matters into criminal justice and general state administration. Among other changes, the extension of Sharia expands the jurisdiction of the
constitutionally established Sharia Court of Appeal of a state, imposes stringent punishments (including flogging for consumption of alcohol, amputation for theft, and stoning to death for adultery) applicable to Muslims only, and establishes multiple bureaucracies (ministry of religious affairs, Hisbah Board, Zakkat, or Islamic charity commission) to implement Sharia. Predictably, the extension has provoked unprecedented ethno-religious debates.\(^{106}\)

For its proponents, fully-fledged Sharia implementation is consistent with Nigeria’s constitutional federalism and enhances the religious freedoms of Muslims. Sharia implementation, they further argue, would restore Muslims’ pre-colonial Islamic heritage, ensure inter-religious equity by redressing Muslims’ marginalisation under the country’s British-oriented legal system, provide a more popular and accessible alternative to the country’s Western-style justice system, promote moral and cultural rebirth, and stimulate popularly accountable and legitimate governance. What is more, its proponents believe that official Sharia implementation could undercut extremist grassroots Islamist movements, although such a conclusion is belied by the rise of the Boko Haram insurgency in north-eastern Nigeria. Indeed, critics of Sharia implementation disparage it as fundamentally unconstitutional, inherently abusive of human and minority rights, and ethno-politically motivated and divisive.\(^{107}\)

In fact, Sharia extension represents an act of constitutional infidelity and ethno-political defiance against Nigeria’s centralised federalism. Sharia extension is at odds with several provisions of the 1999 Constitution. These include the Constitution’s prohibitions of a ‘State Religion’ at the national and sub-national levels, of ‘inhuman or degrading treatment’, and of religious discrimination.\(^{108}\) In addition, the Constitution limits the jurisdiction of the Sharia Court of Appeal to ‘civil proceedings involving questions of Islamic personal law’, thereby making the conferment of criminal jurisdiction on the court constitutionally dubious.\(^{109}\) Although the Constitution includes a somewhat ambiguous provision that empowers a state legislature to confer additional jurisdiction on the Sharia Court of Appeal, judicial precedents suggest that the provision refers only to additional matters that are within the realm of Islamic personal law already specified under the Constitution.\(^{110}\)

Despite its dubious constitutionality, however, Sharia implementation has been constructive for Nigerian federal decentralisation in several ways.\(^{111}\) Sharia extension in Nigeria represents a bold and innovative attempt to implement Islamic law within the framework of a liberal-democratic order. Democratically elected state governors who rejected theocracy and embraced constitutionalism, pluralism, and peaceful inter-religious co-existence led the implementation of Sharia. Consequently, state Sharia laws preserve the existing structures of elected democratic sub-national government, guarantee an elaborate process of judicial review, largely preclude the imposition of Sharia on non-Muslim residents, avoid the criminalisation of apostasy, and generally follow the constitutionally prescribed procedures regarding legislative codification and ratification of state laws.

The idea of local self-rule inherent in Sharia implementation served to both articulate and assuage a sense of political displacement and alienation felt by the Muslim north following the 1999 transition, when a southern Christian president was elected for the first time in the nation’s history. As key northern leaders saw their hegemony eroded at the centre, they sought political security, autonomy, and legitimacy in the assertion of self-rule via Sharia implementation in their states. Their goal was not to impose Islamic law nationwide or undermine the religious neutrality or plurality of the federal government. Rather, the Sharia programme extends states’ rights in the sphere of religious affairs in accordance with the wishes of a majority of the Muslim electorate in those states.\(^{112}\)
Sharia implementation reinvented and reinvigorated Nigerian federalism in more specific ways. The programme replaced Nigeria’s unitary federalism with an implicit form of asymmetrical federalism, in which Sharia-implementing states exercise federalist prerogatives different from those in operation in other states. Bolaji, however, argues that this is an ‘unusual form of asymmetrical federalism’, because it defies Western-style liberal constitutionalism, intergovernmental bilateralism, or consensus, and the broadly inclusive or non-discriminatory citizenship rights that are typical of federalism.\textsuperscript{113}

Significantly, however, Sharia-based asymmetry is deepened by variations in the institutional design, legal administration, and socio-political practices of Islamic laws across the Sharia-implementing states, ranging from Zamfara’s ‘strict constructionist approach’ to Kaduna’s ‘minimal approach’\textsuperscript{114}. These differences involve not only the nature and manner of specifying Islamic punishments, but also the organisation of the new Sharia-based judicial bureaucracy. By highlighting different versions of the same Islamic vision, such inter-state variations in Sharia-implementation have helped to depolarise the debates around Sharia extension, while highlighting the federalist roles of the states as potential laboratories of local democracy.

(p. 123) At the same time, despite the inter-communal and intergovernmental conflict that immediately followed the extension of Sharia,\textsuperscript{115} the inherent centralism of Nigerian federalism has functioned to moderate Sharia implementation, precluding the aggravation or escalation of Sharia-driven decentralisation and self-rule into full-blown ethno-religious warfare or secessionism. The fragmentation of the Muslim-dominated north into nineteen relatively weak constituent states; the concentration of executive, legislative, juridical, fiscal, and other constitutional powers in the central government; the centralisation of policing and prisons; the prohibition of sectional or sectarian political parties; and the implementation of a federal-character principle regarding the establishment of an ethnically and religiously inclusive federal government, have been consequential in restraining potential excesses by Sharia-implementing states.

Lacking independent police departments, for instance, the Sharia states are constrained to rely partly on the unitary police force for the enforcement of Islamic law.\textsuperscript{116} Similarly, the dependence of the Sharia-practising states on the Federation Account has unleashed powerful economic incentives for these states to moderate their behaviour and avoid excesses that could disintegrate the federation. In addition, the subordination of state courts, including the Sharia Court of Appeal, to federal courts, especially the national Court of Appeal and Supreme Court, means that any Sharia rulings imposed by the sub-national courts could be overturned or redressed at the national level. In practice, the Sharia Court of Appeal has played an impressive role in overturning some of the early draconian Islamic sentences imposed by lower Islamic courts under the new Sharia codes, making further appeals to federal courts unnecessary.\textsuperscript{117}

Reflecting the liberal environment of Sharia implementation in Nigeria, the Sharia project has provoked a robust internal critique within the Muslim community, with critics emphasising the humane and generous, rather than punitive or draconian, traditions of Islamic law. At the same time, Sharia implementation has been assimilated into, and mediated by, a larger ongoing constitutional debate about diverse issues of state-faith relations, sub-national economic and political rights, internal citizenship, and federalism in Nigeria’s deeply divided society.

One important aspect of this constitutional debate involves the appropriateness of geopolitical zones as a widely recognised, yet constitutionally unsupported, basis for channelling and managing the country’s federal diversity.
4.5 Geopolitical zones

The idea behind geopolitical zones is that Nigeria’s multiple states and ethnicities can be grouped into fewer large cultural-territorial entities in order to promote inter-group power-sharing and resource distribution, intergovernmental coordination, or (p. 124) fundamental federalist restructuring. In its most radical formulation, the concept fundamentally challenges a defining constitutional legacy of the military, namely the dissolution of large regional units into smaller constituent state governments. The military created those multiple states in order to break up the country’s major ethnicities, combat ethno-regional secessionism, and consolidate the hegemony of the central government. But critics contend that the states have become too numerous, too weak economically and politically, and too incoherent culturally to function credibly and viably as the constituent units of a robust federal system. This has revived a long-standing debate about the most appropriate federating units for Nigeria, with the idea of reorganising Nigeria into six geopolitical zones (three each in the north and south) becoming particularly influential.

A sub-committee on the executive and the legislature of the Constitution Drafting Committee (CDC) first canvassed division of the country into geopolitical zones during 1975-76. The sub-committee proposed the constitutional division of the country’s states into four zones (two each in the north and south), which could then serve as a basis for rotating the newly proposed position of executive federal president. The proposal was eventually abandoned ‘for the more realistic’ and integrative provision, enshrined in the 1979 and subsequent constitutions, that requires the President to be elected with broad support across states of the federation.

Nonetheless, the idea of zoning was resuscitated by the ruling party in the Second Nigerian Republic (1979–83), the National Party of Nigeria (NPN), which elaborately distributed political positions (party chairman, the federal presidency, vice-presidency, and leadership positions in the federal bicameral legislature) on a geopolitical basis. The idea of zoning received further recognition at a time of great ethno-political turbulence and ferment in 1995, when the military head of state, General Sani Abacha, announced a thirty-year scheme for rotating the following six political positions among six geopolitical zones: president, vice-president, prime minister, deputy prime minister, senate president, and speaker of the House of Representatives.

Although General Abacha’s zoning scheme was abandoned following his sudden death in 1998, the principle of zoning continued to resonate powerfully in Nigerian constitutional debates and political practices. Following the disengagement of the military in 1999, for instance, the federal administration often appointed six federal ministers to represent each of the geopolitical zones. This was in addition to the implementation of the constitutional requirement that the federal cabinet should include a minister from among the indigenes of each state of the federation. The PDP and APC, like the NPN in the Second Republic, have also adopted elaborate zoning and rotation formulas that allocate key political positions to ethno-regional zones or constituencies on a rotational basis. This is in spite of constitutional provisions requiring political parties to avoid ‘any ethnic or religious connotation’ and to undertake ‘periodical election’ of their principal officers and executives ‘on a democratic basis’.

Zoning is now widely used to distribute various public positions and resources, especially in situations (e.g., appointments to the Supreme Court) where it is unfeasible or undesirable to insist on the representation of each of the thirty-six states. The zones are also officially recognised and used by the Federal Character Commission, which is the agency responsible for monitoring and enforcing ‘fairness and equity in the distribution of
public posts and socio-economic infrastructures among the various federating units of the Federal Republic of Nigeria’.  

At the same time, while it has remained a popular feature of party politics, public policy, and constitutional debates, the idea of zoning has been described by critics as ‘extra-constitutional’, ‘untenable’, ‘glaringly unconstitutional’, and/or subversive of the centrist idea of making tractable states, rather than large and potentially disruptive ethnic regions, the primary organising units of the federation. The fear that the revalorisation or institutionalisation of large regional identities could contribute to the centrifugal destabilisation of Nigeria is reinforced by the crystallisation of current major ethno-political conflicts around the geopolitical zones. These include the Boko Haram insurgency in the north-east, militant resource nationalism in the oil-rich Niger Delta or South-South, violent clashes between Muslim herdsmen and Christian crop farmers in the north-central or Middle Belt zone, and the resurgence of Igbo-based Biafran secessionist agitation in the south-east.

Echoing the view that the zoning is unconstitutional, the Lagos State Government in a memorandum to the 2014 Nigerian National Constitutional Conference declared:

> There are said to be six geopolitical zones in the country: this nomenclature is unknown to the constitution and yet it continues to feature in national discourse. We do not recommend the zones ... as a feasible structure of government for Nigeria. It is folly to believe that the coincidence of geography dictates anything but convenience; we recommend that Nigeria should adhere to constitutional federalism which to date only prescribes states, and desist from the use of zones for the planning or execution of constitutional authority.

Yet while a full-fledged reorganisation of Nigeria into six geopolitical zones is perhaps unlikely and even undesirable, the idea of zoning, although constitutionally dubious, retains significant political appeal for multiple reasons. Although there is very little consensus on an appropriate internal territorial configuration for Nigeria, the six-zone structure is arguably more politically coherent, and more culturally and historically embedded, than many other principles for demarcating the federation. The zones, for instance, do not vary too widely in their populations; comprise between five to seven states each; are equally distributed between north and south; and include three relatively homogeneous, ethnic majority-based zones (Hausa-Fulani north-west, Yoruba south-west, and Igbo south-east) and three more ethnically heterogeneous, mostly ethnic minority-populated areas (north-east, north-central, and south-south (p. 126) or Niger Delta). Indeed, the historian John Paden describes the zones as an enduring reality that can be traced to the earliest British colonial perceptions of the country.

The geopolitical zones represent a less combustible fault-line than the country’s other macro-identity boundaries, including north versus south, Christian versus Muslim, the three-region federal structure bequeathed by the British, or the four-region system established during the First Republic. Another potential advantage of the geopolitical zones involves their ability to mitigate the proliferation of practices that discriminate between indigenes and non-indigenes of the states, which has been one of the more perverse consequences of the multiplication of constituent states. Furthermore, as previously
indicated, geopolitical zones represent a credible matrix for inter-group representation and
distribution where it is imprudent to implement the constitutionally entrenched principle of
inter-state equality.

Finally, even those who reject the idea of replacing states with zones as Nigeria’s primary
federating units nevertheless acknowledge that the zones can become a viable basis for
intergovernmental cooperation and developmental coordination among geographically
contiguous and/or culturally homogeneous states. The promise of such coordination is
already evident in the establishment of bodies such as the Development Agenda for Western
Nigeria (DAWN) Commission, the Bayelsa, Rivers, Akwa-Ibom, Cross River, Edo and Delta
(BRACED) Commission (or the South–South Governors Forum), and the South-East
Governors Forum.

5. Assessing the Promise and Perils of Constitutional Infidelity

This discussion of federalism-related constitutional infidelity in Nigeria suggests that it
involves varying degrees and patterns of deviation from perceived constitutionality by
contending centripetal and centrifugal forces, leading to politically constructive or
functional as well as corrosive or dysfunctional consequences. To reiterate, constitutional
infidelity in Nigeria covers the spectrum from practices that are clearly unconstitutional, to
behaviours that are constitutionally ambiguous, and to activities that are arguably not
unconstitutional in a legal sense but may be contrary to the underlying spirit or intent of
the constitution.

However, deciding where each of the five Nigerian cases of infidelity belongs in the
spectrum is not a clear-cut exercise, especially as there has been relatively limited (p. 127)
adjudication of conflicts over constitutional infidelity. Such lack of systematic judicial
engagement reflects several things, including relatively strict rules of standing in Nigerian
courts, the exclusive jurisdiction of the Nigerian Supreme Court over intragovernmental
and intergovernmental disputes (in addition to its function as a final appellate court in all
cases), the absence of a specialised Constitutional Court, an entrenched ‘culture of judicial
avoidance’ of ethno-political entanglements, and a systemic deterioration of the
capacities of Nigerian institutions generally, including the courts.

Nonetheless, as already noted, the courts have proclaimed the federal government’s
diversion of centrally collected revenues and the states’ abrogation of democratically
elected councils unconstitutional, even if they have not complied with the decisions.
Similarly, the Supreme Court has declared states’ creation of new local government areas
without federal ratification inchoate and incomplete, but not illegal. However, the decision
of the states to go ahead and operate such inchoate localities, albeit under a different name,
represents a clear act of constitutional defiance.

Sharia extension seems to be the most constitutionally ambiguous of all the cases of
infidelity reviewed in this chapter, with Nigerian experts expressing radically divergent
opinions regarding the extension’s constitutionality. In AG Kano State v AG
Federation, the Supreme Court sidestepped an opportunity to pronounce on the legality
of Kano State’s Hisbah organisation, following a clampdown by the inspector-general of
police on the organisation’s controversial activities as an Islamic morality police in the
cosmopolitan city of Kano. The Court ruled that the suit involved an administrative dispute
between agents of the Kano and federal governments: it was, therefore, outside its original
jurisdiction to arbitrate federal-state constitutional conflicts. In essence, Sharia
implementation persists, and continues to be broadly tolerated, in a grey zone of
constitutional ambiguity. Similarly, the disproportionate weight given to the inter-unit
equality principle in revenue allocation, at the expense of other constitutionally and
statutorily recognised distributive principles, is unlikely to be accepted for (or even subjected to) judicial review.

The other major instances of infidelity reviewed here are not unconstitutional in the legal sense, but demonstrate a lack of fealty to the underlying centrist philosophy and design of the Constitution. In particular, the growing recognition of geopolitical zones challenges the constitutional policy of creating multiple constituent states as a way of undercutting the mobilisation of major ethno-regional groups and consolidating the hegemony of the central government. Similarly, sub-national funding of, and increasing influence over, the national police (among other sub-national incursions into the policing sector) contradicts the constitutional policy of over-centralising control of the security apparatus in the central executive. Nevertheless, such attempted decentralisation of security sector governance is arguably more consistent with Nigeria’s federal character.

Indeed, constitutional infidelity has contributed in multiple ways to the robustness, flexibility and resilience of the Nigerian federation, despite multiple challenges to national stability. Constitutional infidelity has highlighted dissonant elements of Nigeria’s formal constitutional design. Specifically, it has underscored the discrepancy between Nigeria’s constitutional centralism and societal pluralism. Such infidelity has highlighted decentralisation pressures in key areas of governance, including policing, state-religion relations, local government structures, and the internal territorial configuration of the federation. It has, in particular, demonstrated the disjuncture between unitary police structures and the imperatives of security in a diverse, multi-ethnic society.

Constitutional infidelity has challenged and curtailed the formal centralisation of Nigeria’s federal system. It has retrieved a significant amount of sub-national political autonomy through practices like sub-national security provisioning, local government reorganisation, the assertion of cultural or religious self-determination, and the reconsolidation of regional identity boundaries. In a context of a relatively rigid federal constitution and unfulfilled formal constitutional reform agendas, constitutional infidelity has functioned as a veritable source of flexibility and constitutionally significant political change. High ethno-political stakes and combustible fault-lines have, indeed, impeded the development of the national consensus required to achieve formal national constitutional settlements or amendments on contentious matters like the status of Sharia law, the reorganisation of sub-national government boundaries, and the devolution of police powers. However, constitutional infidelity has enabled significant and largely benign practical changes in these areas without the symbolic conflicts and protracted procedures associated with formal constitutional change.

In promoting informal but constitutionally significant change, constitutional infidelity may be providing an experimental template or political laboratory for future formal constitutional change. For instance, constitutional infidelity has highlighted the potential challenges and opportunities of current constitutional change proposals such as those concerning state policing and Sharia extension. By providing practical experiences that can inform future constitutional reform proposals, constitutional infidelity can help shape the evolution of a new, more authentic, and durable formal constitutional settlement and order in Nigeria.

Yet constitutional infidelity embodies multiple risks, costs, and challenges. In the context of Nigeria’s centralised constitution, it has taken not only the form of decentralist challenges to central authority, but also of aggrandising strategies by the centre against the states, and by the states against local authorities. Constitutional infidelity has abetted Nigeria’s fiscal
centralism and subverted the political and fiscal autonomy of local authorities, while reinforcing a corrupt and illiberal neo-patrimonial culture.

Overall, while infidelity has produced several benign consequences, including constructive challenges and remediation to the overcentralised polity, it may be an overgeneralisation to conclude definitively that infidelity is more beneficial than detrimental to Nigeria, or that sub-national infidelity is more constructive than central government infidelity. Ultimately, nearly two decades of constitutional infidelity since (p. 129) 1999 have not redressed the basic pathologies of Nigeria’s federal system, which remains fundamentally unbalanced, breathtakingly corrupt, profoundly inefficient, and deeply contentious.

6. Conclusion

Constitutional infidelity in Nigerian federalism is rampant, consequential, and multifaceted. It is rooted in several things, including the dissonance between formal constitutional centralism and the centrifugal dynamics inherent in a multi-ethnic society, the extensive opportunities for informal and unconstitutional behaviour in a neo-patrimonial context, the difficulty of formal constitutional change, and the ambiguities, contradictions, and compromises written into the formal constitutional document.

But constitutional infidelity in Nigeria takes many forms. In particular, it is possible to identify decentralist and centralist forms of constitutional infidelity, variations and nuances in the extent of deviation from constitutionality, and perverse and benign renditions and consequences of infidelity. While discussions of constitutional infidelity have often focused on its perverse nature and effects, this chapter has analysed some of its more benign, decentralist ramifications in an overcentralised political context. At the same time, the multiple risks, abuses, and challenges associated with constitutional infidelity suggest that it is a problematic and incomplete strategy for the reform, development, and decentralisation of Nigerian federalism.

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Footnotes:
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3 Seidman (n. 1).


7 Bridges (n. 2).

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9 Bridges (n. 2).

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11 Seidman (n. 1) 5.

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