

IMPLEMENTATION AND ENFORCEMENT OF THE FEDERAL CHARACTER PRINCIPLE IN NIGERIA*

Abstract

Federal character principle is one of the means devised by the Nigerian nationalists to prevent the [pre]dominance of persons from a few states or ethnic groups in the political governance of Nigeria by ensuring that the composition of the Government of the Federation reflects the federal character of Nigeria. This principle, which is one of the autochthonous features of Nigerian federation, became formally institutionalized in 1979 when the framers of the defunct 1979 Constitution introduced it into the Nigerian corpus juris. However, the utility of the federal character principle has been marred and mired by its poor implementation over the years especially in the recent time. This paper examined the implementation and enforcement of the federal character principle in the political governance of Nigeria so as to ascertain the reason why the principle is more honoured in breach than in observation. The research methodology adopted by the researcher was purely doctrinal whereas the approaches employed herein are chiefly analytical, descriptive and prescriptive. This paper found that the principle of federal character is subject to persistent abuse because it is contained in Chapter II of the 1999 Constitution, as amended which is ordinarily non-justiciable. On the alternative, this paper made a case for the amendment of the Constitution so as to make the federal character principle wholly justiciable. On the other hand, this paper identified the various ways of enforcing compliance with the federal character principle notwithstanding its non-justiciable status.

Keywords: Commission, Constitution, Enforcement, Implementation, Nigeria, Principle.

1. Introduction

One of the basic considerations for adopting a federal System of government is the existence of groups with different ethnic, religious and political backgrounds within a country.¹ And so, every federation devices means of managing its pluralism so as to ensure fair and equal participation of various interest groups in its political governance and Nigeria is not an exception.² Federal character principle, a form of affirmative action,³ is one of the means devised by the Nigerian nationalists to ensure fair and equitable representation and participation of various geo-ethnic groups in Nigeria in the political governance of Nigeria.⁴ Federal character principle demands that the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner that reflect the federal character of Nigeria in order to promote national unity. In a nutshell, federal character principle seeks to prevent the [pre]dominance of persons from one or a few states or from one or a few ethnic groups in the running of the Government of the Federation or any of its agencies. Although the federal character principle forms part of the 1999 Constitution, it has remained substantially non-justiciable because it is enshrined in its Chapter II, which is rendered non-justiciable by Section 6 (6) (c) of the Constitution. However, the federal character principle will become justiciable where the Constitution otherwise provides that it shall be justiciable.⁵ It

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¹ J Erk, 'Still in Search of the Federal Spirit: The US Supreme Court and Federalism' in A G Gagnon *et al* (eds) *Understanding Federalism and Federation* (London: Routledge, 2016) pp. 87-104 at 88.

² In *Buhari v. INEC* (2008) 19 NWLR (PT. 1120) 246 at 427, Niki Tobi (JSC) noted that 'Nigeria is one vast and huge country made up of so many diversities in terms of tribe, cultures, sociology, anthropology.'

³ C K Agamo, 'Affirmative Action in Nigeria' in O Dupper and K Sankaran (eds) *Affirmative Action: A view from the Global South* (Stellenbosch, SA: AFRICAN SUN MeDIA, 2014) pp.229-252 at 234.

⁴ Federalism is a system of government often resorted to in a plural society, especially in a multi-ethnic country so as to preserve the distinctive identities and the core values of the various ethnic groups that make up the country and to accommodate their peculiar needs.

⁵ GN Okeke and C Okeke 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria', OSR Journal Of Humanities And Social Science (IOSR - JHSS) Volume 7, Issue 6 (Jan. - Feb. 2013),

shall also become justiciable where the Constitution empowers the National Assembly to implement the principle of federal character via legislation.⁶ The task of promoting, monitoring and enforcing compliance with the federal character principle is entrusted with the Federal Character Commission, one of the federal executive bodies established by Section 153 of the Constitution. The powers and procedures of the Commission are spelt out in Part I C of the Third Schedule to the 1999 Constitution⁷ and the relevant sections of the Federal Character Commission Act.⁸ The Commission is specifically empowered to ‘take such legal measures, including ‘prosecution’ of the head or staff of any Ministry or government body or agency which fails to comply with any federal character principle or formula prescribed or adopted by the Commission.’⁹ However, over the years, the Commission has partially failed to live up to its responsibility for promoting, monitoring and enforcing compliance with the federal character principle, largely because of the lack of independence of the Commission, which visibly appears to be a mere appendage of the executive arm of the government. This has not only resulted in the mind boggling abuse of the federal character principle especially in the recent time,¹⁰ but has also led to the rising threat to the national unity: the very mischief which the federal character principle was invented to curb. This state of affairs has once again brought the issue of implementation and enforcement of the federal character principle on the front burner of our national discourse.

2. Introduction of the Federal Character Principle into Nigeria’s Body of Laws

The introduction of the federal character principle into the Nigerian body of laws [*corpus juris*] began in 1979 when the framers of the defunct 1979 Constitution introduced the Principle into that Constitution; and since then, federal character principle has become one of the permanent features of the successive constitutions of Nigeria. Section 318 (1) of the 1999 Constitution defines federal character of Nigeria as ‘the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation as expressed in section 14 (3) and (4) of the Constitution.’ This provision does not only identify the basic utilitarian function of the federal character principle, *to wit*, the desire to foster national unity and loyalty, but also incorporates subsections (3) and (4) of section 14 of the Constitution, which, in fact, states what the federal character principle entails. On the one hand, subsection (3) of the said section 14 of the Constitution provides that: ‘The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that Government or in any of its agencies’. On the other hand, subsection (4) of the said section 14 states that: ‘The composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation’.

It is clear from the above provisions that the federal character principle applies to the three tiers of government which Nigeria currently operates, namely, federal, state and local governments. While section 14 (3) of the Constitution solely provides for the application of the federal character principle at the federal level, section

PP 9 – 14 at 10, available at <<http://iosrjournals.org/iosr-jhss/papers/Vol7-issue6/B0760914.pdf?id=6018>> (last accessed 30 August 2016).

⁶ *Att.-Gen., Ondo v. Att.-Gen., Federation* (2002) FWRL (Pt. 111) 1973 at 2138.

⁷ 1999 Constitution, Third Schedule, Part I C, item 8(1).

⁸ Federal Character Commission Act, Cap. F7, L.F.N. 2004.

⁹ 1999 Constitution, Third Schedule, Part I C, item 8(1) (c).

¹⁰ According to Bisi Lawrence, ‘never before has our history of governance recorded such a disregard, such outright disdain, for the ‘Federal Character’ policy of the nation.’ B Lawrence, ‘Unconstitutional Appointments, Vanguard (Nigeria), September 3, 2016, available at <<http://www.vanguardngr.com/2016/09/unconstitutional-appointments/>> (last accessed 3 September 2016).

14 (4) of the Constitution deals with the operation of the federal character principle at both state and local government levels. It is, however, submitted that the use of the term ‘federal character’ to describe geographical balance and spread in the composition of the government of a state and a local government council, or any of the agencies of such government or council is a clear misnomer. It is suggested that the terms ‘state character’ and ‘local character’ should be respectively adopted in the place of ‘federal character’ in relation to a state government and local government. The constitution also established the Federal Character Commission which is saddled with the responsibility for promoting, monitoring and compelling compliance with the federal character principle.¹¹ This Commission is regulated jointly by Part I C of the Third Schedule to the Constitution and the Federal Character Commission Act.¹² According to item 8 (1) (a) of the said Part I C, in giving effect to the provision of section 14 (3) and (4) quoted hereinbefore, the Commission shall have the power to: ‘Work out an equitable formula subject to the approval of the National Assembly for the distribution of all cadres of posts in the public service of the Federation and of the States, the armed forces of the Federation, the Nigeria Police Force and other government security agencies, government owned companies and parastatals of the states’. In keeping with the above provision, a subsidiary legislation, namely, Guiding Principles and Formulae for the Distribution of All Cadres of Posts in the Civil and the Public Services of the Federation and of the States,¹³ was formulated by the Commission with the approval of the National Assembly. This subsidiary legislation clearly states the ways and manners in which the federal character principle should be implemented in Nigeria both at the federal and state levels.

3. Scope of the Federal Character Principle

The federal character principle as provided for in section 14(3) of the Constitution applies mainly to appointive positions and does not, as a matter of course, extend to elective positions, which are ordinarily determined by the relevant electorates. Indeed, this is one of the limitations on the operation of federal character principle in Nigeria. Hence, it is possible for the President and the presiding officers of both houses of the National Assembly to come from the same geographical section of the country contrary to the notion of the federal character of Nigeria. In fact, this is what currently obtains in the country, because the trio of the President of Nigeria, the Senate President and the Speaker of the House of Representatives are all from the northern region of the country. There is, however, an informal arrangement within all the frontline political parties in the country under which key elective positions within the National Assembly and the Federal Executive are evenly zoned to various sections of the country in keeping with the federal character of Nigeria.¹⁴ But, these arrangements are usually honoured more in the breach than in the observance by overzealous party men and women who would stop at nothing at pursuing their selfish ambitions. Cases in point where personal ambitions overrode party’s zoning arrangement include the emergence of Tambulwal, a northerner of North West Geopolitical Zone, as the Speaker of the Seventh House of Representatives contrary to the zoning formula of Peoples Democratic Party which zoned the position to the South West Geopolitical Zone.¹⁵ Also the emergence of former President Goodluck Jonathan, a southerner of South South Geopolitical Zone, as the presidential candidate of Peoples Democratic Party in the 2011 Presidential Election was an outright violation of the zoning formula of the Peoples Democratic Party which hitherto zoned the position to the North.¹⁶

¹¹ 1999 Constitution, sec. 153 (1) (c).

¹² Cap. F7, L.F.N. 2004.

¹³ Federal Character Commission (Establishment, etc.) Act, Subsidiary Legislation, Guiding Principles and Formulae for the Distribution of All Cadres of Posts, 1997.

¹⁴ Note that by sec. 223 (1) of the 1999 Constitution, the constitution and rules of political a party shall ‘ensure that the members of the executive committee or other governing body of the political party reflect the federal character of Nigeria.’

¹⁵ The same scenario played out when Yakubu Dogara, a northerner of north central geopolitical zone, emerged as the Speaker of the Eighth House of Representative contrary to the zoning formula of the All Progressive Congress which zoned the position to the South West geopolitical Zone.

¹⁶ It shall be noted that the People Democratic Party has an informal zoning formula of alternating presidential ticket between the northern and southern Nigeria after every eight years in keeping the federal character of Nigeria.

It is important to note that the federal character principle is traditionally not applicable in the selection and appointment of the presiding officers of the major federal courts, which appointments are usually predicated on seniority at the bench. In view of this, it is possible for the trio of Chief Judge of the Federal High Court, the President of the Court of Appeal and the Chief Justice of Nigeria to hail from the same geographical section of the country. In fact, this was the case in the country until recently because the trio of the Chief Judge of the Federal High Court, the President of the Court of Appeal and the Chief Justice of Nigeria were all northerners. Cases like this, it is submitted, have not only raised doubt as to the sincerity of the application of the federal character of Nigeria, but have almost made a mockery of the whole thing. Finally, the federal character principle provided for and contemplated in the Constitution does not extend to geographical spread in the distribution of the available federal infrastructure, parastatals and institutions, and this may lead to and has, in fact, led to the concentration of the major federal infrastructure, parastatals and institutions in few geopolitical zones of the country. In a bid to fill this fundamental lacuna, the Federal Character Commission Act empowers the Commission ‘to work out an equitable formula... for distribution of socio-economic services, amenities and infrastructural facilities’¹⁷ in a manner that reflect the federal Character of Nigeria. Similarly, the Act empowers the Commission to enforce compliance with its guidelines and formulae in areas of distribution of infrastructural facilities, socio- economic amenities and other indices.¹⁸

4. Non-Justiciability of the Federal Character Principle

The federal character principle per se is non-justiciable because it is contained in Chapter II of the Constitution which is rendered non-justiciable by section 6(6) (c) of the Constitution. A piece of legislation or any part of it is said to be non-justiciable if it cannot be positively enforced by courts within a given jurisdiction.¹⁹ Subsection (6) (c) of section 6 of the Constitution which deals with the judicial powers of courts specifically provides that the judicial powers vested in accordance with the section shall not: ‘Except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution’. This provision clearly ousts the jurisdiction of Nigerian courts to adjudicate on any matter relating to the provisions of Chapter II of the Constitution. Indeed, this is a clear detour from the very essence and nature of a constitution as the supreme law that has binding force on all authorities and persons within a given legal system.²⁰ As far as the provisions of its Chapter II are concerned, the 1999 Constitution is not constitutive, but merely declaratory and therefore non-justiciable. This point was amply made by the Supreme Court in the case of *Att.-G Ondo v. Att.-G Federation*,²¹ where the Court held that those objectives and principles provided for under Chapter II of the Constitution remain mere declarations. Therefore, the provisions of Chapter II of the Constitution are not only non-justiciable, but are devoid of constitutional character.

However, the non-justiciable status of the federal character principle and other principles contained in Chapter II of the Constitution is neither total nor absolute since they could become justiciable under certain circumstances. This is, in fact, evident from section 6 (6) (c) of the Constitution itself, which began with the proviso ‘except as otherwise provided by this Constitution.’ This unambiguous proviso simply means that if the Constitution otherwise provides in another section, the provisions of Chapter II, including the federal

¹⁷ Federal Character Commission Act, sec. 4(d) (i).

¹⁸ *Id.*, sec. 5(c).

¹⁹ GN Okeke and C Okeke, above at note 5 at 11. See also *Yisa vs Ojo Local Government* (2004) FWLR (194) 439 at 454. In the case of *Ugwu v. Ararume* (2007) 12NWLR (Pt. 1048)367, the Supreme Court held (at 496) that ‘enactment is justiciable if only it can be properly pursued before a court of law or tribunal for a decision. But where a court or tribunal cannot enforce such enactment then it becomes non-justiciable. This means that the Executive does not have to comply with the enactment unless and until the legislature enacts specific law for its enforcement. Examples of such enactments in Nigeria are particularly those contained in Chapter II of the 1999 Constitution.’

²⁰ J. Akande: Introduction to the Nigerian Constitution (London: Sweet & Maxwell: 1982), p. 1.

²¹ Above at note 6 at 2135.

character principle, shall become justiciable. This point was amply made clear in the case of *Federal Republic of Nigeria V. Aneche & 3 ors*, where Niki Tobi (JSC) observed as follows: ‘In my humble view section 6 (6) (c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words ‘except as otherwise provides by this Constitution.’ This mean that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter 11 justiciable, it will be so interpreted by the courts’. There are two ways by which the federal character principle could be made justiciable in the light of the proviso to section 6 (6) (c) of the Constitution.²² First, the federal character principle shall automatically become justiciable where the Constitution otherwise provides or refers to the federal character principle in any justiciable section of the Constitution. As a matter of law, all other parts of the Constitution other than its Preamble and Chapter II are, as a matter of course, justiciable. A casual perusal of the provisions of the Constitution readily shows that the Constitution otherwise provides in a number of places that the federal character principle shall be justiciable. For example, subsection (3) of section 147 of the Constitution provides that the President shall conform to the federal character principle while appointing his ministers. In fact, the proviso to this subsection specifically mandates the President to appoint at least one Minister from each State, who shall be an indigene of such State.

Similarly, section 171 (5) of the Constitution makes it mandatory that the President shall comply with the federal character principle in the appointment of other key public officers of the Government of the Federation including the ambassadors, high commissioners and permanent secretaries or heads of any extra-ministerial departments of the government of the federation. Although the President is not under obligation to ensure that the appointments under section 171 (2) get to every state as is the case with the appointment of the ministers of the government of the federation, it is expected that such appointments should be spread across the states as much as practicable.²³ Against this backdrop, it is submitted, for example, that in the case of the appointment of the ambassadors that the President shall appoint at least one ambassador from each state of the federation, who shall be an indigene of such state. This was, in fact, the thinking of the Senate when it refused to confirm the 47 ambassadorial nominees forwarded to it by President Buhari for confirmation. According to the Senate, the nomination was ‘lacking the principle of federal character’ because indigenes of 4 states, namely, Bayelsa, Ebonyi, Ondo and Plateau, were not included in the list of the nominees.²⁴ The contention of the Federal Government that the 4 states ‘omitted from the list... lacked qualified candidates’²⁵ does not follow because as we shall see below, the principle of federal character often referred to as ‘quota system’ is not merit-driven, but wholly predicated on its utility in giving every section of the country the sense of belonging.

Furthermore, section 217 (3) of the Constitution provides that the composition of the officer corps and other ranks of the armed forces of the federation shall reflect the federal character of Nigeria. By this provision, the President or anybody acting on his behalf is obligated to comply with the federal character principle in the appointment of the officer corps and other ranks of the armed forces of the federation. It is, however, not very clear why this requirement is restricted to the armed forces only and does not specifically extend to other security outfits like Nigeria Police Force, Nigerian Immigration and Nigerian Customs. This lacuna has, however, been cured by the Guiding Principles and Formulae for the Distribution of All Cadres of Posts, a subsidiary legislation formulated by the Federal Character Commission with the approval of the National

²² GN Okeke and C Okeke, above at note 5 at 11.

²³ Federal Character Commission (Establishment, etc.) Act, Subsidiary Legislation, above at note 13, secs. 1 and 4.

²⁴ Saharareports, ‘We're Disappointed at Senate Over Ambassadorial Nominees, Presidency Says’, *Saharareports*, Jun 27, 2016, available at <<http://saharareporters.com/2016/06/27/were-disappointed-senate-over-ambassadorial-nominees-presidency-says>> (last accessed 31 August 2016).

²⁵ *Id.*

Assembly. This Guideline, among other things, stipulates the formula for the distribution of all cadres of posts in the armed forces of the federation, the Nigeria Police Force and other security agencies.²⁶

The second way by which the federal character principle could become justiciable is where the Constitution in its justiciable sections empowers the National Assembly to implement the provisions of the Chapter II of the Constitution via an ordinary legislation. A typical example of this is item 60 (a) of the Exclusive Legislative List under Part 1 of the Second Schedule to the Constitution which empowers the National Assembly to make laws with respect to ‘the establishment and regulation of authorities for the Federation or any part thereof... to promote and enforce the observance of the Fundamental Objectives and Directive Principle contained in this Constitution.’ In view of the above provision, the federal character principle and indeed any other fundamental objectives and directive principles contained in the Constitution shall become justiciable if the National Assembly enacted any law to promote and enforce their observance pursuant to the said item 60 (a) of the Exclusive Legislative List. Thus, according to Mohammed Uwais, CJN: ‘[I]tem 60 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria specifically empowers the National Assembly to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles... The breath-taking possibilities created by this provision have sadly been obscured and negated by non-observance’.²⁷ One example of such legislation is the Federal Character Commission Act, Cap, F7, LFN 2004, which empowers the Federal Character Commission established by Section 153 of the Constitution to promote and enforce the observance of the Federal Character principle. It is for this reason that the federal character principles and formulae laid down in the Act or prescribed in the Guiding Principles and Formulae for the Distribution of All Cadres of Posts formulated by the Commission pursuant to section 4(1) of the Act are justiciable per se.

5. Implementation of the Federal Character Principle

Section 13 of the Constitution makes the duty and responsibility for the implementation of the federal character principle a joint task of the three organs of government. According to the said section 13, which is the introductory section of Chapter II of the Constitution, ‘[i]t shall be the duty and responsibility of all organs of government and all authorities and persons, exercising legislative, executive and judicial powers to conform to, observe and apply the provisions of this Chapter of the Constitution.’²⁸ The federal character principle, as noted above, is provided for in section 14, which is the second section in Chapter II of the Constitution. However, section 13 is not only a mere general provision, but also purely declaratory because it created responsibility without liability.²⁹ This is so because as we have noted above the said Chapter II of the Constitution is ordinarily non-justiciable. Although section 13 of the Constitution apparently make the responsibility for the implementation of the joint task of the three arms of government, it appears that the Constitution only imposes specific and enforceable duty on the executive arm of government *vis-à-vis* the implementation of the federal character principle. This is evident from the various sections of the Constitution, which we examined above. In fact, this is in consonance with the traditional role of the executive arm of government, *to wit*, implementation and execution of governmental policies as contained in the laws and other instruments enacted by the legislative arm of government.³⁰ Also, item 7 (2) (c) of Part I C of the Third Schedule to the Constitution makes it clear that it is only the agents of the executive arm of government that could be held responsible for non-compliance with the federal character principle.

Notwithstanding the utility of the federal character principle in the sustenance of the corporate existence of Nigeria, there has been incessant abuse of the principle especially in the recent time. In fact, no single issue

²⁶ Federal Character Commission (Establishment, etc.) Act, Subsidiary Legislation, above at note 13.

²⁷ As quoted in GN Okeke and C Okeke, above at note 5 at 12.

²⁸ 1999 Constitution, Sec. 13.

²⁹ GN Okeke and C Okeke, above at note 5 at 12.

³⁰ 1999 Constitution, ses 147 (3), 171(5), 192(2), 197(3) and 217 (3).

appears to have attracted as much attention in the recent time as the issue of abuse of the federal character principle. However, this did not come as a surprise to any conscious follower of the national politics since the emergence of Muhammadu Buhari as the executive President of Nigeria. In fact, in what could be termed the policy statement of his administration, he publicly declared in faraway United States during one of his official visits that the constituencies that gave him 97% votes during the election cannot in all honesty be treated like the constituencies that gave him 5%.³¹ Indeed, this inarticulate assertion left no one in doubt that his obligation to conform and observe the federal character principle in the composition of the government of the federation and its agencies will be honoured more in the breach than in the observance. Little wonder then that out of over 40 initial appointments Buhari made, only a few persons from the southern region of the country were appointed. Worst still, not even a single person from South East Geopolitical Zone benefited from the said appointments.³² In view of this, Reno Omokri noted as follows: '[t]hose who thought the President was joking... when he said 'the constituents, for example, that gave me 97% cannot in all honesty be treated on some issues with constituencies that gave me 5%' now know that our President was speaking the truth, the whole truth and nothing but the truth.'³³

While defending his lopsided appointments, President Buhari boasted in an interview with BBC Hausa Service that he has constitutional right to appoint only those he could trust. According to him, the Constitution allowed him full control over the choice of his closest officials.³⁴ Unfortunately, most of those appointees which he classified as his closest officials are among those that the Constitution specifically mandates the President to comply with the federal character principle in their appointments. For example, section 171 (5) of the Constitution provides that the President 'shall have regard to the federal character principle and the need to promote national unity' while appointing 'any office on the personal staff of the President'³⁵ including the Secretary to the Government of the Federation.³⁶ The attitude of the President Buhari-led federal government towards the federal character principle constitutes an outright defeat of the utilitarian function of the federal character principle – promotion of national unity and integration. And this has resulted in the rising threats to the corporate existence of Nigeria with various segments of the country calling for disintegration of the country.³⁷ This point was aptly made by Professor Daudah Sale who noted as follow: 'The [Buhari] administration has not been adhering to the principle of federal character... The

³¹ Sahara Reporters, 'Buhari's Statement At The US Institute Of Peace That Made Everyone Cringe', *Sahara Reporters*, July 25, 2015, available at < <http://saharareporters.com/2015/07/25/buhari%E2%80%99s-statement-us-institute-peace-made-everyone-criinge-0>> (last accessed 10 October 2016).

³² Omeiza Ajayi, 'Recession: Hold Buhari responsible – Ezeife', *Vanguard*, October 3, 2016, available at <<http://www.vanguardngr.com/2016/10/recession-hold-buhari-responsible-ezeife/>> (last accessed 10 October 2016). In December 2016, *Bloomberg*, a reputable foreign new medium observed that '[o]ut of 17 top positions in the [Nigerian] army, navy, air force and other security agencies, (only) three are from the south. Reno Omokri, 'President Buhari's Double Standard Syndrome', *This Day*, 7/1/17, available at <<http://www.thisdaylive.com/index.php/2017/01/07/president-buharis-double-standard-syndrome/>> (last accessed 10 October 2016).

³³ Reno Omokri, 'President Buhari's Double Standard Syndrome', *This Day*, 7/1/17, available at <<http://www.thisdaylive.com/index.php/2017/01/07/president-buharis-double-standard-syndrome/>> (last accessed 10 October 2016).

³⁴ Wale Odunsi, 'Why I appointed more Northerners' – Buhari finally opens up', *Daily post*, September 9, 2015, available at <<http://dailypost.ng/2015/09/09/why-i-appointed-more-northerners-buhari-finally-opens-up/>> (last accessed 10 October 2016).

³⁵ 1999 Constitution. sec. 171 (2) (e).

³⁶ *Id.*, sec. 171 (2) (a)

³⁷ The conduct of President Buhari is clearly inconsistent with the vision statement of the of the Federal Character Commission, *to wit*, 'building a strong, virile and indivisible nation, united in purpose and to which every citizen feels proud to belong, founded on the philosophy of fairness, equity and justice'. See O J George, *Impact of Culture on the Transfer of Management Practices in Former British Colonies* (Xlibris Corporation, 2011), p.186.

imbalance in appointments is fuelling agitations and it is not good for Nigeria.³⁸ It has also been observed that since the end of Nigerian Civil War, Nigerian corporate existence has never witnessed the kind of threats it is currently facing.³⁹ The situation got to its peak in October 2015 when the leaders of South West Geopolitical Zone threatened to secede from Nigeria.⁴⁰ A threat like this should not be taken lightly considering the unifying role the South West Geopolitical Zone has been playing in Nigeria's fragile unity.

6. Enforcement of the Federal Character Principle

The mindboggling abuse of the federal character principle in the recent time has once again brought the issue of enforcement of the federal character principle on the front burner of our national discourse. One of the major factors responsible for the persistent abuse of the federal character principle is the prevalence of ethnic cleavages and prejudices among the populace especially the political class and elites. There is no doubt that the principle of federal character will amount to an empty rhetoric if it is not honestly implemented by those whose responsibility it is to do so. Thus, the issue of enforcement of the federal character principle is as crucial as the principle itself. Federal character principle could be enforced directly by resort to courts. But courts could not be resorted to save in those isolated cases where the federal character principle is expressly made justiciable either by the Constitution or an Act of the National Assembly, or where a subsidiary legislation of the Federal Character Commission renders the federal character principle justiciable. Judicial enforcement of federal character principle could take the form of private action, public action or institutional action.

Enforcement of the Federal Character Principle through Private Action

The question of whether an individual in his private capacity has the *locus standi* (legal capacity) to judicially enforce the federal character principle is somewhat controversial.⁴¹ This controversy has been raging on since the promulgation of the defunct 1979 Constitution which did not only canonize the federal character principle, but also abolished the doctrine of non-suability of the state.⁴² The controversy largely stems from the fact that the principle of federal character primarily seeks to protect public or collective rights or interests as against private right or interest. At the common law, a private person lacks the requisite legal capacity to institute a judicial proceeding to enforce public right or to enforce the performance of a public duty. An individual will only have *locus standi* in such cases only if he has a special legal right, or alternatively, if he has sufficient or special interest in the performance of the duty sought to be enforced,⁴³ or where he has suffered special damages over and above the one suffered by the general public.⁴⁴ Prior to 1981, this common law principle applied in Nigeria without any limitation, but since its decision in the *locus classicus*

³⁸ G Iyatse and T Eniola, 'Do Buhari's Appointments Reflect Federal Character?', *Punch*, July 18, 2016, available at <<http://punchng.com/buharis-appointments-reflect-federal-character/>> (last accessed 10 October 2016).

³⁹ According to Emeka Anyaoku, 'Since the 1967 Civil War, I do not think this country has ever been as divided as it is now.' M Olowojejo, 'Practical Ways to Restructure Nigeria before 2019 Election – Anyaoku', available at <<https://www.vanguardngr.com/2017/10/divisions-tearing-nigeria-apart-caused-buhari-nwabueze/>> (last accessed 10 October 2018).

⁴⁰ George Agba, 'Fala's Kidnap: North-east Group Asks PMB to Caution Yoruba Elders', *Leadership*, Oct 14, 2015, available at <<http://leadership.ng/news/467145/falae-kidnap-north-east-group-asks-pmb-to-caution-yoruba-elders>> (last accessed 10 October 2016).

⁴¹ This controversy has been raging on since the promulgation of the defunct 1979 Constitution which did not only institutionalized the federal character principle, but also abolished the doctrine of the non-suability of the state.

⁴² See section 6(6) (b) of the 1979 Constitution which abolished the doctrine of crown immunity and make state suable.

⁴³ *Adesanya v. President of FRN* (2004) 9-12 Supreme Court Monthly (SCM) (Pt.1) 159 at 181.

⁴⁴ *Fawehinmi v. President, F.R.N* (2007) 14 NWLR (Pt.1054) 275 at 334.

case of *Adesanya v President of Nigeria*,⁴⁵ the Supreme Court has taken the view that this principle should have limited application in any case involving an infraction of provisions of the Constitution.

From the case of *Fawhinmi v. Akilu*,⁴⁶ it is crystal clear that an individual in his private capacity has *locus standi* to judicially enforce compliance with the federal character principle even though the principle seeks to protect public rights and interests. This is so because the principle of federal character is a creation of the Constitution, and as we discussed above, citizens or even non-citizens, who reside in Nigeria and are subject to the Nigerian laws, have unlimited locus to enforce compliance with the provisions of the constitution or to challenge any infraction of the provision of the Constitution.⁴⁷ Also, an individual in his private capacity has *locus standi* to enforce compliance with the provisions of the Federal Character Commission Act or to challenge any infraction of the same because it possesses constitutional flavour and dignity.⁴⁸ A private person may also enforce compliance with the federal character principle by way of ‘relator action’, that is, with the fiat of the Attorney General of the Federation or a state. This point was amply made in *Fawehinmi v. President, F.R.N.*,⁴⁹ where Aboki, JCA, held as follows: A private person can only bring such an action if he is granted a fiat by the Attorney General to do so in his name. This is referred to as ‘relator action’. Thus, the Attorney General of any state may authorize a private person to sue the Federal Government where the latter is in breach of the principle of the federal character of Nigeria especially where the breach affects the legal right of the relevant state. For example, where no indigene of a state was appointed as one of the ministers of the Government of the Federation by the President of Nigeria in line with section 147 (3) of the Constitution, the Attorney General of the affected state may authorize any citizen of the state to sue the federal government. Finally, it is pertinent to point out that where an individual suffered any special damages or disadvantages as a result of an infraction of the principle of federal character, he may as well approach any court of competent jurisdiction for the enforcement of his right to freedom from discrimination, especially where the damages or disadvantage he suffered was directly as a result of his membership of a particular ethnic group.⁵⁰

Enforcement of the Federal Character Principle through Public Action

Public action as the name goes is a legal action undertaken by a public officer to protect a public right or interest or to enforce the performance of a public duty. At the common law, only the Attorney-General has the legal capacity to institute a proceeding in a court of law to assert public right or interest or to enforce the performance of a public duty. This point was amply made in the case of *Adesanya v. President FRN*, where Fatayi Williams held as follows: ‘[u]nder the common law, it is only the Attorney-General alone who can

⁴⁵ (1981) 2NCLR 358 at 373.

⁴⁶(1987) 4 NWLR (Pt. 67) 797. This point was clearly made by Eso (JSC) as follows: ‘I think with respect that the lead judgment of my learned brother, Obaseki, JSC, is advancement on the position hitherto held by this court on ‘locus standi’. I think again with respect it is a departure from the former narrow attitude of this court in *Abraham Adesanya case* and subsequent decisions... My humble view and this court should accept it as such, is that the present decision of my learned brother, Obaseki, JSC, in this appeal has gone beyond the Abraham Adesanya’s case... My agreement with this judgment is my belief that it has gone beyond *Abraham Adesanya’s case*’.⁴⁶

⁴⁷In *Adesanya case* (above note at note 45 at 376) Fatai Williams, CJN, held as follows: ‘[i]n my view, any person whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an obligation to see to it that he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is a civil right to see that this is so.’

⁴⁸Above at note 44 at 343. See also *Zakari v. Inspector-General of Police* (2000) 8NWLR (Pt. 670) 666 at 679 and *Bawaji v. Obasanjo* (2008) 9 NWLR (Pt. 1093) 540 where it was held (at 582) that ‘[t]he new trend in judicial interpretation must primary aim at preserving legal order and ensuring that the legislative and executive are confined within their powers in the observations of the rule of law’

⁴⁹ *Id.*

⁵⁰ 1999 Constitution, secs. 42 and 46.

sue for the protection and enforcement of public interest.⁵¹ This common law position was strengthened by the relevant provisions of the Constitution. For example, section 150 (1) of the 1999 Constitution makes the Attorney-General of the Federation the Chief Law Officer of the Federation.⁵² As the chief law officer of the federation, the Attorney-General of the federation is the person constitutionally entrusted with the responsibility for the protection of the public right or enforcement of the public duty or to challenge any infraction of the Constitution. He may, however, delegate this task to any officer or agency of the federal government, or even to a private individual by means of fiat. But even at that, he reserves the power to terminate such delegated power at any time and take over and continue from where the relator stopped or even discontinue the action altogether. Such is the magnitude of the Attorneys-Generals' power under our laws. Unfortunately, as the Minister of Justice, the Attorney-General is also a member of the Federal Executive Council, and as such, he is not likely to take any action to compel the federal government to comply with the federal character principle in the face of violation of the principle. In fact, such an action is practically impossible as it would amount to the federal government suing itself. It is thus contended by many scholars including the present author that the office of the Attorney-General should be separated from the officer of the Minister of Justice.⁵³

An Attorney-General of any state, however, may sue the federal government where the latter or any of its agency violates or fails to comply with a mandatory provision of the Constitution vis-à-vis the federal character principle, especially where such violation affects the legal right of the relevant state. For example, an Attorney-General of a state may sue the President of the Federal Republic of Nigeria directly or through the Attorney General of the Federation where no indigene of that state was appointed a minister in line with the federal character principle. Conversely, the Attorney-General of the Federation as the Chief Law Officer of the Federation may also sue any state, which violates any constitutional provision vis-à-vis the federal character principle. This is, in fact, the fastest way of enforcing the federal character principle because the Constitution empowers the Supreme Court to exercises original jurisdiction in any suit between the Federal and any state and vice versa.⁵⁴

Enforcement of the Federal Character Principle through Institutional Action

The apparent indisposition of the Attorney-General of the Federation and his state counterparts to compel their respective paymasters to observe the federal character principle makes the desire to establish a special institution for the purposes of enforcement of the federal character principle inevitable; and this is the *raison d'être* for the establishment of the Federal Character Commission (the Commission). The Commission is one of the federal executive bodies established by section 153 of the 1999 Constitution. But the Commission was initially established in 1996 via Decree No. 34 of 1996, which currently operates as an existing law by virtue of the saving clause of the Constitution.⁵⁵ This Decree, which is now contained in the Federal Character Commission Act, Cap F7, L.F.N. 2004 has continued to regulate the Federal Character Commission alongside the relevant provisions of the Constitution. But in the event of conflict between the provisions of the Act and that of the Constitution, the latter shall prevail.⁵⁶ The Commission is a body corporate with perpetual succession having the capacity to sue and be sued in its corporate name.⁵⁷

⁵¹ *Adesanya v. President FRN*, above at note 43at 174.

⁵² A similar provision in section 195 of the Constitution makes an Attorney-General of each state of the Federation the Chief Law Officer of the state.

⁵³ M U Enwere, 'Nigeria: The Significance of Separating the Office of the Attorney-General From the Minister of Justice', *Allafrica*, August 1, 2011, available at <<http://allafrica.com/stories/201108020860.html>> (last accessed 31 August 2016).

⁵⁴ 1999 Constitution, Sec. 232(1).

⁵⁵ 1999 Constitution, sec. 315.

⁵⁶ *Id.*, sec. 1 (3). Note however that where any provision of this Act is inconsistent with the provisions of any other law or enactment, the provisions of the Act shall to the extent of that inconsistency prevail. See Sec. 16 of the Act

⁵⁷ Federal Character Commission Act, Cap. F7, L.F.N. 2004, Sec. 1(2) (a) and (b).

The Commission is empowered, among other things, to work out an equitable formula, subject to the approval of the President, for the distribution of all cadres of posts in the civil and the public services of the Federation and of the States, the armed forces, the Nigeria Police Force and other security agencies, bodies corporate owned by the Federal or a State Government and Extra - Ministerial Departments and parastatals of the Federation and States. The Commission is also empowered to promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government.⁵⁸ In particular, the Commission was empowered ‘to take such legal measures including the prosecution of the heads or staff of any Ministry, Extra-Ministerial Department or agency which fails to comply with any federal character principle or formula prescribed or adopted by the Commission.’ Without prejudice to section 1 (2) (a) of the Act which generally clothes the Commission with legal personality, it is from this very provision that the Commission derived its specific power to judicially enforce compliance with the federal character principle. Part 1 C, item 8 (1) (c) of the Third Schedule to the 1999 Constitution⁵⁹ confers prosecutorial powers on the Commission, which empowers the Commission to institute a criminal proceeding against any head or staff of any Ministry, Extra-Ministerial Department or agency who fails to comply with any federal character principle or formula prescribed or adopted by the Commission. By this provision, it is clear that the framers of the 1999 Constitution intended the Commission to be a barking dog, as well as, a biting dog. It is, however, not very clear why the prosecutorial powers of the commission is restricted to taking legal actions against the heads or staff of any Ministry, Extra-Ministerial Department or agency which fails to comply with any federal character principle. Such power should be very broad so as to enable the Commission to take similar actions against everybody who violates the principle of federal character of Nigeria. However, Section 14(3) (b) of the Federal Character Commission Act seems to have filled this lacuna, because according to this section, any person, body corporate or unincorporated body who fails, refuses or neglects to comply with any directive given by the Commission pursuant to any provision of this Act is guilty of an offence.

It must however be noted that the heads of the executive arms of government both at the federal or state levels, namely, the President or the Vice-President and the Governors or the Deputy-Governors respectively cannot be prosecuted for failure to comply with the federal character principle. This is so because they enjoy constitutional immunity,⁶⁰ which shields them from both civil and criminal actions in their personal capacities during their periods of office. The exclusion of the President, the Vice-President, the Governors and their Deputies from legal actions for violation of the federal character principle has seriously undermined the capacity of the Commission to enforce compliance with the federal character principle because the holders of these offices are the major violators of the federal character principle since most of the appointments are directly or indirectly made by them. However, even though the Commission cannot proceed against the holders of those offices, it is not precluded from investigating them for the purposes of prosecuting them at the expiration of their tenure,⁶¹ but such belated prosecution may amount to a mere cosmetic exercise. Note, however, that a State House of Assembly or the National Assembly may view the report of such investigation as evidence of ‘gross misconduct’ which may be relied upon to impeach the defaulting Governor or President as the case may be.⁶² It must also be pointed out that the Federal Character Commission cannot truly live up to its mandate under the Constitution and the Act, especially as regards its responsibility for prosecuting violators of the federal character principle, unless it is fairly made independent of executive control. Thus, 10 years after its establishment, one cannot truly point at any person whom the Commission has prosecuted for violation of the federal character principle notwithstanding the

⁵⁸ *Id.*, sec. 4(1) (a) and (b).

⁵⁹ *Id.*, Sec. 4(1) (c).

⁶⁰ 1999 Constitution, sec. 308.

⁶¹ *Fawehinmi v IGP* (2002) 7 NWLR (Pt.767) 606 at 680. Note that reference to criminal investigation in this case is not limited to police investigation but equally extend to criminal investigation by statutory bodies having prosecutorial powers, like the Federal Character Commission.

⁶² 1999 Constitution, secs 143 and 188.

mindboggling abuse of the principle over the years, especially in the recent time. It is, indeed, regrettable that notwithstanding the enormous powers conferred on it by the Constitution and the Federal Character Commission Act, the Commission has failed to live up to its responsibility for the implementation and enforcement of the principle of federal character of Nigeria. And this does not only constitute a defeat of the utilitarian function of the federal character principle, but also constitutes a defeat of the intentions of the brains behind the establishment of the Commission. It is, therefore, submitted that section 1(3) of the Federal Character Commission Act which provides that the Commission shall be subject to the direction, control or supervision of the President should be expunged from the Act. Of course, making the Commission dependent on the Presidency or subjecting its decisions to presidential approval is counterproductive, because it is not likely that the President would authorize the Commission to proceed against any of his appointees or any loyal agent of the Federal Government.

7. Conclusion and Recommendations

The invention of the federal character principle is a landmark achievement in Nigeria's quest for national unity and integration. But, its utility has been played down over the years due to its poor implementation.⁶³ The Federal Character Commission which was established by the Constitution to implement and enforce compliance with the federal character principle appears to exist in name only as it neither barks nor bites. In fact, the Commission was *ab initio* designed to fail since it was not only structured to be over-dependent on the executive, but also to pander to the whims and caprices of the same executive whose conduct it was primarily established to supervise.⁶⁴ It is therefore recommended that the Federal Character Commission, like other bodies that perform *quasi* judicial function, should be fully independent of executive control and devoid of partisan politics.⁶⁵ Also, the inclusion of the federal character principle in Chapter II of the 1999 Constitution which is ordinarily non-justiciable hinders its smooth implementation and enforcement because it deprives citizens the requisite locus to approach court to enforce compliance with the principle of federal character. This encourages various organs of government, especially the executive, to disregard the principle of federal character in the composition of the Government of the Federation and its agencies with impunity. It is, therefore, recommended that relevant provisions of the Constitution should be urgently amended so as to make the federal character principle justiciable like other operative parts of the Constitution. This will, among other things, impose enforceable obligations on the relevant public officers to comply with the federal character principle. But this amendment will be of little importance unless citizens are allowed unhindered access to court to compel relevant public officers to comply with the federal character principle in the day to day running of the government of the federation. A leaf may be taken from the Constitution of the Gambia which specifically empowers all citizens to challenge any infraction of the Constitution.⁶⁶ Thus, it is also recommended that the Constitution should be amended in such a way that every citizen should have an unhindered access to court to enforce compliance with, or to challenge any infraction of the federal character principle. Furthermore, the section 14 (3) of the Constitution should be immediately amended in order to extend the application of the federal character principle to geographical spread in the distribution of the federal infrastructure, parastatals and key institutions of the government. This will go a long way in addressing the current concentration of the major federal infrastructure, parastatals and institutions in few geopolitical zones of the country. Also, it is recommended that the relevant sections of the Constitution should be amended so as to separate the office of the Attorney-General of the Federation from the officer of the Minister of Justice. This will ensure that the Attorney General of the federation is free from executive control; and so, be in a better position to enforce compliance with the federal character principle.

⁶³As Asaju noted, 'the success of the Federal Character Principle has been mired by implementation problems'. K Asaju, 'Democratic Governance, Federal Character Principles and National Development in Nigeria', *Review of Public Administration and Management* Vol. 4, No. 8, December 2015, 172-187 at 181, available at , <http://www.arabianjbm.com/pdfs/RPAM_VOL_4_8/15.pdf> (last accessed 31 August 2016).

⁶⁴ See section 1(3) of the Federal Character Commission Act which provides that the Commission shall be subject to the direction, control or supervision of the President in the performance of its functions under the Act.

⁶⁵ TA Babawale, 'Federal Character Commission: An Evaluation', p. 13, available at , <<http://www.nigerianlawguru.com/articles/constitutional%20law/FEDERAL%20CHARACTER%20COMMISSION,%20AN%20EVALUATION.pdf>> (last accessed 31 August 2016).

⁶⁶ The Constitution of the Republic of the Gambia 1997, sec 6.