

**PRIVATIZATION AND
FOREIGN INVESTMENTS
IN NIGERIA**

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Lawrence Okechukwu Azubuiké
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Privatization and Foreign Investments in Nigeria

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This book is dedicated to the memories of
Mpa, Cajé and Ugonna.

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FOREWORD

I am very pleased to write this foreword to Dr. Lawrence Azubuike's work – *Privatization and Foreign Investment in Nigeria* – the progress of which I had the privilege of following from time to time with great interest. It is an important piece of work that cannot fail to provoke thought and interest among the public and international lawyers. The book developed out of the author's doctoral dissertation, the Committee of which I had the privilege to Chair. Over the past ten or twenty years, the matter of privatization and foreign investments have been revitalized and made considerable progress in various developing countries.

Dr. Azubuike's book is very topical and timely dealing with the two important issues of privatization and foreign investments. The author makes a balanced presentation of the various questions that he dealt with. He came to conclusions that are defensible even where still controversial. After all, controversy in law has to be welcomed. The work is all the more to be commended in that it examined and analyzed a highly sensitive topic in international investment law at the present time.

Dr. Azubuike's work is also very significant in many other ways. Its significance lies in the fact, firstly, that it is the work of a jurist from a young country looking at matters familiar to the international investment lawyer in novel and progressive ways. Secondly, he set his study in such a way that he covered a considerable number of individual legal questions pertaining to the international investment under international law.

In particular, he treated rather well the nature of State participation in the economy, Nigerian privatization and commercialization program 1999 to date, foreign investments in Nigeria and the Impact of Privatization on Foreign Investments in Nigeria. In dealing with these legal issues, he succeeded in setting forth his arguments clearly, honestly and in very persuasively measured lucid language.

Another very important positive effect of the work is to show that there is sufficient room in the international investment law field for fresh insights into matters of great historical significance

from a purely usual Euro-American centric standpoint. In this way, it makes a real contribution to better balanced understanding.

It is greatly to be hoped that this work will be followed up in due course by further writing in a field for which Dr. Azubuike is so evidently well qualified.

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I express gratitude to GOD for enabling me complete this endeavor and for His mercies.

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I thank my family for their patience and tolerance while I undertook the writing of this book. I thank my wife, Maria and my daughter, Mary. I also thank my mother. I thank Sonia Bonsu and Frana Chukwuogor for reading aspects of this book. I thank Chizoma Akujobi and my brother and learned friend, Chikere Azubuike, for their invaluable assistance with this work.

To others, into whose convenience I intruded in the course of doing this work, I say, as I always do, borrowing the words of Shakespeare, “your pains are registered where every day I turn the leaf to read them.”

Any errors are mine.

Lawrence Okechukwu Azubuike

INTRODUCTION

Nigeria's political economy has straddled the ideological divide between socialism and capitalism. The country produces oil, and at some point in its existence, it embarked on robust state involvement in the economy. This was marked by the acquisition, or establishment, of numerous state enterprises. Over the years, the performance of these enterprises was found to be dismal, and as part of the overall reform of the economy, Nigeria has joined the global trend toward reduction in direct state ownership of enterprises. Indeed, it has embarked on massive divestment of state interests in once publicly owned firms. Besides the universal rationale of efficiency, one of the objectives of the privatization exercise in Nigeria is the attraction and retention of foreign investments. This work examines the direct and indirect linkage between the government's divestiture of its interests in firms, on the one hand, and foreign investments in the country, on the other hand.

The book is divided into seven chapters. Chapter 1 reviews the political and economic history of Nigeria, to set the background and context that necessitated the introduction of the reform package of which privatization is just an aspect. Chapter 2 is a discussion of various natures of state involvement in an economy. This ranges from mere regulation to active participation. The Chapter discusses the competing conceptual and ideological theories and tries to situate the Nigerian experience within the broader conceptual dichotomies of capitalism, socialism and the *via media* of mixed economy. Chapter 3 is an examination of the meaning and rationales for privatization of state owned enterprises generally and the Nigerian attempts in particular. Nigeria's privatization program is an ongoing exercise. Yet two distinct attempts are identifiable: one which started in 1988 and the reinvigoration of the exercise, albeit with new constitutive frameworks, in 1999. Thus, Chapters 4 and 5 review the legal and institutional frameworks for these two exercises. Chapter 6 deals with foreign investments in Nigeria. The discussion encapsulates the pros and cons of foreign investments, especially in Nigeria. Chapter 7 explores the direct

and indirect linkages, between the privatization program in Nigeria and foreign investments in the country. This is particularly apposite because one of the touted objectives of the privatization exercise is the attraction of foreign investments. A conclusion follows. The work finds that although foreign investments appear to have been indirectly boosted by the privatization exercise, foreign investors initially did not show interest in direct acquisition of the shares and other interests being relinquished by the government, but that that attitude has been changing gradually.

CHAPTER I

A POLITICAL ECONOMY OF NIGERIA

I. INTRODUCTION

To set the overall context and background for this book, this chapter will review the political and economic history of Nigeria up to the present time. It is realized that such history is of itself so broad and indeed might constitute a full-fledged study. And, in actuality, there is a plethora of works devoted just to such history.¹ Thus, the attempt here will be to set the broad outlines of the historical experiences of Nigeria emphasizing those aspects that significantly give a sufficient background to a work such as this.

Nigeria is a complex sovereign nation situated in the western part of sub-Saharan Africa, and has a total land area of 923,768 square kilometers. With an estimated population of about 130 million people, Nigeria is the country with the most blacks in the world.² It is also the most populated country in Africa and one of the most well known developing countries.³ It is bordered by the

¹ See for example FOLORUNSHO AFODUNRINBI, *POLITICAL HISTORY OF NIGERIA* (New Millenium Communications, 2000); ALAN BURNS, *HISTORY OF NIGERIA* (Allen and Unwin, London, 1972); K.O. DIKE, *TRADE AND POLITICS IN THE NIGER DELTA, 1830-1885: AN INTRODUCTION TO THE ECONOMIC AND POLITICAL HISTORY OF NIGERIA* (Claredon Press, Oxford, 1966)

² See C.C. Ifemesia, *Nigeria: The Country of the Niger Area*, in BONIFACE I. OBICHERE (ED), *STUDIES IN SOUTHERN NIGERIAN HISTORY*, 21 (Frank Cass Publishers, London, 1982)

³ See TOYIN FALOLA, *CULTURE AND CUSTOMS OF NIGERIA*, 1 (Greenwood Publishing, Westport, CT, USA, 2002)

Atlantic Ocean to the south and by Niger Republic to the north. Its western neighbor is Benin Republic, part of the population of which is said to have an affinity with, or indeed to have come from, the Yorubas, a major group in Nigeria. To the east, Nigeria is flanked by Chad and the Cameroon.⁴ It has two main climatic seasons,⁵ the rainy and dry seasons, although the intensity of the seasons varies with the particular geographic part of the country. The rainy season is usually more intense in the south than it is in the north. The situation is reversed with the dry season, which is usually more intensive in the north than in the south. It is endowed with many rivers and waterways; the two most prominent ones are the Rivers Niger⁶ and Benue. Its peoples are multifarious and diverse. It is claimed that there are over 250 ethnic groups and languages in the country.⁷ As a result, there is hardly any one defining culture applicable to Nigerians. In contemporary times, the two dominant religions of Christianity and Islam co-exist with different forms of traditional religion, by which is meant a belief or faith system indigenous to the people before the advent of westerners or other foreigners. This has been a major source of friction and tension, with occasional, and sometimes violent, clashes occurring between the two major religions of Islam and Christianity. Some parts of the country practiced farming, other parts fishing, while others are known more for cattle rearing.

So pronounced are the differences, and lack of homogeneity, that it is an accepted notion that Nigeria is a creation of the British. Scholars⁸ and politicians alike are prone to start a

⁴ Ibid at 2

⁵ ONWUKA NJOKU, ECONOMIC HISTORY OF NIGERIA, 19TH AND 20TH CENTURIES, 6 (Magnet Business Enterprises, Enugu, Nigeria, 2001)

⁶ It is thought that the country's name was derived from this river. But see Ifemesia, supra note 2 at 21-23, for a discussion of the academic and linguistic controversy on the source of the name Nigeria. Lady Lugard is credited with coining that name but some argue that the name had already been used in materials to which Lady Lugard had access before she allegedly coined it.

⁷ Ibid at 4.

⁸ See for example, Hassan A. Saliu and J.O. Durojaiye, *Background and Overview of Chapters*, in HASSAN A. SALIU (ED), ISSUES IN CONTEMPORARY

discussion of Nigeria by reference to the momentous action taken by the British in 1914. It was in that year that the British colonial administration, under the leadership of then Governor General, Lord Lugard, unified the southern and northern protectorates of Nigeria, to, in essence, form what is present day Nigeria. Hitherto that unification, popularly known as the amalgamation of northern and southern Nigeria, either protectorate had existed as a separate entity with its own governor general. Indeed, Lord Lugard, the architect of the amalgamation, in 1914, was on his second tour of duty, having served for six years, from 1900, as the high commissioner for northern Nigeria, and returning in 1912 to set in motion the process for the unification of Nigeria. Critics of the amalgamation accuse Lugard of bias towards the north and of attempting to institute a northern hegemony over the south. Had Lugard not been changed as the governor general in 1918, it is speculated that he would have moved the capital of Nigeria from Lagos, the most cosmopolitan city in Nigeria then, and located in the south, to Kaduna situated in the north.⁹

Ade Ajayi would seem to allude to this preferential disposition on the part of Lugard, when he observes that Lugard gave two reasons for pressing for amalgamation. "First, Northern Nigeria needed to pool her resources with Southern Nigeria. For, while the administration in the North was still dependent on Colonial Office grants to balance its budget, the South with a better-developed overseas trade was able to exist on its customs and excise duties. Secondly, if the trade of the North was to expand rapidly, she needed an outlet to the sea which was open all year round, in contrast to the River Niger on which traffic was seasonal."¹⁰ Whatever the merits, it seems clear that the merger was prompted by a desire on the part of the British for easy access, for trading and economic purposes, to

POLITICAL ECONOMY OF NIGERIA, 1 (Sally & Associates, Ilorin, Nigeria, 1999) (asserting that: "the emergence of Nigeria in its modern sense can be traced to colonialism.")

⁹ See <http://lcweb2.loc.gov/cgi-bin> last visited 03/07/07

¹⁰ J.F. ADE AJAYI, MILESTONES IN NIGERIAN HISTORY, 27 (Longman, New Edition, 1980)

the entirety of the geographical entity now called Nigeria. Some still argue that the perceived prejudice, in favor of the north, has been maintained by postcolonial rulers.¹¹ Historic as the amalgamation was, it did not wean the peoples of Nigeria of their profound attachment to their ethnic roots as is demonstrated by constant tensions and cleavages. Nor did the early leaders have any illusion that it would. The British government's reason for the unification was economic not political.¹² In fact, it has been noted that the British, out of immense concern with exploitation, kept the ethnic nationalities as further apart as possible, and that this was so notwithstanding the celebrated amalgamation of the Northern and Southern protectorates.¹³ If the colonial powers were not interested in real integration amongst the people, the early post colonial leaders did not seem persuaded of the existence of any such real unity either. Nor are the people themselves. It has been claimed that:

the fact is that Nigerians individually and collectively tend not to have allegiance to the state imposed by the British in 1914. On an abstract level, Nigerians identify with the geographical entity mapped out by the British, but concretely, seem unwilling to associate

¹¹ See KELECHI AMIHE KALU, *ECONOMIC DEVELOPMENT AND NIGERIAN FOREIGN POLICY*, 54 (Edwin Mellen Press, New York, 2000) (asserting, "... the practice of robbing the south to pay the north, once institutionalized, has remained a vexing issue. The same practice is at the root of the current strategy for economic development, manifested either in the form of economic diplomacy or as structural adjustment policies, within which the political and economic interests of the northern oligarchy are protected by the military establishment. Contemporary economic and political policies in Nigeria will be shown to parallel those of the colonial era, especially with respect to development, debt, and funding policies."

¹² J.F. ADE AJAYI, *supra* note 10 at 23 (asserting that: "the British were not seeking to unify Nigeria. They were not religious or political reformers seeking an empire where new religious or political principles could be enforced. They were essentially traders from abroad anxious to establish a situation favourable for the growth and development of their trade.")

¹³ Saliu and Durojaiye, *supra* note 8 at p.1

with the idea of Nigeria. Perhaps the key reason is that the founding fathers of Nigeria are foreigners. Hence most Nigerians irrespective of their nationalistic claims, have a tendency to first identify with their ancestral roots before identifying themselves as Nigerians.¹⁴

Similarly, some of the nationalist leaders have been quoted to openly doubt the reality of the unity of Nigeria. Perhaps, the most famous statement, in this regard, is that credited to the late sage and Yoruba icon, Chief Obafemi Awolowo, who was the leader of one of the early political parties to have emerged on the Nigerian scene, the Action Group. He is quoted to have said that “Nigeria is not a nation. It is a mere geographic expression.”¹⁵ His counterpart in the north, Sir Abubakar Tafawa Balewa, who led the Northern Peoples Congress, is said to have seen Nigerian unity as only a matter of intention, stating that “since the amalgamation of the North and the South provinces in 1914, Nigeria had existed as one country on paper... It is still far from being united. Nigerian unity is only a British intention for the country.”¹⁶

However, some argue that prior to the advent of the colonialists, the people inhabiting what is now called Nigeria interacted and communicated, even if they did not have a common government. Such communication was enabled by the many waterways existing in the territory of Nigeria and by the absence of major mountains.¹⁷ Yet, others aver that though

¹⁴ KELECHI AMIHE KALU, *ECONOMIC DEVELOPMENT AND NIGERIA'S FOREIGN POLICY*, 39 (Edwin Mellen Press, Ltd, New York, 2000)

¹⁵ *Ibid* at 41 (quoting OBAFEMI AWOLOWO, *PATH TO NIGERIAN FREEDOM*); See also Jeffrey Herbst and Adebayo Olukoshi, *Nigeria: Economic and Political Reforms at Cross Purposes*, in STEPHAN HAGGARD AND STEVEN B. WEBB (ED), *VOTING FOR REFORM (DEMOCRACY, POLITICAL LIBERALIZATION, AND ECONOMIC ADJUSTMENT)*, 453, 454 (Published for the World Bank, Oxford University Press, 1994) (citing RICHARD A. JOSEPH, *DEMOCRACY AND PREBANDALISM IN NIGERIA*, 184 (Cambridge University Press, 1987)

¹⁶ KALU, *supra* note 11 at p.41 (citing Ayeni Olugbenga, *Which Way forward*, West Africa, Feb 14-20, 1994 p. 255)

¹⁷ ONWUKA NJOKU, *supra* note 5 at 6-7

amalgamation was an act of the British, it was guided, and to a large extent dictated, by existing unities, geographical, commercial and cultural.¹⁸ Whatever the merits of amalgamation, it is clear that it did not erase any ethnic or other sectional cleavages. Those divisions, which persist today, underscore the fact that though formally enunciated as one entity in 1914, Nigeria's history, per force, involves the distinct histories of the several peoples that make up the country, an issue to which we now turn.

II. PRE-COLONIAL HISTORY OF NIGERIA

It is of course not always easy to determine how far back any historical study of any people can easily go. That dilemma is the more manifest when the place to be studied was not always within the radar of early historians. "The early political history of Nigeria's states, large and small, is very complex, and full of obscurities."¹⁹ Evidence abounds of the existence, in what is present day Nigeria, of indigenous societies during pre-historic times.²⁰ Such evidence includes the finding of brass items in Bida, Ile-Ife and Benin, bronze in Igbo-Ukwu, terra cotta animals in Borno and terra cotta heads in Nok.²¹ Similarly, people lived in

¹⁸ ADE AJAYI, note 10 at 27. The eminent historian considers amalgamation a positive and asserts, at p. 28, that "we are therefore fortunate in Nigeria that by and large the British were drawn to recognize these unities and to follow them in their negotiations for acquisition and amalgamation."

¹⁹ ELIZABETH ISICHEI, *A HISTORY OF NIGERIA (WITH CONTRIBUTION BY PETER UCHE ISICHEI)*, 129 (Longman, London, Lagos, New York, 1983)

²⁰ TOYIN FALOLA, *HISTORY OF NIGERIA*, 37 (Greenwood Publishing group, Inc., Westport, CT, USA, 1999); The Library of Congress documents that the earliest known example of a fossil skeleton with Negroid features, perhaps 10,000 years old, was found in Ileru in western Nigeria and attest to the antiquity of habitation in the region. See <http://lcweb2.loc.gov/cgi> (visited 03/07/07)

²¹ FALOLA, *supra* note 20 at 37; The skilled artisans and ironworkers of the Nok were said to have flourished between the fourth century B.C and second century A.D. See <http://lcweb2.loc.gov/cgi> (visited 03/07/07)

Nigeria, during both the stone and metal ages.²² Pre-colonial Nigeria was made up of many states. Some were large, some were small. Besides, even before the advent of the British, the contours of these states continued to change both from internal and external factors. Isichei argues that “in some areas, where the celebrated kingdoms developed, a change seems to have taken place which often follows a similar pattern, whereby a multiplicity of small-scale states, whose ‘priest kings’ were sometimes rulers of little territories, and sometimes linked with vocational guilds, gave way to unified kingdoms. The creation of a kingdom is often linked with an invasion from outside- but the invader need not come from far away.”²³

A. The Yoruba Kingdoms

The Yorubas occupy the western part of Nigeria and speak a language called Yoruba. They trace their origin to a common progenitor known as Oduduwa. Myth has it that Oduduwa founded the city of Ile-Ife. To this day, the Yorubas regard that city as the center of their history and tradition. The origin of other cities is traced to Ile-Ife as it is claimed that Oduduwa dispatched his sons to establish the other cities such as Oyo, Ibadan and others. Remarkably, about the fifteenth century, some of these new cities surpassed Ile-Ife in both political and economic powers, with the result that Ile-Ife’s relevance assumed only a spiritual dimension. Actually, this would seem to be the case even in contemporary times. Most of the other Yoruba cities are larger and more developed than Ile-Ife. But in matters of tradition, Ile-Ife enjoys a pride of place and its traditional ruler, the *Ooni*, is regarded not just as the traditional ruler of the city but also as the traditional head of all Yorubas since he occupies the stool of their progenitor, Oduduwa.

Of all the cities founded by the children of Oduduwa, Oyo became the most powerful²⁴ and was headed by a traditional ruler

²² “Stone age refers to the period associated with hunter-gatherers who roamed the area in search of food and subsequently made a transition to agriculture.” The metal age began with iron, and later copper, brass, and bronze.” See Falola, *supra* note 20 at 37-38

²³ ISICHEI, *supra* note 19 at 129

²⁴ FALOLA, *supra* note 20 at 20

called *Alafin* who was assisted by a council of state called *Oyo Mesi*. It achieved substantial military victories resulting in the extension of its empire further north to Nupe and Borgu and even parts of what is now the Republic of Benin, Nigeria's neighbors to the west.²⁵ Although, the Binis, to the east of the Yoruba kingdoms, are not strictly considered Yorubas, they have an affinity to Ile-Ife. Like the Yorubas, their traditional rulers are called Obas.²⁶ It is said that because of internal quarrels amongst the Binis, Oduduwa sent someone to rule them, and the practice endured. Today, it is claimed, that the Oba of Benin (the modern name) descended from Ile-Ife.

B. The Northern Kingdoms

The history of pre-colonial northern Nigeria is the history of the Hausas, Fulanis and that of the other peoples who live in that region. The dominant pre-colonial themes were the Kanem Bornu, the Hausa and later the Sokoto Caliphate. The Kanem Bornu empire lay in the north east part of Nigeria and existed partly outside the territory that constitutes present day Nigeria. The Hausas existed more or less in the center and were for a long time ruled by the Songhai Empire, which had stretched from Senegal and the Gambia, in the west, all the way into Hausa land including Kebbi, Katsina and Gobir. It was not until the sixteenth century when the Songhai empire collapsed, following an invasion by an army from Morocco, that the Hausa states became independent, that is became free from Songhai's domination. About the same time Borno reached its zenith, and also benefited from the fall of the Songhai empire by being the uncontested power in northern Nigeria. A severe drought and famine in the middle of the eighteenth century combined with internal agitations and rivalries to weaken the Borno empire and set the stage for the Islamic jihad, mounted by a cleric, Usman dan

²⁵ Ibid.

²⁶ Falola notes that originally Benin's rulers were known as *Ogiso*. Then a dynasty was established by a certain Eweka, who, according to tradition, was influenced by the Yoruba and chose the title of Oba (king). See Falola, *supra* note 20 at 21

Fodio, and the creation of the Sokoto Caliphate in the nineteenth century.²⁷

C. The Ibos

A majority who are Ibos populates the eastern part of Nigeria. The unique feature of the history of the Ibos is the notion that prior to the advent of the colonialists they were a stateless society. This simply means that in contrast to the Yorubas and the Hausas and Fulanis, in respect of which certain organizational features had been documented at, what may fairly be said to be, a macro level, the Ibos “were divided into small mainly patrilineal clans, each with its own founding ancestor. Hundreds of villages existed not as members of one Ibo kingdom, but as autonomous units, each with its own government.”²⁸ There was of course mutual cooperation among the various families and clans. Government existed at the level of these families and clans. Disputes and serious matters were settled by the elders or by age grades.²⁹

III. THE ADVENT OF THE BRITISH

As noted earlier, Britain colonized Nigeria and ruled the country for about six decades.³⁰ However, the first Europeans that happened on the Nigerian scene were the Portuguese, who arrived about the fifteenth century and concentrated on trading and missionary work. They had no territorial desires and restricted themselves to fortified trading stations.³¹ In the sixteenth century, the British, French and the Dutch began to compete with the Portuguese and the focus shifted to the dehumanizing and immoral trade in slaves.³² The British continued to place emphasis on trade but was willing to use force and intimidation to protect

²⁷ See <http://lcweb2.loc.gov/cgi> visited 03/07/07

²⁸ FALOLA, *supra* note 20 at 44

²⁹ An age grade is an association of people born within a particular period usually between one to two years. Essentially, members of a particular age grade are usually age mates.

³⁰ From 1900 to 1960; this was the period of formal colonization. Certainly British coercion started way before 1900 and, some would argue that, it did not end with the independence proclamation of 1960.

³¹ Falola, *supra* note 20 at 50

³² *Ibid*