Democratising and Legitimising Constitution Making in Nigeria: A Focus on the 1999 Constitution of Nigeria

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Abstract

It is globally acknowledged that every state deserves a constitution especially with the new democratic wave. Constitution is a sacred document which regulates state's affairs to achieving a fair, just and egalitarian society. By the same token, the process of making or reviewing a constitution should be a nation's moment of truth when fundamental questions affecting it are confronted head-on and resolved. subsequently, it should be seen as a social contract freely entered into with utmost confidence and abiding faith built into it. However, in Nigeria, inspite of the approaches to constitution making in the colonial and post colonial years, the various constitutions have not emanated from the full involvement of the Nigerian people. It has been dogged by controversies and contentions from civil society. This paper argues that constitution making and to a very large extent review is bereft of democratic ethos and lacks legitimacy in the eyes of the people. A strand of the work centres on why constitution lacks legitimacy in Nigeria. It equally takes a look at the history of constitution making. The work highlights some of the contentious issues in the 1999 constitution having chronicled the background to its making. The work concludes by suggesting the major ingredients needed for democratizing and legitimising constitution making.

Key Words: Constitution, democratizing, legitimacy, egalitarianism

1.0 Introduction

The history of the country- Nigeria can be traced to Pre-colonial times when there were "elaborate systems of governance, which varied in scale and complexity depending on their geographical environment, available military technology, economic, spiritual and moral force" (Political Bureau Report, 1987). There were various kingdoms and empires such as the Yoruba kingdom, the Fulani emirate, the Igbo traditional system, the Urhobo gerontocratic system, e.t.c. (otive, 2013). The import of the above is to attest to the fact that before the advent of colonialism, the Country has been existing. The argument of the modernization theorists of a people with no history and system of government in Nigeria and by extension, Africa can thus be historically refuted. The reason is simple: The various clans in Nigeria had various modes of administering their societies subscribed to and religiously followed which formed the basis of their interactions and existence. Although, it was not a formal arrangement like the modern day constitution, yet, it had the force of obedience and compliance than the written constitutions. The era of colonialism occasioned by imperialism as a result of the industrial revolution made mess of the existing traditional systems. In Nigeria, it was indirect rule system that was adopted by the colonialists. This brought with it constitution. Achebe's Things Fall Apart aptly describes the scenario thus:

> *Now he has won our brothers and our clan can no longer act like one. He has put a knife on the things that held us together and we have fallen Apart (Achebe, 1958)*

As a result of the ulterior motive of the imperialists, constitutions were put in place as regulatory instrument to contain and curtail the activities of those perceived as supposed enemies and where the challenges were becoming daunting, they were replaced with another. This was the pathetic situation Nigeria found herself and still finding herself. The spill-over effect of this is the inability of Nigerians to give themselves a document that has been truly Nigerian in content capable of addressing the teething problem of national question.

It is this failure that is making democratic consolidation and subsequently good governance a mirage. It could be argued that the numerous conflicts and crises at the socio-economic, religious and political levels are the precipitates of this absence of a people's constitution.

Commenting on the national question, (Ade Ajayi, 1992) argued as follows:

> *The National Question is … the perennial debate as to how to order the relations between the different ethnic, linguistic and cultural groupings so that they have the same rights and privileges, access to power and equitable share of national resources.*

The above can equally find fulfilment in (Osaghae, 2000) who opines that "what the colonial powers handed down to the people of Nigeria has been variously pointed out as being 'artificial' or 'illegitimate' in the distorted order that it spawns and preserves – alongside analogous illustrative typologies – its manifestation in the post-independence period has emphasized an heightened state of intolerance, insecurity and strife, routinely assuming religious and ethnic overtones/expression, as actors within the different groups struggled to access the privileges of the state at the expense of others". Be that as it may, if the post independence signalled the departure and severance of ties with the colonial masters and an effort "to embark upon the project of nation-building, it has yet been mainly pre-occupied with the task of creating a coherent and cohesive political system for peaceful accommodation of its diverse ethnic groupings" (Fayemi, 2013). This may not be unconnected with the fact that Nigeria has never had a really participatory or people- driven constitution making approach. It is this onerous task that should be the basis of our corporate existence as an entity. To accomplish the essence of this work, the paper is divided into sections. Section **one** deals with the introduction, while section **two** explores some concepts. Section **three** examines the lack of legitimacy by constitution in Nigeria. Section **four** takes a look at the history of constitution making. The **fifth** section appraises the background as well as the contentious issues in the 1999 constitution. The last section concludes and offers recommendations.

2.0 Conceptual and Theoretical Framework

The paper is built upon the Iron Law of Oligarchy. The iron law of oligarchy is a political theory, first developed by the German Sociologist Robert Michels in his 1911 book, political parties. It claims that rule by an elite, or "oligarchy", is inevitable as an "Iron law" within any democratic organization as part of the "tactical and technical necessities" of organization. Michels used anecdotes from political parties and trade unions, which supported democratic reforms to build his argument. Michels particularly addressed the application of this law to representative democracy, and stated" "It is organization which gives birth to the domination of the elected over the electors, of the mandatories over the mandators, of the delegates over the delegators. Who says organization, says oligarchy. The inference from the above as it relates to constitution making is that in Nigeria, it is almost exclusive for the few selected either to construct a constitution or tinker with it. It has never been an exercise whose foundation is the people where sovereignty resides. It is the absence of a people's driven constitution that is generating friction and lack of ownership as the people's aspirations are not properly so today factored into its making and approval not sought in a referendum.

2.1 Democratisation

Conceptualization of democratization like many other social science concepts does not lend itself to easy definition. Democratisation is 'the action of rendering, or process of becoming, democratic' and democracy is defined as "Government by the people; that form of government in which the sovereign power resides in the people as a whole, and is exercised either directly by them (as in small republics of antiquity) or by officers elected by them. In modern use often more vaguely denoting a social state in which all have equal rights, without hereditary or arbitrary differences of rank or privilege. A more colloquial notion of democratisation, and a much weaker one, is making a process or activity that used to be restricted to an elite or privileged group available to a wider group in society and potentially to all. (Poversham, 2012).

Democratisation is influenced by various factors, including economic development, history, and civil society. It evokes idea about participation, equality, the right to influence decision making, support to individual and group rights, access to resources and opportunities, etc.

2.2 Legitimation

According to the key concepts in political science: legitimation connotes a sense of rightfulness, approval and popular acclaim. The legitimacy of a government confers on it unquestionable obedience, that is, the authority to allocate values authoritatively. A government may be legal, but yet, illegitimate. It is the citizens' free obedience of government that underscores its legitimacy. There are two senses in which the issue of legitimacy can be understood. First, philosophically, as a moral imperative on which the authority of government must be based.

Second, behaviourally, "as a willingness to comply with a system of rule regardless of how this is achieved" it is important to know that the concern of legitimacy is not why the people should obey the state, but why they obey the state (Andrew Heywood (ed), 2000).

Similarly, the Blackwell Encylopaedia of political science (1991:333) sees legitimacy in terms of the "lawfulness of a regime, its representatives and their 'comands'. As it further argued, "it is a quality derived not from formal law or decrees but from social acceptance (or acceptability) and 'appropriateness' as judged by reference to norms to which 'subordinates' accord (more or less) active assent".

Locke, 1632 – 1704) said political legitimacy derives from popular explicit and implicit consent of the governed. "The argument of the (second) Treatise is that the government is not legitimate unless it is carried on with the consent of the people. It is consent of the governed that confers political legitimacy.

3.0 Lack of Legitimacy of the Constitution in Nigeria

Incontrovertibly, the notion of a constitution was alien to pre-colonial Nigeria and was unquestionably unknown in Nigeria before the advent of colonialism. It only came with colonization. "The first known written constitution being that of Liberia of 1847. Like the state itself and all its other institutions, the written constitution originated in Africa as an imposition on African peoples by the colonizers. ((Nwabueze, 1997). He posits further that the earliest colonial constitutions by which various African peoples in a given area were constituted into one colonial state was drawn up by official – lawyers and other experts – in the metropolis of the imperial power and just handed down to the colonial territory concerned. It thus had no greater meaning or significance and commanded no more respect and loyalty for the colonized Nigerian peoples than the other colonial laws by which they were governed, because neither the one nor the other had any roots in the culture and life of their Nigerian subjects. As aptly captured by (Hannah, 1962), there is "an enormous difference in authority (i.e. legitimacy) between a constitution imposed by a government upon people and the constitution by which a people constitute its own government. "Aside the fact that the independence and republican constitutions of 1960 and 1963 of Nigeria respectively, which bore the character of illegitimacy stamped on it by colonialism, its content, form of government instituted was dictated, in part, at any rate, by the vested interest of the departing British colonial masters in leaving behind the legacy of their own system of government as a lasting memorial of their imperial glory.

Secondly, in the words of (Nwabueze, Op cit), "the legitimacy of the constitution in Africa is besmeared by the character stamped on it by colonialism as an instrument of autocratic control. From the beginning, it was employed by the colonizing power, and was therefore seen by colonized Africans, as an instrument of autocracy or authoritarianism because of the absolute or unlimited power it gave to the imperial government". This colonially- induced attitude towards the constitution as an instrument of control, rather than as a charter of freedom from arbitrary coercion, still persists today more than five decades after independence, and is lamentably reflected in the tendency on the part of post-colonial Nigerian rulers to use it as an instrument in the game of politics. Nigerians must free themselves from this attitude; they should de-colonise their mind of the attitude which, as in the colonial days, regards the constitution as an instrument of autocratic control rather than as a charter of freedom.

> *Finally, as vividly captured by (Nwabueze, opcit) "it has been the lot of Africa to have passed, quite rapidly, from one tragic misfortune to another- from the tragedy of colonial autocracy to that of military absolutism". Military coups and take-overs complicate Nigeria's legitimacy problem in various ways of which only three need to be noted here. First, military take-overs mark a break in governmental legitimacy because it is an armed usurpation, not only of powers of government, but also of the most fundamental attribute of a people's sovereignty. It is a second colonization, as it were, this time by the indigenes of a country.*
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> *In the second place, military rule is devoid of legitimizing role of popular participation in government and politics. All the electioneering processes inspite of its deficiencies are all attempt at legitimizing the state and its institutions.*
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> *Thirdly, military rule reincarnates and aggravates the problem of an absolute. It derives neither its existence nor its power from a constitution; no question therefore arises of any constitutional limitations upon its power".*

4.0 Constitution Making in Nigeria: An Historical Exploration

As earlier noted in this work, the foundation of anything is crucial as it houses other structures. Similarly, the source of constitution will make the citizens to have abiding faith in it. However, because constitution has been virtually an alien document in Nigeria coupled with the process of its emergence, it has not been seen as emanating from the people. The Holy Bible even attests to it (Psalm 11:3) when it states that "if the foundations be destroyed, what can the righteous do?

Constitutional development in Nigeria could be said to have begun with nationalist agitation. The earliest attempt at constitution making in Nigeria was that made in 1914 (Nigeria Council), which united the Southern and Northern protectorates, otherwise known as amalgamation, which was the handiwork of Sir Lord Lugard. The changes which the 1914 Nigerian Council was expected to usher in were denied by the British government. Instead, the British pursued a vigorous policy of divide and rule. The North was ruled by proclamation while the South was ruled by a colonial constitution. The first main constitution was however the Clifford Constitution of 1922 named after the then Governor, Sir Hugh Clifford. For the first time, four people were elected into the legislative council of 46 members (Three from Lagos and one from Calabar).

It was through a limited franchise based on annual income of E100. After the second World War, the fight for the right of self-determination and struggle against colonialism increased in tempo leading to a review of the Clifford Constitution (Otive, 2013). In 1946, the Richard Constitution was made and named after the Governor, Sir Arthur Richard. It has been documented that the lack of consultation that characterized the making of the Richards Constitution angered many Nigerians. According to (Dare and Oyewole, 1987), "with the promulgation of the constitution, many people were angry because the Governor did not consult the nation before the constitution was drawn up. It was therefore regarded as an arbitrary imposition on the country". In the words of (Arthur, 2010), the colonial constitutions were imposed on Nigerians by the British in the sense that they were neither allowed to determine the nature of the documents nor did they participate in the process of bringing them into being.

In this category fell the Lugard Constitution of 1914, the 1922 Clifford Constitution and the Richards Constitution of 1946. The 1946 Richard's constitution introduced regionalism and in the process gave official seal to separatist tendencies without the people's consent. As a result of the non-consultation, the criticism and rejection of the constitution was immediate. This led to a series of activities that culminated in the making of the Macpherson constitution of 1951 also named after the then Governor, Sir John Macpherson. It is instructive to note that before the Macpherson constitution was promulgated into law, the draft was debated at village, district, provincial and regional levels. (Otive, Opcit). As captured by (Sagay, 1999), "The 1951 constitution came into being after an unprecedented process of consultation with the peoples of Nigeria as a whole … on 9th January, 1950, a general conference of representatives from all parts of Nigeria started meeting in Ibadan to map out the future system of government in Nigeria with the recommendation of the Regional Conferences as the working documents".

Despite the consultation that went into its making, the implementation of the Macpherson constitution was ridden with crisis. Consequently, the 1953 London Conference and the 1954 Lagos Conference were put in place culminating in the promulgation of the Lyttleton constitution in 1954. The constitution succeeded in laying the foundation for a federal structure by removing the unitarism embedded in the 1951 constitution. In readiness for independence, the London constitutional Conferences of 1957 and 1958 were held leading to the 1960 Independence Constitution which had the footprint of the colonialists. In 1963, the Republican Constitution was made. According to (Sagay, Opcit), "both the 1960 (Independence) constitution and the 1963 (Republican) constitution were the same. The differences were the provisions for a ceremonial president (1963) in place of the Queen of England (1960) and the judicial appeals system which terminated with the Supreme Court (1963) rather than the judicial committee of the British Privy Council (1960)". The point being made here is that all the constitutions so far used in Nigeria till 1963 could best be described as one imposition or the other.

The military intervened in the political scene in 1966 and the 1979, 1989, the unpromulgated 1995 Draft Constitution and 1999 constitutions were during military regimes. The 1979 constitution was written by a Constitution Drafting Committee (CDC), made up of 49 wise men (no woman), headed by Late Chief Rotimi Williams (SAN). Later, the Constituent Assembly (CA) was established by a Decree of 1977 with 230 members. (Nwabueze, Opcit). Both the CDC and CA were mainly handpicked and where elected, it suffered the basis of democracy as well as legitimacy. It had both deliberative and advisory role. A Draft of the 1989 constitution was debated by an elected Constituent Assembly (with one-third of the members appointed by the regime) (Report of Political Bureau, Opcit).

In 1994, the Military Administration of Late General Sani Abacha set up and inaugurated a Constitutional Conference and charged it with the responsibility to produce a constitution for Nigeria. The summoning of the conference itself was dogged by controversies and boycotts following the reaction that greeted the emergence of the Military Administration in the first place. However, the Conference was able to produce what came to be referred to as the 1995 Draft Constitution. That constitution was neither promulgated nor adopted before the change of Government and the emergence of the Military Administration of General Abdulsalami Abubakar in mid-1998 (Main Report, 2001).

5.0 The Making of 1999 Constitution and Some Contentious Issues Raised About it

With the emergence of General Abdulsalami Abubakar as Head of the Federal Military Government, in a circumstantial condition, it was deemed necessary to provide a new constitution to guide the rapid transfer of power from Military to Civilians. The Justice Niki Tobi led Constitution Debate Co-ordinating Committee (CDCC) was set up solely to organize nation-wide consultations on the unpromulgated 1995 Draft Constitution. It had barely two months to do its work in a nation of about 120 million people, 774 Local Governments, 36 States and the Federal Capital Territory (FCT). It divided the country into zones, called for memoranda, organized debates, had special hearings and traveled to selected sites to listen to views from a widely array of groups. (Main Report, Ibid). Lending credence to the shortcoming of constitution making in Nigeria, (Arthur, Opcit) has this to say, "curiously, all these constitutions were made in the absence of any organized party system. Therefore, as democratic institution concerned with interest aggregation and articulation, no political party in Nigeria has ever taken part in the process of constitution making. Because of the historicity in terms of constitutional evolution, these constitutions have tended to generate more friction in the system than it envisaged to solve. The real stakeholders in the Nigerian enterprise have been denied the opportunity of making inputs in the constitution that is supposed to guide them". The General Abubakar Government, through Decree No. 24 of May 5, 1999 promulgated the constitution of the Federal Republic of Nigeria, 1999.

Ridiculously and with pride, it declared that:

> *The provisional Ruling Council has approved the report of the constitutional Debate Co-ordinating Committee subject to such amendments as are deemed necessary in the public interest and for the purpose of promoting the security, welfare and good governance and fostering the unity and progress of the people of Nigeria with a view to achieving its objective of handing over an enduring constitution to the people of Nigeria.*

Shortly after its promulgation, it was virulently attacked from all segments of the society. The (Main Report, Opcit) summarizes it thus:

> *While it is seen as a legal document, its legitimacy has been questioned. It is not seen as a document arising from the collective consent of the people. The process that led to it was not sufficiently democratized to ensure full consultation and popular participation. It did not directly address the nationality or ethnic question and has actually deepened primordial contradictions, thus posing more challenges to the country's new democracy. Indeed, the process was actually a brief discussion among a section of the educated and urban-based elite with little or no involvement of the majority of the people.*

5.1 Some of the Contentious issues about the Constitution include

The preamble that is seen as telling a lie about itself when it claims that the document was put together by the Nigerian people, with the clause: **"WE THE PEOPLE";**

Political Structure – that it is federal in name only but very unitary in content;

Secularity – that it does not fully establish without contradictions the secularity of the Nigerian State;

The judiciary – that the control of the federal government over judicial institutions and appointments in the States is rather excessive;

Revenue allocation – that the principle of derivation is not adequately addressed;

Women – that not only is the constitution not gender-sensitive but there are no affirmative action clauses to address historical discrimination and injustices against women;

Human rights – that the Human Rights Commission should not have been left out of the constitution and that it is weak on socio-economic and cultural rights;

Language – that sections of the constitution tend to uphold the language rights of the majority groups without granting equality to other languages;

The Military – that given Nigeria's bitter experiences with the Military, the constitution should have drawn lessons from south Africa, Ghana, and Uganda on how to contain and control the Military;

State-Federal relations – that too much power is concentrated at the centre;

Indigeneship – that there is still no clear definition of social indigeneship that guarantees full rights to Nigerians in any part of the country;

Constitutionalism – that there are no institutions built into the constitution to make it a living document and accessible to the Nigerian people'

Police Force – whether or not to establish state police in a federal system;

Political parties – that it is a negation of federalism and individual rights to preserve for the federal government control over the formation and registration of parties; that the requirements as set out in the constitution assume too much as to why parties are formed and negates the right to form small parties exclusively for local politics;

Amending the Constitution - that the current process is purely designed to frustrate amendments because it is cumbersome, expensive, and unrealistic and could only be seen as a strategy to maintain undemocratic status quo;

Land use Decree - that it is undemocratic in a federal system to vest all land in the Federal Government;

Local Government – that the system has not been accorded its desired status in the 1999 Constitution. [Main Report, Opcit)

It is the failure to use the constitution to address burning questions that made the then President Olusegun Obasanjo to embark on amending some portion of the constitution which could not achieved the desire result owing to mainly political maneuvering. Since then, the concern has been on amending the 1999 constitution. Little feat was achieved with the minor amendments recorded in year 2011. The on-going attempt at amending the 1999 constitution that is seen as radical and determined is being anxiously awaited by within and without. It is being anchored by the National Assembly. Time will tell of its utility in terms of addressing the national question that is making convocation of National Conference a desideratum. Its democratic credentials as well as legitimacy stance is debatable.

6.0 Conclusion and Recommendations

A critical examination of the history of constitution making in Nigeria reveals that the Nigerian people have never been afforded the opportunity to exercise their sovereign power of producing a constitution. It smacks of democracy and legitimacy. In the words of Ihonvbere, 2000), "the elite has remained incapable of constructing the necessary political platform to effectively mediate contradictions, promote tolerance and pluralism, articulate a holistic programme for growth and development and construct the necessary structures and platforms for democracy and democratisation. It is this failure that has increased ethnic, regional, religious and class suspicions and contradictions, raise corruption to unprecedented levels; delegitimated the state and its custodians; and eroded the foundations of a dynamic and productive economy". There is the need for the convocation of a National Conference – people's Conference from which an authentic constitution of the country would emerge. The interest in constitutions and constitutionalism is a new paradigm on democratising the environment in which constitutions are developed, adopted and proclaimed. Put differently, for constitutions to have value and legitimacy, the enabling environment for its making must first be established.

As (Issa, 1991), has observed, the new discourses and initiatives attempt to "recast constitutional issues and concerns with a different conceptual framework of constitutionalism guided by a new democratic perspective. Aside the basis for defining power, setting basic law and rights, a constitution should involve the people in the political process and should clearly articulate the aspirations of all communities and individuals in society. It must directly go to be heart of engaging not only those contentious issues that shape politics and power, but also those that shape the larger society, breed distrust, intolerance and violence".

Nothing can be more capturing in the resolution than (Ihonvbere, Opcit) when he says:

> *Today, our understanding of constitutionalism must go beyond a legalistic interpretation. Essentially, the focus of what we mean by constitutionalism is on two issues: first, the process of constitution making and the extent to which it is popular, inclusive, participatory or process-led, and democratic; and second, the available openings, institutions and processes of making the constitution a living document by taking it to the people so that they are in position to understand it, claim ownership and use it in the defence of the democratic enterprise. It must of course involve, among other Issues, the language of the debate and Language of the document.*

A rider to the above is (Louis, 1998) when he noted that "constitutionalism implies also that constitution cannot be suspended, circumvented or disregarded by political organs of government, and that it can be amended only by procedures appropriate to change of constitutional character and that give effect to the will of the people acting in a constitutional mode". The famous definition of (Thomas Paine) is now generally accepted as axiomatic. "A constitution", he said, "is not the act of a government, but of a people constituting a government".

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