A justification for the proscription of the 1999 constitution of Nigeria: lessons of the american experience

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Abstract
The Constitution of Nigeria-the 1999 Constitution of the Federal Republic of Nigeria is the grundnorm in the legal system of Nigeria. The procedures leading to the adoption of the legal instrument was bereft of the conventional practice of constitution making, this is against the backdrop of the American constitutional making experience- a sovereign State Nigeria owe its political and ethical practices to; and consequently, years after that process, the first to fourth amendments of the statute has created more disaffection than unity because the constitution is not a by-product of national consensus. It is therefore meant to show why the constitution should be jettisoned for another based on national accord. The methodology is doctrinal. The paper concludes that because the practice of a nation's constitution is autochthonous to its practitioners and that basis is the benchmark for the legitimacy of the legal instrument, Nigeria ought to go back to the drawing board, draw lessons from the American constitutional making experience and re-invent a democratic instrument acceptable to all and sundry to forestall the calls regarding succession, coup d' et at, terrorism, tribal sentiments, procedural impunity and so on.

Keywords: constitution, referendum, governance, democracy, sovereignty

Introduction

One of the factors that enhance social order and the principles of good governance for an egalitarian society is the constitution in a political framework. If the making and practice of a nation's constitution is sanctioned by a verse majority of its citizens, there is the likelihood for an enhanced practice and its observance. However, where a nation's constitution is derived from shabby and unconventional means and practices, the mechanism for its practice and due observance may have been shattered even before it comes into operation. Thus, Fombad (2016: 11) [1] believes that when laws are made, the mechanisms to ensure that they are fully implemented must also be put in place. This mechanism, according to him consist of the efforts from government in its determination to ensure the success of the legislations. This effort of government starts from the proposal stage of a legislation, even before the proposal becomes a bill of the legislature. This is not to be when it comes to the issue of the making of the 1999 constitution of Nigeria.

When the military administration of Nigeria began the transition to civil rule programme and proceeded to inaugurate a Constitution Debate Coordinating Committee (CDCC) on 11th November, 1998, hopes for a true democratic constitution to enhance good governance of Nigeria was anticipated. However, this was not to be as there where proposals from several interest groups in Nigeria, which said proposals and ideas would have re-invented Nigeria-these where swept under the carpet. For example, the Association of Nigerian Scholars for Dialogue had proposed the insertion of a section illegalising military coup in Nigeria as well as the issue of rotational presidency and an introduction of six (6) Vice Presidents for each of the six (6) geopolitical zones in Nigeria. As contained in the 1995 draft constitution that was not implemented. These novel ideas where meant to ensure the continuous peaceful co-existence of the more than 250 ethnic groups making up more than one hundred and fifty million people (150milloin) in Nigeria. These ideas were cheaply discarded without tenable reasons. Thus, the decision of the government of Nigeria to adopt the edited version of the defunct 1979 constitution as the 1999 constitution of Nigeria was never made public and it was when the 1999 constitution was published that the people of Nigeria had little idea of what transpired (Akande, 2000: 3) [2]. Today, despite the first to fourth amendments of the said 1999 constitution, the country has been thrown into 'a theatre of uncertainty' owing to the agitations for self-determination from the eastern part of Nigeria; control of resources of the Niger Delta region of Nigeria, to reflect true federalism as envisaged in federal systems of governance all over the world, and so on. It is the import of this author that these agitations stem from the abysmal nature of the constitution of Nigeria. It is in this regard that this research intends to expose the unconventional practices that produced the 1999 constitution of Nigeria towards justifying the fact that it is not a democratic legal instrument, sanctioned by the majority of the people of Nigeria, reason why it should be jettisoned for a people oriented constitution.

Meaning of constitution

The expression constitution, is a relative word that commands different meanings. It can be viewed from a very broad as well

as a narrow perspective. One way in which a constitution may be explained in a broad perspective is explaining it as a summation of the historical facts of a government and its institutions. However, it may also be considered from a narrowed view. According to Finer (1970: 145), a constitution may be defined as follows:

Codes of rules, which govern the allocation of functions of power and duties amongst various governmental agencies and define the relationship between them and the public.

The definition above explains a constitution as a collection of all the rules and regulations through which governance is attained by government and its agencies.

Relatedly, Wheare (1980: 3-5) [3] explained what a constitution is in a broad but formal perspective when he reasoned that a constitution is the whole system of legal rules that regulates the government of a country; it consists of the whole system of legal rules, non-legal rules and extra-legal rules that are enforceable by the courts. Legal rules are laws made by the legislature; non legal rules are not laws by the legislature per se, but customs, traditions and usages that have been recognised and incorporated over a period of time as standard practice of a given society or people. Extra-legal rules are laws made by "a government by force", that is to say, a government that is not recognised by the regular laws of the legal system of a country. One way in which such a government is possible is through a coup d' tat; another way is by the imposition of a government, for example, a government of unity or an interim government: while these governments are unconstitutional and illegitimate, their laws, it is argued by this author are undemocratic and ought not to be recognised by regular courts.

Another definition of constitution is suggested by the Supreme Court of Nigeria in the case of *Dapianlong & Ors. Vs. Chief (Dr.) Joshua Dariye & Anor***.,** in the following terms:

It is settled law that the constitution of any country is what is usually called the organic law or grundnorm of the people. It contains all the laws from which the institutions of state derive their creation, legitimacy and very being. The constitution is also the unifying force in the nation apportioning rights and imposing obligations on the people who are subject to its operation. It is a very important composite document, the interpretation or construction of which is subject to recognised cannons of interpretation designed or crafted to enhance and sustain the esteem in which constitutions are held the world over.

A constitution is a "national script" through which government and its institutions attain good governance. The reason is because it contains directive principles which are practice directions for enhanced governance. When these directive principles are concrete and an embodiment of the collective resolve of the citizens, then, the constitution is said to be autochthonous (that is, of an approved local application). Thus in the case of *Nafiu Rabiu Vs. Kano State*, the Supreme Court via Udo Udoma, JSC (as he then was) explained the then 1979 constitution (which is the brainchild of the 1999 constitution) in the following way:

*My Lords, in my opinion, it is the duty of the court to bear constantly in mind, the fact that the present constitution has been proclaimed the supreme law of the land, that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn; that it was ma*de, *enacted and given to themselves by the people of the Federal Republic of Nigeria in Constituent Assembly-for which reason and because it is autochthonous, it, of necessity, claims superiority to and over and above any constitution ever devised for the governance of this country- the unwarranted intermeddleness of the military authority with some of its provision notwithstanding; that the function of the constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve.*

But where the reverse is the case- like the Nigerian constitution making anomaly of the defunct Military administration of Nigeria, then the stage is set for incivility, anarchy, attempts at succession, unhealthy rivalry of interest groups, etc. the result of the aforementioned unhealthy situations as we have it in Nigeria today is bad governance and the core values of good governance, to wit, transparency, accountability and the rule of law are compromised.

The import of a constitution

A constitution has been interpreted diversely, based on individual experiences as seen above. However, as diverse as these opinions, there is a convention worldwide on what a constitution is meant to imply. Thus, in this regard, the Supreme Court of Nigeria in the *Nabiu Rabiu's* case posited that one of the import of a constitution is that a constitution is 'devised for the governance of a country' by 'establishing a framework and principles of government, broad and general in terms'. The framework and principles that a constitution establishes are normally directive principles or practice directions embedded in the content of the constitution as sections, subsections, paragraphs, subparagraphs and schedules. When the content is formulated by majority or representatives of the people, the constitution is likely a democratic instrument. But where the contrary is the case, this author is doubtful if such a devise is democratic and people oriented. Thus, Awofeso (2014: 275) [4] while commenting on requirements for a people centred constitution posited that it must 'aspire to address all conflict generating issues, whether socio political or economic among the people' which includes 'cases of marginalisation, religious conflicts, secessionist movements, agitation for resource control, ethnic militancy and insecurity'. In sum, a constitution is normally content driven, meant to answer the majority of national questions.

Furthermore, it is a legal tradition the world over that democratic constitutions are products of the people who are the practitioners. In the *Nabiu Rabiu*'s case, the Supreme Court of Nigeria said about the people oriented nature of a constitution as follows *'that the constitution… was made, enacted and given to themselves by the people of the Federal Republic of Nigeria in a Constituent Assembly, assembled…'* it follows therefore that a people oriented constitution is one derived from a people or citizenry gathered via a Constituent Assembly. What is then

a Constituent Assembly?

A Constituent Assembly is a gathering of the representatives of an entire people derived from an election of the representatives from all the acknowledged strata of a society and meant to engage in some sort of specialised debates on terms of references of national concern, towards agreeing on a common front for the advancement of a country. It was in this regard that Ihonvbere (2000: 272) posited that:

Any constitution that does not emerge from widespread consultations with all nationality and interest groups cannot be regarded as legitimate. The basis of constitutional legitimacy must now be measured by the extent to which the masses were part of the process of compacting the constitution.

What is being said here is that the measuring tool or test for the validity and legitimacy of a democratic constitution is the citizenry of a country, that is, the level of their involvement in the making and its practice. If the level of participation of the citizens is grossly circumscribed, the constitution is illegitimate and undemocratic and not even a subsequent act of a legislature to validate it can make it legitimate since its foundation is faulty.

Another significance of a constitution is that it is a moral instrument that ought to implement strict ethical codes in its observance. The implementation or observance of a constitution ought not to be partial or selective or bias in nature but holistic. It is normally a by-product of conscientious resolve to re-invent a society, which is why it may be regarded as a chief social engineer of the society, meant to streamline conducts and fashion out ways to enhance the good governance of a society through its provisions. When this is attained in a society, such is then regarded as an egalitarian society. Emphasizing the interconnectivity of morality and the laws of a society, Nyasam (2000) [5] says 'society by default is a moral one', this being the case, the observance and practice of a nation's constitution ought to be founded on the platform of morality and it follows that the making and practice of a constitution is reverend and sacred and must not unduly be politicized or conceived in a bias or autocratic way. Nyasam asserts further that:

Morality and law are inseparably bound together in their prime objectives as they both reinforce each other in the consolidation of those principles and values upon which ultimately, the humanity and humaneness of the society thrive and depend and also for the realization of those social and political ideal which compel the society to enter any form of social covenant.

Morality and the law are 'partners in progress'. The relationship is one founded upon the principles of mutual reinforcement and fecundation especially considering that law cannot entrench itself satisfactorily where morality is either declining or is at its lowest ebb. The Supreme Court of Nigeria in the case of the *Governor of Kwara State & Anor. vs. Alhaji Issa Ojibara & 6 ors.* posited about the sanctity, reverence and moral nature of the constitution of Nigeria in the following words:

I have said this much in the hope that all players in the field of politics will imbibe the culture of paying due reverence and regard to the provisions of the constitution. This has become necessary because these times there is an unrestrained inclination to disregard the constitution and treat its terms with irreverence and disrespect. The constitution is the very foundation and structure upon which the existence of all organs of governance is hinged. It must be held inviolable.

Lastly, another significance of a constitution in a polity is that it is a *prima facie* prove of sovereignty. It is also prove that the citizens of the sovereign state have resolved within themselves to come together and be bound in national unity because it is to the people that sovereignty belongs. This is another way of saying that independent states of the world operate constitutions and this is because it is the bedrock or fulcrum to enhance public administration. There is hardly any sovereign state in the world that does not have a constitution. Constitutions are either written or unwritten. In terms of the structure of government, they can also be categorized as parliamentary, presidential, unitary, communist or monarchical in form and either rigid or flexible, with regard to their amendments. Nigeria from inception has been operating constitutions. The first of such was the Amalgamation Constitution of 1914 which facilitated the amalgamation of the Northern and Southern Protectorates by the then Governor General Sir Lord Lugard, who was the representative of the Queen of England in the colony of Nigeria. The Constitution failed for several reasons, including inadequate political will. Other constitutions include the Clifford's constitution of 1922, the Richards constitution of 1946, the Macphersons constitution of 1952 as well as the Lyttleton and the Independence constitutions of 1956 and 1960, respectively. The constitution of 1960 and the subsequent ones are the national constitutions of Nigeria since Nigeria became a sovereign state in 1960.

The sovereignty of Nigeria can be referred to as a federation. A federation may be seen as a covenant relationship involving distinct nations, who have agreed to be bond together in terms and having a central government, while still maintaining some level of autonomy. In explaining what a federation is, the Supreme Court in the case of *A.G. of Kano State vs. A.G. of the Federation* said *'now the word, Federation is defined by the 1999 constitution itself in section 318 where it stated "federation means the Federal Republic of Nigeria"*. This implies that the federation of Nigeria is the entire states of the federation and the capital territory. It follows that the making and practice of the said 1999 constitution ought to involve all and sundry in the Nigerian polity. It shall soon be discovered that this was never the case in Nigeria.

The constitution of Nigeria is couched with regard to the above as 'the 1999 constitution of the Federal Republic of Nigeria', putting into consideration the diverse ethnic nations (over 250 ethnic nations) that have come together to become the federation of Nigeria.

Another feature of a sovereign state indicated by a constitution, which is significant is that it may as well be a republic. A republic is defined by the *Black's Law Dictionary* in this form: *A republic is a government which derives all of its powers directly or indirectly from the great body of the people and is*

administered by persons holding their office during pleasure, for a limited period or during good behaviour [6].

A republic is a people's mandate and it is patterned after the democratic government of a people. There are at least three (3) forms of democracy, to wit, direct, indirect and constitutional democracies. The direct form of democracy is the earliest form of democracy practiced in the Greek City State of Athens. It involved a direct participation of the populace in their affairs in an open square designed for that purpose. However, as society evolved, it became impracticable to practice such and this led to the introduction of the indirect democracy. This type of democracy involves representatives, where the people decide on societal issues based on the opinions of the representatives they have chosen for that purpose. The third type of democracy is what is referred to as contemporary form of democracy- constitutional democracy. It is a type of democracy observed through the principles and tenets of the constitution. It involves provisions for the periodic election of the people's representatives as well as the ambit of their responsibilities when they have been elected. This type of democracy usually has fixed tenures and such public positions are perpetually successive in nature. According to Gayovwi (2011: 126-155)[7] 'constitutional democracy is the newest brand of all types of democracies. This brand was developed to avoid the oppressive and autocratic experiences of the past. It involves a unique system of checks and balances intelligently codified in legal instruments to avoid power intoxication by political office holders'. It follows therefore that a constitution, to say the least, is a democratic or people-oriented device. Thus, to the mind of this writer, it is an aberration for a military junta to facilitate the making and practice of the democratic constitution of a sovereign state, as we have it in the Federal Republic of Nigeria.

Lessons from the making of the american constitution

Nigeria has a political history that is slightly similar to that of the United States of America, at least, with regard to the formation of each of the unions. While the indigenous people that made up the union now referred to as Nigeria in 1914- the amalgamation of the southern and northern protectorates, had individual traditional institutions headed by the Obas, Emirs, Chiefs, etc, the United States of America (USA) as far back as 1781, a period when the nation was a loosed confederation of states, each of these federations operated just like independent entities or countries. So, the nexus here is that both countries at the inception of their unions did exist as independent conglomeration of several groups.

The initial document which formed the constitution of America is the *articles of confederation* of 1781. This instrument was a subject of deliberation in a constitutional convention convened to enact a constitution that fits the new status of a republic it had just obtained from the British government after the American Revolution in 1783. The constitutional convention resolved, amongst other things that the articles be worked upon and sequel to this resolution, delegates from the states or regions that formed the American union where elected to attend an organised constitutional delegates' conference held at Philadelphia. The delegates representatives where fifty five (55) from the states of America- consisting of merchants, farmers, bankers, and legal practitioners.

One of the mandates of the conferees was the amendment of the articles of confederation which had earlier been used as an instrument to the declaration of the independence of America. This mandate however also ensured the conferees, who passed as the constituent assembly, to also deliberate on the structure of government and the accompanying powers as well as constitutional safeguards like checks and balances and separation of powers of government among the legislature, the executives as well as the judiciary. Other mandates came as proposals from interest groups, particularly the states, who would later donate some of its powers in the loosed confederation to a central government which would now become more powerful and functional for the interest of all Americans.

According to the United States National Archives and Records Administration (2018) the delegates conference lasted for about three (3) months wherein a committee was set up to design the details into a working document- this was the constitution drafting committee. The final document of this committee was signed by the delegates signifying approval. The signed document was then passed to all the states of the union to rectify- nine (9) of the thirteen (13) states rectified it to pass as the new constitution of the United States of America since it satisfied the conventional practice of a simple as well as a two-thirds majority. The constitution was rectified by a referendum.

Based on what has been discussed above, it is evidently clear that there was a need for a constitution of the United States of America to reflect the then present union of the loosed groups. This necessitated the procedures for the enactment of an appropriate legal document to reflect the national consensus of the people. This entailed the use of an initial document, the *articles of confederation*, as a precedent guide. A constitutional convention was set up to make modalities for the success of the plan. It further organised a delegates' conference meant to debate the several proposals from interest groups which were synthesised by a specialised group- a constitution drafting committee, which harnessed all the viewpoints into legal writings to arrive at the draft copy of the American constitution. The draft copy was then rectified by all states of the then union as the constitution of the United States of America.

While it is conceded that it is difficult for countries in the world to have a uniform process of constitution making or enactment, the same cannot be said of the basic or fundamental areas of the procedure that a democratically enacted constitution ought to evolve. One of such areas is that there must be a need for the enactment of a constitution. This need is germane because it helps to show that no form of coercion existed at inception.

Another basic criteria for a valid constitution is that the people are aware and participated in the processes that led to the enactment of the constitution. This position is as earlier enunciated in the Nabiu Rabiu case. The will of the people is in short the basis for all the processes, from the constitution of

the delegate's conference to the draft by the drafting committee and the rectification, which must also be to the knowledge and participation of the people because it is to the people that the constitution belongs. These viewpoints where properly put in perspective in the American constitution making experience.

Again, there was no undue influence from the governing body of the United States of America in any attempt to subvert the need for the making of the constitution neither was there any dubious move to abridge the resolve of the American people constituted for the novel objective.

The making of the 1999 constitution of Nigeria

The gist of the making or enactment of the 1999 constitution of the Federal Republic of Nigeria (which has undergone series of amendments in a relatively short period of time) commenced after the sudden demise of a military Head of States in Nigeria who assumed the said position on 17th November, 1993 and died on 8th June, 1998. Describing the event of that time, Inegbedion and Odion (2000: 48) [8] stated that the military junta made attempts at returning Nigeria to democratic government with the inauguration of a Constitutional Conference. The Constitutional Conference was made up of 369 members and charged with the design of a new constitution for Nigeria based on social justice and equality by considering fundamental issues like rotational presidency, plausibility of a federal system of government opposed to a confederal system, ideas on devolution of powers amongst the supposed tiers of government in order to reduce the tension associated with the quest for power at the centre. The Constitutional Conference headed by Justice Adolphus Karibi Whyte submitted its report on 27th June, 1995. It however became clear that the late Head of States was interested in a self-succession bid. By the words of Inegbedion and Odion, 'everything had been well programmed until the cold hands of death played its "joker" in Nigeria's constitutional history'.

The General Abdulsalami Abubakar's administration succeeded the late Head of States and facilitated the enactment of the Constitution of the Federal Republic of Nigeria (Promulgation Decree) No. 24, 1999 which enabled the enactment of the 1999 constitution of Nigeria.

The military government in facilitating the enactment of the 1999 constitution of Nigeria inaugurated a Constitution Debate Coordinating Committee (CDCC) on the 11th of November, 1998. The committee was headed by Honourable Justice Niki Tobi (as he then was) and the committee was given terms of references which included collecting viewpoints argued by interest groups in Nigeria. According to Awofeso (2014: 225) 'the CDCC received large volumes of memoranda from Nigerians both at home and abroad and benefitted from oral presentations in several of its organised public debates, seminars, workshops and conferences across the country. He argued that it was the information that was received from these sources that convinced the CDCC that the general consensus of opinion of Nigerians is the desire to retain the provisions of the 1979 constitution of the Federal Republic of Nigeria, with some amendments'. This author is of the humble opinion that this argument is at variance to the activities of the military government during the period under review and opt to align with that of Akande (2000) who vividly submitted that the report of the CDCC was pruned by the Provisional Ruling Council (PRC, a body of military personnel with quasi legislative powers in semblance with that of the National Assembly of Nigeria). He argued further that the activities of the government and this body was unknown at the submission of the report as the entire nation was in the dark on the nature of final report, the deliberations of the Provisional Ruling Council as well as the pattern for the final adoption of the viewpoints embedded in the final draft. He posited that it was when the constitution was enacted that a glimpse of what transpired was known in Nigeria. The PRC unilaterally adopted the 1979 constitution, shoving aside the recommendations of interest groups which included the academia, civil societies as well as the mass media. It also made the efforts of the CDCC one in futility as the Federal Military Government could have as well directly adopted the 1979 constitution of Nigeria without even constituting the CDCC and it would have been easier to predict that it is not a democratic device.

The mode and manner of the making of the 1999 constitution of Nigeria was rather shoddy and undemocratic, orchestrated by the military government- a pattern similar to that of the 1979 constitution which was vividly criticized by Ige (1995: 7) [9] in the following way:

The first issue to tackle is: who has the right and power to frame and approve a constitution? I submit that since the existence and power of a government derives from a constitution, the government cannot logically, and should not, make it. Logically, government cannot create itself. Or, considering our experience with colonial and military rule, it is better to say, it should not. As the Yoruba aptly put it, a knife does not sharpen or sculpt its own handle. A constitution must proceed from the exercise of sovereignty by the people. The reason is that political theory had long accepted and affirmed the axiom that sovereignty- or if you like, power- belongs to the people.

Also criticizing the processes and procedures adopted by government in the making of the 1979 constitution, which is the brainchild of the 1999 constitution of Nigeria, the Chairman of the then Constitution Drafting Committee (CDC) opined as follows:

The idea that a Decree is necessary must have owed its existence to a failure to appreciate that a constitution enacted by a representative assembly specially elected for that purpose possess a legitimacy superior to that to be derived from any other authority- salus populi suprema lex.

It therefore bits ones imagination that a constitution (the 1979 constitution) with so much controversy in its making is the precedent of the present 1999 constitution of Nigeria. Nigeria can do better in her practice of constitutionalism. At least, the model of the Unites States of America, briefly highlighted by this author above is a valid guide to a better procedure for the making of the constitution of the Federal Republic of Nigeria.

Conventional practice in constitutional making

There are basically two (2) factors that are condition precedent

to a smooth procedure of constitution making. These are the *process* and the c*ontent* of the constitution. The process involves the pattern of procedure that has been adopted for the making of the constitution, that is, how democratic is it? Are the majority of the citizenry aware and take active participation in the constitution making process or through their representatives? The best way of answering this is by determining if there was a Constitution Debate Committee and a Constituent assembly (or whatever designation it is referred to) that highlighted points of references, argued same and agreed on some salient points which later formed the content of the constitution. It is also a condition precedent in considering the democratic extent of a constitution to be sure that the *content* is a product of national consensus. A way of ensuring this is by making sure that the draft constitution embodied all the salient points or issues that were debated and agreed upon. At this point, any imposition by the government or stakeholder negates the whole process as the sovereign (the people) has been bypassed. This is why it is popularly remarked: *vous populi vox dei* (the voice of the people is the voice of God).

There are different styles or patterns in the making of democratic constitutions worldwide- the people or citizenry's level of participation is the denominator that determines its democratic extent. Nigeria ought to have borrowed a leaf from the American constitution making process briefly enunciated above.

Where the nation is a federation of several states, or course, the process is more tedious as it involves all the states. This is slightly different when the nation operates a unitary system of government. The mode of adoption is however the same- which is either through a referendum or an act of legislature (involving the representatives of the people) [10]. But the process of making involves the constitution of a drafting or debate co coordinating Committee or group that is saddled with collation of viewpoints of interests groups and a Constituent Assembly, which is a representation of an agreed percentage or quota of the citizenry meant to galvanize the viewpoints and agree on a common front from which a draft is made which is adopted either by a referendum or a legislative procedure. A referendum is described by the Black's Law Dictionary (2004) as the process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote: A vote taken by this method.

Any other act or practice apart from the above, is not a standard practice and ought to be re visited to regularise the irregularity. In short the processes occasioning the enactment of the 1999 constitution of Nigeria fall short of the above standard practice, especially with regard to the knowledge of the draft content and adoption of same- which were the reserve of the PRC of the defunct military government. The political practice of Nigeria is patterned after the model of the United States of America and it is only rationale that this attempt at constitutionalism ought also to be patterned in the same regard. This is however not the case.

Justification for the proscription of the 1999 constitution of Nigeria

As we have seen above, a referendum affirmed the constitution making process of the United States of America which involved an affirmation of interest groups as well as the States of the United States of America, more so as they were expected through the provisions of the adopted constitution to cede much of the powers to a new central government. Conversely, the process by which the 1999 constitution of Nigeria was adopted and enacted was bereft of due standard practice and for that reason, it is undemocratic and even illegitimate and no act of legislative amendment (as is being observed presently by the National Assembly of Nigeria) can correct this abnormality because it is foundational in nature. It is a foundational problem since the acts or practices of the citizenry did not affirm in adoption the content of the constitution neither were they allowed to reject same, as conventional practice demands. If this had been done, then it would have been easily concluded that Nigerians adopted the 1999 constitution in a referendum or through their elected representatives.

Secondly, the American people where deeply involved in their constitution making processes, whereby elected representatives were selected from all the states of the United States of America, firstly, as a constituent assembly which debated proposals from interest groups of the Americans and secondly, as a constitution drafting committee which harnessed all the proposals into a draft document which was later on adopted. In the Nigerian experience the 1999 constitution of Nigeria is a ruse and an act of superimposition played by a few cabal of the military administration. Thus, if the people neither affirmed nor rejected the draft constitution in a referendum nor by any legislative action, how then the preliminary provision of the 1999 constitution does provides as follows:

We the people of the Federal Republic of Nigeria having firmly and solemnly resolved to live in unity and harmony do hereby make and give to ourselves the following constitution.

It seems to this author that the act of superimposition by the government of Nigeria in the constitution making processes has become a tradition of Nigeria. This is against the backdrop of previous, similar experiences had in the past. For example, chapter 62 of the Laws of the Federation of Nigeria (LFN), 1990 contains the 1979 constitution of Nigeria, which irregular enactment process we briefly cited, and in regard of which Inegbedion and Odion (2000) had posited that prior to its enactment, 'the Constituent Assembly's powers were grossly circumscribed by the enabling Decree and as such, it was not conferred with the powers of enacting the constitution'; the said process was criticized by the Chairman of the Constitution Drafting Committee when it became clear that the military government had a 'plan B' unknown by the Assembly and the Committee assigned with the making processes. The enabling section of the 1979 constitution finally enacted provides as follows:

Whereas, the Constituent Assembly established by the Constituent Assembly Act, 1977 and as empowered by the Act has deliberated upon the draft constitution drawn up by the

Constitution Drafting Committee and presented the result of its deliberations to the Supreme Military Council and the Supreme Military Council has approved the same subject to such changes as it has deemed necessary in the public interest.

The question at this juncture is, what is the status of a military government in a democratic and constitutional process? The military has no status in a constitutional process, which in itself is founded on the platform of a democracy. This is because apart from combat, in a professional perspective, the military has no nexus in public governance, or better put, there is no established convention all over the world that harbours this outfit in public governance. Thus any attempt at this renders such a government undemocratic, draconian and illegitimate. It is a better way to sum up this idea in the words of the last military Head of States of Nigeria:

This administration has also given considerable thought to the calls for a Government of National Unity (GNU). We note the patriotic moves of these calls. But such an arrangement is full of pitfalls and dangers which this administration cannot accept. A Government of National Unity whose composition could only be through selection would be undemocratic. We will not substitute one undemocratic institution for another.

Thirdly, the enabling law that enacted the 1999 constitution into law, that is, the *Constitution of the Federal Republic of Nigeria (Promulgation Decree) No. 24 of 1999* does not have a status that may be equated or put above that of the constitution which it is said to have enacted. The Latin maxim, *salus populi suprema lex* (an ancient axiom which sets a conventional style of practice involving the supremacy of the people concerning the laws to govern them) indicates that the collective resolve of a people on issues of their society is the denominator or measuring tool of ascertaining legitimacy at all levels of governance and not the activities of a group of cabals. At least, it is a lesson learnt from the American constitution making experience which clearly shows that instead of the adoption of the constitution through a decree, a referendum or an act of parliament ought to have been considered. As a matter of principle, the courts, during the military juntas of Nigeria had stood their ground on a plethora of cases regarding the aberration of military Decrees. Thus, in *Attorney General of the Federation & Ors. Vs. Guardian Newspapers Ltd & Ors.* stated:

This subsection is awesome in content. This decree is simply letting it be known to the public at large that anything, whatsoever that is done in pursuant to any Decree or Edict is incontestable. It is frightening in that the Federal military government is literally saying that any matter it states to be the law of the land in whatever way it is conceived must stand unquestioned by the courts. Ouster clauses will not be interpreted in a manner that the rule of law cannot be preserved by withdrawing the protection of law from citizens and obliterating the operation of the doctrine of separation of powers.

It follows that the courts were aware of the irregularity of military juntas and their Decrees as opposed to democratic governments which are normally seized with upholding the rule of law.

Fourthly, the constitution comprises incoherent provisions, primarily occasioned by the abysmal way in which it was made. For example, the constitution addresses itself as the 'Federal Republic of Nigeria' but nothing indicates in its provisions that a federal system of government is being practiced in Nigeria. On like the American constitution and political arrangement wherein states in the union enjoy high level of autonomy, indicated in their control of funds; full operation of their tiers of governments, including parastatals and agencies like ministries, police force, all levels of courts up to the supreme court, tax systems, etc, The states in Nigeria are subservient to the federal government as if the Nigerian polity is a unitary system of government where power is concentrated at the centre. Inshort, section 11 (4) of the Nigerian constitution provides that wherever any House of Assembly of a state is unable to perform its function by reason of the situation prevailing in the state, the National Assembly may make such laws for the peace, order and good government of that state with respect to matters on which a House of Assembly make laws. The question is, what is the limitation of this power? How can it be determined that an Assembly cannot make its laws? What is the denominator for public interest and security? This section is a unitary styled one meant to prove the relevance of the federal government at the state level. It is non federalist.

Also, section 6 (6) (c) of the constitution is an ouster clause. What is an ouster clause doing in a supposed democratic instrument like the constitution? Egalitarian societies do not deny their citizens the rights due to them on the platter of flimsy politically motivated agenda. A democracy is expressive and not exclusive in nature.

More laughable is the provision of section 29 (4) (b) of the 1999 constitution of Nigeria which provides that any woman who is married is deemed to be of full age or majority age. It is established that there are parts of Nigeria where minors are married on mutual consent of parents. Does it then follow that these minors are adults knowing fully well that this act contravenes the Child Rights Act, 2003? Certainly not. An eminent personality, seeing this loop hole in the constitution has engaged in the marriage of a minor [11]. There are more of these provisions in the content of the 1999 constitution, even after the fourth amendment.

Conclusion

Nigeria is bedevilled by myriads of problems. There is no gainsaying the fact that sovereign states have their peculiar problems. The issue however is that many of the problems of Nigeria can be resolved by a thorough constitutional enactment.

A constitution that can help Nigeria achieve the status of an egalitarian society must be one derived from conventional means. This is to say that Nigeria must have participated convincingly in its making and ad EHP [opted same by referendum or better still, a l`RT156O\23YJegislative process, at least following the clue of the American constitutional making experiences, after all we pride ourselves as a union patterned politically after the United States of America. The American constitution was adopted by a referendum (although

with several amendments, presently) over 200years ago. Nigeria must aim to achieve such a feat and the time to start planning and strategizing for that is now.

Nigeria needs to learn to observe conventional practices and stop taking them for granted, and as rightly observed by Ige (1995):

There are universal axioms…which we will ignore at our peril- as we had done in the past. There is nothing peculiarly Nigerian about governance which should necessitate the violation of universal rules, norms or truths. There is nothing which is happening in Nigeria which has not happened in some other parts of the world before, and from which, if we are reasonable and responsible, we could not learn from.

Nigeria has actually not had an acceptable constitutional making experience, either during the military juntas or in democratic dispensations and to achieve this, the present constitution ought to be jettisoned for a new one founded on democratic best practices as envisaged all over the world. This will not only help to put to rest the issues of succession and marginalization from some parts of the country, but it will also ensure that Nigeria is reckoned with as a country that keeps to international best practices.

Table of cases

- Dapianlong & Ors. vs. Chief (Dr.) Joshua Dariye & Anor. (2007) vol. 12 LRCN 1 at 174.
- Nafiu Rabiu vs. Attorney General, Kano State (1980) 8-11 SC 148.
- The Governor of Kwara State & Anor. vs. Alhaji Issa Ojibara & 6 ors. (2007)148 LRCN pg. 1268 at pg. 1276p.
- Attorney General of Kano State vs. A.G. of the Federation (2007)148 LRCN pg. 1282 at pg. 1286.
- Attorney General of the Federation & Ors. vs. Guardian Newspapers Ltd & Ors. (1995) 5 NWLR Pt. 390 Pg. 703.
- Chief Gani Fawehinmi vs. General Sanni Abacha & Ors. (1998) HRLRA 541.

References

1. Fombad C. 'Problematising the issue of Constitutional Implementation in Africa', Fombad, C. M. (ed.), The Implementation of Modern African Constitutions: Challenges and Prospects (Pretoria: Pretoria University Law Press), 2016.
2. Akande J. Introduction to the Constitution of the Federal Republic of Nigeria, 1999. Lagos: MIJ Professional Pub., 2000.
3. Wheare, Modern Constitution. London: Oxford Publishers, 1980.
4. Aw EHP [Ofeso O. Constitutional Development in Nigeria: `RT Historical and Political Perspective. 156o\DB. Lagos: MacGrace Publishers, 2014.
5. Nyasani. 'The Ethical and Ideological Basis of a Constitution' at <http://www.common.org/ke/other/keckrc/2001/28.html>
6. Black's Law Dictionary, 9th ed., Texas: West Publishing Co., 2004.
7. Gayovwi GA. 'Democracy and Human Rights', Philosophy, Logic and Human Existence, Utuama, Amos and Whawo, Daniel (eds.). Ibadan: Kraft Books Ltd., 2011.
8. Inegbedion NA, Odion J. Constitutional Law in Nigeria. Lagos: Ameitop Books Ltd., 2000.
9. Ige B. Constitutions and the Problems of Nigeria. Lagos: NIALS, 1995.
10. Gayovwi GA. 'Issues on the Amendment of the 1999 Constitution of the Federal Republic of Nigeria (pt. 1), 2015. www.*nigerianlegalarticles.com*
11. Osewa. 'Senator Ahmed Sanni Yerima Justifies Marriage to 13year old Egyptian Girl'. Nairaland Forum, 2014 August 15.