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The Contradictions of Constitution-Making in Nigeria

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Abstract

Constitution-making is a popular but poorly understood concept. There are many speculations about the impact of different design processes on constitutional outcomes. Much of the debate reduces to the question of who is involved in the process and for what intent? We consider two central issues in this regard. The first is the problem of institutional self-dealing, or whether governmental organs that have something to gain from the constitutional outcome should be involved in the process. The second deals with the impact of public involvement in the process. Both of these concerns have clear normative implications and both are amenable to straightforward social scientific analysis. This study surveys the relevant research on constitution-making, describes the conceptual issues involved in understanding constitution-making, reviews some claims regarding the process of constitution-making, and presents a set of baseline empirical results from a new set of data on the content and process of constitution-making.

Key Words: Constitution, Constituent assembly, Parliament, Sovereign power, General will, Liberty, Adult suffrage, Democracy, Referendum, Enactment, Supremacy, Justiciability, Mandate, Political equality.

Introduction

To adequately appreciate the dynamic of constitution-making in Nigeria, it will be useful to look briefly into the history of constitutionalism. That history dates back to the 18th and 19th centuries. John Locke, like most political philosophers of his time, started his theory of the state with a consideration of man's state of nature. Accordingly, in his *Treaties of Government* (1690), he held the view that man originally lived according to the laws of nature. Following Hobbes' argument that life in the state of nature is solitary, poor, nasty, brutish and short, Locke described it as a state of peace, goodwill, mutual assistance, and preservation. He noted that the state of nature is not a state of war. He therefore distinguished between the two thus; "Men living together according to reason without a common superior on earth with authority to judge between them is properly the state of nature" and "... force exercised without right, creates a state of war, because it contributes to a violation of the state of nature, that is, of what it ought to be" (Locke, 2009).

Locke's state of nature is characterized by the lack of some basic fundamentals he calls 'wants.' These include the want of an established 'known laws', the want of an impartial judge, and executive power to enforce just decisions. Proceeding from this, men unanimously consented to enter into a social compact that created a government for the purpose of protecting their natural rights. But the only right they surrendered was to enforce the law. Government in this manner was based on the consent of the governed. Those who govern are bound to observe the terms of the compact.

Locke saw the ills of vesting absolute power on one person or a group of persons. From the account of his experience of the abuse of such powers by monarchs in his time, he set a limit on the power to be entrusted on government. But it must exercise its supremacy through laws properly promulgated and applying equally to all groups and classes. Locke (2009) in enunciating the principles of separation of powers as a way of limiting the government spoke of "balancing the power of government by placing several parts of it in different hands."

In Lockean society, the people still retained sovereign power, not the government. The people's power is supreme but is latent. Locke recognizes the power of revolution which is vested in the people. If rulers do not exercise their trust in the interest of the governed, then resistance is justifiable and a new government may be instituted. The dissolution of government can take place while society still remains intact.

Another Philosopher who provided a theoretical framework for constitutionalism was Jean-Jacques Rousseau. According to him, all individual citizens are merged into an all-powerful sovereign in whom inheres the expression of the general will. 'The general will in this instance cannot be wrong so far it is the will of all.' Rousseau's task from this indication was to provide the legitimacy of government through universal participation in legislation. Men for Rousseau were free. This accounts for his emphasis on the individual will, individual reason and individual liberty. Thus, "sovereignty is claimed for the many, not for the few, the state must exercise power not for itself but its members" (Chappell, 1994).

A basic import of the above view of Rousseau is the question of popular involvement in constitution-making. It is this substantive requirement if met that ensures that the people craft a constitution for themselves- one that they will identify as their own. It is a constitution that is a product of a popular participation that will stand the test of time and not susceptible to the vagaries of temporary majorities (Citizens Convention, 1995). This raises the question of what is a constitution. A conceptual understanding of constitution is that it is a system of laws, customs, and conventions which define the composition and powers of the state, and regulate the relations of the various state organs to one another and to the private citizen (Joye and Igweike, 1982).

Conceptual framework

In any well constituted democracy, the National Assembly, elected on the basis of universal adult suffrage in free and fair elections should embody the sovereign will of the people (Jennings, 1967). In normal circumstances, therefore, constitutional reforms and other forms of law reform are dominated by the legislature. In the past, the conventional pattern has been for government to appoint a Constitutional Review Committee to review existing constitutional documents. Usually the terms of reference are determined by the government in power-the appointing authority. After

periods of soliciting and collating the views of the people, through oral and written submissions, the committee then submits its recommendations, to the government (Inquiries Act). The grouse against this process has been precisely that the people have no control over the end product. The government of the day choose and accept what suits it, lending credence to the view that the government of the day abused their temporary majorities in government to push through constitutional reform to suit their own parochial interests. The history of constitution-making in Nigeria especially, the 1979, 1989 and 1999 constitutions attest to this sad pattern of constitutional development. Against the preceding background, it becomes instructive to reflect on what is meant by popular involvement. What form should it take? Who should participate and how? What frame(s) should it take?

In attempting to proffer solution to these questions, we will draw instances from the processes of constitution making and emerging jurisprudence from the South African Constitutional Court. These two constitute the bulwark of our conceptual framework.

A constitution is an act of the people if it is made by them either directly in a referendum or through a convention or constituent assembly popularly elected for this purpose, subject or not to formal ratification by the people in referendum (Nwabueze, 1982).

Within the context of the quote, constitution-making does not refer to the act of promulgation. Instead, it expresses the relationship existing between especially the systems of government, and the individual. If a constitution is agreed upon and accepted by the people in a referendum or through a constituent assembly, it is truly a representation of the people's act. The people's act in this sense becomes the consent of mathematical aggregate of the general will. This follows from the fact that all the people cannot vote in a referendum, for example, the under aged. Likewise, only true representatives of the people popularly elected by them can take part in the deliberations of a constituent assembly. In some cases, the referendum or constituent assembly precedes executive or legislative action and in others it is a ratification of an executive or legislative act. What this means is that promulgation is only a formal act, which should not detract from the popular consent.

In any well constituted democracy, the referendum or a constituent assembly needs to be preceded by a wide range of constitutional proposals. All the populace cannot take part in deliberations of a constituent assembly. It becomes pertinent therefore that the terms of reference of the constituent assembly should be determined through an election specifically organized for that purpose. This situation calls for the electorate to properly understand that they are voting to authorize the adoption of a constitution on their behalf. Any configuration short of this is not a genuine reflection of the popular will.

In two recent judgments, the Constitutional Court had had occasion to adumbrate on the nature and scope of the duty to facilitate public involvement in the law-making process. In the first of these cases (case CCT/2/,2005) *Doctors for Life International Vs the Speaker of the National Assembly and others*. The Court concluded that the proper approach was as follows:

The duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation.... Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament ... to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less. In determining whether Parliament has complied with its duty to facilitate public participation in a particular case, the court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is

reasonable, this court will pay respect to what Parliament has assessed as being the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in the public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable (Case CCT/2/05, at paras 145-6).

The Court (Doctor for Life, 2006), went on to hold that there are at least two aspects of the duty to facilitate public participation and said:

What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus-construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making.

Sachs, J. (Sachs, J.2006, in Doctors for Life, 228), who agreed with the majority but for different reasons perceptively observed that although regular elections and a multi-party system of democratic government are fundamental to a constitutional democracy they were not exhaustive of it. He went on to articulate a vision of

a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodic elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticize it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to

feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical ...

The learned Judge further observed that it would be a travesty to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years.

Sachs noted with approval that there was a growing trend globally to “see constant public involvement in law-making not only as integrally bound to representative democracy, but as an important contributor to its revitalization. He quoted, with approval, a recent report in Britain concerning what was seen as a growing trend in that country towards disengagement by the public from formal democratic politics. The report observed that public re-engagement with formal democracy was vital to avoid:

- ... the weakening of the mandate and legitimacy for elected governments because of plummeting turnouts”;
- the further weakening of political equality because whole section of the community feel estranged from politics;
- the weakening of effective recruitment into politics;
- the rise of undemocratic political forces; and
- the rise of what the report calls “quiet authoritarianism” within government (Rountree, 2006).

We have quoted extensively from these recent developments to show that Nigerians are not alone in demanding their involvement in crafting their own constitution. It is their participation that would produce a sacred compact, they would call their own, one which articulate their “shared aspirations and the values which would bind them and which would discipline their government and its national institutions” (Mwanakative, <http://www.post.co.zm>).

Methodology

The method which we adopt for this study is that of exposition, conceptual clarification and critical analysis. Traits of the analytical explanation of philosophy would also be pursued in order to bring it to bear on aspects of the study that so requires. The underlying methodological framework is

ideational. And this is expository, critical, analytical, and even historical. It is a method of investigation deriving from the idealist articulation of the character of phenomenon in general (including social phenomenon).

There are a number of methodological frameworks which may be pursued to understand social reality such as constitutional development. We may for instance, adopt the idealist or the materialist framework. However, the adoption of any framework requires that we justify our rejection of the other. Our chosen methodological framework shall then give a guided excursion into the conceptual entailments of our operative concepts by posing them as critique of the status quo.

In line with most philosophical expositions, the data used for this study were derived from secondary sources and through the existent constitutional realities in Nigeria. Part materials from this source include; products of extensive review of related literatures, books, and journal articles. In this regard, the position advanced by this study is not based on any research instrument. Despite this, the materials and methods used in this research are relevant and reliable to the extent that their prognosis approximates various expressions of constitution-making in Nigeria.

Contradictions of constitution-making in Nigeria

Following the outlined perspective of the processes of constitution-making, Nigeria's current constitution (1999) as has been the case with previous ones (1979/1989), is an act of the federal military government. It did not follow the outlined processes of a people's constitution and was also not adopted by them in a referendum. As has been the case with all military organized constitutions in Nigeria, there was a constituent assembly established by constituent assembly decree. The composition of the constituent body is usually made up of persons appointed by the military government. For instance, the 1988 constituent assembly consisted of a chairman, a deputy chairman appointed by the government. Other membership included 450 members who were not directly elected by the people but through electoral colleges formed by the local government councils, which themselves did not have the mandate of the people. Another 111 were government nominated members. The composition of the constituent assembly as shown above clearly reveals that the constitution adopted by government was not on behalf of the people. To buttress this point, we use the speech of the self-styled Military President in which he said that aspirants to the constituent assembly

would be screened and the decree establishing it will contain provisions that will “discourage extremists in our body politic” (This-Week, 1988). He (Babangida) further said that “no community should send bench-warmers, and ... those whose traits are extremism or fanaticism of any kind.”

The point of departure here is that it is the people on their own who should decide the sort of constitution they need, and which kind of people to produce it. If the forward to the constitution (1999) would be “we the people ... do hereby make enact and give to ourselves the following constitution,” then the people and the people alone should be left to decide their fate. In reference to the President’s speech, if their choice is an ‘extremist,’ a ‘bench-warmer,’ or ‘fanatic,’ then they should go ahead and make one. It is their daily lives that the constitution would affect. In any case, what is at the heart of the demands of the polity is a people driven process through a widely constituted Constituent Assembly so as to guarantee ownership and legitimacy of the constitution. It is in this respect that a constitution according to Jennings (1967) is “an organization of men and women. Its character depends upon the character of the people engaged in governing and being governed...”

Contrary to this, what appears missing, largely on the part of government, is the realization that electoral democracy and popular involvement are mutually reinforcing. For as the South African Constitutional Court has succinctly observed:

General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and to become familiar with the law’s as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken into account. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it

acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered... (Mbao, 2007).

The government has no monopoly of political wisdom. It ought to reflect and respect the sovereign will of the people. It is therefore, necessary that there be broad consensus on the modalities of adopting a constitution. The demand and struggle of the people are not limited to the process alone. The substance of the constitution should also be agreed to in such a way as to embody the sovereign will of the people, which includes a broad range of fundamental issues.

Legitimacy

A very important aspect of constitution-making apart from the mandate of the constituent assembly established to draw up the constitutional proposals is the issue of legal power. Part of the mandate of that assembly includes; the role of drafting constitutional proposals for the Federal Republic of Nigeria. The implication of this provision according to Nwabueze (1982), is that the “assembly had no power to decide the substantive content of the constitution.” The only power it had was to make recommendation, which could be accepted or rejected by the government. By this act, the assembly was reduced to the level of a mere deliberative body, with no power to take decisions on the form and content of the constitution.

A tacit implication of this is that, the federal military government made the 1999 constitution by status like the previous ones of 1979 and 1989 respectively. This suggests why many amendments were made by the then Armed Forces Ruling Council. Against this phenomenon, Nwabueze observes that: “The mere fact of a substantive amendment, as distinct from a purely formal one, seems irrespective of its nature or importance, to have eroded the basis of the people.”

The hypocrisy of this orientation is that the structural forms of the government have remained as they were approved by the constituent assembly; the charges resulting from the amendments are those that have to do with the material well of the entire polity.

The content of the Nigerian constitution exhibits anti-grass root and therefore anti-people tendency. This is expressed in a conceptual argument

as to whether the people, acting either in a referendum or through constituent assembly possess the legal capacity to adopt a constitution and restore its validity as law? This question arose out of the contention that law-making is a function only of a political community, and not the people in their mass. It further holds that only a people organized as a political community can enact laws through the machinery of the state. In this regard, it is proper for the people to constitute themselves into a political community. But a constituent act of this sort through which a constitution is established is purely a political act, giving the constitution only a political existence different from a legal one. According to Nwabueze, “if it is intended that the constitution should also be a law, then it is for the resultant political creation, the state, to enact it as such through its regular procedure for law-making.”

This view disregards the notion that the state is a creation of the people by means of a constitution. The state on its part derives its power of law-making from the people. So, the people who constitute and grant this power can act directly through a referendum or otherwise, to give the constitution its character and the force of law. This point goes on to explain why the lawness of a constitution as a country’s legal order should not depend upon its enactment through the law-making processes of the state. It should instead depend upon its recognition as such by the people to be governed by it.

A discernible conclusion from the above analysis is the need for a constitution to be adopted by the people. The importance of this is revealed by the fact that the legitimacy of the constitution depends on the people’s consent. But we should note that it is an elected (not nominated) constituent assembly that can give legitimacy to a constitution (Eresia-Eke, 1992). Contrary to this and with particular reference to the 1989 constitution, the then Chief of General Staff, Augustus Aikhomu (March 31, 1988), in his press briefing with media executives said;

in addition to elected members of the constituent assembly, there will be other persons of well-proven integrity and patriotic commitments to represent critical interest which would include labour, youth, the universities, women and so on, who may not be adequately represented through the electoral process. These persons would be nominated by government.

This is an example of anti-democratic and anti-grass root trait in constitution-making in Nigeria. When a constitutional document is perceived to be anti-grass root, it fails to command the loyalty, obedience and confidence of the people. This means that it is illegitimate. The illegitimacy of constitutions accounts for failures of many constitutional governments. It leads also to lack of respect for the constitution among the populace. When the constitution fails to provide the necessary regulatory framework, politics is played according to the whims and caprices of the politicians.

One other way of securing legitimacy is for a constitution to be properly understood by the people. It may then be acceptable to them. It is therefore important that a constitution be put through a process of popularization. Popularization helps to generate public interest in the constitution as well as an attitude that everybody has a stake in it- the common property of all. Without the sense of a total involvement, a constitution will remain remote and artificial to the people. Further, if the final act of adoption is that of the entire polity, that may conceivably enhance the legitimacy of the constitution by;

fostering among the people a feeling that the constitution is their own, and not an imposition by the government, and that they thus have a stake, a responsibility, in observing its rules (Nwabueze).

This would also serve to give meaning and reality to the phrase “we the people ... do hereby make enact and give to ourselves the following constitution.”

Supremacy of the constitution

Adoption of the constitution is important in that it provides the framework for the supremacy of the constitution. This supremacy rests on the authority of the people as the source and donor of all political power in the state. In this way, constitution compels greater obedience when it is recognized as a superior law by the people. The persistent call for a constitution to be adopted by the people according to Eze (1984), serves to correct the erroneous view held by African leaders that the power to govern embraces power to enact a new constitution.

In holding this common view, they lose sight of the fact that a government has no more than a limited mandate to govern according to the constitution under which it took office. When a mode of government has been instituted, and a group of rulers is elected to govern under it, the right to change the system under a new constitution remains with the people. Just like the right to choose the rulers were organized around the people. Any attempt by government to assume the right of the people amounts to usurpation.

In Nigeria, this denial of the people's right has persisted for a long time. Throughout the colonial period, constituent power remained the exclusive preserve of the colonial masters. This power was jealously guarded to enable them dictate the pace of constitutional advance. With the achievement of independence, the situation was inherited by the Nigerian elites who are all out to protect and maintain the status quo. A further usurpation of the people's constituent power was reproduced in the 1966 coup. The effect of the coup on the right of the people was to destroy the existing constitution, and replaced it with a new one, based on the authority (decree) of the coup-makers. Thus, the return to civil rule in 1979 was an opportunity for the people of the country to exercise their right to adopt a constitution for themselves. Regrettably, however, the opportunity was ruined by the method adopted by the Federal Military Government in constituting the constituent assembly and by its arrogation of supreme power to amend in many significant respects, the decisions of the assembly. This phenomenon was repeated in the cases of the 1989 and 1999 Nigerian constitutions respectively.

As part of the inherent contradictions in our constitution, we highlight the issue of justiciability of the provision of the constitution. A constitution is a mode of organizing a state and its government. This definition relates to a constitution as a political charter. It is in this understanding that it is a body of fundamental principles according to which a state is organized. The emphasis here is on authority and sanction which are primarily political. This is the approach adopted by those who drafted our constitution (members of the constituent assembly). Another is the legal aspect of the constitution, especially, as it concerns the objectives and directive principles of government. This gives us the idea why the constituent assembly considered the appropriate function of the constitution to be that of a political charter of government. And this consists of declaration of

objectives or directive principles of government and a description of the organs of government in terms that import no enforceable legal restraints.

A constitution of this nature exhibits its political existence only. Its provisions are political, not legal serving just to exhort, to direct and inspire governmental action. It also bestows on the actions, the stamp of legitimacy. Writing about the non-enforceability of French 'Third Republic' constitution, Dicey (1974), held that:

... the restrictions it placed on the action of the legislature are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public opinion.

From the foregoing, therefore, inasmuch as the judicial enforcement is an inexorable criterion of lawness, there exists a contradiction in a command being legal and yet not judicially enforceable. The Nigerian 1979, 1989, and 1999 constitutions have this character. They possess the capacity of being a law, but certain aspects of it are not justiciable. The judicial enforcement is excluded, such as the fundamental objectives and directive principles of state policy. This prevailing state of affairs accounts for reason the directive principles are no more than ideals which the nation anticipates. They are merely ideals which, to realize, "the citizen can only pray and hope for, but in respect of which he can hope for no assistance whatsoever from the courts" (Aguda, 1983).

Conclusion

The point of departure in this study as already stated is that no country can afford to trust temporary majority with the constitution-making process. By drawing on the emerging jurisprudence from South Africa whose own transition to a constitutional democracy has been commended, we have been able to show that constitution-making is a painful process which cannot be left to one segment of society. The demand is for a document which the people will identify as emanating from them, not one imposed on them by the ruling elites. In order to adopt a constitution through a people driven process, government and the progressive forces in the

country need to agree on that process. Again, there is also the need to agree on the procedures and guiding principles. Enabling legislation must be enacted to create the Constituent Assembly. Such legislation must spell out the composition of that body. How are the delegates to be elected/designated? These and other such measures would ensure that the constitution which would emerge from the process would be a beacon of hope for Nigeria anchored on the values of openness, responsiveness, accountability, equity and inclusiveness, popular participation and fidelity to the rule of law.

A constitution exhibits the political and legal existence. When any of these aspects is lacking, it ceases to be an ideal constitution. Our constitutions had always shown this lack emphasizing only the political aspect. This is so because, its pre-occupation has been to only exhort, direct and inspire governmental actions. It also bestows on the actions, the stamp of authority. Following this trend, the legal aspect of the constitution is carefully excluded. This is explained in the non-justiciability of the fundamental objectives and directive principles of state policy, and the fundamental rights as contained in chapters two and four of the 1999 Nigerian constitution respectively. And this situation has prevailed because the temporary majority has always excluded the rest of the polity from active involvement in the processes of constitution-making. Rather than the people deciding the content of their constitution, it is decided and imposed on them by those already in rulership positions.

Owing to the need for an ideal constitution (one which emanates from the people themselves), and for democracy to succeed in Nigeria and elsewhere, the errors in the constitution-making processes must be corrected. It should be made to function ideally, incorporating both the political and legal aspects of its provisions. Where this is achieved, it would help to protect the individuals against violations of their right as well as against unjust regimes.

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Under the Inquiry Act, the President appoints Commissions of Inquiry, gives them their terms of reference. At the end of the inquiry, the government chooses and picks as it pleases from the recommendations and publishes these in a White Paper. The people have no say on what ultimately gets into the White Paper.