

CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (AS AMENDED): THE WILL OF NIGERIANS?*

Abstract

The search for an autochthonous Constitution for Nigeria has always been a teething problem since inception of Nigeria in 1914. Almost all the Constitutions so far enacted in Nigeria lacked autochthonous nature of a valid Constitution and due process in constitution-making. Thus given rise to so many deficiencies and many Constitutions enacted in the polity being rejected and jettisoned soon after the enactment, and a quest for another new Constitution pursued. The object of this paper is therefore, to examine in a global perspective whether the Constitution of the Federal Republic of Nigeria, 1999, (as amended), is the will of the people. To examine this, the paper adopted the doctrinal methodology using primary and secondary sources of information supported with a historical and a comparative analysis to drive home the points. To this end, it is sadly discovered that the Constitution of the Federal Republic of Nigeria, 1999, (as amended), is not the will of the people, and so face more or less disobedience than obedience to the provisions of the Constitution. It is therefore, recommended among other things, that immediate replacement of the Constitution that will emanate from the people is of essence. This could be achieved by creating an interim Constitution which will guide the people while a constituent assembly that will emanate from the people is constituted to draft a Constitution which will reflect the desires and aspirations of the people and which will also at the end be thrown back to the people through referendum and later adopted based on people's will.

Keywords: *Constitution of the Federal Republic of Nigeria 1999, Will of the People, Preamble, Federalism*

1. Introduction

The Constitutional development of Nigeria shows that Nigeria has no doubt produced numerous Constitutions starting from the colonial era to date. These include the Clifford of 1922; the Richard's Constitution; the 1946; the Macpherson's Constitution 1951, the Lyttleton Constitution 1954, the Independence Constitution 1960, the Republican Constitution, 1963, the 1979 Constitution, the 1989 Constitution, the botched 1995 Constitution and the Constitution of Federal Republic of Nigeria, 1999, (as amended). Except the 1963 Republican Constitution none of the above mentioned Constitutions were produced by the appropriate process of constitution-making, nor were the Constitutions originated from the people. The Lyttleton Constitution, 1954, which ushered in a loose Federation was a foreign based Constitution, 1960 Independence Constitution was only a change in name while the British West minister model of Constitution continued. For instance there was still the office of Governor-General who was the ceremonial Head of State while the Prime Minister was the Head of Government.¹ It is observed that the 1960 and 1963 Constitution according to Sagay were basically the same. The only differences were the provisions for a ceremonial President (1963) in place of the Queen of England (1960) and the judicial appeal system which terminates at the Supreme Court (1963) rather than the Judicial Committee of the British Privy Council (1960).² The 1979, 1989, 1995 and 1999 Constitutions were all military based and so lack ingredients of home grown Constitutions despite some positive features some of them portrayed. Constitution is a major part of any legal system. It serves an engine of development, socially, economically and politically and so requires that any enactment of the Constitution should be based on the will of the people to give it the efficacy and legitimacy it requires. Both government and the governed can hardly co-exist effectively and function accordingly with an imposed Constitution. The Chief Executive as the custodian of Law should as a matter of necessity be a vanguard of and protector of an autochthonous Constitution because, a Constitution sets the pace for all and sundry and lays bare the responsibility accountability and ever ready for socio-economic and political changes that inevitable in the contemporary society. It therefore, beholds on the polity to ensure that at any pointing time, the serving Constitution meets these demands. This is why also every serving Constitution must originate from the people owning it to be able to serve the purpose for which it is enacted otherwise it will be a wild goose chase attracting abuses than obedience. In the light of these, the paper examines among other things, the concept of federalism; the concept of Constitution; the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the nature of the Constitution, the process of constitution making; the drafters of the Constitution; the rationale for a Constitution to be adopted by the people, and finally the preamble which seals the agreement after a rigorous process, to ascertain

***A. C. AKPUNONU, PhD, LLM, BL, LLB, BEd.**, Department, of Public and Private Law, Chukwuemeka Odumegwu Ojukwu University, Anambra State,

¹I. Ekwerehadu & O. D. Amucheazi, *Constitutional Review In AN Emergency Democracy: The Nigerian Experience*, (New Jersey: Goldline and Jacob Publishing, 2015), p.7.

²I.E. Sagay 'Federalism, the Constitution and Resource Control, a speech made at a sensitisation programme organized by the Ibori Vanguard on 19th May, 2001 at the Lagoon Restaurant, Lagos in I. Ekwerehadu & O.D. Amucheazi, n I above, p.9.

the truth or otherwise of whether the Constitution of the Federal Republic of Nigeria, 1999 is actually the will of the people.

2. Definition of the Key Words

Federalism

The word Federal is derived from the Latin word *Foedus* meaning alliance or treaty. An alliance or treaty presupposes the separateness of the allying parties who now decided to act in togetherness³. Be that as it may, federalism is among the terms that lack universally accepted definition, with the result that authors who attempted the definition defined it according to their perceptions and backgrounds. In view of this, Nwabueze defines Federalism as an arrangement whereby powers of government within a country are shared between a national country-wide and government and a number of regionalized, (that is territorially localized) government in such a way that each exist as a government separately and independently from the others, operating directly on persons and property within its territorial areas, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others.⁴ Federalism entails a tighter alliance than a confederation. The reasons for adopting federalism are many and include, military reasons, economic, international reasons and the preservation of the interests of the minorities who are often found in such a union.

Constitution

The term Constitution is also one of the terms that lacks universally acceptable definition and so, some authors adopted the complex approach while some adopted the simplistic approach to define the term. The Black's Law Dictionary adopted the complex approach and defines a Constitution as 'the fundamental and organic law of a nation, character and organization of its government, as well as prescribing the extent of its sovereignty power and manner of its exercise'⁵ Chambers Universal Learners Dictionary, on the other hand, adopted simplistic approach to define a Constitution and states thus 'a Constitution is a set of rules governing an organization or a supreme law and rights of a country's people'⁶. Nwabueze simply views the term Constitution as 'the frame or composition of a government, to the way in which a government is actually structured in terms of its organs, the distribution of powers within it, the relations of the organs, and the procedure for exercising power'⁷. In another vein, the Supreme Court was minded to define Constitutional Law in the case of *A.G. Bendel v A.G. Federation and 22 ors*, as the Law which regulates the structure of a country, the powers and functions of government, rights and duties of the individual and provides remedies for unconstitutional acts.⁸ Constitution in this context is the instrument of the state, which stipulates the standards and principles that guide the government and its citizens in their inter-relationship per se and thus sets the standard for penalizing misconducts. Indeed without a Constitution, whether written or unwritten to regulate government, set out the fundamental objectives, goals and directive principles of a country, the national life and the people would be subjected to a lot of arbitrary actions from the government and government would be according to the whims and caprices of the rulers, public authorities and their agents⁹. Without a Constitution in a country like Nigeria, truth, justice and equity would fall to the ground, lawless, chaos and lack of direction would reign.

Constitution must be according to civil and regular laws, that is, laws which are reasonably justifiable in a democratic society and not according to men.¹⁰ Therefore government and persons who constitute government must be subjected to the laws of the land until the laws are changed, for law made them rulers and government needs laws than anything else to rule and discharge its functions¹¹. In *William v Majekodunini*,¹² the plaintiff petitioned against the Administrator of Western Region to set aside a restriction order placed on the plaintiff purportedly made under the Emergency Power Act 1961 because, it was illegal and ultra vires and sought an injunction to restrain the defendant, the servants and from giving effect to the order. The Attorney General of the

³ A. I. Okafor & O. D. Offornze. *The Concept of True Federalism in Nigeria*, (Enugu: SNAAP Press Ltd, 2008), p.3.

⁴ B.O. Nwabueze, *Federalism in Nigeria Under the Presidential Constitution*, (London, Sweet and Maswel, 1983), p.1.

⁵ A. Garner Bryan, *The Black's Law Dictionary* (ed.), (7 edn. USA: West Publishing Company, 1991), p.306.

⁶ Kirkpatrick *Chambers Universal Dictionary*, (7 edn. Ibadan: Spectrum Books Ltd, 2007), p.5.

⁷ B.O.Nwabueze in Bola Ige, *Constitution and Problems of Nigeria*, (Lagos: Panat Press, 1995). P.5

⁸ (1982). All NLR 85SC, see also Akpan Moses E. *Constitution and Constitutionalism: An Analysis of Nigeria*, (Lagos: PAICO Ltd, 1979), p.1.

⁹ *Shugba v Minister of Internal Affairs* (1999) INCLR, *Dele Giwa v IGP*. Unreported Suit NoM/44/83 of 30/7/84. *A.G. Federation v Guardian Newspaper* (1999) NWLR Pt 618 p.187, *Director of SSS v Agbakoba*, S.C. (1980) 3 NWLR p.595, p314 sc.

¹⁰ E.O. Malami, *The Nigerian Constitutional Law*, (1st edn. Lagos: Princeton Publishing Co, 2006), p.5.

¹¹ *Lagos state v Ojukwu* (1986) INWLR pt 18, p.621.

¹² (1962) 1 All NLR 710.

Federation contended that the restriction was in the interest of public order and public safety. The Supreme Court in declaratory judgement, held that the plaintiff was entitled to his freedom and was at liberty to apply for an injunction. As also stipulated in the provisions of the Constitution, everybody is entitled to due process of law and fair hearing as demonstrated in *Garba and Ors v University of Maiduguri*¹³. These cases are some of the checks and balances provided by the Constitution to ensure that the government and governed at any pointing time act according to provisions of the Constitution which is the basic law of the land-and which of course must be autochthonous to attract the obedience it requires, because, acting outside the provisions of the Constitution is an invitation to anarchy.

3. Historical Origin of Constitution

The idea of a Constitution was first elaborated by Aristotle in his classification of government as monarchies, tyrannies, aristocracies, oligarchies, democracies and so on. For Aristotle, the best form of government was that which combined elements of monarchy, aristocracy in such a way that the citizens of every class were enabled to enjoy their respective responsibilities in the interest of the whole.¹⁴ However, the modern idea of a Constitution began to change after the Reformation particularly, in the works of scholars like Thomas Hobbes, John Locks and Jean Jacque Rousseau who developed the notion of the social contract.¹⁵ Under the social contract ideology, people agreed among themselves to shelve or to give up a portion of the absolute freedom that signifies the pre-social 'state of nature' in return for the security that an acknowledged sovereign government can provide¹⁶. It is pertinent to note herein that it was Lock's work especially on the division of rights between those assigned to the government and those retained by individual and on the division of powers within the government, that influenced the 18th century authors of American Declaration of Independence, the United State Constitution and French Declaration of Right of men and citizens.¹⁷

4. Sources of a Constitution

The fundamental rules which make up the Constitution of a nation are many, such rules or provisions of a Constitution may be collated from various and sources such as the past experience of the country, for instance, the social, economic, political, historical and geographical experience of its various people as the major sources¹⁸. Also sources of a constitution could be drawn from notable historical documents such as the British Magna Carta of 1215 and American Bill of Rights.¹⁹ Sources of Nigerian Constitution are mainly collated from statute of General Application which was applicable in England in January 1, 1900, the Received English law, statutes passed by the Nigerian parliament, decree and edicts passed by the military government, intellectual works of eminent scholars, jurists, historians, philosophers, essayists, politicians, and statesmen, such as John Lock, works of Dicey, customary law and so forth. Other sources of Constitution include conferences and constitutional conference, such the 1953 London conference and Lagos 19th January 1954 conference which later ushered in the Independence and the recent 2014 national conference and a host of others.

5. Nature of a Constitution

The nature of a Constitution in this context is determined essentially by the source of its authority, that is, one whether it is the original act of the people and secondly, by the justifiability of its provision, that is whether it is a law enforceable in the Court or merely a political charter of government amenable to judicial enforcement.²⁰

6. Sources of Constitution's Authority

A Constitution is an act of the people if it is made by them through a Constitutional Convention or Constituent Assembly popularly elected for this specific purpose and later approved by the people in a referendum²¹. The making of a constitution in this context refers to the act by which its substantive content, particularly the system of government, and the relations of governmental structure inter se and with the individual is determined and adopted, rather than the formal act of promulgation²². It therefore, follow that where the substantive opinions of the people

¹³(1986) INWLR Pt 18, at p.550 SC. and the Constitution of the Federal Republic of Nigeria, 1999 (as amended) section 36 (1).

¹⁴ Encyclopedia Britianica, (15th edn. Britian: Elicayo co Jacob, 1998), p.567.

¹⁵ Ibid.

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ E.O. Malami, n 10 above, p.15.

²⁰ B.O. Nwabueze, *The Presidential Constitution of Nigeria*, (London: C. Hurst and Company,1982),p.1

²¹ Ibid

²² Ibid

are freely agreed upon and adopted by them probably in a referendum or through a constituent assembly popularly elected by the people and for the purpose, the final agreement that is the Constitution, is the act of the people. Promulgation may, in the interest of formality and regularity, have been effected by an existing state authority but should not detract from the popular will.²³ In view of the above fact, any Constitution in existence lacking this process is not the reflection of popular will, no matter how symbolic, genuine and advantageous it may manifest to be.

7. Constitution-Making

Opinions are that the process of Constitution-making is divided into two, the old approach and the new approach. Accordingly, Igbuzor states that in the old approach, the government manages the election of a constituent assembly. The process ensures little or no debate, no consultation with ordinary people and no referendum on the draft Constitution before it becomes law as government has its own agenda and the direction of the Constitution will eventually reflect the wishes of the government. The new approach however is a participatory process that places premium on dialogue, debate, consultation and participation. Such a process is guided by the principle of openness, legitimacy and inclusivity.²⁴ Inclusivity indicates that all voices and opinions including those of minority groups should be heard and reflected. It is an actual participation of all segments of the society in the discussion and determination of national priorities and values.²⁵ In any well constituted democracy, the referendum or a constituent assembly needs to be preceded by a wide range of Constitutional proposals.²⁶ Since all the people cannot participate at the same time in the deliberations of a constituent assembly, it becomes paramount therefore that the participants to this assembly should be determined through election, particularly organised for the purpose.²⁷ Again, this situation vividly beholds on the electorates to properly understand that they are actually voting to authorise the adoption of an accord (Constitution) on their behalf. Any other channel short of this process, no matter the genuineness, is not a reflection of the popular will.

According to Agha, two recent judgements in the Constitutional Court have occasioned adumbration on the nature and scope of the duty to facilitate public involvement in the law-making process. One of these cases is *Doctors for Life International v the Speaker of National Assembly and others*.²⁸ In this case it is stated also that public involvement may be seen as ‘a continuum that ranges from providing information and building awareness, to partnering in the decision-making. Sachs observes, with agreement, that there is 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 revitalization²⁹. Sachs observes also that, there is in recent times in Britain a growing trend towards disengagement by the public from formal democratic politics and this is vital to avoid what Sachs calls.

- i. The weakening of the mandate and legitimacy for elected governments because of plummeting turnouts.
- ii. The further weakening of political equality because whole section of the community feel estranged from politics;
- iii. The rise of undemocratic political forces and the rise of what the report calls ‘quiet authoritarianism’ within government.³⁰

The recent development in Britain over people’s attitude towards democratic politics is not peculiar to Britain; Nigerians are fast demanding for full participation in producing a document they will call their own; incidentally, where this situation is not addressed, Nigeria may face the same experience in Britain.

8. Rationale for a Constitution to be adopted by the People

The desideration for a Constitution to be adopted by the people lies mainly on its bearing with the legitimacy of a Constitution and it is concerned with how to make it command the loyalty, obedience and confidence of the

²³ Ibid

²⁴O. Igbuzor, ‘Strategy Towards a Peoples Constitution in Dare E. Arowolo, ‘Constitution–Making, Constitutionalism and Insurgencies in Nigeria’, *Nigerian Journal of Applied Behavioural Science*, (2014), (accessed 6th June, 2016), p.220.

²⁵ Ibid.

²⁶Agha Eresia Eke, ‘The Contradictions of Constitution-Making in Nigeria’ *African Research Review: An International Multidisciplinary Journal*, Ethiopia, Vol. VII(4), No. 27, (2012). p.79 (Last accessed 6th June, 2016).

²⁷ Ibid

²⁸(2005) CCT/2/2005. Need for the participation and consultation of the populace is emphasized in the above case and the parliament is required to provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them.

²⁹Sachs in Agha Eresia Eke *ibid*.

³⁰ *ibid* p.82.

people.³¹ Many Constitutional governments in recent time either have problems or have collapsed because of lack of respect and value from the citizens, the masses or from even the politicians. It is therefore commonsensical that people must be integrated with the Constitution and command their loyalty and confidence and under this umbrella the Constitution is then the common property of all. On this premise, people often get themselves identified, attracted and get involved in the management of the Constitution rather than see it as imposition. This again would serve to give meaning and reality to the phrase 'We the people... do hereby make, enact and give to ourselves the following Constitution, which, since, the adoption of the American Constitution in 1787, has become a familiar feature of modern republican Constitutions.³² Adoption of the Constitution by the people is very important for it provides the basis for the supremacy of the Constitution and these proceeds the legislature that drafted the Constitution as well as the government and other organs of government and their powers thereto. But where this is otherwise, the efficiency and respect required of the people may be lacking as we find in some developing countries especially in Africa and Nigeria in particular. Finally, allowing the people to fashion out and adopt their Constitution would remove the misconception, common among African leaders, that power to govern embraces power to enact a new Constitution.³³ It is the prerogative right of the people to change any system or rather fashion out a new Constitution where necessary and doing otherwise by any existing or emergent government amounts to usurpation of people's inherent right.

In Nigeria the usurpation of the people's right to fashion out and adopt their Constitution is being practiced for a long time, starting from the Colonial masters who saw the citizenry as tools to be used and discarded after use. Therefore, power and fashioning out a Constitution was the exclusive preserve of the colonialists. The Independence Constitution handed over to the Nigerians was just a mere change of name because the remnants of colonial mode of leadership and provisions of Constitution did not significantly change. The adoption of the Republican Constitution in 1963 was the act of the Prime Minister and Regional Ministers who single-handedly decided that the 1963 Constitution should reproduce the 1960 Constitution. So if ever people gathered, it was in the bid to decide this and the proposals were adopted by them. The 1966 coup d'état crowned all, by suspending the existing Constitution through Suspension and Modification Decree they fashioned, the devastating effect and blow is still living with us here till date. The military equally arrogated to themselves the supreme power to make and amend the Constitution and so ended up in making a lopsided Constitution which is more or less a Unitary than Federal a Constitution.

9. Contradiction of Constitution-Making in Nigeria; the Question of the Constitution of the Federal Republic of Nigeria 1999's Preamble

From the available information and expert opinions above, for a preamble to project the term 'we' or rather claims a Constitution to be the act of the people, it must pass through the rigorous process already examined above. Which means:

- a. The Constitution must be the consensus of the people in a federal set up like Nigeria in all the geo-political set ups.
- b. There must be constituent assembly exclusively elected by the people of various component units.
- c. The assembly must operate on the mandate of the people of various component units of the country/federation.
- d. The result of the deliberation must be referred back to the people in a referendum exposing when the draft Constitution drafted by the constituent assembly is submitted to the people for approval and such draft (Constitution) is approved after rigorous deliberations by the populace.³⁴

Thus, it is in this context that the Constitution is said to be formulated, driven and people-oriented. Also it is on this premise could the preamble with the words such as, WE THE PEOPLE of the Federal Republic of Nigeria ... DO HEREBY MAKE AND GIVE TO OURSELVES the following Constitution, could emanate and where this process is lacking, adopting and presenting the Constitution to be the people's act and will, is nothing, but a contradiction. Or rather a charter of government consisting largely of declaration of objectives, directive principle of government and a description of organs of government and in this regard, it bears no enforceable legal restraints. A Constitution of this quality without more exist only to serve to direct, exhort and inspire governmental action and has only a stamp of legitimacy. Such was the position of the commonwealth countries Constitutions then. However with the independence of the USA from the colonialist, Britain, in 1787, the jinx was broken³⁵, and the new idea which see a Constitution a formal document having the force of law from the people was ushered in. A thorough observation

³¹ B.O. Nwabueze *The Presidential Constitution of Nigeria*, n 20, p.3.

³² *Ibid.* p.5

³³ *Ibid.* pp.7-9

³⁴ Agha Eresia Eke, n 26, p.79.

³⁵ B.O. Nwabueze, *The Presidential Constitution of Nigeria*, n. 20 above, p.3.

of the mode of Constitution-making in Nigeria shows that Nigeria toes more or less the old approach and emphasizes more on the exclusion of the populace. It adopts the colonial method where the colonialists in Nigeria initiated and drafted the Constitution for the country without the active participation of the citizenry.

In the post-colonial era, especially between 1960 and 1966 before the military incursion, there was also no significant change from what it used to be in the colonial era. When the leadership fell practically through a coup d'état, the constitution-making in Nigeria was also hijacked, so were the 1979, 1989, 1995 and the present 1999 Constitutions. Constitution-making under these period were acts of the military; the citizens were excluded from participating in the affairs that concern them. Rather, the military adopted Constitution suspension and modification mode such as (Suspension and Modification), Decree No. 34, 1966; (Suspension and Modification), Decree No 13, 1970; (Suspension and Modification), Decree No 30, 1971; (Suspension and Modification) Decree No. 32, 1975; (Suspension and Modification), Decree No. 1, 1984 and a host of others, to suspend and modify any sections or provisions of the early Constitution that did not suit them or rather their thinking. In 1999 the military under the leadership of Abudusalami Abubakar hand-picked his loyalists and fashioned out a Constitution for Nigeria. The Constitution is not the original act of the people but an act of Federal Military Government. The Constitution was not adopted by the people in a referendum nor was there any adequate constituent assembly established by the people. There was no legal power distinct from the popular mandate of the constituent assembly established by the mandate of the people to adopt the Constitution, because the Constitution Drafting Committee appointed by the federal military government lacked the power to decide the substantive content of the Constitution, even if it had, it would only be by way of recommendation as part of bodies in the polity and this might have been accepted or rejected, as the case may be. The process of Constitution-making as enumerated above was not adhered to, rather the citizenry were totally excluded from participating. No wonder the Constitution is lopsided with much power concentrated at the centre and with many amendments thereafter, all to no avail. When democracy finally returned to the polity in 1999 that is about 17 years ago, the political elites under the Peoples Democratic Party (PDP) out of their corrupt and selfish tendencies adopted and continued with the old approach thus denying the citizens the opportunity of exercising their fundamental and sovereign rights of making themselves a Constitution to guide them. Thus, the Constitution is alien and alienates the people who ought to have genuinely made and have it. Today the Constitution breeds more problems than it intends to solve. The long time neglect and the seemingly inability of the Constitution to address critical national questions, especially as it concerns the lopsided nature of the Constitution, resource control and implementation of the recently concluded 2014 National Conference resolutions, have added to the sporadic violence and uprising that are threatening the corporate existence and unity of the polity. The process of Constitution-making excludes the different categories of the Nigerian population. The views and aspirations of the Nigerian citizens are not captured by the Constitution. These frustrations have to some extent led to the aggressions that have currently resulted in violence and terrorism,³⁶ such as Boko Haram in the North, kidnapping and aggression of the Indigenous People of Biafra (IPOB) in the East and recently the Niger Delta Avengers in the South-East/South-South of Nigeria.

The Constitution of the Federal Republic of Nigeria, 1999 opens up with a lie by attributing the authorship of the Constitution to the people of Nigeria. 'WE THE PEOPLE ... Do Hereby make, enact and give to ourselves the following Constitution...'³⁷ The implication of this is that the Constitution that does not evolve from the people may suffer from legitimacy and adherence problems and may not be adequately equipped to deal with a legion of critical challenges of nationhood.³⁸ A comparative assessment of Constitution-making process in other parts of the world indeed reveals that such principles have a high chance of success when they emphasize process over content.³⁹ U.S. as the father of federalism laid down the universal precedent in constitution-making wherein it emphasized that the Constitution, the sovereign power, the power to make or change the Constitution of the polity belong to the people. Borrowing the words of Emmanuel Ibiham Amah quoting Thomas Paine in his Right of Man stated that a Constitution is not the Act of a government but the people constituting it.⁴⁰ Edward Corwain, traces the efficacy of the U.S. Constitution to the fact that the people to be governed by it established it.⁴¹

The French fourth and fifth Constitution of 1946 and 1958 respectively were prepared by a specially elected Constituent Assembly of members, 64 of whom were representatives from

³⁶ E. Dare Arowolo *op.cit*, note 6, p.221

³⁷ *Ibid* Falana Nwabueze and Osagha in E. Dare Arowolo.

³⁸ *Ibid*.

³⁹ University of Pennsylvania-African Studies Centre, <f:/e//E:/Barr.Mrs/NigeriaConstitution-making9.7.98.htm>, (n.d), (Last accessed 6th June, 2016)

⁴⁰ Emmanuel Ibiham Amah, 'Nigeria – The search for Autochthonous Constitution' Faculty of Law, Ebonyi State, University Abakaliki amahibiam@gmail.com, (last accessed 11/3/2019), p.1

⁴¹ Edward Corwain in Emmanuel Ibiham Amah *Ibid*.

Africa. The draft proposals of the Constituent Assembly were submitted to a national referendum, which rejected them on 5 May 1945. A fresh proposals were prepared by a second Constituent Assembly duly elected on 2 June 1964, and were later approved at a referendum on 13 October, 1946 likewise the 1958 Constitution of French.⁴²

Using due process for constitution-making rooted in a Constitution assembly and a referendum specially elected by the people concerned are also adopted on the amended Constitution of Belgium 1831, the several Constitution of the Republic of South Africa and the Ethiopian Constitutions, after the latter's several bloodshed to get the political issues sorted out and one of which was ensuring that constitution-making emanates from the people instead of the other way round, as obtains in the Nigerian government. Constitution is not also produced over night as we have them in Nigeria. It took the United States of America about four years (1785-1789) to enact the Federal Constitution using the process of constitution-making when it became clear in the thinking of the leaders and citizens that the former confederation Constitution practiced around (1785-1787) no longer serve the desired purpose. The participation by the public on a continuous process provides validity 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 laws as they are made.⁴³ The participants of Nigeria Constitution-making in the University of Pennsylvania-African Studies Centre, already cited above unanimously agreed that if the process of Constitution-making is to be inclusive and successful, this must begin with a number of steps among which are promulgation in 1995 of an interim Constitution after which the government that emerges in 1999 will begin a full process for the making of the Constitution which is of course similar to the steps we have enumerated above. Unfortunately, this noble idea was not adopted nor was the modern process of Constitution-making followed; no wonder the majority of the Nigerian populace continues to criticize the Constitution of the Federal Republic of Nigeria, 1999, as not the people's document. The principles of Constitutionalism and rule of law must be adhered to for any meaningful Constitution to emerge. The government is not a citadel of knowledge, and so has no monopoly of political wisdom. It is therefore of paramount importance that any Constitution-making in Nigeria must be based on the consensus of the people and the modalities for adopting a Constitution. There is an umbilical cord between Constitutionalism and bottom-up approach to Constitution-making.⁴⁴ The concept of bottom-up tends to co-opt and involve the communities in the process of Constitution-making. Scholars have observed that a Constitution that emerges through the people's participation receives obedience and the people's acceptance capable of promoting national unity and political stability; but what is deficient in the Nigerian case is the bottom-up approach.⁴⁵ The 1999 Constitution is foisted on the people by the military.⁴⁶ There is therefore, a missing link and this explains why Nigerian laws are largely disrespected even by the very elected leaders sworn to uphold the Constitution.

Ekweremmadu and Amucheazi agree with the fact that the Constitution of the Federal Republic of Nigeria, 1999, as amended is not the will of the people because it lacks their participation. Rather it was fashioned by the military and approved by them and so it is not a legitimate document. They also stated that the Constitution vest all the nation's resources on Federal Government which is a negation of Principle of Fiscal Federalism, and also concentrated powers at the centre. They pointed out other criticisms of the Constitution of FRN, 1999 as follows:⁴⁷ The Constitution did not take into consideration the political history of the country. In addition, there are lot of inconsistency provisions that do not meet the wishes and aspirations of the people. The Constitution for example established a national judicial council to control the appointment, promotion and discipline of both state and federal judicial officers. According to Sagay, the Fundamental problem of the 1999 Constitution is the subversion of Federalism, which was accepted as option for Nigerian government institutionalized in the various Constitutions from 1951 to 1963 and to a much lesser extent in the 1979, 1989 and 1999 Constitutions because of the consequences of military rule. The language of the Constitution having made under military is commanding and poses two problems. First, the Constitution is written in masculine gender as if there are no women in Nigeria. Secondly, it is written in legal jargons that are very difficult to understand. But the trend today is to write Constitution in a simple language that the average man can understand. The Constitution does not guarantee economic, social and cultural rights. Thus, provisions relating to adequate shelter, sustainable and adequate food,

⁴²*Ibid*

⁴³*Ibid.*

⁴⁴A. Oyeboode, 'Law and Nation-building in Nigeria: Selected Essay', in E. Dare Arowolo, *Ibid*, p.222.

⁴⁵*Ibid.*

⁴⁶F. Falana, '*Constitutionalism and the Re-invention of the Nigerian State*'. A paper presented at the Gani Fawehimi Annual lecture organized by the Ikeja Branch of Nigerian Bar Association held at Oranmiyan Hall, Lagos Airport Hotel, Ikeja, 15 January (2009), (accessed 6th June, 2016).

⁴⁷Ekweremadu & Amucheazi, n 1 above, pp 22-23.

reasonable national minimum living wage, old age care and pension, unemployment and sick benefits and welfare of the disabled are congregated under Chapter Two otherwise called 'Fundamental Objectives and Directive Principles of State Policy', which are tagged by the same Constitution as non-justiciable and unenforceable by the Courts of Law.⁴⁸ Whereas these are Fundamental issues which many Nigerians need to be given. Meanwhile in the federal Constitutions of the United States, Germany and South Africa, these are enshrined in the Human Rights, Human Dignity or Basic Rights respectively of the Constitution and they are justifiable. Similarly the enormous powers of the Chief Executive under the same Constitution are quite alarming,⁴⁹ and that is why at the lightest opportunity they are involved and abused. The current disobedience to rule of law especially the court orders both at the national and state levels especially under the President Buhari administration speak for itself⁵⁰. Fiscal Federalism and multiple Constitutions which are part and parcel of a Federalism are all myths in the serving 1999 Constitution. The republican nature found in Federal State is also not provided in the current Constitution unlike what is obtainable in South African and the U.S.⁵¹

The Constitution is also faulted as regards inelegance and failure to make provisions for some critical matters of state. For example, until the first alteration in the Constitution of the FRN, 1999, a candidate for appointment as chairman or member of the Independent National Electoral Commission, in section 156 of the Constitution must possess the same qualifications as candidate contesting for a seat in the House of Representatives as stipulated by section 65 and 66. Incredibly, one of such qualifications is membership of a political party. But this may not have been the intention of the drafters of the Constitution that the umpire or referee should be a member of any of the competing sides. So the National Assembly had to amend section 156 of the Constitution to insulate INEC membership from partisan politics. In a similar vein, section 65 (b) prescribes membership to a political party as one of the qualifications for becoming a member of the House of Representatives. This implies that even the members of INEC charged with organizing and supervising elections in the country must be members of political parties. This certainly could not have been the intention of the Constitution. Ihonbere also criticized the Constitution of the FRN, 1999, as amended as having failed to address in its entirety the character of the state; the nature of the custodians of state powers, the critical issue of hegemony and the inability of the elite to initiate a national project; national question, production and exchange relations; and other primordial determined or constructed identity questions.⁵² Ekweremadu is of the view that citizens have moral claims to participating in Constitution-making and insists that strict observance of the principles of inclusivity, diversity, transparency, and accountability are capable of guaranteeing legitimacy of the final product through wide acceptance among the citizenry.⁵³ Ekweremadu further states that whatever Constitution the people will live with and obey must enjoy popular recognition and acceptance as their own document by capturing their views, expectations and aspirations. This is also the view of many Constitutional lawyers like Nwabueze. Unfortunately, the Constitution of the Federal Republic of Nigeria, 1999 lacks this process. In making a Constitution, every identifiable community should be invited and consulted and its view included and reflected in the Constitution where necessary. The new approach is capable of stabilizing the polity by adequately addressing the fears of the minority as well as taking care of the aspirations of the majority.⁵⁴ Evolving an acceptable Constitution in Nigeria involves visionary leadership and supportive followership. This, again, could be achieved by exemplary leadership that serves the people in a selfless and sincere manner.⁵⁵

⁴⁸The detailed account of the above provisions, of Nigeria is provided in the chapter II of the current Constitution and in the work of I. Ihonbere 'Towards participatory Mechanism and Principle of constitution-making in Africa in Path in Peoples Constitution, (Lagos: CDHR, 2010) in Ekweremadu & Amucheazi n.2, P.23.

⁴⁹See the United States Constitution 1787 (as amended) chapter iv (Fundamental Human Rights), the Constitution of Federal Republic of Germany; 1949. (as amended). Article I (Human Dignity, and the Constitution of the Federal of South Africa, 1996, chapter II (Bill of Rights), particularly at sections 26-27.

⁵⁰The Constitution of Republic of Nigeria, 1999 is deficient and so gives room for bad management by the custodians of the Constitution, such as the attitude of Appeal Courts in certain cases such as the conflicting ruling of the authentic candidate for PDP between Tony Nwoye v Andy Uba unreported in November 16th 2013 in Anambra, where the Appeal Court, Port Harcourt Division ruled in favour of Andy Uba and disqualified Nwoye, whereas the Appeal Court, Abuja Division ruled in favour of Tony and this was reaffirmed by the Supreme Court and also the case of A.G. Benue State v Umar, Appeal No, CA/OW/215/2011 delivered on 5th day of July, 2012 unreported and many more others.

⁵¹See for example the United State Constitution, Article IV, s 4.

⁵²Ekweremadu & Amucheazi, n 23, pp. 22-24

⁵³I. Ekweremadu, *The Politics of Constitution-Making: The Parliament's Role to the People*, A paper Delivered at the 58th Commonwealth Parliamentary Association, CPA, Conference in Colombia, Sri-Lamical, 14th September (2012), in Dare, (accessed 6th June, 2016).

⁵⁴Dare *op. cit.* note 6, p. 222

⁵⁵*Ibid.*

10. Conclusion and Recommendations

The focus of this chapter is centred on whether the Constitution of Federal Republic of Nigeria, 1999 (as amended) is the will of the people. We observed from the expression of scholars and the masses that Constitution-making has two approaches, the old and the new approaches. The old approach reflects the constitution-making in the colonial era where the masses or the citizenry are excluded from active participation in making a crucial document or agreement that guides them. In this approach, the Constitution is made by the government, adopted and imposed on the people. The old approach is rather government-oriented or what Dare describes as 'elitists;' the elitist nature of constitution-making excludes the citizenry and this makes obedience to the Constitution difficult and often problematic. On the other hand, the new approach is modern and attracts major opinions and it is mainly practiced in the contemporary world. It is a process and involves the people who own it, and it is also sovereign. The new approach allows for consensus opinion, constituent assembly and referendum that emanates from the people. People are included instead of excluded and this makes the Constitution efficient, eventually gives the Constitution the legitimacy it requires as the people's document. Sadly, findings above show that Nigerian constitution-making adopted the old approach practiced during the colonial era which could also be changed at the attainment of independence but for the corruption, self-centred attitude of the elites and the political class and the eventual blow of military interventions. The military fashioned out many Constitutions in Nigeria as a result of their long regimes as shown in the work and this includes the Constitution of the Federal Republic of Nigeria, 1999. The making of these Constitutions followed the old approach instead of the modern approach of constitution-making as we find in most modern countries with Federal Constitutions such as the USA and South Africa. Considering the heterogeneous nature of the polity, the Nigerian Constitution should adopt, in the provisions of the Constitution, the ideas and approaches that addresses the problems and concerns of the multi-ethnic groups in the polity, guarantee the fundamental human rights and control electoral violence. Thus the Constitution of the Federal Republic of Nigeria, 1999 is not and will never be said to be the will of the people because it did not evolve from them; rather it is the reflection of the military and the elitist whims and caprices to the exclusion of the poor masses especially the grassroots. So no amount of advocacy, campaign will cure the deficiencies of the Constitution of the Federal Republic of Nigeria, 1999. Rather the time to address the ugly trend is now and this can be achieved by following the due process in constituting as exemplified in other jurisdictions above and also adoption the recommendations outlined above. Otherwise he may wake up one day with anarchies and insurgents waiting at our various doors.

Following the lopsidedness as discovered in the provisions of the Constitution of the Federal Republic of Nigeria, 1999, we suggest that an interim Constitution should be enacted to take care of the polity while a constituent assembly is set up to start off the process of constitution-making which will correct the deficiencies of the 1999 Constitution through decentralization of the powers of the centre, (federal government), provision of multi-constitutions as applicable in federal states, provision of a clear cut fiscal federalism which the Constitution of the Federal Republic, 1999 as amended lacks, establishment of state police to nip in the bud numerous crimes that are ravaging the system especially at the grassroots.