CONSTITUTIONAL AUTOCHTHONY: THE NIGERIAN EXPERIENCE*

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 peoples will.

Keywords: Constitution, Autochthony, 1999 Constitution, Nigeria

1. Introduction

In the organized political world, countries have a supreme law called the Constitution[1] which is a reflection of the general will of the people.[2] In the preamble of the Constitution of the Federal Republic of Nigeria, 1999,[3] it starts with 'We the people…' This seemingly conveys the message that the people are the makers of the Constitution who gave same to themselves and thus carries with it a mark of autochthony. However, this is not the case because among other reasons same is a brainchild of a military government and was enacted by a Decree.[4] It therefore follows that the preamble of a constitution does not confer nor clothe same with autochthony but rather what confers autochthony on a constitution in a democracy is the collective participation of the people in the constitution-making process by themselves and through their elected representatives. An autochthonous Constitution is one that carries the seal and mark of the 'general will' of the people.

2. Autochthony and Constitutional Autochthony

The word 'autochthony' or 'autochthonous' is a synonym for 'native' or 'indigenous'.[5] 'Autochthonous' means 'indigenous; formed in a region where found; found in the place of origin.'[6]It denotes nativity by virtue of originating or occurring naturally (as in a particular place).[7] It is the quality of belonging to or being connected with a certain place or region by virtue of birth or origin.[8] Autochthony is derived from the Greek word 'autochthon' or 'autochthones'.[9] Autochthony in law refers to the fact that a constitution is, legally speaking, home grown or rooted in native soil.[10] Constitutional autochthony is the process of asserting constitutional nationalism from an external, legal or political power.[11] It usually means the assertion of not just the concept of autonomy, but also the concept that the Constitution derives from their or its own native traditions.[12] An autochthonous constitution is one which is native,

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***By Ogugua V. C. IKPEZE, PhD, LLM, LLB, BL,** Professor and Dean, Faculty of Law, Nnamdi Azikiwe University Awka; and

***Jude Tobechukwu OKORO, LLB, BL, LL.M, PhD Candidate**, Faculty of Law, Nnamdi Azikiwe University, Awka; Lecturer, Department of Public Law, Faculty of Law, Federal University, Oye-Ekiti, Tel: +234 8064758398; E-mail: jude.okoro@fuoye.edu.ng.

[1] A constitution is the aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organization or other type of entity, and commonly determines how that entity is to be governed. <www.google.com> Wikipedia accessed 10 September, 2023

[2] See the preamble to the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter CFRN,1999)

[3] The CFRN, 1999 was enacted on 5th May, 1999

[4] The CFRN, 1999 came into force on 29th May, 1999 and was promulgated on 5th May 1999 under Decree No. 24 of the CFRN (Promulgation) Decree, 1999. See S 1 (1)

[5] <https://vocabulary.com> accessed 10 August, 2023; Autochthonous means a thing or idea that is native to a place and indigenous to people of a particular region or race.

[6] Kirk Patrick, *The Chambers Twentieth Century Dictionary* (ed.) (1983), p. 82 cited in T Osipitan, *An Autochthonous Constitution for Nigeria: Myth or Reality*, (Lagos: University of Lagos Press), 2004, p. 9

[7] Ibid

[8] Ibid

[9] 'Autos' means 'self' and 'Chthon' means 'soil' that is 'people sprung from earth itself'- the indigenous inhabitants of a country who kept themselves free from an admixture of colonizing entities.

[10] https://oxcon.ouplaw.com accessed 10 August, 2023

[11] P C Oliver, 'Autochthonous Constitutions', *Max Planck Encyclopedia of Comparative Constitutional Law* (MPECCoL), 2016

[12] K C Wheare, *The Constitutional Structure of the Commonwealth*, (Oxford Clarendon Press), 1960, p. 89

homegrown or indigenous law of a nation. Autochthonous constitutions are home-grown, home-made, and home-processed Constitutions in contradistinction to imposed and imperially-processed Constitutions.[13] Therefore, a constitution which is home-made and which has been wholly and exclusively processed by the people or their representatives of the people or both, without foreign involvement or intervention is autochthonous.[14]

As observed by Justice Tobi,

> A Constitution is … autochthonous if it derives its force and validity from 'its own native authority' … here … 'native authority' … is used in context of the people in their sovereignty. Autochthonous constitution must be home grown in the sense that it is home-made and not a product of imperialism or colonial intervention …Once the entire constitution-making process is indigenous and home-made, the element of autochthony is fulfilled[15]

Nature of Constitutional Autochthony

An autochthonous constitution possesses three fundamental elements namely: (a) autonomy in form, (b) self-sufficiency and (c) break in legal continuity. When it is said that 'Constitutional autochthony' refers to the nativity or indigenous nature of a constitution, it has two practical applications thus: (i) when referring to a constitution that emerges internally from a country, meaning that it is free from external legal control and influence; or (ii) when referring to a constitution that is redrafted, amended or otherwise remade to reclaim it as being autonomous and native. In the latter context, this often has occurred when countries achieved independence from colonial powers. Post-colonial countries amend or replace these constitutions with ones developed in the native country, as they are considered more legitimate and enforceable.[16]

Theories and Tests for Autochthony

The theories that determine whether a constitution is autochthonous or not are namely:

1. The Pure Autochthony Theory: It posits that a completely people led and processed constitution is the immutable test for the autochthony of a constitution. The purists assert that the Constitution-making process must be monopolized by the people and their elected representatives.[17] Where there is a Constituent Assembly, it must consist of the elected representatives of the people only and where possible, the Constitution must be approved by the people in a referendum.
2. The Substantiality of Process Theory: This theory embraces the concept of a constitution- making process where there is evidence of substantial input by the people in the constitution-making process provided that there is no imperial intervention or influence in the process.[18]
3. Acceptance Theory: This theory posits the acceptance of a constitution though not made by the people but accepted and recognized as binding. There may be room for subsequent amendments/alterations which will be a process involving the people or their elected representatives.[19] A Constitution can only become the organic law of a country if it is accepted and allegiance is given by the people to the Government established by such Constitution.

3. Constitutional Autochthony: The Colonial Period and Experience

From 1914 to 1954, five colonial and pre-independence constitutions were enacted for Nigeria by the British Parliament.[20] These Constitutions were fashioned by the legislations of the Imperialist Great Britain and proclamations of the Governor-General and were therefore not autochthonous. In cases where the people's elected representatives participated in the constitution-making processes, they were joined by selected government nominees thereby adulterating such Constitutions with imperialist interests. The British Parliament which passed the enabling laws was the legal source of the authority of these constitutions.

Luggard's Constitution, 1914

Nigeria formally came into existence in 1914 following the amalgamation of the Northern and Southern Protectorates.[21] Luggard's Constitution, 1914, was enacted by Order-in-Council.[22] By Article 17 of the Order-in-

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[13] T. Osipitan *An Autochthonous Constitution for Nigeria: Myth or Reality* op cit., p. 9
[14] *ibid*
[15] N Tobi, 'The Legitimacy of Constitutional Change in the Context of the 1999 Constitution' in *Nigeria: Issues on the 1999 Constitution*, I Ayua, A Guobadia and A Adekunle (eds.) (Lagos: NIALS, 2000). p.30 cited in T Osipitan, *op. cit.*, p.9
[16] Specific examples include the redrafting of the Irish Constitution in 1937, India in 1949 and Zambia in 1991.
[17] *Ibid.*, p. 9
[18] *Ibid*
[19] For example, the 1999 Constitution has undergone several alterations
[20] Luggard's Constitution, 1914; The Clifford Constitution, 1922; Richards Constitution, 1946; McPherson Constitution, 1951 and Sir Lyttleton Constitution, 1954
[21] This was as a result of the promulgation of the (Nigerian Council) Order-in-Council, 1912; The Nigeria Protectorate Order-in-Council, 1913; Letters of Patent of 1913 by Lord Lugard. These three Ordinances are at times considered or referred to as Lugard's Constitution, 1914; F D Luggard, *The Dual Mandate in British*, (London: Blackwood and Sons Ltd., 1922), p. 46
[22] *Ibid*; it is a type of legislation in many countries, especially the Commonwealth realms.

Council, 'No resolution passed by the Council shall have any legislative or executive authority and the Governor shall not be required to give effect thereto'. By this provision the powers of the Council were advisory and its resolutions lacked the force of law and could not take effect unless ratified by the Governor-General an appointee of the Queen. The Governor-General had power to make laws for the Protectorates.[23] In place of a Legislative Council for the country, was an advisory and deliberative body called the Nigerian Council for consultation purposes to ensure that local opinion was consulted for the purpose of law making.[24] It had 30 members of whom 17 were officials and 13 non-officials.[25] The 17 officials were British. The 13 non-officials were appointed by the Governor-General out of which 4 were nominated by him. The major flaw of this Constitution was that it lacked local content in terms of personnel as its membership was dominated by British colonial officers irrespective of the fact that some Nigerians were 'members' with no legislative or executive powers. Besides, they were not elected representatives of the people but nominees of the Governor-General and the Queen. Furthermore, as unofficial members, they could not participate in official proceedings and consequently were not part of the officials with the duty of advising the Governor-General.[26] Legislations or ordinances were made by the colonial officials without any input from the natives and without any consideration for their interests.

Clifford's Constitution 1922

The Clifford Constitution provided for a Legislative Council of Nigeria[27] which substituted the Nigerian Council. Its jurisdiction to make laws covered Southern Nigeria while laws were made for the North by way of the Governor's proclamation.[28] It introduced a Legislative Council which had the power to make laws for the colony of Lagos and the Southern provinces. The Council was headed by the Governor-General and consisted among others of 26 appointed official members who were British. Like its predecessor, this Constitution was a product of imperialism and had no local content or representation for Nigerians.[29] It was solely fashioned to perpetuate the business and political interest of the Queen.

Richard's Constitution 1946

The Richard's Constitution created a Regional Legislative Council (RLC) for each of the three regions: North, East and West.[30] The RLC had no legislative power but had power to debate any bill but could not enact these bills into law. The Constitution provided for a new Legislative Council of 44 members. The Governor was the President and had 16 official members and 28 unofficial members. Of the 28 unofficial members, 24 were nominated by the Governor while 4 were elected.[31] The process of drafting the Richard's Constitution did not in any way take into consideration the collective wish of the natives or people. The Governor merely drafted his constitutional proposals embodied in a white paper published in the United Kingdom and subsequently sent to the Legislative Council for approval and finally received parliamentary approval subject to approval by the Queen of England.[32] Invariably, this Constitution was a product of an imperialist Government even though membership of the Legislative Council consisted of locals who were more seen than heard. The fact that it gave room for more political participation by Nigerians did not make the Constitution autochthonous because the processes that led to its making did not include collective participation of Nigerians. It was not subject to any referendum for acceptability or otherwise by the people it was meant to govern.

Macpherson Constitution 1951

The Macpherson Constitution was promulgated on 29th June, 1951. The processes that led to the making of the 1951 Constitution saw public opinion and mass participation through regional, provincial and divisional conferences. The reports of these conferences were debated in the Regional Houses and the Legislative Council before a final document was submitted to the Governor-General and the Secretary of State for the Colonies for final approval.[33] The Constitution provided for a central Legislature and also regional legislatures that could make laws for their regions. It was also from the regional legislatures that members were nominated to the Legislative Council. The laws made by the Legislature were subject to assent by the Governor before they could become operative. In addition, the British

[23] Article 8, *ibid*

[24] B O Igwenyi, Modern Constitutional Law in Nigeria, (Abakaliki, Nwamazi Printing and Publication Company Limited, 2006), p. 136

[25] *Ibid*

[26] Article 6, Letters Patent of 1913 for the Colony and Article 7 of Nigeria Protectorate Order-in-Council, 1913

[27] Article 3 of the Nigeria (Legislative Council) Order-in-Council 1922 and Article 8 of the Nigeria Protectorate Order-in-Council 1922 (for the Protectorate) and Article 6 of the Letters Patent 1922 (for the Colony)

[28] Article 10 Protectorate Order-in-Council; T. N. Tamuno, 'Governor Clifford and Representative Government', *Journal of Historical Society of Nigeria*, Vol. IV, No. 1, 1967, p. 120 cited by Attoh, Ukwueze and Nwosu, *op. cit*., p. 5

[29] O I Odumosu, *The Nigerian Constitution: History and Development* (1963), pp., 10 – 17 cited by D. A. Chima, *op cit*., pg 136

[30] S. 4, Nigeria (Legislative Council) Order-in-Council, 1946

[31] Okonkwo, *op. cit.* p. 255 cited by cited by Attoh, Ukwueze and Nwosu, *op. cit*., p. 6

[32] A Ojo, *Constitutional Law and Military Rule in Nigeria*, (Ibadan: Evans Nigeria Publishers Ltd., 1987) p. 62 cited by Attoh, Ukwueze and Nwosu, *op. cit*., p. 7

[33] K. Ezera, *Constitutional Developments in Nigeria* (1960) pp. 105 – 112 cited in T Osipitan, *op. cit*., p. 13

parliament was still the legal authority for this Constitution as it was the British parliament that passed the enabling law for it to be operational.

Lyttleton Constitution 1954

The making of this Constitution started with a conference held in London between July, 1953 and August, 1953. There were also constitutional conferences held in Lagos and Ibadan at the same period and all these conferences gave birth to the Lyttleton Constitution. This Constitution was an aftermath of series of negotiations between the Nigerian Nationalists on the one hand and the British Representatives of Her Majesty under the control of the Governor-General and the colonial Secretary. The Constitution provided for division of powers between the central government and the regions. Area of legislative competence between the central government and regional governments were spelt out in the executive, concurrent and residual list. In the concurrent list, both the regional and central government had the right to legislate on it. The residual list contained matters of legislative competence of the regions only. Members of the House of Representatives were directly elected from the regions. There was a speaker and three ex-officio members.[34] The Constitution vested reserve and veto powers in the Governor-General and Regional Governor. Irrespective of the apparent positives, the people of Nigeria collectively were not consulted neither was there any constituent assembly elected for that purpose and the outcome of the conferences was also not subject to referendum or plebiscite. On a conclusive note, on the entire colonial experience, it is pertinent to state that all the colonial Constitutions including the Independence Constitution, 1960 were subject to ratification of the British Government. The legal source of authority was the Crown. The act of ratification by the Crown berefts these Constitutions with the constitutional legitimacy required of a constitution clothed with autochthonous character.

Independence Constitution 1960

The 1960 Independence Constitution was also not exempted from imperialist influence (even though Section 1 (2) (a) of same provided that Her Majesty's Government ceased to have regional responsibility for the Government of Nigeria or any part) as the legal source of the 1960 Independence Constitution was also the British Parliament. The granting of independence did not guarantee an autochthonous constitution as the Independence Constitution was the brainchild of the British Government promulgated by means of a British ordinance.[35] It did not have the stamp of our local parliament as a source of its legality. Therefore, in so far as the 1960 Independence Constitution were processed and enacted into law by the British Parliament it was not autochthonous. Under the Constitution, the Queen of England still remained the Queen of Nigeria and the Head of Government. Her powers were exercised through the Governor-General and the Regional Governors, her appointed representatives.

Republican Constitution 1963

This Constitution was passed into law by the Federal House of Representatives[36] and came into force on 1st October, 1963.[37] It proclaimed 'the people' as the source of its authority. The Preamble stated thus: **'**We, the people of Nigeria, by our representatives here in Parliament assembled, do hereby declare, enact, and give to ourselves the following Constitution ....'[38] It was the Nigerian Parliament that enacted the Republican Constitution into law.[39] However, the British Government still had its imprimatur on the Republican Constitution as it had entered into dialogue with representatives of Nigeria in Parliament before the enactment of the Constitution.[40] The Bill on the 1963 Republican Constitution received the assent of the Governor-General, who at the time was the representative of the British Queen in Parliament. At this juncture, Nigeria took effective control of all arms of government and was not answerable to any other institution. The Queen of England ceased to be the Head of State which terminated the requirement of her consent before a bill is assented to by the President or Governor-General. Section 41 of the Constitution provided for the establishment of a Parliament that shall consist of Her Majesty (Queen of England), Senate and House of Representatives. Section 62 (1) conferred legislative powers on the Parliament to make laws passed by both Houses and assented to by the President. Like previous constitutions, this Constitution was not processed by the elected representatives of the people. There was neither a Constitution Drafting Committee nor a Constituent Assembly which drafted and examined the Constitution. Regardless of this, it is acclaimed as the only autochthonous Constitution Nigeria has had having been made and adopted by the Parliament comprising only of Nigerians elected for that purpose by the people of Nigeria. However, this claim is debateable in view of the fact that for a Constitution to be acclaimed as autochthonous, all the three requirements of constitutional autochthony must be present and satisfied concurrently and not in isolation of each other. For this reason, the Republican Constitution did not meet all the

[34] The Chief Secretary, Financial Secretary and Attorney General

[35] B. O. Nwabueze, *Constitutional History of Nigeria* (Ibadan: Spectrum Books ltd.), 1995, p. 11 cited in E. I. Amah *op. cit.* p. 144

[36] 19th September, 1963

[37] Act No. 20 of 1963 which was gazetted as Gazette Extraordinary No. 71, Vol. 50.

[38] The Preamble, 1963 Republican Constitution

[39] Sessional Paper No. 3 of 1963

[40] I A Ayua, D A Guobadia and A O Adekunle, *Nigeria: Issues in the 1999 Constitution*, (Lagos: Nigerian Institute of Advanced Legal Studies, 2000), p. 23

requirements as there was no referendum to test its legitimacy and acceptability by Nigerians whom it was meant to govern.

Constitution of the Federal Republic of Nigeria 1979

The making of the Constitution of the Federal Republic of Nigeria, 1979 started with the composition of a Constitution Drafting Committee (CDC).[41] The Committee called for memoranda[42] from the public[43] and worked both in plenary sessions and through sub-committees that examined various aspects of the Constitution and whose reports were debated and adopted, with modifications, by the full Committee. The CDC produced a draft Constitution based on them. A Constituent Assembly (CA) was set up to deliberate on this draft constitution[44] with 230 members, 20 of whom were appointed by the Federal Military Government (FMG) while seven were appointed by the Chairman of the CDC.[45] The remaining members were elected, not directly by the people but by the local councils acting as electoral colleges. The CA which made final adjustments to the Constitution was a deliberative body. The draft Constitution was further amended by the Supreme Military Council before it was promulgated by same and it came into force on 1st, October 1979.[46] Clearly, a CA elected in this way could not claim to have the people's mandate to make and adopt a Constitution on their behalf. The local government councils had no such mandate themselves and could not confer it on the CA which, being one removed from the people, was indeed, as regards reflecting the popular will, in a position inferior to that of a national assembly which constitutes itself into a constituent assembly without a prior popular mandate.[47] Besides, the composition of the local government councils had not been fully democratic as election in many cases was by indirect method or by selection by village or family heads, while in some places traditional members were brought in by nomination.[48] The Decree establishing the CA charged it with a mandate to 'deliberate upon the draft Constitution of the Federal Republic of Nigeria drawn up by the CDC appointed by the FMG'.[49] The CA had no power to decide the substantive content of the Constitution. As a matter of fact, the FMG had the power to amend, change or reject whatever recommendations the CA made.[50] The draft constitution was presented to the FMG in the form of a bill but in enacting the recommendations of the CA into law, made a number of amendments to them. For example, the FMG jettisoned the proposed parliamentary system of government and replaced it with a presidential system. Therefore, the mere fact of a substantive amendment clearly eroded the basis of the constitution as an original act of the people and robbed it of any little autochthonous element it had, if any. Also, it was the Supreme Military Council, not the CA that acted as the final authority that decided on the content and form of the Constitution. The 1979 Constitution can hardly be said to be a product of the popular will and choice of the people. The Military government at the time of adoption of the Constitution did not relinquish constituent power to the people and the Constitution was not a democratic constitution. Finally, the draft constitution was not subjected to a referendum.

Constitution of the Federal Republic of Nigeria 1999

The Constitution of the Federal Republic of Nigeria, (CFRN), 1999, was promulgated on 5th May, 1999, and came into force on 29th May, 1999 [51] by virtue of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree, 1999.[52] The making of the CFRN, 1999, kick started with the inauguration of a Constitution Debate Coordinating Committee charged with the responsibility to pilot and co-ordinate a debate on a new Draft Constitution, coordinate and collate views and recommendations canvassed by individuals.[53] The Committee received memoranda from Nigerians with public hearings held at various debate centers[54] and later submitted its report to the Provisional Ruling Council (PRC) who amended some portions of the report before promulgation on 5th May, 1999. The CFRN 1999

[41] The Committee was headed by Chief F. R. A. Williams, SAN and had 50 members.

[42] The committee received a total of 346 memoranda

[43] See the report of the Constitution Drafting Committee, Vol. II, p. 9 in I A Ayua, D A Guobadia and A O Adekunle *loc. cit.;* W Ofonagoro *et al The great debate: Nigerians' viewpoints on the draft constitution 1976/77* (1977), p. 50

[44] Decree No. 50, 1977

[45] B O Nwabueze, *The Presidential Constitution of Nigeria* (1982), p. 24

[46] Constitution of the Federal Republic of Nigeria (Enactment) Decree No. 25 of 1978; Ben Nwabueze, *Constitutional Democracy in Africa*, Vol. 5, (Spectrum Books Limited, Ibadan, 2004), p. 73; The amendments made by the military to the Constituent Assembly's report include the National Youth Corps Decree 24 of 1973, the Public Complaints Commission Decree 31 of 1975, the National Security Organization Decree 36 of 1979, and the Lands Use Decree 6 of 1978.

[47] *ibid*

[48] *ibid*

[49] Constituent Assembly Decree, 1977, S. 1

[50] The Constituent Assembly vigorously sought to replace the Presidential system proposed in the draft bill with a Parliamentary system of cabinet government but this was refused twice.

[51] Decree No. 24 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree, 1999

[52] *Ibid*

[53] Paragraph 3 of the inaugural address contained in the Main Report of the Constitution Debate Coordinating Committee Annexure 1, 44 - 50

[54] H A Sotayo-Aro, *Legitimacy and the 1999 Constitution (Part 1)*, <https://www.orderpaper.ng/Legitimacy-1999-Constitution-Part 1,> accessed 16 September, 2023>

tells a lie against itself when it proclaims in its preamble as being the 'firm and solemn' resolution of the Nigerian people. The reality is that the Constitution was foisted on Nigerians by the military and is not a representation of the collective will of the Nigerian people. However, there are those who hold the view that the CFRN, 1999 is autochthonous. They base their argument that the military government merely promulgated it into law[55] but that it was the Nigerian people who deliberated on it. They argue that the meaning of autochthony has been widened to include total inclusiveness of the citizens to participate in the drafting process of a constitution. They assert that the first three words 'We the people…' [56] refers to the period when the Constitution becomes effective and operative; that it does not as erroneously believed or held, refer to the process of making the Constitution. Finally, their argument is concluded with the impossibility and impracticability of every Nigerian to make an input and agree on the structure and content of the Constitution. That if 'We the People' is to be read as referring to the drafting process, it would be inaccurate if the Constitution was affirmed by a referendum as a '100% yes' would be impossible. However, nothing could be far from the truth as the CFRN, 1999 did not provide any role to be played by the Military in constitution-making or law making which is the exclusive preserve of the Parliament.[57] Besides, the CFRN, 1999 is not a product of constitutional democracy.

In view of the examinations of all Nigerian Constitutions, the following findings were made thus:

1. All the colonial constitutions[58] were not autochthonous. They were enacted by the British Parliament which passed the enabling laws as the legal source of authority.
2. The Independence Constitution, 1960 was passed by the British Parliament in the Court at Balmoral, United Kingdom[59]. The Constitution did not sever the legal relations between Nigeria and Britain. The Queen remained the Queen of Nigeria[60] and by proxy, the Head of Government through the Governor-General.
3. The Republican Constitution, 1963 was passed by the Nigerian Parliament as the source of its legal authority but it is not regarded as wholly autochthonous as it was not made or passed by the elected representatives of the people. The authority to pass it was derived from an imperially processed Constitution.[61]
4. The Constitution of the Federal Republic of Nigeria, 1979 is in part arguably autochthonous and only to the extent of the acceptance test or theory in view of the provisions of the Constitution of the Federal Republic of Nigeria (Promulgation) Act[62] and the decision in *Nafiu Rabiu v Kano State*[63] where the learned Udoma, JSC, described the amendments by the Supreme Military Council as an unwarranted meddlesomeness which did not take away the autochthony of the 1979 Constitution. However, it failed the pure theory and therefore not autochthonous because the members of the CA were not elected as representatives of the people. The members of the CA that drafted the Constitution were selected and not elected representatives of the people. The CA that drafted it did not enact the legislation that brought the Constitution into operation and in this regard, it cannot be said to be autochthonous generally.
5. The CFRN, 1999 fails all the three tests constitutional autochthony. It was not made by the people or their elected representatives. It was made and enacted by the Provisional Ruling Council (PRC). The process of making it did not substantially comply with the process of making an autochthonous constitution in a constitutional democracy. It does not provide for a referendum and thus lack that legitimacy of acceptance by the people. Finally, the makers were not elected representatives of the people coupled with the fact that it was promulgated *via* a military Decree[64] who are not constitutionally empowered to make laws.

4. Challenges of Constitutional Autochthony in Nigeria

Some of the factors that militate against constitutional autochthony in Nigeria are as follows:

a. Ethnicity and religion- Ethnicity and religion are divisive factors along which many decisions and policies of the government are based. These two factors have been the bane of national cohesion, unity and harmony and continue to be a recurring decimal in our socio-political and economic affairs.
b. Unequal representation- This challenge usually comes up in a heterogeneous country like ours where there are minority groups that are usually considered inconsequential in the scheme of things because they are regarded to have and hold no leverage in the polity. In Nigeria, the three major ethnic groups recognized by

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[55] The Provisional Ruling Council (PRC) through Decree No. 24 promulgated the 1999 CFRN into law on 1998 during the regime of General Abdulsalami Abubakar and it came into force on 29th May, 1999 following transition from military rule to civilian rule
[56] The Preamble to the 1999 Constitution
[57] Sections 4 and 217 CFRN, 1999
[58] Lugard Constitution, 1914; Clifford Constitution, 1922; Richards Constitution, 1946; MacPherson Constitution, 1951 and Lyttleton Constitution, 1954
[59] O V C Ikpeze, Constitutionalism and Development in Nigeria: The 1999 Constitution and Role of Lawyers, op. cit in D Odeleye and S A Tebira, *The Validity or Otherwise to the Claim of Autochthonous Constitution of Nigeria Since Independence*, op. cit., p. 136
[60] Nigerian (Constitution) Order-in-Council Ss. 33 and 114
[61] See Ss. 4 and 5 of the Independence Constitution of 1960
[62] CFRN (Promulgation) Act, 1999
[63] [1980] JELR 33943 SC; B O Nwabueze, *Constitutional History of Nigeria* (Ibadan: Longman, 1982), p. 26
[64] Decree No. 24

the Constitution are the Hausa, Igbo and Yoruba[65] while as a matter of fact, we have over two hundred and fifty other ethnic groups.[66] These minority groups always feel threatened and emasculated by the major ethnic groups in national affairs and thus may lack adequate representation on the national stage.

c. Apathy by the people- At times, quite a large section of the populace are indifferent to political issues and discourse and neglect or fail to partake in the decision making process or constitution-making process. For instance, when memorandum is called for from members of the public on a constitutional issue or national discourse, the response is usually low compared to the population. This apathy also reflects in voting during elections and even registration for and collection of Voters Cards.

d. Lack of consensus by constituent units- Glaring and persistent lack of consensus hinder the making of a truly autochthonous constitution. This for example, has stalled any effort made at restructuring *via* constitutional amendment or alteration because there is no consensus among the relevant stakeholders as some constituent unit feel that would lose some privileges if restructuring is allowed.

e. Interference by the representatives and elites- It is not unknown in the Nigerian polity that the elites and representatives of the people usually and often hijack policies that will benefit the generality of the people. For example, during emergencies, palliatives meant for the people are routinely diverted or hoarded and consequently do not get to the people. Also, economic policies are skewed against the people to benefit the elites.

f. Copying and application of constitutional concepts without considering local peculiarities- There may be occasion where constitutions copy or borrow ideas, concepts and structure which are fundamental but not suitable to be implemented locally. For example, the Presidential system of government run by Nigeria is copied from the United States of America but it has proven not to meet the aspirations of the people.

5. Conclusion and Recommendations

Nigeria's constitution making experience has, thus far, largely followed the trend of government stage-managing a constituent assembly to draft a constitution. Under this trend, there is little or no debate, nor is there any referendum on the draft constitution before it is decreed or passed into law.[67] In this regard, it is unfortunate that the practice of subjecting constitution-making and review to a referendum is omitted from Nigerian constitutions. Sadly, all the Constitutions Nigeria has had were either tainted with colonialism or military autocracy. This exclusion of the people in the constitution-making process offends the spirit of autochthony. There is a general consensus that Nigeria is yet to have an autochthonous constitution because none was a product of a people driven referendum or a constituent assembly void of governmental nominees and interference. The following recommendations were made:

1. An enabling legislation should be enacted by the Parliament (National Assembly) establishing a Constituent Assembly, spelling out its powers, composition (preferably elected representatives of the people and identified interest groups) among others to produce a draft and final Constitution. This will ensure that the Constitution that will emerge will be a product of inclusiveness, popular participation of the people to be governed by it, openness, equity, accountability and fidelity to the rule of law and due process.
2. The enabling legislation creating the Constituent Assembly should specifically confer immunity on same against political interference from the State or Government and vest the Constituent Assembly with the power to make the final draft of the constitution which shall not be subject to any alteration or amendment thereafter by the State or Government or any of its organs including the Parliament.
3. The conduct of a transparent referendum by the people on the final draft of the constitution with a view to testing its acceptability and conferring legitimacy on same. In other words, subjecting the draft constitution as produced by the Constituent Assembly to the test of legitimacy through a referendum to obtain a seal of consent and approval before it is enacted as a constitution.
4. Divesting the National Assembly of the powers to amend or alter the final draft the constitution as produced by the Constituent Assembly and accepted by the people in a referendum as the law to govern them.

[65] S 55 CFRN, 1999

[66] Tiv, Ibibio, Jukun *et al* are some of the minority ethnic groups in Nigeria.

[67] J O Ihonvbere, *Towards a new constitutionalism in Africa* (2000) *London Centre for Democracy and Development Occasional Paper Series* No. 4.