

# **THE MILITARY AND CONSTITUTION MAKING: THE NIGERIAN EXPERIENCE.**

By Ikuromo Margaret Oruan<sup>1</sup>

Constitution making and reform is very important for any nation because the constitution is the fundamental law of the land, it is the most important instrument of governance since any other law and policy that is inconsistent with the provisions of the constitution is null and void and of no effect.

Nigeria has had long years of military rule and this eroded the democratic culture of dialogue and consensus building. The constitution drafting initiatives embarked by the various military regimes were mainly aimed at legitimising the military in power. The military style of coming into power negates the principle of supremacy of the constitution. On assuming power the military suspend, modify and re-enact the constitution as a military decree to negate the principle of constitutionalism and the rule of law. The nature of the law made under it commonly oust the jurisdiction of the court, have retrospective effect and takes away the rights of individuals.

It is the constitution that empowers and legitimises rule, an illegal regime cannot therefore foist and empower its constitution upon the Nigerian people (Constitution of the Federal Republic of Nigeria, 1999). Constitutions empower government; it is the rule by the laws of the constitution that confers legitimacy on the government. The current Constitution of the Federal Republic of Nigeria is military inspired and has a chaotic history.

It is important for the constitution making process to be legitimate as well as the process leading up the adoption and implementation of the constitution. Popular participation confers legitimacy on a constitution and by extension makes it popular, acceptable and sovereign. The 1999 Constitution is deficient of

---

<sup>1</sup> Lecturer, Faculty of Law, Niger Delta University, Yenegoa campus, Bayelsa State, Nigeria. MLD(Nigerian Institute of Advanced Legal Studies, Lagos), LLB(University of Jos, Plateau State)BL(Nigerian Law School, Abuja) oruanikuromo@yahoo.com

participation of the Nigerians or their representative as such fails to command loyalty, obedience and confidence of the people.

This paper compares the military involvement in constitution making in Nigeria and the process of making the constitution in South Africa and Kenya. It analyses the effect of the process of constitution making on the legitimacy of the constitution. It discusses the machinery adopted for public participation, highlighting the benefits. It concludes by making recommendation on the arguments developed throughout the paper.

### **Constitution defined**

In a vast majority of modern states, there exists an identifiable document or group of documents called the Constitution.<sup>2</sup> The word “Constitution” is used here in two different senses, the abstract and the concrete. In the abstract sense it is the system of laws, customs and conventions which define the composition and power of the organs of the state, and regulate the relations of the various organs to one another and to the private citizens. A constitution in the concrete sense is a document in which most important laws of the nation are authoritatively ordered.<sup>3</sup>

The term ‘Constitution’ has been variously defined in manners that are reflective of the particular constitution or constitutions to which the proponent of a particular definition is exposed.<sup>4</sup> A constitution is the basic law of the nation. It is termed as a set of rules that are not subject to the will of sovereign authority in the state and which have existed and must exist in any state, worthy of the term constitution; a document having special legal sanctity, which sets out the framework and the principal function of the organs of government within the state, and declare the principles by which such organs must operate. It sets out the

---

<sup>2</sup> De Smith S A *Constitutional And Administrative Law* 6 ed (1986) 17

<sup>3</sup> O Hood Phillips *O Hood Philips Constitutional and Administrative Law* 7 ed (1987) 5

<sup>4</sup> Mowoe K M *Constitutional Law in Nigeria* (2008) 2

framework of government, postulates how it ought to operate and makes declaration about purpose of the state and the society and the rights and duties of citizen, but no real sanction is provided against violation of particular provisions of the constitution.<sup>5</sup> It is a set of laws that a set of people have made and agreed upon for the government, often written as a document that enumerates and limits the powers and functions of a political entity.<sup>6</sup>

In addition there is also the issue of autochthony or home grown nature being the basis for the authenticity and effectiveness of the constitution. In most developing nations former colonial masters or military disengaging from power often enact the constitutions in such nations.

Another aspect to the definition of a constitution is that apart from embodying certain rules, it is in itself a social contract. This theory was formulated by John Locke which he believed predated societies and made government mere trustees of the common interest of a community. A constitution once drafted and approved by the people within a state maybe regarded as a contract between the people concerned. It constitutes an agreement between them to create the organs of government and to hand over powers to such organs to carry out certain functions on their behalf.<sup>7</sup>

### **Basic content of constitutions**

Constitutions are primarily about political authority and power-the allocation, conferment, distribution, exercise and limitation of authority and power among the organs of the state. They are concerned with the matters of procedure as well as substance. They also include explicit guarantees of the rights and freedoms of individuals. Sometimes they incorporate ideological

---

<sup>5</sup> McIlwain C H "Constitutionalism" in Mowoe K M (2008 )2-3

<sup>6</sup> Available at <http://en.wikipedia.org/wiki/constitution> (accessed 16 June 2010)

<sup>7</sup> McIlwain C H *Constitutionalism Ancient and Modern* (1940) 5 in Osieke E, 'The meaning of the term constitution and the nature of constitutional functions in the national state' (1984) *University of Jos Law Journal* 5

pronouncements- principles by which the state ought to be guided or to which it ought to aspire and statements of the citizen's duties.<sup>8</sup>

There is no stereotyped of an ideal constitution. The form and content of a constitution will depend on the interest prevailing when the constitution is established and amended, on common sense considerations of practical convenience and on precedent available to the politicians and their advisers who draft the constitution.<sup>9</sup>

### **Constitutional development in Nigeria**

There are divergent views on the number of constitutions Nigeria which have existed in Nigeria. This is because Nigeria has had a plethora of constitutions, some adopted or enacted while some ended at the draft stage spanning pre-independent to present day Nigeria. Aside from a legislative and technical change in 1963 in Nigeria's official title from a commonwealth domain whose head of state was the Queen of England, to the present title Federal Republic of Nigeria, civilians have never been in charge of Nigeria's constitution making exercises. Constitution making have been dominated by British colonial officers and the Nigerian military rulers.<sup>10</sup>

The first real attempt at some form of constitution making actually started in 1914 with the merger of the northern and southern protectorates of Nigeria, both of which thereafter became known as provinces, under the administration of Lieutenant Governors for each province, both of whom were subordinate to the Governor General for the whole area. Prior to that time, the then Governor General, Sir Frederick Lugard, was the sole executive and legislative authority for the northern

---

<sup>8</sup> De Smith (1989) 20

<sup>9</sup> De Smith (1989) 21

<sup>10</sup> The Nigerian scholars for dialogue to the Constitution debate co-ordinating committee 'Comments and viewpoints on the Nigerian Constitution' [http://www.waado.org/nigerian\\_scholars/.../constitution/viewconst1](http://www.waado.org/nigerian_scholars/.../constitution/viewconst1) (accessed 17 May 2013)

protectorate, assisted by some British officials appointed by him, and his proclamations were subject to the assent of the Queen. In the south, after the annexation of Lagos in 1861, executive and legislative councils were set up to assist the Governor, and their function was extended to the whole area in 1906. Sir Lord Lugard's constitutional initiatives which led to the amalgamation of the northern and southern protectorates were carried out without any form of consent from Nigerians.

In 1921, Sir Hugh Clifford became the Governor of Nigeria; he repealed the 1914 Order in council and replaced it by a new constitution popularly referred to as the Clifford constitution. The legislative council and the Nigerian council were abolished and in their place the Clifford constitution established a new legislative council of 46 members, out of whom 27 were official members, including the governor. Of the remaining unofficial 19 members, (10 of whom were Nigerians) 15 were nominated by the governor and 4 were elected. The new legislative council legislated for the peace, order and good government of the colony of Lagos and southern provinces whilst the Governor legislated for the northern provinces by proclamation.<sup>11</sup> This constitution was also a direct imposition of the colonial government.

The Richards Constitution of 1945 was conceived and promulgated with the least consultation with Nigerians for whom it was intended. It contained many lapses and deficiencies and could not in any manner of speaking be said to have achieved the objective for which it was achieved. In terms of constitutional advancement, it had nothing to offer the Nigerians for though conceived as a new constitution, it retained some of the unacceptable features of the one it replaced. The executive council remained virtually unchanged while the number of elected members of the legislative council remained at the 1922 figures and the legislative council consisted of nominated instead of elected members. As a result, the new constitution received very poor reception among the nationalist while evoking bitter

---

<sup>11</sup> Mowoe K M (2008) xlvi

and hostile expression of condemnation from them.<sup>12</sup>This Constitution introduced regionalism, and effectively divided the country into 3 regions without any reference to, or consultation with the people.<sup>13</sup>

The making of the 1951 constitution gave Nigerian their first opportunity of expressing themselves on the type of constitution that they wanted. This was achieved in various phases beginning with the setting up of a select committee of the legislative council to review the 1946 constitution<sup>14</sup> after consultation with the public at village, district, provincial and regional levels. The problem then arose as to how best to achieving this review and its basic aim of consulting the people. It was eventually resolved by the legislative council at its meeting at Ibadan on March 1949 that this should be done by compiling a series of questionnaires which should be submitted for discussion and comment at various levels. The result was submitted to a general conference for debate. The general conference was made up of 25 members (drawn from the various regional conferences, which deliberated on constitution); 25 unofficial members of the Nigerian legislative council; and 3 non-official members. The chairman was the attorney general, an expatriate who had no vote. They unanimously recommended a constitution under which the regions became more autonomous with larger more representative legislatures, wider political, administrative and legislative powers, regional executive councils, house of chiefs in the northern and western regions. Also there was to be the central legislature to be known as council of ministers. The house of representative created under the constitution had 148 members comprising of 136 elected Nigerians and 12 members nominated by the Governor.<sup>15</sup>

After 2 years of operation, the 1951 Constitution broke down, as a result of ethnic rivalry. Following the crises, two constitutional

---

<sup>12</sup> Joye E M & Igweike K *Introduction to the 1979 Nigerian Constitution* (1982) 17-8

<sup>13</sup> Udoma U *History and the law of the Constitution of Nigeria* (1994) 49

<sup>14</sup> Joye E M & Igweike K (1982) 25

<sup>15</sup> Mowoe K M (2008) xlviii

conferences were held to review the 1951 Constitution, the adoption of the report resulted in the Lyttleton Constitution which came into effect on 1<sup>st</sup> October 1954. Under the new Constitution, Nigeria formally became a federation comprising the Northern, Western and Eastern region of Nigeria, the Southern Cameroon and the Federal Territory of Lagos. The Constitution made radical changes to the distribution of legislative, executive and judicial powers within the federation. The House of representative was presided by a speaker and had 6 special members, and 184 representatives elected from the various constituencies in Nigeria. It was empowered to make laws for the country and discuss financial matters.

There were agitations for self government but due to dissenting views and the ensuing confusion, the meeting was adjourned indefinitely. At the resumed conference in 1954, the issue of self government was reawakened and political parties and their representatives were invited to London, a new constitution based on loose federation was proposed by the colonial administration. This was accepted with minimal input of the representatives. The outcome of the various agitations led to the independent constitution of 1960, which was enacted by the British government. FN The Constitution maintained the characteristic features of a federal system with residual powers falling to the regions while both the central and the regional governments operated the bicameral Westminster model type of parliamentary government. The federal system was completed by the addition of the Constitution of each of the three Regions.<sup>16</sup> After the 1960 Constitution had been in operation for a few years, there were proposals for a change to a Republic. These were openly discussed in the press, and in the various legislative houses. In 1963, the Federal Government published its 'proposals for the Constitution of the Federal Republic of Nigeria'. On 1 October of that year, Nigeria became a Republic with a President as Head of

---

<sup>16</sup> Joye E M & Igweike K (1982) 36

State and the repository of the federal executive power.<sup>17</sup> The 1960 and 1963 Constitutions were negotiated as a compromise from the interest and demands of the 3 regions, nevertheless, the British colonial rulers had the final word in approving these constitutions.<sup>18</sup> Military intervention on the political scene however altered this constitutional profile; it changed the federal system of government in which the constituent units chose their separate paths of governance and political development.

The first coup d'état took place on 15 January 1966; it led to the killing of many political leaders. In order to avoid further national calamities, the administration of the country was handed over by the council of ministers (excluding the prime minister) to the Armed forces. However, there was no authority under the Republican Constitution under which the council of ministers could hand over the government to the armed forces. The council of ministers decision was therefore unconstitutional. It was an act of abdication of power. The first act of the military was to promulgate Decree No 1 and 3 of 1966, which suspended and modified the constitution. The decree was named the Constitution (Suspension and Modification) No 1 of 1966. The Decree suspended the parliament and the executive of the federal and regional governments.<sup>19</sup> The Head of the Federal Military Government set up three study groups on constitutional, administrative and constitutional problems in the federation. The study group was charged with inter alia, with the responsibility of reviewing all aspects of the existing constitution including the structure, division of powers, the electoral and party political system, with a view to identifying those factors militating against national unity and the emergence of strong central government

---

<sup>17</sup> Joye E M & Igweike K (1982) 38

<sup>18</sup> 'A realistic and credible road map for achieving a people's national constitution for Nigeria' available at <http://www.nigeriaworld.com/articles/2005/feb/24.1.html> (accessed 24 July 2013)

<sup>19</sup> Oluyede P A & Aihe D O *Cases and materials on constitutional law in Nigeria* 2 ed ( ) 509



and recommending safeguards.<sup>20</sup> This assignment was abruptly brought to an end with the second coup d'état.

The second and third coup d'état took place on 29<sup>th</sup> July, 1966 and 29<sup>th</sup> July 1975 respectively. The Constitution (suspension and modification) Decree was the basis of everything done by the military between 1966 and 1979, when the military handed over the reins of power to the civilians.<sup>21</sup> In 1979, as a result of the intention of the military rulers to disengage from power, a proper constitution had to be written for the incoming civilian government. A constitution drafting committee, made up of 2 persons representing each state of the federation was set up to look into the issue and recommend an appropriate constitution for Nigeria. It recommended a presidential system of government as opposed to a parliamentary system previously operated. This was submitted to a constituent assembly established under Decree No. 50 of 1977 made up of 203 elected members representing the various states and 20 others nominated by the supreme military council under the chairmanship of Sir Udo Udoma. Memoranda were invited and considered from various segments of the society.<sup>22</sup> The recommendations of the constituent assembly by way of another draft were placed before the supreme military council, which promulgated the 1979 Constitution<sup>23</sup> into law after making a number of amendments, purportedly to 'strengthen it and ensure stability and progress and continuity' inserting certain provisions which were not considered by the assembly.<sup>24</sup> The effect of the insertion of sections by the military was that a document vastly different from the draft produced and deliberated on at the constituent assembly, was passed into law as the constitution of the federal republic of Nigeria, 1979.<sup>25</sup>

---

<sup>20</sup> Joye E M & Igweike K (1982) 40

<sup>21</sup> Oluyede P A & Aihe D O ( ) 509

<sup>22</sup> Mowoe K M (2008) li

<sup>23</sup> Constitution of the Federal Republic of Nigeria (Enactment) Decree No. 25 of 1978

<sup>24</sup> Mowoe K M (2008) 47

<sup>25</sup> Abioye F T 'Constitution- making, legitimacy and rule of law: a comparative analysis' (2011) 44 Issue 1 *Journal to comparative & international law of Southern Africa* 71

The 1979 Constitution became victim of the 1983 military intervention which resulted in the overthrow the civilian government and the establishment of the military regime of Major-General Muhammadu Buhari on the 31<sup>st</sup> December, 1983.<sup>26</sup> The events of August 1985 were similar to the January 1983 situation; General Ibrahim Babangida came into power as military president and commander in chief of the armed forces. With the promise to hand over power back to civilians by 1989, the armed forces ruling council set up political bureau in 1986 to recommend an appropriate constitution.<sup>27</sup> Later a Constitution review committee was established under the Transition to civil rule (political programmes) Decree of 1987 to review the 1979 constitution in line with the accepted recommendations of the political bureau. Thereafter, a constituent assembly was set up in 1988 to deliberate on the draft of the review committee. It was made up of 561 members, 450 of whom were elected whilst 111 were nominated. Memoranda were invited and considered and culminated in the 1989 constitution. The draft was submitted to the Armed forces ruling council (AFRC), which again made modifications and inclusions before enacting it. It however did not make many fundamental changes to the 1979 constitution and it did not come into operation due to the annulment of the elections of June 12 1993 by the government of General Ibrahim Babangida. The annulment of June 12 elections was followed with an outcry which resulted in General Babangida handing over power to an interim government headed by Chief Ernest Shonekan. His regime was toppled in the same year by General Sani Abacha with the promise to hand over power to civilian administration within a short time which lasted a period of 3 years. By Decree No 1 of 1994, a constitutional conference commission was set up to organise a constitutional conference, invite and collate memoranda from all over the nation on the agenda of the conference for later submission to the conference.

---

<sup>26</sup> Tobi N 'The legitimacy of constitutional change in the context of the 1999 Constitution' in Ayua I A et al (eds) *Issues in the 1999 Constitution* (2000) 24

<sup>27</sup> Tobi N 'The legitimacy of constitutional change in the context of the 1999 Constitution' in Ayua I A et al (eds) *Issues in the 1999 Constitution* (2000) 24

In 1994, 273 delegates each representing a conference district were elected as members of the conference in addition to 96 others nominated by the provincial ruling council (PRC) made up of 3 from each state and 3 representing the Nigerian labour congress, Nigerian union of teachers and the national union of students. It is noteworthy that only 8 were female out of this number. Memoranda were again invited from all over the nation and the draft was submitted to the Provincial ruling council for enactment. The PRC however again submitted the findings of the conference to another review body, and the 1995 draft constitution was never promulgated until the death of the head of state in 1998 after which General Abdulsallam Abubakar took over as head of state. He established through the Provisional ruling council a constitution debate co-ordination committee (CDCC) to organise a national debate on the 1995 Draft Constitution. The committee consisted of the chairman and 23 other members.<sup>28</sup> The panel was given 2 months to carry out this assignment. The panel invited and considered various views from members and segments of the society after which it submitted its reports. The 1999 Constitution was promulgated into law on 5 May 1999 through the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 1999.

There has been a lot of dissatisfaction with the procedure for the making of the 1999 Constitution which is not seen as a constitution made by the people of Nigeria for themselves, as well as with some of its provisions.

### **Military rule and constitution making**

It is obvious that one of the dominant features of constitutional development in Nigeria has been the recurrence of military rule. Out of the about 53 years of political independence, Nigeria has been effectively governed under military regime for over 30 years

---

<sup>28</sup> Tobi N 'The legitimacy of constitutional change in the context of the 1999 Constitution' in Ayua I A et al (eds) *Issues in the 1999 Constitution* (2000) 25

the outcome of 5 coup d'état.<sup>29</sup> Since independence, constitutions have been drafted and redrafted following successive changes between the various military governments with different interests, programmes and goals. Military dictatorship contributed to this pattern by replacing the 1963 and 1979 constitution. The question this raises is on what authority has the military made these constitutions or the legal basis for such constitutions? Section 1(2) of the 1979 Constitution, which is also s.1(2) of the 1999 Constitution provides as follows:

'The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.'

The literal interpretation of this provision is that it proscribed coup d'état and military rule through coup d'état is neither a creature of nor an institution established by constitution or within the contemplation of the constitution and therefore by implication illegal. The first act of the various military interventions was to suspend and modify certain provisions of the constitution and create its own institutions with executive and legislative powers. The unsuspended provisions of the constitution become only effective subject to modifications made by Constitution (suspension and modification) Decree i.e once a Decree is made, the provisions of the Constitution cannot derogate from it.<sup>30</sup> One of such Decrees was the Constitution (suspension and modification) Decree No 1 of 1966, it provided thus:

S 1(1) The provisions of the Constitution of the federation mentioned in schedule 1 of this Decree is hereby suspended

(2) Subject to this and any other Decree, the provisions of the Constitution of the federation which are not suspended by

---

<sup>29</sup> Ijalaye D A 'Coup d'état and the Nigerian constitutions' (1997) 1 *Nigerian journal of public law* 26

<sup>30</sup> Oluyede P A & Aihe D O ( ) 511

subsection (1) shall have effect subject to the modification specified in schedule 2 of this Decree.

These provisions endured throughout the various military interventions in Nigeria with little variations until May 29 1999.

It makes use ouster clauses to make its laws unquestionable and this contravenes the rule of law and takes away the right of individuals. These Decrees form the grundnorm of the military from which other laws derive their validity. It is pertinent to quote in full one of such provisions, S. 1(2)(b)(i)(ii) Decree No 13 of 1984 provided as follows:

1(2) It is hereby declared also that

(a) for the efficiency and stability of the Federal Republic of Nigeria and

(b) with a view assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federal Republic of Nigeria:

(i) No civil proceeding shall lie or be instituted in any Court for or on account or in respect of any act, matter or thing done or purported to be done under or pursuant to any decree or edict and if any such proceedings are instituted before, on or after the commencement of this decree the proceeding shall abate, be discharged and made void.

(ii) The question whether any provision of Chapter IV of the Constitution has been, is being or would be contravened by anything done or proposed to be done in pursuance of any decree or an edict shall not be inquired into in any court of law and, accordingly no provision of the Constitution shall apply in respect of any such question.

These acts were also contrary to Ss. 1 (1) and (3) of the 1979 which provides:

(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

(3) If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law, shall to extent of the inconsistency, be void.

These provisions declare the Constitution supreme and further emphasises the illegality of the contrary legislations (Decrees). It is worthy to note that such declarations were subject to judicial interpretation and the basis of judicial decisions. These declarations of the military negate the principle of supremacy of the constitution and constitutionalism and the rule of law. Constitutionalism is governance according to the constitution; it is aimed at defending freedom and limiting political hazards by means of the constitution or fundamental law. It favours the democratic processes and adoption of new constitutions generous in terms of rights and freedom<sup>31</sup>. It connotes and implies government by consent, renewable or otherwise by popular free and fair elections. Constitutionalism means that the government is subject to restraint in the interest of ordinary members of the community and that the government is not arbitrary or totalitarian. A constitutional scholar, Montesquieu stated that 'constant experience shows that every man vested with power is liable to abuse it, and to carry his authority as far as it will go. To prevent this abuse, it is necessary from the very nature of things that one power should be a check on another'<sup>32</sup> where the constitution contains clear checks and balances to the exercise of public power, it serves as an underpinning for the principle and practise of constitutionalism<sup>33</sup>. Coup d'état disqualified the democratic process as the legitimate means of access to power.

---

<sup>31</sup> Centre for democratic governance 'Constitutionalism and constitutional amendments in West Africa: Case study of Benin, Burkina Faso and Senegal' available at

<sup>32</sup> Media Development Association and Konrad Adenauer Foundation 'History of Constitution-making in Kenya 2012 1 available at <http://www.kas.de/welcome/publications> (accessed 9 May 2013).

<sup>33</sup> Media Development Association and Konrad Adenauer Foundation 2012 1

The proliferation of constitutions under military regime is somewhat paradoxical given that military regimes are provisional in nature and usually justified by the need to restore constitutional order under a civilian government.<sup>34</sup> The Nigerian experience has revealed that all the constitutions drafted by the military were intended to for use by subsequent democratic administration. How can an authoritarian government established by coup, which virtually ruled by its own laws decide to institutionalise a constitutional government by means of a new constitution? Such constitution cannot be said to be democratic. Military leaders adopt new constitution when their intervention in politics seeks broad transformations in the political, social and economic order.<sup>35</sup> The new Constitutions also facilitate imposing constraints on the functioning of the future democratic regime, something which military rulers typically intend to do to preserve their reforms and protect their personal and corporate interest after leaving power.<sup>36</sup>

### **Procedure adopted for constitution making by the military in Nigeria**

Military constitutions have been drafted by different procedures, among which predominate are constitution drafting committee, political bureau, constitution review committee, constitutional conference commission and constituent assemblies. Drafting of the constitution was done by a committee and submitted to a constituent assembly for deliberation; these bodies are made up of delegates appointed by the military rulers while the others are elected under their supervision. A review of the procedure adopted by the military in formulation and creation of the constitution will show that there had been some input which can

---

<sup>34</sup> Negretto G L 'Authoritarian constitution-making: The role of the military in Latin America' in Ginsburg T & Simper A (eds) *Constitutions in Authoritarian regimes* (2013) 1

<sup>35</sup> Negretto G L 'Authoritarian constitution-making: The role of the military in Latin America' in Ginsburg T & Simper A (eds) *Constitutions in Authoritarian regimes* (2013)

<sup>36</sup> An example is the inclusion of S 6(6) (d) which prevents the courts from inquiring into acts done after January 1966.

be traced to the people but this ‘popular’ participation can be described as superficial.<sup>37</sup> The level of participation especially in the formulation of the 1999 constitution does not justify the preamble to the constitution. The writer’s opinion stems from the intervening constitutional order which immediately preceded the regime which passed the 1999 Constitution into law. The sovereign will of the people was undermined and reduced to no more than mere words while the restrained and uncontrolled will of the one man held sway.<sup>38</sup> The final draft is submitted to the highest law making body of the military (PRC) for promulgation and the act of this body becomes final since there is no other means of ensuring that the recommendations were not altered. The Nigerian experience reveals that changes were made to the final draft before promulgation.<sup>39</sup>

### **Orientation of new constitutions**

Due to the changing understanding and expectation of the functions, powers and duties of the state, which now include public welfare and policies for a just society, promotion rather than just the protection of rights, honest administration and sustainable environment. The scope of the contemporary constitution goes beyond its older counterpart that dealt with the structure and powers of the state. The older constitution did not specify policies of the state but left them to be developed by the political process within the framework of the constitution. Constitutions now intrude on society, to try to change it assist disadvantaged citizens or communities, to take responsibility for education, health, the economy and other matters that impinge deeply on society.<sup>40</sup>

---

<sup>37</sup> See constitutional development above.

<sup>38</sup> Achimu J V The legitimacy of constitutional change: the enactment of the 1999 Constitution in Ayua I A et al (eds) *Issues in the 1999 Constitution* (2000) 7

<sup>39</sup> The council accepted some of the committee’s recommendations. It however, rejected some of them. The federal ministry of justice was requested to present a Draft of the constitution as agreed by council.

<sup>40</sup> ‘Part 1: Introduction to Constitution-making processes’ available at <http://www.interpeace.org/.../194-part-1-introduction-to-constitution-making-p> (accessed 24 July 2013)



An understanding of the role of a constitution is critical to designing the process for making it. Constitution making has shifted to active and intense participation of the people, whether as individuals, social organisations or communities. Public participation leads to a complex and often lengthy process as will be seen in the making of Kenyan and South African constitutions. The design process has a lot to do with the spirit of the constitution that is how the people adhere to constitutional provisions (in other words constitutional outcomes). Keen attention is paid to the design of the constitution making process and the public participation principles that must determine the substance of a constitution. The process is not only for making the constitution but for generating or creating the environment, promoting the knowledge, and facilitating public participation that are conducive to a good constitution and the prospects for implementing it. A new constitution can take root easily if the country has a commitment to and the infrastructure necessary for the rule of law.

### **The Kenyan experience**

Kenya share similar colonial constitutional history with Nigeria, the colonial government adopted a strategy of imposing non-negotiated constitution.<sup>41</sup> The independence constitution in 1963 was negotiated between the British government and representatives of Kenya's political parties. The people of Kenya were not consulted in the making of the constitution and the British parliament adopted the constitution. Between 1963 and 2005 several amendments were made which were not intended to improve the quality of the constitution but to entrench an authoritarian and undemocratic administration or to serve political problems facing the government from time to time. The people neither had a say in these constitutional changes or given time to debate or discuss the changes (the amendments were

---

<sup>41</sup> Media Development Association and Konrad Adenauer Foundation 'History of Constitution-making in Kenya 2012 1available at <http://www.kas.de/welcome/publications> (accessed 9 May 2013).

carried out by a parliament dominated by one political party).<sup>42</sup> Kenyans demanded and fought for the review of the constitution to restore the valuable aspects of the constitution that had been removed by self driven amendments, to rationalise and refocus the judiciary, legislature and executive power of the state, to ensure the welfare of the people, and effectively tackle the many political, social, cultural and economic problems that the country faced due to failings of the constitution. Based on the lessons learnt from the past, the Constitution of Kenya Review Act of 2008 sought to place the people at the centre of the review process and aimed at making the process comprehensive, participatory and inclusive. The constitution reconstruction spanned several years and phases.

The constitution review process commenced with the enactment of Constitution of Kenya Review Act 2008, and Constitution of Kenya (Amendment) Act 2008. The Act outlined the critical organs for the review and laid out the principles that were to guard the organs e.g supremacy of national interest over sectarian or regional interest, accountability to the people, accommodating national diversity, inclusiveness, responsible management, transparency, respect for human rights and reflective of the majority wish. The organs were the committee on experts (COE), parliamentary select committee (PSC), the national assembly and the referendum. The Act provided for steps to be followed till a new constitution was ratified or rejected, it also provided for requisite timelines (12months from the commencement of the Act).

The COE had reference materials, it analysed the documents that came out from the Constitution of Kenya review commission (CKRC) process, the public made input on contentious issues, there were public written and oral memoranda through regional hearings in different provinces, meetings were held with groups

---

<sup>42</sup> Media Development Association and Konrad Adenauer Foundation 'History of Constitution-making in Kenya 2012 1available at <http://www.kas.de/welcome/publications> (accessed 9 May 2013).

in civil society, religious sector, private sector, political parties and coalition government. The proposals from the public were drafted into the Harmonised draft constitution, which was revised upon recommendations from the public and the PSC on the constitution review to produce the revised harmonised draft (CRHDC). This was sent to the PSC for adjustments, the COE prepared the proposed constitution of Kenya (PCK) submitted it to the National assembly for deliberation and approval by the parliament. It is then transmitted to the Attorney General for publication. The COE conducts civil education to ensure that whatever choice is made at the referendum is an informed choice, the proposed constitution was circulated using different techniques including direct engagement of the public through meetings, media engagement, paid adverts, setting up a website that had all the crucial information regarding the proposed constitution.

The referendum was held twice. It was conducted in major languages and with the aid of visual symbols. The mandate for conducting the referendum was bestowed on the Interim Independent Electoral Commission (IIEC). The constitution stand ratified if supported by 50 percent of the votes at referendum and 25 percent of voters in at least 5 provinces.

### **The South African experience**

South Africa share similar colonial experience with Nigeria, the people were not represented in the various constitution making process and had no political rights conferred by the constitution<sup>43</sup>.

The South African constitution making process is widely regarded as the most democratic, inclusive and consultative process in modern democracy. Based on the culture of the South African people and communities, the adoption of the constitution

---

<sup>43</sup> Abioye F T Constitution making, legitimacy and the rule of law: A comparative analysis 2011) 44 Issue 1  
*Journal to comparative & international law of Southern Africa* 74

involved the citizens. The process was open and transparent and involved public education on the issues. Formal negotiation started in December 1991 at the Convention for a democratic South Africa (CODESA). The parties agreed on a process where a transitional constitution would provide for an elected constitutional assembly to draw up the permanent constitution.<sup>44</sup> The CODESA negotiation broke down in 1992. In 1993, the parties renewed their effort at to reach a negotiated settlement, in what was known as the Multi Party Negotiating Process (MPNP). A committee of the MPNP proposed the development of the collection of “constitutional principles” with which the final constitution would have to comply, so that basic freedoms would be ensured and minority rights would be protected. The parties adopted this idea proceeded to draft the interim or transitional constitution which came into force in 1994.<sup>45</sup> The interim constitution prescribed procedures, time table, and the principles for the writing of the final constitution.<sup>46</sup> The interim constitution provided for a parliament made up of 2 houses, a 400 member national assembly which was directly elected and a senate of 90 members, representing the 9 provinces. The joint sitting of the member formed the constituent assembly and was responsible for drawing up the final constitution within 2 years. The adoption of a new constitutional text required a two-third supermajority in the constitutional assembly and the support of the senate on matters relating to provincial government. Where this could not be obtained, a constitutional text could be adopted by a simple majority and then put to a national referendum in which 60 percent support would be required for it to pass.

The interim constitution contained 34 principles with which the new constitution was required to comply. The constitutional court had to certify compliance with the principles. This task was undertaken by the court with such application that the first draft was referred back to the elected constitution-makers before its

---

<sup>44</sup> Media Development Association and Konrad Adenauer Foundation (2013) 110

<sup>45</sup> Media Development Association and Konrad Adenauer Foundation (2012) 111

<sup>46</sup> Venter F ‘South Africa- Introductory notes’ available at <http://www.up.ac.za/sitefiles/file/47/15338/South%20Africa.pdf> (accessed 20 August 2013)4

amended version could be certified and put into operation<sup>47</sup>. The process was completed with the distribution of millions of copies of the final document in 11 languages thereby underscoring the importance of the involvement of the citizenry in the entire process.<sup>48</sup>

### **Constitution making process in Kenya, South Africa and Nigeria compared**

History has it that the three jurisdictions are heterogeneous societies and share similar colonial constitutional history. The post independent constitutions were negotiated by the government and a segment of the society (few elites, political parties etc). These constitutions were subject to various amendments which were undemocratic, in response to a political problem and self driven as the people were neither consulted nor reflective of the yearnings and aspirations of the people. Despite this chequered history, the making of the present South African and Kenyan Constitution recognised the constitution as an act of the people, made directly by them or through their democratically elected representatives. Conscious steps were taken to ensure a comprehensive, transparent, participatory, inclusive and accountable process by clear legislative provisions which created organs, committee, commissions or bodies with designated powers and a time frame within which to accomplish its responsibilities. Measures were put in place to address contentious issues. The process involved regional hearing, contributions from civil society, religious bodies, and private sector; it also entailed public and civic education.

The content of the draft constitutions were made public through the media and other forms of public enlightenment to get feed backs and further redrafted to harmonise the response. The constitution was available and accessible especially in native

---

<sup>47</sup> The court held that the constitutional text adopted the constitutional assembly could not be certified because some basic features did not in its view comply with the constitutional principles.

<sup>48</sup> Media Development Association and Konrad Adenauer Foundation (2012)112

languages. There was an institutionalised means to validate the content of the draft constitution, the Constitutional Court in South Africa and by means of referendum in Kenya.

Constitution making under the military was devoid of all these steps especially the making of the 1999 Constitution. The process was not institutionalised; provision was not made for elected representatives or public participation. The present constitution was drafted within two months by a 24 man panel appointed by the Head of state on November 11, 1998. In his inauguration address to the committee, the Head of State charged the committee:

‘...to pilot the debate, coordinate and collate views and recommendations by individuals and groups and submit your report not later than December 31, 1998’<sup>49</sup>

The allotted time for the exercise was unreasonable (to consider oral and written memoranda from a country of over 120million people) and as a result the deliberations were hurried and the recommendations inconclusive. The response cannot be said to reflect of the aspirations of the ordinary Nigerian since they were not aware of the ongoing process. The segment of the society who was privileged to make inputs had no means of verifying whether their contributions were captured as the Provisional ruling council debated the report of the Constitutional Debate Coordinating Committee. It accepted and rejected some of the recommendations. A draft was presented by the Federal Ministry of Justice; the draft was deliberated on by PRC and forwarded to the CDCC. It was after the final debate and amendments by the PRC that the Constitution was promulgated on May 5, 1999 and came into force on May 29, 1999.<sup>50</sup>

---

<sup>49</sup> Tobi N ‘The legitimacy of constitutional change in the context of the 1999 Constitution’ in Ayua I A et al (eds) *Issues in the 1999 Constitution* (2000) 25. He was the chairman of the CDCC

<sup>50</sup> Tobi N ‘The legitimacy of constitutional change in the context of the 1999 Constitution’ in Ayua I A et al (eds) *Issues in the 1999 Constitution* (2000) 29.

Immense benefits abound from the constitution making process adopted in South Africa and Kenya:

It ensures primacy of public interest and reflects the peoples will.

It has strong impact on the real life of the citizens as they are aware of the constitutional provisions

It promotes respect and adherence to constitutional provision

The environment becomes friendly and allows for monitoring

It reduces the risk of manipulation of the constitution

It consolidates human rights and strengthens the democratic institutions

It strengthens democracy and checks autocratic behaviour

It promotes peace and social cohesion.

## **Conclusion**

The constitution is a creature of the people's lawmaking power. The right to exercise the power is inherent in the people exercised directly or through a popularly elected constituent assembly. No group has the right to take away that right. Popular participation recognises of the need to empower the people with the means to effectuate their actual interest. It is the positive tool by which the people can participate in the formulation of policies and programmes. Popular participation should be institutionalised in Nigeria. Constitution making should be made popular to generate public interest so that the constitution will not be an ordinary document and remote. Constitutions seek to channel the behaviour of officials by setting the stage within which they act. The military personnel are indeed Nigerians but their constitutional right to be involved in the constitutional making process should be exercised not only at their discretion but in consonance with every other Nigerian. Compromise and negotiation are essential and cannot be substituted.

Nigeria's current constitutional reform is perceived as heading in the wrong direction, what she needs is an interim constitution expended in such a way as to define clear time frame for the construction of a new constitution. The constitution reconstruction should be motivated by the desire to secure protection against past mistakes and excesses that led to political instability and poor social and economic performance. The missing link is the political will to cause a change and so long as the frequent amendments are elite, civil society, legislature, executive driven there will continue to be a disconnect between the people and the constitution.

DO NOT DISTRIBUTE