



Constitution and Constitutionalism in Nigeria Issues in Democratic Consolidation

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Abstract

This paper discusses Constitution and constitutionalism in Nigeria as an issue in Democratic consolidation in Africa, particularly in Nigeria, have been handled with profound ambivalence, handed down by colonial governments as a document legitimising the supremacy of the state over society. For so long, many have identified constitution with legislation. However, a constitution by its nature should be more than a mere set of rules and laws regulating society and government. It is more than a social contract, rather an expression of general will of a nation. it is a reflection of its history, fears, concerns, aspirations, visions and the soul of that Nation.

Introduction

As a result of this long "accepted" wrong perception of constitution, there is more emphasis on *constitutionality* than *constitutionalism*. The post - colonial government have used constitutions as an instrument of control and repression and the military regimes that over threw them perfected the art of manipulating the laws to justify their hold on power. They suspend all aspects that is seen detrimental to their government and retain the ones that serve their interest. Recent waves of democratisation in Africa has called for the close of gap between constitutionality and constitutionalism. In virtually all African states, there are debates going on around the question of constitutional reforms as part of the political or national question. These debates have given premiums to | issues of human rights, gender, rule of law, media rights, minority rights, etc. (Ihonvbvere, 2000:2).

The essence of this paper is to discuss constitution and constitutoinalism in relation to the process and content of constitution as it impacts on consolidation of democracy. We hope to observe how Nigeria can use the ongoing constitution review to strengthen¹ its democracy and enhance popular participation. The. paper is divided into four sections: the new constitutionalism and Democracy. This .is followed by a brief history and character of constitution and constitutionalism in Nigeria, the fourth section dwells on constitutionalism and constitutionalism in Nigeria, the fourth section dwells on constitutionalism and democracy in Nigeria.

Clarification Of Concepts

We intend in this section to clarify some concepts that are primary to this discussion, and may keep reoccurring as we go further.

Constitution and Constitutionalism

As indicated earlier, the meaning of constitution may beeles ambiguous, but constitutionalism is quite difficult todefine because of the controversy surrounding its meaning and politics. In liberal political discourse,

constitutionalism revolves around the twin issues of individual rights and the limited powers of government, while the popular perception see it as not only a political document, but instrument for Development.

in the context of recent global celebration of democracy and the multi-disciplinary interest in issues of democracy and constitutionalism, emphasis are beginning to be given to the environment and processes in which the constitution emerges, thus, "Beyond asserting the sovereignty of the state and setting the basic Law of the land as well as defining the powers and rights, it should -also serve as a basis for controlling state power involving the people in the political process, and should

clearly articulate the aspirations of the communities and individuals in society, it must directly go to the heart of engaging the contentious issues that not just shape politics and power, but also those that shape the larger society, breed distrust, intolerance and violence" (Ihonvbere, 2000:5).

Constitutionalism, according to Louis Henkin (1978) "implies that the constitution cannot be suspended, circumvented or disregarded by political organs of government and that it can be amended only by procedures appropriate to change of constitutional character and that give effect to the will of the people acting in a constitutional mode". Henkin further asserts that constitutionalism means that public authority can legitimately be exercised only in accordance with the constitution.

Nevertheless, the meaning of constitutionalism should go beyond this legalistic conception. Constitutionalism in this context refers to .a process for developing, presenting, adopting and utilising a political compact that defines not only the power relations between communities but also defines rights, duties and obligations of citizens in any society. Constitutionalism must emphasize on two essential issues: the process of constitution making and the content of the constitution. The process revolves on how popular oriented, transparent and

democratic is it, while the content dwells on the issues articulated in the constitution, whether it captured the feelings, pains and needs of the people.

Democracy

Democracy, like constitutionalism means different thing to different people. However liberal Universalism has dominated contemporary discourse on democracy, particularly the idea that there has been a total exhortation of viable systemic alternative to western liberalism especially after the collapse of socialism in Soviet Union and eastern Europe and, this has translated to an ideological end-point for mankind in favour of western democracy (Abdu, 2000:4)

Robert Dahl (cited in Martimissen, 1996, 303), one of the liberal scholars who have done a lot of work on democracy identified three core conditions for democracy.

1. Meaningful and extensive competition' among" individuals and organised groups for major opposition to government power.
2. A highly inclusive level of political participation in the selection of leaders and policies, at least through regular and fair elections such that, no major adult social group is excluded.
3. A level of civil political liberties:- Freedom of expression, pass, etc, sufficient enough to ensure the integrity of political competition.

While accepting to some extent these basic requirements for democracy they must be situated within the general context of class relations because, democracy has different meanings to different social classes. Therefore, democracy in non-western societies must go beyond this liberal conceptions, it must reflect other developmental issues (Abdui, 2000). While noting the limitations of liberal conception of democracy, we want to add that democracy should be particularly concerned with the guarantee and exercise of human rights including economic and social rights. Democracy is a dynamic concept which should be continually evolving. It is more of a process than a fixed and

complete state. It therefore requires constant reassessment and discussions of modalities, institutions, processes and values (Totenmever 994-.50)

Constitution and Constitutionalism in Nigeria

Apart from the 1963 process of the Republican' Constitution which changed Nigeria's official title from aCommon Wealth Dominion to a Federal Republic, Civilians have never been very much in-charge of constitution making in Nigeria. The history of constitution making in Nigeria have been dominated by the British colonial officials and Nigerian military junta.

Until 1951, colonial constitution making was in the form of decree in which Nigerians had little involvement (Ekeh, 1999). When Frederick Lugard amalgamated the separate Southern Nigeria and the North through his 1914 - 1918 Constitution, people of these communities were not consulted. Provinces and other divisions were later created according to the wisdom of the British colonial authorities. The 1946 opposition to Governor Richards' attempt at imposing a new constitutional order resulted to some changes in the ways Nigeria Constitutional affairs were handled by the British Colonial authorities.

Beginning from the famous Ibadan Conference in 1950's | the spirit of consultation and negotiation was embraced in Nigeria constitution making process. Beginning from Governor-General John MacPherson's 'Ladder' arrangement for selecting representatives in 1951. constitution-making was initiated from button. The final outcome was the constitutions of 1960 and 1963 (Ekeh 1999). However, the Colonial Constitution suffered some limitations, the whole process was elite based,manifaced and manipulated by the British colonial overlords.

The state inherited from the colonialists was therefore undemocratic. The authoritarian and repressive colonial values were transferred to the post-colonial formation. The ruling class inherited a state with limited legitimacy and without hegemony. This illegality and lack of hegemony was captured by Claude Ake.

"The lack of autonomy of... state and the style of politics which is associated with it produces governments which are lacking in legitimacy. Given the Hobbesian character of politics, only a limited range of social forces articulates as constitutive elements of the state, and the government which emerges from the political struggle is necessarily based on a vary narrow range of interests. It becomes extremely difficult to endow the government with any veneer of legitimacy. The high incidence of political violence in the political struggle and the heavy reliance of the government on coercion reveal starkly the nature of political system as a form of domination. This is underlined by the absence of even the liberal facade of a democratic choice, the lack of institutionalisation of accountability, the lack of any meaningful form of popular participation and of any prospects of changing the government by peaceful means without a veneer of legitimacy, the government is delinked form the society and alienated from it. (Ake, 1989:46)."

This socio-political situation provided the basis for military intervention in politics and the protracted military rule in Nigeria. The coming of the military profoundly altered the constitutional profile. First, the military rule suspended those aspect of the constitution with which it feltuncomfortable, retaining only those articles and sections of the constitution that it found useful for its dictatorial purposes. Secondly, the military overcentralized power by destroying all federal elements in the socio-political and economic setting of the country.

Since the intrusion- of the military into political affairs in 1966, Nigeria had undergone four constitution making processes and produced four constitutions: 1979, 1989, 1995 and 1999 Constitution. All of these constitutions suffered from the same problem of being elite-based, unpopular and undemocratic. They therefore enjoy no element of legitimacy. "The constitutions were/are not compacted through democratic process and paid little" attention to the dreams, pains and aspirations of the people, their communities and constituencies. Most of these constitutions were directly imposed constitutions. The hallmark of this

imposition and illegitimacy is that the constitutions were never subjected to popular debate or referendum. If at any point the constitutions were subjected to any public debates, the debates were often brief, elite-based, monitored and manipulated. The documents either in draft or final forms, were never made available to the people (Ihonvbere, 2000).

This is the problem with the current 1999 Constitution and it forms the basis for the present constitutional crises in the country and the ceaseless agitation by popular voices including the government for the review of the constitution and the movement towards constitutionalism. This may be the first time since 1963 when a civilian government may be presiding over constitution making or review. However, the way the government is going about the whole issue is creating doubt on the possibility of producing an acceptable and popular constitution.

Constitutionalism and Democracy in Nigeria

Since the collapse of Soviet Union and the consequent demise of socialism in the global political configuration, liberal democracy has begun to be celebrated as the most viable political system. International community led by the United State and other multi-lateral organisations shifted focus to democratisation in Africa. This, coupled with the internal struggles against authoritarian regimes have created a new trend in Africa. It is increasingly being realized that the political spaces have to be contained within the context of recognized processes, it is no longer fashionable to prescribe armed struggle against the state as a means to capturing power on behalf of the people. It is now generally accepted that a struggle for human rights, gender equality, social justice, and good governance through democratic means can achieve similar goals, even if slowly (Ihonvbere, 2000:17).

People have begun, to be more committed to constitutional reform and the institutionalisation of democracy through popular struggle for accountability,

transparency, rule of law and for constitutional provisions that acknowledge and support diversity and pluralistic values in society. This has been reflected in the constitutional conferences in Benin, Togo, Niger Republic etc in the 1990's, the successful constitutional arrangement of South Africa and the process-based constitutional commissions in Uganda and Eritrea. From the experiences of these countries, the last decade in Africa has witnessed an upsurge in the demand for constitutional based governance that broadly reflects, interims of process and outcome, the will of the people (CHRI, 1999).

The recent successful handover to civil democratic governance in Nigeria has exhibited hegemonic control of the military and their civilian collaborators have become unfashionable, people need to take the initiative and lead the process of constitution reform that is all encompassing, democratic and inclusive. General Sani Abacha's junta had thoroughly delegitimised the military and aroused a robust civil society opposition to continued military rule. It is as a result of the robust and vibrant opposition that General Abdulsalami's junta had to make a hasty retreat from power.

Increasingly, people are beginning to see constitution and constitutionalism making as the most viable legitimate way of dismantling the oppressive neo-colonial state and restructuring it to reflect the needs of the people. This explains the recent attraction and interest in constitution and constitutionalism. It is generally believed that the survival of Nigerian democracy primarily lies on the acceptability of the constitution. Human rights groups, pro-democracy, women groups and even nationality groups have begun to believe that it is only through constitutional reform that the problems of unequal access to the distribution of power and resources can be addressed.

Nigeria's 1999 Constitution is presently being subjected to review. This is because of it being widely rejected across the country as an imposed and undemocratic and undemocratic document that cannot serve as the foundation for good governance. Since it is agreed that Nigeria's democratic consolidation

depends on an acceptable constitution, how can the country produce an acceptable constitution? This can only be done by using some basic principles and mechanisms 'for constitution making.

Principles and Mechanisms of Democratic Constitution Making

Constitution making process should be inclusive, as for any constitution to work, the people must not only understand it but they must have taken an active part in its making which will ultimately make them identify with it. The constitution making process and its development should not be seen only through the eye of well educated lawyers, academicians, politicians etc. who may fail to relate it to the thinking, understanding and aspirations of the people affected by such developments. (NasaTumweisigye, cited in ihonvbere, 2000).

The above quotation summarizes the basic principles of democratic constitution. It is important to have some established minimum principles and mechanisms that would guide the process of making a constitution to enable the society to produce a more democratic constitution that would reflect the interests of various communities and constituencies in the country. Some of the acceptable principles include:

i. Legitimacy:

The legitimacy of a constitution making is informed by the socio-political context of the country. This legitimacy can be achieved by giving legal mandate upon body/bodies involved in constitution making. that will solicit citizen's , input, draft a new constitution and present a final document for adoption by a representative body or through a referendum.

ii. Inclusivity:

The process of making the constitution must be all inclusive i.e. there should be public participation. All segments of the society must be encouraged to participate.

iii. **Openness and Transparency:**

The process of consultation must be transparent and open. Everything should be clear.

iv. **Accessibility:**

This principle agree that the process must at all time be made accessible to the broadest possible community.it is not sufficient that the public calls for submissions are advertised widely. H is important to ensure that ordinary members of the public are able to access the process, both physically and intellectually.

v. **Accountability:**

To be committed to the principle of public participation, the bodies must be seen to be accountable to the people. There should be a way that people can be able to question some of the issues being debated.

vi. **Empowering the Civil Society:**

The civil society must be empowered to understand the process of constitution making because, without the necessary assistance to understand the process in which they are involved, people cannot make appropriate recommendations as to its outcome. Consultation would be hollow and without meaning.

vii. **Independence:**

The process of constitution making must be independent of government interference. No no go areas, everything should be subject to the approval of the government. The making of constitution through this process enhances constitutionalism, it allows the democratic communities that participate in the process to continue to claim ownership of the document and use it as a weapon to defend not just their individual and collective rights but also the larger democratic process. This is why it is essential to debate every issue in the constitution and acknowledge the importance of the principles of constitution making.

Conclusion

Our recent experience in non-constitutional governance and the oppressive and authoritarian character of such governments called for more emphasis on constitution and constitutionalism. Our emphasis on constitutionalism is informed by the fact that every government has constitution. In fact, almost all the authoritarian governments of Africa manipulate one constitution or the other to perpetuate their atrocities. There is need for constitutionalism rather than constitutionality because, the latter is more democratic. Constitutionalism however depends on the environment in which a constitution emerges, i.e. the process in which the constitution emerges and the content of the constitution: whether it captures the feelings, pains, yearnings and aspirations of various communities, nationalities and constituencies of a given political setting.

Therefore, Nigeria today cannot talk of constitutionalism until acceptable constitution is fashioned out. The current constitutional crises in the country cannot be divorced from the undemocratic nature of the constitution, its lack of legitimacy and consequent disrespect. The new process of constitution review must divorce itself from the colonial and military fashion of constitution making. Being the first time a civil democratic government is presiding over constitution making the process must be all inclusive to reflect the new democratic spirit. Human rights groups, pro-democracy movements, women's groups, students, youth organisations and other social and civil society groups must pick serious interest in the constitution, it is only through constitutionalism that Nigeria's democracy can be consolidated. Any civil government that is not rooted in constitutionalism cannot be democratic.

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