

Nigeria—The Search for Autochthonous Constitution

Emmanuel Ibiam Amah

Faculty of Law, Ebonyi State University, Abakaliki, Nigeria

Email: amahibiam@gmail.com

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Abstract

The issue of a Sovereign National Conference has always been a burning issue in the Nigerian media and in the public discourse. The arguments of former Presidents Olusegun Obasanjo and Goodluck Ebele Jonathan as well as former members of the National Assembly as to why a Sovereign National Conference is not attainable in the present democratic Nigeria are far from reality. This work x-rays the history of Nigerian constitutions making and the resultant consequence of her inability to evolve an autochthonous Constitution. It argues that the power of the sovereign people of Nigeria to make a Constitution by themselves through a constituent assembly elected for the purpose, subject to a referendum by the people could not have been taken away by the provisions in the 1999 Constitution of Nigeria for parliamentary constitutional amendments. It opines that the mandate given to the President and the Legislators to amend the Constitution is a limited mandate and is not meant to substitute the people as the repository of constituent power; it concludes that only an autochthonous constitution can salvage the country from her present political, ethnic and economic quagmire.

Keywords

Autochthonous Constitution, Constitution-Making Process, Military Governance, Nigeria

1. Introduction

A constitution in the abstract sense may be defined as a system of laws, customs and conventions, which defined the composition of organs of the state and regulate the relations of the various state organs to one another and to the private citizens. It may further regulate relations among citizens. The Nigerian Supreme Court has defined constitution to mean the grundnorm and the fundamental law of the land from which all other legislations in the land take their hierarchy and

legitimacy.¹

A constitution is therefore the supreme law of the land, which distributes power between different organs of government and determines their functions and relationship between themselves and the citizens. It is the organic law of a state and may be written or unwritten establishing the character and conceptualization of the government, laying the basic principles by which its internal life is to be conformed, distributing and limiting the functions of its different department and prescribing the extent and manner of the exercise of her sovereign power.²

As a result of the importance of a constitution and its strict enforceability, most states involve their citizens in the constitution-making process. This is carried out by means of a representative body elected directly by the citizens for the purposes of constitution making. In some states, the outcome of this process is further subjected to a referendum to enable the people vote for or against the proposed constitution. This process is known as direct democracy. A constitution that evolves from this process is regarded as autochthonous having been made by the people themselves.

The actual participation of the common citizens in the promulgation of a statute that would be binding on them would legitimize not only the process but also the outcome. The necessity for legitimacy of a constitution need not be over-emphasized as its importance is also the reason why most written constitutions are commenced with the phrase “we the people”, which signifies the participation of the citizenry and their intention to be bound by the provisions contained in the constitution. In the case of Nigeria as we shall see, the recurring of such phrase in the preamble to all her constitutions, past and present are nothing more than mere embellishment.

The legitimacy of Nigerian constitutions has consistently been put in doubt as Nigerians have consistently agitated for a sovereign national conference to cater for the opinions and needs of the Nigerian public bearing in mind her cultural and ethnic differences. These agitations as we shall see in this paper have fallen on deaf ears.

2. History of Constitution-Making in Nigeria

The constitutional history of Nigeria may be classified into about four (4) phases. These are: 1) the period of colonial administration; 2) the period of internal self-government; 3) the period of independence; and 4) the period of military rule. We shall briefly highlight the manner of constitution making in each of these phases.

2.1. The Period of Colonial Administration

This is the period Nigeria was ruled by the government of Britain. During this period constitution making was the sole responsibility of the colonial government seated in London. This period commenced from 1914 when the colony

¹A.G. Abia v. A.G. Federation (2002) 6 NWLR (Pt. 763)264, (2006) 16 NWLR (Pt. 1005) 265 SC.

²Black's Law Dictionary, 6th Edition p. 311.

and protectorate of southern Nigeria was merged with the protectorate of Northern Nigeria and terminated in 1946 before the making of the Richards³ Constitution. During this period, constitution making was carried out by the colonial power acting by and through the British officials in Africa. In fact, between 1914 and 1920 the only existing legislative council was only restricted to the colony of Lagos and members were made up of British officials only. For the rest of the protectorates of Nigeria the Governor General was empowered to make law by way of a proclamation. Further the legislative council was mainly advisory in function.⁴ In 1922 a legislative council of Nigeria was established, it was however restricted to the southern protectorate and the Lagos colony.⁵

By 1946 however, a new Constitution was tabled before the legislative house for adoption by the then Governor-General, Governor Richard.⁶ Although there were indigenous members in the federal legislative house at this time, the Constitution was poorly received as it was conceived and promulgated with least possible consultation with Nigerians with whom it was intended.⁷

2.2. The Period of Internal Self-Government

This period dates from the making of the Macpherson Constitution of 1951 to the period of independence. One remarkable feature of constitution making in this period was that before the adoption of the draft Constitution (Macpherson's Constitution, 1951) a series of questionnaires was submitted for discussions at various levels; villages, districts meetings, and at provincial and divisional conferences followed by regional conference and Lagos colony conference and rounded off with a general conference in London. For the first time, Nigerians were given opportunity to participate in the framing of the Constitution under which they were to be governed.⁸

However, this Constitution could not endure as events unfold rapidly indicating the preference of Nigerians for a federal constitution and an accelerated transition to full independence for the country. A conference was held in London between July 1953 and August 1953 as well as in Lagos in 19th January 1954 under the chairmanship of Sir Lyttleton. The aftermath was the birth of a new

³Governor-General, Governor Richard., see Udoma (1994) *History and Law of the Constitution of Nigeria* (Lagos: Malthouse Press Ltd.,) p. 7.

⁴Article 29 of the Letters Patent 29-11-1913, see Ben Igwenyi, *Modern Constitutional Law of Nigeria*; (Abakaliki: Nwamazi Printing & Publication co. Ltd., 2006) p. 136, see also Olamide (2016) *Nigerian Constitutional Law*, <http://www.djetlawyer.com/history-nigerian-constitutional-development/> March 17, 2016 (visited 27/7/16).

⁵Article 3 of the *Nigerian (Legislative Council) Order in Council (1922)* and Article 8 *Nigerian Protectorate Order in Council 1922* and Article 6 of the Letters Patent 1922(for the Colony). B. Igwenyi, *ibid.* 138

⁶*Ibid.*, U. Udoma, *Op. cit.* p.7-8., B. O. Nwabueze, *Constitutional History of Nigeria* (Spectrum Books Ltd.) 1995, p.11

⁷The Richards Constitution of 1946 was actually prepared by Governor Bourdillion before he was succeeded by Governor Richard in 1946 who then introduced same into his administration. See Ben Igwenyi, *Op. cit.* pp. 139-140. See also, Olamide *Nigerian Constitutional Law, Op. cit.*

⁸Chukwujekwu (1994), *ibid.* Historical Origin and Evolution of Nigerian Federalism, in *History and Law of the Constitution of Nigeria*, (Lagos: Malthouse Press Ltd.), p. 7, In Anthony & Obiajulu (eds.) (2004) *Federalism and National Integration In Nigeria*, (Onitsha: Book Point Ltd.) p. 19, U. Udoma, *ibid.*; see also B. Nwabueze, *ibid.* p. 11

constitution named after Oliver Lyttleton. 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, Sir Oliver Lyttleton. The people of Nigeria collectively were not consulted neither was there any constituents assembly elected for that purpose, the outcome of the conferences was also not subject to referendum or Plebiscites.

It is worthy to note that all the succeeding Constitutions up to the 1960 Independence Constitution of Nigeria were subject to the ratification of the British government represented by Her Majesty the Queen. This act of ratification by the British crown bereft these constitutions with the legitimacy required of a constitution donned with autochthonous character.

2.3. The Period of Independence

Constitution making took place after the period of independence, which climaxed with the enactment of the Republican Federal Constitution of 1963. The granting of independence to Nigeria in October 1960 following the 1960 Independence Constitution did not guarantee autochthonous constitution as the said Independence Constitution was a brainchild of the British Government promulgated by means of a British ordinance.⁹ However, the granting of independence having marked the realization of her self-realization; the desire for a republican constitution terminating all the vestiges of colonialism was accelerated by the aftermath of the decision of Privy Council in the appeal case of *Akintola v Adegbenro*.¹⁰ The federal government having been embarrassed by the appeal decision of the Privy Council overruling the judgment of the federal Supreme Court of Nigeria; an indigenous appellate court,¹¹ which served as the Nigerian appellate court then, (not final court of appeal) moved fast to amend the Independence Constitution. The result was the enactment of the Republican Federal Constitution 1963.

The Republican Constitution of 1963 is acclaimed as the first and only autochthonous Constitution of Nigeria having been made and adopted by the parliament comprising only of Nigerians elected for that purpose by the people of Nigeria.¹² The Constitution made Nigeria a republic, the implication being that all the constitutional links and influences of her majesty the queen were severed and extinguished.

The unique features of the Republican Constitution included;

- a) The abolition of appeal to the Privy Council and the establishment of a Supreme Court of Nigeria as the court of last resort.
- b) The abolition of the requirement of her majesty's consent before a bill is assented by the president or Governor-General.

⁹ *ibid.*

¹⁰ Cited in K. Eso, *The Mystery Gunman*, (Ibadan: Spectrum Books Ltd 1995), pp. 146-162.

¹¹ The Supreme Court of Nigeria then was an appellate court but not the final court of appeal, the Privy Council was regarded as the final court of appeal.

¹² *Ibid*, p. 162.

c) Provision for the supremacy of the constitution instead of the British crown.

The inadequacy of the Republican Constitution was that it was merely a re-enactment of the Independence Constitution with few amendments, which included the above stated features.¹³ Further, the people of Nigeria were not as individuals given opportunity to discuss and make input, neither was the final draft subjected to a referendum for final adoption by the people.

2.4. The Period of Military Governance

The period of military constitution making is the period commencing from the period of conception of the 1979 Constitution of Nigeria to the present 1999 Constitution of Nigeria. The operation of the Republican Constitution of 1963 could not be sustained as the military made their introit into Nigerian political scene. A failed military coup had taken the life of the Prime Minister and other top government functionaries. As the President, Dr. Nnamdi Azikiwe was on vacation at the moment, The Acting President then, Dr. Nwafor Orizu, having been overwhelmed by the incidence voluntarily handed over power to the military expressing his “fervent hope that the new administration will ensure the peace and stability of the Federal Republic of Nigeria and that all citizens will give them (the military) their full cooperation”¹⁴ for the purpose of maintaining law and order and of maintaining essential services. Thus power was handed over to the military under the headship of the General Officer Commanding, General J. T. U. Aguiyi-Ironsi. This military government which was stated to be ruled by way of decree¹⁵ promulgated Decree No. 1 of 1966 which abolished or suspended certain democratically functional part of the 1963 Republic Constitution to give full effect to the military government.¹⁶ These ushered in what later became a protracted period of military Dictatorship with its attendant ill effect on Constitutional order.

From 1966 to 1999, different military government did attempt to introduce a constitutional order by a somehow thwarted programme of transition to democratic governance usually intertwined with the reconstitution of a constitution making body. while the first military government did not establish any programme of transition before the untimely demise of the Head of the military government, major General J. T.U. Aguiyi Ironsi in an unsuccessful military coup, his successor General Yakubu Gowon though promised to hand over power to civilian administration in 1976 after the civil war of 1967/1970 but retracted from his promise.¹⁷

¹³B. Igwenyi, *Op. cit.* p. 158.

¹⁴*Ibid.* p.170, Government Notice No. 147 of 28th January, 1966 cited from B.O. Nwabueze, *Op. cit.*, p. 162.

¹⁵Constitution (Suspension and Modification) Decree No. 1 of 1966.

¹⁶For example Decree No. 1 of 1966 modified section 1(1) of the 1963 Republican Constitution on issues of its supremacy as follows “this Constitution shall have the force of law throughout Nigeria and if any other law including the Constitution of a region is inconsistent with this Constitution, this Constitution shall prevail and the other law shall to the extent of the inconsistency be void, provided that this Constitution shall not prevail over a Decree and nothing in this Constitution shall render any provision of a Decree void to any extent whatsoever”.

¹⁷O. Olamide, *ibid.*

On 29th July, 1975, General Murtala Mohammed succeeded him in a military coup. It was this military administration that for the first time initiated a programme of transition, and to make good its promise, the government appointed a Constitution Drafting Committee in October 1975 comprised of forty nine (49) persons. The result of the Constitution Drafting Committee (CDC) was subsequently tendered before a constituent assembly of 230 members elected through members of the Local Government Council; appointed by the military government. The Draft constitution on completion was submitted to the Military Government of Olusegun Obasanjo whose administration tinkered with the Draft Constitution and thereafter promulgated same into the 1979 Constitution.¹⁸

This military promulgated Constitution of 1979 heralded the brief exit of military rule and a short introit of democratic government of Shehu Shagari who was elected on 1st October 1983 but was overthrown on December 31st 1983 barely two months of the inauguration of his government. The democratic system was regrettably a still birth. The new military government headed by General Mohammed Buhari and Tunde Idiagbon could not initiate a transition programme to civil rule before it was ousted by another military Junta led by General Ibrahim Babangida.

The Babangida administration initiated the most elaborate and expensive programme of transition which took a period of eight years but could not yield any tangible result. This transition programme initiated a process of constitution making resulting to a Draft Constitution of 1983.¹⁹ The Babangida administration set up three bodies specifically for the purpose of piloting a new democratic constitution. These bodies were; the Constitution Review Committee, which was mandated to review the past constitutions and make recommendations, the reviewed report was to be submitted to the second body; The Constituent Assembly made up of 450 members inclusive of 111 members nominated by the military government. The constituent Assembly took about one year to deliberate on the Draft Constitution and made recommendations to the Armed Forces Ruling Council Presided by President Babangida.²⁰ The members of the constituent assembly were forbidden from deliberating on what was described as sensitive matters which were left to the Armed Forces Ruling Council to determine. The third body was the Political Bureau set up in 1986 for the purpose of organizing debate on the future of the Nigeria Political system.²¹ The outcome would have been the promulgation of the 1989 Constitution of Nigeria and a successful transition to civil rule. The annulment of the Presidential Election of June 12, which Chief Moshood K. O. Abiola was popularly acclaimed to have won, led to the demise of the still birth 1989 Constitution. An interim government took over power as President Badamasi Babangida stepped out of power. The new Interim

¹⁸*Ibid.*

¹⁹Government of Nigeria.

²⁰Oraun. The Military and Constitution Making: the Nigerian Experience, (visited 29/07/16).

[http://bem.law.ui.ac.id/fhuiguide/uploads/materi/htn--\(kki\)-the-military-and-constitution.pdf](http://bem.law.ui.ac.id/fhuiguide/uploads/materi/htn--(kki)-the-military-and-constitution.pdf)

²¹Tobi (2000). The Legitimacy of Constitutional Change in the Context of the 1999 Constitution; in Ayua I. A. et al. (eds.) *Issues in the 1999 Constitution*, p. 214.

National government which was believed to be an illegal government²² could not survive as the head of the interim government was removed in a palace coup by General Sanni Abacha who took over power.

Between 1994 and 1998, General Sanni Abacha commenced his own protracted programme of transition to civil rule. A Constitutional Conference Commission was set up pursuant to Decree 1 of 1994 and charged with the task of organizing conferences, inviting and receiving memos from Nigerians for submission to the Constitutional Conference Commission. The commission was made up of 369 delegates among whom 96 were nominated by the Provisional Ruling Council (P.R.C) headed by General Abacha. Like its previous constitution making assembly, the delegates were not permitted to deliberate on issues of Nigerian unity, the federal structure as well as the June 12 annulled election.²³

The Provisional Ruling Council further appointed a review committee to advise the government on the necessary changes to the Draft Constitution. A Constitution Analysis Committee was appointed to review the work of the Review Committee after which the Draft Constitution was examined by the following bodies; The Federal Executive Council, The Council of states and the P.R.C. By October 1, 1995 the government announced the changes on the final Draft Constitution.²⁴ The Mysterious death of General Abacha the head of the ruling Provisional Ruling Council, saw to the end of the constitution making process as another military government headed by General Abdulsalami Abubakar took over power.

On assumption of office, General Abubakar vowed to commence an accelerated transition to civil rule. To make good this promise, a 24 member Constitution Debate Committee (CDC) was constituted to deliberate on the 1995 Draft Constitution for the purpose of adopting same.²⁵ The idea of adopting the 1995 Constitution was not palatable to many notable Nigerians as a result of the stigma of illegitimacy attached to it owing to the misgivings associated to the personality of the late Sanni Abacha the brain child of the Draft Constitution.²⁶ As a result, the military government of General Abdulsalami decided to review and promulgate 1979 Constitution as the new 1999 Constitution of Nigeria with little amendment.²⁷ This remains the current Constitution of Nigeria.

²²A Federal High Court declared the Interim Government as illegal. See Alex Gboyega; (<http://book.openedition.org/ifra/649#ftn1...>) *ibid*, for a report on the judgment, see, *The African Guardian*, Lagos (22 November 1993): pp. 16-21.

²³Alex Gboyega, Institutfrançais de recherche en Afrique, 2001, Conditions d'utilisation: <http://www.openedition.org/6540>. An Elusive Target: Nigeria fends off sanctions1Conference Report. The Nigerian Democratization Process and the European Union (visited 28/7/16) See, Federal Republic of Nigeria *Report of the Constitutional Conference containing the Resolution* (<http://book.openedition.org/ifra/649#ftn23>) (visited 10/08/16).

²⁴Nigerian Tribune, Ibadan, 2 October, 1995.

²⁵See N. Tobi, Presentation of the Report of[Nigerian] Constitution Debate Coordinating Committee (CDCC) by Justice Niki Tobi[Being the text of a speech delivered by the Chairman of the Constitution Debate Co-coordinating Committee (CDCC), Justice Niki Tobi, while presenting the Committee's report to the Head of State, General Abdulsalami Abubakar www.nigerianscholars.africanqueen.com (visited 28/07/16).

²⁶Buhari (2010) Re: Abacha's Constitutional Conference 1994-95-politics: <http://www.nairaland.com/> (visited 28/07/16), see also Niki Tobi *ibid*.

²⁷*ibid*.

The 1999 Constitution at present has experienced some amendments by Nigerian Federal Legislators.²⁸ There exist however as much as the years before, if not much more, loud clamour for a people-driven National Convention for the purpose of evolving a democratic based Constitution founded on the free will of the people of Nigeria and not a Constitution made by way of a military Fiat.

One of the major characteristics of all the past and present Constitutions of Nigeria is that Nigerians were not given a free hand to participate in the making of these Constitutions. Although in few cases, some of the delegates were elected, yet a larger number were usually appointed by the military government of the day.

It is worthy to note that these successive colonial and military governments ruled not by the collective will of the people of Nigeria but through the force of arms. Meanwhile, it was the practice for the final Draft Constitutions to be tinkered by these successive unconstitutional regimes.²⁹ Throughout these periods, Nigerians led by pro-democracy groups have persistently agitated for an all inclusive Sovereign National Conference with the powers to steer itself toward evolving a people oriented Constitution for the Country. These successive regimes have however rejected these patriot calls based on pre-modal fears that it may precipitate to the disintegration of the Country.

As Nigeria moved to the 4th Republic, stringent calls for people' driven Constitution were rebuffed by successive civilian administration based on the ill founded logic that it will amount to the existence of two Sovereigns in a state, to bestow a parallel body outside the National Assembly³⁰ with a law making pow-

²⁸See Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010. No.1, Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010.No.2, and Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.No.3.

²⁹For example the preamble to the 1989 Constitution read inter-alia;

WHEREAS the Federal Military Government of the Federal Republic of Nigeria in compliance with the transition to Civil Rule (Political Programme) Decree 1987, set up the Constitution Review Committee to review the Constitution of the Federal Republic of Nigeria 1979 in line with the accepted recommendations of the Political Bureau inaugurated by the Federal Military Government on 13th January 1986;

AND WHEREAS the Constituent Assembly, established by the Constituent Assembly Decree 1988 consisting of a Chairman, a Deputy Chairman, 450 elected members and 111 nominated members was to deliberate upon the Draft Constitution prepared by the Constitution Review Committee;

AND WHEREAS the Constituent Assembly established by the Constituent Assembly Decree 1988, and as empowered by that Decree, has deliberated upon the draft Constitution (except certain provisions thereon) drawn up by the Constitution Review Committee and presented the result of its deliberations to the Armed Forces Ruling Council;

AND WHEREAS the Armed Forces Ruling Council has approved the same, subject to such modifications as it deemed necessary and may be deemed necessary in future, in the public interest and for purposes of promoting the welfare and fostering the unity and progress of the people of Nigeria;

WHEREAS, it is necessary in accordance with the provisions of the Transition to Civil Rule) Political Programme) Decree 1987 for the Constitution of the Federal Republic of Nigeria 1989 after necessary modifications and approval by the Armed Forces Ruling Council to be promulgated in order to give the same forces of law by 1st October, 1992 in the interest and for the promotion of the welfare and unity of the people of Nigeria. (underline mine)

³⁰National Assembly is the name of the two national legislative houses in Nigeria.

er. This is irrespective of the fact that our government is fully aware of other States that have followed this modern trend of evolving a people made Constitution through conferences outside the legislatures of their States. The Nigerian successive civilian administrations have preferred holding a political Jamboree in the name of Political conferences, which conferences have not materialized in entrenching a people's acceptable constitution. It is to be noted that the administration of Olusegun Obasanjo did set up a national political reform conference at the inception of his administration;³¹ the outcome of this expensive jamboree conference has been lying in the dustbin of history. Also toward the end of his tenure, President Goodluck Jonathan also set up a political conference of selected and nominated members on March 17, 2014 among other objectives according to him was:

to engage in intense introspection about the political and socio-economic challenges confronting the country and to chart the best and most acceptable way for the resolution of such challenges in the collective interest of all the constituents parts of the country.³²

None of the outcome of the conference was implemented or materialized into a constitutional text. Commenting on the illegitimacy and the consequential ineffectiveness of such constitutional conferences or dialogue to culminate into a constitutional binding document,

Chris Uche (SAN) stated thus:

... Once the dialogue does not have the status of a SNC (sovereign national conference) it would not achieve any purpose for Nigeria. At best, it would serve to douse tension in the land by diverting the attention of Nigerians from the real issues and help politicians to prepare for 2015.

At the end of the day, the outcome will not have the force of law as long as it is subject to the approval of the President or the legislature. As far as I am concerned, only a SNC, which will have the force of law, can serve the real purpose of a conference and nothing else.³³

In addition to use of conferences of people elected for the purpose of evolving a Constitution, modern States have accepted the use of Direct Democracy, known as referendum for the purpose of enabling all citizens to participate in Constitution making and the adoption of the final Draft of the Constitution.³⁴

We shall consider some of these States. But before that it is important that we consider the imperative of a Constitution founded on the free will of the people, a Constitution made by a Constituent Assembly specifically elected for that purpose by the people and subjected to a referendum for adoption by the people.

³¹Daily Independence, Thursday June 23, 2005 p. 13.

³²Henry Umoru, National Conference: More questions than answers-Vanguard News (Mar 22, 2014). <http://www.vanguardngr.com/2014/03/national-conference-questions-answers/>

³³Chris Uche SAN, only a sovereign national confab can save Nigeria (Oct 3, 2013), also cited in Pius E. Omene, *Op. cit.*

³⁴Elazar (2003) The use of Direct Democracy (Referenda and Plebiscite) in Modern Government, www.jcpa.org/dje/articles/ref-pleb.htm (visited 4/29/2003).

3. The Legitimacy of a Constitution

A legitimate constitution must evolve from the legitimate will of the people. A promulgation or enactment of a constitution by an undemocratic government does not bestow same with the character of legitimacy. Even the stereotyped phrase in almost all the successive Constitutions of Nigeria to the effect that “we the people of the Federal Republic of Nigeria ...”³⁵ made the Constitution, does not, and cannot clothe them with legitimacy. Further, it is the Constitution that ennobles and legitimizes government and not the other way round. Therefore an illegal regime; government not supported by or derivable from the Constitution cannot legitimately foist its own constitution on the people.³⁶ This is because of the well known accepted principle that political sovereign inheres with the people and such the people reserves the right to determine by themselves how best they want to be governed. Sovereignty is described as inalienable.³⁷

In the era of *Hobbessian Leviathanic monarchs*, sovereignty lied with the Kings or Queens. During the ecclesiastical period of the Reign of Pope in Rome, the custodian of sovereignty was the Pope. However, in this modern era of republicanism and democracy, sovereignty inheres with the people; the citizens of the state. It cannot be delegated nor transferred even temporarily to government officials.³⁸

The idea of social compact has as well experienced modernization. This idea as explained by Rousseau³⁹ is one entered by the citizens with themselves for the purpose of self preservation. This notion of social contract in the perspective of Paine⁴⁰ does not amount to surrender of sovereignty to a class of people. According to Paine;

There is no such thing as the idea of a compact between the people on the one side and the government on the other side to preserve and constitute a government. To suppose that any government can be party in a compact with the whole people is to suppose it to have existence before it can have right to exist. The only instance in which a compact can take place between the people and those who exercise the government is that the people shall pay them while they choose to employ them.⁴¹

No matter what may be its own preconceived advantage, any process by which an existing legislative assembly be it elected or otherwise, without prior popular

³⁵E.g. see the preamble to the *Constitution of the Federal Republic of Nigeria (1999)*.

³⁶M. O. Ikuromo, *The Military and Constitution Making; the Nigerian Experience*.

³⁷Reisenberg (1956) *Inalienability of Sovereignty in Medieval Political Thought*, (Columbia University Press) chapter one cited in C. U. Anyanwu, *Op. cit.*, p. 26.

³⁸Anyanwu (2004) “Of Sovereignty, Grundnorm, Autochthonous Constitution, Conferences and the Stability of a Decolonized Federal State”, in M.M. Gidado, et al. (eds.) *Constitutional Essays in Honour of Bola Ige*, (Enugu: Chenglo limited). p. 25.

³⁹Rousseau (1998): *the Social Contract*; Worldworth Classics of World Literature, translated by H.J. Tozer 1998, p.14 John Rawls; *A Theory of Justice*; (Oxford University Press, 1999) Introduction., Cited in C.U. Anyanwu, *ibid.* p. 26.

⁴⁰Kucklick (1999): *Thomas Paine: Political Writings; The Right of Man*; Cambridge Text in the History of Political Thought, Cambridge University Press, p. 187 cited in C.U. Anyanwu, *ibid.*

⁴¹*Ibid.*

mandate for the purpose of enacting a constitution purports to make a constitution, cannot be a reflection of the popular will of the people. This is because its mandate is limited to lawmaking according to the provisions and limit of the existing Constitution.⁴²

The lawmakers cannot go outside the Constitution upon which they derived legitimacy no matter the popularity or exigencies of such temptation as the outcome will be *ultra vires*. A Constitution will be an act of the people if it is made by them either directly in a referendum or through a convention or constituent assembly popularly elected for the purpose of Constitution making and nothing else.

It is not the formal act of promulgation that crowns the Constitution the character of legitimacy as an act of the people. The legitimacy of the constitution is concerned with how to make it command the loyalty, obedience, and confidence of the people. It cannot be disputed that a constitution often embodies ideas that are not part of the native cultural heritage of the people, like ideas originating from Roman law, Greek philosophy, English as well as American and French revolutions. No matter how popular such ideas may sound, it is fundamentally essential that the people are made to be acquainted with as well as voluntarily accept this foreign heritage otherwise such ideas will be resisted by the people.

Therefore, to achieve this understanding and acceptance, a constitution needs to pass through a process of popularization with a view to generating public interest in it. The people must be made to identify themselves with its ideas and contents; otherwise it will remain remote, artificial with no more existence than the paper on which it is written.⁴³

A constitution needs not be necessarily 'enacted' by the people to have legitimacy, what is necessary as stated above is that the people should be involved in the process of its making.

The argument that constitution making is an act of lawmaking of which only a state machinery can perform and such that the people either in a referendum or through a constituent assembly elected for that purpose are not legally competent to adopt a constitution and bestow validity upon same is founded in error. If the state is a creation of the people by means of a constitution and derives its power of lawmaking from the people then the people who constituted the state and granted power to the constitution can always act directly in a referendum or otherwise for the purpose of directly conferring on the constitution the character of legitimacy.⁴⁴ The mandate conferred on the President and members of the National Assembly by their election is only a mandate to govern under and in accordance with the provisions of that Constitution and to make as such amendment as may be necessary, such changes in them not affecting the fundamental structures and principles of the system of government established by the Constitution. It is a limited mandate, and is not meant to substitute the people as

⁴²B. O. Nwabueze, *ibid*, pp. 1-3.

⁴³Nwabueze (1973) *Constitutionalism in the Emergent States*, (U.K. C. Hurst & Co. 1973), p. 5.

⁴⁴Nwabueze (1982) *the Presidential Constitution of Nigeria* (Nwamife Publishers Enugu and Lagos, 1982) pp. 2-6.

the repository of constituent power.⁴⁵ This proposition was earlier accepted and affirmed by the late respected Prime Minister, Alhaji Sir, Abubakar Tafawa Balewa.⁴⁶ The Prime Minister stated during the debate on the transition to a Republican Constitution in 1963 that the demand for a change from the existing West Minister parliamentary System of government to a Presidential System was of such fundamental and radical nature as put it beyond the mandate of the government to effect without the approval of the people in a referendum and that without such approval, only non-fundamental changes were within the government's power to make under the provision in the 1960 Constitution relating to constitutional amendment.⁴⁷ Any amendment process affected pursuant to the constitutional limitation itself cannot bring about an autochthonous constitution, but rather an amended Constitution.

The problems confronting the Nigerian federal state are of such complexity and enormity as to require fundamental and radical changes in her Constitution, which put them beyond the power of the government to effect by way of constitutional amendment without recourse to the people through the machinery of a referendum. The limited nature of government's mandate in this regard is further underlined by the universally recognized distinction between its legislative organ and a constituent assembly. The latter is an assembly specially mandated by the people, as the repository of a country's constituent power, either to adopt a constitution on their behalf or to draw up proposals for a constitution to be submitted for adoption by the people in a referendum.

4. Referendum and Plebiscite

Plebiscite and referendum are two forms of Direct Democracies employed in modern times, the former having originated from French revolutionaries⁴⁸ and described as "totalitarian democracies". Through Plebiscite people were prompted to vote on specific matters to provide legitimacy to government actions. Its origin is traceable to the ancient Rome in the fourth century when the plebeians or the commoners directly participated in law making process.⁴⁹ Today plebiscite is used to describe a vote that is advisory or consultative rather than legally binding on the government.⁵⁰

The referendum on the other hand originated from the Switzerland in the

⁴⁵ *Ibid.*

⁴⁶ Cited in Okoye (2006), "Why Resolution of Confab Should go for a Referendum", Vanguard Friday (Nigeria) April 22, 2006, p. 18.

⁴⁷ *Ibid.*

⁴⁸ Daniel J. Elazar, *Op. cit.*

⁴⁹ See <http://www.thecanadianencyclopedia.ca/en/article/referendum/> assessed (12/01/17).

⁵⁰ In Europe plebiscite is usually used in a negative sense to refer to unfair and un-free vote in an undemocratic political system. Dictators like Napoleon Bonaparte, Louis Napoleon, Adolf Hitler, and Mussolini all held plebiscites in which rejection of their proposals were unthinkable. A referendum by contrast is a free, fair and competitive vote –it is democratic if the wording of the question and the rules governing the campaign give both the proponents and opponents of the issue the ability to compete on fair terms and votes are cast and counted without fraud. See Richard Rose "referendum or plebiscite: what's the difference?" www.csp.strath.ac.uk/ESRC-ref%20or%20pleb.pdf assessed (12/01/17).

middle of the nineteenth century and were employed as a substitute to the previous outdated and presently unrealistic method of assembling voters in a place for the purpose of deciding major policy decisions, as it was no longer possible to congregate citizens in one place so as to make them vote.⁵¹ Through referendum direct constitutional or political questions were presented to an electorate for direct decisions by general vote.⁵²

In the modern times referendum has become a popular tool of policy making associated with republican Democracy. Since the beginning of the twentieth century, referendum has been accepted as an effective tool for policy making by government around the world. Today referendum is the most people friendly election device in which a law can be either accepted or repeal based on the popular vote of the people. Through the process of referendum voters can reject or accept law or statute passed by a legislature by taking a popular vote on the issue. Both constitutional changes and legislative changes may be carried out through the process of referenda.

In Australia referendum is a veritable part of the country's constitutional and democratic process as it is employed for constitutional amendment.⁵³ Even in United States of America where no provision was made for referenda in her Constitution, 49 out of 50 states of US has employed referenda as a normal part of their government and has been made part of the Constitution of these states.⁵⁴

In Britain where the parliamentary sovereignty is practiced, referendum has been considered for the purpose of granting more autonomy to Scotland and Wales, such that Scotland and Wales were expected to vote for or against the granting of increased rules. Recently, Britain was allowed to decide by means of referendum whether or not they should continue to be part of the European Union.⁵⁵

The major distinction between referendum and plebiscite is that whereas the outcome of a referendum is binding on the government as well as the citizens the outcome of a plebiscite is advisory as government is at liberty to adopt or to reject same.⁵⁶ In other words, while referenda change the law, plebiscites merely

⁵¹This is also known as small republic" the evolution of large federations make the practice of "small republic" impossible and unrealistic. Daniel J. Elazar, *Op. cit.* See also, C. U. Anyawu, *Op. cit.*

⁵²<http://www.thecanadianencyclopedia.ca/en/article/referendum/> assessed (12/01/17) The word referendum is derived from the Latin expression "ad referendum" which means "that which must be taken back" or "that which must be submitted to an assembly." Switzerland apart, France and other European countries have accepted referendum as a form of democracy.

See <https://www.quora.com/What-is-the-difference-between-a-referendum-and-a-plebiscite> assessed 12/01/17)

⁵³Pursuant to section 128 of the Commonwealth Constitution of Australia, constitutional amendment can only be carried out by means of a referendum. The key feature of the Australia referenda is that they are legally determinative. In other words given a successful vote in favor of an issue in a referendum the results operates to change the relevant provision of the Constitution without any further governmental action or discretion, be it legislative or otherwise except the ceremonial granting of royal assent. www.peo.gov.au/learning/fact-sheets/referendums-and-plebiscites.html (assessed 12/01/17)

⁵⁴The American founding fathers opposed the idea of referenda because of their belief that policy decisions required formal deliberation. Daniel J. Elazar, *Op. cit.*

⁵⁵Wikipedia (Assessed (28/01/17)

https://en.wikipedia.org/wiki/United_Kingdom_European_Union_membership_referendum_2016

indicate that the people would like the law to be changed in a certain direction-it then being the responsibility of government to implement it if it so desire.⁵⁷ Further while referendum is usually applied to constitutional polls plebiscite may be applied for a wider range of objectives.⁵⁸

In practice, a referendum is employed after the draft constitution must have been first deliberated by a constituent or other deliberative body preferably a deliberative body specifically elected for that purpose. This process is necessary since the referendum does not normally provide a proper opportunity for canvassing of views on the issues in question or the accommodation of different perspectives.⁵⁹ Referendum will thereafter be employed to ratify the decision of the constituent deliberative body.

Modern government and advanced democracies thrives on the employment of Direct Democracy; a method which gives the people the opportunity of deciding political and national issues on the basis of voting in favor or against specific matters.⁶⁰ This is a product of modernity founded on the principle that sovereignty inheres on the citizens and therefore the choice of governmental policies resides with the people.⁶¹ Referenda and plebiscites are democratic process. Whereas parliament are only derivatively democratic as comprising the peoples representative, plebiscites and referenda are the expressions of the popular will by the people and without the need for obfuscating legislative intermediaries. While parliamentary processes are representative in nature, referenda and plebiscites represent the people themselves making decisions by themselves; the people become the government. Plebiscites and referenda encourage popular education in government and therefore enhance the people's confidence in government process.⁶²

5. Autochthonous Constitution: Drawing from Other States

The making of the U.S. Constitution laid the universal precedent that the constituent, the sovereign power, the power to make or change the constitution of a

⁵⁶Plebiscite is sometimes called advisory referendum because the government does not have to act upon its decision.

⁵⁷Greg craven; referenda, plebiscites and sundry parliamentary impedimenta

www.aspg.org.au/journal/2005autumn_20_1/05-craven.pdf assessed (12/01/17) See also Greg Craven, *Conversations with the Constitution* (2004) 223–34.

⁵⁸In Australia plebiscites was employed in connection with the choice of an Australian national flag.

⁵⁹The only choice usually available in a referendum is 'yes' or 'no' and not a nuanced answer.

⁶⁰Another major component is initiative. Initiative however only proposes new laws for consideration see moadoph.gov.au/blog/referenda-and-plebiscites-whats-the-difference (12/01/17)

⁶¹C. U. Anyanwu, *Op. cit.*

⁶²Professor Markku Suksi, a foremost authority on the referendum, notes that more than half of the constitution-making processes from 1998 through 2007 used the referendum to decide on new constitutional text. But at the level of states (ignoring subnational entities), new constitutions, or constitutions that seem to be the result of a more specific constitution-making process rather than a regular amendment process, have been decided by means of the referendum only in some fourteen cases (Albania [1998], Sudan [1998], Venezuela [1999], Qatar [2003], Rwanda [2003], Cyprus [2004], Burundi [2005], Iraq [2005], Kenya [2005; 2010], Democratic Republic of the Congo [2006], Serbia [2006], Kyrgyzstan [2007], and Thailand [2007]). Suksi also estimates that at least half of the world's constitutions require a referendum for constitutional change Suksi 2008, cited in <http://constitutionmakingforpeace.org/book/3-5-referendums-and-plebiscites/> assessed (12/01/17).

country belongs to the people. Thomas Paine⁶³ in his “Right of Man” stated that a Constitution is not the Act of a government but the people constituting it. Edward Corwain⁶⁴ traces the efficacy of the U.S. Constitution to the fact that the people to be governed by it established it. The great French philosopher and Jurist Alexis de Tocqueville⁶⁵ in his great classic described the emergence of the people as a constituent power and lawmaker, not as a matter of political theory but in the real practice of government. He said;

The doctrine of the sovereignty of the people took possession of the state. Every class was enlisted in its cause; battles were fought and victories obtained for it, it became the law of laws... the people reign in the American Politician world as the deity does in the universe. They are the cause and the aim of all things, everything comes from them, and everything is absorbed in them.⁶⁶

The characterization of the people by Tocqueville as “the law of laws” needs to be particularly emphasized. The opening words of the U.S Constitution: “*we the people... do ordain and establish this Constitution for the United States of America*”, does not merely echo a revolutionary sentiment, it reflects a common practice. The French Fourth and Fifth Constitution of 1946 and 1958 respectively were prepared by a specially elected Constituent Assembly of 586 members, 64 of whom were representatives from Africa. The draft proposals of the Constituent Assembly were submitted to a national referendum, which rejected them on 5 May 1945. A fresh proposals were prepared by a second Constituent Assembly duly elected on 2 June 1946 and were later approved at a referendum on 13 October, 1946, likewise the 1958 Constitution of France.

The notion of the people as the rightful authority to adopt a constitution through a referendum or a constituent assembly specially elected by them for the purpose is also well-rooted and accepted in Belgium, one of the European colonizing powers in Africa. A specially elected National Congress of 200 delegates adopted its first and still surviving written Constitution of 1831. The First amendment by which the suffrage was vastly expanded in September 1893 was likewise adopted by a constituent assembly elected for the purpose in April 1952. The monarchy being the central pillar of the Constitution, the question whether or not Leopold III should be permitted to return to the country from exile after the Second World War to resume the throne from his brother regent was decided by a referendum in 1950 at which 57.68 percent of the population voted in favour and 42.32 percent against.⁶⁷

The South Africans found useful the Convention on Democratic South Africa (CODESA). It resolved for them, the contradictions of power relations through

⁶³Bruce Kucklick, Thomas Paine: Political Writings; The Right of Man; Cambridge Text in the History of Political Thought, *Op. cit.*, Cited in Vanguard, (Nigeria). *Op. cit.*

⁶⁴*Ibid.*

⁶⁵Alexis de Tocqueville, *Democracy in America* (1835), cited in Vanguard Friday April 2, 2005 p. 18.

⁶⁶*Ibid.*

⁶⁷He was forced to abdicate afterwards because of widespread violent and disturbance provoked by his return and the threat of civil war. *Ibid.*

the adoption of about thirty four constitutional principles for a democratic South Africa⁶⁸. Similarly the Ethiopians, after several years of bloodletting went through a process-led constitution making exercise and adopted a constitution which is distinguished by its recognition of Ethiopia as a multi-ethnic state and creation of ethnically based states. The right to self-determination, freedom to determine a working language by states and the composition of the national defense force on the basis of equitable representation of the nations, nationalities and peoples of Ethiopia are all enshrined in her Constitution.⁶⁹

The stabilising effect of real grassroots constitutional assemblies or conventions whose outcomes are articulated and enacted by a central constitutional conference or convention for constitution making purposes need not be over-emphasised. For instance, the 1960 *Constitution of Ghana* was enacted by a Constituent Assembly but only after it had been submitted to the people in a referendum. The constitution itself incorporated the people as part of the legislative process. Powers not delegated to the regular organs of the state remained with the people who could exercised them by means of a referendum; in particular of the fifty five articles of the Constitution no less than seventeen were made alterable only by the people, exclusive of the legislature.⁷⁰ Similarly in Kenya, which battled with a colonial government' imposed constitution; a constitution which has undergone processes of amendment by a one party dominated parliament propelled by self interest.⁷¹ At last Kenya was able to initiate a process of constitution making process centred on the Kenya populace. The proposed constitution was exposed to public debate through various fora and finally subjected to a referendum.⁷²

The Indian Constitutional Assembly was elected by provincial legislative assemblies at the ratio of one to one million people. The three main communities

⁶⁸The South Africa initiated a process of constitution making through the convention for democratic South Africa. In 1991, a transition Constitution was made which provided for an elected constitution assembly for the purpose of drafting a final constitution for South Africa. By 1993, through its multi-party negotiating Process (MPNP) A set of principles forming the standard for the modern constitution was agreed upon to ensure basic liberty as well as preserved rights of minorities. The Interim Constitution took off in 1994. The Interim Constitution provided for a parliament made up of 2 houses, a 400 member national assembly and 90 member senate representing 9 provinces, the joint session of the national assembly and the senate was required to form the constituent assembly. This constituent assembly was required to draw up the final Constitution. A provision for referendum of which 60 percent vote is required was provided therein. The process of constitution making was completed with the distribution of millions of copies of the final document in 11 languages of the country thereby underscoring the importance of the citizen participation in constitution making process. See, *Abioye (2011) Constitution Making, Legitimacy and the Rule of Law: A comparative analysis (2011) 44 issues 1, Journal of Comparative and International Law of South Africa, 74*. See also Media Development Association and Konrad Adenauer Foundation (2013) 110, (2012) 111, Venter F 'South Africa-introductory Notes' available at http://www.icla.up.ac.za/images/country_reports/south_africa_country_report.pdf (accessed 20 August 2013).

⁶⁹*Anyanwu (2006), Jurisprudence of Sovereignty*, (Africom Ltd., Lagos, 2006) 462.

⁷⁰See article 31 of the *Constitution of Ghana 1960*.

⁷¹*Media Development Association and Konrad Adenauer Foundation (2012) History of Constitution—making in Kenya, 2012, 1*. Available at <http://www.kas.de/kenia/en/publications/32994/> (accessed 9 May 2013).

⁷²Kenyan constitution review process commenced with the enactment of the Constitution of Kenya Review Act 2008. The Act laid out among other things the major organs for the review which included the Committee of Experts (COE), Parliament Select Committee (PSC), The National Assembly and the Referendum. Public participation was encouraged through memorandum, regional, provincial meetings, civil societies, private sectors, religious sector, political parties and the coalition government participation. Civil education was conducted to enlighten the general public to ensure that informed decisions were made during the referendum. The proposed constitution was circulated by means of different methods of public enlightenment; meetings, media engagement, paid adverts, websites etc. and the final referendum was held twice in the major languages of the state and with the aid of visual aids. The Constitution stands ratified with a 50 percent votes at referendum and 25 percent of voters in at least 5 Provinces. See, Media Development Association and Konrad Adenauer Foundation 'History of Constitution –making in Kenya, *Op. cit.*

namely *Muslims, Sikhs* and General Population elected the Provincial Assemblies. According to Dr. Hari Chand, the Indian Constitutional Assembly was the master of its own procedure and its powers were not limited or fettered by any other authority. It was a self directing and self governing body. It was the second of its kind in Asia, the first being the Chinese national assembly conceived by Dr. Sun Yatsen and convened by his successor Marshall Chiang Kai Shek which was 'turbulent' in session at that time. The Constitution of India provided for a flexible procedure of amendment for a transitional period of three years derived from Article 51 of the Irish Constitution to guard against any mistakes or loopholes that may need to be revisited.⁷³

6. Conclusion

We have so far X-rayed the history of constitution making in Nigeria and demonstrated her inability to evolve a people driven constitution, which is acceptable, by the citizens. We have further considered the true source of legitimacy of a constitution and the imperative of a constitution made by the people through a constituent assembly elected for that purpose and submitted to the people by way of a referendum. We noted that a people's made constitution is in conformity with the practice of republican democracy, which encourages popular participation in the governance process. This is a process followed by most states of the world today and Nigeria should follow suit. It is therefore submitted that even under a democratic regime, Nigeria can organize a constituent assembly with the aim of effecting a fundamental and lasting changes to the constitution or with the aim of radically bringing into life a new and autochthonous constitution, which shall be subjected to a referendum. The method of voting at the referendum shall be Yes/No response to the key decisions of the conference. Such constitution made in this direct democratic manner will gain legitimacy and support from the citizens and therefore engender political cohesion and a virile federal Nigeria.

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⁷³Dr. Hari-Chand, *Amending Process in the Indian Constitution*, (Metropolitan Book Co. Delhi) pp.10-11. Cited in Chris U. Anyanwu, *Jurisprudence of Sovereignty, Op.cit.*, pp.466-467. See also C.U. Anyanwu, "Of Sovereignty, Grundnorm, Autochthonous Constitution, Conferences and the Stability of a Decolonized Federal State", in M.M. Gidado, et al. (eds), *Op. cit.*

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