



TRENDS AND DYNAMICS IN CONSTITUTION MAKING AND DEVELOPMENT IN NIGERIA

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Abstract

It is a truism that frameworks legal and Institutional framework provide support for constitutional democracy. They provide the requisite elixir for democracy. Various laws were discussed in this work: Constitution of the Federal Republic of Nigeria,1999,The Electoral Act,2022, Case law , Electoral Guidelines, National Judicial Council of Nigeria Policy Direction on Political and Election Related Cases,2022 and Election Judicial Proceedings Practice Direction,2023.The work also discussed international instruments supporting constitutional democracy, such as the Convention on the Elimination of all forms of Discrimination against women,1979, Universal Declaration on Human Rights, Convention on the Political Rights of Women,1953, African Charter on Human and People Rights,1981, African Charter on Democracy ,Election and Good Governance,2007 and International Covenant and Political Rights,1966.The work further discussed the institutional frameworks, such as the Legislature, Independent National Electoral Commission, The Judiciary, The Nigeria Bar Association, Security Agencies, Political parties, civil societies ,the media, National Human Rights Commission, Code of Conduct Tribunal and Tribunal, Economic and Financial Crime Commission and Independent Corrupt Practices Commission and Traditional/ Religious institutions. The conclusion is thereafter drawn.

INTRODUCTION

A constitution is 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 that specific purpose, subject or not to formal ratification by the people in a referendum². Constitution making in this context refers to the act by which its substantive content, particularly the system of government, and the governmental structures inter se and with the individual is determined and adopted, rather than the formal act of ratification. A constitution whether written or unwritten, rigid or flexible and unitary or federal³, is an expression of the will or desires of the people who make up the state or the country⁴. Further, a constitution is a compact or a contract between the citizens of a country in regard to the manner in which they will jointly shape their collective destiny, manage their affairs and makes its rules. Succeeding generations accept the compact or adjust it to bring it in line with new ways in which the citizens view their relationship with each other whether as individuals or members of distinct regional or ethnic groups⁵. A constitution can be more than merely the rule of government. It may assemble the nation's aspirations and codify its common values⁶. Constitutions may even address the nation's history⁷. In other word, a constitution is a complex document which should not to be construed as a mere law but as the machinery by which laws are made⁸. In the case of *Attorney General of Ondo State v Attorney General of the Federation*⁹, the Supreme Court of Nigeria defines a constitution as an instrument of government under which laws are made and are not mere Acts or Laws and the construction of which the court will give to a constitutional provision must

² B.O. Nwabueze, *The Presidential Constitution of Nigeria*, Nwamife Publishers, 1982) p.1

³ *Olafisoye v Federal Republic of Nigeria* (2004) 4 NWLR (Pt.864) p. 43

⁴ E. Malemi, *The Nigerian Constitutional Law*, (Princeton Publishing Company, 2012) p.15

⁵ N. Haysom, "Constitution Making and Nation Building", in J. Kincaid (ed) *Federalism in A Changing World: Learning from Each Other* (St. Gallen, MIT Press, 2002) p.275

⁶ For instance, Chapter II of the Constitution

⁷ For example, Nigeria's successive constitutions proclaim repeatedly the unity and indivisibility of Nigeria regardless of the state of origin

⁸ P.M Bakshi, *The Constitution of India*, (Universal Law Publishing Co. PVT LTD, 2006) p. 36

⁹ (2002) 9NWLR (Pt.772) 53 at 106-107, paras, E-A,

be such that will serve the interest of the Constitution and will best carry out the subject and purpose and give effect to the intention of the framers¹⁰. In the case of Nigeria, the constitution defines and determines the relation between various institutions and the area of government, the legislature, executive and judiciary, Federal Government, State Governments and Local Governments, people and the government, and political, social and economic issues¹¹.

Flowing from the preceding discuss, constitution making and development in any country is often the product of complex factors and considerations. Nigeria has had its own peculiar experiences and circumstances which have influenced its development before the advent of the colonial master, during the colonial rule and after the colonial rule. Nwabueze for instance in his consideration of the origin and nature of the 1979 and 1999 constitutions respectively stated that:

The 1979 and 1999 constitutions were made by the Federal Military Government, a government of absolute power, by virtue of sovereignty seized by force or threat of it from the Nigerian people. In the result, the civilian governments, both federal and state, installed since 29th May, 1999 derive their existence and authority as a government from the military – a monstrous contradiction concealed behind the beguiling lie in preamble to the 1979 and 1999 constitutions: we the people of the Federal Republic of Nigeria ...do hereby make, enact and give to ourselves the following constitution. Needless to reiterate, the people had no hand, not a direct hand any way, in the making or enacting of either of these constitutions¹².

Nwabueze's position as above underscores the point generally acknowledged by constitutional experts that the 1979 and 1999 falsely claim that the constitutions owe their origins as an act of

¹⁰ *Kalu v Odili* (1992) 5 NWLR (Pt.240)p. 130 at 156; *Kalu v The State* (1998) 13 NWLR (Pt. 583) p. 531 at 575; *Attorney General of the New South Wales* (1908) 6CLR 496 at 612 and *Ekeocha Civil Service Commission, Imo State & Ors.* (1981)1 NCLR 154 at 156, where Oputa J as he then was, held that in all cases of interpretation of the constitution, the court should adopt such a construction as will promote the general legislative purpose underlying the constitution, which is to the Federal Legislature in such a position that it can legislate for the general interest of the whole country.

¹¹ Encyclopaedia of Social Sciences, Vol. 3, Routledge & Kegan Paul, London, 1985. Also see, Commonwealth Human Rights Initiative. "Consultation on Participation in constitution Making recommendation to CHOGM", Holiday Inn, Burgerspark, Pretoria, 16-17 August, 1999.

¹² Sagay, I.E, *Review of Ben Nwabueze's Constitutional Democracy in Africa* (Spectrum Books Ltd, 2005) p.5

the people by the proclamation in the preambles of the constitution-*we the people of the Federal Republic of Nigeria, made, enact and gave to ourselves the constitutions*. In the light of the above, the series examines the directions, pattern and forces that over time influenced or shaped the making and development of the Nigerian constitutions. Also, the series examines the genesis of Nigeria as a sovereign state.

History of the Nigerian State

Before the British intervention in the territories now constituting the Federal Republic of Nigeria, Nigeria consisted of a number distinct empires and kingdoms¹³. In 1861, Britain acquired Lagos and accorded it a Crown Colony status¹⁴. The Niger Delta and the districts east and west of it were acquired and named the Oil Rivers Protectorate¹⁵. The territory was subsequently expanded inland and renamed the Niger Coast Protectorate in 1893 and was later merged with the colony of Lagos to form the Colony and Protectorate of Southern Nigeria in 1906. In December 1899, the jurisdiction of the Royal Niger Company was expanded to include the administration of the territories in which it operated and on 1 January, 1900, Britain assumed direct authority over Nigeria¹⁶. By 1906, the British acquisitions as above were consolidated into two distinct administrative units; known as the Protectorate of Northern Nigeria and the Protectorate of Southern Nigeria. In spite of the fact the two areas differed radically in administrative style and purpose, and had two different administrations and a growing schism of tradition, character and orientation, they were amalgamated to form a corporate political entity called Nigeria under Sir

¹³ Examples of these empires and kingdom were the Oyo and Fulani empires and the Benin kingdom etc.

¹⁴ TA Aguda, *The Challenge of the Nigerian Nation: An Examination of its Legal Development 1960-1985*, (Heinmann Educational Books (Nigeria) Limited, (1985) p. 1

¹⁵ Olakanmi & Co, *The Nigerian Constitutions: 1963, 1979, and 1999*, (Law Lords Publications, 2008) p.1

¹⁶ On that date, Nigeria was structured into three separate units for administrative purposes. The three units were: the Protectorate of Northern Nigeria with Lord Lugard as its High Commissioner; the Protectorate of Southern Nigeria with Sir R.D.R Moore as its High Commissioner and the Colony and Protectorate of Lagos with Sir W. Edgerton as its High Commissioner.

Fredrick Lugard as Governor-General in 1914. Passing through series of constitutional developments, Nigeria became independent in 1960¹⁷ taking the name the federation of Nigeria. The 1960 Constitution which was bequeathed to Nigeria by the Britain provided for a political structure of government similar to the British Parliamentary System. The Parliamentary System was characterized by four main features: (1) The separation of the Head of State from the effective Head of Government; (2) plurality of the executive, that is, the Prime Minister as Head of the Executive Council; (3) the Parliamentary character of the Executive, since Ministers were chosen from the legislative houses; and (4) the responsibility of Ministers to the Legislature. Three years after attainment of the independence, Nigeria was transformed into a Republic¹⁸ following the enactment of the "Constitution of the Federal Republic of Nigeria, 1963". However, the change in status did not mean much in terms of constitutional change as some factors such as lack of conscious culture of national consensus conceived in the broadest sense caused serious political crises which led to military intervention on the 15 January 1966. The military intervention led to the suspension of the 1963 Republican Constitution¹⁹. On the 1 October, 1979, the Federal Republic of Nigeria got a new Constitution named the Constitution of the Federal Republic of Nigeria, 1979. One of the innovations introduced by the 1979 Constitution was the introduction of the Presidential System of government by which there was a clear separation and mutual independence of the Legislature, Executive and the Judiciary²⁰. Barely five years after the exit of

¹⁷ This was on the 1 October, 1960. The Nigerian Independence Act enacted by the British Parliament was entitled, "An Act to make provisions for, and in connection with, the attainment by Nigeria of fully responsible status within the Commonwealth". The legal status and name of the country were changed from the Colony and Protectorate of Nigeria to Nigeria and dependence upon Britain was formally terminated by the declaration that as from 1 October, 1960, Her Majesty's Government in the United Kingdom should have no more responsibility for the government of Nigeria or any part of Nigeria.

¹⁸ This took place on the 1 October, 1963. A significant change that took place was the abolition of the Monarchy and transferring all the functions of the Queen upon the President of the Republic and Governors of the Regions. Laws were made for the federation by the federal legislature and the President. It should be noted that both the Independence constitution of 1960 and the Republican constitution of 1963 adopted a parliamentary system of government.

¹⁹ This was done through the promulgation of the Constitution (Suspension and Modification) Decree No. 1 of 1966 by which the legislative and executive institutions in the centre and the regions were and the Federal Military Government given the power to make laws for peace, order and good government of Nigeria or any part of Nigeria.

²⁰ The doctrine of separation of powers was provided in sections 4, 5 and 6 of the 1979 Constitution. Thus, section 4 of the Constitution stated that the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly for the Federation which consisted of the

the military, on 31 December, 1983, had the military forcefully taken over power from the civilian. The consequence of that event was the suspension and modification of the 1979 Constitution²¹. Following intense pressure to return Nigeria to a democratic order, the military government in 1998 set up a committee to review the 1979 Constitution. The outcome of the exercise led to the enactment of the Constitution of the Federal Republic of Nigeria, 1999²². This brief history is necessary to illustrate the complex manner through which Nigerian partnership was formed.

Trends in constitution making

In the organization of contemporary societies, there is an increasing constitutional sensitivity to the need for stability²³. Consequently, in constitution making and development, inclusivity in the approach, joint stake holding, and common ownership of loyalty to the overall political system promotes that stability. Thus, what is appropriate for the substance of the constitution is also appropriate for the process of constitution making²⁴. Nigeria during the colonial and military era had experienced many constitutional changes²⁵. The least that can be said about the colonial and military constitutions is that they were not democratic as they did not satisfy the requirements of a democratic constitution. Nwabueze pointed out that for a constitution to be democratic, the state, the form of government, the choice of rulers as well as the process by which the constitution is adopted must conform to democratic principles, that is, it must rest on the approval or consent of the people²⁶. Consequently, the constitution is the grundnorm and the fundamental law of the law²⁷.

Senate and House of Representatives; section 5 of the Constitution also stipulated that the executive powers of the federation shall be vested in the President while section 6 stated that the judicial powers of the federation shall be vested in the courts to which the section relates.

²¹ See section 1 of the Constitution (Suspension and Modification) Decree No. 1 of 1984

²² It should be noted that the Constitution of the Federal Republic of Nigeria, 1999 is a Schedule to the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999; (now to be referred to as Act No. 24 of 1999). Specifically, section 1 (1) of Decree No. 24 (Act No. 24 of 1999) provides that there shall be for Nigeria a Constitution which shall be set out in the Schedule to this Decree.

²³ Lovedlan, I. *Constitutional Law, Administrative Law and Human Rights* (University Press, 2009) p.341

²⁴ Rossum, R.A, *American Constitutional Law*, (Wardsworth, 2003) p.259

²⁵ The period spanned from 1914-1954

²⁶ Nwabueze, (n.1)

²⁷ *Marwa v Nyako* (2012) NWLR (Pt. 1296) p.200

All other legislation in the country takes their hierarchy from the provisions of the Constitution²⁸. It is an organic instrument which confers powers and also creates rights and limitations. It regulates the powers of the nation state and defines the powers of the different components of government as well as regulating the relationship between the citizen and the state. Once the powers, rights and limitations are identified under the constitution as having been created, their existence cannot be disputed in a court of law. However, the extent and implications may be sought to be interpreted and explained by the court. The provisions of the constitution take precedence over any law enacted by the National Assembly even though the National Assembly has power to alter the constitution²⁹. As a result, all powers, legislative, executive and judiciary must ultimately be traced to the Constitution. The powers of the organs of government cannot be exercised inconsistently with the Constitution. Where the Constitution has exhaustively provided in respect of any situation, conduct or subject, the legislature cannot legislate on the same situation, conduct or subject. Also, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of the State House of Assembly can alter the conditions in any way directly or indirectly unless of course the constitution itself as an attribute of its supremacy expressly authorises³⁰. ‘Thus, the importance of a constitution to a nation cannot be overemphasized. It is a comprehensive document about the principles, ideals and aspirations of a nation including the division of powers between the levels of government³¹ and the aims of the state³². Indeed, the constitution is the crucible within which the right attitudes and the proper way to behave are given

²⁸ This is in line with the supremacy clause in section 1 (1) and (3) of the 1999 Constitution

²⁹ Section (1) & (3) of the 1999 Constitution. See also the cases of *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt.772) p. 222; *Attorney General of Abia State v Attorney General of the Federation* (2002) 6 NWLR (Pt. 763) p.204; *Abacha v Fawehinmi* (2000) 4 SC (Pt.II) p.1, (2002) 6 NWLR (Pt.660) p.228; *Balonwu v Governor, Anambra State* (2009) 18 NWLR (1172) P.13

³⁰ *INEC v Musa* (2003) 3NWLR (Pt.806) p. 35

³¹ The Second Schedule to the Constitution of the Federal Republic of Nigeria provides for division of legislative powers between the federation and the states in Parts I and II of the Schedule.

³² The preamble to the 1999 Constitution provides the aims of the state in the case of Nigeria

a chance to evolve³³. It contains issues fundamental to the existence of the people which on several occasions undergo review to make it reflect the political, social and economic ideals and state of development of the people³⁴. The point has been made that right from the colonial period, Nigeria has had a plethora of constitutions. Starting from the 1914 initiative of Lord Lugard to the Independence Constitution, the people of Nigeria were hardly involved in the drafting of their constitutions. The colonial state used constitution drafting to consolidate imperial strategies. The post-colonial period does not look promising. Post-colonial Nigeria until recently was dominated by the military who in a bid to earn legitimacy had drafted one form of constitution or the other. The current 1999 constitution is characterized by a number of deficiencies that have inevitably led to a clamour for its outright repeal. Constitutional developments in Nigeria date from the Amalgamation in 1914 of the Protectorates of Southern and Northern Nigeria. Chronologically, there are identifiable phases in the process with each phase accommodating a number of constitutional developments. Examples of constitutional developments from the African continent include the following:

1. Amending the constitution to provide for proportional representation This is intended to facilitate representation in proportion to political preference and to ensure small but distinct political tendencies or cultural communities are represented.
2. Requiring public officials, such as the President, to win regional diverse support not just an overall majority³⁵. This ensures breadth of support for the executive, and not merely depth of support as the significant value.

³³ Vilhena, O, Transformative Constitutionalism: Comparing the apex courts of Brazil, India and South Africa, (Pretoria University Law Press, 2013) p.71

³⁴ E Osiruemu, "The 1989 Constitution and its Constitutional Antecedents" in S G Tyoden, (ed) *Constitutionalism and National Development in Nigeria*, (The Political Science Association, 1990) p. 96

³⁵ *ibid*

3. Allowing the opposition to participate in the executive as of right. This facilitates direct participation by opposition parties-often representing a minority group-in the task of managing the country.
4. Requiring posts in the national public service or the judiciary to be evenly distributed across regional, gender, racial or tribal lines (Nigeria, South Africa). This promotes visible representation of the diversity of the nation in its public appearance and encourages a sense of stake holding by all communities.
5. Affording vulnerability or small minorities a guaranteed representation or over-representation in Parliament or government, thus pacifying their distrust in majoritarian democracy and giving an incentive to participation (Tanzania in respect of Zanzibar). The caveat to such a device is that the over-representation should never amount to granting a small minority a veto over a larger majority, and that the representational device used takes a geographical form not an ethnic one.

What these initiatives indicate is a concern to promote inclusivity even at the expense of free choice and the adversarial fundamentals of liberal democracy, and yet a reluctance to constitutionally elevate identity segmentation. In broad terms therefore, constitution making and development in Nigeria can be periodized or grouped into three phases.

The Pre-Colonial

Before the advent of the British colonial authorities, the area now known as Nigeria was never a single political unit. Modern Nigeria is a British creation which came into being by the merger in 1906, of Lagos and other Southern parts as the Protectorate of Southern Nigeria and the subsequent amalgamation of the Northern and Southern Protectorates by Lord Lugard in 1914. Prior to these dates, the area was a collection of ethnic groups, each severally pursuing its own destiny at its own

pace and direction. But for occasional contacts in commercial and social interactions, each group remained a separate and distinct political and cultural entity. The result was that by the time of the Colonial administration in these parts, each group had achieved, at varying degrees, its own peculiar characteristics and development in various spheres of human endeavour in a manner that is consistent with nation states.

The Hausa and Fulani of the North, for instance, had become well blended by the influence of Islam. The Yoruba in the West consisted of well structured and highly centralised Kingdoms while within the Eastern area and parts of Mid-West, there was a highly decentralised republican oriented group of Igbo extraction weaved together by common language, ties of kinship, cultural affinity and local contiguity³⁶. Besides these three major blocks, there were several other major tribes dotted here and there which, even though associated with the major blocks, maintained some level of distinctiveness and independence³⁷. The Edos and Ijaw of the Mid-West and Delta areas, the Ibibios, Efiks and Annangs of the East, the Kanuris of the North East; and the Jukuns, Tivs, Idomas and Beroms of the North Central are classical examples of such smaller groups. In the Northern parts, because of a strong commingling of the local cultures with Islam and Sharia law, theocracy which was a political system with strong centralised administration influenced by Sharia emerged. The units in the Western parts followed a similar pattern partly because of the spread of Islam and partly because of their own monarchical structure and system of political administration. The units in the Eastern parts were largely more liberalised as government was mostly by consensus and collective will of the people. Generally however, most of the traditional units in the whole areas had customary rules that regulated the conduct of their members towards their neighbours,

³⁶ P.C.Onumajulu, 'Human Rights Development in Nigeria' in N.O. Obiaraeri ,(ed) *Human Rights Development and Democracy in Nigeria*, (Whytem Publishers Nigeria, 1998) p.2

³⁷ Ibid

relatives, religious and political authorities and other members of society. These rules which bound every member were aimed at achieving harmonious living and peaceful co-existence in society. Although the rules varied from one community to the other, essentially, their end of orderly social cooperation and cohesion was the same. The people relied by and large on customs and constitutional conventions to provide the stability all societies need to survive.

As mentioned earlier, though there was nothing like Nigeria in pre-colonial times, there were people living in the territory. These people lived by unwritten constitutions. However, three aspects of the pre-colonial constitutionalism are worthy of mention. The first was the consensus form of democracy which existed in many parts, especially among the smaller ethnic groups and peoples with uncentralised form of government. A second aspect was the communal life. Leaders were the representatives of lineages, villages or clans and were unlikely to cut off from those who placed them in position of leadership and authority. A third related feature was that pre-colonial constitutionalism was based on a system of checks and balances which prevented authoritarianism. The fact that any misuse of authority would be known and despised by all inhabitants acted as a check on the flagrant abuse of power. All these aspects of pre-colonial constitutionalism arose out of the common element which may be called the “all-inclusive harmony” of communal life³⁸.

Colonial Constitutional Order

Historically, it is well known that European penetration of Nigeria started as a result of the desire to establish and expand trade, coupled with the curiosity to locate and trace, with the help of explorers, the sources of River Niger³⁹. According to Udoma, originally, it was the slave trade which was the most important factor that aroused and dominated foreign interest in Nigeria⁴⁰. As

³⁸ Jordan, R.S, *Government and Power in West Africa*, (Publishing Corporation, 1978) pp.46-50

³⁹ Udoma, U *The History and the Law of the Constitution of Nigeria*, (, Malthouse, Press Ltd, 1994) p. 1

⁴⁰ ibid

a result of frequent visits to the areas, trade in palm oil and palm kernels developed and replaced slave trade. The political entity known as Nigeria was a British creation which started with the annexation of Lagos as a crown colony in 1861. But before the annexation of Lagos in 1861, however, the British Government regarded the territories that were amalgamated to form the entity called Nigeria, as foreign territories over which Great Britain could not claim sovereignty except such a right was obtained by treaties. Consequently, the relationship between the British merchants and the natives was regulated by trade agreement. In a historical context, after the Berlin conference of 1884 to 1885, the territories in the coastal districts which had come under British influence became known as the Oil River Protectorate. In compliance with the agreement at the Berlin-West African Conference on the question of Notification, the declaration of a 'Protectorate' over the Oil Rivers District appeared in London Gazette of 5 June, 1885. It read as follows:

It is hereby notified for public information that under and by virtue of certain treaties concluded between the months of July last and the present date, and by other lawful means, the territories on the West Coast of Africa, herein after referred to as the Niger Districts, were placed under the Protectorate of Her Majesty the Queen, from the date of the said treaties respectively. The British Protectorate of the Niger Districts comprises the Territories on the Line of the Coast between the British Protectorate of Lagos and the right or Western Bank of the North of the Rio del Rey. It further comprises the territories on both bank of the Niger, from its confluence with the Benue at Lokoja to the sea, as well as the territories on both banks of the Benue from the confluence up to and including Ibi⁴¹.

The law that was administered in the Protectorate, was clearly and specifically stated to apply only to (i) British subjects, (ii) Persons under the British Protection, (iii) Persons whether African or not, who subjected themselves to the jurisdiction and (iv) Africans subjects of a native King Chief, who by treaty or otherwise agreed to being subject to the laws⁴².

⁴¹ London Gazette 5 June, 1885 p. 2581

⁴² The West African Order-In-Council of 10 April, 1885

As British influence was further extended into the hinterland, the Protectorate in 1893 was renamed the Niger Coast Protectorate which comprised the Oil Rivers (Niger Delta), the valley of the Niger up to Lokoja and the valley of the Benue. Even before the annexation of Lagos, the British firms that had established trading posts on the Niger had amalgamated and formed a company. In 1885, the company was granted a charter and became known as the Royal Niger Company. The company was granted permission not only to trade in the area which extended from the middle of the Niger valley into Northern Nigeria, but also to administer the territory. Meanwhile, in July 1889, the first recognition of the name Nigeria appeared in the British House of Commons Debate on the Royal Niger Company Bill. When in 1900, the Charter of the Royal Niger Company was revoked; the greater part of the territory which was under its administration was taken over by the Government and constituted it into the Protectorate of Northern Nigeria. The remaining part of the Royal Niger Company's which did not form part of the Protectorate of Northern Nigeria was added to the Niger Coast Protectorate which became the Protectorate of Southern Nigeria. Thus, in 1900, the territory now known as Nigeria was divided into three distinct entities. These were the Colony and Protectorate of Lagos, the Protectorate of northern Nigeria and the Protectorate of Southern Nigeria. Each of this was independently administered by an administrator who was directly responsible to the colonial administration in United Kingdom. However, after 1906, the administrator of Southern Protectorate became the administrator of Lagos colony. Thus, in 1906, the first step was taken towards unifying the distinct entities which constituted Nigeria. The colony of Lagos was merged with the Protectorate of Southern Nigeria⁴³. Consequently, the administration of the Country was reduced to two Group of Provinces⁴⁴. These

⁴³ T A Aguda, (n.)

⁴⁴ J N Aduba and S Oguiche, *Key Issues in Nigerian Constitutional Law*, (Nigerian Institute of Advanced Legal Studies, 2014) p.71

were the Northern Group of Provinces and the Southern Group of Provinces⁴⁵ and placed under the leadership of Frederick Lugard with the aim of uniting them⁴⁶. For the Protectorate of Northern Nigeria, the system of administration adopted by the colonial administration was under a nomenclature known as ‘Indirect Rule’, which was a system of administration through native chiefs. Dame Margery Perham defined ‘indirect rule’ as a system by which the tutelary power recognizes existing African societies and assist them to adapt themselves to the functions of local government⁴⁷. In other words, it is a system of government by which the controlling authority encourages among its dependent peoples the fullest possible use of their own dynamic institutions as instrument of local governance on lines consistent with modern requirements. Indirect rule can best be described as the colonial authority’s attempt to rule through the traditional political structures by which the traditional authorities in the colonies were recognized wherever possible and that whenever possible, the metropolitan power should seek to rule through them in accordance with their own social and political institutions and values. The cornerstone of indirect rule as envisioned by Lugard centred on two concepts: Integration and Dualism. Lugard in his own very words said that ‘British sovereignty, first uncompromisingly declared, then fitted gradually and selectively over the native institutions, here weakening and destroying, there retaining and reforming⁴⁸’. The duality excluded the sharing of power but included the sharing of administrative functions between the traditional rulers and the colonial authorities.

The imposition of colonial rule and the introduction of indirect rule destroyed a cardinal principle of pre-colonial constitutionalism. The traditional rulers for instance, were no longer accountable

⁴⁵ T A Aguda, (n.)

⁴⁶ There were several reasons advanced for uniting the two Group of Provinces, among which were (a) that the two Group of Provinces formed a continuous stretch of British territory without any intervening foreign possession between them and therefore, it was unnecessary to keep incurring; (b) the practical impossibility of maintaining artificial barriers between the South and the North; and (c) the clamour for unification from educated Nigerians.

⁴⁷ U Udoma, ()33

⁴⁸ Lord Frederick Lugard, Political Memoranda, 1906 No. 18 p. 2641

to their subjects. Those in centralized Kingdoms or Chiefdoms were responsible to the British administration. They could no longer be deposed, in case of misrule, by traditional methods. Traditional Councils which in the pre-colonial period could appeal against the Chief's misrule were not recognized as part of the indirect rule system. The consequence was the power of the Chiefs under the colonial authorities increased and they became increasingly autocratic. Though it is not intended to deal in detail with the policy of indirect rule and its application in Nigeria, it has become imperative to continue in the examination of the processes of evolution whereby Nigeria attained independence and thereby adopted several constitutions which is the crux of the subject matter. The brief overview of the indirect rule system is necessary to illustrate the complex manner through which Nigerian partnership was formed and administered by the colonial authorities. Thus, on 1 January, 1914 the Southern Protectorate and the Northern Protectorate were merged. With this development, Nigeria came into existence as a nation⁴⁹. On the whole, the genesis of Nigeria was summarily described by Afigbo as:

The first to emerge was the colony of Lagos (1861), which within twenty years or so grew into the Lagos Colony and Protectorate incorporating also most of Yoruba land. Then came the Oil Rivers Protectorate (1885), which by 1900 which grew into the Southern Protectorate. Finally, there was the territory of the Royal Niger Company (1886), which again in 1900 became the Protectorate of Northern Nigeria⁵⁰.

The Order-in-Council 1914

⁴⁹ Sir Frederick Lugard was appointed the Governor-General following this development

⁵⁰ Yakubu, J.A Constitutional Law in Nigeria, (, Demyaxs Law Books, 2003) p. 16

The starting point for any discussion on constitution making and development in Nigeria during the colonial era is the Legislative Council started by Frederick Lugard. Between 1914 and 1950, the British Colonial Office was responsible for constitution making in Nigeria⁵¹. The amalgamation of the Northern Protectorate and Southern Protectorate was executed in three Constitutional instruments. These were the Nigerian Protectorate Order-in-Council, 1913, The (Nigeria Council) Order-in-Council, 1912 and the Letter Patent, 1913⁵². These instruments constituted what can be called Nigeria's first constitution by reason of the fact that under the instruments, there was an Executive Council for the whole country and a 30-member Advisory Deliberative Council constituted by the Governor for the whole country⁵³. These constitutional instruments vested executive powers in the Governor who acted in his own discretion. Secondly, though there was one Governor for the whole country, the North and the South maintained different policies and concepts of colonial administration. The executive and legislative councils were dominated by British officials who were appointed by the Governor and whom they owed allegiance. Nigerians were not involved in the governance beyond seeking for their advice and opinion.

The Clifford Constitution, 1922

In 1921, Sir Hume Clifford became the Governor and Commander-in-Chief of the Armed Forces of Nigeria⁵⁴. He found the Nigerian Council most distasteful and ineffective. In 1922, Sir Hume Clifford, set up a new Legislative Council which reflected his own conception of the appropriate machinery for the governance of Nigeria. In the new arrangement introduced by Sir Hume Clifford, the Legislative Council was extended to include the whole of Southern Nigeria as had been the

⁵¹ Report of the Constitutional Conference Containing the Resolutions and Recommendations, Vol. II 1995, p.43

⁵² These instruments constituted what can be called

⁵³ Seventeen of this Advisory Deliberative Council members were official and thirteen were unofficial members, seven of whom represented commercial, mining, shipping and banking interests while six members represented the indigenous population

⁵⁴ U Udoma, *History and Law of the Constitution of Nigeria*, (n.)49

position before the amalgamation of 1914⁵⁵. The constitution of the new Legislative Council provided for a total membership of forty-five; comprising 26 official members, four elected members and fifteen nominated members. Among the elected members, three represented Lagos as a capital and a big commercial nerve centre, while one represented Calabar as a big commercial centre in the coastal region of South Eastern Nigeria. This marked the first time in the history of Nigeria, when Lagos and Calabar were granted franchise in election to the Legislative Council. One significant achievement in the area of constitutional development was the introduction of elective principles to the Nigerian Legislature⁵⁶.

Thus, under the Clifford Constitution of 1922, an Executive Council was created, which composed of British Officials and a Legislative Council whose function was limited to the colony and Southern Protectorate, while in respect of the Northern Protectorate, the legislative function was vested in the Governor. The limited elective system into the legislature gave rise to political action among educated Nigerians. Herbert Macaulay formed the National Democratic Party while in 1938, the Nigerian Youth Movement was also formed and when it collapsed, it was succeeded by the National Council of Nigeria and the Cameroons. The West African Students' Union in London in 1941 submitted a memorandum to the Governor of Nigeria, the Sultan of Sokoto, the Oni of Ife, the Oba of Benin and the Alake of Egba land demanding for a Federal Constitution for Nigeria. The pressure for reform succeeded to the extent that Sir Richards, as Governor of Nigeria made proposals for a new constitution aimed at promoting the unity of Nigeria, providing adequately for its diverse elements and securing greater participation by Nigerians in their own affairs.

The Richard's Constitution, 1946

⁵⁵ Ibid

⁵⁶ Oyewo, A.T & Yakubu, J.A *Constitutional Law in Nigeria*, (Demyaxs Law Books, 1998) p.11

Sir Arthur Richards assumed power in Nigeria in December, 1946. He ushered in a new Constitution that was named after him: *The Richard's Constitution*. The major provisions in the Constitution included the creation of a Legislative Council of 44 members out of which only four were elected; the creation of three regions in Nigeria with a legislative assembly. The regional assemblies of course had only advisory powers. The process leading to the enactment of Richard's Constitution started on the 22 March 1945, when a proposal for a new Constitution for Nigeria was presented before the Legislative Council in a motion⁵⁷. The principal features of the proposal were:

- 1) A Legislative Council which would legislate for the whole of Nigeria as a single united country;
- 2) Regional Councils for Northern, Western and Eastern provinces comprising Houses of Assembly with the addition that in the Northern province, there would be a House of Chiefs;
- 3) The introduction of direct representation of the people through the Native Authorities and the Houses of Assembly of the Regions and in the Legislative Council; and
- 4) African majority both in the Houses of Assembly in the Regions and in the Legislative Council⁵⁸.

The aims and objectives of the proposals as set out in the Sessional Paper No. 4 of 1945 were as follows:

- I. To promote the unity of Nigeria and secure the participation of Africans in the management of their own affairs;

⁵⁷ Sessional Paper No. 4 of 1945

⁵⁸ Udoma, (n.53)89 -90

- II. To evolve a constitutional framework embracing the whole of Nigeria and establishing a Legislative Council in which all sections of Nigeria would be represented. For that purpose, Regional Councils or Houses of Assembly were created in the three main sections into which politically, administratively and constitutionally Nigeria had naturally been divided, namely the Northern, Western and Eastern Regions, each of which was to be directly and administratively under the political control and supervision of a Senior Administrative Officer designated *Chief Commissioner*.
- III. To forge political links between the various semi-autonomous Native Authorities in each region with the Regional Council or House of Assembly for the respective region concerned in the former Western, Northern and Eastern provinces and therefore created direct links with the Legislative Council for Nigeria at the centre. Consequently, the legislative powers of the Legislative Council covered the entire country; and
- IV. There would be African unofficial majority both in the Houses of Assembly and in the Legislative Council.

In line with the above proposals, the Constitution Order-in-Council of 1946 was issued, thereby bringing into force the Richards' Constitution of 1946. Thus, the Richards' Constitution of 1946 incorporated these proposals. Sir Arthur Richards made the mistake of not consulting the opinion of Nigerians over his constitutional proposals and found himself faced with a spate of criticisms from the nationalists⁵⁹. The NCNC referred to the Constitution as a document prepared by one

⁵⁹ National Conference 2014 Final Draft Report p.7

man without the knowledge and consent of the millions of Nigerians who were directly concerned⁶⁰. The Constitution was also criticised for laying the foundation for regional politics.

The Macpherson's Constitution 1951

The making of the Macpherson's Constitution of 1951 began with the setting up of a Select Committee of the Legislative Council to review the Richards' Constitution of 1945. Between 1949 and 1950, Nigerians were consulted through questionnaires at Village and District Meetings, Provisional and Divisional Conferences, Regional Conferences and at Conference in the colony of Lagos. Thus, the opinion collected at the village and district meetings and the divisional and provisional conferences were submitted to the respective regional conferences, each of which also submitted its recommendations to the Legislative Council. In the year 1950, a General Conference was held in Ibadan to determine the future system of Government for Nigeria. The General Conference recommended that a new constitution be drafted for Nigeria based on the following issues:

- I. Increased regional autonomy within a united Nigeria;
- II. Larger and more Representative Legislatures with wider powers to be created both in the Regions and at the centre, that is to say, wider political, administrative and legislative powers to be devolved to the Regions from the Central Government; and
- III. Nigerians, who were to form the majority in each Legislative House to be given full share in the responsibility of shaping government policies and in the direction of executive action.

The General Conference also recommended that there should be two-tier systems of government for Nigeria which should comprise:

⁶⁰ J Ojiako, Nigeria: *Yesterday, Today, and.....*(Onitsha, Africana Pub. 1981) p.10

- 1) The Central Legislature known as the House of Representatives with a Central Executive Council, known as the Council of Ministers;
- 2) The Regional Legislature to be known as the Regional House of Assembly and the Regional Executive Council for each of the Region; and
- 3) The House of Chiefs for the Northern and Western Regions

At the General Conference, a draft constitution was adopted which formed the basis of the Nigeria (Constitution) Order in Council of 1951 or the Macpherson's Constitution of 1951. Under the Macpherson's Constitution an Executive Council was established and a Lieutenant-Governor appointed in each region. The Legislative Council was replaced by an enlarged central legislature known as the House of Representatives which had power to legislate for peace, order and good government of the whole country subject, however, to the veto of the Secretary of State for the Colonies. Members of the House of Representatives were elected by the Regional Houses of Assembly from among their own members, having themselves been elected partly by persons entitled to be registered as voters and partly by electoral colleges. For the first time, both the Central and Regional Legislative Houses were composed of elected Nigerians who were in the majority. Both the Regional and Central Executive Councils became the principal instrument of policy - making thus giving way to rule by elected representatives of the people. By far the most appreciable advance was the quick evolution of political party in the Regions⁶¹.

However, the 1951 Constitution reflected the increasing trend towards regionalism as the Regions ceased to be mere administrative units and became political entities vested with both executive and legislative powers. Moreover the 1951 Constitution could not endure the Eastern Region crisis of 1951, the 1953 crisis in tile centre between the Northern and Southern representatives, and

⁶¹ The NCNC in the East, the Action Group in the west and the NPC in the North

ethnic rivalry. As a result of these crises two Constitutional Conferences were held in London in 1953 and Lagos in 1954 to review the Constitution. At these Conferences it was agreed between the representatives of the three major political parties in powers in each of the Regions on the one hand and the Secretary of State for the Colonies on the other, to create the fullest possible authority for the Regions under a truly Federal Constitution⁶². The most important consequences of the breakdown of Macpherson's Constitution were:

- 1) The complete crystallization of the Regionalization of Nigeria into three separate, distinct and quasi-autonomous, but unequal political and administrative units;
- 2) The permanent excision of British Southern Cameroon from Nigeria;
- 3) The excision of Lagos from the Western Region of Nigeria and been constituted as the Federal Territory and Capital of a Federal Nigeria
- 4) The reversion of the system whereby power powers or functions were devolved from the Central Government on specified subject matters to the Regional Governments, the former thereby retaining the residue of powers or functions;
- 5) The sustained agitations by the minorities in the country for the creation of regions or states, whereby the three regions were to be split into smaller units; and
- 6) Direct elections from the federal constituencies to the House of Representatives.

⁶² This gave birth to the Littleton Constitution of 1954

The Littleton Constitution, 1954

The Littleton Constitution of 1954 was a product of a Constitutional Conference which started on the 30 July 1953. Sir Udo Udoma succinctly summarised the resolutions at the conference as follows⁶³:

- 1 The establishment of a Federal Supreme Court for the Federation of Nigeria with exclusive jurisdiction to hear appeals from the Regional High Courts⁶⁴;
- 2 The establishment of a High Court for each of the three Regions. Also, a Regional Judiciary and a Chief Judge as well as a Judicial Service Commission were established for each Region;
- 3 Magistrate and Customary Courts were established for each of the Regions;
- 4 Public Service Commissions were set up for the Federation and for each of the Region to recruit personnel for the services in the Federation and in the Regions;
- 5 The Regional Houses of Assembly ceased to be electoral colleges for election to the House of Representatives. As a result, all elections had to be contested directly from delimited single member constituencies;
- 6 The principle of separation of powers was introduced under which there was a separation of power between the legislatures and the Judiciary;
- 7 Federalism was introduced and each Region was treated as a separate, independent and autonomous entity which had willingly surrendered part of its sovereignty to the Federal Government;

⁶³ U Udoma, Op. Cit. 152-153

⁶⁴ It replaced the old West African Court of Appeal, the former Court of Appeal for all British West African Colonies of Gambia, Sierra Leone, Ghana and Nigeria

- 8 The Nigeria Police was allowed to remain a Federal Police while Local Native Administrative Police were abolished and the personnel absorbed in the Nigeria Police Force;
- 9 The title of the Governor at the centre was changed and designated the Governor-General of the Federation of Nigeria and Commander-in-Chief of the Armed Forces of Nigeria; and
- 10 The establishment of a single central legislative house designated as the House of Representatives of the Federation of Nigeria⁶⁵.

Under the 1954 Constitution, Nigeria was divided into five parts⁶⁶. All legislative and executive powers were transferred to the Regions with some reserved exclusively and others in part for the centre. The Eastern and Western Regions were to achieve internal self-government in 1957 and the Northern Region in 1959. Most importantly, Nigerians virtually took over the Legislative Houses. Though the system of franchise varied from Region to Region, generally the direct system of election replaced the indirect system. Both the Governor-General and the Regional Governors ceased to be members of the Legislative Houses. A Federal Supreme Court was established as were a High Court of Lagos, and the High Court of the Regions as well as of the Southern Cameroons. The 1954 Constitution worked smoothly until 1957-1958 when there were further Constitutional Conferences in London at which the Independence Constitution was proposed. Two important political developments followed the 1957 Conference: first, the Eastern and Western

⁶⁵ The House of Representatives consisted of: 1. A Speaker. 2. 3 Ex-Officio Members, namely the Chief Secretary to the Government of the Federation; the Attorney General of the Federation and Financial Secretary of the Federation. 3. 184 Representative Members made up of 92 Representative Members to be elected from the Northern Region, 42 Representative Members to be elected from each of the Western and Eastern Regions, 6 Representative Members to be elected from British Southern Cameroon and 2 Representative Members to be elected from Lagos. 4. 6 Special Representative Members to be appointed by the Governor-General in his discretion to represent interest not adequately represented.

⁶⁶ These five parts were Northern, Western and Eastern Regions, the Southern Cameroons and the Federal Capital Territory of Lagos.

Regions achieved self-government on August 8, 1957; and secondly, Alhaji Abubakar Tafawa Balewa became Nigeria's first Prime Minister on September 2, 1957.

The Constitutional Conference of 1958

The concern for Independence necessitated the 1958 Constitutional Conference which discussed the Independence Constitution and agreed to write in the Constitution a list of Fundamental Rights to protect Nigerians against arbitrary use of power by government or its agents or organs. It was also agreed that the Northern Region should attain self-government on March 15, 1959 while Independence for Nigeria should be attained on 1 October 1960. There was an agreement on revenue allocation, creation of new regions, boundary adjustments, and amendment to the Constitution.

It can be seen that Nigeria had during the colonial period experienced many constitutional changes. The least that can be said of the colonial constitution is that they were not democratic as they did not satisfy the minimum requirements of a democratic constitution. For a constitution to be democratic, the state, the form of government, the choice of rulers as well as the process by which the constitution is adopted must conform to democratic principles. That is, it must rest on the approval or consent of the people; be an original act of the people directly and a democratic politics is constitutionally guaranteed in which freedom of political discussions, communication, meetings and other activities; free press, an informed public opinion, freedom of popular protest by means of public processions and assemblies and freedom form and belong to political parties, in particular to organize in opposition to the government in power. Against the foregoing, it can be said that Nigerians were not given the opportunity to exercise the constituent power inherent in them as the sovereign. The colonial constitutions denied Nigerians the right to vote and be voted for by enacting spurious qualifying conditions. For instance, until 1946, there was not in existence

universal adult suffrage. In addition, there were different and lopsided electoral systems in the Northern, Eastern and Western Regions. Thus, for the same election into the Federal House of Representatives, the Northern Region had the indirect electoral college system, the Western Region had a suffrage in which only adult males who paid tax were eligible to vote by secret ballot while the Eastern Region had universal adult suffrage as citizens of both sexes of 21 years upwards were entitled to vote by secret ballot. Under these electoral systems, elections to the Federal House of Representatives were held in 1954.

However, under the 1958 Electoral Regulations, a uniform electoral law was enacted for the whole country but without prejudice to the power of the Regions to fashion out their Electoral Regulations for their Regional elections. It must be pointed out that universal adult suffrage was introduced for the first time under the 1958 Electoral Regulations. For example, Regulation 4 of the Electoral Regulations, 1958 provided that every person shall be entitled to register to vote in an election provided he was ordinarily resident in Nigeria and a British subject or a British protected person of the age of 21 or above, and if resident in Northern Nigeria was a male. Clearly, women in Northern Nigeria were denied the right to vote on grounds of religion. This was a sharp contrast to the situation under the 1922 Constitution where no provision was made for the franchise of women in Nigeria. Thus, throughout the colonial period, constituent power was the exclusive preserve of the imperial power, jealously guarded to emphasise the force of its authority.

Post Colonial Constitutional Order

The Independence Constitution, 1960

Preceding the enactment of the Independence Constitution, a Constitutional Conference was convened in 1960. At the conference, a draft constitution was presented to delegates which after extensive debate became the Independence Constitution. The Conference ratified the decision of

the House of Assembly of the Southern-Cameroon to cease to be part of Nigeria at Independence and approved the Independence of Nigeria with full responsible status within the Commonwealth⁶⁷. Both the Federal and Regional Governments operated the bicameral Westminster model of parliamentary government. The Regions and their boundaries were safeguarded by an elaboration of boundaries. Provisions were entrenched to safeguard important constitutional provisions such as those relating to the Federal framework, fundamental rights, citizenship, legislative powers, executive powers, the courts and revenue allocation. The independence Constitution of 1960 did not bring about a radical and complete severance from Britain. This is because the Queen of England was still the Queen of Nigeria. Internally, the government was still her majesty's government. She was represented in Nigeria by a Governor-General at the centre and by Governors in the Regions. The Queen was responsible for law making in Nigeria in conjunction with the various Legislative Houses. Her role in the legislative process was to assent to bills passed by the Legislative Houses. Her assent had the effect of transforming a bill into binding law. The executive government was vested in the Queen alone as the Head of State. Within Nigeria, the government together with its institutions belonged to her and was carried out in her name. Another fundamental feature of the 1960 Constitution was that it provided for a strongly federal system, with the powers and functions of the State divided among the Central and the Regional Governments. In order to remove colonial vestiges in the Independence Constitution, proposals were made for a change to a Republican status. In July 1963, a Constitutional Review Conference was held in Lagos. The decisions of the conference led to the making of the Republican Constitution of 1963.

The Republican Constitution, 1963

⁶⁷ This was to become effective from October 1, 1960.

The 1963 Constitution provided for a President as the Head of State and the repository of the Federal executive authority while in the Regions executive power was vested in the Governors. The President was elected by a secret ballot of the National Parliament which comprised the House of Representatives consisting of elected members and the Senate consisting of nominated members. At the Regions were elected members of the Houses of Assembly and nominated members of House of Chiefs. The National Parliament made laws for the Federation and controlled public funds through placement of restrictions on withdrawals, debate and enactment of appropriation bill and monitoring of audit reports on the Accounts of the Federation. Two Legislative Lists were entrenched, namely the Exclusive Legislative List for the Centre and the Concurrent Legislative List for both the Centre and the Regions. The Supreme Court became the highest appellate court instead of the Privy Council London. A National Police Force was established in addition to Native Authority Police. The 1963 Constitution did not operate for more than two and a half years. Thus, preceding its enactment, there were signs of discord, tension and disagreements which later led the nation into a series of crises⁶⁸. The crises eventually led to the fall of the First Republic and the military takeover of government in January, 1966.

The Military and the Constitution making: 1966-1979

The military in most African, Latin American and Asian countries had played crucial role in the constitutional development of those countries. In Nigeria, the military took over power through coup d'état in January 1966 which subsequently led to profound constitutional changes. To begin with, immediately on taking over the government, the military government promulgated a decree⁶⁹

⁶⁸ The crises included the Action Group crisis of 1962, the revenue allocation disputes, the treasonable felony trial of Chief Awolowo and 20 other members of his party, the census controversy, the alignment and realignment of political parties before and after the 1964 federal elections, the dispute between the President and the Prime Minister over the 1964 elections, the crisis in the Western Region elections of 1965 and the civil violence that followed.

⁶⁹ The Constitution (Suspension and Modification) Decree No. 1 of 1966.

which suspended the democratic institutions in the country. The two principal organs of government at the federal level were the Supreme Military Council and the Federal Executive Council. The decree provided that:

The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof.⁷⁰

In February, 1966, three Study Groups were set up on Constitutional, Administrative and Institutional problems in the Federation. The Study Group on Constitutional Review was to review all aspects of the 1963 Constitution including the structure, division of powers, the electoral and party political system, the factors militating against national unity, the emergence of strong central government and to recommend possible safeguards. The work of the Study Group was terminated by the promulgation of the Constitution (Suspension and Modification) (No. 5) Decree⁷¹ under which Nigeria ceased to be a federation and instead became known as “Republic of Nigeria”. The Regions were abolished and each became known as “Group of Provinces” under a Military Governor appointed by the Head of the National Military Government. A national public service was set up with the unification of all the existing public services of the Regions.

However, Decree 34 of 1966 was abrogated following another the coup that brought Lt. Colonel Yakubu Gowon to power. Lt. Colonel Yakubu Gowon set up an advisory group of civilians to advise the government on constitutional changes. The Constitution (Suspension and Modification) (No. 9) Decree 1966 returned the country to the position prior to Decree 5. An Ad-Hoc Conference of the advisory group of civilians was convened but before deliberations were finalized attempts to solve the constitutional impasse shifted to Aburi, Ghana. Following the disagreements over the implementation of the Aburi accord, the Federal Military Government promulgated Decrees which

⁷⁰ S. 3 of the Decree

⁷¹ No.34 of 1966

first vested the Legislative and Executive powers of the Federation on the Supreme Military Council and restored fully the executive and legislative powers of the Regions and then further subdivided the Regions into 12 States. It was in reaction to these constitutional developments that the then Military Governor of the Eastern Region, Lt. Colonel Odumegwu Ojukwu declared the Region independent. A civil war ensued which lasted for 30 months. After the war, General Yakubu Gowon set a nine-point programme for return to civil rule. The programme included reorganization of the armed forces, national reconstruction, implementation of the National Development Plan, elimination of corruption, creation of more states, revision of the revenue allocation system, a new constitution, national census, reorganization of party political system and popular elections at both Federal and State levels⁷².

In September 1975, a Constitutional Drafting Committee was inaugurated by Gen. Murtala Mohammed, then Head of State⁷³. Inaugurating the Committee, Gen. Murtala Mohammed told the Committee that the Supreme Military Council had agreed on the following principles which should guide the Committee in its deliberations:

- (A) The Government was committed to a federal system of government;
- (B) A free democratic and lawful system of Government which guarantees fundamental human rights;
- (C) A stable system of Government through the creation of viable political institutions that would ensure maximum participation, consensus and orderly succession to political power;
- (D) Considering past political experience constitution should seek to:-

⁷² Increased disenchantment with his regime and the indefinite postponement of the return to civilian rule culminated in another coup d'état on July 29, 1975.

⁷³ The Committee was headed by Chief Rotimi Williams.

- I. eliminate cut throat political competition based on a system of winners take all,
 - II. discourage institutionalized opposition to the government in power but instead develop a system of consensus politics devoid of ethnic or sectional hegemony,
 - III. firmly establish the principle of public accountability for all holders of public office,
 - IV. eliminate over-centralization of political power in a few hands, decentralize power wherever possible as a means of reducing the intensity of competition for public offices, and
 - V. evolve mechanisms for free and fair electoral processes that will ensure adequate representation of the people at the centre.
- (E) A free and fair electoral system which would ensure adequate representation
- (F) Devise measures that would have the effect of depoliticizing population census in Nigeria.⁷⁴

It was believed that the above principles could be achieved through: genuine and truly national political parties, the number of which should be marginally limited; an executive presidential system of government in which the President and the Vice President would be directly elected in a manner that reflects the federal character of the country; an independent judiciary; corrective institutions, and constitutional restrictions on the number of states to be created. The military regime anchored its hopes on ‘a good Constitution’ with emphasis on a transformation of

behaviour through wise Constitutional provision.⁷⁵ Thus, addressing the inaugural meeting of the Constitution Drafting Committee⁷⁶, General Murtala Mohammed further stated:

While it is evident that some of our difficulties may have been created by political leaders who operated the Constitution, it is clear also that some of the provisions of the Constitution facilitated the periodic political crises this country went through⁷⁷.

He charged the Committee to draw up a Constitution that would reflect past experience and capable of influencing the nature of the orderly development of the politics of people adding that his administration believed strongly that the provisions of the Constitution could be used for minimizing some basic problems. However, the military amended certain sections of the draft Constitution submitted by the Constituent Assembly under the Chairmanship of Justice Udo Udoma. In addition, some Decrees passed by the military were incorporated into the Constitution⁷⁸. The military conferred upon the Decrees the status of a Constitutional Enactment which could not be altered except by the process of a formal constitutional amendment⁷⁹.

The Presidential Constitution, 1979

The process leading to the enactment of the Constitution of the Federal Republic of Nigeria, 1979, commenced with the announcement⁸⁰ of a programme of transition to civil rule including the setting-up of a Constitution Drafting Committee⁸¹ to produce and submit to the Supreme Military Council a Draft Constitution. Members of the Committee were selected on the basis of two per

⁷⁵ Keith Planter-Brick, *"The Constitution Drafting Committee" in Idem (ed.) Soldiers and Oil: The Political Transformation of Nigeria*, (Frank Cass, 1978, pp. 291-350, esp. p. 293.

⁷⁶ This was on the 18th of October, 1975.

⁷⁷ See the speech of the Head of State to the Constitution Drafting Committee on the 18th of October, 1975.

⁷⁸ The Decrees were the National Youth Corps Decree No. 24 of 1973, Public Complaints Commission Decree No. 31 of 1975, the Nigerian Security Organization Decree No. 16 of 1978, and the Land Use Decree No.6 of 1978. See also section 315 (5) of the 1999 Constitution which still preserves the Decrees existing laws.

⁷⁹ See sections 274 (5) and 315 (5) of the 1979 and 1999 Constitutions of the Federal Republic of Nigeria which provides in identical terms that nothing in the Constitution shall invalidate the enactments and shall not be altered or repealed except in accordance with sections 9 (2) of the said Constitutions.

⁸⁰ On October 1 1975

⁸¹ The Committee comprised 50 men of diverse experience-political, social, economic, military, civil service, academic, e.t.c, drawn from all states of the federation with Chief Rotimi Williams as the Chairman.

State. At the inaugural meeting of the Committee, the Head of State gave an insight into what the Supreme Military Council expected in the draft constitution. These were:

- (a) A federal system of government based on democracy and rule of law guaranteeing fundamental human rights,
- (b) Establishment of genuine and truly national political parties,
- (c) An Executive presidential system of government,
- (d) An independent judiciary,
- (e) Establishment of Corrupt Practices Tribunal and Public Complaints Bureau, and
- (f) Constitutional restriction on the number of states to be created.

A Constituent Assembly was then established⁸² in August 1977 to deliberate on the Draft Constitution drawn up by the Constitution Drafting Committee. During the debates, the most controversial issues were those on creation of new states, establishment of Federal Sharia Court of Appeal, the ban on corrupt public officers from contesting for or holding public offices for sometime under the new constitution and the scope of the powers of the Constituent Assembly i.e. whether it was to deliberate on the Draft Constitution or to proceed to enact the Constitution after deliberation. Despite the argument that a Representative Assembly possesses a legitimacy superior to that to be derived from the stamp of any other authority, the Military Government made 22 amendments to the constitution which the Head of State said were meant to strengthen it and ensure stability, progress and continuity. The Military then handed power to the elected public officers on October 1, 1979 from which date the Constitution of the Federal Republic of Nigeria, 1979 took effect. The 1979 Constitution provided, in the main, for an Executive President who was also the Head of Government and Commander-in-Chief of the Armed Forces. His office, powers and

⁸² By the Constituent Assembly Decree No. 50 of 1977

functions were clearly spelt out⁸³. A National Assembly⁸⁴ was established comprising the Senate whose members were elected on the basis of equality of States and the House of Representatives whose members were elected on the basis of population. Both Houses were vested with legislative powers.

The Executive and Legislative arms at the federal Level were similarly reflected at the state level except for unicameral legislature in the States. The 1979 Constitution also provided for Fundamental Objectives and Directive Principles of State Policy⁸⁵ spelling the philosophical or ideological justification of the state of Nigeria and the principles, ideals, goals and objectives of the social and economic order. The 1979 Constitution provided for a popularly elected President invested with executive powers. The National Assembly consisted of two chambers. These were the House of Representatives and the Senate. The states had State Houses of Assembly and an elected State Governor. The tenure of all offices was four years. To guide against past experience section 1(2) of the constitution stated that:

- a. 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 provision of the Constitution;
- b. Section 2 (1) further provided that Nigeria is one indivisible and indissoluble sovereign state.

The 1989 Constitution

⁸³ Section 5 of the 1979 Constitution

⁸⁴ Section 43 *ibid*

⁸⁵ Chapter II *ibid*. See also sections 13-22 of the 1979 Constitution

The problems of the 1979 Constitution related more to the implementation of the content of the Constitution than the shortcomings of the provisions of the Constitution. Thus, political and financial recklessness of political office holders ruined the economy and created a dangerous schism among the political parties and the Federal Government and some State Governments. Not many were surprised, therefore, when the military took over power from the civilians after four years of its coming into force. Under General Muhammadu Buhari, the military introduced austere measures aimed at ridding the country of corruption and restoring sanity in the conduct of government affairs⁸⁶. The austere economic policies of the military regime caused severe hardship and a faction of the military took advantage of it to stage a counter-coup⁸⁷ which brought General Ibrahim Badamasi Babangida to power. In September 1987, Gen. Ibrahim B. Babangida, as President, inaugurated a 45 member Constitution Review Committee under the Chairmanship of Justice Buba Ado to review the 1979 Constitution but not to contrive a new legal framework. The Constitution Review Committee submitted its Report and a Constituent Assembly was inaugurated to fashion out a constitution for the country⁸⁸. The Armed Forces Ruling Council reviewed the Report by inserting its views on some aspects of the Constitution apart from the imposed Terms of Reference. The Constitution was promulgated in May, 1989 but to come into effect in October 1993. The differences between the 1979 and the 1989 Constitutions were:

- 1) The number of states were increased from 19 to 21 and Local Government Councils also rose to 449,

⁸⁶ Mass arrests and trials of political office holders by tribunal were instituted, as a result of which several political office holders were given long prison terms for alleged offences of embezzlement and corruption.

⁸⁷ This was in 1985.

⁸⁸ The Constituent Assembly submitted its Report in April, 1989.

- 2) Membership of the National Assembly changed as the number of Senators were reduced per state from five to three and one for the Federal Capital Territory while the number of members of the House of Representatives increased to 453 members,
- 3) The Constitution also provided for part time legislators,
- 4) Establishment of more Federal Executive Agencies like the Code of Conduct Bureau, National Boundaries Commission, National Primary Education Commission, National Defence Council, Revenue Mobilization Allocation and Fiscal Commission, Public Complaints Commission etc,
- 5) Introduction of the Duties of the Citizens,
- 6) Entrenchment of a two party system, and
- 7) Commitment to follow a capitalist path to development through privatization of the economy.

The 1989 Constitution despite the Constitution (Promulgation) Decree No. 12 of 1992, did not wholly come into operation. Portions of it were promulgated in piecemeal beginning with Local Government (Basic Constitutional and Transitional Provisions) Decree No. 15 of 1989 under which Local Government Councils were constituted; the States Government (Basic Constitutional Transitional Provisions) Decree, No. 50 of 1991 under which civilian Governors and members of the Houses of Assembly were elected; and the Federal Government (Basic Constitutional and Transitional Provisions) Decree under which the National Assembly was constituted and the Presidential Election of June 12, 1993 was held⁸⁹.

The Constitutional Conference 1994

⁸⁹ However the government of General Babangida annulled the election of June 12, setting the stage for the latest phase of Constitution making in Nigeria.

Repeated interference by the military in governance and the democratic process, disillusionment with the performance and conduct of people in government and deep dissatisfaction with perceived injustice in power sharing, revenue allocation, State and Local Government creation as well as all aspects of national life built up but became unprecedented with the uncertainty of the transition programme of the Babangida regime, especially with the annulment of the Presidential elections of June 12, 1993. The annulment of the election and the crisis that ensued thereafter forced Gen. Ibrahim B. Babangida to step aside as Head of State and the administration was replaced with an Interim National Government under Chief Ernest Shonekan. The military again seized power from the Interim National Government. Shortly after the military took over power from the Interim National Government in 1993, the Head of State, General Sani Abacha, stressed the determination of the Government to restore power to civilians based on a genuine process of democracy and hinted that Government would convene a National Constitutional Conference at which the nation's problems would be discussed. Amidst calls from several quarters for a Sovereign National Conference, Government finally set in motion the machinery for the take-off of a National Constitutional Conference. The Constitutional Conference Commission was established⁹⁰ and was charged with the responsibility to:

- 1 Organise a Constitutional Conference;
- 2 Serve as the Secretariat of the Constitutional Conference;
- 3 Invite memoranda from all parts of the Federation and from interest groups on the agenda of the Conference; and
- 4 Collate documents and sample memoranda for submission to the Conference.

⁹⁰ By Decree No. 1 of 1994

Nation-wide non-partisan elections were held⁹¹ at which 273 delegates, each representing a Conference District were elected. The election at the District level was preceded by elections at ward level in which voters elected delegates to the District level to elect Districts' delegates to the Conference. In addition to the elected Conference delegates, the Provisional Ruling Council nominated 96 persons, three from each State of the Federation and three other persons representing the Nigerian Labour Congress, the Nigerian Union of Teachers and the National Union of Nigerian Students. The Chairman and Deputy Chairman of the Conference were appointed by the Head of State. Decree No.3 of 1994 spelt out the objectives of the Constitutional Conference in the following terms:

- 1 To pass resolutions and conclusions to form the framework for the good government;
- 2 Guarantee freedom and equality, equity and justice and even-handed opportunities for social, political, educational and economic participation and enjoyment;
- 3 Establish a system of Government reflecting the general consensus of Nigerians with due regard for our national expectations and aspiration as a united and indivisible Federal entity;
- 4 Preserve the unity and territorial integrity of the Nigerian State within an equitable framework;
- 5 Guarantee the promotion of social, economic and political cohesion of Nigeria;
- 6 Promote good governance, accountability and probity in public affairs;
- 7 Identify areas and proffer solution to public mal-administration at any tier of government;
- 8 Promote love, understanding and mutual respect among the citizenry;

⁹¹ On May 28, 1994

- 9 Acknowledge and encourage the harnessing of individual and collective initiatives aimed at the overall growth and development of the country;
- 10 To propose a new Constitution to be promulgated into law by the Provisional Ruling Council.

The Conference passed through three stages in the course of its deliberations.⁹² The delegates debated issues raised in the speech of the Head of State and the Conference Agenda as prepared by the National Constitutional Conference Commission from the memoranda submitted to it. The speech of the Head of State covered issues which were identical to those on the Conference Agenda and this informed the decision of the Conference to address them together. The Head of State stressed the independence of the Conference and underlined its broad mandate. Referring to the respective attractions of the Presidential and Parliamentary systems of government, the Head of State urged the Conference to fashion out a system which would accommodate divergent political interests, ensure full participation of all and incorporate such restraints on government and the elected representatives of the people to prevent the oppression, domination or marginalisation of any group.

The Head of State noted that while there was a general agreement that the cycle of military interventions be terminated, that could only be achieved through what he called an irrevocable and binding agreement that “rectifies the systematic fault lines”. Drawing attention to the thorny issues of revenue allocation, the Head of State further noted that the nation needed a useful and long-lasting formula that takes due cognisance of its political structure, accords each tier of government

⁹² A Plenary stage, lasting from July 11 to August 3, 1994 at which there was general debate on issues on the agenda and the Inaugural address of the Head of State; a Committee stage, lasting from August 4 to September 27, 1994, during which the 18 of the 19 Committees set up by the Conference conducted debate on their respective Terms of Reference, receiving contributions and memoranda from interested or relevant persons and institutions and conducting visits as appropriate; and, lastly, a Committee of the whole Conference, lasting from September 28, to December 8, 1994, when the reports of 18 of the 19 Committees were received and debated by the whole Conference, which then took final decisions on all items presented by the Committees or raised in the course of debate. The Conference then adjourned till January 9, 1995, to allow the Constitution Drafting Committee to produce a draft of the Constitution as well as the Conference Report for its consideration.

the resources to discharge its responsibilities and giving due weight to the respective contributions of different sections to the creation of national wealth⁹³. While the speech of the Head of State and the Conference Agenda defined the broad framework of discussion at the plenary, delegates approached the issues from their personal convictions.

The Constitution of the Federal Republic of Nigeria 1999

In 1998, the Federal Military Government in its determination to hand over to a democratically civilian administration on the 29th May 1999, inaugurated the Constitutional Debate Coordinating Committee, charged with the responsibility to pilot the debate on the new constitution for Nigeria, coordinate and collate views and recommendations canvassed by individuals and groups for a new constitution for Nigeria⁹⁴. After collating memoranda from Nigerians at home and abroad and oral presentations at the public hearings at the debate centres throughout the country and the conclusions arrived thereat as well as the various seminars, workshops and conferences, the Committee submitted its report to the Provisional Ruling Council. The Provisional Ruling Council approved the report subject to some amendments which according to the opinion of the Provisional Ruling Council, were necessary in the public interest and for the purpose of promoting the security, welfare and good governance as well as fostering the unity and progress of the people of Nigeria with a view to achieving its objectives of handing over an enduring Constitution to the people of Nigeria. The Committee was convinced that the 1979 Constitution should be retained with some amendments as the 1999 Constitution of the Federal Republic of Nigeria⁹⁵. As a result, section 1

⁹³ Other issues raised by the Head of State included demands for more States, education, health and shelter, traditional rulers, religion and public life, indiscipline and corruption, human rights and the freedom of the press, leadership and the exit date of the military regime. He stressed the need to balance the demands for the creation of more states against their economic and wider implications; the inalienable right of the people to education, health and shelter without discrimination but with special recognition and protection of women's rights, the need to accord traditional rulers a clear role and functions in national life; the need to maintain secularity of the state; the need to provide firm legislation against corruption; the need to enact Constitutional provisions that balance the freedom of the press against the right to privacy and the protection of national unity and the preservation of peace and stability.

⁹⁴ Preamble to Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999

⁹⁵ Ibid

(1) of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree⁹⁶ No. 24 of 1999 provides that *there shall be for*

⁹⁶ Now to be known as the Constitution of the Federal Republic of Nigeria (Promulgation) Act No. 24 of 1999

Nigeria a Constitution which shall be set out in the Schedule to this Decree.

However, since the restoration of democratic rule on the 29 May, 1999, there has been agitations by diverse sections and Segments of the country to amend the Constitution relative to some sections of the Constitution that are seen not to be in harmony with the aspirations of the people in order to accelerate the country's social, political and economic development. Preceding the alteration of the Constitution, series of conferences were held in an attempt to amend the Constitution. The first of the series of the conferences commenced with the setting up of the Presidential Committee on the Review of the Constitution in 2001. The former President, Olusegun Obasanjo while inaugurating the Committee gave the terms of reference of the Committee to include collation of views and memoranda on the specific areas of the 1999 Constitution that required amendment. The presidential initiative was preceded by the National Assembly. The National Assembly set up a panel led by Senator Ibrahim Nasiru Mantu, the then Deputy Senate President to review the Constitution with a view to expunging the sections that were considered contradictory to the tenets of democracy but the panel could not complete its assignment before the end of the Legislative Session. After the National Assembly initiative, another programme aimed at amending the Constitution was the setting up of the National Political Reform Conference by the then President Olusegun Obasanjo in 2005. Its term of reference was to conduct a holistic reform of the Constitution. At the same time, the National Assembly set a Joint Committee on the Constitution Review under the Chairmanship of the then Deputy Senate President. These efforts failed to amend the Constitution because of the acrimony and rumpus engendered principally by the proposal for tenure elongation, otherwise popularly known as "***Third Term.***"

The Jonathan Administration in response to continued agitation for a national dialogue constituted a Committee on the Review of Outstanding Issues from past Constitutional Conference under the

Chairmanship of Justice S.M. Belgore. The Committee was charged with the responsibility of examining the relevance and currency of the recommendations of the past conferences, draft a bill where possible as well as propose policy guidelines for the implementation of those recommendations. Determined to strengthen the democratic process as well as resolve the intractable security and political crises confronting the nation, the Jonathan Administration decided to organize a National Dialogue by setting up a 13-member Presidential Advisory Committee. The Committee was charged with the responsibility of designing framework for the National Dialogue. The Committee submitted its report to the President in December 2013. Government accepted the recommendations for the convening of a National Conference. Accordingly, the Conference was inaugurated on the 17 March 2014 under the Chairmanship of Hon. Justice Idris Legbo Kutigi. The Conference was charged with the responsibility of laying a stronger foundation for faster development by building a more inclusive national consensus on the structure and guiding principles of that will guarantee the emergence of a more united, progressive, just, peaceful and prosperous Nigeria⁹⁷.

At the moment, the National Assembly had altered the Constitution times⁹⁸. The major highlights of the areas amended in the 1999 Constitution under the First, Second and Third Alterations were the financial autonomy granted to the National Assembly and the Independent National Electoral Commission; presidential and governorship elections to hold 120-150 days to the expiration of the tenure of the incumbents but the Constitution was later amended in the Second Alteration to

⁹⁷ Final Draft of the Conference Report, August 2014, p.23

⁹⁸ See the Report of the National Assembly Joint Committee on the Review of the 1999 Constitution; 23rd March, 2006-Pp. 22-23. See also the Report of the National Assembly Joint Committee on the Review of the 1999 Constitution (Amendment) Bill, 2002, Pp.2-6. The highlights of the issues include: State and Local Government creation and their autonomy; Roles of Traditional Rulers and the establishment of National Advisory Council of Chiefs; Immunity of certain Public officers; Tenure of some elected Public Officers; Electoral law; Revenue Sharing Formula and Derivation Formula; Rotation of Presidency; Office of Accountant General of the Federation; Devolution of power; Residency Rights of Nigerians; True Federalism; Levies and Port Collection/Charges; Establishment of National Industrial Court as a Court of Record; Equal number of States in the Geo-Political zones; Independent Candidates; Establishment of certain Executives Bodies; Review of the Exclusive Legislative List; Fundamental Rights; Federal Character; Independence of the Judiciary; Investments and Security Tribunal; and Fiscal Independence of the Legislature.

provide for conduct of elections not earlier than 150 days and not later than 30 days to the expiration of the tenure of the incumbents; no tenure extension for sitting president or governor who wins in a rerun election; panel indictment can no longer be used to disqualify candidates from running for elections; if the president does not transmit a vacation letter within days, the National Assembly shall pass a resolution making the vice president the Acting President. In the same vein, if the governor does not transmit a vacation letter within days, the State House of Assembly shall pass a resolution making the deputy governor the Acting Governor and the Court of Appeal to have original jurisdiction on the question of interpretation of the tenure, validity of election and determining if vacancy exists in the position of president, vice president, governor and deputy governor⁹⁹.

Conclusion

One of the fundamental objectives of the Nigerian Constitution is to foster national unity to facilitate the process of national development and to guarantee popular participation in the political process. From the review of the constitutional changes above, one can say that substantively, there are two contentious issues in the constitution and politics of Nigeria. These are the issues of sovereignty which questions the desire and practicability of Nigeria continuing as a unified legal and political entity consistent with section 2 (1) of the constitution which provides that Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria¹⁰⁰; and governance issues such as revenue allocation, State and Local Government creation, corruption, election and electoral system, devolution of power, access to national institutions, Fundamental rights, Fundamental Objectives and the Directive Principles of State

⁹⁹ The sections of the Constitution amended by the National Assembly were:66,69,75,76,81,84,107,110,116,132,136,137,145,156,160,178,180,182,190,200,228,229,223,239,246,251,272,285

¹⁰⁰ See also the preamble to the 1999 constitution which provides that we the people of Nigeria firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble sovereign nation under God dedicated to the promotion of inter-African solidarity, world peace, international cooperation and understanding...do hereby make and give to ourselves the following constitution.

Policy, the Economy, Population, Revenue generation, the Judiciary, Law and Order, National Security and Defence and Press freedom. Even though, commendable efforts are being made by the three arms of government to address the shortcomings in the constitution, Nwabueze, in his book *The Story of Africa's Chequered Journey to Constitutional Democracy*¹⁰¹ identified some of the challenges confronting effective constitution making and development in Africa as follows; (1) the tragic consequences of colonial heritage- the illegitimacy of the state created by colonialism, the lack of legitimacy of the constitution, the character of the state, its powers and institutions, the state as instrument of arbitrary, dictatorial power and of organized violence, the absence of the spirit of the laws and institutions of state, (2) non-existence or weakness of civil society (3) mass illiteracy and ignorance and a press largely controlled by ethnic or sectional interest, (4) the absence of a libertarian and democratic ethic. However, using an effective and accountable leadership within the context of a constitutional governance system which respects the rule of law and support a general desire by citizens to cooperatively work together will resolve these contentious issues

¹⁰¹ Ben Nwabueze, *The Story of Africa's Chequered Journey to Constitutional Democracy*, (Safari Books Ltd, 2018) p. 621