Constitution-making, legitimacy and rule of law: a comparative analysis

FT Abioye[*]

Abstract

The African continent has been besieged a by vast range of problems in modern times. These include abnormally high levels of poverty; incessant outbreaks of war; ineptitude of its leaders and their reluctance to relinquish power; corruption; and persistent under-development. These problems stem principally from the failure of good governance on the continent. It is further exacerbated by the inability of the law to rule, and to provide a conducive environment for growth and nation building. This article traces one of the reasons for the continued failure of the rule of law in Africa to the foundational law in most African countries, the constitution, and in particular, the way in which the constitution is made.

INTRODUCTION

The fact that Africa is often ranked as the world's least developed continent is no longer news. International development lists, world economic development indices, and a host of other rankings constantly feature countries within Africa at the bottom of their lists. Ironically, the lists in which African countries have a high ranking are usually those measuring levels of corruption, poverty, high mortality rates, and the like. Without a doubt, all is not going well for the continent, and has not gone well for a larger part of its post-colonial African history.

Many valid reasons that have been offered explaining the dire state of affairs on the continent, in particular the failure of good governance which epitomises the plight of the continent. This failure has been brought about by many factors including the imposition of foreign systems through colonisation; poor governance capacity; lack of democracy in the real sense of the word; cross cutting divisions across the continent, including ethnic and religious divisions; and inequitable wealth distribution, to name few. It is, however, suggested that a more foundational reason is the disjuncture

[*] LLB (Unilag); LLM (Pretoria); Senior Lecturer: Department of Jurisprudence, University of South Africa.

between the people and the law; the inability of the law to establish rule, to inspire compliance, to address the different challenges, and to provide a conducive environment for growth and nation building. This failure of the rule of law in Africa is germane to the various challenges enumerated above.

This article traces part of the continued failure of the rule of law in Africa to the foundation of the law that is in force in most African countries, the constitution. The constitution is viewed as the most basic law, the *Grundnorm* (from which all other laws derive their validity) of any society, and thus serves as the foundation of the law within a society.[1] In particular, this article explores the processes of constitution making. When examined, it would be observed that the constitution-making process in many African countries is devoid of popular input; devoid of consent of the society, and does not reflect the values of the people. In other words, it is undemocratic. In a situation in which such law fails to reflect popular values and aspirations, but nevertheless seeks to guide, bind and compel people to obey its provisions, tension, which may escalate into forms of civil unrest and rebellion of the people, is inevitable. This creates a disjuncture between the people and the law, as such fundamental law which is devoid of legitimacy, would be unable 'to penetrate its society, to effectively regulate social relationships within its territory, to extract needed resources from its citizens and to manage those resources in rational ways'.[2]

Thus, in essence, this article seeks to explore how participation of the people (society) in the process of constitution-making impacts on the way in which the final results of such processes are perceived and / or received by the people, that is, on the way in which the Constitution is received and obeyed by the people. It is necessary to note here that public participation in constitution-making does not guarantee the legitimacy of a constitution, but is contributory to it.

---

1 A term which Kelsen has described as the most basic law of any society from which all other laws within the society derive their validity (its own validity being presupposed or assumed). See H Kelsen *Introduction to the problems of legal theory* (1992) at 29 (a translation of *Reine Rechtslehre*, 1ed Pure theory of law). Also H Kelsen *General theory of law and state* (1961); Finch *Introduction to legal theory* (2ed 1974) at 121; TC Hopton 'Grundnorm and Constitution: the legitimacy of politics' (1978) 24 *McGill L J* 72 at 76. For a more comprehensive explanation of *Grundnorm*, see generally, A Aguda *The judicial process and the Third Republic* chapter 5; A Ojo 'The search for a Grundnorm in Nigeria: the Lakanmi Case' (1971) 20(1) *ICLQ* at 117.

2 P Ocheje 'Exploring the legal dimensions of political legitimacy: a rights' approach to governance in Africa'' in EK Quashigah & OC Okafor *Legitimate governance in Africa: international and domestic legal perspectives* (1999) 165 at 168.

Constitutions have evolved from merely establishing the structure of a political regime or setting limitations on government power, to documents which reflect the character of the nation and delineate the principles and ultimate values shared by the citizens of a country.[3] The failure of the constitution-making process to reflect the participation of the people poses and translates into a fundamental problem which affects the state of the rule of law in Africa. This has led to the tenuous position in which the rule of law finds itself in Africa today.

As case in point, the participation of the people in the constitution-making processes in Nigeria and South Africa will be examined here, together with the effect this has on the way the people relate to such constitutions, and inadvertently, the impact on the legitimacy of such constitutions. This is done in an attempt to explain the disjuncture that currently exists between Africans and the laws that are in force and which bind them as indicated by the constitution.

HISTORICAL PERSPECTIVE OF LAW WITHIN TRADITIONAL AFRICAN SOCIETIES[4]

For any law to be binding on a group of people, for it to be obeyed and respected by the people, without the threat of sanctions, it must reflect the norms and values of the people which it seeks to bind. There must be something that gives such law an inherent value that makes it binding on the people; there must be some evidence that the people have given their consent to be bound by such laws and rules. In this light, governance in the traditional (pre-colonial) African society will be examined briefly in order to provide an understanding of how things were prior to colonialism, and where the African is coming from in relation to governance. Another issue that may be relevant in examining governance issues in Africa, is whether the received notions of governance in Africa tally with the philosophy of governance that is in the consciousness and world outlook of Africans. However, this issue, in itself, is broad enough to form the subject of a separate article, and will not be dealt with here in detail.

---

3 H Lerner *The people of the Constitution: Constitution-making, legitimacy, identity* (2004) 6 available at: http://www.columbia.edu/cu/polisci/pdf-files/apsa_lerner.pdf (accessed on 7 February 2011).

4 Traditional African societies refer to the pre-colonial African society: to those societies which existed in Africa prior to the colonising missions of the Europeans. These are those societies which embody the ways and values of the indigenous African people.

In traditional African societies, law and governance reflected the wishes of the people. Pre-colonial African societies followed a form of governance which operated in accordance with their values, traditions, way of life and religious belief systems.[5] In this way, the ruler was seen as appointed by the 'gods' and thus had to rule in accordance with the principles that were fair and just. Any failure on the part of the ruler to do so was taken to signify the fact the 'gods' had departed from such a ruler, and the people were free to deal with him or her her as they deemed fit. Societal norms, with their inherent values regulated the systems of succession to office, and legitimacy was conferred through the respect accorded to the lines of authority.[6]

Another fact of pre-colonial African society was that 'the King [or Queen] ruled but at the pleasure of the people, for a King [or Queen] without subjects is no King [or Queen]'.[7] The leader or chief in these societies led at the pleasure and behest of the people, and the chief was required by tradition and customs to rule according to the dictates of the tradition of the land and of the people.[8] In these cases, the economic life of the people dictated what developed as traditions and customs as well as the type of governance models that were practised. Quashigah states that the nature of subsistence in pre-colonial Africa necessitated reciprocity between the people and the rulers, as honour and respect for the people by the rulers and *vice versa* were the basis of political authority within these societies.[9]

Support for the ruler in these societies was not based on force or intimidation (as we have it today), but on the respect that the ruler earned from the

---

5 See generally, TO Elias *Africa and development of international law* (1988) at 36; EK Quashigah 'Legitimate Governance: The pre-colonial African perspective' in EK Quashigah & OC Okafor *Legitimate governance in Africa: international and domestic legal perspectives* (1999) 1–66 at 47; CR Ezetah 'Legitimate governance and statehood in Africa: beyond the failed state and colonial self-determination' in EK Quashigah & OC Okafor *Legitimate governance in Africa: international and domestic legal perspectives* (1999) 419–459 at 422–425.

6 FT Abioye (2011) *Rule of law in English speaking African countries: the case of Nigeria and South Africa*, unpublished LLD thesis, University of Pretoria, Chapter 2.

7 Quashigah n 5 above at 44. This assertion is true for both the acephalous societies and the non-acephalous societies. It is also worthy to note that some pre-colonial African societies recognised women as rulers and leaders, such as the 16 th century Queen Amina of Zaria who is remembered for her fierce military exploits; Rain Queen Mujaji, the regent of the Lovedu, as explained by G van Niekerk 'Stereotyping women in ancient Roman and African societies: a dissimilarity in culture' 365 at 374–377, available at: http://www2.ulg.ac.be/vinitor/rida/2000/vanniekerk.pdf (accessed on 16 February 2011). See also N Sudarkasa 'The status of women in Indigenous African Societies' (1986) 12/1 *Feminist Studies* 91.

8 Abioye n 6 above.

9 Quashigah n 5 above at 46.

people.[10] Political power, in itself, was said to incur cultural and mystical responsibilities which acted as checks on authoritarianism.[11] Ezetah views such power as possessing '"an aura of mystical majesty" and was defined as a composite of ritual functions and political leadership …'.[12] It was all of these attributes of traditional societies that evoked acceptance and compliance with the social and legal order, and not the use of or threat of sanctions. It has been said that there was 'an ontological connection' between the state and the African being.[13]

Decisions by the leadership were made through popular consultation within the framework of a bottom-up approach as opposed to the top-down authoritarian model.[14] Due to the oral nature of these societies, and the evolution of laws through practice within pre-colonial African societies, decisions through usage and time became laws that governed the society. These laws were acknowledged as being inherent to the people as a whole and they were obeyed and adhered to by the whole society. Thus governance within these societies was collective, democratic and based on the allegiance of the people. The people participated in the formation of the rules that governed, and thus such rules reflected their values, norms and way of life. This meant, as earlier indicated, that they identified with the rules that governed them, and governance was not coerced or forced; obedience and compliance came from within and was effective.

Governance within traditional African societies was based on practices, hearsay, and a host of verbal communication, as was the nature of the societies. Thus they did not have written constitutions which sought to encapsulate their laws. These societies rather had their own internal checks and balances to guide the exercise of authority by the rulers (or the council of rulers as the case may be). Part of this was the ease with which the allegiance of the people could be transferred from one ruler to the other if the people felt that their initial ruler had become despotic or tyrannical.[15] The advent of European powers on the continent brought about a change in the

---

10 *Ibid*. The author gives examples of the rules in pre-colonial societies for the consequences of a ruler or king being despotic or cruel. The members of such society could legitimately impose sanctions on such ruler (either via isolating or deserting such ruler).

11 Ezetah n 5 above at 423. These were said to be manifest in the intangible such as myths, symbols, dogmas, ritual beliefs, mystical values and the like.

12 *Ibid*.

13 *Id* at 424.

14 TN Fonchingong 'The state and development in Africa' (2005) 8(1&2) *African Journal of International Affairs* 1 at 4.

15 Quashigah n 5 above at 46.

relationship that Africans had with the rules and regulations that guided them. Foreign control in Africa lasted for decades and introduced rules and regulations which imposed changes to the way of life of the people; changes in their belief systems; and changes to their traditions.[16] These changes are said to have created systems that were alien to the indigenous societies, both in nature and in structure.[17]

THE ROLE OF THE RULE OF LAW AND LEGITIMACY

The phrase 'rule of law' is one that has often been used as a general term, referring to everything to do with law within a society. It has been interpreted to mean and to encompass a range of ideas and notions, from robust to limited, broad to narrow, value-free to value-laden.[18] This is explained in what Craig has referred to as the 'formal' and 'substantive' conceptions of the rule of law.[19] The formal conception of the rule of law is used to refer to the law seen in its formal terms, that is the law as it exists, the way in which the law was promulgated (by properly authorised persons in a properly authorised manner), clarity of the ensuing norm, and its ability to order the conduct of individuals in order to create certainty.[20] The substantive conception of the rule of law, on the other hand, takes the above definition further, applying it to notions of justice, democracy, equality (before the law and otherwise), human rights, or respect for persons and their dignity.[21]

Taking the formal conception of law as a point of departure, the rule of law in this article refers to the process through which law is made, and specifically, the manner in which African constitutions are made. An important fact to note is that for a group of people to be bound by a law or

---

16 See articles of Ocheje n 1 above at 170; and CR Ezetah n 5 above at 424. He mentions the ways in which cultural checks on royal prerogative were destroyed in centralised traditional states, and in decentralised societies, the reversal of the dispersion of power along cultural formations, with the appointment of warrant chiefs by the colonial government.

17 R Jackson & C Rosberg 'Sovereignty and underdevelopment: juridical statehood in the African crisis' (1986) *Journal of Modern African Studies* 1–31.

18 JA Goldstone 'The rule of law at home and abroad' (2009) 1 *Hague Journal on the Rule of Law* at 38. See also D Kairys 'Searching for the rule of law' (2003) 36(2) *Suffolk UL Rev* at 307, where the author refers to a huge range of formulations and meanings for the rule of law in legal, historical, academic and popular usages; F Fukuyama 'Transitions to the rule of law' (2010) 21(1) *Journal of Democracy* at 33–44; A Bedner 'An elementary approach to the rule of law (2010) 2 *Hague Journal on the Rule of Law* at 48–74.

19 P Craig 'Formal and substantive conceptions of the rule of law' (1997) *Public Law* at 467.

20 *Ibid*.

21 *Ibid*.

set of laws (without the threat of sanctions), such law(s) must be legitimate, and be perceived as legitimate by the people. This means that the people must have agreed to, or consented to be bound by such law(s), either directly or indirectly.[22] Such consent or agreement will be implicit where the law reflects the fundamental societal values and norms of such people. It is only in this that such law(s) can be said to be legitimate. To this end, Rosenfeld notes that '[t]here is a long-standing tradition that conceives institutional legitimacy and political justice in terms of consent'.[23] It can thus be deduced from this that implicit in the concept of legitimacy of laws, is democratic governance. When there is participation and/or consent by the people in the law-making process, it means that the people have been given an opportunity to exercise their will, and to decide as to the nature and substance of the laws that will bind them. This brings about a democratic government, as democracy simply put, means governance of the people, for the people, by the people.

In most post-colonial African countries, the governance system of constitutional-democracy has been adopted. For a government to be legitimate, it must have been created in a democratic manner, with the mandate and participation of the people it seeks to govern.[24] This means that the people must have agreed, consented to, and given their mandate to be governed. The medium through which they 'agree', 'consent to' and 'give their mandate' to be governed is captured in their participation in the constitution-making process.[25] Participation of the governed in the law-making process is thus a very important element of legitimacy. This participation must be real and not just perfunctory. The views and submissions of the people must have been considered and incorporated by the drafters of the constitution. The act of participation is one of the factors

---

22 The importance of consent of the people, the governed as the basis for legitimacy in any society, has been established by the social contract theory, as postulated in the philosophies of Thomas Hobbes *The Leviathan* (1651), John Locke *Two treatises of government* in P Laslett (ed) John Locke (ed) *Two treatises of government* (1967), Jean-Jacques Rousseau *On the social contract* (1972), and John Rawls in *A theory of justice* (1971). See also P Riley *Will and political legitimacy: a critical exposition of social contract theory in Hobbes, Locke, Rousseau, Kant and Hege l* (1982); D Boucher & P Kelly (eds) *The social contract: from Hobbes to Rawls* (1994).

23 M Rosenfeld 'The rule of law and the legitimacy of constitutional democracy' (2000–2001) 74 *Southern California Law Review* 1307 at 1311.

24 Ocheje n 1 above at 166; see also Lerner n 2 above at 11–12, where the author observes that a constitution derives its legitimacy from the procedural or formal aspects of popular sovereignty and representation.

25 *Ibid* .

that provide legitimacy to the final document.[26] This was recently reiterated in the 2010 Ibrahim 'Index of African Governance Summary', to the effect that 'the ability of citizens to participate in the political process is a vital gauge of the legitimacy of government …'.[27] Ihonvbere has also explained that the making of constitutions must be popular, inclusive, participatory and democratic, and that the constitution itself must be such a document that the people can understand, claim ownership to, and use in defence of the democratic state.[28] This does not mean that every single member of a society would have the same values or consent to the same rules, but at least an opportunity would have been given to the people to participate in the process.[29]

In the sections below, I shall explore how these elements of participation, consent, and agreement have or have not been included in the constitution-making processes in Nigeria and South Africa; and to what extent these elements have affected the legitimacy of the two constitutions and consequently the state of the rule of law in the countries.

CONSTITUTION MAKING IN NIGERIA AND SOUTH AFRICA

Nigeria

Nigeria, a former British colony, achieved independence in 1960. Before this, the country had been under formal British colonial rule for some one hundred years (from 1861 to 1960).[30] Nigeria has had five constitutions made by the colonial government, and a further four made by and imposed on the people by either the military or the elite in the country.[31] The constitutions

---

26 F Biggs 'Participation in constitution-making' in G Hyden and D Venter *Constitution-making and democratisation in Africa* (ed, 2001) 177 at 179.

27 Available at: http://www moibrahimfoundation.org/en/media/get/20101108_eng-summary-iiag2010-rev-web-2.pdf (accessed on 6 February 2011).

28 JO Ihonvbere 'How to make an undemocratic Constitution: the Nigerian example' (2000) 21/3 *Third World Quarterly* 343–366 at 344.

29 See Biggs n 26 above at 179, where he contends that the important issue is not whether the final document reflects the views of the majority or not, but that the opportunity given to all to participate is the important issue, against which the legitimacy of the constitution would be measured.

30 For a brief historical background of the country, see Abioye n 6 above. See also BO Nwabueze *A constitutional history of Nigeria* (1982) at 5–23 which details how the British came to acquire territorial jurisdiction over the territories now constituting Nigeria through treaties of cession. See also Udo Udoma *History and the law of the constitution of Nigeria* (1994) at 1–20.

31 Nwabueze n 30 above at 89. It could be argued that the country has had five post-colonial constitutions. However, the 1989 Constitution of the Federal Republic of Nigeria, though drafted and concluded, was never promulgated into law, thus it never became effective as binding law.

made during the colonial rule are: the 1914 Constitution of the Colony and Protectorate of Nigeria; the 1922 Clifford Constitution; the 1946 Richards Constitution; the 1951 MacPherson Constitution; and the 1954 Lyttleton Constitution.[32] These constitutions were colonial impositions, designed to enhance the effectiveness of the colonial government over the indigenous people of the country. They were made without, or at best with minimum consultation with or input from the people, and generally without any participation by the people. They imposed a foreign system of governance, and foreign laws on the indigenous people of the territory. No effort was made to accommodate the foundational values of constitutionalism, namely to embody the hopes and aspirations of the people, and to reflect their societal values and traditions.[33]

The first two constitutions, the 1914 and 1922 Clifford Constitutions, were direct impositions of the colonial government, which gave the governor (usually a British appointee of the Queen) imperial powers to run the colony, with the aid of a legislative council which comprised predominantly Europeans living and holding office within the territory, and a few nominal Africans.[34] The composition of this council did not materialise into any form of input by the Africans, as the officials of the council were appointed by the governor and bound to vote under his direction.[35]

From the 1946 Richards Constitution, there was a gradual relaxation in imperial control, with more and more powers granted to Nigerians to govern. The 1946 Constitution purported to strengthen the elective principle by which a new Nigerian legislative council was created to establish governance for the whole nation. Under this constitution, the governor needed the consent of the legislative council to make laws for the whole country.[36]

---

32 As will be noted, all these constitutions are named after the governor and commander-in-chief at the time of their enactment. The governor was the highest British officer appointed by Her Majesty, the Queen of England, to govern the colony. Such person held office at Her Majesty's pleasure and was seen as the representative of Her Majesty in the colony. See article 4 of the Northern Nigeria Protectorate Order in Council 1899; also art 4 of the Southern Nigeria Protectorate Order in Council 1899.

33 Ihonvbere n 28 above at 343. See also Ocheje n 1 above at 166; Lerner n 2 above at 11–12;

34 Udoma n 30 above at 49.

35 Nwabueze n 30 above at 40–42, where the author gives an explanation as to how the councils functioned and the fact that everything that was deliberated on by the council was still subject to the veto power of the governor. He concludes that the establishment of the legislative councils as the legislatures of the areas under their jurisdiction did not in any way diminish the subordination of the government of Nigeria to the colonial government.

36 Section 4 of the Nigeria (Legislative Council) Order in Council 1946.

Though the council was composed of an unofficial majority of Africans (most of whom were nominated by the governor), the governor still exercised a veto power over any legislation that did not meet with his approval.[37] Importantly, this constitution introduced regionalism, and effectively divided the country into three regions without any reference to, or consultation with the people.[38]

The 1951 MacPherson Constitution was the product of a more consultative process, in which the people of Nigeria had an opportunity to voice their ideas and wishes for the first time. It was drafted after consultation with people at different levels in the country, from villages to settlements and regions.[39] Its contents, however, established a structure in which, even though the regions enjoyed greater autonomy and power, the imperial government continued to exercise control through its reserved power to disallow laws enacted by these indigenous participants.[40]

The 1954 Lyttleton Constitution was the result of a constitutional conference organised by the then British Secretary of State for the Colonies, Rt Honourable Mr Oliver Lyttleton.[41] Interestingly, this constitutional conference for the drafting of the constitution of Nigeria was held in London from the 30 July 1953, with delegates from the different political parties then existing in Nigeria, in attendance. At the constitutional conference, proposals for the 1954 constitution based on recommendations of the British colonial administration in Nigeria, were put forward and accepted, and the 1954 constitution became law.[42] It established the Federation of Nigeria and also imposed a federal structure of governance by which the regions were strengthened and given greater autonomy, at the expense of the central government, and by which institutions were established to suit the nature of a federation.[43] Despite these changes which came about as a result of

37 Nwabueze n 30 above at 43–44.

38 It is noted by Udoma n 30 above at 91, that regionalisation, amongst other things, crystallised the tendency to re-emphasise ethnicity and separate nationalities amongst Nigerians.

39 See Udoma n 30 above at 100–110 for a thorough analysis of how the 1951 MacPherson Constitution was made. See also Alan Burns *History of Nigeria* (1978) at 251.

40 Nwabueze n 30 above at 52.

41 Udoma n 30 above at 144.

42 Udoma n 30 above at 145.

43 Udoma n 30 above at 150. These institutions included a Federal Supreme Court (which took over the hearing of appeals in constitutional matters from the West African Court of Appeal); high courts, magistrate courts and customary courts in the regions; a federal police force known as the Nigeria Police Force; Public Service Commissions for both the federation and the regions; legislative houses at both the federal and regional levels, amongst others.

agitation by nationalists and the people of Nigeria for greater autonomy and self governance, the British government retained powers to make laws generally and directly for the territory, and still controlled the foreign relations of the territory.[44]

Nigerian independence

By July 1960, the agitation of the people of Nigeria for independence yielded fruit with the passing of the Nigerian Independence Act by the United Kingdom parliament.[45] In September of the same year, the Queen approved the Nigerian (Constitution) Order in Council, which set up the 1960 Independence Constitution.[46] Unfortunately, independence did not bring its promised gains. The Independence Constitution did not mark a departure from the colonial past but rather, as has been observed, remained 'fundamentally colonial'.[47]

As noted above, independence did not automatically alter or fully terminate the relationship between the country and the Queen of England. Under the 1960 Constitution, the Queen remained Nigeria's constitutional monarch by virtue of section 78(1) of the 1960 Constitution which provided that, 'the executive authority of the Federation shall be vested in Her Majesty'. Subsection (2) further provided that 'subject to the provisions of this Constitution, the executive authority of the Federation may be exercised on behalf of Her Majesty by the Governor-General, either directly or through officers subordinate to him'.[48] Also, the final Court of Appeal for Nigeria remained the Judicial Committee of the British Privy Council.[49]

A new constitution in 1963 introduced a radical change to the status and levels of authority within the country. This constitution was drafted by a constitutional conference held in Lagos in July 1963 at which Nigerian

---

44 Nwabueze n 30 above at 54–59. The author points out that the regions and institutions were still subordinated to the British government by virtue of various veto powers, powers to legislate, and the overall control by Her Majesty's government.

45 Sections 1(1) and (2) of the act had the effect of changing the legal status and name of 'the Colony and Protectorate of Nigeria' to 'Nigeria'; and formally terminated the dependence of Nigeria upon Britain as follows: 'Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Nigeria or any part thereof.'

46 Burns n 39 above at 257.

47 E Okpanachi & A Garba 'Federalism and Constitutional Change in Nigeria' (2010) 7(1) *Federal Governance* 1 at 5.

48 Nwabueze n 30 above at 72–76 for an in depth explanation of how the Queen retained constitutional monarchy even after the granting of independence.

49 Section 114 of the 1960 Constitution. See also Okpanachi n 47 above at 5.

political leaders decided that the country should become a Federal Republic. The 1963 Republican Constitution of Nigeria, which was introduced by the federal parliament of the nation, declared Nigeria a republic and abolished the monarchy.[50] By this the Queen ceased to be the head of state of Nigeria, and all powers held in this capacity, devolved to the president and regional governors.[51] The Supreme Court of Nigeria also became the final court of appeal in respect of all matters.[52] However, apart from these changes, the 1963 Constitution was very similar to the independence constitution, incorporating basically the same provisions. Unfortunately the 1963 Constitution was also unable to bridge the ethnic divides that the colonial policy of regionalism had solidified. Power tussles and inept leadership led to the collapse of democracy.

Military Constitutions

On 15 January 1966, there was a *coup d'état* in Nigeria, whereby military leaders took power by force, killing many of the political leaders in the process. This was the first of many *coup d'états* in the country.[53] It signalled the emergence of the military in governance in Nigeria, and continued under successive military regimes till 1979.[54] It is important to note that military governments were, by their very nature, an imposition on the country, and thus every purported action of the military in legislating by use of decrees lacked legitimacy. This was especially so as such laws and decrees were made by the government in authority, and backed by the threat and use of force. Thus, there was no participation by and engagement of the people of Nigeria in the law making processes under the military regimes.

---

50 Sections 1, 2 and 3 of the Constitution of the Federal Republic of Nigeria 1963.

51 Section 34 of the Constitution of the Federal Republic of Nigeria 1963.

52 Section 130 of the Constitution of the Federal Republic of Nigeria 1963. See ss 75, 84, 158, 165 for the changes effected by the 1963 Constitution.

53 JA Yakubu 'Trends in Constitution making in Nigeria' (2000) 10 *Transnational Law and Contemporary Problems* 423 at 441.

54 See T Falola *et al History of Nigeria 3: Nigeria in the twentieth century* (1991) 102; C Jarmon *Nigeria: reorganisation and Development since the mid-twentieth century* (1988) 57; Yakubu n 53 above at 441–448 for the impact of military rule in Nigeria and Africa, see S Decalo *Coups and army rule in Africa* (1976); S Decalo *The stable minority: civilian rule in Africa* (1998); WF Gutteridge *Military regimes in Africa* (1975). The military regimes that have ruled Nigeria are as follows; the regime of Major-General Aguyi-Ironsi from January 1966 to July 1966; the regime of General Gowon from July 1966 to July 1975; the regime of Brigadier Muritala Mohammed from July 1975 to February 1976; the regime of General Obasanjo from February 1976 to October 1979; Major General Muhammadu Buhari's regime from December 1983 to August 1985; General Babangida's regime from August 1985 to August 1993; and General Abacha's regime from November 1993 to June 1998.

As seen in the case of the military regimes generally, and particularly those that have ruled Nigeria; they came to power by *coup d'état*, suspended the operation of the constitution and the pre-existing legal order, and issued decrees to oust the jurisdiction of the courts from deciding on the validity of their actions. Such regimes set themselves up as the all-encompassing and absolute authority in the country.[55]

The first constitution passed by the military was the 1979 Constitution of the Federal Republic of Nigeria, under the regime of General Obasanjo. This was passed after thirteen years of military rule and a civil war. General Obasanjo's regime was the forth consecutive military regime the country had experienced since 1966. The process of constitution-drafting had commenced during the preceding military regime of General Muritala Mohammed, who had appointed a Constitution Drafting Committee (CDC) to coordinate the exercise. The committee produced a draft, which was debated at an elected Constituent Assembly, and then submitted it to the new Head of State, General Obasanjo.[56] By the Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978, the 1979 Constitution of Nigeria was enacted into law after the inclusion of additional sections by the military government.[57]

The effect of the insertion of sections by the military was that a document, vastly different from the draft produced and deliberated on at the Constituent Assembly, was passed into law as the Constitution of the Federal Republic of Nigeria 1979. This, coupled with the fact that the constitution was enacted by a decree of the military government, raises the question as to the legitimacy of the document.[58] The Enactment Decree of 1978 left no doubt that the constitution established by it was not a product of the people, but rather a document imposed by the military. It established the constitution,

---

55 For example, the Constitution (Suspension and Modification) Decree 1 of 1966; the Federal Military Government (Supremacy and Enforcement of Powers) Decree 28 of 1970, which was promulgated directly to nullify the decision of the Supreme Court in the case of *Lakanmi* v *Attorney (Western Nigeria)* 1 UILR 201, which held that the military government then was an interim government and thus was bound by and expected to uphold the Constitution in force.

56 By this time General Mohammed had been assassinated in February 1976, and his deputy, General Obasanjo had succeeded him.

57 Nwabueze n 30 above at 253. This decree was enacted into law by the supreme military council (the body with the highest legislative power under the military regime).

58 Nwabueze n 30 above at 253–256 . The author refers to the preamble of the 1979 Constitution which read *inter alia*; 'whereas the Constituent Assembly established by decree … has deliberated upon the draft constitution … and presented the result of its deliberations to the Supreme Military Council AND the Supreme Military Council has *approved* the same *subject to such changes as it has deemed necessary* in the public interest …' (author's emphasis).

and made it operational from 1 October 1979.[59] This process defied the rules regarding the role of the populace in constitution making, and ultimately resulted in the lack of legitimacy of the 1979 Constitution of the Federal Republic of Nigeria. This can be viewed against the background of Lerner's proposition that a constitution 'derives its legitimacy from the procedural or formal aspects of popular sovereignty and representation'.[60] The author further states '[h]ence a constitution will be considered legitimate only if it enables the vast majority of the polity's members to identify with it and to relate to the document as their own'.[61] The 1979 Constitution and its predecessors did not comply with these requirements.

The 1999 Constitution was adopted on 5 May 1999 and currently remains in force.[62] It was drafted with the aim of reviewing the 1979 Constitution, which was considered not to reflect neither the needs nor the wishes of the people. However, the 1999 Constitution is infected by the same problem of legitimacy suffered by its predecessor. In 1998, a year before the promulgation of the 1999 Constitution, the General Abdusalami Abubakar regime, through the Provisional Ruling Council (PRC),[63] set up a Constitution Debate Committee (CDC), with the brief to coordinate the debate on the new constitution. This committee had barely two months to do this in a country of over 120 million people, before handing over its report to the military government. Only 450 people were reported to have made written submissions to the committee, mainly members of the political class.[64]

As seen in the case of the 1979 Constitution, the military regime made inclusions to the draft constitution that was presented to them, and

---

59 Section 1 of the Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978.

60 Lerner n 2 above at 11–12.

61 *Id* at 12

62 Even though prior to this, there had been other attempts to review the 1979 Constitution. General Babangida had taken steps to amend the document, which steps were inconclusive when he had to step down in 1993; General Abacha during his rule had proposed a 1995 Draft Constitution, which could not be consummated before the end of this regime, following his death in 1998. See 'Constitution review and electoral reforms in Nigeria: The journey so far' *Nigerian Compass Newspaper* Sunday 13 June 2010.

63 Equivalent of the Council of Governors in a civilian regime.

64 JO Omotola 'Democracy and constitutionalism in Nigeria under the Fourth Republic, 1999–2007' (2008) 2/2 *Africanna* 1 at 6. See also Ihonvbere n 28 above, where the author gives an analysis of the 1999 constitution-making process, and the resultant defects in the document; TI Ogowewo 'Why the judicial snnulment of the Constitution of 1999 is imperative for the survival of Nigeria's Democracy; (2000) 44/2 *Journal of African Law* 135.

promulgated it as the 1999 Constitution of the Federal Republic of Nigeria on 5 May 1999. Thus, the 1999 Constitution cannot claim legitimacy and moral authority over the people of Nigeria. It has been criticised for maintaining the legacy of military meddling, lack of public consultation, and for being a fraudulent document purportedly made in the name of the people of Nigeria, as its preamble refers to 'We the people of the Federal Republic of Nigeria …'. This is because at no time did the people of Nigeria agree by themselves or through their elected representatives to the 1999 Constitution.[65]

As seen from this brief analysis, all the post-colonial constitutions that Nigeria has had to date have been advanced by either the military as part of their transition to civilian rule program or the political elite. On the face of things, it would seem that the constitution-making processes were participatory, especially with the use of constituent assemblies. However, as pointed out above, measures were not taken by these assemblies to ensure that an opportunity was created for widespread public participation in the process.[66] The 1999 Constitution may have yielded better results, but it was affected by many problems, in particular, that the appointment of a Constitution Debate Committee by the incumbent military power left no illusion as to the 'representativity' of the process. The members of the committee were not elected, and therefore did not have the mandate of the people. Sufficient time was also not allowed for the debate process, with just about two months to make submissions in a country of over 120 million people. Ultimately, the powers of the military governments to amend, remove and include additional sections in the documents meant that the military could, and did, shape the documents to suit themselves and their own purposes.

By these problems, it can be seen that the 1999 Constitution lacks one of the important elements for legitimacy through its failure to give Nigerians an opportunity to participate fully in its making. Thus the Nigerian people cannot be deemed to have an 'ontological' connection to the constitution. They do not validate the document by their actions, rather it appears that they invalidate it as evidenced by the different malaise plaguing the nation, such as breakdown of law and order; high poverty levels; political instability; corruption; underdevelopment and the like. I shall now turn to an

---

65 Omotola n 64 above, Ogowewo n 64 above at 135–136.

66 Some of the measures that should have been taken will be seen in the case of the South African constitution making process.

examination of the process that preceded the making of the South African constitutions.

South Africa

Historically, South Africa is a country that has gone through years of apartheid rule, during which the system of racial discrimination and white domination over the population was legalised. The Union of South Africa Act of 1909, served as the Constitution for the Union of South Africa, which was formed through the merging of the different republics. It was drafted by an unrepresentative convention, despite the fact that there were several protests and pleas for representation from the African and coloured populations.[67] The 1909 Act established the Union of South Africa, and was imposed by the British colonial government of the time.[68] The preamble to the Act stated that it was 'passed through both Houses of the Imperial Parliament' and 'assented to by King Edward VII'. The Act provided for the executive government of the Union to be vested in the King and to be administered by a representative referred to as a Governor-General,[69] and for the legislative power of the Union to be vested in and comprised of the King and parliament.[70]

The Union Act of 1909 was replaced in 1961 by the new apartheid government, and it transformed South Africa into a republic. The Republic of South Africa Constitution Act 32 of 1961 was largely based on the 1909 Constitution, with the difference that the terms that had previously indicated allegiance to the United Kingdom were substituted with the word 'state'.[71] This was followed by the Republic of South Africa Constitutional Act 110 of 1983 which was promulgated by the National Party-led apartheid government in 1983. Section 6 of the Constitution provided for the position of a 'President' as opposed to a Governor-General, and made changes to the composition of the executive to reflect the new position of 'president'.

It is important to note that the drafting of these constitutions did not involve the participation of the majority of the population of the country neither did

---

67 See a submission made by the Natal Native Congress to the convention drafting the 1909 Act reported in H Ebrahim *The soul of a nation: constitution-making in South Africa* (1998) at 8, 9 and 10.

68 The preamble to the Act stipulated that the act was 'passed through both Houses of the Imperial Parliament … it was assented to King Edward VII'. This denotes the influence of the British government on the country then.

69 Part III, ss 8 to 9 of the 1909 Act.

70 Part IV, ss 19 to 20 of the 1909 Act.

71 Abioye n 6 above chapter 5 at 285.

it confer political rights on them. The 1909 Constitution was a product of the colonial government, whilst the 1961 and 1983 Constitutions were impositions of the apartheid government. The disenfranchised African, Asian and coloured populations could not at the time contribute anything to the making of these documents. In this way, these constitutions did not meet the criterion of legitimacy, in as much as they were legal.

Events that led to the making of the 1993 Constitution have been documented severally in various forms.[72] Suffice it to say that prior to and following the release of Nelson Mandela in 1990, 'talks about talks' and negotiations were held between the white minority government led by the National Party (NP), the African National Congress (ANC), the Pan African Congress (PAC), Azania's Peoples Organisation (AZAPO), the South African Communist Party (SACP), the Inkatha Freedom Party (IFP) and other political parties and organisations.[73] These negotiations took place in various forms and groups that came to be known as the Convention for a Democratic South Africa (CODESA) I[74] and II negotiations, the Negotiation Planning Conference, and lastly the Multi-party Negotiating Process (MPNP) which gave birth to a Negotiating Council.[75]

The parties to the negotiations recognised the need for an interim constitution to act as a 'stop-gap' during the transition to democracy. This was necessary because the negotiating parties at the time had not been democratically elected, and did not have democratically proven constituencies.[76] Some were

---

72 Some of these are: L Thompson *A history of South Africa* (5ed 2000) 240; RB Beck *The history of South Africa* (2000) 180; Ebrahim n 67 above at 5–27; HL Tafel 'Regime change and the federal gamble: negotiating federal institutions in Brazil, Russia, South Africa, and Spain' (2010) *Publius* 1–29 at 14–17, available at: http://0-publius.oxfordjournals.org.oasis.unisa.ac.za/content/early/2010/05/06/publius.pjq015.full.pdf+html?sid=0705203c-449b-48fc-8042-b1a31a8b2653 (accessed on 13 June 2010) in which he discusses *inter alia* the events that led to the collapse of the apartheid system, and how the negotiations to bring about a new democratic system evolved. See also C Jung & I Shapiro 'South Africa's negotiated transition: democracy, opposition and the new constitutional order' (1995) 23(3) *PAS* 269–308; and H Corder 'Towards a South African Constitution' (1994) 57(4) *Mod. L Rev* 491–533.

73 Ebrahim n 67 above at 6–91, 96.

74 It was at these negotiations that general constitutional principles were agreed on, and that it was agreed that an interim constitution was necessary.

75 Ebrahim n 67 above at 150–151.

76 E Lemmer & M Olivier 'The South African Constitution as a post-colonial document: a long walk to freedom' (2000) 33/1 *De Jure* 138 at 141. See also J Sarkin 'The drafting of South Africa's final Constitution from a human rights perspective' (1999) 47(1) *The American Journal of Comparative Law* 67–87 at 68. All the negotiating parties had at this time was either their 'struggle credentials' or the fact that they were part of the government of the day.

averse to the constitution-making process to be subjected to a constituent assembly, feeling that the negotiators should rather be the ones to draft the new constitution, and then put it to a referendum to gain legitimacy.[77] This was opposed by other negotiating parties who felt that in order for the constitution to gain legitimacy, it needed to be drafted by a democratically elected constitutional assembly, which would be representative of the people.[78] Even though the drafting of the 1993 Constitution was done by the negotiating parties, inputs from the South African population were received and taken into account by the drafters.[79] The interim constitution was agreed to by all the negotiating parties on 18 November 1993. It paved the way for a new constitutional order, and provided a framework of basic constitutional principles agreed by all the parties.[80]

As indicated, the making of the 1993 Constitution was not a representative process in the true sense of the word. The constitution, however, served as an 'historic bridge between the past of a deeply, divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence ….for all South Africans …'.[81] It was drafted by members of political parties and those who had been involved in the struggle for democracy.[82] Even though it was necessary and expedient at the time to have the 1993 Constitution in order to ensure that the transition went ahead, the document lacked sufficient legitimacy as the drafters were not elected representatives of the people of South Africa, but they were members of political parties as indicated above. This deficiency was well recognised by the parties involved at the time, and it was planned that a more representative document had to be drafted.

After the 1994 elections which saw the commencement of a new democratic era in South Africa, work began on the drafting of a more democratically representative constitution. The 1993 Constitution provided that a joint sitting of the newly elected National Assembly and the Senate would make up the Constitutional Assembly that would deliberate on and draft the new

---

77 A Sachs 'Constitutional developments in South Africa' (1996) *New York University Journal of International Law and Politics* 695; Sarkin n 76 above at 68.

78 Ebrahim n 67 above at 165–170.

79 See H Klug 'Participating in the design: constitution-making in South Africa' (1996) 3 *Review of Constitutional Stud ies* 18 at 31–39 where the author details the processes of participation and deliberation that were engaged in.

80 *Id* at 170.

81 Chapter16 (Provision on National Unity and Reconciliation) of the Constitution of South Africa Act 200 of 1993.

82 Klug n 79 above at 37–57.

constitution.[83] These people had been elected by their constituencies (members of the public), and were their representatives in parliament. The Constitutional Assembly also recognised that in order to have a legitimate and an enduring document, and in order for the document to be sufficiently legitimate, the drafting process had to be credible and accessible to all.[84]

The process of public participation involved two phases. In the first phase, a series of public consultations; meetings, community based workshops, awareness campaigns, media releases, and campaigns followed, all aimed at informing every South African of the proceedings and proposals for the new constitution.[85] In particular, the rural areas were targeted in the bid to inform and allow every South African an opportunity to contribute to the process. Information was also made available in the South African languages.[86] Information as to the ongoing submissions, and debates were disseminated in a free monthly newsletter published by the Constitutional Assembly, called *Constitutional Talk.* At the end of this phase, nearly 1,7 million submissions were received from the South African public.[87]

In the second phase, the Constitutional Assembly redrafted and produced a refined working draft, which had taken cognisance of the comments and submissions that had been made. This document was also circulated, and feedback was received. The final draft was eventually completed after two years of work on the 1996 Constitution.[88]

The making of the 1996 Constitution, by all standards, was deliberately inclusive and participatory. The extent of the consultations carried out showed recognition on the part of the drafters of the need to have a legitimate document that the people would identify with, and that would represent the aspirations of the people. This has resulted in the people identifying with the

---

83 Section 68(1) of the 1993 Constitution of the Republic of South Africa.

84 Ebrahim n 67 above at 177. It was felt that this was necessary to ensure that the Constitution would be one that the people would feel that they own, that it belongs to them, and that it would represent the aspirations of the people.

85 *Id* at 241–247; see also Sarkin n 76 above at 69–87 where the author explains the process of making the 1996 Constitution in three distinct time periods; negotiations from may 1994 leading to the adoption of the document in May 1996; the first Constitutional Court certification process ending in September 1996, and the second round of negotiations leading to certification by the Constitutional Court in December 1996.

86 *Id* at 243.

87 *Id* at 244; Klug n 79 above at 56.

88 Ebrahim n 67 above at 248–250, records how the Constitutional Assembly concluded the process, and thereafter ensured that in line with the need for accessibility of the Constitution, seven million copies of the document in all the eleven official languages were distributed in the week of the 17–21 March 1997.

1996 Constitution, as it gives a voice to their hopes and aspirations. South Africans, thus generally, identify with the 1996 Constitution and it is legitimate in their eyes.

CONCLUSION

While Nigeria seems to have had more experience with constitution-making (having had four post-colonial constitutions), it has, however, failed to ensure participation of the people or to ensure that the provisions of the constitutions that emanate from such processes are reflective of the values, traditions, hopes and aspirations of the people. In this failure, we see a disjuncture between the people and the law(s) that are meant to bind them. This has led to great levels of disenfranchisement on the part of the Nigerian people, as they do not see the constitution as self-binding, neither do they identify with the laws that emanate from it. For them, these laws do not hold any legitimacy, and compliance with the constitutional provisions or the laws is merely as a result of the threat of sanctions. Social ills like bribery, corruption, violence, theft, diversion of public funds, illegitimate practices thus become a way to express rebellion by the people. In the country's fifty-one years of independence, Nigeria has had more than half of those years, twenty-nine years to be precise, under military rule. The remaining years have been spent under the leadership of civilian governments that have shown great levels of corruption, and disregard for the people. These civilian governments have been characterised by incompetence, corruption, and self-enriching individuals, who have not attempted to carry out the mandate of the people. This has resulted in highgreat levels of disenfranchisement on the part of the people.

South Africa's experience with constitution-making has been instructive. In ensuring a transformed society, the drafters of the two post-apartheid constitutions have deliberately sought public participation and input of the people to ensure legitimacy, to promote a 'sense of oneness' and 'a sense of belonging'. This serves as the first step in promoting the commitment and allegiance of the members of the South African society to their country, and to make things work (even in the face of huge challenges). It induces a 'self-binding' commitment to the constitution and other laws of the land in the people.

When there is no common or unifying factor amongst a people; when the people of a country are not allowed to contribute to the constitution-making process; and when they do not therefore identify with the constitution itself, it loses legitimacy in their eyes. Compliance with the constitution, and with

other laws emanating from it becomes a factor of the threat of sanctions or use of force. Thus, in situations where the people feel they can evade the law or get away with breaching the law, they readily do so, as there is no innate 'thing' that compels them to obey as seen in the traditional African societies. It has been said that the ultimate test of the ownership of the constitution-making process is that its product (the new constitution) is genuinely observed as a self-binding commitment.[89] This genuine observation and compliance with the constitution as a self-binding commitment is what gives rise to the rule of law being enthroned in a society.

[89] Biggs n 26 above at 214.