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Between the State and the Civil Society: The Politics of Constitution Making in Nigeria

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Abstract
Since 1999, there has been persistent agitation for constitutional reform in Nigeria. Pressures for constitutional change in Nigeria were inspired by two considerations. The first is the contention that Nigerian Constitution is fraught with several complications and contradictions, which limit its capacity to address the national question. The other consideration is that the Constitution failed to adequately address interests of less privileged social groups in Nigeria. This paper contends that for the controversy surrounding Nigerian Constitution to be settled, and a relevant and acceptable constitution fashioned, Nigeria needs to adopt a more inclusive, participatory and democratic process of constitution making. This paper is arranged in five sections. The paper begins with a theoretical exploration of the question: who should make the constitution? It argues that a synergy between the state and the civil society is a necessary condition for creating an acceptable and legitimate constitution. The next section reviews the history of constitution making in Nigeria. It demonstrates that the state has an overwhelming predominance over the civil society in the process of constitution making in Nigeria. The third section assesses the consequences of state-dominated constitution making in Nigeria. The fourth section addresses the current effort to review the 1999 Constitution and suggests a greater civil society involvement. The final section concludes the discussion.

Introduction

In the context of contemporary practice of constitutionalism, there is a new emphasis on democratizing the environment in which constitutions are developed, adopted and enacted. To this end, some scholars suggest that the value and legitimacy of any constitution should be measured on the basis of two specific conditions (Ihonvbere 2000a:344). The first is the extent to which the process of constitution making is popular, inclusive, participatory, and democratic. The second condition relates to the degree to which there is available openings, institutions and processes for making the constitution a living document, by taking it to the people so that they are in a position not just to have access to the document, but also to understand it, claim ownership and use it in the defense of democracy.

The current understanding of constitutionalism is influenced to a large extent by the awakening of the civil society in many parts of the world. The idea of civil society is hinged

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on a theory, which recognizes that three sectors exist in the society: the state, the market, and the civil society (Jorgensen 1996, Whaites 2000, Ibeanu 2000). Each of the sectors function to make and enforce laws, provide avenue for exchange of goods and services, and serve as arena for debate and common endeavour, respectively. The civil society provides the platform for debate on the direction of social development and makes it possible for the people to influence and control both the state and the market. To Korten (1990:99):

> … they supplement political parties as varied and flexible mechanism through which citizens define and articulate a broad range of interests, meet local needs, and make demands on the government. … they provide training grounds for democratic citizenship, develop the political skills of their members, recruit new political leaders, stimulate political participation, and educate the broader public on a wide variety of public interest issues. … they serve as checks on the relentless tendency of the state to centralize its powers and evade civic accountability and control.

It has been suggested that efforts by the civil society to check the state should begin from the process constitution making (CFCR 2002, Ubani 2003). The civil society can effectively carryout its watchdog role in the society by taking up greater role in constitution making. To this end, the civil society can be conceived as the principal arena of constitution making. In Nigeria, the history of constitution making shows that the state, rather than the civil society, is predominant sphere constitution drafting and enactment. All the constitutions promulgated in Nigeria since 1922 have been crafted and endorsed by the state, without any significant civil society participation.

This paper contends that civil society participation in constitution making is critical to the relevance, effectiveness, and legitimacy of any constitution. It argues that the tradition of state-driven constitution making in Nigeria has led, on one hand, to the production of constitutions that are riddled with all sorts of contradictions and complications, and on the other hand, to constitutions which lack popular acceptance. This has limited the capacity of the constitution to promote democracy and resolve the national question in Nigeria.

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The argument of this paper is arranged in five sections. The first section addresses the question: which sector should drive the process of constitution making the society? The second section relates this question to the Nigerian case and demonstrates that the state has dominated the constitution making in Nigeria. The third section assesses the consequences of state-driven constitution making to democracy and national unity in Nigeria. The fourth section addresses the current effort to review the 1999 Constitution and suggests a greater civil society involvement, while the final section concludes the discussion.

Who Should Make the Constitution?

One of the principal practical dilemmas of constitution making is the question of 'authorship' and 'source of authority' of the constitution. This question relates to the decision of who should make the constitution. Broadly speaking, there are two contending perspectives to this dilemma (McWhinney 1981:24-41). The first I call state perspective, while the second is the civil society perspective.

The statist perspective

Proponents of this perspective oppose the idea of popular participation in the process of constitution making. They claim that the production of a constitutional charter that will be effective, involves mapping the scope and borders of institutions and process of governance and of their mutual interactions. This exercise they argue is obviously a technical process, requiring some degree of specialist constitutional expertise that goes beyond the capacity of the ordinary citizen.

Therefore, advocates of this approach see the need for the state to step-in and drive the constitution making process; making choices of the author(s) and the procedure(s) for constitution enactment. The state can confront this task in two major ways. First, it can engage the services of distinguished jurists, intellectuals and constitutional experts to serve as an expert commission responsible for drafting a constitution. Ideally, the members of expert commissions are selected on some genuinely independent, non-partisan basis, and their terms of reference are so precisely and narrowly defined in advance, so that the commission will be compelled to limit itself, to a purely technical, non-partisan function.

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Critics of this approach contend that the state, through the naming of members of an expert commission, is in a position to determine or at least influence the outcome of the commission's work. They argue that assuming that the commission wants to play its role in a technical, unbiased and non-partisan manner, the possibility of the state being overwhelmed by the expert's opinion is not substantial since the expert commission serves only as an aid to constitution making, while the political leaders remain in firm control of the actual constituent power (McWhinney 1981:27).

The second way through which the state can drive the constitution making process is by allocating the parliament with the responsibility of constitution enactment. Here, states with flexible constitutional system may choose the national legislature as the principal or sole arena for constitution making. Proponents of this approach opine that the idea of constitutional flexibility and the role of the legislature as the main repository of the processes of constitutional review confer a certain confidence in the capacity of duly elected legislators to wisely direct their country's future. Also, they avow that when the constitutional system is already on-going, and needed only incremental changes that build on existing constitutional values and institutions without any perceived need for radical restructuring, other modes of constitutional change, involving large-scale, popular participation may be not merely expensive and time consuming but functionally unnecessary and irrelevant (McWhinney 1981:29).

The civil society perspective

Advocates of the civil society perspective support active participation of the people in constitutional drafting through a representative elected constituent assembly and later ratification by a referendum. They claim that constitution making involves transfer of popular sovereignty to the state; thus popular support for the codification of the constitution is a pre-condition for its legitimacy.

The civil society perspective is in accord with recent trends toward democratic constitutionalism. According to a notable Nigerian civil rights activist, Femi Falana:

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> Any constitution that does not emerge from widespread consultation with all nationality and interest groups cannot be regarded as legitimate. The basis of constitutional legitimacy must now be measured by the extent to which the masses have been part of the process of compacting the constitution (Cited in Ihonvbere 2000b:9).

Proponents of this perspective, suggest that constitutional charters should be openly arrived at through popularly elected constituent assemblies and the final constitutional text ratified through a referendum. They argue that the experience of countries that have produced legitimate constitutions is that such countries and their governments have used credible processes that constructively engaged a majority of their population (Sichone 1998). The credibility of the constitution making process, according to this view, depends on the extent to which the process is guided by principles such as transparency, inclusiveness, and consensus-building (Moyo and Fayemi 2003:327). Although the dichotomy between state-driven and civil society-driven approaches to constitution making may be disappearing in the constitutional practice of countries with flexible constitution such as Great Britain, or those which want to maintain constitutional continuity, the question of 'authorship' and 'source of authority' of constitution is still salient for the legitimacy of the constitution.

The Making of Nigerian Constitutions: State or Civil Society-Driven?

The end of the two World Wars, the impact of Western education, racial discrimination, and the inability of the colonial state to improve the poor living conditions of Nigerians, were some of the major motivations behind the demand for self-government in Nigeria (Ihonvbere and Shaw 1998:16). Although early demands by Nigerians for self-rule was despised by the colonial authorities, they laid the broad basis for specific agitation and struggles that hastened the decision of Sir Clifford to write Nigeria's first constitution in 1922 (Nwabueze 1982).

The so-called Clifford's Constitution of 1922 provided for a Legislative Council of 46 members made up of 27 officials and 19 unofficial members, of which three members were to be elected by all adult males in Lagos and one in Calabar. To qualify as a Voter, an individual had to reside in a location for at least 12 months and must have a gross income of 100 pounds per annum. Although the Clifford Constitution disenfranchised a substantial proportion of

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Nigerians, it opened the way for an overt mobilization of local political interests in Nigeria through the formation of several political parties (Burns 1955, Coleman 1958, Sklar 1963, Dudley 1982).

The increasing political activity in Nigeria and the arrival of Sir Arthur Richards as the Governor created a new phase in the country's constitutional history. The Richards' Constitution as it was called was enacted in 1947, to promote national unity and greater local participation in government. It expanded the Legislative Council to 44 members with a majority of the members unofficial. The constitution also included the Northern part of Nigeria in the central legislature and regional Councils were created in the Northern, Eastern, and Western Regions. Again, the colonial officials wrote the Richards' Constitution without any meaningful participation by Nigerians. Expectedly, the constitution was severely criticized not just for the unilateral way in which its proposals were conceived and enacted, but also for 'regionalizing' Nigerian politics (Coleman 1958, Olusanya 1966).

The Richards' constitution precipitated an immense controversy in Nigeria, however when John Macpherson was appointed the Governor in 1948, he decided to consult the people before introducing another constitution. Taking heed of criticisms by the nationalists, he encouraged nation-wide discussion over the form of his proposed Constitution, which was enacted in 1952. However, the vagueness of the constitution on several critical issues, and its claim to be a tentative document, set the ground for bitter rivalry within and among the ethnic-based political parties.

Thus, the functioning of the Macpherson's Constitution was greatly inhibited by inter- and intra-party feuds, and the Colonial government was compelled to call two constitutional conferences in London in 1953 and 1954 to resolve the matter (Uweche 1991:1454). The Constitution, which came out of the conferences was named after the then Governor, Mr. Oliver Lyttleton. The Lyttleton's Constitution laid down the basic design of Nigeria's independent government. Between 1954 and 1960, two additional Constitutional Conferences were held in London (1957) and Lagos (1958) in preparation for independence, and the agreements reached at those conferences formed part of the 1960 Independence Constitution.

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The first 'made by Nigerians' Constitution came in 1963 as a result of agitation for changes in the 1960 Constitution which retained the Queen of England as Nigeria's Head of State and the Judicial Committee of the British Privy Council as the final Court of Appeal. The development and adoption of this constitution was carried out by leaders of the newly independent Nigerian State in a meeting they held on 25th and 26th July 1963. The Constitution known as Republican Constitution was passed by Nigeria's Federal Parliament in September 1963 and through its provisions the Queen of England ceased to be Nigeria's Head of State, while the Supreme Court of Nigeria became the final Court of Appeal.

The subsequent Nigerian Constitutions can be referred to as 'Military Constitutions', because they were written and enacted by military rulers as they made their exit out of power (Jega 1999, Ihonvbere 2000c, and International IDEA 2000). The military first took over government in Nigeria in 1966 and remained in power until 1979. When General Olusegun Obasanjo led government decided to quit power, it inaugurated a Constituent Assembly to produce a constitution upon which the incoming civilian regime will be based. The military government appointed a substantial number of the members of the Assembly including its leadership, and also reviewed and amended the draft constitution produced by the Assembly before promulgating it in 1979 (Panter-Brick 1978, Gboyega 1979, Phillips 1980).

Four years later, both the constitution and the civilian government it brought to power were swept away by another generation of soldiers, which came to power. Again, when the General Ibrahim Babangida led military government conceded to quit power, it established a Constituent Assembly of which he appointed one-third of its members (Keohn 1989). The Constitution produced by this Assembly never came into effect as a result of the annulment of the June 12, 1993 Presidential election which terminated the transition to civil rule (Momoh 1997). The annulment of the Presidential election and the continuation of military rule generated unprecedented political crisis in Nigeria, and this informed the decision of General Sani Abacha led government to inaugurate yet another Constituent Assembly.

The constitution produced by this Assembly was inconclusive following the death of General Abacha in June 1998. But, General Abdulsalami Abubakar who succeeded Abacha, sought to

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finalize work on the constitution by inaugurating a Committee to co-ordinate a national debate on the constitution. Apparently under pressure to leave power, the military government mandated the Committee to complete their work urgently, and within two months the Committee finished its assignment without adequately enlisting the participation of the people. The Provisional Ruling Council of the military government quickly enacted the Constitution as they made their way out of government in May 1999.

Consequences of State-Driven Constitution Making in Nigeria

Effective governance requires that state officials be endowed with the capacity to carryout state responsibilities. However, when the law making and enforcement capacity of the state is not checked, the state can infringe on the rights of the citizens. In a constitutional democracy, the constitution constrains the actions and activities of elected state officials. Therefore, constitutional democracy is an institutional framework for achieving a balance between the guarantee of the fundamental rights of citizens and the law making and enforcement capacity of the state.

The search for constitutional governance is a search for revalidation of democracy and it is in this light that this paper considers the politics of constitution making in Nigeria. Constitutional democracy requires a culture which regards the constitution as inviolable and which promote acceptance and respect for the wishes of the people as the ultimate authority of government. This sort of culture can be best achieved when the constitution is initiated, drafted and enacted in a genuinely democratic environment and not imposed from 'above'. A constitution that falls short of the above condition can be regarded as illegitimate.

The value and legitimacy of any constitution depend on the extent to which it reflects the needs and priorities of the people. They also depend on the extent to which the people are involved in the process of constitution making as well as the extent to which the people are made to understand the essence of the document, its importance and relevance to the community. Participatory constitution making helps the people to build ownership around the document. When considered on the basis of the foregoing, all Nigerian constitutions can be regarded as illegitimate. This is because the colonial and military regimes that enacted these

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constitutions do not have the legal and political authority required to promulgate the constitutions.

Indeed, there is a link between the process by which a constitution is given and its capacity to address specific contentious issues of national politics. For instance, one negative consequence of state-driven approach to constitution making in Nigeria is that the constitutions have failed to fully address the national question in Nigeria. A renown student of Nigerian politics observed that the 1999 constitution in particular, had avoided "everything that has constituted the long-standing demands of opposition groups, and spends most of its time defining state boundaries, how to create states and local governments, remove elected officers from power, and so forth" (Ihonvbere 2000a:351). The pressing issues in Nigerian society and politics that the Nigerian Constitutions have failed to fully address are numerous, but due to the dearth of space, I limit my discussion to two issues - citizenship and rights as well as political and institutional structure of the federation.

Citizenship and rights

Although the Bill of Rights in the constitution guarantees freedom of movement, freedom from discrimination and residence rights to all Nigerians (sections 49 & 50, The Constitution of the Federal Republic of Nigeria, 1999), the situation in reality is that Nigerians from other states or ethnic groups are regarded as 'foreigners', or 'non-indigenes' in parts of the country other than theirs. This is due to the contradiction between indigeneity and citizenship, which was introduced in the 1979 constitution, following the insertion of the federal character principle into that constitution.

An indigene of a state is defined in constitutional terms as "a person either of whose parent was a member of a community indigenous to that state" (Nnoli 1978:270). However, in practice it is difficult to decide what constitutes a 'community indigenous to a state'. Thus, the constitution has inadvertently created three types of Nigerians (Nnoli 1978:271). The first and the most privileged class are those citizens who belong to the indigenous communities of the state in which they reside. Those citizens who are able to show that they belong to communities indigenous to some states but are themselves resident in other states are less

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favored. The least favored are those citizens who are unable to prove that they belong to a community indigenous to any of the states but are nevertheless full-fledged Nigerian citizens.

This contradiction is compounded by the right of each state in Nigerian federation not only to organize its own affairs in its own ways, but also the right if necessary to do so by excluding indigenes of other states from full enjoyment of citizenship rights such as employment, land purchase, admission to educational institutions, marriage and distribution of welfare services.

Nigeria's federal structure

One major impact of military rule in Nigeria has been the introduction of all sorts of complications in Nigeria's federal constitution. These complications now constitute what a notable scholar of Nigerian federalism has referred to as the 'pathologies' of Nigerian federalism (Suberu 2005:3). The contradictions resulting from the political and institutional engineering of Nigerian federalism by successive military regimes have prompted students of Nigerian federalism to characterize it variously as 'bizarre', 'irregular', 'misleading', and 'purely distributive' (Diamond 1988:155, Osaghae 1992:182, Welch 1995:635, Bach 1997:346). These depictions symbolize the complications and pathologies of Nigerian federation.

Despite the repeated attempts to engineer Nigeria's federal system, makers of Nigerian constitutions have tended to avoid direct engagement with the contentious issues such as the structure of the Federation, States creation, revenue allocation, derivation and resource control as well as devolution of powers. When these issues are raised, the discussion is manipulated and influenced to favour the status quo. This strategy has been questioned by many. Ihonvbere (2000c:14) believes that a properly compacted constitution should "directly go to the heart of engaging the contentious issues that not just shape politics and power, but also those that shape the larger society, breed distrust, intolerance and violence". Akinrinade (2003:368) suggests that the strategy inhibits the development of political and institutional mechanisms of conflict management in Nigeria. The result of this state of affairs is the inability of the constitution to provide relevant platform for the mediation and resolution of conflicts in Nigeria.

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Revisiting the 1999 Constitution

Due to the flaws that beset the 1999 Constitution, there were agitations for the review of the 1999 constitution by various groups. When the government conceded to the pressure, opinion there were divergent opinions on the method to be adopted for the review. On one hand, the pro-democracy, minority and opposition groups as well as political leaders from the South East and South West favoured for a civil society-driven constitution review process, but on the other hand, the federal government and political leaders in the North canvassed for a state-driven constitution review process, which will make use of the existing legislative channels and institutions no matter how imperfect they might appear.

While this debate was raging, the government quickly inaugurated a Presidential Committee on the Review of the 1999 Constitution in October 1999. In February 2001, the Committee submitted its report to the President (Federal Government of Nigeria 2001). The report claimed that the Committee received about two million written memoranda and one and half million oral presentations as a mark of its acceptance by the public (Federal Government of Nigeria 2001:6). The Committee recommended the convening of a national conference, and the amendment of the 1999 Constitution to accommodate the creation of new states, devolution of powers and an increase in the derivation formula beyond the existing 13 percent.

The recommendations of the Presidential Committee was received by the federal government and after consideration, they were incorporated in the government's 'Constitution Amendment Bill, 2001', sent to the National Assembly by the executive branch of government. Presently, separate Committees in the Senate and House of Representatives are working on the Constitution Amendment Bill; there is also a National Assembly Joint Committee on the Bill. There are still widespread lack of confidence in the state-driven constitution review process. This lack of confidence is exacerbated by growing speculations that drafts of the Constitution Amendment Bill were prepared by senior figures in the ruling Peoples Democratic Party (PDP) and that a proposal to allow the incumbent administration to remain in power for two more years has been inserted in the Bill (CDD 2006:3).

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How can confidence in the 1999 constitution review process be bolstered? One viable option is for the National Assembly to reopen the constitution review process, making it as much as possible transparent, inclusive and participatory. The value and legitimacy of the outcome of the 1999 Constitution review will depend largely on the extent to which the views of various disadvantaged social groups sought and accommodated. The starting point would be for the Legislative Committees on Constitution Amendment to consider incorporating the rich materials produced at the National Political Reform Conference (NPRC) into the Bill.

After work must have been concluded on the draft Bill, the Legislative Committees would need to subject the contents of the Bill to a national dialogue. Non-state actors such as the media, trade unions, intellectuals, religious leaders, youth and women's groups as well as other non-governmental organizations should be allowed to make input and submissions in the open dialogue. After mutual consent has been expressed that the draft constitution incorporates unambiguously the binding recommendations of the people, the document would be returned to the parliament for adoption without further alterations, then the document would finally be put forth to the people for acceptance in a referendum.

Conclusion

The rejection of Nigerian Constitution by the people, and the agitation for a fundamental review of the 1999 Constitution is anchored on the fact that the process of constitution drafting and enactment has been dominated by the state since the colonial era, and this has prevented the people in whom sovereignty inheres from participating in the crafting of the document. Consequently, Nigerian Constitutions do not adequately protect the interest of many social groups in Nigeria, especially disadvantaged groups such as national minorities, workers, children, youths and women. Also, Nigerian constitutions are fraught with several complications and contradictions, which lead to their inability to properly address the national question in Nigeria.

This paper supports the growing opinion that there is need for a comprehensive review of the 1999 constitution to meet the dynamics of the Nigerian society, and to reflect the wishes and aspirations of all the major social groups in the country. An important aspect of this paper's

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argument is that popular participation in the constitution making process is a necessary condition for the acceptability and legitimacy of the constitution. The submission of this paper is that, since it is now obvious that the state has failed to produce an acceptable and legitimate constitution in Nigeria, the federal government should allow the citizens, organized under the platform of the civil society, to produce a relevant, acceptable and legitimate constitution.

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