

**AN AUTOCHTHONOUS
CONSTITUTION FOR NIGERIA:
MYTH OR REALITY?**

BY

TAIWO OSIPITAN



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1. INTRODUCTION

An inaugural lecture is a milestone in the career of a university professor. When a university finds her lecturer appointable as a professor, she appoints him/her as a professor on the understanding, that the newly appointed professor will thereafter deliver an inaugural lecture. An inaugural lecture is, therefore, a contractual obligation which should be performed by a professor.

A professor's obligation to deliver an inaugural lecture vests the university with a corresponding right to demand that the professor delivers his/her inaugural lecture. The relationship between a university and her professor can consequently be likened to that of a creditor and debtor with super-added obligations. Therefore, when a university requests a professor to deliver an inaugural lecture, it is legitimately asking him/her to furnish consideration for the appointment and a professor who is able to deliver his/her inaugural lecture is simply repaying a debt owed. Some professors pay their debts to their universities either too early or too late. By accident or design, some professors are unable to pay their debts. There are professors who are able to pay at the right time. I thank my Vice-Chancellor, Professor Oye Ibidapo-Obe for being a channel for the timely repayment of my debt to my University.

The audience at an inaugural lecture will not normally consist exclusively of members of the university community. The lecture is an open invitation to members of the public who can spare the time to attend. May I acknowledge that my Vice-Chancellor, Professor Oye Ibidapo-Obe hails from Ilesha. Indigenes of Ilesha and Ijeshas in general, are reputed to be creditors, who give their debtors sleepless nights, until all

outstanding debts and accrued interests thereon are fully repaid. The Ijeshas are not known for debt forgiveness. To the Ijeshas, a debt can never be too early, too late or time barred for repayment. This evidently explains the harvest of inaugural lectures in the University of Lagos since the mantle of leadership fell on Professor Oye Ibidapo-Obe. A total of thirty-five inaugural lectures have so far been delivered during Professor Oye Ibidapo-Obe's tenure as the Vice-Chancellor of the University of Lagos and by the special grace of God, more inaugural lectures will be delivered before the end of his term as our Vice-Chancellor. These harvests of lectures corroborate his standing as a serious-minded scholar.

I thank the Almighty God for sparing my life until today, to stand before this wonderful audience, to deliver my inaugural lecture ten days after our birthday (Professor Taiwo Osipitan, Dr. (Mrs.) Kehinde Olayinka & Mrs. Olapeju Osipitan); six days after the 21st anniversary of my appointment as a lecturer of this great University and fifty-five days after the sixth anniversary of my appointment as a Professor of Law of this citadel of learning.

The journey to today's event commenced in November 1983, when by a letter dated 18th November 1983, I was notified of my appointment as a Lecturer Grade II in the Faculty of Law of the University of Lagos. I must admit that my intention then, was simply to lecture for a few years, before settling down to full time legal practice. I did not deliberately set out to be a Professor of Law. However, soon after my appointment, I found lecturing exciting and challenging. Years after becoming a Professor of Law, lecturing remains alluring and refreshing to me.

In my career as a law lecturer, I have traversed the field of Public Law. Criminal Law and Procedure, Law of Evidence, Environmental Law, Principles of Civil Litigation and Constitutional Law are my main areas of teaching and research. When I received the request to deliver my inaugural lecture, my dilemma was, "on which of these pet public law subjects of mine, should I speak on, bearing in mind that my distinguished audience will definitely consist of my precious law students, non-law students, lawyers and non-lawyers." How would I explain terms such as **ACTUS NON FACIT REUM NISI MENS SIT REA** (an act is not criminal unless accompanied by the guilty mind), **RES GESTAE** (Facts which are closely connected with facts in issue), **LOCUS IN QUO** (scene of crime), **PARTICIPIS CRIMINIS** (parties to crimes) to my distinguished audience within the one hour or so of this lecture, without disrupting their digestive systems? I appreciate the need to keep my audience with me for as long as the lecture lasts. I am a firm believer in the marriage of the town and the gown and the need for an academician to remain relevant always to the society. I agree with the views of Jeremy Bentham, that law must be gainfully utilized to achieve the greatest happiness of the greatest number of people. The beauty of an inaugural lecture and indeed of any lecture lies in the lecturer's ability to communicate with the audience. To lawyers and my precious law students, a lecture on Law of Evidence or Criminal Law must be welcome. But not so for non-lawyers, who though highly educated will definitely find such a lecture esoteric.

The Constitution is the organic law of a nation in which basic rights and corresponding obligations of students and non-students, lawyers and non-lawyers, the rich and the poor, the old and the young, the strong and the defenceless are contained. We all need the

Constitution, hence, the choice of the Constitution as the theme of my inaugural lecture.

In 1914, the Northern and Southern Protectorates were merged into one, to form the Colony and Protectorate of Nigeria. Since 1914, apart from the still-birthing 1989 and 1995 Constitutions, Nigeria has operated eight different Constitutions. These are the Imperial (4), Independence (1), Republican (1) and Presidential (2) Constitutions. Regrettably, Nigeria has unsuccessfully operated Constitutions which have worked perfectly well in other jurisdictions. Nigeria has also experienced military dictatorship with this having serious implications for the workings of her many constitutions. Out of her forty-four years of independence, different military administrations ruled Nigeria for approximately thirty years.

After more than fifteen years of military dictatorship, democracy was restored in Nigeria on 29th May 1999 and the 1999 Constitution became operative. The 1999 Constitution, which like the 1979 Constitution, was processed and decreed into existence by the departed Military administration, has attracted mixed reactions. Some Nigerians see the 1999 Constitution as the product of few educated and urban elites who were supported by the military hierarchy. Apart from the obvious criticism of it being a legacy of the departed military administration of General Abdulsalami Abubakar, the autochthony of the 1999 Constitution has been questioned by its opponents.

The 1999 Constitution has been labelled as a fraudulent document because its preamble gives a false impression that it was authored by "WE THE PEOPLE" of Nigeria. According to Chief F.R.A. Williams SAN, the 1999 Constitution is a false instrument "because although

it was in truth and in fact enacted or imposed upon the country by the military authorities the constitution in question falsely declared that it was made by 'We the people' of the Federal Republic of Nigeria."¹

The criticisms of the 1999 Constitution resulted in the setting up of two Review Committees by the President of the Federal Republic of Nigeria and the National Assembly. These Committees were mandated to highlight all areas of defects in the Constitution in the hope that identified defects will form the basis of its review.

A silver thread, which runs through Nigeria's ninety years of Constitution-making, is the perpetual search for a Constitution that will satisfy the aspirations of political elites, ensure peace, order and good government and promote the unity and the welfare of Nigerians. The persistent demand for either a full blown Sovereign National Conference or a simple Constitutional Conference where issues affecting Nigeria and Nigerians would be discussed is a manifestation of dissatisfaction with the Constitution. The structure of the Federation, review of revenue allocation formula, control of resources and the principles of derivation, establishment of State Police, devolution of political powers, the restoration of true Federalism and a restructuring of the foundations of Nigeria through negotiations, are the evident justifications for convoking either a Sovereign or a simple Constitutional Conference.

1 "A Constitution for the People of Nigeria," Lecture delivered on 19/8/99 under the auspices of U.B.A. Plc. at p. 7.

If we may ask, "Is a full blown Sovereign National Conference the solution to Nigeria's numerous socio-political problems? Can we convoke a Sovereign National Conference which will consist of the genuine representatives of the people? How do we ensure that the will of the people is not subverted through electoral malpractices? Will election of members of the Conference ensure that persons knowledgeable in constitutional matters are elected to represent the people at the Conference? How best can we, in the light of our socio-political experiences, produce an autochthonous Constitution for Nigeria? Are Nigeria's socio-economic problems limited to the Constitution or attributable to the operators of the Constitution? Are we not losing focus in the task of nation-building, in the endless clamour that the 1999 Constitution be supplanted by a people-led and people-processed Constitution? Is it not possible to achieve autochthony of the Constitution by amending the 1999 Constitution?" These are some of the issues addressed in this inaugural lecture.

The lecture commences with the definition and identification of relevant concepts. **Part Two** of the lecture consists of a conspectus (over-view) of Constitution-making Processes in Nigeria. Conflicting theories on the autochthony of the Constitution are the highlights of **Part Three**. **Part Four** focuses on some of the political crises which Nigeria has experienced. The lecture ends with a blue-print and suggestions on how to ensure an autochthonous Constitution for Nigeria.

A noteworthy preliminary point is that the theme of the lecture is Constitution-making processes, in contradistinction to an analysis of the texts of our past and present Constitutions. The objective is to examine Nigeria's score card and those of other jurisdictions in

the search for an autochthonous Constitution. The result of the inquiry will be the cornerstone of the blue print.

2. WHAT IS A CONSTITUTION?

If there is any point which has resulted in a *consensus ad idem* among lawyers, it is the fact that words lack universally acceptable meaning. Law, itself, is an embodiment of controversies. The teaching of jurisprudence begins on the hypothesis that words have no exact meaning as they are generally determined by the speakers' abstractions. Consequently, the word "Constitution" means different things to different people.² Judge Cooley testified that "it is easier to tell what a Constitution is not than what it is".³ In *Webster's New Twentieth Century Dictionary*, a Constitution is defined as (a) The way which a government, state, society etc. is organized (b) The system of fundamental laws and principles of a government, state, society, corporation etc. written or unwritten (c) a document or set of documents in which these laws and principles are written down. *Black's Law Dictionary*⁴, defines a Constitution as "the organic and fundamental Law of a Nation or State which may be written or unwritten establishing the character and conception of its government, laying the basic principles to which its internal life is conformed, organizing the government and regulating, distributing and limiting the functions of its different departments, prescribing the extent and manner of exercise of sovereign powers, a charter of government deriving its whole authority from the governed. The written instrument agreed upon by the people of the union and officers of the government in

2 K. Mowoc; *Constitutional Law in Nigeria* (Vol. 1) (Malthouse Press Ltd, 2003) pp. 2-4.

3 *Constitutional Limitations*, 2nd Edition. (1971), p. 38

4 *Blacks Law Dictionary*, 5th Edition.

respect of all the points covered by it and in opposition to which any act or ordinance of such department or officer is null and void."

To Prof. Nwabueze, a Constitution refers simply to "the frame or composition of a government, the way in which a government is actually structured in terms of its organs the distribution of powers within it, the relations of the organs inter-se and the procedure for exercising power."⁵ A Constitution has also been defined as "rules which set out the framework of government, postulates how it ought to operate and makes declaration about the purposes of the States and the society and the rights and duties of citizens but no real sanction is provided against violation of particular provisions of the Constitution."⁶

Hogg, however, draws a distinction between the narrow and wide meanings of a Constitution. According to Hogg, in the narrower sense, the Constitution "refers to those rules embodied in a basic constitutional document such as in the United States of America, India or Nigeria. In the wider sense, it includes all - important rules, which establish, empower and regulate principles of government, some rules not contained in the basic document and some non justifiable rules such as is the case in the United Kingdom."⁷

AUTOCHTHONOUS CONSTITUTION

In nations with colonial experience, constitutions processed under Colonial governments are described either as Imperial or Governors' Constitutions.

5 B. O. Nwabueze, *Ideas and Facts in Constitution-Making*. (Ibadan: Spectrum, 1993) p. 1.

6 H. Street & R. Brazier (eds.), *De Smith Constitutional and Administrative Law* 4th Edition p. 16.

7 *Constitutional Law of Canada*, 3rd Edition (1977). pp. 1-2.

Autochthonous Constitutions, however, are home-made, home-grown, and home-processed Constitutions in contradistinction to imposed and imperially-processed Constitutions. In *Chambers Twentieth Century Dictionary*, the word "autochthonous" is defined as "indigenous: formed in a region where found: found in the place of origin."⁸ Therefore, a Constitution which is home-made (home-grown and home-processed) and which has been wholly and exclusively processed by the representatives of the people, without foreign involvement or intervention is autochthonous. It is a Constitution which the people acknowledge as their own, in contradistinction to an Imperial or Colonial Constitution.

As observed by Hon. Justice Niki Tobi, "In general terms, a Constitution is said to be autochthonous if it derives its force and validity from "its own native authority" and here the expression "Native authority" is not used in the context of a local government authority, but rather in the wider context of the people in their sovereignty. In other words, an autochthonous Constitution must be home-grown in the sense that it is home-made and not a product of Imperialism or colonialism. An autochthonous Constitution should be free from any Imperial or colonial intervention ... Once the entire constitution-making process is indigenous and home-made, the element of autochthony is fulfilled."⁹

8 Kirk Patrick (ed.) (1983) p. 82.

9 "The Legitimacy of Constitutional Change in the Context of the 1999 Constitution" in *Nigeria: Issues on the 1999 Constitution*, 1. Ayua, A. Guobadia and A. Adekunle (eds.) (Lagos: N.I.A.L.S., 2000) p. 30.

IMPORTANCE OF CONSTITUTION

Every organized society requires a Constitution to regulate the relationship between its members, institutions and government. The Constitution spells out the rights and corresponding duties of the government and the governed. It is difficult for a society to effectively function without rules and regulations, because society normally consists of individuals who seek to achieve their personal aspirations and those who desire to promote fundamental values of the society. In order to preserve the society's fundamental values, it is necessary that individual goals should be pursued within the limits of the law. Freeman highlighted the importance of law to the society when he said:

"Fiction provides us with numerous examples of utopian societies where congruence of norm and ideal is such that there is a perfect social harmony and no need for law and lawyers to emerge. History teaches us the unhappy truth that no such society ever existed. In all societies, socialisation is an unequal process, there is always deviance and conflict and law can be seen to emerge as a norm asserting authority with the coercive power to sanction those guilty of violating the norm. It is difficult to escape the fact that law is necessary. If a society should ever come about where it is not, it may be predicted with certainty that it will be a society different from anything we have known."¹⁰

10 *Legal Structure*, (Longman, 1974) p. 1.

A private or public company is regulated by her Memorandum and Articles of Association; Public Corporations and Enterprises are set up and regulated by statutes; a Club's Constitution is the instrument which regulates the relationship among its members. Acts and conducts which are at variance with these Constitutions and instruments are ordinarily *ultra vires*, null and void. The Constitution, therefore, is what makes the difference between a group of individuals behaving in total disregard of each other's interest, without common goal and a collaborative enterprise towards a common end.

The importance of a Constitution as a document which regulates conduct of a society and her residents finds strong corroboration in the Scripture. Three months after the Israelites left Egypt, they entered into the wilderness of Sinai and they camped in front of Mount Sinai. The Lord called Moses from the mountain and directed him to tell the children of Israel that if they will fully obey Him and keep His covenant, they shall be His special treasure and be placed above all other people. The Lord's promise to the Israelites was that theirs shall be a Kingdom of Priests and a Holy Nation. Moses communicated God's requests and promises to the elders of Israel and the people answered affirmatively that "All that the Lord has spoken we will do".¹¹ Thereafter, the Lord gave the Ten Commandments¹² to Moses who, in turn, communicated them to the Israelites. It is therefore true, that a society without a Constitution is bound to be a nasty and lawless organization which can be likened to a suicide club.¹³

11 Exodus 19:5-8

12 Exodus 20:3-17

13 H.L.A. Hart, *Concept of Law* (1961) p. 189 cited by M.I. Jegede, "What is wrong with the Law?" (Lagos: N.I.A.L.S, 1993). p. 6.

3 A CONSPECTUS OF CONSTITUTION-MAKING IN NIGERIA

Prior to colonial rule, the geographical area now called Nigeria had several settlements. Each settlement had its own distinct identity, administrative techniques and methods of governance.¹⁴ The people and their territories were subsequently exposed to Western influence through activities of explorers who were followed by Missionaries, Traders and Political Administrators.

A good starting point in the history of Constitution-making in Nigeria is 1914. Ninety years ago the Northern and Southern Protectorates were for economic reasons and administrative convenience merged to form the Colony and Protectorate of Nigeria. The merger which was achieved through three legal instruments¹⁵ satisfied the imperial objective of creating a conglomeration of diverse nationalities, cultures and forms of Government into a single country, with great potentials for economic exploitation and market outlet for British manufactured goods.¹⁶

Between 1922 and 1954, four different Constitutions were enacted for Nigeria by the British Parliament. A common feature of these Constitutions was that they were processed by the imperialists and were therefore non-autochthonous. There were explicit instances of

14 See generally, P. Olayede, *Constitutional Law of Nigeria* (Ibadan: Evans Bros. 1992); A. Burns, *History of Nigeria* 6th Edition; T. Elias, *Nigeria: The Development of its Laws and Constitution*.

15 The (Nigeria Council) Order-in-Council 1912; The Nigeria Protectorate Order-in-Council 1913; and Letters Patent of 1913. See also, F. D. Lugard, *The Dual Mandate in British Tropical Africa* (London: Blackwood & Sons Ltd., 1922) p. 46.

16 J. A. Yakubu, *Constitutional Law in Nigeria* (Ibadan: Demyx Law Books, 2003) p. 15.

non-consultation with the people of Nigeria and their representatives and even in cases where the people's elected representatives participated in the constitution-making processes, they were joined by selected government nominees. The British Parliament which passed the enabling laws was the legal source of authority of these pre-independence Constitutions. The pre-Independence Constitutions were consequently labelled as Imperial or Governors' Constitutions. Hear a testimony on the 1922 and 1946 Constitutions:

"All that happened particularly with the 1946 Constitution was that the Governor merely drafted his Constitutional proposals for the review of the 1922 Constitution. These proposals embodied in white paper published in the United Kingdom and in Nigeria were submitted to the legislative council for approval. They finally received British parliamentary approval."¹⁷

Under the 1951 Constitution, a serious attempt was made by Governor Macpherson to address the problem of non-consultation with the people and their representatives. The processes which led to the 1951 Constitution ensured the tapping of public opinion and mass participation through Regional, Divisional and Provincial Conferences. The reports of these Conferences were considered at a General Conference. The report of the General Conference was in turn, fully debated in Regional Houses and the Legislative Council before a final document was submitted to the Governor-General and Secretary of State for the Colonies for final approval.¹⁸

17 A. Ojo, *Constitutional Law and Military Rule in Nigeria* (Ibadan: Evans Nigeria Publishers Ltd. 1987), p. 62.

18 K. Ezera, *Constitutional Developments in Nigeria* (1960) pp. 105-112.

In view of the elaborate consultations which preceded the 1951 Constitution, it has been observed that "probably no Constitution in the world will ever have been put through such an elaborate or democratic process and discussion."¹⁹ Although the legal source of authority of the 1951 Constitution was still the British Parliament, which passed the enabling Law so that it was an Imperially-processed document, it has been argued that the 1951 Constitution "even in a colonial setting, could be said to be 'people's' Constitution."²⁰

The 1951 Constitution, which established a quasi-federal structure, was replaced by the 1954 Constitution. The latter established a full-fledged Federal Structure. However, unlike the 1951 Constitution which ensured wide consultations with the people and their representatives, the 1954 Constitution was the product of a Constitutional Conference which was organized along party lines with nominees of political parties monopolizing the Conference. Like the 1922, 1946 and 1951 Constitutions, the legal source of authority of the 1954 Constitution was still the British Parliament.

The 1960 Independence Constitution was also preceded by various Constitutional Conferences which were organized along party lines with selected representatives of political parties as members. Although by virtue of Section 1(2)(a) of the Independence Constitution Act, "Her Majesty's Government in the United Kingdom ceased to have responsibility for the Government of Nigeria or any

part." The legal source of the Independence Constitution was also the British Parliament. As autochthony of a Constitution is hinged on its being home-grown and home-processed, without imperial or external involvement and intervention, in so far as the pre-Independence and the Independence Constitutions were processed and enacted into Law by the British Parliament, strictly speaking, they are non autochthonous Constitutions.

Under the Independence Constitution, the Queen of England still remained the Queen of Nigeria and the Head of Government. The Queen's powers were exercised at the Federal and Regional levels through the Governor-General and the Regional Governors who were the Queen's appointed representatives. Appeals from the Federal Supreme Court were also determined by the Privy Council which served as the apex Court. The arrangement under the Independence Constitution was widely perceived as repugnant to Nigeria's status as a sovereign nation. When the need to give practical effect to Nigeria's Independence was felt, there was an all-party Constitutional Review Conference, which considered the desirable changes in the Constitution. The Conference was also organized along political party lines because it was dominated by selected representatives of political parties. Decisions at the Conference were the cornerstones of the 1963 Constitution. It was under the 1963 Constitution that Nigeria attained a Republican status. The Queen of England also ceased to be the Queen of Nigeria and rights of appeal from the decision of the Federal Supreme Court to the Privy Council were abolished. Again, like previous Constitutions, the 1963 Constitution was not processed by the elected representatives of the people. There was neither a Constitution Drafting Committee nor a Constituent

19 Miss. Perlman, *West Africa*, (August 1951) p. 78.

20 A. Ojo, *Constitutional Law and Military Rule in Nigeria*, op. cit. p. 63.

Assembly which drafted and examined the Constitution respectively. Hear Chief Bola Ige on the 1963 Constitution:

"This Constitution is one of the three we have had since Independence. None of them was initiated or drafted under a genuinely democratic environment. This particular one was conceived in bad faith. Its gestation and birth broke all rules for Constitution-making. There was no committee which collated and drafted the proposals to be included in the Constitution. There was no Constituent Assembly which deliberated on and passed the Constitution. There was no referendum through which "WE THE PEOPLE" could express our approval or disapproval."²¹

Divergent views have been expressed on whether the 1963 Constitution achieved its objectives of giving practical effect to Nigeria's Independence through an autochthonous Constitution. Dr. Elias believed that in spite of the fact that the power to enact the 1963 Constitution was derived from the imperially-processed 1960 Constitution, the former was an autochthonous Constitution. Dr. Elias argued that the Queen of England performed her last role as the "head of Nigerian monarchy and at the same time, helped to usher in the new Republic to which she became a foreigner except perhaps as the Head of the Commonwealth."²² Prof. Ben Nwabueze has argued against the autochthony of the 1963 Constitution against the

21 *Constitutions and the Problems of Nigeria* p. 23.

22 T. O. Elias, *Nigeria: The Development of its Laws and Constitution*. (Stevens, 1967) p. 121.

backdrop of the fact that it was enacted by a Nigerian Parliament pursuant to the power derived from the imperially-processed 1960 Constitution. He contends, and it is submitted, rightly so, that the 1963 Constitution was "authorized (though not directly enacted) by the British Government and as such, was ineffective to break the tie that linked Nigeria's legal order to the British Government. It failed to launch the country upon a completely new existence with Constitutional roots springing from its own native soil (the link was only broken in 1966 by the Military coup of January 15, 1966)."²³

Nigeria experienced the first Military intervention in politics in January 1966. Thereafter, it experienced various Military coups d'etat through which some amateur Military administrators used the nation "as a stage for their ignorance mediocrity, illegality and arrogance".²⁴ The factors responsible for military intervention in Nigeria have been highlighted elsewhere.²⁵ It suffices here to note that Major General Ironsi sought to alter the Federal structure by promulgating the unification Decree No. 34 of 1966. The Decree was "intended to remove the last vestige of intense regionalism of the recent past, and to produce that cohesion in the government structure which is so necessary in achieving and maintaining the paramount objective of National Military Government ... National unity."²⁶ Specifically, the Decree provided that:

23 B. Nwabueze, *Constitutional History of Nigeria* (Longman, 1982) p. 26.

24 B. Ige, *Constitutions and the Problems of Nigeria*, op. cit. p. 27.

25 T. Osipitan, "Legal and Institutional Framework for Combatting Corruption in Nigeria" in *Readings on Nigeria Law*, E.O. Akanki (ed.) pp. 4-6.

26 Broadcast to the Nation by Major General Aguiyi Ironsi. Lagos Ministry of Information (1966) p. 3.

"Nigeria shall on the 24th day of May 1966 cease to be a Federation and shall accordingly as from that day be a Republic by the name of The Republic of Nigeria, consisting of the whole territory which immediately before that day was comprised in a Federation."

The unification Decree resulted in the abolition of the Regions. The Regions became Provinces under Military Governors who were appointed by the Military Head of State. A National Military Government was established to replace the Federal Government. The civil service was also unified. The unification exercise obviously underestimated the cultural gulf and political distrusts which existed, and still exist, among the people of Nigeria. If anything, the need to ensure unity and preserve diverse interests in the country, are issues which Nigerians are agreed upon. General Ironsi's political experiment of a unified National Military Government resulted in widespread protests and demonstrations across the country. The experiment contributed to the quick demise of Ironsi's government in a bloody coup d'état in which General Ironsi lost his life. Parter-Bricks rightly testified that "it was the unification Decree (Decree No. 34 of 1966) and that part of it, which related to the civil service that caused immediate concern."²⁷

General Yakubu Gowon subsequently emerged as the Head of State in July 1966. His first assignment was to restore the Federal arrangement and this he did by creating States out of the old Regions. In spite of the

27 S. K. Parter-Bricks, "From Military Coup to Civil War January 1966 - May 1967" in *Nigeria: Political and Military Rule* (ed.) 1970 P. 24.

unified command structure of the Armed Forces, Military rulers after General Aguiyi Ironsi theoretically preserved Nigeria's Federal status. The structure of government was federal in form, but unitary in substance.²⁸

The various military governments legislated for the Federation and States through Decrees and Edicts respectively. The Decrees, which conferred legitimacy²⁹ on various military governments, suspended parts of the Constitutions and empowered the various Federal Military Governments to legislate for the peace order and good Government of Nigeria or any part thereof with respect to any matter whatsoever. State Governors were empowered to legislate for their States through Edicts, but State Edicts and the unsuspended part of the Constitution were inferior to Decrees. Any unsuspended part of the Constitution or Edict which was inconsistent with a Decree was therefore null and void to the extent of its inconsistency with the Decree.³⁰

The Courts were further prohibited from entertaining cases which challenged the competence of the Federal Military Government and a State Governor to promulgate a Decree or an Edict.³¹ Section 6 of Decree No. 1 of 1966 for example, stipulated that "no question as to the validity of this or any Decree or of any Edict shall be entertained by any court of Law in Nigeria." The decision of the Supreme Court in the case of **Lakanmi Kikelomo v. The A.G of Western Nigeria**³²

28 T. Osajima, "Federalism under the New Military Administration: in Nigeria Myth or reality?" (1986) 5 J.P.P.L. p. 60.

29 See Constitution Suspension and Modification Decrees No. 1 of 1966; No. 1 of the 1984 and No. 107 of 1993.

30 Council of University of Ibadan v. Agamolekun (1987) 1 ALL NLR 213; Ojokolo v. Alamu (1987) 3 NWLR (Pt. 61) P. 377.

31 Lekwot v. Judicial Tribunal (1997) 2 NWLR (Pt. 276) P. 410.

32 (1971) CLR P. 201.

challenging the provisions of an Asset Confiscation Validation Decree, which the Supreme Court viewed as a "legislative judgment" and therefore unconstitutional, was reversed by the Federal Military Government through the Federal Government Supremacy and Enforcement of Powers Provisions Decree, No. 28 of 1970.³³ The Decree made it abundantly clear that the military take-over of government of January 1966 was not a mere transfer of power from the civilians to the military but a revolution which destroyed the existing legal order. The message of the Decree was that a successful coup produces its own legality and consequently, the courts lack the power to challenge the legislative competence of the Federal Military Government. As rightly observed by Achike, "It was through the Decree that the Federal Military Government re-asserted its absolute and supreme authority over all laws - whether the 1963 Republican Constitution or even Decrees made by the Federal Government itself."³⁴

The departed Military Administrations successfully processed and enacted the 1979 and 1999 Constitutions into existence. The processes which resulted in the 1979 Constitution, commenced in October 1975 with the appointment of members and the inauguration of the Constitution Drafting Committee. The 49 selected members of the Committee ably led by Chief F.R.A. Williams, SAN, produced an initial Draft Constitution which reflected the views expressed by individuals, interested bodies and organizations. The Draft Constitution was publicly debated before it was

33 See A. Ojo, "The Search for Grundnorm in Nigeria - The Lakanmi Case", *International and Comparative Law Quarterly* (Jan. 1971) pp. 117, 136.

34 O. Achike, *Groundwork of Military Law and Military Rule in Nigeria* (1978) Fourth Dimension Publishers, p. 160.

forwarded to the Constituent Assembly. The Constituent Assembly deliberated on the Draft Constitution and made minor amendments before forwarding it to the then Supreme Military Council.

The Supreme Military Council accepted most of the recommendations of the Constituent Assembly but tampered with the provisions of the Draft Constitution by inserting some Decrees³⁵ in the final Constitution. Admittedly, these Decrees did not form an integral part of the 1979 Constitution. However, their inclusion in the Constitution made their amendment or repeal impossible unless the requirements of constitutional amendment stipulated in section 9(2) of the Constitution were strictly complied with.³⁶

The forty-nine wise men who drafted the 1979 Constitution were not the elected representatives of the people. The Constituent Assembly which considered the Draft Constitution consisted of elected and selected members. The elected members emerged through elections by Electoral College members made up of Local Government Council Chairmen and members who were themselves unelected representatives of the people. The report of the Constituent Assembly was also not subjected to a referendum for adoption by the people. The attempt by the Constituent Assembly to legislate the Constitution into existence was aborted by the defunct Supreme Military Council which took it upon itself to tamper with the report of the Constituent

35 National Youth Service Corps Decree No. 24 of 1975; The Land Use Decree No. 6 of 1978; and Nigeria Security Organisation Decree No. 16 of 1976. See also Section 294(5) 1979 Constitution.

36 *Nkwocha v. Governor of Anambra State* (1984) 6 SC. at p. 362; T. Osipitan, "The Land Use Act and the 1979 Constitution: Problems and Resolutions" (1991) Vols. 13, 14 & 15 J.P.P.L. pp. 65-76.

Assembly, by inserting some Decrees in the final Draft Constitution. While it is admitted that "the 1979 Constitution was the nearest to how a Constitution can be properly and democratically produced in the eighty-one years of Nigeria's political life"³⁷, speaking from the view point of the purist School, the Constitution was non-autochthonous.

As the military government which came to power through the military coup of 1983 planned to give way to a democratic government, the stage was set again for another constitution-making exercise. The Constitution Review Committee was set up in 1987 to prepare the Constitution for the new democratic dispensation. The Committee was preceded by a Political Bureau which organized and collated political debates throughout the country. However, all the 46 members of the Committee were selected by the government. The Committee's report formed the basis of discussions in the Constituent Assembly. Out of the 567 members of the Constituent Assembly, 117 were selected while 450 were elected. The 1989 Constitution, which was designed to come into force piece-meal, was jettisoned in 1993 following the annulment of the presidential election results by General Ibrahim Babangida.

The next experience was with the 1995 Constitution, which had a still birth because it was neither promulgated into law nor adopted before the death of General Sanni Abacha in 1998. It was a product of the efforts of the National Constitutional Conference which brought together 369 members. 270 members were elected while 96 members were nominated. The inclusion of selected members would definitely have

robbed the 1995 Constitution of its autochthonous status.

The 1999 Constitution, in turn, is a product of the 12-month rule of the General Abdulsalami Abubakar. In view of the evident impatience of Nigerians with military rule, the Abubakar's administration did not attempt to organise an elaborate process for the 1999 Constitution. A 25-member Constitutional Debate and Co-ordinating Committee was inaugurated in November 1998 with a mandate to organize a debate on the 1995 Constitution. The Committee requested and received memoranda from individuals and groups within and outside Nigeria. Individuals and groups were encouraged to organize and did organize workshops and symposia on the 1995 Draft Constitution. The reports of these workshops and symposia were made available to the Committee by the organisers.³⁸

The Committee also held public hearings at various Debate Centres and a Special Hearing at Abuja. The Judiciary, the Nigerian Bar Association, the Nigeria Police Force, the Press, the Nigerian Medical Association, the Nigerian Society of Engineers, the Nigerian Labour Congress, the Organised Private Sector, Market Women Association, the Students' Union appeared at the Debate Centres and made contributions. At the end of the debates and public hearings, the Committee collated and synthesised the data collected. The report of the Committee which was submitted to the Head of State indicated that Nigerians preferred

37 Bola Ige - *Constitutions and Problems of Nigeria* op. cit. p. 29.

38 For detailed account of the activities of the Committee, see Niki Tobí, "Legitimacy of Constitutional Change in the Context of the 1999 Constitution" in *Nigeria: Issues in 1999 Constitution*, Ayua, Guobadia and Adekunle (eds.) (Lagos: N.I.A.L.S., 2000) pp. 21-42.

the 1979 Constitution to the still-born 1995 Constitution.

The Provisional Ruling Council debated the Committee's report. Although it accepted most of the Committee's recommendations, it amended some parts of the Committee's report. A Draft Constitution was thereafter produced by the Federal Ministry of Justice, based on the report of the Committee as amended by the Provisional Ruling Council. The draft was re-examined by the Provisional Ruling Council and subsequently enacted into law. The enabling Law enacted the Constitution into existence with effect from 29th May 1999.

4. THE AUTOCHTHONY QUESTION - "WE THE PEOPLE"

The Preambles to the 1979 and 1999 Constitutions identically contain the above famous words "We the People". The Preamble to the 1963 Constitution also stated that "WE THE PEOPLE" but with the addition of "by our representatives." As noted earlier, the autochthony of the 1999 Constitution has been questioned against the backdrop of the insertion of these words in a Constitution which was processed and enacted into existence by the departed military rulers, who were not the people's elected representatives.

The question which must be addressed is, whether the autochthony of the Constitution is rooted within or outside the Preamble. Assuming the Preamble contains a false statement, we yet ask, "Does the falsity of the statement destroy the Constitution's autochthony? Can a Constitution that is devoid of these three words be autochthonous? What exactly is the place of a Preamble in a Constitution?"

The three words "WE THE PEOPLE" first found written expression in the Preamble to the American Constitution of 1787. Some countries have subsequently embraced these words as the badge of democracy and inserted them in their Constitutions. In jurisdictions with unwritten Constitutions, no importance is attached to these words. Great Britain, Israel and New Zealand operate unwritten Constitutions in the sense that there is no single constitutional document in each of these jurisdictions. A Preamble which contains the famous words "We the people" has never been part of the Constitutions of these countries and the autochthony of their Constitutions have not been questioned. Therefore, the autochthony of a Constitution does not depend on the inclusion in or the exclusion of these words from the Constitution.

A Preamble is neither an integral nor an operative part of the Constitution³⁹ and consequently not the source of its autochthony. A Preamble in a Constitution merely illuminates the objects of the framers of the Constitution. "The Preamble to the Constitution of the United States", observed Anticu, "illuminates the objects of the framers and thus can be a guide, but it is not construed to confer rights or powers. The Preamble explains that the objects of the framers were: to form a more perfect union, to establish justice: to insure domestic tranquility, to provide common defence, to promote general welfare and secure the blessing and liberty to us and our posterity"⁴⁰, and as rightly observed by Justice Harlan in the case of **Jacobson v. Massachusetts**: "Although the preamble indicates the

39 In exceptional cases preambles are specifically declared as integral part of the Constitution. See the Constitution (Supremacy and Enforcement of Powers) Decree No. 28 of 1970.

40 John Antieu. *Constitutional Construction* p. 31. See also Attorney-General of Bendel State v. Attorney-General of The Federation (1981) NSCC p. 314 at 369.

general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of the substantive powers conferred on the government of the United States or any of its department ."⁴¹

A survey of Preambles to the Constitutions of other countries shows that they not only make strong political, social, cultural and religious statements, but also promote specific and detailed ideologies. Some countries with history of revolution and warfare use Preambles in their Constitutions to chronicle the events and accomplishments of the past generations. In other jurisdictions, Preambles are utilised to identify leading ideological and religious foundations such as workers socialism.⁴² For example, the Preamble to the Constitutions of Vietnam (1980); and the Peoples Republic of China (1982) chronicle these nations' exploits in warfare. For **Vietnam**, it reads:

Throughout their four-thousand year history, the Vietnamese people have worked hard and fought hard to defend their country... in the spring of 1975, the Vietnamese won total victory.

For the **People's Republic of China**, it reads:

China is one of the countries with the longest histories in the world. The people of all nationalities in China have jointly created splendid culture and have a glorious revolutionary tradition.

41 (1905) 197 v. s 11; 255 CT 31.

42 See J. Curry, R. Riley & R. Battisomi, *Constitutional Government: The American Experience*, (West Publishing Co., 1987) p. 7.

Under the 1976 Constitution of **Cuba**, pre-eminence was accorded to workers Socialism, Marxism and Leninism. The Preamble reads, "We, Cuban citizens ... Guided by the victorious doctrine of Marxism-Leninism ... AND HAVING DECIDED to carry forward the triumphant revolution ... under the leadership of Fidel Castro ... AWARE ... that only under Socialism and Communism ... can full dignity of human beings be attained ..." The Preamble to the 1974 **Burmese** Constitution also contains a promise to enthrone socialism stated thus, "We, the working people ... shall ... build a socialist economic system by the Burmese way to socialism."

In the Preamble to the 1886 **Columbia** and the 1972 **Bangladesh** Constitutions, religious sentiments of these nations were highlighted. The Preamble of the former, states: "In the name of God, Supreme source of all Authority." In the latter Constitution, the Preamble states: "In the name of Allah, the Beneficient, the Merciful ... the high ideals of absolute trust and faith in the Almighty Allah ... shall be the fundamental principles of this Constitution."⁴³

A careful reading of the Preamble to the 1999 Constitution illuminates its goals as the firm and solemn resolution of Nigerians to live in unity and harmony as one indivisible and indissoluble Nation, the promotion of inter-African solidarity, world peace, international co-operation and understanding. Other objectives of the 1999 Constitution include the promotion of good government and welfare of all persons on the principles of Freedom, Equality and Justice and

43 Albert P. Blaustein & Gisbert H. Flanz (eds.) *Constitutions of Countries of the World* (Dobbs Ferry M.Y.O. Leana Pub.. 1988).

the consolidation of the unity of Nigerians. The Preamble to the 1999 Constitution of the Federal Republic of Nigeria specifically provides:

"WE THE PEOPLE" of the Federal Republic of Nigeria: HAVING 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 co-operation and understanding.

AND TO PROVIDE for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom Equality and Justice, and for the purpose of consolidating the unity of our people:

DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following Constitution."

The above full text of the Preamble to the 1999 Constitution is in contradistinction to the selective reading of the Preamble by the opponents of the Constitution who construe the Preamble thus: "WE THE PEOPLE" of the Federal Republic of Nigeria ... DO HEREBY MAKE, ENACT AND GIVE to OURSELVES the following Constitution."

The Preamble reminds us that Nigeria is an indivisible and indissoluble sovereign state where sovereignty is traceable to the people and from whom the government derives its authority to govern in accordance with the Constitution. It is also a reminder of Nigeria's sovereign status in contradistinction to being a nation under imperial rule, military dictatorship or without a sovereign government.

The words "WE THE PEOPLE" in the Preamble, however, do not mean that all Nigerians met to draft and enact the Constitution. That is physically and factually impossible. As rightly observed, what these words, "WE THE PEOPLE" connote is that "... in the art of government, there is no single authority or person that is solely responsible for the governance of the populace. Rather, the government is collectively run for the common good of all persons who have some say in their governance. This means that political power resides in the people who exercise it through their representatives in the government of the State. In its total package the word "people" includes all Nigerians irrespective of their place of origin circumstances of birth, sex, religion, political opinions and status in society."⁴⁴

5. THE SEARCH FOR THE AUTOCHTHONY OF THE CONSTITUTION

PURE AUTOCHTHONY TEST

The pure autochthony theory insists on a completely people-led and people-processed Constitution as the immutable test for the autochthony of the Constitution. The stand of the purists is that the constitution-making processes must be monopolized by the people and their elected representatives. Where there is a Constituent Assembly, it must consist of the ELECTED REPRESENTATIVES OF THE PEOPLE only and where possible, the Constitution must be approved by the people in a referendum. Chief Bola Ige argued the case of the purists as follows: "It must be a Constitution that is not only conceived by WE THE PEOPLE of the Federal Republic of Nigeria, it must be thoroughly

44 Nkidi Tobii; "Legitimacy of Constitutional Change in the Context of the 1999 Constitution" *op. cit* at p. 32.

debated and discussed by representatives of WE THE PEOPLE through a Constituent Assembly of representatives **popularly and democratically elected by universal suffrage and secret ballot, taken back to the WE THE PEOPLE** at all levels - Nationality, Ethnic interest group, local council, professional groups, the business community etc. - and subjected to debate on radio, television and newspapers and finally, if a referendum cannot be organized to decide on sensitive issues, the Constituent Assembly, acting on behalf of WE THE PEOPLE should pass and give unto themselves and all of us the Constitution of the Federal Republic of Nigeria. Once any Provisional Ruling Council decrees a Constitution for us, especially one put together by the present Constitutional Conference, we would be beginning again with an undemocratic legislation which is not likely to last more than the first term of the regime it gives birth to."⁴⁵

Indirect consultation with the people in the constitution-making process, in lieu of direct mass participation, was rejected by Chief Bola Ige. He argued, "no amount of consultations with Obas, Emirs, Obis, Obongs and Chiefs, no amount of seminars and workshops with professional or other groups, no amount of public discussion on radio, televisions, newspapers and other form can be a substitute for popular election and referendum. That is the only way the people's democratic will and power can be demonstrated and gauged. All other methods are merely bamboozlement."⁴⁶

45 Constitutions and the Problems of Nigeria, *op. cit.* at p. 32.

46 *Ibid.* at p. 13

The processes which resulted in the 1979 Constitution definitely failed to comply with the above prescription of Chief Bola Ige on the monopoly of the constitution-making processes by the **people** and their **elected representatives**. The Constitution Drafting Committee, which produced the initial draft Constitution, consisted wholly and exclusively of **selected members**. The Constituent Assembly also had **some selected members**. The report of the Constituent Assembly was not subjected to any referendum.

Finally, the Constituent Assembly did not pass the enabling law which gave life to the 1979 Constitution. Notwithstanding these deficiencies, Chief Bola Ige was yet prepared to invest the 1979 Constitution with autochthony. He said:

"... the 1979 Constitution was the nearest to how a Constitution can be properly and democratically produced in the eighty-one years of Nigeria's political life. At the risk of sounding immodest, no Constitution Drafting Committee by whatever name called either before 1975-6 or since then can be said to be more distinguished, more national and nationalist in outlook, more selfless and more hardworking than the Committee under the distinguished and wise Chairmanship of Chief F.R.A. Williams, SAN. A careful look at the Draft Constitution will show that the provisions therein remain the best and most pragmatic method of constitutional engineering that can proffer solution to the problem of Nigeria".⁴⁷

47 *Ibid.* at p. 29

The above stand of Chief Bola Ige is at variance with the position of his political mentor, Chief Obafemi Awolowo who insisted on the monopoly of the constitution-making processes by the people and their elected representatives as the only test for the Constitution's autochthony. In his *Thoughts on the Nigerian Constitution*, Chief Awolowo, argued that the inherent and inseparable attribute of the Constituent Assembly "is that it must be composed of representatives duly elected by registered voters in the country. This we must have. Anything other than this, I submit, cannot in strict constitutional sense and usage be a Constituent Assembly. And it would be a grand deception to give it that name".⁴⁸

Mr. Vice-Chancellor Sir, it is evident that even among heroes of like minds, autochthony of the Constitution has not only failed to produce a *consensus ad Idem*! It has created a gulf.

But will popular election of drafters of the Constitution foster an autochthonous Constitution for Nigeria? Will elected members of a Constituent Assembly be sufficiently knowledgeable, selfless and non-partisan as to be able to produce a living and enduring Constitution? Will the elected members not see their participation in election, as investments which must yield dividends through the insertion of personally beneficial provisions in the Constitution? Will they not, like the members of the 1979 Constituent Assembly use the Assembly as a platform to secure their political future?

48 Chief Obafemi Awolowo, *Thoughts on Nigerian Constitution* (1966) p. 133.

Elections in Nigeria seldom produce selfless and knowledgeable candidates. Elections are marred by electoral fraud and malpractices with the result that election results are hardly credible. There is no assurance that election into the Constituent Assembly will produce the experienced and selfless representatives who will examine the Constitution. For example, while the unelected members of the Constitution Drafting Committee of the 1979 Constitution, under the able leadership of Chief F.R.A. Williams SAN, "were selfless and hardworking, the elected members of the Constituent Assembly were busy negotiating and securing their political future with the result that the deliberations of the Constituent Assembly was not as good as what was contained in the draft."⁴⁹ A nation needs more of selfless and committed citizens and less of persons with political ambitions to draft its Constitution. As rightly observed, "... popular election might not throw up the calibre of people who would be able to do justice to the draft Constitution. Popularity is certainly not the same thing as common sense and knowledge of Constitution-making. A Constituent Assembly is not merely a forum for political aspirants alone but also a serious venue for a thorough consideration of a draft constitution clause by clause, word for word by apolitical persons so that those with naked political ambitions are not allowed to throw out the baby with the bath water. Popular election may not cater for this mischief."⁵⁰

Our past and present Constitutions, viewed from the prescription of the pure autochthony theory, on the monopoly of the constitution-making processes by the

49 Bola Ige, *Constitutions and the Problems of Nigeria*, *op. cit* at pp. 29-30.

50 A. Ojo, *op. cit* fn. 17 at p. 74.

people and their elected representatives, are non autochthonous. Similarly, Constitutions of most countries will fail the monopoly test of the purists.

SUBSTANTIALITY OF PROCESS TEST

The principle of substantiality of the process of Constitution-making has been embraced as an alternative to the purist requirements of monopoly of the processes by the people and their accepted representatives. Where there is evidence of substantial input by the people in the constitution-making process, such Constitution is autochthonous provided there is no imperial intervention or influence in the process. Under the principle, it is not mandatory that the processes be monopolized by the elected representatives of the people. In this view, a constitution that has been processed by a body which includes selected members can yet bear an autochthonous label. For example, despite the selection of all members of the Constitution Drafting Committee which drafted the 1979 Constitution, and the inclusion of unelected members in the Constituent Assembly, if the departed military government had not tampered with the draft Constitution, the 1979 Constitution would have been labelled as autochthonous because "it was **substantially** a product of the will of the people of Nigeria."⁵¹ It has been rightly observed that "In order to determine whether a Constitution is autochthonous or not, the entire constitution-making process should be taken into consideration and examined not in bits and pieces. Therefore, once the totality of the constitution-making process moves or slides in favour of a home-grown and home-made nature and content, the Constitution qualifies for the appellation "autochthonous"⁵²

⁵¹ *Ibid.*

⁵² Niki Tobl, *op. cit.* at p. 30.

The 1963, 1979, and 1999 Constitutions were processed in Nigeria, for Nigerians under an exclusively non-imperial Nigerian government. Admittedly, their processes were not monopolised by the elected representatives of the people, but these Constitutions are autochthonous under the substantiality of process principle.

THEORY OF ACCEPTANCE OF THE CONSTITUTION

Proponents of a Sovereign National Conference point to the fact that it was the departed military administration of General Abdulsalami Abubakar that processed and legislated the 1999 Constitution into existence in response to the people's clamour for a new Constitution. They contend that as the people were not fully engaged in the birthing of the Constitution, there is need to remedy this through the convocation of a National Conference. Dr. Lateef Adegbitc presented his plea for a National Conference thus:

"There is a need for a National Conference because none of the country's Constitution either before or after independence can be called the people's Constitution. ... The National Conference is needful because the Constitutions we have adopted in our history have never been people-driven. Our pre-independence Constitution was a colonial one, the 1979, 1989 and 1999 Constitutions were formulated Military Constitutions. **The time has really come for the country to have a Constitution designed by the people**".⁵³

⁵³ *The Guardian* of 31/5/2004 at p. 8.

Chief Supo Shonibare, a frontline advocate of Constitutional Conference also justified the call for a Conference where the People's Constitution would be drafted thus:

"The 1979, 1989 and 1999 Constitutions are all derived from the Military. Even the 1979 Constitution, which had more input from the Nigerian people than the other two was faulty. It was more or less presented structurally with a *fait accompli* about the basic issues that were to be the foundation of the Constitution. Once there is a Constitution Drafting Committee before a Constituent Assembly as they did in 1979, then the outcome of the Constitution had already being (sic) manipulated".⁵⁴

It is evident that both Dr. Adegbile and Chief Shonibare adopted the legal source of authority as the exclusive basis of determining the question of autochthony of a Constitution. They both ignored the fact of "acceptance of the Constitution" by the people, in contradistinction to its legal source, as an alternative test of the Constitutions' autochthony. A Constitution with extra-legal origin, which has been accepted and effectively applied by the people, is as autochthonous as a Constitution processed by the elected representatives of the people. Mr. Vice-Chancellor, Sir, I find strong corroboration for the above position, in the views expressed by the doyen of the legal profession, Chief F.R.A. Williams SAN. In a lecture which he delivered under the auspices of UBA PLC, shortly after the 1999 Constitution became operative, he said:

⁵⁴ See *The Guardian* of 1/6/2004 at p. 9.

"A Constitution can have an extra legal origin. What is meant by this is that in its origin the Constitutional law of a State can be enacted by an authority which does not claim to derive its power to enact a Constitution from the existing legal order. This happens either following a revolution or with the acquiescence or by the permission of a revolutionary regime. A Constitution enacted by a Revolutionary Government will have as much validity as one enacted by a Constituent Assembly set up by a Decree enacted by such a Revolutionary regime."⁵⁵

A careful study of Constitutions of other countries reveals imperfections in origin and texts. It is heart-warming that in most jurisdictions, identified imperfections have been corrected through constitutional amendments. Most nations have resisted the temptation of completely razing their constitutions to the ground and rebuilding on entirely new foundations. I shall illustrate the above point with the British and American Constitutions. The British Constitution is unwritten in the sense that it is not contained in one constitutional document. It also has a revolutionary origin because no elected representatives of the people or unelected members of a drafting committee sat down to draft the British Constitution. The British Constitution has never been made but has grown from written sources namely: "decided cases, statutes, and writings of jurists where other guidance for the court is lacking".⁵⁶

⁵⁵ *A Constitution for the People of Nigeria* op. cit. at p. 8.

⁵⁶ Eldonney, *Public Law* p. 10.

The origin of the British Constitution is traceable to the reign of King James II. King James II was deposed by a revolutionary cabal which constituted itself into a Parliament and invited William of Orange and Mary his wife to don James's Crown. The revolutionary cabal thereafter "proceeded by a remarkable piece of bootstrapping to declare itself to be a valid Parliament and William and Mary to be entitled to the Crown."⁵⁷ The process did not involve the people and their elected representatives. No one sat to draft the British Constitution in the way the 1979 and 1999 Constitutions of the Federal Republic of Nigeria were drafted. There was no Constitution Drafting Committee, no Constituent Assembly and no Referendum. It has been acknowledged that "if the legality of the source of a Constitution were (sic) the criterion for its validity it is only a brave man that would assert that the United Kingdom ever had a valid Constitution"⁵⁸ The autochthony of the British Constitution has, however, never been challenged, the way and manner our past and present Constitutions have been denounced. On the contrary, the British Constitution and the Institutions created "were accepted and within a remarkably short space of time the new institutions thus established came to enjoy, if not universal acquiescence, at least the support of a sufficient number of people including those wielding sufficient force to render the new Constitution effective."⁵⁹

57 H. Culvert, *British Constitutional Law* (1985) Financial Training Limited P. 27.

58 *Ibid.* at p. 5.

59 *Ibid.* at p. 27.

The **selected** delegates who gathered in Philadelphia to draft the American Constitution were certainly not the elected representatives of the people although they were men of fame and wisdom. Among them were lawyers, physicians, land owners, businessmen and bankers. Women, slaves, "back country folks" and city mechanics who were wage earners were, however, not represented at the Philadelphia Convention.

After months of intense debates and compromises, the Convention decided that the Articles of Confederation should be supplanted by a new Constitution. However, not all the members of the Convention voted in favour of the new Constitution. Sixteen delegates had, for example, departed Philadelphia in protest before the end of the Convention. Out of the seventy-five selected delegates, only fifty showed up at the Convention. Rhode Island outrightly refused to send delegates to the Convention. Twelve of the delegates who were reportedly vocal during the Convention monopolised proceedings of the Convention. It was decided that the Constitution would only stand approved, if it received support of at least nine out of the thirteen States. The Constitution was finally ratified by all the States and thereafter, it became the Supreme Law of the Land.⁶⁰ During the ratification exercise, there were votes against the adoption of the Constitution. There were also those who voted in favour of its adoption, only on the condition that necessary amendments reflecting the Bill of Rights would be made immediately after the adoption of the Constitution.

60 Edward S. Corwin, *Background to American Constitutional Law* (1928) *Harv. Law Rev.*, p. 129

Strictly speaking, the selection of members of the Convention and the exclusion of representatives of women, and "back country folk and city mechanics" from the Convention, from the view-point of the purists, negatively impaired the autochthony of the American constitution. Yet, notwithstanding the imperfections in its Constitution-making processes, the autochthony of the American Constitution has not been seriously questioned by Americans. The Constitution has been accepted and effectively applied throughout the United States of America for centuries and has served as model to emerging democratic nations. All the drafters and ratifiers of the American Constitution are presumably dead. More than two centuries after its ratification, the Constitution remains the supreme law of the land. There are no immediate plans for the Constitution to be supplanted by a new Constitution despite the fact that "the people" who drafted and ratified it and for whose immediate benefit it was made are presumably dead. The present generation of Americans has not jettisoned the Constitution on account of the fact that it was made by a past generation.

The acceptance of the American Constitution by the past and present generation of the people of the United States of America is the hallmark of the autochthony of the American Constitution. A Constitution can only become the organic law of a country if it is accepted and allegiance is given by the people, to the Government established by such Constitution. Loyalty to the Constitution may not necessarily be a matter of choice. It is a matter of habit which is bred into us before we know it. No autochthonous Constitution can sustain a bad government. But a good government can sustain the autochthony of a Constitution which has not been processed and drafted by the elected representatives of the people.

Autochthony of the Constitution can be sustained by the government making adequate provisions for food, shelter, and transport available to the people at either subsidised⁶¹ or affordable rates. Educational and employment opportunities, payment of meaningful wages and provision of benefits during sickness and unemployment are some of the other factors through which a government created by a Constitution can be sustained. In other words, the Constitution meets the aspirations of the people. Legitimacy and invariably autochthony of the Constitution, however, breaks down where a bad government is unable to satisfy the economic, social and political aspirations of the people. People find it easier to associate with a good government even where such government is not the product of a strictly autochthonous constitution than with a bad government which is an off-shoot of a people-processed Constitution.

6. THE CRISIS

It must be said that much of the clamour for an autochthonous constitution cannot be divorced from the political history of Nigeria and the failure of Nigerian governments to meet the people's aspiration for a just and equitable society.

The 1960 and 1963 Constitutions embraced the Westminster Parliamentary system which created a distinction between the offices of the Head of Government and Head of State. Under these Constitutions, the President was the ceremonial Head of State while the Prime Minister was the effective Head of Government. At Regional level, the Governor

61 J. Curry, R. Riley & R. Baltistone, *Constitutional Government: the American Experience* op cit. at p. 64.

was the ceremonial Head of the Region, while the Premier was the Head of government. The President was empowered to advise the Prime Minister on national issues but his advice was not binding on and in some cases, were ignored by the Prime Minister. For example, the 1964 Federal Election was conducted contrary to the advice of the President that it should be postponed to a more convenient date. This resulted in complete and partial boycott of the Elections in the Eastern and Western/ Mid-Western Regions respectively. The shared powers of the President and Prime Minister strained and stressed the political system. As rightly observed, "It is very difficult for a Head of State in Africa to occupy the position of titular head. Even if he reluctantly accepted such a position, there was bound to be a personality clash between the Head of Government and the Constitutional Head of State because such a concept is still alien to the African who has been used to seeing his leaders (traditional and local leaders) wield enormous powers."⁶²

The Western Region of Nigeria soon presented an example of the crisis that can emanate from such shared powers. The rivalry between Chief Obafemi Awolowo, the leader of the Action Group and Chief S.L. Akintola, the Regional Premier and deputy leader of the Group resulted in a *Vote of No Confidence* passed by members of the Region's House of Assembly in the Premier. The parliamentarians had through a letter requested the Governor to remove Chief S.L. Akintola as the Region's Premier. The request, however, did not emanate from any debate on the floor of the House nor was it supported by a motion. It was on the strength of the letter, that

the Governor removed the Premier and appointed Chief Adegbenro as the new Premier. Chief Akintola not only challenged his removal from office, he also refused to vacate office. The Federal Supreme Court declared his removal from office void because a motion for his removal was not passed by the House. The Federal Supreme Court's decision was reversed by the Privy Council⁶³ which held that once it was apparent to the Governor that the Premier did not enjoy the confidence of the House of Assembly he could be removed from office without a motion duly passed by the House.

Immediately after the Privy Council's decision, the Constitution of the Western Region was amended⁶⁴ with the result that the Region's Premier could only be removed, if there was a motion passed by the House requesting for his removal on the ground that he had ceased to enjoy the confidence of members of the House. The amendment which was given retrospective effect to 2nd October 1960 and ratified by the Federal Government enabled the Premier to remain in office despite the decision of the Privy Council. Also the right of appeal against decisions of the Federal Supreme Court to the Judicial Committee of the Privy Council was abolished in the arrangement that saw the Federal Supreme Court becoming the apex Court.

These bold steps, however, proved insufficient to stem the tide of political dissatisfaction which soon manifested in arson and thuggery and general breakdown of law and order in the Western Region. The crisis resulted in the declaration of a state of emergency in the Region by the Federal Government. The nation continued to experience general insecurity

62 J. D. Ojo, *The Development of the Executive under the Nigeria Constitution 1960-1981* (Ibadan: University of Ibadan Press) pp. 7-8.

63 *Akintola v. Aderemi* (1962) WLR 185.
64 Western Nigeria (Constitution Amendment) Law 1963.

and when civilians were unable to arrest the worsening political turmoil, the military intervened in January 1966.

Nigeria experienced military dictatorship between 1966-1979 and 1984-1999. During these periods, the country became a pawn in the hands of amateur military administrators who supplanted merit with mediocrity, fostered divisiveness, disregarded fundamental rights and pillaged the country's wealth. Under some of the military rulers, corruption was perceived as "a right step in the right direction", to the extent that if God had not, in his divine wisdom, exclusively monopolised the control and the distribution of air, those who dared to speak or write to challenge corruption would have died as a result of deliberate withdrawal of supply of air to them by corrupt rulers and their accomplices.

Democratic governments did not necessarily prove better. During the Second Republic, Nigeria experienced widespread corruption, election malpractices and glaring undermining of the letters and spirit of the 1979 Constitution. The problems created by politicians and operators of the Constitution resulted in the demise of the second Republic.

INTER-GOVERNMENTAL RELATIONS

Operators of our past and present Constitutions have constantly misconceived Federal principles and inter-governmental relations. A Federal Government is a plural government, consisting of at least two tiers of government with powers being shared between the federating tiers of government within the Federation. As such, there must be interaction between agencies and officials of the different tiers of Government. Unfortunately interaction and inter-governmental relationships which should ordinarily foster co-

operation have often resulted in confrontation and the struggle for ascendancy between the various tiers of government and their officials. While some officials of the Federal Government, in the belief that "might is always right" perceive Federalism as an instrument of oppression, some officials of state governments also see Federalism as a weapon of confrontation. These divergent forces have continuously heated up the political system.

The controversies which arose from the application of the Land Use Act under the 1979 Constitution illustrates how operators of our Constitutions negatively manipulate clear provisions of the Law to the detriment of citizens. Land is evidently crucial to the survival of the government and the governed. "Land is the foundation of shelter, food and employment. Man lives on land during his life time and upon his demise his remains are kept in it permanently."⁶⁵ "Likewise a government has to exist on land; it cannot exist in the air or on water."⁶⁶ The Land Use Act was inserted in the 1979 Constitution⁶⁷ purposely to ensure that its provisions were neither altered nor repealed except in accordance with the procedure stipulated for Constitutional amendment. The Act has also been inserted in the 1999 Constitution.⁶⁸ It has, however, been decided that notwithstanding its insertion in the Constitution, the Land Use Act is not an integral part of the Constitution.⁶⁹

65 Omotola; *Land Law and Rights: Whither Nigeria?* (Lagos: University of Lagos Inaugural Lecture Series, 1988) p. 8.

66 Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, p. 153.

67 Section 274 (5) 1979 Constitution.

68 Section 315 (5) 1999 Constitution.

69 *Nkwocha v. Governor of Anambra State* (1984) 6 SC p. 362; see Taiwo Osipitan, "The Land Use Act and the 1979 Constitution: Conflicts and Resolutions" 1990 Vols. 13-15 J.P.P.L., pp. 65-76.

Under the Land Use Act, the State Governor is a trustee of land within the State who holds land in trust for the use and common benefits of all Nigerians.⁷⁰ The State Governor is empowered by the Act to grant right of occupancy to any person or organisation.⁷¹ Land held by the Federal Government and its agencies at the commencement of the Act are exempted from control by a State Governor.⁷² Where the Federal Government and/or any of its agencies subsequently require land in a State for the execution of Federal projects, land can only be acquired through the State Governor. In such situation, the Federal Government is expected to notify the State Governor that it **requires** for land for its projects and on receiving such request, the State Governor should acquire and make the land available to Federal government.⁷³ But how did operators of the law in the Second Republic apply these clear provisions of the Land Use Act?

In the former Bendel State, the State Governor refused to make land available to the Federal Government for the construction of low-cost houses⁷⁴, which the latter, had planned to sell at subsidized prices to the good people of the State. The Oyo State Governor similarly failed to make land available to the Federal Government to build low-cost houses.⁷⁵ The Federal Government, however, constructed some houses in Oyo State on land which was neither acquired nor made available to it by Oyo State Government. As a result, the latter demolished 38 units of the Federal Low-cost Houses

70 Section 1 Land Use Act.
 71 Section 5 Land Use Act.
 72 Section 49 (1) Land Use Act.
 73 Section 28 (4) Land Use Act.
 74 Daily Times of 18/4/81.
 75 Daily Times of 26/2/81.

built by the Federal Ministry of Housing in the State. The Federal Minister of Housing reacted to the demolition of the Houses, in the following words:

"The Act (i.e. the Land Use Act) empowered the Federal Government ... to acquire the land on which the official residence of Chief Bola Ige stood, if it so wished and there was nothing the Governor or any person could do about it under the Act".⁷⁶

Wrongful perceptions of federalism impinged on the application of the clear provisions of the Land Use Act and resulted in the avoidable confrontation between Federal, Bendel and Oyo State Governments. A careful reading of the provisions of the Land Use Act reveals that the Federal Government lacks the power of direct acquisition of land in any State. Where the Federal government requires land to execute Federal projects, in a State, it must channel its acquisition through a State Governor who, in turn, has a statutory obligation to acquire the required land and make it available to Federal Government.⁷⁷ A State Governor has no discretion to exercise on the Federal Government's request for land. He must make land available. Mandamus is a proper cause of action against a State Governor who deliberately refuses to make land available for the execution of Federal projects in his State.

Admittedly, there has been a breach of the law by the Federal Government, pertinent questions which require answers include, "Why should a State Government, whose indigenes would have been the direct beneficiaries of Federal

76 Daily Times of 26/2/81.
 77 Section 28(4) Land Use Act.

projects, demolish houses merely because they were constructed by the Federal Government that was controlled by a different political party? Why should a State Governor outrightly refuse to make land available to the Federal Government for the execution of Federal projects which would be beneficial to the residents of the State, merely because he belonged to a political party different from that of the Federal Government?" The point which operators of our Constitutions fail to appreciate is that Federalism is neither synonymous with the battle for ascendancy⁷⁸ between the Federating tiers of government nor designed to promote ethnic demagogues. Federalism is all about cooperation, good governance and fostering of socio economic interests of the people who reside in a Federation. Surely, the ultimate losers in the hostilities between the Federal and Oyo/Bendel States are the good people of Oyo and former Bendel States who were deprived of the benefits of becoming proud owners of those demolished and unbuilt houses!

The evident co-operation which currently exists between the Federal and Ogun State Governments under the present Constitution is heart-warming. It is noteworthy that both Governments are controlled by the Peoples Democratic Party. The Sagamu-Abeokuta, and the Sagamu Ijebu Ode Express Roads are Federal roads and by virtue of the Federal Highway Road Act and Item 63 of the Exclusive Legislative List of the 1999 Constitution,⁷⁹ these roads are under the control of the Federal Government. Yet, the positive impact of the Ogun State Road Maintenance

78 See Taiwo Osipitan; "Inter-Governmental Relations and the 1999 Constitution: Problems and Prospects (1990)", in *Justice* Vol. 1, No. 2, pp. 27-39.

79 Second Schedule 1999 Constitution.

Agency (OGROMA) on these two roads is all too visible. The Sagamu-Abeokuta Road is currently being dualised by OGROMA, while the Sagamu-Ijebu-Ode Express Road has been resurfaced by OGROMA under the visionary administration of Otunba Justus Olugbenga Daniel, the Executive Governor of Ogun State.

The Federal Minister for Works recently promised to engage the services of OGROMA to construct part of the Lagos-Sokoto Road. Whether the dualisation and resurfacing of Federal roads by the Ogun State Government is the result of Federal Government's promise to defray the expenses incurred by Ogun State Government on these roads is for the moment irrelevant. What is commendable is the evident co-operation between the two governments. The beneficiaries of the co-operation are the good people of Ogun State and other Nigerians who use these roads. Lagos State, despite its common boundary with Ogun State and its status as the nation's commercial nerve centre, has not been fortunate in her relationship with the Federal Government. When officials of the Federal Government are not preventing Lagos State officials from controlling traffic on Federal roads within the State, they are struggling with Local Government Councils officials in the State to take over and control Marina Car Park, which is evidently an item within the constitutional powers of Local Government Councils.⁸⁰

Interestingly under one of the past military administrations, there was the Control of Traffic (Temporary provisions) Edict of 1977⁸¹ which enabled

80 Item F of Fourth Schedule to the 1999 Constitution.

81 Edict No. 1 of 1977.

the State to regulate the use of vehicles by their owners on Federal and State roads in order to reduce traffic on the roads. The right of the State Government to regulate use of vehicles on Federal roads within the State was unchallenged by the then Federal Military Government.

Can the possible hostile treatment of Lagos State by the Federal Government be the result of the perceived confrontational attitude of the Executive Governor of Lagos State, Asiwaju Ahmed Bola Tinubu? Could it be as a result of the control of Lagos State Government by a party different from the Federal Government-controlled Peoples Democratic Party? Is the hostility in any way connected with the preparation for the battle between Alliance for Democracy and the Peoples Democratic Party for the soul of Lagos State in 2007? Why should the powers of Lagos State Government to beautify and control traffic on Federal roads in the State be curtailed or foreclosed by the Abuja-based Federal Government. Can the Federal Government effectively control traffic in Lagos State from Abuja? In how many of the states controlled by the Peoples Democratic Party is the Federal Government controlling traffic on Federal roads? Why should the Federal Government withhold revenue due to Local Government Councils in some States before requesting the Supreme Court to decide on the legality or otherwise of the newly created Councils? The list of "whys" is endless. The point being made is that these highlighted problems are unconnected with the autochthony or otherwise of the Constitution nor with defects in the text of the Constitution, but are the result of the negative attitude of the operators of the Constitution, politicians and their supporters.

THE POLITICS OF FEDERAL HIGH COURT

The judiciary has also been adversely affected by the wrong application of federal principles. Prior to 1973, Regional (later State High) Courts exercised jurisdiction over Regional (State) and Federal causes. In 1973, the Federal Revenue Court was established in order to expeditiously determine Federal Government's revenue cases which the State High Courts were too tardy to deal with.⁸² The Federal Revenue Court functioned as a Court of limited and special jurisdiction until 1979 when it was renamed as Federal High Court.

The renaming of the Court was the turning point in the perception of the Court as essentially a Federal Court with exclusive jurisdiction over Federal revenue-related matters. The Court started to be perceived as having exclusive jurisdiction over all Federal causes. The arrangement created jurisdictional conflicts between States and Federal Courts.⁸³ The 1999 Constitution confirms the expansion of the Federal High Court's jurisdiction and a shift from its limited to a full-blown jurisdiction over Federal causes and matters. The desirability of dual High Court system in Nigeria has been examined elsewhere.⁸⁴

A disturbing aspect of the dual High Court system is the politics of forum shopping currently being experienced in the High Courts. Potential plaintiffs prefer to sue the Federal Government in State High Courts. The Federal Government, her officials and agencies, prefer to sue and be sued in the Federal High Court. State Governments also prefer to sue and

82 *Jammal Steel Structure Ltd. v. A.C.B. Ltd* (1983) 1 All NLR (Pt 1) p. 208 at 222.

83 The crisis of Jurisdiction under the 1979 Constitution - State vs Federal High Courts, (1983) Nig. Current Law Review pp. 231-248.

84 T. Osipitan, "Two Decades of Jurisdictional Conflicts: Two High Courts or One?" (1993) Nig. Current Law Rev. pp. 94-107.

be sued in the State High Courts. Potential plaintiffs feel more comfortable suing State Governments in the Federal High Court. An arrangement which enables parties to prefer one High Court to another, definitely compromises the integrity and independence of the judiciary. Hear the lamentation of Ray Ekpu;

"When you take a cursory look at the battles of jurisdiction between Federal and State High Courts, you may think it is purely a matter of law, but if you look a little more closely you may convince yourself that it is also a matter of politics. Federal officials and institutions that are arraigned before State High Courts look at these courts with suspicion. State officials and individuals who are taken to Federal Courts view these courts with distrust because of the attitude of some Judges. But why can't someone in Benin hope to get justice at a Federal High Court in Lagos? Why should justice be determined by politics or geo-politics."⁸⁵

THE NATIONAL JUDICIAL COUNCIL

Federalism has also been the plank for opposing the establishment of the National Judicial Council under the 1999 Constitution. The Council which is headed by the Chief Justice of Nigeria, has the next most senior Justice of the Supreme Court, five retired Justices of the Supreme Court or Court of Appeal, the Chief Judge of the Federal High Court, Five Chief Judges of State High Courts and High Court of the Federal Capital

Territory appointed in rotation to serve for two years, one President of Customary Court of Appeal, one grand Khadi both to serve for two years and Five members of the Nigerian Bar Association with not less than 15 years post call experience as members. The Council is empowered to recommend to the President and State Governors, persons whose names are submitted to it for appointment as Judicial Officers. The Council also recommends disciplinary actions against erring judicial officers.⁸⁶

Advocates of Federal principles who perceive the National Judicial Council as a Federal agency argue that its existence is repugnant to Federalism. Prof. Jadesola Akande contends that "The establishment of this body may have corrected one problem – the perceived problem of the manipulation of State judiciaries by the State Governor – but it has violated the cardinal principle of Federalism i.e. the autonomy of Federating units."⁸⁷

Contrary to the above position, there is nothing unfederal in centralising the appointment, promotion and discipline of judicial officers. The National Judicial Council as the name suggests, is a national body. It is neither a Federal nor a State agency. The appointment of five Chief Judges of States High Court, Grand Khadis, Presidents of Customary Courts of Appeal, retired Justices of the Supreme Court, Court of Appeal and private legal practitioners, (nominated by the Nigerian Bar Association) as members of the Council negates the perceived Federal status of the National Judicial Council.

85 Ray Ekpu, "Fata: Williams: 'Nigeria's Lord Denning' " *Sunday Concord* of 3/4/83 at p 3.

86 See Third Schedule Part I Sections 20 and 21. 1999 Constitution.
87 J. O. Akande, *Introduction to the Constitution of the Federal Republic of Nigeria*. (Lagos: M.I.J. Professional Pub. (1999) p. 271.

The National Judicial Council has under the able Chairmanship of the Chief Justice of Nigeria, Hon. Justice M. L. Uwais, GCON, sustained the independence and integrity of the judiciary. The Council has decisively disciplined erring judicial officers who would otherwise have been shielded from disciplinary actions by the Executive arm of Government. The Council has also avoided questionable and politically motivated judicial appointments which are capable of undermining the integrity of the judiciary. Under the 1979 Constitution, it was possible for State Governors to manipulate State Judicial Service Commissions to appoint their friends, relatives and even political associates as Judges. Such questionable appointments are practically impossible under the 1999 Constitution.

The controversy on the appointment of the Chief Judge of Enugu State illustrates the vital role of the Council in insulating the judiciary from Executive and Legislative manipulations. In September 2004, when the need to appoint a substantive Chief Judge of Enugu State arose, the State Judicial Service Commission took an unorthodox "democratic" step of voting in support of the appointment of the second most senior Judge in the State judiciary. The voting ensured that the most senior Judge was sidelined. The established practice is that unless found guilty of professional misconduct, the most senior Judge should be recommended by the State Judicial Service Commission for appointment as the State Chief Judge. In view of the fact that no misconduct was alleged or proved against the most senior Judge, the National Judicial Council rightly rejected the recommendation made by the State Judicial Service Commission and further recommended that the most senior Judge should be appointed as the Chief Judge. The Council further reprimanded the State Judicial Service Commission for their unbecoming

conduct of condoning the travesty of the selection process for judicial officers. In line with the Council's decision, the State Governor forwarded the name of the most Senior Judge to the State House of Assembly for confirmation as the Chief Judge. The House has refused to assent to the appointment of the Chief Judge despite the recommendation of the National Judicial Council.⁸⁸ If we may counsel that unlike an advice which may be ignored, a recommendation should be implemented by the Executive and Legislative Arms of Government.

The point which advocates of Federal principles have consistently ignored is that Federalism recognises co-operation and inter-dependence between the various federating units. Separateness need not extend to the whole of Governments' machineries. Certain agencies such as the Courts and the National Judicial Council may be common. For example, under the 1999 Constitution, appeals from State Courts are determined by the Court of Appeal and the Supreme Court which strictly speaking, are Federal Courts. Similarly, in spite of the Federal structure, Judges of State High Courts are appointed as Justices of the Court of Appeal and thereafter, as Justices of the Supreme Court. The decisions of the Supreme Court and the Court of Appeal are also binding on State High Courts. As rightly observed, in the case **Bronik Motors Limited v. WEMA Bank Limited**⁸⁹ "one unique feature of the 1979 Constitution is the flexibility in the apportionment and exercise of powers as between the Federal and State tiers of government. Although adequate provisions are made for separation of powers so that one government as it were, does not encroach upon the sovereignty of

88 See *The Guardian* of 23/10/2004 at P. 3.

89 (1985) 6 NCLR 1 at 30.

the other, cases abound where the National Assembly can by legislation impose functions on the State House of Assembly and vice-versa".

FISCAL FEDERALISM AND RESOURCE CONTROL

Control of resources and the appropriate allocation of revenue derived from natural resources is one of the reasons for the clamour to restructure the Federation. Under the 1960 and 1963 Constitutions, 50% of revenue from natural resources was allocated to the Region where such resources were located under the derivative principles. In calculating the quantum of revenue derived from a Region for the purpose of determining the royalties payable, a Region's Continental Shelf was regarded as part of the Region. Under section 162(5) of the 1999 Constitution, a natural resource producing State, is entitled to not less than 13% of the revenue derived from the State. Unlike the 1960 and 1963 Constitutions, which treated revenue derived from the Continental Shelf as part of revenue derived from the Region, the decision of the Supreme Court in *Attorney-General of the Federation and Attorney General of Abia State and Others*⁹⁰ creates a dichotomy between resources located on-shore and off-shore. It was decided that for the purpose of the application of the derivation formula, littoral states are only entitled to 13% of the revenue from natural resources located on-shore with the result that revenue from natural resources located off-shore are presumed not to have been derived from the littoral states.

The Supreme Court's decision evidently affected the financial fortunes of the littoral states, because most of the natural resources are located off-shore. The Federal government partially abrogated the effect of

90 (2002) 6 M.J.S.C. p.1.

the decision of the Supreme Court in the resource control case through the on-shore and off-shore Dichotomy Act of 2004. The Act, which reduces the off-shore area by 25%, has been challenged by nineteen Northern State Governors and some South-West Governors. The decision of the Governors to challenge the constitutionality of the Act, which seeks to give more revenue to the littoral states, where these natural resources are derived is bound to widen the gulf between the plaintiffs and indigenes of the oil producing areas, whose farming and aquatic lives have been and are still being disrupted as a result of oil prospecting. Perhaps we need to remind ourselves that a give-and-take approach will strengthen the Federal structure.

7 THE WAY FORWARD

Mr. Vice-Chancellor, the 1999 Constitution, which has served as Nigeria's grundnorm since 29th May 1999, is admittedly not a perfect document for the obvious reason that it was drafted by mortals. The existence of enabling provisions on Constitutional amendments in the 1999 Constitution and in Constitutions of other countries corroborates the fact that there can be no perfect Constitution. We can definitely improve the Constitution, but we cannot have a perfect document because perfection is the exclusive preserve of the Almighty God. There is merit in the clamour for political restructuring of Nigeria in order to ensure fair allocation of powers and resources. The 1999 Constitution evidently fails to sustain a fair equilibrium between the Centralists and the Stateists. We must appreciate the fact that a meaningful balance in the Federal structure will only be achieved "when there is adequate autonomy granted to Regional governments to protect the interest of the people while allowing enough transference of power to the Central government to ensure single nationhood and enough control to

protect the essential interests of the nation as a sovereign unit".⁹¹ Political and fiscal federalism, devolution of powers from the centre to the states, establishment of State Police Forces and the curtailment of immunities enjoyed by the President, Vice-President, Governors and Deputy-Governors are some of the issues which have to be addressed under the 1999 Constitution.

In addressing our constitutional problems, we are faced with different options. A decision on which of options to adopt will depend on whether we believe in the un-negotiated corporate existence of Nigeria or whether we perceive Nigeria as a mere geographical expression, consisting of persons of different values who have been compulsorily merged by Imperialists and the time has come for Nigeria to be dismembered. I would counsel against Nigeria being hastily dismembered. There is strength in unity, especially during internal crisis and attack by external forces.

SOVEREIGN NATIONAL CONFERENCE OR CONSTITUTIONAL CONFERENCE?

If we opt for the corporate existence of Nigeria, an avenue must be provided for dialogue on the terms and conditions of Nigeria's continued existence as a nation. The Constitution Review Committees set-up by the President and the National Assembly are definitely not the solution to the nation's constitutional problems. The National Assembly is also not the appropriate forum for these problems to be exhaustively addressed. We need a forum where representatives of all stakeholders will convene to address the nation's problems and arrive at a consensus on political restructuring and the terms of the continued corporate existence of Nigeria.

91 B. Susu. *Constitutional Litigation in Nigeria*. (Lagos: C.J.C. Press (Nig) Ltd. 1999) pp. 8-9.

A Sovereign National Conference has been suggested as the proper channel of addressing our constitutional problems. A Sovereign National Conference has been projected as the preferred option because of the assurance that the decisions arrived at, at the Conference will not be altered by the Government and they will become automatically binding. A Sovereign National Conference, however, raises constitutional problems in a nation that has a Sovereign government in place. A Sovereign Conference is normally convoked in a nation without a Sovereign government. The Conference is sovereign because its resolutions have legal authority and are automatically binding due to the absence of a superior power to which the Conference reports.

The 1999 Constitution has evidently established a Sovereign government which is not subordinate to the government of any other country. Section 2(1) of the said Constitution specifically declares that Nigeria shall be "one indivisible and indissoluble Sovereign State." It will be imprudent of the Sovereign Federal Government to legislate itself out of existence by acceding to the clamour for a Sovereign National Conference. A Constitutional Conference, in contradistinction to Sovereign National Conference, is a preferred option.

The Federal government should consider it imperative to organise a Constitutional Conference where the identified defects in the 1999 Constitution would be addressed. The Conference should comprise of elected representatives of the people and representatives of identified interest groups, registered professional bodies, labour organizations, religious bodies, human rights group, Council of Women Society, market men and women, Farmers' Union, Universities and National

Association of Nigerian Students. The Conference should also benefit from the experience of experts in Constitutional law and Constitution-making who are unlikely, to either contest or win elections. These experts should be selected in order to enhance the quality of debate at the Conference. I will, however, counsel against the involvement of Federal, State and Local Governments in the selection of experts who will be members of the Conference in order to avoid actual or perceived interference by government with the proceedings of the Conference. I suggest, that a Search Committee consisting of the Chief Justice of Nigeria, the President of the Court of Appeal, Chief Judges of Federal and State High Courts, should select fixed number of experts who will join other members of the proposed Constitutional Conference. In the case of elected members, it is suggested that each state should send equal number of representatives to the Conference.

In order to prevent persons with political ambitions from using the Conference as a platform for securing their political future, it is suggested, that members of the Conference, should be honourable enough to disqualify themselves or be disqualified through legislation, from holding elective positions or accepting government appointments for a period of not less than five years after the Conference. Such disqualifications would enable them avoid diversion and ensure concentration by members of the Conference.

A NEW CONSTITUTION FOR NIGERIA?

The Constitutional Conference, if inaugurated, will be faced with two options. These are whether to supplant the 1999 Constitution with a new Constitution or to amend the Constitution. The Constitution is a lasting document which should not be replaced at will, unless

the need to do so arises. Identified defects in the Constitution should be addressed through constitutional amendments. It is, however, necessary for the National Assembly and State Houses of Assembly to first amend the provisions of section 9(2) of the Constitution which, as it is, makes it easier for a camel to pass through the eye of a needle than for the Constitution to be amended. It is proposed that a simple majority of votes of the National Assembly and of the various State Houses of Assemblies should suffice for constitutional amendments.

The proposal on amendment of the Constitution, in contradistinction to its being supplanted by a new Constitution, is supported by the arrangements in older Federations like Australia, Switzerland and the United States of America where Constitutions have been amended several times, in order to absorb the shocks arising from a Federal structure. Mr. Vice-Chancellor, I also find strong corroboration for my proposal on the amendment of the 1999 Constitution in the views expressed by Chief F.R.A. Williams, SAN. He said:

"If at any stage we find ourselves operating a Constitution which is not our making, that Constitution can only be treated as no more than a temporary arrangement which must be amended or corrected by the elected representatives of the people of Nigeria."⁹²

The role of the National Assembly and the State Houses of Assemblies should be restricted to amending the Constitution strictly in line with the decisions of the Conference.

92 "A Constitution for the People of Nigeria", *op. cit.* pp. 1-2.

8. CONCLUSION

A Constitution consists of two parts. These are the text and operators of the Constitution. The text of a Constitution is as important as its operators. We need good operators to complement a good or an autochthonous Constitution. We cannot address constitution-making process and ignore the operators of the Constitution. The cancer in the latter will affect the former. If bad operators are in charge of the Constitution, there will be negative results no matter the degree of autochthony of the Constitution.

I would like to restate that loyalty to the government established by a Constitution is not necessarily the result of the autochthony or otherwise of the Constitution. No amount of autochthony of the Constitution can sustain a bad government but a good government can sustain the Constitution. Autochthony of the Constitution can be achieved if the government responds to the aspirations of the people for good government by providing food, shelter, public transportation to the people at affordable prices. Educational and employment opportunities, payment of meaningful wages and pensions as well as the provision of unemployment benefits are some of the strategies for sustaining a Constitution and the government established by such Constitution. I dare say, people will definitely find it easier to embrace a government which is not the product of strictly autochthonous Constitution than a bad government which is the product of a people-led and people-processed Constitution.

Devolution of powers as well as political and fiscal Federalism can definitely be achieved through constitutional amendments. Such achievements will, however, be meaningless unless States that are given

more powers and resources utilize them for the maximum benefit of their residents. Unless we have good operators who faithfully apply the provisions of the Constitution for the benefit of the people, there will be continuing discontent and the search for an autochthonous Constitution will be perpetual.

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Mr. Vice-Chancellor Sir, my Inaugural Lecture.