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AN EXPLORATION OF THE GAPS BETWEEN CONSTITUTION AND CONSTITUTIONALISM IN NIGERIA

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Abstract
This paper explores the gaps in Nigerian Constitutions and adherence with constitutionalism as contained in the various Constitutions, with special emphasis on the 1999 Constitution. The paper also explores other factors responsible for failure of constitutions and in achieving constitutionalism in Nigeria. The study uses qualitative method to collect data from primary and secondary sources – Nigerian Constitutions, and other sources, including journals, historical materials, books, public and other relevant documents. Rationalist Choice Theory is used in developing the theoretical framework for the study. It also uses qualitative method to analyse the data collected. The study found that no constitution is perfect, and several gaps and issues apart from those of Nigerian politicians and factor, elites and judicial officers, to be responsible for the severally identified constitutional gaps which hinder constitutionalism in Nigeria. Corruption and other self-interests result in orchestration and widening of such gaps in order to achieve personal interests. The study is unique in uncovering issues in both schemed and erroneous gaps in the Nigerian constitutions. It expands the body literature on the Nigerian constitution and constitutionalism, which Nigeria lacks, especially at this critical time of searching for a viable Constitution vis-a-vis manipulations of the Constitution by various interests in Nigeria, and highlights the imperfections of the Nigerian Constitutions. The paper recommends extensive citizenship education and socialization, strict enforcement of constitutional laws, and constitutional provisions should be made clear and devoid of ambiguities.
Keywords: Constitution, constitutionalism, Nigeria, gap, judiciary, law.

Introduction

Globalisation has inspired states and citizens under the new world order to seek to achieve constitutionalism for human rights, order, dignity and stability, and to move together in the increasingly constitutionally globalising world (Ming-Sung, 2010:329). From the 1990s, there have been increased passion for constitutionalism in Africa resulting in making and re-making of constitutions (Fombad, 2016:1). The roles played by constitutions in establishing and maintaining state/public operational framework, and stability of a political system are such significant that they cannot be over stated (Abdulai, 2000:447). However, just as humankinds are naturally imperfect, so also are the constitutions made by them – inevitably inclusive of gaps, vulnerabilities, weaknesses and limitations. Virtually all states across the world are (voluntarily or involuntarily) engaged in identification and filling up or improving upon these gaps, vulnerabilities and weaknesses which are with time, exposure and experiences, identified and filled or improved upon. However, the more or less a state tries to fill up the gaps or improve on weaknesses the more or less new ones open up. Such are attributed to both deliberate and non-deliberate factors as operated by the various stakeholders (politicians/elites, citizens, judicial officers, and law enforcement agencies

among others) on one hand, and the set laws (constitution) on the other. Neither is there a perfect constitution nor is there any state with such. The imperfections are dependent on the nature and pattern of state evolution, citizens' responses to the political system, level of political culture and socialization, and extent of commitment to and adherence with the rule of law (constitutionalism). Likewise, no state has 100% achievement in constitutionalism – every state has its own limits to constitutionalism, but dependent on the above identified stakeholders and factors.

Constitution and constitutionalism are indispensable elements of every state, whether developed or developing that aims to achieve rule of law, stability, prosperity and development (Ibiam, 2016). The typology and extent of constitutions and constitutionalism vary with geography, time, space, value and political leadership commitment, level of civic education and participation, among others. For every state, the process of constitution making itself is neither perfect nor achieved overnight, but a journey that is un-ending and characterised by learning with experience, additions/drops/amendments/repeals/abrogation. States, being what they are, have constitutions which are characterised by existing gaps between the state principles provisions on paper (constitution) and practical enforcement and adherence (constitutionalism). Over time, states learn from experience and continuously make changes/improvements in their constitutions with the aim of achieving optimal constitutionalism. Each and every constitution develops through experiences from both routines and peculiar trends in a state. This is however, affected by many variables including education, participation, quality of leadership, and extent of constitutionalism among others. Experience over time reveals gaps which are also respectively filled as they appear and or are identified.

All constitutions are aimed at regulating the exercise of political powers and for institutions to abide by in a state as may be provided by the laws, and the much-celebrated democracy is more institutionalized where its operators adhere with constitutional provisions. Similarly, a state's ability to institutionalise democracy is determined by the extent to which political/state actors comply with constitutional provisions (Alberts, 2009:127). Through constitutions and constitutionalism, politics and governance are organised and established on popular grounds. With relativities, constitutional reforms and aligned processes are taking place in every part of the world, especially in Latin America with the Latin American Constitutionalism (NLC), and Africa in the search for constitutionalism in order to re-organise or establish democratic legitimacy of public powers, as well as reform human rights (Felipe, 2018; Dalmau, 2016:158). The current constitutional theorists have been limited on both legal and political grounds to considering the implications of constitutionalism within the tenets of Western liberal democracy and in the names of human rights, rule of law with attachment of pre-eminence to individual freedom (Asem, 2010:421; Ramraj, 2010:191). Similarly, the world is caught between selective constitutionalism and constitutional fragmentism (Ming-Sung, 2010:329). States, especially African and the developing, are generally faced with the problems of practicing constitutionalism and that has apparently become a major factor that negatively affects not only successful operation of the states, but also the process and rate of their social transformation (Dalmau, 2016; Aderibigbe, 2018:2).

Nigeria Africa's largest democracy, the most populous, heterogeneous and highly complicated state in terms of constitutional history and development. The history and development of constitutions making and constitutionalism in Nigeria are tied to the formation of the Nigerian entity itself by the colonial masters (Diala, 2013:136; Basiru, Salawu & Arogundade, 2016:81). From the year 1861, colonial domination and rule had subverted the native arrangements of politico-legal adjudications of the dominated areas (Hussain, 2018). This moved the united Nigeria away from the small, heterogeneous, relative and native to colonially imposed and alien constitutional arrangement. From 1914 to date (2024), Nigeria has experienced the creation and or enactment of several constitutions and is

characterized by gaps, weaknesses and or vulnerabilities between the Constitutions and constitutionalism (Ali & Mohammed, 2018). This means there are areas (gaps) where the provisions of the Nigerian Constitutions on paper are not in real connection with practices, unfeasible, manipulated and or not being enforced. Some of the gaps appear naturally and are filled with time and experience, while others are orchestrated by the stakeholders (judicial officers, politicians/elites, and law enforcers among others) who also in some instances exploit the gaps and or vulnerabilities. This is as all the post-independence Constitutions of Nigeria were more of a compromise between the major Nigerian political actors and their interests (Van-Wyk, 2007). This study, therefore identifies the issues, instances and gaps/weaknesses between Nigerian constitutions and constitutionalism as constitutionalism is the most important and an indispensable criterion for institutionalisation of rule of law and the much-cherished democracy (Alberts 2009:127), which Nigeria has not optimally achieved.

Literature Review

A constitution, is to the constitutional scholars, considered the centre-piece of both negotiation and governance of a political community (Douglas, 2015). Hence, the process of executing/enforcing a constitution involves three major processes of: implementation stage – setting up/establishing institutions, offices as there contained provided in the constitution, and enacting laws to ensure smooth implementation of the constitutional provisions and repeal of former laws; promotion stage – making new laws and institutions established by the constitution to be effectively established and function well; and protection of the sanctity of the constitution in order to reflect and achieve the interests of the public, and also avoid constitutional abuses such as manipulations and violations (Fombad, 2016:11-12). Thus Phillips (1977:5) defines and classifies constitutions from two perspectives of abstract and concrete terms. For the former, he maintains that:

> The constitution of a state in the abstract sense is the system of laws, customs, and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizens. A Constitution in the concrete sense is the document in which the most important laws of the constitution are authoritatively ordained.

These altogether ensure establishment of *measures*, *mechanisms*, and *institutions* from the constitution making to the implementation process. Thus, constitutions are a result of '*carefully negotiated compromises*, *hard*' and more or less '*protracted bargaining*', with both heterogeneous and disagreeing interests, compromises, hope, apprehensions, and uncertainties among others (Fombad, 2016:12-13).

In line with that, Wheare (1951) generally sees constitutionalism as the entire system/composition of a government together with the collection of rules and regulations for its establishment and operations in a state. Hence, constitutionalism is distinguishable as a rule characterised by continuing exercise of sovereignty by the people who have and share equal rights and opportunities, mutual respect, duties, and are all subject to and equal before the laws (King, 1999:29). Thus, constitutionalism has three basic characters as: adherence with the rule of law, limited and accountable government; and protection and guarantee of fundamental rights (Oraegbunam, 2015:25).

For Ihonvbere (2000:15), constitutionalism depicts a: "process of developing, presenting and utilising the political compact that defines not only the power relations between political communities and constituencies, but also defines the rights, duties, and obligations of citizens in any society". Similarly, apart from the traditional/national constitutionalism, Shigong (2014:133) identifies 3 general and current approaches to the global study and understanding of current constitutionalism as: theocratic; transnational and party-state constitutionalism. On

the other hand, disregard to constitutions (un-constitutionalism) is neither peculiar to Africa nor Nigeria, but universal and also relative (Fombad, 2016:10). However, Arne Wulff (as cited in Fombad 2016: v) maintains that:

> A constitution is full of general and abstract principles, so on its own it is not suitable as a practical guide for everyday business. As such, concrete and clear legal steps are necessary to translate the constitution into action and allow the text to enter into perceived reality for the people. Without implementation, the goal of every constitution remains unachieved. As a result, the text may be valued as a nice piece of poetry - but little more.

This supplants the general belief that constitution is the alpha and omega of state laws and stability, and rather than those, appropriate legal steps and true implementation/enforcement of provisions (constitutionalism) are the drivers to achieving order, stability and development in a constitutionally oriented state and society. Therefore, it is the proper implementation of constitutions that enable and sustain constitutionalism. Similarly, constitutionalism entails a country's readiness and ability to work with constitutional provisions as outlined in a state's constitution. Constitutionalism is bound to fail or suffer setback, particularly where there are inadequacies and or ineffectiveness of legislations, and enforcement and compliance with laws as may be there established.

Just as there are externally imposed, majoritarian imposed, judicially imposed and elite imposed constitutions, there also exist unconstitutional constitutions, and unconstitutional constitution amendments in the globe of constitutionalism (Landau, Dixon & Roznai, 2019). To that effect, without proper implementation of contents/provisions (constitutionalism), constitutions become reduced to only pieces of 'printed futility' (Fombad, 2016:10). The independence constitutions of nearly all the former colonial states were more influenced in shape and evolution by the colonial, imperial and transnational factors other than the global ones (Go, 2003; Kalu, 2000:68; Basiru, et al., 2016:81; Diala, 2013:136). Nigeria, like many others in the Commonwealth, also inherited the English Common Law from Britain (Oyewo, 2019). However, there have not been effective usage of legislative powers towards constitutional services delivery as the elites undermine the effective use of constitutional powers and provisions (Fagbadebo, 2019). For that, Kalu (2000:53) maintains that that there are three basic issues in Nigerian constitution as those of sovereignty, secularism and procedural governance. Similarly, with constitutionalism, the ruler(s) are appointed and bound by laws which they cannot violate thereby emphasizing inclusion in participation and governance, public rationality and transparency and accountability (King, 1999:29).

Theoretical Framework

This study is premised on the works grounded in the Rationalist Choice theory as to why constitutions and constitutionalism, which also seek to understand the origin and background, and the justifications; the functions of constitutions and constitutionalism; and the functions of a constitutional/limited state and or government (Ratner, 2003; Ginsburg, 2012:13). It is also based on the act of self-restraint from carrying out actions that would otherwise impact negatively on one individual, society and or the state (Dunoff & Tratchtman, 1999; Ratner, 2003). This is as constitutions and constitutionalism emphasise limited exercise of power and authority in and over a state. Constitutionalism being an ideal, is most associated with rationality which comprises of among others, limited authority, human rights, equality, justice and supremacy of the state laws above individuals, including those in charge of authority. Thus, the rationalist choice theory centres on rational thought, consideration and action based on limited state/government in order to attain the objectives of both constitution and constitutionalism. The focus of using the theory is to understand the essence and importance of both constitution and constitutionalism to a state and society, and trace the historical foundation of constitution making for the Nigerian state as well as adherence with

same amidst the gaps/vulnerabilities, manipulations by elites, judicial officers and politicians in Nigeria.

Statement of the Problem

Although constitution is an indispensable element of societies, especially the democratic and those aspiring to be, and the academics/researches, it has all the same received little attention in terms of study and development (Alberts, 2009:127). For the study area, Nigeria, there exist wide gap between constitution and constitutionalism immediately as Nigeria began the journey from its colonial conquest/colonialism to independence and post-independence with a 'chequered history' of constitutions making process and achieving constitutionalism, and a 'stage managed' constitution making process (Diala, 2013:135-136 & 160). Indeed, shortcomings (gaps) as contained in the Nigerian constitutions have resulted in not only loopholes, but also instabilities due to un-constitutionalism (Matfess, 2016:3).

Many of the provisions in the Nigerian constitutions (in theory/principles) are different from what Nigerians (elites, politicians, public and judicial officers, law enforcers and the ordinary citizens) and practice (Makinde, Hassan & Taiwo, 2016). In some other provisions, there are less synergy between such and the practice/enforcement which altogether hinder constitutionalism and democratization process (Ake, 1996:7). Nigerian constitutions have over the years from pre-independence to date been characterised by multi-dimensioned crises of provisions, interpretation, enforcement, and amendments (Ali & Mohammed, 2018). This is despite the fact that such constitutions have been changed, abrogated, and or amended at different times. At other times, gaps are deliberately orchestrated by politicians/elites, the judicial officers and or lawyers in order to actualise their respective power and material interests because of the 'endemic' corruption that has conquered and occupied the Nigerian judicial system (Nwosu, 2018:11).

The Nigerian Judiciary through some of its inconsistent/conflicting judgment/rulings such as the historically conflicting judgments on the Western regional crisis involving the Action Group (AG) party, Samuel Ladoke Akintola, Awolowo and Adesoji Aderemi involving courts and the Privy Council, and subsequent establishment of the Supreme Court do create and or further widen the gap (Ali & Mohammed, 2018:124; Oyewo, 2019; Badejogbin, 2018:551; Diala, 2013:140). These have over the years plunged the Nigerian constitutions and the drive to constitutionalism into crisis, dilemma and manipulations, which have altogether resulted in weakening the spirit of constitutionalism and threatening the corporate existence of the Nigerian state, peace, stability and political development; the government is destabilized, the public thrown into confusion, while the political atmosphere is over-heated; there is also a great malaise in both administration and the delivery of justice in Nigeria and that has resulted in a crisis of confidence in the Nigerian judiciary; and the unhealthy federal arrangement which has rendered devolution of powers and political autonomy of local governments an illusion among others (Amah, 2018; Ali & Mohammed, 2018:115).

Methodology

This study centres on exploration of gaps in Constitutions and constitutionalism in Nigeria. This study used qualitative (non-statistical) method of enquiry which is flexible and suitable for investigation of social phenomenon (Creswell, 2012). The study used primary (the Constitutions of Nigeria), and the secondary sources of data (books, journals, historical documents and constitutionally related events and multiple crisis) – the various issues and items in the constitutions of the Federation and the Federal Republic of Nigeria 1960-63, 1979, 1989, the 1995 Draft and the 1999 Constitutions, the constitutional - historical documents and the practical constitutional experiences from the actions and reactions of the Nigerian politicians, the Nigerian Judiciary – the judges, the Courts and their rulings; the study purposively selected relevant journals articles and proceedings of the various constitutions and their developments, the 1994-95 Constitutional Conference, established

Constituent Assemblies which produced the 1979 and 1989 Constitutions, the National Political Reforms Conference, National Confab; the various Courts rulings, dissenting/conflicting judgments, emergence of practical and theoretical gaps between Nigerian constitutions and constitutionalism; and the evident and practical manipulation of the Nigerian constitutions by the politicians, judicial officers and other stakeholders to suit their power and material interests. The study also examined traced and used the most visible and contested gaps in the Nigerian constitution(s). All the collected data were analysed in relation to the gaps, issues and events using the historical and documentary method of qualitative (non-numerical/non-quantitative) research design.

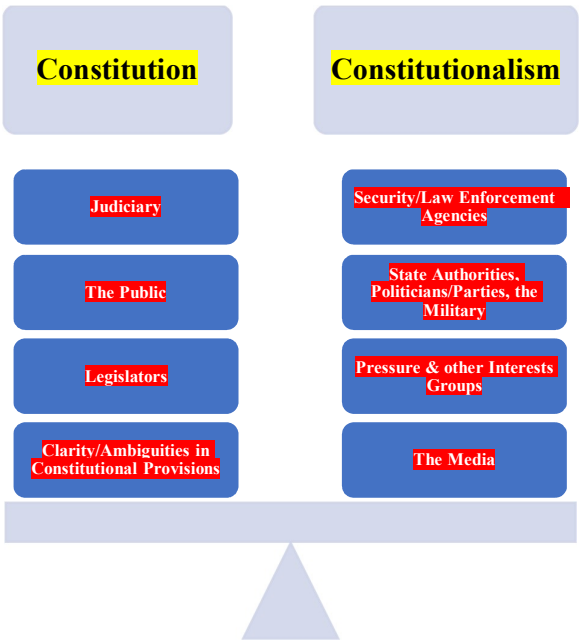


Fig 1 Constitution vs Constitution in Nigeria
Source Authors' Construct (2024)

Major Findings

Through the various sources, this study identified 19 different gaps which have so far manifested into problems for the Nigerian constitutions and constitutionalism as:

1. Constitutional crises of adopting federalism in the 1950s (Mohammed & Aisha, 2020; Mohammed, et al., 2018:7, 372).
2. Crisis of formation of Central Government or the Cabinet after the 1964 federal elections (between Executive Prime Minister, Tafawa Balewa and Ceremonial President, Nnamdi Azikiwe) (Mohammed & Aisha, 2020: 104-106; Read, 1979:133).
3. The legitimacy and role of the military in Nigerian politics pertaining the 12 June, 1993 presidential election and the various Courts judgments and counter/conflicting judgments (Ali & Mohammed, 2018:118; Mohammed, et. al., 2018:139, 148; Yakasai, 2012).
4. The precise constitutional status of local governments and autonomy as the third tier of the Nigerian federation (Sections 7, Fourth Schedule (1) & Part II [1 iv] of the 1999 Constitution of Nigeria; Amah, 2018:281-284; Makinde, et al., 2016:312; Egugbo, 2018; Abdulhamid & Chima, 2015; Doho, Ahmed & Umar, 2018:47 & 49; Nwogwugwu & Olusesi, 2015; DailySun, 2019, October 17, p.14; Othman, Osman & Mohammed, 2019).
5. Full autonomy, Joint Funding/States Local Governments Joint Account and enforcement (Section 162[6], Second Schedule [Part I item 1] of the 1999 Constitution of Nigeria).

6. Secularism viz-a-viz Sharia (criminal and civil) - constitutionality, controversy, implementation and scope (Oraegbunam, 2015:25 & 29) and enforcement and the Nigerian Constitution (Section 10, 260, 275, 279 of the 1999 Constitution of Nigeria; Olanisakin & Adebayo, 2017:22; Umezurike & Ogunnubi, 2016; Nwogwugwu & Olusesi, 2015).
7. Resource control/allocation, the Federation Account, the on/off shore oil resource dichotomy and control between states and the Federal Government, 2003/2004 (Second Schedule Part I item 39 of the 1999 Constitution of Nigeria; Shehu, Othman & Osman, 2017b:244-245).
8. The powers of interpretations on declaration of state of emergency and abuse of such (Agbo, 2019; Section 305 of the 1999 Constitution of Nigeria).
9. The Powers of State to create local governments/withhold their grants (the Obasanjo regimes withholding of the Lagos state local government grants, and the Supreme Court's final verdict over same) (Section 8[3] of the 1999 Constitution; Oni & Faluyi, 2018:15; Umezurike & Ogunnubi, 2016:340).
10. The 2006 third term and vice president Atiku's defection from the People's Democratic Party (PDP) to the Action Congress of Nigeria (ACN) and Supreme Court's final verdict/constitutional interpretation.
11. The President Umaru Musa Yar'Adua's deteriorated health/medical incapacitation and leadership impasse/vacuum between 2009 and May, 2010 and the succession by Goodluck Jonathan (Mohammed, et al., 2018:301-302).
12. Power rotation in the 2011 presidential election and constitutional/political interpretations and manipulations
13. Age long defections/cross-carpeting by Nigerian legislators from one political party to another and constitutional interpretations, especially on the eves of 2011, 2015, 2019 and 2023 general elections (Ali & Mohammed, 2018:122; Adegbite, 2016:130; Sections 131[c], 142(1), 177[d], 187(1) of the 1999 [Amended] Constitution of Nigeria).
14. The enactment of Anti-Grazing/Night Grazing Laws in some Nigerian states, especially Benue, Ekiti and Taraba (Mohammed & Aisha, 2018:70-71)
15. The Presidential powers and suspension of the CJN, Justice Walter Samuel Onnoghen in January, 2019 over charges of failure to declare assets as provided in the Fifth Schedule (Part I, 11[1-3]) & (Part II[5]) of the 1999 Constitution of the Federal Republic Nigeria. The controversy which trailed the appointment of the Economic and Financial Crimes Commission (EFCC) chairperson by the Executive versus the powers of the National Assembly and related questions of appointment on acting capacity.
16. Indigene/Settler and citizenship dilemma. The indigene/settler issue which Fourchard (2015:38) and Arowosegbe (2016:21) maintain has led to accepted discriminations between different sections of Nigeria and highly contested respectively at the national and local levels of the Government. The Nigerian constitution has made provisions for citizens, but leave open and the issue of indigeneity and thus, there exists a clear gap in issues indegeneship status and of areas to where they may move and reside/settle – settlers' constitutional status (Madueke & Vermeulen, 2018:45; Bamidele, 2018:49; Afolabi, 2016:14; Matfess, 2016:10, 15-16). Therefore, Dersso (2008) puts the blame of indigene/settler on 'Africa's nature of post-colonial nation-building process' and poor constitutional frameworks that give little regards to citizenship, but great latitude to manipulate such (Ehrhardt, 2017:464; Mang & Ehrhardt, 2018). Additionally, the Nigerian constitutional laws governing citizenship have been throughout been subjected to elites/political manipulation (Mbaku, 2017:8).
17. The use constitutional powers and the Nigerian Military (imposition of the state of emergency) to quell the prolonged 1962-1965 Western regional crisis.

18. Security votes and constitutional/national financial laws and regulations (Ezeilo, Nwoke & Anya, 2018).
19. The emerging phenomena of 'inconclusive' elections consequent of 2019 general elections vis-à-vis the Nigerian Electoral Laws.

Discussion and Analysis

All the Nigerian Constitutions have been characterised by several gaps which manifest in ambiguities, weaknesses and have remained amendable, but subject to laid down rules mainly based not less than 2/3 majority in addition to other requirements. However, the issues start with the question whether the various Nigerian constitutions themselves have been products of the wishes and aspirations of Nigerians – which are not, but mainly 'design and creation' of the Nigerian military, especially the 1999 Constitution that was drafted and enacted in only about two months period without the input of any Constituent Assembly (Inegbedion, 2016:26). Likewise, the process of as well as the amendment of constitutions have been a major issue in Nigeria which have in her history always been twisted in the interests and control of the central legislative bodies - the Senate and Representatives (Lanre, 2017:45). Weaknesses, corruption and poor composition, NJC; absolute discretion of the Chief Justice of Nigeria (CJN) to appoint members and CJN personality problem; inability of the various anti-graft agencies (EFCC, ICPC among others) to prosecute corrupt judicial officers (Nwosu, 2018:3-5).

In for example, the over-concentration of such powers, the CJN has been made to be a near supreme figure in the Nigerian judicial system he alone (the CJN) appoints 19 of the 23 members of the apex judicial council (Section 153 & Third Schedule Part I [20] of the Constitution of Nigeria 1999). Similarly, the NJC itself wields enormous powers (Third Schedule Part I [21a-i]). On the other hand, the NJC itself is conferred with enormous constitutional powers as there contained (Third Schedule Part I, 20d, f-j); 21a-I of the 1999 Constitution of Nigeria).

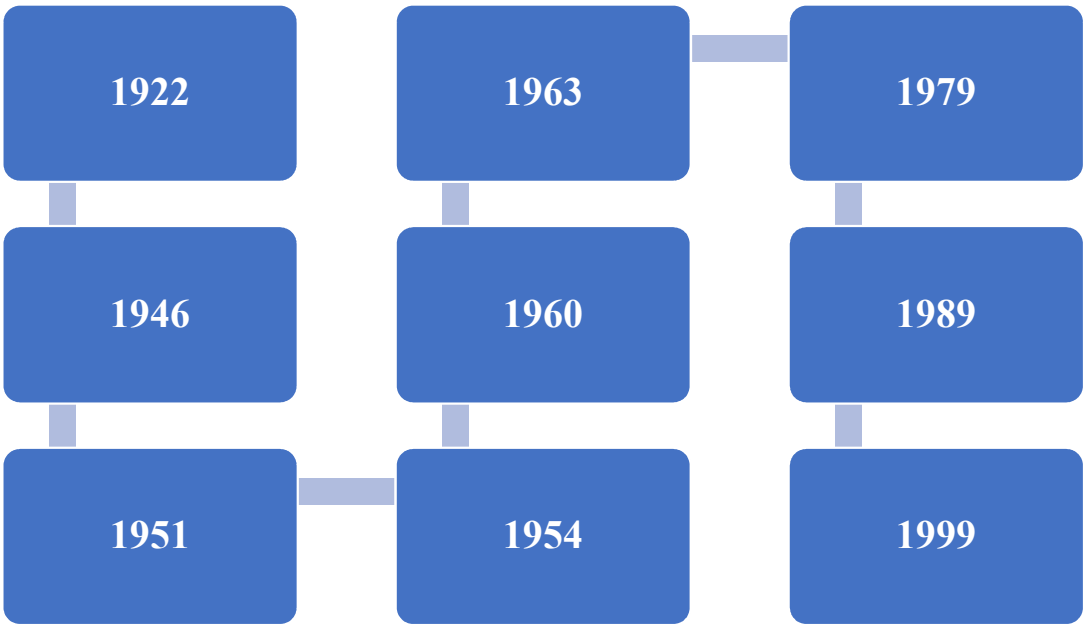


Figure 2 Major Constitutions making and Amendments in Nigeria
Source Authors' Construct, 2023

Orchestrations and Manipulations by Politicians/elites, Lawyers and the Judicial Officers in Issues and Instances of Constitutional Ambiguities and Crises in Nigeria

Nigeria has from its colonial days had about nine different constitutions – Clifford, 1922; Richards 1946, McPherson 1951; Lytteleton 1954; 1960 Independence; 1963 Republican; 1979 Presidential and Republican; 1989 General Babangida; and 1999 Abdussalami Abubakar Constitutions (Mohammed, et al., 2024; Mohammed, Aisha & Saidu, 2018: xxxiv, 165, 201, 241, 415). The most peculiar, but a mere 'draft' Constitution was that of General Abacha which resulted from the 1994/1995 Abuja Constitutional Conference that uniquely and for the first time in Nigeria's history proposed for Nigeria: rotational presidency, five years and single tenure for presidents and governors, fusion of legislative and executive powers; granting more powers to states including education, health and agriculture; full powers for states to create and manage local governments; abrogation of local governments legislative councils; and provision for offices of two vice-presidents (Mohammed, et al., 2018:xi, 163, 213-219; Mohammed, et al., 2024). There are many issues which have appeared as clear gaps and weaknesses as contained in the various constitutions of Nigeria. While some blame the gaps in the Constitutions in explaining constitutional failures, others put it on the state agencies and crafting on the part of the political leadership (Alberts, 2009:127). Practically, many of the gaps were orchestrated by politicians/elites or the military for their class/corporate and personal interest, while others occurred naturally. Not only do elites/politicians emasculate the Constitutions and constitutionalism, but also use the judiciary through court cases to subvert the rule of law (LeVan, 2017:466). Some of the many gaps have, however, are being filled through the Courts interpretations and political compromise among others, but there are others that still linger in Nigeria's constitutional development (Ali & Mohammed, 2018:122).

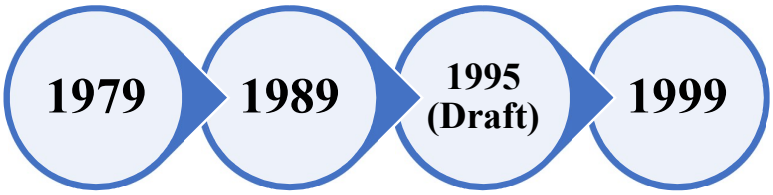


Fig 3 Nigeria Constitutions Made/Enacted by the Military
Source Authors' Construct, 2023

The Crises of Confidence in the Nigerian Judiciary and Legal Profession

In the recent, African states have experienced relative moves towards constitutional rule and constitutionalism (Abdulai, 2000:447), but constitutionalism in Africa is still generally threatened by among others the nature and process of nomination and appointment of the judges by the executive and legislative arms of the government (Fombad, 2014). This has over the years, hindered effective constitutionalism among the states. In the same vein, while the Nigerian judiciary has significant impact on political, legal and constitutional issues and implications through judicial review of constitution and constitutionalism in Nigeria (Sambo 2019), it has been tainted and characterised by crisis of confidence based on numerous factors as: existence of high and massive corruption; obstruction and or procurement of judgments through material bargains; excessive politicisation of appointments and the issues, promotion and disciplining of judicial officers; unnecessary delays in resolving/delivering judgments on numerous cases (with for example, over 5000 cases lingering at the Supreme Court of Nigeria

as at the year 2016); legal practitioners obtain certificates/additional qualifications through questionable means; increasing rate of dissecting and conflicting judgments; the judicial regulatory bodies are highly ineffective in both regulation and maintenance of the Judges and the system; the private practitioners have plunged into crises of breach of privacy, confidence and trusts in addition to corrupt procurement of judgments (Mohammed, Abdullahi & Ameer, 2024; Diala, 2013:140; Nwosu, 2018:5-6; Akinbiyi, 2003:203-4; Supreme Court of Nigeria Report, October, 2016; Shehu, Othman & Osman, 2017a:111; Johnston & Shearing, 2001:44; Shehu, Othman & Osman, 2016:54; Beredugo, 2009; Olong, 2009; Diala, 2013:151). To such effect, a recent published report has provided that Nigerian judicial officers (judges, magistrates and prosecutors), and the Police are the most corrupt public officers in Nigeria (Mohammed, et al., 2024; International Police Association (IPA) Report, 2017; International Security and Police Index (ISPI), 2017; National Bureau of Statistics, NBS, 2017; United Nations Office on Drugs and Crime, UNODC, 2017).

Corruption and other forms of twist, subversion, and deliberate miscarriage of justice have become so evident in Nigeria that the judges are themselves subjected to numerous cases criminal trials, including those bordering on constitutional matters (Anushiem, Mbanugo and Arinze-Umobi, 2017:113). The failure to achieve and balance judicial independence on one hand and accountability on the other inevitably results in both weak independence and then accountability which ultimately affect constitutionalism (Simmons, 2007). Consequently, constitutional crisis that had bedevilled Nigeria for years has led to the interventions of the military in Nigerian politics and a further damage to the judicial system and constitutionalism (Oyewo, 2019).

Consistent and persistent failures (professional and corrupt) of judicial officers in Nigeria have over the years have raised several and debauching questions on merits and processes of both appointment, promotion and sacking of such the officers' vis a vis a judicial system with competence, integrity and productivity. For this, Goubadia, (2017) argues that there is disregard to the ethics of appointing such officers which consequently results in corruption, failure to service delivery and incompetence among others. The process of both selection and appointment of the judicial officers by the other arms (legislative and executive) rings a bell to judicial officers' credibility, professionalism and independence (Fombad, 2014).

Judicial independence and accountability (which are consistent and co-existing) are critical to the success and or failure of constitutionalism in every state (Simmons, 2007). Thus, when constitutions fall into the hands of political hagglers and those who do not care about what will come after them concerning the literal interpretation and enforcement of constitutions, the consequence is most likely to be negative to the state and the public (Ihor & Zhurba, 2011:11).

In the recent decades, the legitimacy and credibility of the judiciary have been greatly undermined as a result of increased number of legal and political tussles which relate to the Constitution in the Courts with conflicting, questionable and inconsistent judgments, bribery scandals and political influences and interventions. These have altogether resulted in posing more questions on the integrity of the judicial officers, the processes of their nominations and appointments, and political interference despite judicial independence and the extent to which the drive to attain constitutionalism is achieved (Fombad, 2014).

The Processes of Drafting and Enactment of Constitutions in Nigeria

It is maintained by Iqbal (1916:251) that 'every human being is the centre of latent power, the possibilities of which can be developed by cultivating a certain type of character' and in this context, Yammarino (2008:188) asserts that there are four levels of analysing human beings and their behaviour as: individuals/persons; two-persons/inter-personal; groups/teams, workgroups; and organisations (groups of groups). Related to those, writing a constitution which is followed by its ratification and enactment is one of the most important and

indispensable ingredients of establishing constitutionalism - sustainable peace, order and rule of law in a society (Widner, 2005). As constitutions emerge from the convictions of establishing a limited government (Wheare, 1951:10), constitutions and constitutionalism are important elements of a state as they are made to, and make governance more orderly, and the life and conducts of people more tolerable (Bradley & Ewing, 1993:4). Although throughout the world and for most of parts of states' history and processes of constitution making have been mainly kept for and or dominated by lawyers and the political elites (Saati, 2016:18), any credible constitution must be drafted/written by individuals with commitment to constitutionalism; who have resources at their disposal to engage in and deliver such assignments; who would take the draft constitution to the public at the lowest level for consultation and input; and with an all-inclusiveness with the public finally and peacefully deciding the contents and its enactment (Kalu, 2008:55).

Therefore, participation in constitution making is generally and specifically dependent on several factors as: who initiates the constitution making process; what means of communication are used and their efficiency in relation to the public; the extent of inclusiveness of the public and other stakeholders in the process; who/what body exercises the power/authority over the proposed constitution and its enactment, and there are various types of participation in the constitution making processes as: consultative/ substantially participatory; false; limited; and symbolic participations (Saati, 2016:19).

Typical for Nigerian state, the process of writing/making a constitution is neither an easy nor a hasty one for it involves among others, draft making Committees, Conference/Constituent Assembly, submission of reports to the government, release of white papers, decreeing reports into law (Basiru, et al., 2016:85). As such, following due and diligent processes of making a constitution for a state is also as important as the constitution itself because following the due and diligent processes are key to producing a popular and viable constitution (Basiru, et al., 2016:79). Constitutions, no matter how ideal, well drafted and constituted, good looking, extensive and principled in coverage they may be, do not result in or translate to basic objectives of constitutionalism (rule of law, good governance and development, and political stability) until they are implemented according to provisions there contained (Fombad, 2016:2).

For that, Ihonvbere (2004:17) asserts that Nigeria has never had the cherished democratic constitution, but rather legal constitutions which were barely legitimate, as the state and elites – not the public have been the dominant forces in determining the contents, acceptance and enactment of the constitutions instead of the public and the heterogeneous interest groups. With that, in the history of constitutions making and constitutionalism in Nigeria, the 1979 Presidential/Republican Constitution has been rated as the most widely, popularly drafted with more degree of consultation, acceptance, and widespread appointments, nominations and representations in the drafting and making processes among all the Nigerian constitutions (Mohammed, et al., 2024; Mohammed, et. al., 2018:186-188; Diala, 2013:145). In contrast, the current (1999 Constitution of the Federal Republic of Nigeria) is mere and an 'amended version of the 1979 Constitution' (Diala, 2013:145). To a relatively larger extent, the 1979 Constitution had an input from the public in its processes of drafting and Constituent Assembly in comparison to that of 1999 which was hastily prepared and as a product of the military which resulted from pressures of both local and foreign forces and interests with no input, deliberation and or ratification from any Constituent Assembly (Diala, 2013:153; Inegbedion, 2016:26).

Federalism, political parties and electoral matters, states police, minorities, and the modes of review/alterations of the constitution whether through 'national' or a 'sovereign national conference' as the critical issues before constitutionalism and constitutional reviews in Nigeria (Diala, 2013:161-162). Similarly, there are both gaps and manipulations on the issues of Sharia with which the Nigerian Muslims seek to protect their human intellect, faith,

sanctity, family and property on one hand, and the Nigerian constitution on the other (Suleiman, 2019; Kalu, 2000:53; Oraegbunam, 2015:25).

In the last phase of constitutions making and constitutionalism in Nigeria, three amendments have so far been made to the 1999 Constitution with the First, Second and Third alterations, then came the latest (1999 Fourth Alteration Act) made by the regime of President Buhari in June 2018 (Oyewo, 2019).

President Buhari in June 2018 assented to 5 of the 32 bills forwarded by the National Assembly to the Presidency for Presidential Assent in the 1999 Fourth Alteration Act which Oyewo (2019:8) identifies as:

> Financial autonomy of state legislature and state judiciary (Fourth Alteration, No. 4) Act; political parties and electoral matters (Fourth alteration, No. 9) Act; restriction on the tenure of president and governors (Fourth Alteration, No. 16) Act; determination of pre-election matters (Fourth Alteration, No. 21) Act; reduction in age qualification for office of the president and members of the House of Representatives and state Houses of Assembly (Fourth Alteration, No. 27) Act.

Accordingly, alteration of the Constitution in Nigeria has now been shifted from having two stages of Sections 9(1) and (2) requiring the votes of not less than two-third majority of the National Assembly members; and approval of not less than two-thirds of all the States Houses of Assembly, to three stages including Section 58(3) which provides that: 'Where a bill has been passed by the House in which it originated, it shall be sent to the other House, and it shall be presented to the President for Assent when it has been passed by that other House and agreement has been reached between the two Houses on any amendment made on it' (Section 58[3] of the Constitution of Nigeria 1999).

Constitutions and the Popular Will

Substantial number of constitutions around the world begin with a preamble of 'the People' or 'We the people' in order to secure and justify the use and legitimacy of such Constitutions, and show that such are prepared by the 'people' as the authors, which makes an "imagined identity" that is not false, but also not true (Addis, 2018:125). From the civic education perspective however, the ordinary citizens in whose names and on whose behalf the constitution is enacted and enforced lack the basic understanding of both the existence and provisions of constitutions in Nigeria. Thus, the common questions/expressions by ordinary Nigerians which showcase the poor/non-understanding of the constitution itself as: 'Constitution? Wetin be that? Me a never see constitution before o. Na wetin e bi? Na book or na food? Abi na di name of one new govnor? My broda, a beg make you talk the one wey poor man pikin fit sabi' (Ihonvbere, 2000:343). These expressing questions (in Pidgin English) meaning: 'Constitution? What is that? I have never seen a constitution before! What is it? A food or book? Or name of a new Governor? My brother, please communicate in a way I can understand!" simply depicts what the constitution is all about to the ordinary Nigerians with direct effects on constitutionalism.

Essentially, the degree to which the public are enlightened, participate in constitutions drafting/making have significant effects on cohesion, extent of constitutionalism and stability of developing states, especially Africa, America and the Pacific, but on the other hand, it is less significant in for example, Europe (Widner 2005) due to varying levels of leadership responsibility, extent of and commitment to accountability and constitutional mechanisms. The Commonwealth best practices in constitution making centre on public consultation, openness to, accommodation and engagement of citizens and diverse views and representation in the making and ratification of such constitutions. With all these, the process of writing, re-writing, making and unmaking, amendments, repeal, and at the same time the

usage of constitutions are unending. Similarly, constitution making entails that: the public is fully informed and involved in its making process; receptive to diverse views, groups' existent in the society; engaging the majority of a state population in its making process; while the ordinary citizens make meaningful contributions; inclusion and assistance of the civil society groups to participation in the process; keeping the public fully informed at various levels of the making; and the process of final ratification be reliable and a clear representation of the peoples will (the Durban Statement, 1999). Therefore, the process of writing a constitution and attaining constitutionalism is such a complex, multi-stage and procedures that cover negotiations on how and where to start from; the ground rules to be adhered; developing generally acceptable rules; formulating the primary documents; deliberating the various and wide range issues; agreeing and adopting such to the final stage which end with general ratification and finally, promulgation of the constitution (Widner, 2005:503-504).

Whenever a participatory/public oriented constitution is to be drafted/written, some basic and indispensable factors must come into consideration of the framers/writers as: broad representation in the various bodies deliberating on the constitution, popular/wide inclusion and participation; achieving a balance between compromises, persuasions and grandstanding among the framers/writers; popular means of ratifying the constitution; sense of inclusion and trust in the making; consideration of norms, fairness and build of trust between the drafters/writers and the public (Widner, 2005:503).

Similarly, Political, economic, social and other experiences and circumstances variedly prompt states to make, unmake, and re-make new laws and constitutions in order to meet up with such. Hence, in less than 25 years (1975-2003) for example, about 200 new constitutions and or fundamental laws were drawn up in various states across the globe in order to meet up with imperfections and gaps existent in various constitutions (Widner, 2005:503). While such attempts to entrench constitutionalism and stability through constitutions writings, national conferences and other means have achieved positive results in some states such as Benin and Mali where cooperation is achieved, it has made negative results in others as Chad (1996) and Togo (Widner, 2005). For this study area, Nigeria, about 6 different constitutions have been tried or enacted during the post-independence making the analysis that of mixed blessing for although some of the attempts have yielded relatively positive results, orchestration and manipulation by elites, political class and the Military have greatly hampered the process thereby undermining the attainment of constitutionalism

Impediments to Constitutionalism in Nigeria

The process towards constitutionalism is hindered by socio-economic and other sufferings which make citizens turn to the Military for relief which normally result in unconstitutional interventions and political transitions after a more or less process of constitution making. However, for lack of definite and clear popular mandate to do so (in the name and will of the people), there are clear cut questions as well as rejections of the legitimacy of constitutions promulgated and handed over to the civilians by the Nigerian military. Such constitutions, therefore become nothing more than mere guidelines to the civilians, yet the military overseers include the preamble indicating the will of the people, at least 'for juristic and jurisprudential reasons', despite the fact that it serves interests of the military more than the civilians (Ihonvbere, 2000:343; Etudaiye, 2007:217).

The struggle to achieve constitutionalism in Nigeria is impeded by many factors, including the elites/politicians whose interests are to use/circumvent both constitutions, constitutionalism and democracy to achieve their power and material interests (Fombad, 2016:22). Constitutionalism is also confronted with absence of or poor mechanisms for establishing institutions and enforcement of constitutional provision; "frequent and abusive" constitutional changes; and selective/non-implementation of constitutional laws; poor public

consultation in the processes, absence of/poor constitutional culture, and heterogeneous complications of the Nigerian state (Oyewo, 2019; Fombad, 2016:5 & 14). Those are tied to the poor attitudes of the constitution operators and in that respect, unless the principles of a constitution as a regulator of all conducts in a state are imposed over all the arms of government, it would not be supreme and binding on all in a state (Finer, 1940). That is the only thing that can guarantee its security of being adhered with by all. With that, strengthening the citizens and civil society organisations would greatly help in achieving constitutionalism (Fombad, 2016:20).

Conclusion

This study explored gaps in constitutions and constitutionalism in Nigeria, and identified both natural and man-made/orchestrated gaps, impediments to the drive to achieve constitutionalism, as well as stakeholders involved in and responsible for the identified gaps. It specifically identified the experiences of colonial and post-colonial; systems (presidential, parliamentary, federal, military, civilian/democratic); peculiar emerging trends/circumstances; errors and omissions; deliberate manipulations by politicians, lawyers, the judiciary and public opinion. There have been various constitutional developments and drives to achieve constitutionalism, but the processes are impeded by many obstacles which revolve around human imperfections and orchestrations by the elites/politicians and other dominant interests in the Nigerian state to twist constitutions and constitutionalism. Judicial officers as the custodians of both the constitution and constitutionalism have significant roles, but made negative contributions in the prevailing state of affairs regarding the constitutions and constitutionalism in Nigeria.

The study concludes that Nigerian elites, politicians, judicial officers, security/law enforcement agencies, the Nigerian military and to some extent the public are through their respective offices and interests deliberately twisting, creating non-existent gaps, exploiting the existing gaps and vulnerabilities/imperfections in the Nigerian constitutions to achieve their interests which altogether weaken the drive to constitutionalism. Therefore, Nigeria has a long way to go in achieving constitutionalism as long as the elites/politicians, judicial officers and other stakeholders would continue to manipulate the constitutions, exploit/orchestrate gaps to suit their interests. To this end, greater public inclusion and participation must be ensured; extensive and intensive enlightenment on the importance and process of constitution making, amendment and repeals should be embarked; civil society organisations and other stakeholders should ensure optimum participation and making contributions not only during constitution making, but also any legislation through the States and National Assemblies; the institutional bodies charged with constitutional matters of interpretation and enforcement such as the judiciary and the law enforcement agencies should ensure optimal enforcement and compliance with constitutional provisions in all circumstances; the extent to which corruption has crept into the Nigerian judicial system should be curtailed to achieve optimal constitutionalism; while constitutional provisions should be strictly adhered with by the state, public and private individuals and entities.

Limitations and Study Forward

This study is limited to the exploration and identification of the main gaps in the Nigerian constitutions and the factors responsible for such. Future researches can deeply investigate the extent of judicial, politicians/elites' orchestrations of constitutional gaps and the extent to which they hinder effective constitutionalism in Nigeria; specific studies need to also be carried out on the powers and influence of the NJC, other law enforcement agencies and the public in writing a viable constitution and achieving constitutionalism in Nigeria.

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