A Living Judicial Legend

Essays in Honour of

Honourable Justice A. G. Karibi-Whyte (CON)

Edited by **Niki Tobi**

Chapter 2

The Search for Legitimacy of the 1999 Constitution

Taiwo Osipitan and K.O. Amusa

After more than fifteen years of military rule, democracy finally replaced military dictatorship in Nigeria on 29th May 1999. The 1999 Constitution of the Federal Republic of Nigeria, which emerged as the ground norm in Nigeria on 29th May 1999, is binding on all persons and authorities. Further, a law is null and void to the extent that it is inconsistent with the provisions of the constitution.[1]

The 1999 Constitution, which was prepared and processed during the Abdulsalami Abubakar-led military administration has, however, continued to generate controversies. Apart from its inherent defects, the constitution's legitimacy has been questioned. It has for example, been argued that the constitution is not people-processed and people-led and, therefore, not the product of the collective will of Nigerians.

Advocates of autochthony of the constitution readily rely on its preamble to support their contention that the constitution is a false and misleading document. One advocate of a people-processed constitution argues thus: 'It (1999 Constitution) tells a lie about itself by declaring that we the people of Nigeria ... do hereby make enact and give to ourselves the following Constitution.'[2]

The objective of this chapter is to test the correctness or otherwise of the criticisms of the 1999 Constitution with respect to its legitimacy. Issues addressed in this chapter include whether popular participation by Nigerians in the constitution making process is wholly and exclusively the barometer for the legitimacy of the constitution; whether the insertion of the phrase 'We the People of the Federal Republic of Nigeria,' in the preamble to the constitution is useful

[1] Section 1 (3) of 1999 Constitution.

[2] Femi Falana. *Tell Magazine* (9 August 1999), 21.

for the purpose of testing the legitimacy of the Constitution. In other words, does the Constitution derive its legitimacy from the preamble? What is the importance of a preamble in a constitutional or statutory document? Assuming that the 1999 Constitution is not a legitimate document, will an amendment of the constitution by the National Assembly, which derives its legitimacy from the same constitution, invest it with legitimacy?

The Autochthony Theory

The people, as the ultimate source of government powers, are the heartbeat of the autochthony theory. It is said that men are born free and are therefore, ordinarily able to organize their affairs. However, in appreciation of the need for social orderliness, limited powers are yielded to the government by members of a society for their common good. Therefore, the right to govern the people is expressly conferred on the government by the people. The people are therefore regarded as the ultimate source of government authority and powers. Sovereignty is consequently ascribed to the people.

Great Britain witnessed an era of absolutism prior to 1215 in the sense that there was no distinction between the king and sovereignty. Sovereignty was ascribed to the monarch who could do no wrong. However, in 1215, when the Magna Carta was established, the King was compelled to concede some powers to the nobles and the clergy. The concession marked the beginning of the recognition of the people as the source of government powers. Thereafter, sovereignty of the people became the cornerstone of modern democracy.

An autochthonous constitution is a product of popular participation in the constitution-making process. It is a people-led, people-processed and people-oriented constitution. Honourable Justice Niki Tobi rightly observed: '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' and not a product of imperialism or colonialism, i.e., it must be free from any external intervention.

To determine whether a constitution is autochthonous or not, the entire constitution-making process should be taken into consideration. Once the totality

of the constitution-making process and the content of the constitution reflect the people's desires, the constitution can be called autochthonous.[3]

The autochthony of the constitution from a people-processed perspective first found written expression in the American Constitution. In 1787, fifty-five delegates from 12 out of the then 13 states assembled at Philadelphia in order to prepare the American Constitution. The constitution which emerged underscored the importance of the sovereignty of the people through their representatives in the constitution-making process. The constitution was the product of a rebellion led by Daniel Shay against tax collectors and the courts in Massachusetts. The mandate of the delegates, was to design an effective system of national government that would win popular approval in a nation that had just revolted against a monarch.[4] They recognized the dangers in concentrated powers and the need for broad popular representation. Above all, the constitution acknowledges the people as the ultimate source of government powers. Accordingly, the preamble to the American Constitution states:

> We the people of the United States of America in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote general welfare and secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America.

The preamble remains a model and has been adopted with or without modifications by many countries with written constitutions. It has for example, been adopted with some modifications in the 1963, 1979 and 1999 constitutions of the Federal Republic of Nigeria. The preamble underscores the element of democracy and the people as the ultimate donors of government's powers in contradiction to dictatorship or monarchical form of government. Thus, section 14(2) of our 1979 and 1999 constitutions identically provide that 'it is hereby accordingly declared that sovereignty belongs to the people of Nigeria from who government through this Constitution derives all its powers and authority'.

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[3] N. Tobi, 'The legitimacy of constitutional change in the context of the 1999 Constitution' in *Issues in the 1999 Constitution*, Ayua et al., eds. (Nigerian Institute of Advanced Legal Studies, Lagos, 2000), 29-30.

[4] H. Ols Stephens and John M. Scheb, *American Constitutional Law* (West Pub Co, St Paul, Minnesota, 1993), 4.

The 1999 Constitution: the Process

On the 11th of November 1998, General Abdulsalami Abubakar, the then Head of State and Commander-in-Chief of the Armed Forces, inaugurated the Constitutional Debate Co-ordinating Committee (CDCC). The Committee was saddled with the responsibility of organizing a debate on the 1995 Draft Constitution. The Head of State, in his inaugural address to the Committee, mandated the Committee '... to pilot the debate, co-ordinate and collate views and recommendations canvassed by individuals.'[5]

The Committee, which consisted of 24 eminent Nigerians, piloted the debate on the Constitution. It called for memoranda from individuals and interest groups. Individuals and groups were further encouraged to organize workshops and symposia within and outside the country. The reports of the various workshops and symposia were made available to the Committee.[6]

The Committee also held public hearings during which individuals and interest groups made contributions. A special hearing was also held at the Federal Capital Territory Abuja, where provisionally registered political parties, the judiciary, the Nigerian Bar Association, the Nigerian Medical Association, the Nigerian Labour Congress, the organized private sector, Nigerian farmers, the National Association of Market Men and Women, women and students associations, among others had the opportunity to contribute to the debate on the constitution.

At the conclusion of the public hearings and submission of memoranda, the committee collated and synthesized the data collected. Each debate centre submitted a report on the views canvassed in both written and oral submissions made to it. The team reports were debated at the plenary sessions of the committee in order to distill the preponderantly canvassed views on the Draft Constitution.[7]

The oral and written submissions made by Nigerians were the cornerstones of the Committee's recommendations. According to the report:

> The recommendations in this report are based on the views of Nigerians on the 1995 Constitution as expressed in their written and oral submissions to the Committee. Volume IV contains the verbatim reports from each of the debate centres.[8]

[5] ibid. See paragraph 3 of the address, contained in the Main Report of the Committee Annexure 1, 44-50.

[6] ibid, 25-29.

[7] ibid, paragraph 1.6.1, of the Main Report.

The committee's report was submitted to the Head of State. The report was further subjected to debate by the defunct Provisional Ruling Council, which was the highest lawmaking body. Most of the recommendations of the Committee were accepted by the Council, the others were rejected. On the basis of the Council's deliberations and amendments, the Federal Ministry of Justice drafted the 1999 Constitution. The Constitution was promulgated on the 5th of May 1999 by Decree No. 24 of 1999, and came into force on the 29th of May 1999.

It is noteworthy that the 1999 Constitution is patterned after the 1979 Constitution. It adopted most of the provisions of the latter. One of the highlights of the Committee's report was that most Nigerians who participated in the debate preferred the 1979 Constitution to the 1995 Draft Constitution because the latter had been doctored by the military government. However, both the 1979 and 1999 constitutions were tampered with by the military rulers. Under the 1979 Constitution, for example, some of the recommendations of the Constituent Assembly were either outrightly rejected or amended by the defunct Supreme Military Council. The provisions of the Land Use Act, and the National Youth Service Corps Scheme are examples of statutes, which were embedded in the 1979 Constitution by the defunct Supreme Military Council. The late Hon Justice T.A. Aguda challenged the legitimacy of the 1979 Constitution thus:

> Even after that Assembly (Constituent Assembly) had submitted what was supposed to be the final Constitution to the Military – that government consisting of a few men in uniform, without any pretence whatsoever to any knowledge of law or of constitution making made some atrocious amendments and additions to it without subjecting the important features of such amendments and additions to a referendum. And yet they had the audacity to say 'we the people' of the Federal Republic of Nigeria do hereby make, enact and give to ourselves the following Constitution. I have always dissociated my self from this assertion since I have a large number of reservations about the Constitution.[9]

[8] ibid, 19; paragraph 1.6.2. of the Main Report.

[9] T.A. Aguda, *The Judiciary in the Government of Nigeria* (New Horn Press, Ibadan, 1983), 101-102.

statutory documents do not depend on preambles. Basically, a preamble illuminates the objectives of the framers of a constitution. Reference may be made to the preamble to resolve ambiguities in the Constitution. As Chester James Antieau rightly observed:

> The preamble to the Constitution of the United States illuminates the objects of the framers and thus can be a guide, but it is not construed to confer powers or rights. The preamble explains the objects of the framers were: to form a more perfect union, to establish justice; to ensure domestic tranquillity, to provide common defence, to promote general welfare and secure the blessings and liberty to us and our posterity.[12]

The above statement by Antieau has the judicial blessing of Hon. Justice Harlan in *Jacobson v. Massachusetts*.[13] His Lordship held that:

> Although the preamble indicates the 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 departments.

There are also judicial decisions in Nigerian courts, which corroborate the restricted utility of preambles in the constitution and statutes. These cases show that a preamble either highlights the pre-eminence of a constitution or declares the objectives of the framers of the constitution or of an enactment. These cases underscore the point that unless expressly incorporated,[14] a preamble is generally not an operative part of a constitution or statute.

In *Attorney-General of Bendel State v. Attorney General of the Federation*,[15] the Supreme Court had to decide whether a money bill passed by the National Assembly in violation of the legislative process, but assented to by the President, was valid or invalid. The court held that the bill was invalid. In the course of the judgment, Obaseki, J.S.C. (as he then was) upheld the preamble to the

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[12] Chester James Antieau, *Constitutional Construction*, 1982, 31.

[13] (1905) 197 U.S. 11; ;255 et., 358.

[14] See for example Decrees No. 28 of 1970; No. 13 of 1984.

[15] (1981) NSCC, 314 at 369.

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iews were expressed by Professor Abiola Ojo. He contended:

> . . that the Supreme Military Council took it upon itself not only o modify what was submitted to it by the Constituent Assembly, t went ahead to insert several new provisions without reference o the Assembly. Aside from being rather undemocratic and rbitrary, the Constitution was, particularly by this last act, obbed of the possibility of being invested with an autochthonous haracter, as being substantially a product of the will of the eople of Nigeria.[10]

of historical interest that in spite of the above criticisms, the 1979 ion remained the grundnorm in Nigeria until 31st December 1983 when ry intervened. The military interventionists did not outrightly jettison the stitution, rather, they modified it. It is also noteworthy that since the 29th 999, the 1999 Constitution has been the organic law in Nigeria.

le and the Legitimacy Question

ted above, critics of the 1999 Constitution have questioned its legitimacy the preamble, which states 'We the people of the Federal Republic of Based on this preamble, the constitution has been labelled a false and t document, which was clearly designed to conceal the fact that it was actment of the representatives of the people of Nigeria.

ccuracy or otherwise of the criticisms of the preamble can be appreciated e backdrop of the role of a preamble in a Constitution. In other words, ible to have a constitution without a preamble? Is the preamble an able feature of a constitution? What exactly is the role of a preamble in tion or statute?

ables are basically introductory. This explains why they are placed at the of the constitution or statute. A careful study of opinions and judicial indicate that a preamble is ordinarily not an integral/operative part of a n or statute.[11] In other words, rights and duties in constitutional and

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Constitutional Law and Military Rule in Nigeria (Evans Brothers, Ibadan, 1987).

ional cases preambles are specifically expressly declared to be integral part of e for example, the Constitution Supremacy and Enforcement of Powers Decree 970.

tion as emphasizing the pre-eminent status of the constitution. According ordship:

> The pre-eminent status of the Constitution is emphasized by the facts stated in the preamble that "We the people of the Federal Republic of Nigeria . . . make, enact and give to ourselves the following Constitution" and reinforced by the declaration in Section 14(2) of the Constitution that "It is hereby declared that sovereignty belongs to the people of Nigeria from whom government through this Constitution derives its powers and authority.

se of *Ogbonna v Attorney General of Imo State*, Hon. Justice Nnaemeka d that a preamble in an enactment is not an integral part of a statute but preface, He said:

> t is necessary to note that the preamble to an enactment is, as it were, its preface or introduction the purpose of which is to portray the interest of the framers and the mischief they seek to remedy. It may sometimes serve as a key to open the understanding of the enactment . . . Strictly, it is not part of the enactment hence most modern statutes do not contain any preamble.[16]

kpata endorsed the above pronouncement of Nnaemeka Agu thus:

> There is no doubt that the preamble of a Constitution or a Statute has its usefulness. It usually states or professes to state the general object and intention of the law makers and the purpose of the enactment. . . . In effect, in the preamble, the law makers chart for themselves a path to a preconceived destination. If however, they decide, even for no reason at all to change their route in the course of the legislative journey and make for a different destination the preamble will not override the change of direction. There being a change of direction does not by itself raise an ambiguity. The function of the preamble is to explain

a v. Attorney General Imo State (1992)1 NWLR pt 220: 647, 671.

> what is really in the enactment and it may either restrain or extend as best suits the intention.[17]

It is evident from the above pronouncements that preambles have limited utility in constitutional and statutory documents. We humbly submit that a preamble such as that contained in the 1999 Constitution is not an integral part of the constitution and consequently cannot be the source of its legitimacy.

Insisting on the preamble as the source of the legitimacy of a constitution amounts to declaring any constitution without a similar preamble illegitimate. By extension therefore, countries with unwritten constitutions stand the risk of their constitutions being classified as illegitimate. Great Britain, New Zealand and (to a limited extend) Israel are glaring examples of countries with unwritten constitutions. Can it therefore be contended that the constitutions of these countries lack legitimacy because they do not have preambles? Only a bold person will contest the legitimacy of the British Constitution. Our contention, is that the preamble to the 1999 Constitution is neither an integral part nor the source of legitimacy of the constitution.

The point frequently ignored by the critics of the legitimacy of the 1999 Constitution is that the preamble merely illuminates the objectives of the Constitution. The sentences after the words 'Republic of Nigeria' and before 'Do HEREBY' are often glossed over by the critics of the 1999 Constitution. The effect of such glossing over is the suppression of the objectives of the preamble to the constitution.

A careful analysis of the preamble to the 1999 Constitution shows that the objectives of the framers of the constitution include fostering the peaceful co-existence of Nigerians as one nation, the promotion of pan-African solidarity, world peace and international co-operation, promotion of good government and welfare of residents of Nigeria and promotion of freedom, equality and justice.

It is in the light of these identified objectives that the preamble to the Constitution states:

> 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

[17] ibid, 694-695.

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 Justice and for the purpose of consolidating the Unity of our people: DO HEREBY make, enact and give to ourselves the following Constitution.

'e respectfully submit that contrary to the stand of the critics of the 1999 itution, its preamble is neither an integral part nor the source of the ıacy of the constitution. It simply highlights the objectives of the ution. The legitimacy of a constitution must surely be located outside its ble.

earch for Legitimacy of the Constitution

ıthonous Theory

nt theories have emerged in the bid to prove the legitimacy of the tion. First is the theory which views a legitimate constitution as a 'home-document free of foreign imposition. Honourable Justice Niki Tobi rightly es that '... An autochthonous constitution must be home-grown in the sense home-made and not a product of imperialism or colonialism'.[18] The point e made that a constitution is not less autochthonous merely because some ovisions are similar to those of foreign constitutions. This is an area of or adaption, which has nothing to do with the autochthonous character nstitution. Once the entire constitution-making process is indigenous to le, it fulfils the element of autochthony. This quality of nativity does not t the constitution must contain traditional or customary provisions.

ler to determine the autochthony of a constitution, the entire constitution-process should be examined. Therefore, once the totality of the on-making process is apparently home-grown in nature and content, the on qualifies for the appellation 'autochthonous'.

ier recognized theory on constitutional autochthony is that which insists ır participation by the people in the constitution-making process. to the theory, anything short of popular participation, either through um or elected representatives, in the making of a constitution robs the n of autochthony. On the true nature of a Constituent Assembly, Chief wolowo commented thus:

> Its inherent and inseparable attribute is that it must be composed of representatives duly elected by the registered voters of 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.[19]

Professor Abiola Ojo takes a similar stance and contends further that the 1979 Constitution was devoid of autochthony because of the insertion of the new provisions by the defunct Supreme Military Council. He contends that:

> . . . the Supreme Military Council took it upon itself not only to modify what was submitted to it by the Constituent Assembly, it went ahead to insert several new provisions without reference to the Assembly. Aside from being rather undemocratic and arbitrary, the Constitution was, particularly by this last act, robbed of the possibility of being invested with an autochthonous character as being substantially a product of the will of the people of Nigeria.[20]

Popular participation in the constitution-making process is an important requirement for legitimacy, which the constitutions of most nations can hardly meet. For instance, since independence, Nigeria has not produced a constitution, which truly complies with the requirement of the autochthony school.

The 1979 Constitution for example, was drafted by the Constitution Drafting Committee, which consisted of 49 'wise men' handpicked by the then federal military government. The Draft Constitution was examined and deliberated upon by the Constituent Assembly. The Assembly consisted of elected and selected members. Twenty-seven out of the two hundred and thirty members of the Constituent Assembly were selected by the government. The other elected members were indirectly elected through the local government councils, which served as the electoral colleges. Professor Ojo rightly observes:

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[19] Obafemi Awolowo, *Thoughts on the Nigerian Constitution* (Oxford University Press, Ibadan, 1966), 133.

[20] Ojo, op cit.

There were fierce and controversial debates on the use of local councils as electoral colleges. It was argued that the system of indirect election used in some states militated against popular will. Nomination of 25 per cent of the membership of councils seriously negated their claim to being truly representatives of the people.[21]

Constituent Assembly did not enact the 1979 Constitution, it merely ed on the draft prepared by the Constitution Drafting Committee. It was inct Supreme Military Council, which passed the enabling law. eless, the clause 'We the people of the Federal Republic of Nigeria' in the preamble to the constitution. Nevertheless, the constitution l the grundnorm in Nigeria from 1st of October 1979 to 31st December ien the military intervened. The interventionists suspended and modified itution. The unsuspended part of the constitution remained in force until 1999! It is on record, that the military intervention of December 1983 ing to do with the legitimacy of the 1979 Constitution. As rightly dged, 'nothing contributed more to the military intervention of 1983 than spread electoral malpractices.'[22]

ist also be acknowledged, that despite imperfections and its inability to e requirements of the pure autochthony theory, the 1999 Constitution has the grundnorm in Nigeria since it came into force on 29th May 1999. g by the strict requirement of popular participation by the people in the on-making process, the legitimacy of the constitutions of most countries ery questionable.

processes which led to the emergence of the American and the British ons support our position on the difficulties surrounding a strict adherence tochthony theory of popular participation in the constitution-making

American Constitution for example prides itself as the constitution in e preamble 'We the people' first found expression. The American on was prepared by fifty delegates from twelve out of the then thirteen , in 1787 gathered in Philadelphia. Rhode Island did not send delegates.

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olekun , *The Fall of the Second Republic* (Spectrum Books, Ibadan, 1985), 74.

It, therefore, was not represented at the constitutional convention. Under the pure autochthony theory, the absence of the delegates from Rhodes Island would rob the American Constitution of legitimacy. In other words, not all Americans participated in the constitution-making process. Despite this, the legitimacy of the constitution as a document made by Americans for the use of Americans has never been denied. However, Shapiro and Trisolini have observed that:

> . . . this is not to say that the Constitution initially established a political system that was democratic by present day standards. Many people were disenfranchised. However, a sound foundation was laid for the future development of more democratic government.[23]

The origin of the British Constitution from the view point of the pure autochthony theory is more undemocratic. The constitution is traceable to the activities of the revolutionary cabal, which arbitrarily sacked King James II, declared itself as the parliament and invited William and Mary of Orange to wear the crown. The revolutionary cabal thereafter proceeded 'by a remarkable piece of boot strapping to declare itself to be a valid parliament and Williams and Mary to be legally entitled to the crown.'[24]

From the viewpoint of the theory of popular participation in the constitution-making process, the above instances are strange. However, only a bold person will contest the legitimacy of the American and the British constitutions. The testimony of McEldowney,[25] a leading British constitutional law expert is that 'The British Constitution has never been made but has grown. The building has been constantly added to, patched and partially reconstructed so that it has remained from century to century but it has never been razed to the ground and rebuilt on new foundations.'

A careful study of the constitution-making processes of different nations shows that the requirement of popular participation in the constitution-making processes is more imaginary than real. It is physically and factually impossible for all the people of a country to participate in the constitution-making process.

[23] Martin M. Shapiro and Rocco Trisolini, *American Constitutional Law* (Macmillan, New York, 1983).

[24] Harry Calvert, *British Constitutional Law* (Financial Training, London, 1985), 14.

[25] J.F. McEldowney, *Public Law* 3rd ed. (Sweet & Maxwell, London, 2003), 10.

of Recognition

ical difficulties surrounding the popular participation theory paved the
e recognition theory. The thesis of the recognition school is that popular
ion in the constitution making process, may not necessarily produce the
gates knowledgeable in constitution making. It concedes the need to
technocrats who may not necessarily be popular to be elected as
However the constitutions which are produced by non-elected persons
quently recognized by the people through application and acceptance.
ding to the recognition theory, loyalty to the constitution is not
y a matter of choice. It is subconsciously developed as a matter of habit
mpulsion. Where a government is bad no legitimate constitution will
However, a good government sustains the legitimacy of the constitution
e lack of popular participation in the constitution-making process.
e of the imperfections in the constitution-making processes of the United
America and Great Britain, these constitutions are accorded respect and
citizens and non citizens of these nations.
panese Constitution was not drafted by citizens of Japan. It was drafted
erican government. The constitution also introduced into Japan western-
e values, which were foreign to the Japanese people. Interestingly, the
to Japanese Constitution states that 'We Japanese people . . . .Proclaim
eign power resides with the people and do firmly establish this
on' . . . The legitimacy of the Japanese Constitution has not been
l. It has been accepted and applied by all concerned.
oint which advocates of the popular participation theory often miss is
ceptance and application of the constitution by the citizens of a nation
ally invests the constitution with legitimacy. Legitimacy is sustained by
sing social services to maintain roads, meeting the needs of the poor,
defenceless and the sick. On the other hand, the legitimacy of a
n is rejected in response to bad governance and a government's inability
he economic, social and political expectations of the people. Kenneth
ghtly contended that 'there are circumstances in which it is morally right
o refuse to obey the Constitution, to upset it. The Constitution may be
tion of law and order in a community, but mere law and order is not
must be good law and good order'.[26]

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[26] Wheare, *Modern Constitution* (1966), 64.

CONCLUSION

The preamble to the 1999 constitution is not the source of its legitimacy. It merely illuminates the dominant objectives of the constitution. The legitimacy of the constitution is evidently located outside the preamble and the constitution. The Nigerian constitution was written by Nigerians and not by foreigners. It was also brought into operation by a decree promulgated by the Armed Forces Provisional Council, which had the legislative power in the country at the time. A constitution may have a legal or an extra legal origin. Chief F.R.A. Williams rightly argued that:

> 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 an existing legal order. 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 Revolutionary Government.

As earlier indicated, since 29th May 1999, the constitution has remained Nigeria's organic law . Elections have been conducted and challenged under the constitution. Judicial officers have been appointed and removed in pursuance of the provisions of the constitution, ministers and special advisers and principal officers of the legislative houses as well as judicial officers have been appointed and removed in accordance with the provisions of the constitution. It is therefore futile to argue against the legitimacy of the constitution.

The constitution has been accorded recognition by Nigerians. Allegiance to and the application of the provisions of the constitution corroborate the acceptance and recognition of the constitution by Nigerians. The legitimacy of the 1999 Constitution is, therefore, evidently rooted in its acceptance and application by Nigerians.

The legitimacy of the constitution should not be queried because of its defects. The constitution was prepared by mortals. Hence, it must of necessity contain defects and imperfections. These defects, however, do not rob the constitution of its legitimacy. The moves by the National Assembly and the Executive to amend the constitution corroborate the author's position that the constitution is legitimate. An amendment of a constitution presupposes that the constitution is valid. The power of the National Assembly to amend the constitution is also derived from section 9 of the constitution. If the constitution is illegitimate, then there is no

valid basis for the exercise of the power of amendment conferred by the National Assembly.

In a bid to prove the legitimacy of the constitution, there are two options: the popular participation and recognition theories. The 1999 Constitution evidently does not satisfy the strict requirements of the former, but it fulfils the liberal requirements of the latter. However, going by the popular participation theory, mere amendment of the 1999 Constitution by the National Assembly would be insufficient to confer legitimacy on the constitution. In such a situation, the search for legitimacy should go beyond participation by the representatives of political parties, selected experts or the National Assembly. There must be a Constituent Assembly, consisting wholly and exclusively of duly elected representatives of the people, with a mandate to produce a constitution.

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