

## CONSTITUTION MAKING, CONSTITUTIONALISM AND INSURGENCIES IN NIGERIA

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### ABSTRACT

This paper examined the process of making constitution as one of the reasons for ubiquitous eruption of insurgencies in Nigeria. The problems that have attracted the attention of the paper are the failure of the constitution of Nigeria to adequately address the fundamental challenges facing Nigeria, most especially the challenge of defining an appropriately agreeable mechanism for harmonious coexistence; flagrant disregard of the constitution by the political leadership and the loss of hope in the constitution by the followership. The paper adopted elite theory to explain the process of constitution making in Nigeria and the level of adherence to constitution. Using content analysis, the paper identified the exclusion of masses as one of the factors fuelling ethnic insurgencies in the country. It concluded that the process of constitution making is reflexive of the whims and caprices of the ruling elite while neglecting the fundamental challenges threatening the corporate existence of the Nigerian State. Expectedly, therefore, the ethnic groups that were dissatisfied with the present federal structure resulted to violence and insurgencies; having lost hope in the capacity of the Nigerian State to adequately address their fears. The paper recommended, inter alia, bottom-up approach of constitution-making as a necessary mechanism to arresting various insurgencies that have become sporadic in Nigeria.

*Key words:* Approach, bottom-up, constitution, elite, insurgency, violence.

### INTRODUCTION

Nigeria has witnessed emergence of different sets of insurgent groups, which have continued to threaten her corporate existence. Some of the existing insurgent groups in Nigeria include: Oodua People's Congress (OPC) (Yoruba), Bakassi Boys and Movement for Actualisation of Sovereign State of Biafra (MASSOB) (Igbo), Movement for the Emancipation of the Niger-Delta (MEND) (South South) and Boko Haram (North) among others (Ekanem, Dada & Ejue, 2012).

Scholars have identified varying factors accounting for the ubiquitous nature of these groups, which include, inter alia, poor leadership; poor economic management arising from endemic corruption; social injustice, marginalisation and neglect;

unemployment and poverty; forced and centralised federal arrangement (Nigeria's federalism was not negotiated by the socio-ethnic groups in Nigeria). Nigeria came into being by the colonial fiat; its existence was not a product of the negotiation or agreement of the hitherto independent ethnic nations (Nwabueze, 1973) and elitist and centralised nature of constitution making (Arowolo, 2013; Ekanem *et al.*, 2012; Nwabueze, 2007; Oyebo, 2005). The concern of this paper therefore is the nature of constitution making, which the paper argues, is the cause of insurgencies in Nigeria.

The relevance and importance of constitution making and constitutionalism cannot be over-emphasised. In the modern state, constitution has come to be regarded as an inevitable instrument of nationhood and development (Kolawole, 1997). As an instrument of behavioural orientation and culture, constitutions have gone beyond any ideological divide. Therefore, all nations, irrespective of ideology, have embraced the efficacy of and the need for constitutions. This is, perhaps, understandable as the complexity of human co-existence demands agreeable sets of rules to condition behaviour (Kolawole, 1997).

The paper is divided into five sections. Section one deals with the introduction; section two dwells on conceptual clarifications; section three focuses on theoretical framework, while section four and five concentrate on the analysis of constitution making, constitutionalism and the challenges of insurgency in Nigeria; and, conclusion respectively.

### **Conceptual clarifications**

An insurgency is an armed rebellion against a constituted authority (Aro, 2013). It is a movement using violent means to oppose a country's government with the aim of carrying out the tenets of or propagating a particular ideology (Arowolo, 2013). It is a movement and a political ideology with a specific aim.

One of the insurgent groups that has shaken the root of Nigeria as a nation and has attracted massive international attention is Boko Haram. Scholars have argued, for instance, that Boko Haram has been in existence right from the 1960s but only started to draw attention in 2002 (Aro, 2013; Ekanem, Dada & Ejue, 2012). It is on record that Boko Haram has been operating under the name Shabaab Muslim Youth Organisation with Mallam Lawal as the leader since 1995 but leadership responsibility of the group later fell on Mallam Mohammed Yusuf when Mallam Lawal left Nigeria to continue his education in Saudi Arabia (Aro, 2013; Ekanem *et al.*, 2012). It was the leadership of Mallam Mohammed Yusuf that allegedly opened the group to political influence and popularity (Aro, 2013). The official name of Boko Haram is: *Jama'atu Ahlis Sunna Lidda'awati wal-Jihad*, which means "people committed to the propagation of the Prophet's teachings and Jihad" (Aro, 2013; Ekanem *et al.*, 2012). The group was nicknamed Boko Haram, a phrase in the local Hausa language, which means, "Western education is forbidden" (Aro, 2013).

Constitution is an embodiment of "rules and customs, written or unwritten, legally established or extra-legal, by which a government conducts its affairs" (Roskin, Cord, Medeiros & Jones, 2008, p. 57). Almost all nations have constitutions since they operate according to some set of rules. It is the foundation on which all other laws are founded. In its essence, it must reflect and define the very basis of human co-existence within the society where it is being developed; the people's norms and values, their

belief systems; their culture. For the constitution to fulfil its role of guiding the behaviour of both the leaders and the led, it must be simple, short, concise, and should not contain too much of legal jargons, it must be easy to read and to understand by the ordinary people without necessarily having a law certificate (Nwabueze, 1973).

It has also been noted that the absence of constitution or rejection of its principles is common in countries governed by authoritarian regimes (Asirvatham & Misra, 2009; Roskin *et al.*, 2008). In such countries, as noted by Roskin *et al.* (2008) and Asirvatham and Misra (2009), there is power recklessness, highhandedness, armed tribes and warlords and stealing by government officials.

The observation of Asirvatham and Misra (2009) and Roskin *et al.* (2008) has made it compelling for every country to, in addition to having a constitution, adhere strictly to the tenets of the constitution (constitutionalism). Constitutionalism has been noted for its emphasis on adherence to the letter and spirit of the constitution (Asirvatham & Misra, 2009). Constitutionalism has a multifarious conceptual utility (Heywood, 2007). Most generally, it is a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law (Fehrenbacher, 1989). Since it derives its force from the collective sovereignty of the people, its obedience and compliance emanate directly from its legitimacy (Asirvatham & Misra, 2009). Its motive is and has been to uphold the supremacy of the constitution and requires that government officials and the people obey and operate within the framework of the law. Heywood (2007) observes that constitutionalism is the practice of limited government, where government institutions and processes are effectively constrained by constitutional rules.

One of the most salient features of constitutionalism is that it describes and prescribes both the source and the limits of government power. Heywood (2007) has captured this dual aspect by noting that constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order. In summary, therefore, constitutionalism, in this sense, is a liberal arrangement that supports constitutional principles, respects individual and groups' rights.

A number of scholars have focused on constitutionalism (Mandaza, 1991; Okoth-Ogendo, 1991; Shivji, 1991). Scholars have argued that constitution without constitutionalism is a mere façade that promotes *sit-tightism* (tenacity in government), insurgencies (ideology-based violent agitation against a constituted government), centralism (concentration of governmental powers, functions and resources at the centre) and endless agitation (Mandaza, 1991; Okoth-Ogendo, 1991; Shivji, 1991). It is, therefore, important that a country should not only have a good constitution but that adherence to the principles of constitution (constitutionalism) should be upheld (Mandaza, 1991; Okoth-Ogendo, 1991; Shivji, 1991). Constitutionalism has been described as a process of political rules and obligations which bind both governors and the governed, both kings and ordinary citizens. There is no constitutionalism under absolute monarchs or absolute presidents. Constitutionalism is of necessity a version of limited government. (Mazrui, 2001).

Nigeria's experience begs for the emphasis on those values that promote adherence to the letter and spirit of constitution. There is constitution in Nigeria but what seems to be practically lacking is constitutionalism (Falana, 2009; Nwabueze, 1973; Oyebode, 2005). Nigerian constitution is a victim of flagrant disobedience by the

political authorities, and suffers from legitimacy problem, which may further promote insurgencies and ethnic violence in Nigeria (Falana, 2009; Nwabueze, 1973; Oyebode, 2005).

## THEORETICAL FRAMEWORK

A lot of approaches and theories have been developed in social sciences to explain power relations and complex processes of interaction among groups and the mechanism for conditioning and constraining such interaction and relation. Constitution, as one of these mechanisms, is put in place to perform the function of regulating behaviour and stabilisation of polity. The processes of constitution making and implementation vary from one country to another. Therefore, it is reasonable to evolve theories to put these processes in a proper contextual perspective. In achieving this, this paper adopts elite theory as a functional and appropriate tool of analysis.

The adoption of elite theory as a tool of analysis in this study has become inevitable because it is the elite that initiate and kick-start constitution making process in developing countries, of which Nigeria is part (Asirvatham & Misra, 2009). In Nigeria, for instance, elite dominates the formal structure of government and can be a threat or bulwark to democracy (Anifowose, 2008).

The study of elites as a political inquiry into the role and nature of leadership in society was popularised by Vilfredo Pareto (1848-1923) and Gaetano Mosca (1858-1941) (Dowse and Hughes, 1983). The elite theory is a philosophical explanation of the role of the leadership in constitution making (Sargent, 2009). If the formal structures of government are central to explaining 'who gets what, when and how', then the study and relevance of the elite in policy process may be relevant (Anifowose, 1999). Elites dominate the formal institutions of government and are, therefore, saddled with the responsibilities of the institutions ostensibly on behalf of the people. Elite theory is premised on a number of assumptions:

The society consists of two categories: the selected few, who are capable and, therefore, have the right to supreme leadership; and the vast masses of people who are desired to be ruled; the majority of human beings are apathetic, indolent and slavishly uninformed about what goes on in the administrative system and permanently incapable of self-government (Dowse & Hughes, 1983). That is, the elite decide on the structure, the personnel and the process of public policies of the administrative system; hence, the structure, substance and output of the administrative system may be viewed as the preferences and values of the governing elite (Dowse & Hughes, 1983).

The theory believes that every society is ruled by a minority that possesses the qualities necessary for its accession to full social and political power. Those who get to top are always the best and are known as the elite (Varma, 2005). Elites are the decision makers of the society whose power is not subject to control by any other body in the society. Political elite, according to Parry (1969), is the small minorities who appear to play an exceptionally influential part in political and social affairs.

The elite theory postulates that public policy reflects the values and preferences of the elite rather than demands of the masses. The elite consist of those few individuals who wield powers and hold leading positions in the strategic aspects of society. The

majority, the masses, only obeys and are guided, controlled and governed by the few. Many of the elites do not hold formal or legal authoritative powers but are rather behind the scene, teleguiding and manipulating overt political and policy actions (Ikelegbe, 1994).

These foregoing presumptions explain the reasons for the contentment and incapability of the masses to challenge the authoritative position of the elite that informs elites' reflection of policy and its processes. The elite theory can be applied to the process of constitution making in Nigeria. This is because the process was dominated by the political elite (Aro, 2013; Falana, 2009; Ikelegbe, 1994). The political elite occupies the institutions of government and thereby determines the direction and functionality of such institutions (Ikelegbe, 1994). The political elite determines when, how and in what manner will constitution be enacted. For instance, government comprises three arms: the executive arm of government (saddled with the responsibility of conceiving, formulating and implementing public policies), is occupied by the president, the vice president, and ministers including a retinue of aids; the legislature has the responsibility of law making (it does this by passing into laws bills emanating from the executive, its own members or the public); and, the judiciary with the responsibilities of adjudicating and interpreting laws. All these institutions including bureaucracy (i.e. the civil service) are all occupied by the elite.

Guided by this fact, the paper affirms that the source of constitution and nature of constitution making in Nigeria and the interests such constitutions serve can be traced to the elite. The theory attempts a realistic explanation of the source of constitution by predicating it in the elite rather than the masses. Various policies in the public service, including the constitution, can also be viewed as emanating from the Nigerian elite- the political, administrative and economic leaders.

This, therefore, explains the process by which constitutions have been made in Nigeria since independence. As a departure from Eurocentric approach of constitution making, Nigeria's experience can be explained better in the context of the role played by the elite to the exclusion of the masses. Scholars are of the opinion that constitutions should be drafted through a bottom-up approach process that includes and involves, in holistic manner, the civil society (Ihonvbere, 1999; Mbaku, 1998).

The issue of constitutionalism has not gained prominence in Nigeria. This is because constitutions are drafted without due consultations with, and to the exclusion of, the people for whom the constitution is made (Anifowose, 2008). Few of the reasons for political instability and ethnic insurgencies in Nigeria include: lack of consultation (domination of political activities by the elite and politicians in government); exclusion of the masses in key policy issues and lack of adherence to the dictates of constitution (Aro, 2013; Falana, 2009; Ikelegbe, 1989). Scholars have argued that the elitist nature of the constitution makes its obedience very difficult. Since the source of the constitution is not in the people; the constitution is alien to the people and obedience is not naturally secured. Electoral laws are not obeyed and thuggery and violence often determine election victory (Arowolo & Lawal, 2009). Scholars have traced source of many insurgencies to disobedience to the principles of the constitution; the source of which is elitist (Anifowose, 2009; Ikelegbe, 1989; Kolawole, 1997).

## CONSTITUTION MAKING, CONSTITUTIONALISM AND THE CHALLENGES OF INSURGENCY

The process of constitution making is divided into two: the old approach and the new approach (Igbuzor, 2001). In the old approach, according to Igbuzor (2001), the government stage-manages the election of a constituent assembly. This process ensures little or no debate, no consultation with ordinary people and no referendum on the draft constitution before it becomes laws as government has its own agenda and the direction of the constitution will eventually reflect the wishes of the government. The new approach, however, is a participatory process that places premium on dialogue, debate, consultation and participation. Such a process is guided by the principle of openness, legitimacy and inclusivity. Inclusivity, according to Igbuzor (2001), indicates that all voices and opinions including those of minority groups should be heard and reflected. It is an actual participation and involvement of all segments of the society in the discussion and determination of national priorities and values.

Taking a serious look at Nigeria's mode of constitution making, it is more of old approach that emphasises exclusion of the mass populace. In colonial era, it was colonialists who formally initiated and drafted constitutions for the country. In postcolonial era, it fell practically within the purview of the military to make the constitutions as various constitutions made within the period under review were done by the military (1979, 1989, 1995 and 1999) (Oyebode, 2005).

The process of constitution making has, since inception, dominated by the elite to the exclusion of the people. As Falana (2009) and Oyebode (2005) have separately argued, the exclusion of the Nigerian people in the making of the constitution is the beginning of the eruption of insurgencies currently being witnessed in Nigeria. According to them, the constitution that was imposed on the people fails grossly to address the major problems of the people. The constitution does not also address the national question of how to cohabit and coexist as one people united by common destiny (Falana, 2009; Oyebode, 2005). In fact, Oyebode (2005) observed that Nigeria has not done well in the issue of constitutionalism because the nation has been treated to a bastardization of constitutionalism and growing impotence of the judiciary in the face of countless acts of impunity, executive lawlessness and economic brigandage by praetorian guards that had imposed themselves on the political landscape of the nation.

A critical examination of the history of constitution making in Nigeria reveals that the Nigerian people have never been afforded the opportunity to exercise their sovereign power of producing a constitution. As noted by Falana (2009), Nigerian people are being deliberately excluded from the process of packaging a new constitution for the nation. According to him, the crises in the polity can be resolved through genuine commitment and adherence to the tenets of constitutionalism (Falana, 2009). In other words, the Nigerian State which is expected to be built on the principles of participatory democracy and social justice can be re-invented through constitutionalism.

The insurgencies in the country including the Boko Haram terrorism may be traceable to the domination of the constitution making process by the elite. The constitution is alien to and alienates the people for whom it was ostensibly made. Long-time neglect and the seeming inability of the constitution to address the critical national questions have propelled the sporadic violence and uprisings that are threatening the

corporate existence and unity of the country (Aro, 2013; Arowolo, 2013). The process of the constitution making excludes the categories of the Nigerian population. Their views and aspirations are not captured by the constitution. This frustration has led to aggression that has currently resulted in violence and terrorism.

The Nigerian 1999 Constitution opens with a lie by attributing the authorship of the constitution to the people of Nigeria. “We the people ...do hereby make, enact and give to ourselves the following Constitution” (Falana, 2009; Nwabueze, 1973; Osaghae, 1998). The implication of this is that the constitution that does not evolve from the people may suffer legitimacy and adherence problem and may not be adequately equipped to deal with legion of critical challenges of nationhood. Another important point to be made here is the issue of amendment procedure: who has the right to amend the constitution and what order should amendment follow? Should the constitution be amended or a new one made? Should the National Assembly initiate and drive the process? Should constitutional amendment be entrusted to the National Assembly? Should the outcome of constitutional conference be subjected to the legislative approval of the National Assembly or national referendum?

There is a plethora of issues to be addressed in the constitution. Although the focus of this paper is not the issues of amendment but the process and model of constitution making, the manner by which constitution is engineered, including the critical issue of inclusion and participation of the mass of Nigerian people and the most contentious issue of constitutionalism (Aro, 2013). For deep analysis, however, it is not out of place to dwell a little on the areas of amendment. Few of the areas include: true federalism ( issues of decentralisation, revenue allocation, fiscal federalism, local government autonomy, and state police), immunity clause, constitutional role for traditional rulers, legislature type (bicameral/unicameral legislature), election, representation, rotational presidency, tenure of the president and governors, form or system of government (presidential/ parliamentary system), and state creation.

Another germane issue is trust. The Nigerian people seem not to have trust in the ability and sincerity of the National Assembly to give Nigerians a generally acceptable constitution (Oyebode, 2005). The mistrust nursed by Nigerians is expected given the fact that the present crops of National Assembly members are beneficiaries of the present arrangement and may not have the political will to reverse the status quo. For instance, the issue of retention or scrapping of bicameral legislature and the mind-boggling allowance accruable to the National Assembly members may be glossed over by the National Assembly.

Another reason for misgiving has to do with the flawed elections that threw up many of the members of the National Assembly (Aro, 2013). At the State level, Houses of Assembly are rubber-stamps of their State Governors. The Governors dictate the tone and tenor for the Assemblies and so the Governors’ views on the amendments will simply be adopted by the Houses of Assembly (Falana, 2009). Some quarters are canvassing for Constituent Assembly that will serve as a platform for people to genuinely choose their representatives to speak on their behalf while others are clamouring for referendum. The process of amendment is very critical to the adherence to the provisions of the constitution; it has consequences on the acceptability and respectability of the constitution.

There is umbilical cord between constitutionalism and bottom-up approach of constitution-making (Oyebode, 2005; Nwabueze, 1973). The concept of bottom-up tends to co-opt and involve the communities in the process of constitution making. Scholars have observed that a constitution that emerges through people's participation receives obedience and people's acceptance capable of promoting national unity and political stability but what is deficient in the Nigerian case is the bottom-up approach (Oyebode, 2005; Nwabueze, 1973). Nigerian 1999 Constitution is foisted on the people by the military (Falana, 2009). This is the missing link and that also explains why Nigerian laws are largely disrespected even by the very elected leaders sworn to uphold the constitution.

## CONCLUSION

The focus of the paper was central to the examination of the process of constitution making which it described as elitist. The elitist nature of the constitution making has excluded the mass of the population and has made obedience to the principles of the constitution very problematic. The paper traced the source of insurgency in Nigeria to the nature of the constitution which was grossly incapacitated in addressing the fundamental national questions of harmonious relationship and appropriate definition of agreeable revenue allocation formula, including the inherently problematic issue of resource control.

While the paper emphasised the issue of constitutionalism and the rule of law, it focused on the new approach of constitution making, the arrangement that is inclusive and all-encompassing, as the only approach capable of reducing the political tension in the country and assuaging the uprisings there from. As a scholar has put it "the stability of a constitution depicts the stability of a nation; conversely, the instability of a constitution reflects the instability of a nation" (Kolawole, 1997).

In making a people's constitution, every identifiable community should be invited and consulted and its views included and reflected in the constitution. The new approach is capable of stabilising the polity by adequately addressing the fears of the minority as well as taking care of the aspirations of the majority. Evolving an acceptable constitution in Nigeria involves visionary leadership and supportive followership. This again could be achieved by exemplary leadership that serves the people in selfless and sincere manner. Leaders should be altruistic enough to surrender themselves to the provisions and letters of the constitution. Also, Nigerian political space should be structured to guarantee basic freedoms, the enthronement of a culture of public accountability, probity and responsibility (Ihonvbere, 1999).

Nigerians should be exposed to and taught the culture of constitutionalism and human rights education. This has become imperative as there is need to instill in the younger generation the principle of human rights and constitutionalism; this will go a long way to de-emphasise the culture of militarism which has already occupied the psyche of the younger generation.

In consideration of its multicultural nature, Nigeria should adopt a constitution that addresses the problem and concern of each ethnic group, allays the fear of the minorities, guarantees fundamental human rights and that eliminates electoral violence in all its ramifications. The present constitution cannot be said to evolve from the people, it

is a reflection of elitist aggrandizement and whims, to the exclusion of national opinion of people especially the grassroots people.

Ekweremadu (2012) has advised that citizens have moral claims to participating in constitution making, and he insists that strict observance of the principles of inclusivity, diversity, transparency, and accountability are capable of guaranteeing legitimacy of the final product through wide acceptance among the citizenry. He pointed out that whatever constitution the people will live under and obey must enjoy popular recognition and acceptance as their own document by capturing their views, expectations, and aspirations.

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