journals.unizik.edu.ng/index-php/jcpl ISSN: 2736-0342
NNAMDI AZIKIWE UNIVERSITY, AWKA
JOURNAL OF COMMERCIAL AND PROPERTY LAW

The Validity or Otherwise to the Claim of Autochthonous Constitution of Nigeria since Independence

Daniel Odeleye*

Sarah-Hope .A. Tebira**

Abstract

The question of autochthony of constitutions as opposed to the autonomy of nations is a subject matter that has held the attention of legal scholars, some of whom have posited that there are three established criteria to determine the autochthony of any constitution. This paper analysed the constitutions Nigeria has had since attaining independence and tested whether they are autochthonous in the light of the pure, substantial compliance and acceptance theories. The paper used the doctrinal research methodology and examined primary and secondary sources.In applying the first two theories, the paper found that the post-independence constitutions of Nigeria have not been autochthonous. But using the acceptance of constitution theory, the paper found that the 1979 Constitution of Nigeria was widely accepted as autochthonous following the provisions of the preamble to the Constitution of the Federal Republic of Nigeria (Promulgation) Act, 1999 and the decision of the Supreme Court in Nafiu Rabiu v State. In conclusion, this paper recommended that Nigeria should adopt the 21st century or modern approach to constitution-making as elucidated in the case of Re Secession of Quebec. To that end, it should amend section 9 of the 1999 Constitution to provide for procedures to convoke national conferences, conduct plebiscites and referendums, and constitute Constituent Assemblies, with a view to making a brand new Constitution. Only then can Nigeria claim to have an autochthonous constitution.

Keywords: Autochthony, Constitution and Constitution-making process

1. Introduction

Autochthonous political and legal system has developed as a new trend. This new trend has flourished within the last ten years of the twentieth century [1] and increasingly, emerging democracies want representative governments that are homogenous with powers that are limited by a constitution that originated from the people. From 1946, Nigerian nationalists had started to demand for full self-government.[2] Although Richard[3] maintained that Nigeria was hardly a coherent whole capable of immediate self-government, agitations by the nationalists continued unabated. These agitations birthed different Constitutions as a means to assuage the yearnings of Nigerians. Interestingly, the Legislative Council[4] played a fundamental role in formulating a plan which enabled Nigerians to participate at all levels in bringing up suggestions[5] for the Constitution of Nigeria. Against this premise, is it valid to assert that Nigeria has had an autochthonous

*__Daniel Odeleye__, Professor of Law, University of Abuja, Nigeria, odeleyedaniel@yahoo.com, 08034522672

**__Sarah-Hope.A. Tebira,__ PhD, University of Abuja, Deputy Director (Legal), National Assembly Abuja, Nigeria sarahhopebaribefi@gmail.com, 08033407763

[1] ABL Phang, *The Development of Singapore Law: Historical and Socio-Legal Perspectives* in EKB.Tan, 'Autochthonous Constitutional Design in Post-Colonial Singapore: Intimations of Confucianism and the Leviathan in Entrenching Dominant Government', (2013) 4 (2) *Yonsei Law Journal*, 273-308

[2] L Hamalai, and R Suberu, (eds) *The National Assembly and Democratic Governance in Nigeria* (National Institute for Legislative Studies, 2014) 90

[3] Ibid; Sir Arthur Richard was the Governor of Nigeria for the period. In his inaugural address to the Legislative Council, he maintained that Nigeria was not sufficiently a coherent whole either politically, socially or economically to be capable of self-governance.

[4] The Legislative Council was the Central Legislature in Nigeria.

[5] Hamalai, andSuberu (n2)

Constitution? The constitutional making process [6] which began in 1949 and produced the 1951 Constitution did not satisfy Nigerians until 1960 when Nigeria attained independence. Afterwards, the need to severe all vestiges of British rule, exemplified by an autochthonous Constitution became the new objective. This paper examines the various Constitutions of Nigeria since independence to ascertain whether Nigeria has had an autochthonous Constitution.

2. Conceptual and Theoretical Framework

2.1 Conceptual Framework

Autochthony originated from the German root word 'autochthon.'[7] It is a geo-scientific word which means originally, one sprung from the earth or aboriginal inhabitant.[8] Something is autochthonous when it is indigenous or native, "formed or originating in the place where found."[9] When applied to constitutional democracy, "autochthony" examines the origin of a constitution to determine whether the process of its emergence is home-grown, home- processed and free from foreign interference. To determine the autochthony of a Constitution, these three tests[10] are applied-

(a) the enactment of the constitution effectively severed legal relations between the nation and a former external power;
(b) the constitution making process and procedure was engineered completely by local sources; and
(c) despite having an extra-legal origin, the owners of the constitution accept and apply the constitution as theirs or the courts make an authoritative statement to that effect.

Scholars[11] agree that a constitution is autochthonous if it passes any of these three tests. It is submitted that if any Nigerian constitution since independence passes any of these three tests, then the claim of autochthony will be valid. Autochthony became particularly important for countries that attained independence from the British Empire[12] including Nigeria and engendered a subtle shift from 'autonomy.'[13] This idea has been explained by some writers using the Constitutions of Australian and Canada as Constitutions that have "struck root in the soil.[14]" As the questions surrounding autochthony has evolved, examination of pertinent issues in this area has shown the

[6]Ibid; the 1951 Constitution ushered a new dynamic to the relationship between Nigeria and her colonial rulers as well as between the various ethnic groups within Nigeria. It presented an opportunity for intense consultations with Nigerians following the directives of the Legislative Council that interactions and consultations be held at village, district, divisional, provincial, and regional levels before organising a "general constitutional conference "at Ibadan in January 1950. The Legislative Council received reports from the various levels of meetings and consultations thus held and published these reports and recommendations for review of same by the drafting committee of the Legislative Council.

[7]<https://www.lexico.com> accessed 16 May 2021

[8] The New International Webster's Comprehensive Dictionary of English Language cited in CAJ Chinwo, 'The Problem of Autochthony in Nigeria's Constitutional Democracy', (2018) 2 (1)*Yenagoa Bar Journal*, 5.

[9]<https://www.merriam-webster.com> assessed 16 May 2021.

[10] O Peter, 'Autochthonous Constitutions' in R Grote and F.Lachenmann and R. Wolfrum, (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, 2017) Ottawa Faculty of Law Working Paper No.2017 available at< SSRN: https://ssm.com/abstract=3000588 > accessed 3 May 2024

[11]Ibid.

[12]Ibid.

[13] EI Amah, 'Nigeria- the Search for Autochthonous Constitution' <https://www.scrip.org/journal/paperinformation?paperid=75142> accessed 3May 2024

[14] 'Popular Sovereignty and Constitutional Continuity'<https://classic.austili.edu.au/au/journals/FedLawRw/1998/1.pdf> accessed 3 May 2024

recent tendency is for constitutions to affirm their autochthony through the legal form. Although some scholars highlight degrees of autochthony when a constitution gains its autochthony through acceptance. Others discuss limitations[15] as a factor that portrays autochthony as a myth rather than a reality. These views are beyond the scope of this paper.

Nwabueze[16] highlights the concept of "constitution" as the act of constituting a state, government or both and that law or set of rules of governments that is constituted. They can either be contained in a written document or implied in institutions, customs and precedents as exemplified in the British Constitution. He uses a picture of a collection of people living in a contiguous area of territories that are not yet evolved into a community to depict another sense of a Constitution. For these people it will form them into a political state, establish a system of government that have powers and institutions that are essential and sufficient to successfully manage their public affairs, place a limit on governmental powers to protect the interest and liberty of individuals. Finally, the Constitution will state "ideals and objectives" of the new nation, the duties of the State and the citizens.[17] Nwabueze also believes that a Constitution is a "formal organic document having the force of a supreme, overriding law"…[18] the society organises a government by the Constitution, defines and limits its powers and prescribes the relationship between the organs amongst themselves and between the citizens. Malemi corroborates Nwabueze's view that the Constitution is a supreme law that prescribes the "collective aspirations" of a people within a given society.[19] The collective aspirations of the people encompass their goal to remain an indivisible political entity, the type of government it seeks to operate, the condition to hold or be removed from positions of trust, the duties and rights of governments and the citizens. Fundamentally, a Constitution must be the original act of the people for it to enjoy the status of the supreme law. This is only possible if the process of enacting the Constitution meets the standards for enacting a Constitution under constitutional democracy.[20] For Nwabueze, theprocess and procedure that births the Constitution must not be imposed on them.

The constitution-making process has been described as a system that involves citizens electing a representative body directly to make a Constitution.[21] According to a report, the process encompasses either the traditional approach as exemplified by the process which produced the 1787 American Constitution[22] or the 21st century or modern approach.[23]The report highlights that the traditional approach which is practiced in developing nations in Africa involves electing

[15]Chinwo, (n8).
[16] BO Nwabueze, *Constitutional Democracy in AfricaVol.1: Structures, Powers and Organizing Principles of Government* (Ibadan: Spectrum Books Limited, 2003)36-37
[17] Ibid; North America exemplifies a constitution in the sense described by Nwabueze, where the Constitution establishes a State and its government. Before the American Constitution was adopted in 1787, there were thirteen political communities occupying contiguous areas of the territory in North America. There was no identifiable political organisation of any kind uniting them. The first act of the new constitution was to establish and unit the several communities into one body politic under one umbrella that now became the United States of America. This signaled the birth of a brand new State thus crowning the makers of that constitution as the founding fathers of the new State, bringing into existence "the constituent act of themselves and their fellow countrymen".
[18]Ibid.
[19] E Malemi, *The Nigerian Constitutional Law* (3rdedn, Princeton Publishing Company, 2012) 2.
[20]Nawbueze (n16)
[21]Amah (n13).2
[22]Nawbueze (n16)
[23] V Hart, *Democratic Constitution Making* (being a United States Institute of Peace Special Report July 2003)

constitutional convention or ratifying the final text by referendum.[24] However, emerging forms of constitution-making process has stretched the traditional process to include emphasis on public participation where the citizens can initiate the process, set the agenda, the content and its ratification.[25] Public participation is the hallmark of the modern constitution-making process and is now recognised as a right with strong moral influence in international law.[26] Notably, some level of public participation in the constitution-making process in Nigeria has been prescribed in the mode of altering the Constitutions since independence.[27] The constitution-making process under a constitutional democracy is very important because it is "critical to the strength, acceptability and legitimacy of the final product." The validity of the process determines whether or not a Constitution is autochthonous. The validity or otherwise of the claim of autochthony of Nigerian Constitution since independence is examined using the theories highlighted below.

2.2 Theoretical Framework

The pure theory of law[28]is a theory of positive law that adopts a scientific approach to law and is preoccupied with the precise "definition of its subject matter".[29] The "Pure theory" is that aspect of knowledge that defines law by excluding it from aspects of knowledge outside the purview of the subject matter of law.[30] It provides basic forms of how meanings can be derived scientifically as a legal norm and presupposes that, given certain conditions, human conduct "ought to be" expressed a certain way.[31] When applied to the constitution-making process, the purists insist that the entire process must be completely controlled by the people and those elected to represent them.[32] Anything that interferes with a people driven- process is not pure and cannot be considered autochthonous.[33]

The substantial compliance theory is a judicial intervention that is equitable in nature because it was designed to prevent hardship that will occur in a case where a party has done everything that is expected of him "reasonably."[34]However, he fails in certain requirements of the task that may be considered minute or inconsequential but the failure "cannot be described as the substance or essence of the requirement."[35] Substantial compliance theory has also been described as actual compliance with respect to the substance that is essential to the "reasonable objective of the

[24]Ibid.
[25]Ibid.
[26]Ibid.; The decision of the United Nations Committee on Human Rights in its judicial capacity and in a general comment interpreting the right granted under the United Nations International Covenant on Civil and Political Rights as extending to Constitution-making. The report also reiterates that the right to participate in the constitution-making process can be deduced logically from the provisions of Article 21, United Nations Declaration of Human Rights, 1948, Article 25 of the ICCPR, 1976.
[27] Nigeria (Constitution) Order- in- Council, 1960, s.4, CFRN 1963, s.4, CFRN 1979 s.9 and CFRN 1999, s.9
[28] MDA Freeman, *Lloyd's Introduction to Jurisprudence (*6thedn, Sweet &Maxwell, 1994) 291
[29]Ibid.
[30]Ibid.
[31]Ibid.
[32] T Osipitan, *An Autochthonous Constitution for Nigeria: Myth or Reality* (University of Lagos Press, 2004)29
[33] This view is discussed in detail in part 4 of this Paper.
[34] CAA Phophali, 'Doctrine of Substantial Compliance'<https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6954>accessed 11 May 2021
[35] PH Gantt, and RC Burg, 'The Doctrine of Substantial Compliance in Federal Government Contracts' C:\Users\Ozioma\Desktop\Journal pdf\2\<https://www.jstor.org/stable/25753767>accessed 4 May 2024

statute."[36]In determining whether the claim to autochthony within the context of this paper is valid or not, it is important to establish whether the constitution-making process in Nigeria since independence, substantially complied with the requirements for making an autochthonous constitution as analysed in part 4 of this paper.

Acceptance of constitution is viewed by scholars like Osipitan[37] , Oliver[38] and others as a theory to test and determine the autochthony of a Constitution. This theory postulates that despite the fact that a Constitution may not originate from local source, if the owners of the Constitution accept and effectively apply it as theirs, the Constitution becomes autochthonous because of that acceptance. The pertinent question is whether any Nigerian Constitution, since independence has been accepted by Nigerians. This will determine whether Nigeria has ever had an autochthonous Constitution since independence. The answer lies in the constitution-making process of the Constitutions in Nigeria since independence.

3. Constitution-making Process of Nigerian Constitutions Since Independence: Overview

Since attaining independence, Nigeria has had a Monarchical Constitution[39], two Republican Constitutions[40] and one Presidential Constitution.[41]

3.1 Independence Constitution 1960

The British Parliament, sitting at Court at Balmoral, passed the Nigerian Independence Act in 1960. Before this Act was passed, constitutional conferences were held in 1957, 1958 and 1960.[42] Notably, the Nigerian Parliament had passed a resolution on 16 January, 1960 demanding that the British Government grant independence to Nigeria. The important facts to note about this Constitution are that it was passed outside Nigeria, the British Parliament was the source of its legal authority and it was not the original act of the people.

3.2 Constitution of the Federal Republic of Nigeria 1963

Few years after independence, the political environment in Nigeria, stemming from the decision of the Privy Council in *Adegbenro v Akintola*[43] and the controversial issues surrounding that case, made the Prime Minister decide that it was urgent for Nigeria to "review her relationship with Britain to reflect her sovereignty and independence." This was pivotal because the 1960 Constitution vested powers in the Governor-General to remove the Prime Minister from office.[44] Under the 1960 Constitution, the Queen was still the Head of Government in Nigeria[45] and appeals still lied from the Federal Supreme Court in Nigeria to the Privy Council.[46] There was a wave in

[36]Phophali(n34)
[37]Osipitan (n32)
[38]Peter (n10)
[39] Nigeria (Constitution) Order-in.-Council, 1960; also referred to as a royalist or the Independence Constitution.
[40] CFRN, 1963 and 1979
[41] CFRN, 1999; notably, that there were two other Constitutions; the CFRN, 1989 and the CFRN, 1995 which did not metamorphose into full-fledged constitutions as narrated in the CFRN (Promulgation) Decree, 1989. That regime was brought to an abrupt end and both Generals Babangida and Abacha could not successfully transit to democratically elected governments.
[42] The conferences composed of nominees that were selected as representatives of the people who were selected along party lines.
[43]*Adegbenro v Akintola* (1963) 3 ALL ER 544.
[44] The Governor had already exercised his powers by removing the Premier of the Western Region.
[45] Nigerian (Constitution) Order in Council 1960, s.33(1)(a).
[46]Ibid, s.114.

Africa where former colonies of the British Empire took deliberate steps to severe all vestiges of their British heritage.[47]

The process that birthed the 1963 Republican Constitution involved a constitutional review conference that was organized with party affiliations and comprised selected representatives from political parties.[48] The decisions reached at the constitutional conference formed the basis for passing the 1963 Constitution.[49] Nigeria attained the status of a "Republic" when the 1963 Constitution was enacted, the Queen of England ceased to be the Queen of Nigeria and appeals no longer lied from the Federal Supreme Court to the Privy Council. Although this Constitution was passed by the Nigerian Parliament and signed into law by the first elected Governor,[50] it has been criticised for not being autochthonous due to its flawed process as highlighted below.

3.3 Constitution of the Federal Republic of Nigeria, 1979 (Republican Constitution)

The 1979 Constitution was processed by the Military Government which established a Constituent Assembly under a Decree.[51].A Constitution Drafting Committee (CDC) composed of 49 persons with specialist knowledge headed by Williams produced a draft Constitution.[52] The Constituent Assembly comprised 230 members out of whom 20 were appointed by the Military Government (seven of whom made up of the Chairman of the CDC and Chairpersons of its subcommittees).[53] The remaining 203 members were elected indirectly by the local councils acting as electoral colleges. The final draft from the deliberations was submitted to the Military Government that failed to keep their promise not to touch the draft Constitution.[54] They made "necessary amendments" and subsequently passed the Constitution. The process regarding the promulgation of the 1979 Constitution, the membership and copious amendment of the draft Constitution has attracted criticism from scholars and jurists in favour or otherwise as a Constitution that is the original act of the people. Nwabueze frowned at this interference as capable of eroding the 1979 Constitution of autochthony while Udoma described the military interference as unwarranted meddlesomeness. These views are used to test whether it is valid to claim that the 1979 Constitution is autochthonous or not.

3.4 Constitution of the Federal Republic of Nigeria, 1999

Nigeria witnessed a third transition period after General Abacha ruled the country from 1993 to 1998 then suddenly died. He failed to succeed himself, the 1995 Constitution which was produced following the 1994/1995 Conference which he convened, also failed.[55] Abdulsalami started afresh amidst the palpable transition in the country.[56] He inaugurated a Constitutional Debate

[47]Peter (n10).

[48]Hamalai, and Suberu (n2) 99-100; the conference was convened to collate the data that was required to effect changes in the 1960 constitution.

[49] S 3 (1) of the 1963 Constitution established four regions. CFRN 1963 s157(1), (2) and 158; s.158 (3) and(4).

[50] OVC Ikpeze, 'Constitutionalism and Development in Nigeria: the 1999 Constitution and Role of Lawyers', <https://www.ajol.info/index.php/naujilj/article/view/138210> accessed 6 May 2021.

[51] Constituent Assembly Decree, 1977

[52]The Draft Constitution was produced after the Committee received and processed 400 memoranda from the general public.

[53]Ibid.

[54] BO Nwabueze, *Constitutional Democracy in Africa (Vol.5): The Return of Africa to Constitutional Democracy* (Ibadan: Spectrum Books Limited,2004)

[55]Osipitan (n32)

[56] General Abdulsalami Abubarkar took over power. Notably, the Independent National Electoral Commission had conducted elections into the office of President, Vice-President, Governors, Deputy Governors, Chairmen, Vice

Coordinating Committee (CDCC) to coordinate debate on a new Constitution and collate views from individuals and groups regarding the Constitution. The CDCC comprised of 25 selected members.[76] It received memoranda from individuals and groups including oral presentations in public hearings at debate centers throughout Nigeria. The views revealed that Nigerians preferred the 1979 Constitution to the 1995 Constitution.[57] The CDCC presented its report to the Provisional Ruling Council (PRC) two months after its inauguration and the PRC made amendments which they described as necessary in the interest of the public. Thus, the PRC amended the 1979 Constitution then promulgated the Constitution of the Federal Republic of Nigeria (Promulgation) Act, 1999.

4. Validity or Otherwise to the Claim of Autochthony of Nigerian Constitutions Since Independence

Paragraph 2.1 of this paper established that a Constitution must pass one of the three tests as highlighted to qualify as an autochthonous Constitution.

Osipitan posits that a Constitution is autochthonous if it is "home-made, home-grown and home-processed" distinct from an imposed or an imperially processed Constitution.[58] Examining the Constitutions in Nigeria since independence using the three tests thus highlighted, will determine whether or not it is valid to claim that Nigeria has had an autochthonous Constitution during the periods under review.

4.1 Constitution of the Federal Republic of Nigeria, 1960

This paper submits that the 1960 Constitution is not autochthonous for reasons adduced below:

The 1960 Constitution was passed by the British Parliament in the Court at Balmoral, United Kingdom.[59] Although it granted Nigeria independence**,** it failed the first test for autochthony because enacting that Constitution did not severe the legal relations between Nigeria and Britain. The features in the 1960 Constitution that allowed the Queen to remain the Queen of Nigeria,[60] the Privy Council to remain the highest court in Nigeria also reiterates this fact.

The Pure Theory School advocates strict compliance due to its scientific approach to law and when this theory is applied to the process for making an autochthonous Constitution, the 1960 Constitution fails. For the Pure Theorists, the 1960 Constitution process failed to end the relationship with Britain.

The 1960 Constitution failed second test for assessing autochthonous constitutions. The second test requires the constitution-making process to be procured locally. However, it was not home-made, home-grown or home processed.[61]

Regarding the third test, the Constitution was not accepted hence it was hastily replaced in 1963 with the Republican Constitution. The 1960 Constitution also failed the requirement for substantial compliance theory on all scores. The Constitution was not really accepted since this Constitution

Chairmen, the National Assembly, House of Assembly and Local Government Councils in compliance with the Transition to Civil Rule (Political Programme) Act, 1998 in ibid (n32)23

[57]CFRN (Promulgation) Act, 1999. CFRN 1999

[58] Osipitan (n32).

[59]Ikpeze (n50).

[60] Nigerian (Constitution) Order-in-Council ss.33 and 114

[61]Osipitan (n32)29

did not derive its validity or force from the sovereignty of Nigeria, it is not valid to describe it as autochthonous.

4.2 The 1963 Constitution is also not autochthonous due to the reasons below:

The second criteria for autochthony is a more suitable test to apply to the 1963 Constitution because Nigeria had already attained independence. Besides it was enacted because Nigeria sought to assert her sovereignty by severing vestiges of her British heritage following the circumstances that gave rise to the case of Adegbenro *v Akintola.*[62]

The 1963 Constitution was passed by the Nigerian Parliament as the source of its legal authority. Although the enactment of this Constitution terminated the imperial reign of the Queen and ended appeals to the Privy Council, it is not regarded as an autochthonous Constitution. This is because it was not processed by elected representatives of the people. Nwabueze [63] challenged its legitimacy and referred to it as the act of the Prime Minister and his regional Premiers who met and agreed amongst themselves that Nigeria needed to reproduce the 1960 Constitution with elegant amendments to confer "Republican" status on it. There was no CDC that drafted Constitution, nor a Constituent Assembly that examined the Constitution.

Scholars and Jurists are divided on the autochthony or otherwise of the 1963 Constitution. Elias[64] believes that the 1963 Constitution was autochthonous, despite the fact that the authority to pass it was derived from a Constitution that was processed imperially. For him, the Queen performed her last role as the Sovereign head of Nigeria and assisted in birthing a new Republic making her a foreigner. However, Ige[65]and Nwabueze[66] disagree. For Ige, the 1963 Constitution was not drafted in a genuine democratic space and was conceived in bad faith with a gestation period that broke all rules required to make Constitutions. Nwabueze argues that the 1963 Constitution though passed by the Nigerian Parliament, the authority was derived from the Imperial 1960 Constitution and indirectly authorised by the British, hence failing to effectively launch Nigeria into a new existence.[67] Its constitutional roots did not spring from the Nigerian soil. This paper aligns with the views of Nwabueze and Ige because the process of enacting the 1963 Constitution fails the strict compliance requirement of the pure theory.

There was also no substantial compliance with the requirement for the process to be locally operated.

It was not accepted as the authoritative source by the people or the courts and shortly thereafter, Nigeria was plunged into a military regime effectively obliterating the existence of the 1963 Constitution. [68]

4.3 The 1979 Constitution is autochthonous based on the factors considered below:

The third test for constitutional autochthony is applied to determine whether it is valid to claim that the 1979 Constitution is autochthonous or not.

---

[62](n60) .
[63] TI Ogowewo, 'Why the annulment of the Constitution of 1999 is imperative for survival of Nigeria's democracy*',* (2000) 44 (2) *Journal of African Law*,135-166
[64]Osipitan(n32)16.
[65]Ibid.
[66]Ibid.
[67]Ibid 17
[68]Ibid

Based on the test, the 1979 Constitution has been accepted by the people as their authoritative act. This submission is based on the reports from the CDCC inaugurated by the Government of Abubakar as highlighted in paragraph 3.4 of this paper. Memoranda from the debates and oral submissions showed a preference for the 1979 Constitution.[69]Remarkably, an application of the pure theory to this criterion will result in failure because the degree of acceptance is still questionable since some persons posit that the memoranda so received were contrived. The theory of acceptance of constitution is more relevant because the enactment of the 1979 Constitution did not bring the end of a relationship with a foreign power (the relationship with Britain ended effectively in 1966)[70], neither was the process managed externally. Notably, the 49 men who drafted this Constitution were not elected as representatives of the people. The Constituent Assembly that considered the draft Constitution was a mixture of elected and selected members. The draft was not subjected to any kind of referendum. The Military Government tampered with the final draft by inserting four Decrees.[71]

The decision of Udoma J.S.C in the case of *Nafiu Rabiu v Kano State,*[72] is an authoritative pronouncement by the courts as required by the third test for autochthony. In his decision, the learned Justice described the amendments by the Supreme Military Council as an unwarranted meddlesomeness which did not take away the autochthony of the 1979 Constitution.

Although the process adopted for making the 1979 Constitution was indirect consultation as against direct mass participation for which purists like Ige have vehemently frowned at, alas he concedes that the process which birthed the 1979 Constitution is the closest Nigeria has ever come to producing a proper democratic Constitution. He described the CDC as having a nationalistic outlook under the distinguished leadership of Williams.

The process that birthed the 1979 Constitution brought purists like Ige and Awolowo at variance as Ige was willing to yield a little in favour of its autochthony but the proposition was outrightly rejected by Awolowo who insists that a monopoly of the constitution-making process by the people and their elected representatives" is the only true test for the autochthony of the 1979 Constitution.

Osipitan[73] is of the view that the 1979 Constitution is autochthonous because the process substantially complied with the requirement for substantial input of the people. He supports this view since there is no evidence of any foreign intervention. For him, the substantial compliance theory takes away the need for the mandatory requirement for the process to be monopolised by elected representatives of the people. Although this argument seems convincing, this paper differs with Osupitan because, the requirement for substantial compliance theory is such that, where there are mandatory and procedural requirements and the mandatory requirements are met, the requirement is satisfied and will not fail for want of fulfilment of procedure. The issue is whether the 1979 Constitution substantially reflected the will of the people despite the amendments made to the final draft of the Constitution. These amendments, Nwabueze described as "substantive amendments." For him, the amendments to the 1979 Constitution by the Federal Military Government were substantive and eroded the basis for describing the Constitution as the original

[69] CFRN(Promulgation) Act, 1999
[70] BO Nwabueze, *Constitutional History of Nigeria* (Longman 1982)26
[71] National Youth Corps Service Decree No.24 of 1937; the Public Complaints Commission Decree No. 31 of 1975; Nigerian Security Organisation Decree No.16 of 1978 and the Land Use Decree No. 6 of 1978
[72](1980) LPELR-2936(SC)
[73]Osupitan (n32)

act of the people." This paper prefers to assess the 1979 Constitution using the acceptance of the constitution by the people as the basis for its autochthony.

Some scholars have adjudged the 1979 Constitution on the basis of the phrase "we the people" as containing a lie because in their view, the 1979 Constitution is not an original act of "we the people."[74] This phrase which was first made popular by the 1787 American Constitution[75] is not a good template for adjudging a Constitution as autochthonous or otherwise. For instance, the Canadian Constitution which has been described as autochthonous with root in the soil is placed on the same pedestal with the Australian Constitution which contains the phrase.[76]Preambles in the Constitution represent different things to the different nations and are not a good test of autochthony.[77]Thus the 1979 Constitution is autochthonous on the basis of its acceptance.

4.4 Constitution of the Federal Republic of Nigeria, 1999

Two criteria for autochthony are applied the 1999 Constitution. The 1999 Constitution is not autochthonous due to the reasons highlighted below.

The 1999 Constitution fails the pure theory test because the process that birthed it did not conform with the strict demands of the pure theory school although the 25 member CDCC held public hearings at various debate centres and members of the public[78] appeared before it to make their contributions. The Provisional Ruling Council subjected the draft report of the CDCC to "necessary amendments" in the interest of the public. When the process is compared to the traditional constitution-making process established by the proceedings at the Philadelphia Convention that birthed the 1787 American Constitution, the difference between both outcomes is that the 1787 Constitution did not suffer any interference. It is important to note that the world has evolved further than traditional method of constitution-making presented by the American Constitution.[79] This is because although the 1787 American Constitution is viewed as an "act of completion" by scholars, the constitution process was carried out by a "hand-picked elite group" that did not include representations from the black people or the "country folk."[80]

Constitution-making in the 21st Century seeks to accommodate diverse and disagreeing groups in a continuous engagement on very difficult issues but accessible to all. Admittedly, this is very difficult. The traditional methods of constitution-making by elected representatives in a Constituent Assembly and ratified by a referendum may represent stability and security.[81] It negates the opportunity presented by the modern form of constitutionalism. The new form of constitution-making process is viewed as a conversation by all concerned, it is open to new issues and not restricted to elites in the society.[82] The heart of the issue is that nations develop their working formula. A democratic Constitution does not just establish governance but must lend

[74]Osupitan (n32) 24
[75]Ibid
[76] 'Popular Sovereignty and Constitutional Continuity' <https://classic.austili.edu.au/au/journals/FedLawRw/1998/1.pdf> accessed 3 May 2024
[77]Ibid
[78] Members of the judiciary, police force, Nigerian labour congress, market women associations, student union, the Nigerian Medical Association, organised private sector and more appeared before the CDCC to make their contributions to the process.
[79]Hart(n23)
[80]Ibid.
[81]Hart (n 23).
[82]Ibid.

credence to the "moral claim of participation" that allows the people share in authoring the Constitution. Only then can they claim it as their own and respect it. In creating a formula that works, the steps taken by the Supreme Court in Canada is instructive. In 1998, the Supreme Court of Canada in *Re Secession of Quebec*[83] declared "that a functioning democracy required a continuous process of discussion" since the truth is not a monopoly for one person alone. Accordingly, there exists an implied duty to listen to dissenting voices, acknowledge them even when the basic unity of the nation is at stake. The Canadian proposition sums the modern constitution-making process of re-negotiation, recognition and inclusion. Interestingly, the 1999 Constitution provides a window under section 9 to develop a process that will be accepted by majority.

The 1999 Constitution does not enjoy the acceptance of the people. The process of making it did not substantially comply with the requirements for making a valid autochthonous Constitution. Hence the continuous clamour for Sovereign National Conference.[84]

The 1999 Constitution continues to experience frequent alterations as evidence of the apparent frustration of Nigerians and a search for a Constitution that will be embraced as theirs.

Some writers have argued that the National Assembly alone cannot fashion out a Constitution that will sufficiently represent the will of the people. They opinion that direct democracy (referendum)[85] is fundamental to adopt the final draft of the Constitution that will be accepted by the people. However, the current 1999 Constitution does not provide for a referendum. The only option available is for the National Assembly to insert this provision as one of the series of processes which may be adopted as a criterion for making the Constitution in Nigeria. The question is, will the National Assembly accommodate such a provision

5. Findings, Observations, Conclusion and Recommendations

After examining the Constitutions of Nigeria since independence using the three established tests for autochthony of Constitutions and applying same tests through the pure, substantial compliance and acceptance theories, this paper found that:

5.1 Findings:

(a) Based on the pure theory, Nigeria has not had an autochthonous Constitution;

(b) Based on the substantial compliance theory, Nigeria has not had an autochthonous Constitution since independence;

(c) Based on the acceptance of constitution theory, only the 1979 Constitution of Nigeria has been accepted as autochthonous following the provisions of the Constitution of the Federal Republic of Nigeria (Promulgation) Act[86] and the decision in the case of *Nafiu Rabiu v. State*[87]; and

(d) Nigeria needs to adopt a modern constitution-making process that will enable her enact an autochthonous Constitution.

[83] Ibid.
[84] L Adegbite, in Osipitan (n32) 5
[85] DJ Elazar, 'The Use of Direct Democracy (Referenda and Plebiscite) in Amah (n13)

[86] CFRN (promulgation) Act, 1999
[87] (n70)

5.2 Observations:

(a) The 1960 Independence Constitution did not make Nigeria independent from the British Government;

(b) The 1963 Constitution did not sufficiently give Nigeria a new Constitution with roots springing from her own soil;

(c) The Military Government made considerable alterations to the 1979 and 1999 draft Constitutions before promulgating them into Decrees; and

(d) A democratic Constitution goes beyond democratic governance, gives voice to all groups and keeps the constitution-making process open, it is not a "once and for all act."

5.3 Conclusion

The question of autochthony of Nigerian Constitutions continues to resonate. These questions are however not raised regarding the 1787 American Constitution which process was made without the representation of women, slaves or persons described as "back country folks." The same question is also not raised regarding the British Constitution[88] which has questionable origin. Both the Americans and the British have found a way to accept their Constitutions. According to Osupitan, no Constitution is perfect. Nigeria urgently needs to develop a constitution-making process that will produce an autochthonous Constitution that reflects the will of the people.

5.4 Recommendations:

(a) Section 9 of the 1999 Constitution remains the only window of opportunity which Nigeria has to develop a constitution-making process that will be accepted as the will of the people. As a result, section 9 may be amended to include provisions regarding convoking national conferences, issues regarding plebiscite and referendum, constituent assemblies and if necessary, how to make a new Constitution.

(b) Nigeria needs to embrace the 21st Century or modern approach to constitution-making process as exemplified in *Re Secession of Quebec*[89] where the Supreme Court made bold democratic statements. A process that is people-driven and makes the process accessible to all voices. Only then can there be a valid claim to autochthony in the Constitution of Nigeria.

[88] The British Constitution dates back to the reign of King James 11 who was deposed by a revolution cabal that constituted itself into Parliament, declared itself valid and gave William and Mary entitlement to the Crown.
[89] Hart (n23).