Revisiting the Legitimacy Question of the Nigerian 1999 Constitution

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Abstract
This article revisits the legitimacy question as touching the Nigerian 1999 Constitution bringing to the discourse, a review and application of pertinent theoretical perspectives on constitution making and constitutional legitimacy. This theoretical and pragmatic approach introduces a refreshing angle to the debate, revealing the paucity of any attempt to ascribe any legitimacy claim to a constitution with a doubtful normative claim and fraudulent attribution of its source and legitimacy to the people. The author finds the consent basis of constitutional legitimacy as most attractive to a divided state like Nigeria and concludes by advocating the adoption of a blend of the principles of the constituent assembly and post sovereign constitution making models for the production of a new people driven and inclusive constitution to meet the needs of the Nigerian peoples.

Keywords: constitution making; constitutional legitimacy; Nigerian Constitution; ethnic divisions; sovereign national conference

I. Introduction

After some 15 years of the second era of military rule,[1] Nigeria finally returned to civil rule in 1999, upon the completion of electoral processes and the promulgation of the Constitution of the Federal Republic of Nigeria (CFRN) 1999.[2] Since that time, one of the recurrent issues besetting the Constitution is the question of its legitimacy. The Constitution, after all, came into being through military fiat, after the work of a 25-member deliberative committee.

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[1] The first era of military rule in Nigeria commenced on 15 January 1966 and ended on 1 October 1979 while the second era commenced on 31 December 1983 and ended on 29 May 1999.

[2] See Constitution of the Federal Republic of Nigeria (Promulgation) Decree 24 1999 (now Cap. C23, Laws of the Federation of Nigeria, 2004) as altered by Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010; Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010; Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010; and Constitution of the Federal Republic of Nigeria (Fourth Alteration) Act (Nos 4, 9, 16, 21, & 27) 2017. All subsequent references to the Constitution or constitutional sections shall be to those of the CFRN 1999 (as altered) except where otherwise indicated.

Beyond this questionable original legitimacy is the fact that 22 years after its promulgation, the Constitution seems to all the same be lacking in derivative legitimacy as the volume of condemnation and attacks towards it has not abated.[3] This, coupled with the oft disregard of its norms by political actors[4] and restiveness in the polity due to dissatisfaction with the same,[5] makes a more incisive engagement with the issue of its legitimacy imperative if the nation is to successfully chart a worthy course out of its current constitutional conundrum.

Critics have indeed spared no effort in denouncing the Constitution as being low on the legitimacy spectrum.[6] As put by Ayua and Dakas,[7] any claim of a 'We the People of the Federal Republic of Nigeria' resolving and enacting the CFRN 1999 is fraudulent since the Constitution is a product of a military decree and does not in any way come near a proper making of such a claim.

Afe Babalola[8] recently expressed a similar sentiment when he stated that the problems Nigeria is experiencing presently are in large part attributable to the CFRN 1999. According to him, '[W]hat Nigeria needs is a bill sponsored by the government, asking the Senate to pass a law

[3] See S Akinrinade, 'Constitutionalism and the resolution of conflicts in Nigeria' (2003) 92(368) *The Round Table* 41, 47 ['Indeed, the 1999 Constitution cannot pass the crucial tests of acceptability and legitimacy that are crucial if it is to serve as a medium for the mediation and resolution of the various conflicts plaguing the Nigerian political system. The 1999 Constitution is inadequate on two major fronts: first, the process by which it was given and, second, the specific provisions in respect of several contentious issues at the centre of the various conflicts plaguing the political system.']

[4] This is more particularly engaged with while discussing Loewenstein's typologies of nominalist, semantic and normative constitutions in section IV.

[5] See for example, 'Notice of constitutional grievances, declaration of constitutional force majeure and demand for transitioning process for an orderly reconfiguration of the constitutional basis of the Federation of Nigeria' (*The Guardian*, 21 January 2021) available at <https://m.guardian.ng/features/notice-of-constitutional-grievances-declaration-of-constitutional-force-majeure-and-demand-for-transitioning-process-for-an-orderly-reconfiguration-of-the-constitutional-basis-of-the-federation/amp/>.

[6] See TI Ogowewo, 'Why Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' (2000) 44(2) *Journal of African Law* 135–66; JO Ihonvbere, 'How to Make an Undemocratic Constitution: The Nigerian Example' (2000) 21(2) *Third World Quarterly* 343, 346; KSA Ebeku, 'Making a Democratic and Legitimate Constitution in Nigeria: Lessons from Uganda' 17 *Sri Lanka Journal International Law* (2005) 183, 185–86; FT Abioye, 'Constitution-Making, Legitimacy and Rule of Law: A Comparative Analysis' (2011) 44(1) *The Comparative and International Law Journal of Southern Africa* 59, 73.

[7] IA Ayua and DCJ Dakas, 'Federal Republic of Nigeria' in J Kincaid and GA Tarr (eds). *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press, Montreal & Kingston, 2005) 248.

[8] '1999 constitution, responsible for Nigeria's problems — Afe Babalola' (*The Punch*, Lagos, 28 August 2019) available at <https://punchng.com/1999-constitution-responsible-for-nigerias-problems-afe-babalola/>.

for the convocation of a Sovereign National Conference that the membership will be elected on zero party system.'[9]

Undoubtedly, the legitimacy of a constitutional order is a fundamental question and as Randy Barnett[10] has noted, it is a proper question to ask and answer or 'we will never know whether we should obey it, improve upon it, or ignore it altogether.' It is however noteworthy that most of the discourse on the legitimacy question of the CFRN 1999 has not been grounded in any engagement with relevant constitutional, legal or political theory. This article makes a modest attempt to redress this. Without any question, the issue of constitutional legitimacy is multidimensional in nature. It is a jurisprudential question to which answers are as unsettled as there are commentators and writers on it; from its sceptics to its apologists, both drawing from critical interpretations of the nature of constitutional and legal order.

In fact, before World War I, the matter of constitutional legitimacy was a question rarely posed as such a question was regarded as 'unscientific' and hence not permissible.[11] Even today, there are still some who regard the question of constitutional legitimacy as irrelevant to the good governance of a State as long as a country has an 'effective' government.[12]

This article however takes the position that the matter of whether a Constitution is legitimate or not is germane and pertinent not only to good governance but also to peace, order, stability and progress especially in deeply divided states such as Nigeria. It also contends that such a constitution is bound to be one founded on consent of the people in whom the *pouvoir constituent* (constituent power) subsists.

[9] Ibid.
[10] RE Barnett, 'Constitutional Legitimacy' (2003) 103 *Columbia Law Review* 111.
[11] M Petrović, 'Constitution and Legitimacy' (2004) 2(1) *Facta Universitatis (Series: Law and Politics)* 7, 9.
[12] T Osipitan, 'An Autochthonous Constitution for Nigeria: Myth or Reality? (University Press, Lagos, 2004) 35.

The article in the following four sections contests this point by first, in section II, highlighting the nature of the constitutional legitimacy crisis in Nigeria, before examining, in section III, the circumstances surrounding the making of the CFRN 1999. Section IV then attempts to locate the legitimacy crisis in Nigeria in the light of different perspectives on constitutional legitimacy. Section V draws lessons from comparative perspectives while section VII advances the discourse by exploring the applicability of constitution making theories and models to the making of a legitimate constitution for Nigeria.

II. The constitutional legitimacy question in Nigeria

The constitutional legitimacy question in Nigeria is closely linked to the autochthony[13] one. In the words of Visser and Bui,[14] '[T]he autochthonous character of a constitution' syncs with the concept of the sovereign status of a state, an expression of the sovereign will of its peoples. As contended by Udombana,[15] paraphrasing Nwabueze,[16] autochthony in fact constitutes the 'source of constitutional authority.' A constitution can thus be deemed autochthonous where:

> its substantive content is freely agreed and adopted by the people either in a referendum or through a constituent assembly popularly elected for the purpose. This is notwithstanding that the constitution is subsequently promulgated by an existing authority, in the interest of formalism and regularity.[17]

This link, of course, is derived from the historical roots of the Nigerian state. Before 1914, there was no geographical space known as Nigeria. Rather, what obtained was a multiplicity of kingdoms, empires and communities with widely differing cultural, religious, linguistic and

[13] The word autochthony is of Greek descent, meaning "sprung from that land itself." See FM Ssekandi, 'Autochthony: The development of law in Uganda' (1983) 5 *New York Law School Journal of International & Comparative Law* 1 2; PA Joseph 'Foundations of the Constitution' (1989) 4 *Canterbury Law Review* 58 69. See also K Wheare, *The Constitutional Structure of the Commonwealth* (Oxford University Press, Oxford, 1960) 89.
[14] M de Visser and NS Bui, 'Glocalised Constitution-making in the Twenty-first Century: Evidence from Asia' (2019) 8(2) *Global Constitutionalism* 297, 302.
[15] NJ Udombana, 'Arise, o compatriots: An Analysis of Duties of the Citizen in the Nigerian Constitution' (2002) 34 *Zambia Law Journal* 24, 27–8.
[16] BO Nwabueze, *The Presidential Constitution of Nigeria* (C. Hurst & Company, London 1982) 1–7.
[17] Udombana (n 15).

governmental systems. The amalgamation was by imperial fiat in advancement of British colonial interests, and not as a voluntary act of self-determination by the peoples concerned.

A quick look at Nigeria's constitutional history also reveals the continued relevance of the legitimacy question. Nigeria's constitutional history can be broken into two main eras. These are the colonial and the post-independence eras. All constitutional arrangements during the colonial era, including the Independence Constitution, 1960[18] did not derive from the popular or sovereign will of the peoples of Nigeria.

Constitutions made in the post-independence era naturally divides into those derived from civilian and military authorities. Republicanism as Nigeria's constitutional norm came in 1963 with the amendment of the 1960 Constitution whereby the Queen of England ceased to be Nigeria's titular head and appeals of decisions of the Federal Supreme Court no longer lied to the Judicial Committee of the Privy Council. The Supreme Court of Nigeria thus became the highest court of the land.[19]

The 1963 Constitution has however been heavily criticised. First, since the Constitution was amended via the amending clause of the 1960 Constitution with cosmetic changes, some have doubted any ascription of autochthony or legitimacy to it.[20] As put by Bola Ige,[21] the 1963 Constitution was particularly conceived in bad faith and its 'gestation and birth broke all rules for Constitution-making.'

The military however broke faith on 15 January 1966 and hijacked power in a bloody coup d'état. This military incursion into power lasted until 1979 with the promulgation of the Presidential Constitution of that year and commencement of a civilian regime. The 1979

[18] See Nigerian (Constitution) Order-in-Council 1960.
[19] See JA Yakubu, *Trends in Constitution Making in Nigeria* (Demyaks Law Books, Ibadan, 2003) 61.
[20] See Osipitan (n 12) 16–7.
[21] B Ige *Constitutions and the Problems of Nigeria* (Nigeria Institute of Advanced Legal Studies, Lagos, 1995) 23.

Constitution has been the nearest to the legitimate claim. It was drafted by a 49-member Constitution Drafting Committee (CDC) and subsequently deliberated upon and approved by a 230-member Constituent Assembly.

The 1979 Constitution have nonetheless been denounced for the manner of composition of both the CDC and the constituent assembly. All members of the CDC were appointed by the military as were the leadership of the constituent assembly which membership consisted of 203 members who were indirectly elected by local government councils while the rest were appointed. Also, regarded as fatal to any legitimacy claim is the fact that the military adjusted the Constitution approved by the constituent assembly and went ahead to promulgate a different version.[22]

The 1979 Constitution was equally short-lived as the military struck again on 31 December 1983 and forcefully took over power. This era continued until 1999. Thus, when the opportunity of the making of another constitution came between 1998 and 1999, many people were enthusiastic that the faults of the past will be remedied and a truly people-driven constitution reflecting the genuine wishes and aspirations of Nigerians will be fashioned out. As discussed below, such expectations were however soon dashed in the making of the CFRN 1999.

Another factor that continue to put the constitutional legitimacy question on the front burner is the division of the Nigerian state along varied ethnic identities. That Nigeria is a deeply divided state is perhaps begging the question. With over 350 ethnic groups and indigenous languages,[23]

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[22] Ayua and Dakas (n 7) 248.

[23] The simple truth is that there is currently no exact data on the number of ethnic groups in Nigeria. See EE Osaghae and RT Suberu, *A History of Identities, Violence, and Stability in Nigeria,* CRISE Working Paper No. 6 (January 2005) available at <www.gov.uk/dfid-research-outputs/a-history-of-identities-violence-and-stability-in-nigeria>. Different estimations given over the years include: 248 [JS Coleman, *Nigeria: Background to Nationalism* (University of California Press, Berkeley, 1958)]; 394 [C Hoffman, *The Languages of Nigeria by Language Families* (Mimeograph: Department of Linguistics, University of Ibadan, 1974)]; 62 (GP Murdock, *Outline of World Cultures* (Human Relations Area Files, New Haven, 1975)]; 161 (A Gandonu, 'Nigeria's 250

Nigeria definitely depicts a highly plural and heterogeneous society. Coupled with the presence of active social and political actors who continuously exploit the psychological elements of ethnic affiliation[24] to promote ethnic sentiments, mobilise members of different ethnic communities and deepen ethnic consciousness, the fact that Nigeria is principally divided along ethnic lines is easily understood. Ethnicity, after all, according to Osaghae[25] connotes 'the employment or mobilization of ethnic identity and difference to gain advantage in situations of competition, conflict or cooperation.'

The Nigerian political space offers a very fertile ground for such ethnic rivalry and competitiveness. This is more so as despite a century of togetherness under the banner of a single country, an average Nigerian still sees himself or herself in the light of their ethnic identity. Indeed, ethnicity has been identified as the primary group and personal identity icon in African countries.

Writing on the Nigerian situation, Osaghae and Suberu[26] contend that 'both in competitive and non-competitive settings, Nigerians are more likely to define themselves in terms of their ethnic

Ethnic Groups: Realities and Assumptions' in RE Holloman and SA Arutiunov (eds), *Perspectives on Ethnicity* (Mouton, The Hague, 1978)]; 143 (TO Odetola, *Military Politics in Nigeria: Economic Development and Political Stability* (Transaction Books, New Brunswick, 1978)]; 619 [R Wente-Lukas (with the assistance of Adam Jones), *Handbook of Ethnic Units in Nigeria* (vol. 74., Studien zur Kulturkunde of the Frobenius Institute, Frankfurt University, Wiesbaden: Franz Steiner, 1985)]; 374 (O Otite, *Ethnic Pluralism and Ethnicity in Nigeria* (Shaneson, Ibadan, 1990)]; and over 500 (PEFS, *Ethnic Map of Nigeria*, 7 vols (Programme on Ethnic and Federal Studies, University of Ibadan, Ibadan, 2001)]. See also AR Mustapha, *Ethnic Structure, Inequality and Governance of the Public Sector in Nigeria*, UNRSID Programme Paper No. 24 (November 2006) available at <http://www.unrisd.org/80256B3C005BCCF9/httpAuxPages)/C6A23857BA3934CCC12572CE0024BB9E/$file/Mustapha.pdf>; FH Ayatse and AI Iorhen, 'The Origin and Development of Ethnic Politics and its Impacts on Post Colonial Governance in Nigeria' (2013) 9(17) *European Scientific Journal* 178, 178–79.

[24] For example, in the following definition of an ethnic community by Anthony Smith, the psychological elements are typified by the signal words like 'myths', 'memories' and 'sense of solidarity' as opposed to the pragmatic elements such as ''common ancestry', 'shared history', 'common culture' and 'homeland'. Smith defines an ethnic community as 'a named human population with myths of common ancestry, shared historical memories, one or more elements of a common culture, a link with a homeland and a sense of solidarity among at least some of its members.' See AD Smith, *Nations and Nationalism in a Global Era* (Polity Press, Cambridge, 1995) 56–7.

[25] EE Osaghae, *Structural Adjustment and Ethnicity in Nigeria* (Nordic African Institute, Uppsala, 1995) 11.

[26] Osaghae and Suberu (n 23) 8.

affinities than any other identity.' This is corroborated by Lewis and Bratton[27] and asserted by Osinubi and Osinubi,[28] who reported that an in-depth study carried out in 2000 for the United States Agency for International Development (USAID) by the International Foundation for Elections Systems (IFES) identified ethnicity as the strongest type of identity among Nigerians. This goes for about half of all Nigerians (48.2%), with 28.4% and 21% respectively opting for class and religious identities.

It goes without gainsaying that in a deeply divided state such as Nigeria, the constitutional arrangement by which the state is to be governed must be one to which there is widespread acceptance and assent to its normative and institutional ethos. It, in other words must be one that is high on the legitimacy spectrum if the goals of a peaceful, cohesive and prosperous society would be attained.

This actually is the point as the fact that the current constitutional arrangement derives its authority not from the people but from the elitist military class, is seen as making Nigeria worse than what obtains under the 1960 Constitution. That Constitution, after all, contained the terms of the Nigerian state as negotiated for transition into an independent and sovereign state. Some of these terms, such as the number of federating units and the division of powers between the centre and subnational units, have been substantially tampered with by the military. For example, while Nigeria under the Independence Constitution had three federating units (Regions), she under the current Constitution has 36 federating units (states). Also, the manner in which the centralist orientation of the military has played out in the division of powers is vividly portrayed in the table below.

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[27] P Lewis and M Bratton, *Attitudes towards Democracy and Markets in Nigeria: Report of a National Opinion Survey, January-February 2000* (International Foundation for Election Systems and Management Systems International, Washington, DC, 2000) 24–5.

[28] TS Osinubi and OS Osinubi, 'Ethnic Conflicts in Contemporary Africa: The Nigerian Experience' (2006) 12(2) *Journal of Social Sciences* 101, 102.

Table 1: Matters on exclusive and concurrent lists by constitutions

Constitution	Exclusive List	Concurrent List
1960	42 items	26 items
1963	45 items	29 items
1979	65 items	12 items
1989	64 items	12 items
1999	68 items	12 items

Source: MO Adediran, *Constitutional History of Nigeria* (Cleanprint, Ile-Ife, 2004) 98

As seen from above, while the 1960 Constitution had 42 and 26 items respectively on the exclusive and concurrent lists, the 1999 Constitution has 68 and 12 respectively. The increasing centralisation of powers and subsequent reduction of subnational competences thus became the trend.

All of the issues discussed in this section continue to activate discontent with current arrangements under the CFRN 1999. This discontent manifests in various calls for 'restructuring', 'true federalism' and a sovereign national conference (SNC) where the basis, terms and other issues concerning the Nigerian federation are expected to be renegotiated.

The primary basis for the discontent against the Constitution no doubt lies in the procedure adopted for its making. This is not to discountenance the importance attached to the normative prescriptions. Rather, the emphasis is the belief that the right procedure will produce prescriptions that will be acceptable to all.

III. The making of the CFRN 1999

The Constitution of the Federal Republic of Nigeria (CFRN) 1999 is the Constitution that is currently in force in Nigeria. Upon the death of General Sani Abacha on 8 June 1998, the mantle of leadership of the military junta fell on General Abdulsalami Abubakar. The political climate at that time did not permit the military staying any longer than necessary in power. The government thus felt it had to fashion out a Constitution and successfully transit to civilian rule as soon as possible. Towards this, General Abubakar on 7 September 1998 made known his transition to civilian rule programme.[29]

General Abubakar thereafter set up a 25-member Constitutional Debate Coordinating Committee (CDCD) composed of experts drawn from the academia, law profession and retired military officers. The Committee's mandate essentially was to come up with a Constitution that is acceptable to the generality of Nigerians by reviewing the 1995 draft Constitution.[30]

The CDCD [31] which commenced its work on 11 November 1998 organised public hearings in 10 cities including a special hearing in Abuja, held several workshops and received over 405 memoranda. The Committee thus purportedly interacted with or received information from different sectors of the Nigerian society.[32]

It however did this within a period of less than two months. It is said that the preponderance of opinion received took a staunch objection to the 1995 Constitution particularly on the basis that

[29] Project on Constitution Writing and Conflict Resolution, 'Nigeria 1999', available at <http://pcwcr.princeton.edu/reports /nigeria1999.html>.
[30] The 1995 Constitution, drafted under the watch of Abacha, fizzled out into history as it was never promulgated.
[31] For a detailed account of the committee's work, see N Tobi, 'The Legitimacy of Constitutional Change in the Context of the 1999 Constitution' in AA Guobadia and A Adekunle (eds), *Nigeria: Issues on the 1999 Constitution* (Nigerian Institute of Advanced Legal Studies, Lagos, 2000) 21–42.
[32] Different sectors of the Nigerian society said to have made presentations during the public hearings are the Organised Private Sector, Market Women Association, Nigerian Labour Congress, the Press, the Nigerian Medical Association, the Nigerian Society of Engineers, the Nigeria Police Force, the Students' Union, the Nigerian Bar Association and the Judiciary. See Osipitan (n 12) 23.

the Conference which drafted it 'was unrepresentative, since voting for the 273 elected members had been marred by boycotts and cynicism to include only 400,000 voters.'[33]

The Committee's report submitted to the military government thus indicated preference for a reversion to the 1979 Constitution (with minor amendments) instead of the still-birthed 1995 Constitution as the latter purportedly 'lacked credibility as a means to introduce democratic reforms.'[34] It is to be noted that though the (military) Provisional Ruling Council (PRC) accepted most of the Committee's recommendations, it also typically tinkered with some. The Council, even after the Federal Ministry of Justice had produced a draft Constitution based on the Committee's report as amended, still re-examined the draft. The Constitution was thereafter promulgated into existence with effect from 29 May 1999.[35]

It may be quickly noted that any attempt to found the legitimacy of the CFRN 1999 on the 1979 Constitution may not stand. First, the 1979 Constitution itself was a military constitution with a faulty process in its making. For instance, as previously mentioned, all members of the 1975 Constitutional Drafting Committee (CDC) which initially drafted the constitution were handpicked by the military while members of the 1978 Constituent Assembly apart from containing nominated members, were not elected through popular votes. Some matters were also not up for discussion by both the CDC and Constituent Assembly[36] and the military later tinkered with the draft constitution of the assembly before promulgating it.

Secondly, the military cannot approbate and reprobate at the same time. If the military took power in violation of the 1979 constitution, it surely cannot found the 1999 Constitution on the constitution it had flagrantly violated. What it could have done was to recognise the continuous

[33] Project on Constitution Writing and Conflict Resolution (n 29).
[34] Ibid.
[35] See Constitution of the Federal Republic of Nigeria (Promulgation) Decree 24 of 1999 (now Cap. C23, Laws of the Federation of Nigeria, 2004).
[36] O Obasanjo, *Constitution for national integration and development* (Friends Foundation Publishers, Ltd, Lagos, 1989) 2.

validity of that constitution up to the time of handover. This, of course, would have translated into the liability of all who participated in the coup of 31 December 1983 for the crime of treason. Notably also, the basis of the Nigerian federation was not addressed during the making of the 1979 Constitution.

A question may equally be raised that if a 1995 Constitution crafted through an elaborate process involving a 369-membership strong National Constitutional Conference is considered as lacking in credibility, how will the one hurriedly packaged by an all-selected team of 25 be described? It is therefore not surprising that the CFRN 1999 has since the date of its promulgation been consistently resisted, denounced and rejected by various sectors of the Nigerian society.[37] So, how does the CFRN 1999 stand in providing answer to the legitimacy question in the light of theoretical perspectives on constitutional legitimacy?

IV. Some perspectives on constitutional legitimacy

A quick surmise from discussion above is that the constitutional legitimacy question in Nigeria, though historical, locates more in the dissatisfaction with the undemocratic process from which previous constitutions, particularly the current one emerged. Does this find support in Western thought? Put otherwise, how do notable theoretical positions on constitutional legitimacy apply to the Nigerian case?

[37] Ebeku (n 6) 183-186.

Legal, sociological and moral perspectives

According to Richard Fallon, Jr,[38] the legitimacy of a Constitution is a question which may be determined legally, sociologically or morally. Carlos Bernal[39] presents a similar typology except for the replacement of the moral sense of discussion on legitimacy with the normative one. Assessing the legitimacy of a Constitution on legal basis for example considers the question from the perspective of its conformity or non-conformity to some legal norms. It is however easier to assess the legal legitimacy of a statute based on its conformity or otherwise with extant constitutional provisions than to gauge the legal legitimacy of the Constitution itself especially in its making.

This is more so as the Constitution presents an *a priori* evidence of its own legality or validity. Circumstances surrounding its making, especially when made as an act of self-determination or as a consequence of a revolution, are viewed as law creating facts and its compliance with any legal norm normally takes a back stage.

It is therefore taken in this article that as much as it is desirable to comply with extant legal norms both in the making and execution of a Constitution, legal legitimacy may after all not offer much succour to the concerns of the constitutional legitimacy debate. Constitutions made by military juntas such as the CFRN 1999 are after all made to conform to some legal requirements for their enactment, yet this fact does not make such constitutions to evade the legitimacy question from constantly assailing them. The noisome character of the claims of legal legitimacy is further evinced when the ultimate norm during Nigeria's military regimes

[38] RH Fallon, Jr., 'Legitimacy and the Constitution' (2005) 118 (6) *Harvard Law Review* 1796.
[39] C Bernal, 'How Constitutional Crowdsourcing can enhance Legitimacy in Constitution Making' in D Landau and H Lerner (eds), *Comparative Constitution Making* (Edward Edgar, Cheltenham, UK, 2019) 246.

is taken into consideration. This, briefly stated is: whatever the military regime through its supreme military council permits or sanctions.[40]

The sociological sense of the legitimacy question applies where the general public regard the constitutional system 'as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.'[41] A Constitution, from the sociological perspective is, in other words, legitimate where it is accepted as worthy of respect or obedience or, where it is otherwise acquiesced in.[42] However, the issue of whether an obligation exists to obey law *qua* law is one that continues to beset jurisprudential discourse. The problem as put especially by natural law critics of positivism is that even supposing the claims of the latter are true, there surely cannot be a moral obligation to obey law *qua* law.[43]

A subjection of the CFRN 1999 to the set of criteria embedded in the claims of constitutional legitimacy from the sociological perspective may also not be favourable. The fact of military origin no doubt is ordinarily inimical to a legitimacy claim. This is surely exacerbated by the circumstances surrounding the making of the Constitution. As previously noted, the CFRN 1999 was the product of a 25-member committee and subsequent adjustment by the military council. There was no Constituent Assembly not to talk of any recognition of the people's constituent power. All we have are the fraudulent 'We the People' claim in the preamble and the false assertion in section 14(2)(a) that 'sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.' How can a Constitution that does not derive from the people make such bogus claims? No wonder, the

[40] See Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 2, 1993 (as amended by Decree No. 12, 1994); *Attorney-General of the Federation v Guardian Newspapers Limited* (1999) 9 NWLR 187.
[41] Ibid 1795.
[42] Ibid 1790–791.
[43] See LL Fuller, 'Positivism and Fidelity to Law' (1958) 71(4) *Harvard Law Review* 630; J Feinberg, 'Civil Disobedience in the Modern World' (1979) 2 *Humanities in Review* 37; KE Himma, 'Positivism, Naturalism, and the Obligation to Obey Law' (1998) 36(2) *Southern Journal of Philosophy* 145.

condemnations and objections that greeted its promulgation have continued to the present times.

Fallon, Jr. identifies the moral sense as the third conception of constitutional legitimacy. In other words, the Constitution to be regarded as legitimate is held up in the light of certain moral standards of governance and law-making. A Constitution's legitimacy in this sense is regarded as a 'function of moral justifiability or respect-worthiness.'[44]

Frank Michelman[45] has for instance posited that 'governments are morally justified in demanding everyone's compliance with all the laws.' According to him, citizens will also 'be morally justified in collaborating with the government's efforts to secure such compliance … if, and only if, that country's general system of government is reliable or shall I say, "respect-worthy".'[46]

Theories in this regard have been advanced prescribing ideal, minimal and intermediate standards. For ideal theorists, moral legitimacy is grounded upon the highest possible standard of justice.[47] The unfortunate conclusion of this view however is that a perfectly just (if at all possible) constitutional State is considered legitimate even where its bearers of power govern without consent.

On the other hand, are those who base moral legitimacy on consent. Of course, based on the principle of *volenti non fit injuria*, ground for objection or disobedience may not arise when

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[44] Fallon, Jr. (n 38) 1796.
[45] FI Michelman, 'Ida's Way: Constructing the Respect-Worthy Governmental System' (2003) 72 *Fordham Law Review* 345, 346.
[46] Ibid. See also J Habermas, *Communication and the Evolution of Society* (Thomas McCarthy trans., Beacon Press, 1979) 178 where Habermas contends that 'Legitimacy means a political order's worthiness to be recognized.'
[47] See also A Buchanan, 'Political Legitimacy and Democracy' (2002) 112 *Ethics* 689, 702 (arguing that consent cannot require compliance with grossly immoral commands); J Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in L Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge University Press, Cambridge; New York, 1998)152, 162–63 (where he argued that consent cannot establish the legitimacy of authority in the absence of good reasons for that authority).

the State applies principles to which its citizens have furnished prior consent.[48] A variant of the consent theory is the hypothetical consent theory espoused by John Rawls.[49] He, in his classical work on justice, conceives it by reference to 'the principles that free and rational persons would accept in an initial position of equality as defining the fundamental terms of their association.'[50]

Rawls's 'liberal' theory of legitimacy thus posits that the 'exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.'[51]

In contradistinction to ideal theorists, advocates of minimal theories usually premise their thesis on the absolute necessity for a government to assure decent human lives in modern times.[52] They are willing to accord the legitimate garb to any government which guarantees a minimal threshold of justice 'in the absence of better, realistically attainable alternatives.' Raz[53] for example asserts the self-validating feature of constitutions provided 'they remain within the boundaries set by moral principles.'[54]

As previous discourse indicates, the matter of consent is crucial in the constitutional legitimacy debate especially for a highly divided state like Nigeria. This article thus considers the consent foundation of constitutional legitimacy as being germane in explaining and resolving Nigeria's constitutional legitimacy crisis. It is of course to be noted that mere acquiescence does not translate to consent. Rawls' hypothetical consent theory, particularly his 'original position'

[48] See for example, A Hamilton, The Federalist No. 22 (that 'THE CONSENT OF THE PEOPLE' is the 'pure, original fountain of all legitimate authority'). Also see Barnett (n 10) 117 (where he noted that 'genuine consent, were it to exist, could give rise to a duty of obedience'); G Klosko, 'Reformist Consent and Political Obligation' (1991) 39 *Political Studies* 676, 676–77 (where he identified the necessary conditions for consent to give rise to political obligation).
[49] J Rawls, *A Theory of Justice* (Belknap Press (Harvard University Press), Cambridge, Mass., 1971).
[50] Ibid 11.
[51] See John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993) 217.
[52] See Michelman (n 45) 353.
[53] Raz (n 47) 173.
[54] See also D Copp, 'The Idea of a Legitimate State' (1999) 28 *Philosophy and Public Affairs* 3, 43–4.

proposition may in the final analysis be crucial in attaining a cohesive and progressive society, particularly in ethnically divided societies. The means, process or procedure by which a constitution is made is therefore important in deciding or swinging the pendulum of its legitimacy question.

Assured procedure for just laws?

Barnett,[55] has however denounced the possibility of a legitimacy derived from general consent of the governed. This, to him, is because any argument of constitutional legitimacy being traceable to the consent of 'We the People' is factitious.[56] In the absence of the otherwise required unanimous consent, the Constitution may only be legitimated by 'putting enforceable limits on government powers-limits that would not be necessary if unanimous consent existed.'[57]

Such constitutional limits manifest in assured law-making procedure that result in the enactment of just laws or that ensure unjust laws do not ensue. Only when this happens, according to Barnett, would a moral duty to obey the resulting laws arise – an outcome of a legitimate legal system. This is more so as 'a constitution that lacks adequate procedures to ensure the justice of valid laws is illegitimate even if consented to by a majority.'[58]

Barnett's thesis presupposes that once enforceable constitutional norms are made, their prescriptions would necessarily be followed. While this may be a self-assertive quality of Western legal systems, experience points to its absolute negation in the constitutional regime of most African countries, including Nigeria. In the latter, the rate at which constitutional norms and legislation are breached by political actors who have sworn to uphold and defend the

[55] Barnett (n 10).
[56] Ibid, 113.
[57] Ibid.
[58] Ibid.

Constitution, indicate that some other factors are in play in the determination of the legitimacy question.

Principal, no doubt, are the manner by which the constitutional norms themselves are derived and the existence or absence of a constitutional culture that favours enforcement. This article thus argues that the fact whether or not the procedure by which the Constitution is made is consensual is fundamental in its legitimacy question. It may be noted, however, that Barnett was not 'asking why people *perceive a* constitution to be legitimate and constitutional laws binding in conscience.'[59] Rather, his concern was on 'what qualities a constitution should have to justify this perception.'[60]

Prevailing attitudes and beliefs

The contribution of Richard Kay[61] to the legitimacy question is quite incisive. To him, constitutional legitimacy closely relates to the acceptability of the applicable pre-constitutional rule. His conception of 'preconstitutional rule' syncs with the 'basic norm' of Kelsen[62] and Hart's 'rule of recognition'.[63]

Kay posits that two issues must be evaluated while discussing 'the legitimacy of a preconstitutional rule'. These are the contents and origins of the pre-constitutional rule both of which must conform with the 'values and beliefs' of the particular society it seeks to regulate.[64]

A pre-constitutional rule is therefore legitimate where its acceptability is ascertained based on the fact that it derives from the ways (attitudes, beliefs, traditions and values) of the society 'in

[59] Ibid, 145-46.
[60] Ibid, 146.
[61] Richard Kay, 'The Creation of Constitutions in Canada and the United States' (1984) 7 *Cannada United States Law Journal* 111
[62] H. Kelsen, *The Pure Theory of Law,* trans M Knight (University of California Press, 1967) 46–8, 194–200.
[63] H. Hart, The Concept of Law (Oxford University Press, 1961) 103–05.
[64] Kay (n 61) 121.

which the legal system is to be effective.'[65] Kay's thesis is quite useful in explaining the legitimacy crisis of the CFRN 1999 which pre-constitutional rule as previously captured is 'whatever the military regime through its supreme military council permits or sanctions.'

If this is contrasted with the heterogenous nature which informed the federal system of Nigeria, the reason why the CFRN 1999 is low on the legitimacy spectrum may not be far-fetched. A federal constitution which on one hand is an agreement between the different levels of government may certainly not be solely drafted and promulgated by a central autocratic government without necessary hiccups resulting in the polity. On the other hand, is the need to ensure that the procedure by which the constitution of a plural society is made captures not only the support of the various nationalities but also their aspirations and needs.

Traditional, charismatic and rational legal authority

An application of Max Weber's trio categorisations of legitimate authority to the legitimacy question of the CFRN 1999 also seems useful.[66] Weber, on the whole, contends that a legal system is 'legitimate if those subject to the system have made a value judgment that the laws promulgated by the system ought to be obeyed.'[67]

To Weber,[68] legitimate power could manifest as traditional authority, charismatic authority or rational legal authority. The legitimacy of traditional authority derives from the faith or consciousness of subjects in the rightness of the legal order by virtue of its existence from time immemorial while that of charismatic authority flows from the charisma (extraordinary abilities) of the one holding the power.

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[65] Ibid, 118.
[66] See DHJ Herman, 'Max Weber and the Concept of Legitimacy in Contemporary Jurisprudence' (1983) 33 *DePaul Law Review* 1.
[67] Ibid, 9.
[68] M. Weber, Wirtschaft und Gesellschaft, herausg. von J. Winckelmann, I, Köln/Berlin 1964, 22 sqq., 157 sqq. Cited by Petrović (n 11) 11.

Charismatic leadership, no doubt, can be contagious in eliciting widespread obedience and acceptance. Things go well as long as the leaders retain their charm while matters of order and authority in the legal system may quickly go south where the charm is lost due to real or apparent perceptions of incompetence, misdeeds and the likes.

The legitimacy of rational legal authority, on the other hand, either rests on faith in the absolute applicability of the norms prescribing the power or on the State's coercive order based on formally correct rules established in a customary way. Both scenarios presuppose some ascription to *a priori* rules of validity at the base of the legal system.

Traditional authority certainly syncs with the African ethos but the CFRN 1999 is certainly not vested with traditional authority. Certainly not in the manner of its making nor in the norms it espouses. In contrast, despite the Constitution not recognising the traditional governance system, the precolonial traditional system instead of fizzling out has remained evergreen and relevant to the Nigerian polity.

It may also not lay any claim to charismatic authority either in its making or implementation so far. The military junta, by the time of the making of this Constitution, had (if it ever had one) in fact lost its charm upon the Nigerian people. By the time of the Abubakar's regime in 1998, the cumulative effect of the economic downturn of the Buhari regime, the endless transitions of the Babangida regime and the totalitarian junta of the Abacha era had clearly demonstrated to Nigerians the futility of hinging any hope on the military for the redemption of the Nigerian state.

The CFRN 1999 would have ostensibly laid claim to legal authority but considering the hurried, non-democratic and non-inclusive manner the Constitution was fashioned out, any such claim

may equally fail. As noted by Julius Ihonvbere,[69] the rules of the game were not even ascertainable as at the time of the conduct of the general elections in 1999 as the CFRN had not been promulgated.[70] It is indeed interesting that the military junta had opened up the space for democratic elections to form governments at both federal, state and levels without anyone knowing the contents of the legal and political Charter (the Constitution) dictating the terms thereof.

Normative, nominalist and semantic constitution

Another interesting contribution to the discourse on constitutional legitimacy is the theory of normative, nominalist, and semantic constitution put forward by Karl Loewenstein.[71] A nominalist constitution in this respect is one in meaning only and not as a means of substantive legal or political ordering as 'conflicts between the constitutional norm and constitutional reality are resolved in favour of the latter.'[72]

Loewenstein however curiously considers this type of constitution justified (legitimate) as a means of political education due to the factual existence of some goodwill on the part of both the addressees and bearers of power to in the future make the constitution normative. This article however takes the view that a Constitution that is not predictive of political and constitutional reality may not come near being termed justified or legitimate.

A semantic constitution is one which depicts no discrepancy between norms prescribed by the constitution in question and factual legal realities. The problem rather lies in the ends to which the constitution is put; being utilised as a tool for perpetuation of the bearers of power's will

[69] Ihonvbere (n 6) 346.
[70] The Constitution of the Federal Republic of Nigeria (Promulgation) Decree 24 1999 was promulgated on 5 May 1999 to take effect from 29 May 1999. General elections however held on 5 December 1998 (local elections), 9 January 1999 (state and gubernatorial elections, 20 February 1999 (National Assembly elections), and 27 February 1999 (presidential elections). See The Carter Center, *Observing the 1998-99 Nigeria Elections Final Report* (National Democratic Institute for International Affairs, Washington, 1999) 10.
[71] K Loewenstein, *Verfassungslehre* (Tübingen, 1959) 252 sqq, cited in Petrović (n 11) 9.
[72] Ibid.

for continuous domination of the addressees of power. The constitution serves not to limit exercise of State power but instead is employed to validate it.[73]

The ideal form, according to Loewenstein, is found in the normative constitution where constitutional norms inform or guide State actions and processes. The result is a constitutional State where rule of law, as opposed to rule of men or rule by law, obtains as ostentatiously practised and canvassed by Western democratic nations. To him, while normative and nominalist constitutions can lay claim to legitimacy, semantic constitutions, being 'apparent constitutions' can surely not.

Loewenstein's postulates however beg at least two questions. First, does constitutional fidelity equate constitutional legitimacy? It may indeed be unequivocally stated that while a legitimate Constitution may determine the extent the norms prescribed thereunder inform political and governmental relations, the fact that they do, nonetheless, does not determine that Constitution's legitimacy.

The second question borders on whether constitutional legitimacy is in anyway a function of adopted governmental forms or tied to the Constitution's philosophical basis? Yes, a fascist or totalitarian system may, among others, seriously compromise human rights and undermine the principles of democracy as advanced by western societies. All the same, the question of constitutional legitimacy raises a different set of issues distinct from that of the operative governmental system. Also, the philosophical or ideological base of a Constitution does not usually obviate nor expedite its legitimacy.

Determining where the CFRN 1999 lies in the Loewenstein's typologies of nominalist, semantic and normative constitutions is problematic. It cannot be said to be completely

[73] According to Loewenstein, the semantic constitutional form is typified by the Plebiscitary Caesarism of the two Napoleons in the past, and present-day Islamic regimes, totalitarian fascist or communist dictatorships and strong presidential regimes.

nominalist as there is nothing interim about it. Also, while it portends a normative claim, experience in the past 22 years of its operation, indicates that there often is a wide gap between its norms and political cum legal realities.

Three examples may suffice to illustrate this. In 2004, former President Obasanjo gave instructions to the Minister of finance to forthwith stop the release of revenue meant for local governments to Ebonyi, Katsina, Lagos, Nasarawa and Niger States simply because these states, taking advantage of the provisions of section 8(3) had created new local government areas in their respective states. The Supreme Court in *Attorney-General of Lagos State* v *Attorney-General of the Federation*,[74] a consequent case thereon, invalidated the step taken by the federal government and sharply rebuked it for resorting to self-help instead of seeking judicial redress as provided for by the Constitution.[75]

Also, on 25 January 2019, some weeks to the holding of nationwide general elections, current President Buhari in flagrant abuse of constitutional provisions, suspended Justice Walter Onnoghen, the Chief Justice of Nigeria, from office. The move which attracted national and international condemnation, was premised on allegations of failure to declare certain assets levelled against the CJN some 15 days prior to the suspension.[76]

The President took this step despite the clear constitutional norm forbidding the removal of the CJN from office except where the President is acting upon an address supported by two-thirds majority of the Senate that the office holder be so removed 'for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or body) or for

[74] (2004) 11-12 S.C. 85.
[75] See section 232(1).
[76] 'Nigeria's president sacks the chief justice weeks before an election', The Economist (2 February 2019) available at <https://www.economist.com/middle-east-and-africa/2019/02/02/nigerias-president-sacks-the-chief-justice-weeks-before-an-election>. See also 'Statement on the Suspension and Replacement of the Chief Justice', available at <ng.usembassy.gov/statement-on-the-suspension-and-replacement-of-the-chief-justice/>.

misconduct or for contravention of the Code of Conduct.'[77] The President equally conveniently forgot that the power to discipline erring judicial officers is, in the first instance, constitutionally vested in the National Judicial Council.[78]

The third example relates to the discrepancy between the legal regime prescribed by the CFRN 1999 for local government administration and the factual situation in many states of the Federation from 1999 to the time of writing this article. By the unambiguous prescription of section 7, local government councils must be democratically elected, constituted and administered. However, in many states today, local government councils are constituted with handpicked members nominated or appointed by the Governor. This anomaly continues despite several decisions of the court which have held the practice as being unconstitutional.[79]

For instance, the Court of Appeal in *Barr. Enyinna Onuegbu & Ors v Governor of Imo State & Ors*[80] held that since the Constitution in section 7 guarantees 'the system of local government by democratically elected local government councils,' any attempt by a state government to do otherwise would be null and void. Such an attempt includes the running of the councils by transitional or caretaker committees whose members are nominated and not elected. This

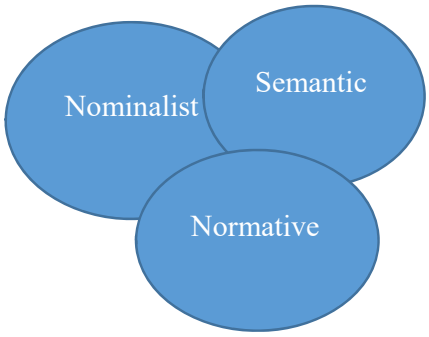
[77] Section 292(1)(a).
[78] Third Schedule, para 21(b), (g).
[79] See *Akan v* A*ttorney General, Cross River State* (1982) 3 NCLR 881; *Akpan v Umah* (2002) FWLR (Pt.110) 1820; (2002) 7 NWLR (Pt.767) 701; A*ttorney General, Plateau State v Guyol* (2007) 16 NWLR (Pt. 1059) 57 at 95 - 96; Attorney General, Benue State *v* Umar (2008) 1 NWLR (Pt. 1068) 311 at 355; *Adamawa State House Assembly v Tijjani* (2012) All FWRL (Pt.615) 330 at 377. The court in A*ttorney General, Plateau State v Guyol* for instance held: '[A]lthough it is within the legislative power of a State House of Assembly to make law to regulate a local government council in the State plagued with crisis, or to make a law to prescribe for an event upon which happening a Local Government Council is dissolved or the Chairman or Vice-Chairman of a Local Government Council is removed or vacates his office, any law made by the House of Assembly which provides for nomination of membership of a council or appointment of an administrator or caretaker Committee to replace a democratically elected council is inconsistent with the clear and unambiguous provisions of section 7(1) of the 1999 Constitution, which guarantees democratically elected local government councils and is therefore, unconstitutional. Thus, the action of the Government in dissolving the councils and proceeding to appoint caretaker committees rendered its action unconstitutional and the trial court was therefore right in striking down section 41(4) of the Local Government Law, 2007 on the ground that it is inconsistent with section 7 of the Constitution. In the instant case, even if the respondents consented to the dissolution of the councils which paved way for the enactment of the law giving the Governor power to appoint caretaker committees, it would still not alter the position because the parties had no power to contract out of the Constitution.'
[80] (2015) LPELR-25968 (CA).

decision is in line with several others, indicating the non-normative character of the CFRN as perpetuated by the political actors themselves.

As touching appointed local government councils, the crux of the matter of course, though objectionable, has not been whether state governments can dissolve democratically elected local government councils by following due process in qualifying circumstances. The emphasis has been that in such a case, a bye election should be conducted to reconstitute the Council and not that the Council is replaced by nominated members by the state government.[81]

It may indeed be argued that the CFRN 1999, to the extent that it serves as a tool of perpetuation in the hands of the bearers of power for their perpetuation in office or corridors of power solely for the advancement of their own interests, seems to be more of a semantic constitution. Such a constitution according to Loewenstein may, of course, not lay any claim to legitimacy.

Figure 1: Amorphous character of CFRN 1999



However, as already seen, the CFRN equally has nominalist and normative characters. It all depends on the circumstances as perceived by the bearers of power. This leads to an interesting

[81] *Dogari v Attorney-General of Taraba State* (2011) All FWLR (Pt. 603) 1926.

typology (Figure 1) of its amorphous character in sharing traits of a nominalist, semantic or normative constitution. This brings to mind the position of Fallon, Jr.[82] that 'the sorting of legitimacy claims into neat linguistic categories sometimes proves impossible' as the debates on the legitimacy question 'reflect concerns with the necessary, sufficient, or morally justifiable conditions for the exercise of governmental authority.'[83]

V. Comparative perspectives

Contingent upon the consent basis for constitutional legitimacy, it is understandable that the dissatisfaction with the CFRN 1999 is primarily tied to issues surrounding its making. The Abubakar military regime in 1998 was not particularly interested in any democratic and process-led constitution making exercise. Hence, the CFRN 1999 was principally 'made' by the 25-member coordinating committee with final inputs by the military junta.

This clearly contrasts with the making of the 2010 Kenyan Constitution which in its two phases attracted far much more inclusive popular participation and intense engagement with substantive provisions. The first phase[84] from November 2000 to November 2005 was a people-driven process under the auspices of the Constitution of Kenya Review Commission (CKRC),[85] the National Constitutional Conference (NCC),[86] and the National Assembly (KNA).[87] The process however suffered a setback when the KNA which initially did not

[82] Fallon, Jr. (n 38).
[83] Ibid 1791.
[84] Conducted under the legal regime of the Constitution of Kenya Review Act, 2000 (as amended in 2001).
[85] The CKRC was composed of 29 members. See C Murray, 'Political Elites and the People – Kenya's Decade-Long Constitution-Making Process' in GL Negretto (ed), *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives* (Cambridge University Press, 2020) 192.
[86] The NCC was composed of 629 members in all. This is made up of 'all members of Parliament, three delegates elected from each district, 42 representatives of political parties, and 125 representatives of religious, women's and youth groups, the disabled, trade unions and NGOs'. See J Cottrell & Y Ghai 'Constitution Making and Democratization in Kenya (2000–2005)' (2007) 14(1) *Democratization* 1, 6.
[87] The NCC could adopt the provisions of the draft Constitution by two-thirds vote while the Kenyan NA could only adopt or reject the draft Constitution but could not modify it.

possess the power to modify the draft Constitution adopted by the NCC was eventually granted this power, resulting in a much more different draft than that approved by the NCC. The Kenyan people subsequently at a referendum on 21 November 2005 roundly rejected the Constitution as modified and passed by Parliament.[88]

The second phase with wisdom garnered from the pitfalls of the first phase and the nasty violence that visited the announcement of the results of the 2007 elections, kicked off under a new arrangement under the Constitution of Kenya Review Act, 2008 and complementary amendment of the 1963 Constitution.[89] This phase was principally driven by a Committee of Experts (CoE) whose job was to reconcile the drafts of the first phase, focussing only on the contentious areas.[90] The committee[91] having adopted its draft was to submit it to a Parliamentary Select Committee (PSC) which had 21 days to deliberate on it, reach consensus and return the draft to the CoE for incorporation of its agreed inputs.[92] A special Interim Independent Constitutional Dispute Resolution Court was set up to handle any litigation that might arise as part of the review process.[93]

As noted by Murray,[94] 'The first clear indication that the process was on track was in November 2009 when the CoE released a draft constitution to the public for the brief month of consultations provided for in the Review Act.'[95] The committee thereafter amended the draft,

[88] See Cottrell & Ghai (n 86) 12–21; C Murray, 'Kenya's 2010 Constitution' (2013) 61 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 747–88.
[89] See for example, 1963 Constitution of Kenya, art 47A which required a 65% vote before a draft Constitution submitted by Parliament could be successfully modified.
[90] Murray (n 85) 201.
[91] The CoE received and engaged with some 26, 451 oral and written submissions within eight months of its establishment. See CoE, *Final Report of the Committee of Experts on Constitutional Review* (Westlands, Kenya: CoE, 2010) 41 available at <https://katibaculturalrights.wordpress.com/resources/drafting-the-constitution/>
[92] Ibid, 202.
[93] As part of the measures to ensure the impartiality and independence of the court, three foreigners were included in its membership of nine judges. See 1963 Constitution of Kenya, art 60A.
[94] Murray (n 85) 201.
[95] The CoE within this period 'received 39,439 substantive memoranda' containing 1,732,386 suggestions or recommendations. See CoE, 'The Report of The Committee of Experts on Constitutional Review Issued on the Submission of the Reviewed Harmonized Draft Constitution to the Parliamentary Select Committee on

incorporating inputs from the public into it and was able to submit its draft to the PSC by early 2010. The amended draft adopted by the PSC was later reviewed by the CoE (accepting some and rejecting some) before it submitted its final draft to Parliament for approval. The Parliament on 1 April 2010 passed the draft which was, after a period of public education, submitted for adoption at a referendum on 5 August 2010. The Constitution was adopted by 67% votes of the Kenyan people.

The legitimacy of the constitution was thus ensured and enhanced through the massive public participation of the first phase and the close linkage of the second phase to the first one. In fact, if any defect may be attributed to the second phase, the final adoption by referendum, a recognition of the people's sovereign will, was certainly designed to cure it. Indeed, the referendum criterium was a *sine qua non* of the entire process. This was the thrust of the decision in *Njoya* v *AG*[96] where the court held that the constitutional power to alter the constitution does not amount to the power to replace same by a new one. This could only be done as an act of the people's constituent power.[97]

Similarly, the legitimacy of the South African Final Constitution (FC) was founded upon an inclusive, broad based, and highly participatory two-step process. The 1993 multi-party negotiations signalled not only the end of the apartheid regime but also the commencement of a liberal, democratic society. Solace was found in an interim constitution with sufficient

Constitutional Review, 8th January, 2010' available at <https://katibaculturalrights.wordpress.com/resources/drafting-the-constitution/>

[96] [2004] LLR 4788 (HCK).

[97] See *Kesavananda Bharati Sripadagalvaru* v *State of Kerala* (1973) 4 SCC 225 where the Indian Supreme Court decided that Parliament's power to amend the constitution does not include the power to fundamentally alter the Constitution's basic structure.

guarantees[98] that the multi-party agreement would be honoured even after power has slipped out of the hands of the National Party, the then ruling party.

The path of legality was followed as the apartheid government adopted the agreement but it was clear to all that a break with the old order would occur and a new one would result with the conduct of the 1994 elections and the coming into effect of the interim constitution. The conduct of elections and the formation of a Government of National Unity (GNU) thus indicated the end of the first step and the commencement of the second step of the constitution making exercise.

The FC itself was to be made within two years and the bicameral Parliament served as the Constitutional Assembly (CA) in its drafting and passage. The 490-member strong CA, chaired by Cyril Ramaphosa,[99] engaged in some 15 months of active debate and decision making, engaged with over two million submissions (out of which are 11,000 substantive ones), and generally reached decisions over contentious issues through negotiations and compromises.[100]

By September 1995, the first draft had been produced for review by a Panel of Constitutional Experts[101] and despite all odds, the CA met the 9 May 1996 deadline by passing the draft Constitution. The process then moved to the newly established Constitutional Court (CC) which had function of certifying the Draft as the some took the opportunity to contest the consistency of some provisions of the draft with the constitutional principles. The court having failed to certify the draft,[102] kickstarted another round of further negotiations and compromises which culminated in the adoption of the amended draft and certification of same by the CC on

[98] Part of the guarantees were the binding nature of the interim constitution, formation of a Government of National Unity (GNU) and its 34 constitutional principles by which the validity of the Final Constitution would be determined.
[99] The current South African President.
[100] Generally, see C Murray, 'A Constitutional Beginning: Making South Africa's Final Constitution' (2001) 23 *University of Arkansas at Little Rock Law Review* 809.
[101] This was one of the deadlocks breaking mechanisms of the interim constitution to resolve differences.
[102] See *In re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SALR 744 (CC).

4 December 1996. The FC was signed on 10 December 1996 and it took effect on 4 February 1997.

The making of the United States Constitution in 1787 was no less eventful. To cure the deficiency of the Articles of Confederation, the delegates at the September 1786 Annapolis convention convened by the Virginia legislature had proposed to Congress to convene another convention in Philadelphia 'to devise such further provisions as shall appear to [the delegates] necessary to render the constitution of the federal government adequate to the exigencies of the union.'[103]

The Philadelphia convention did hold and delegates went forward to devise a federal constitution that significantly depart from the extant confederal one. Also, in defiance of the amending clause under the Articles,[104] the approved mode of adoption of the new constitution was through ratification 'by specially elected conventions in each state.'[105] The Constitution eventually 'became the supreme law of the land'[106] upon the inauguration of the federal government in 1789.

Even, where the amending clause was followed and the amendment has the character of a different constitution than the one being amended, this in Rawlsian view would have amounted to a revolutionary change and not just a mere amendment.[107] This in the words of Richard Albert occurs where 'the alteration is so transformative that we must recognize that conceptually the effect of the change is not merely to amend the constitution but rather to create

[103] Kay (n 61) 125.
[104] Articles of Confederation, art. XIII (U.S. 1781) ['Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which, by this confederation, are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.'
[105] Kay (n 61) 126.
[106] Ibid.
[107] Rawls (n 51) 239.

a new one.'[108] Regarding the making of the US Constitution however, the combined effect of state delegates that fashioned out the Constitution and the special conventions of each state that ratified it no doubt served to ground its legitimacy on solid grounds, particularly when it is noted that the Constitution was only binding on states that ratified it.

VI. The making of a legitimate constitution

It may then here be expedient to consider the constitution making model that may best suit the Nigerian situation. Constitution making is often regarded as a pivotal work; one in an effort to design a durable governmental structure for the good governance of a society. It has however been contended that the 'constitution moment' needs not be so momentous. It may also occur purely as part of normal politics.[109] So, how may the Nigerian constitutional legitimacy crisis be remedied — through a momentous process or through normal political (legal) process?

It may be quickly mentioned that, since 1999, two national (constitutional) conferences have at different times been unsuccessfully held by both the Obasanjo and Jonathan administrations[110] in an attempt to redeem the Constitution. Frantic efforts have also been

[108] R Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, New York, 2019) 70. See also G Jacobsohn, 'Anchoring and Sailing: Contrasting Imperatives of Constitutional Revolution' in G Jacobsohn & M Schor (eds), *Comparative Constitutional Theory* (Edward Elgar, Cheltenham, UK, 2018) 334 ['A constitutional revolution occurs when there is a paradigmatic displacement in the conceptual prism through which constitutionalism is experienced in a given polity. Such a transformation will be accompanied by critical changes in constitutional identity, although not every mutation of identity will entail a shift of sufficient magnitude to be considered revolutionary.']

[109] See for example KE Soltan 'Constitution making at the edges of constitutional order' (2008) 49 *William and Mary Law Review* 1409. Soltan outlays four hypotheses on constitution making to justify his contention that constitutions are nothing more than commitments. His four 'theses about constitution making in fragile states (p 1416) are as follows: 'First, constitutions are not supreme law. Or, to use a British phrase, the law of the constitution is not to be identified with the constitution. Second, constitutions are commitments to moderation, above all to diminish the use of the means of destruction, and to enhance impartial principles. Third, these commitments are likely to develop in stages, not in one constitution-making convention. Fourth, the result may not be a strengthened state, but rather a union of states akin to the contemporary European Union, or it may be a number of separate states. Constitution making is not necessarily state building.'

[110] The first one officially tagged National Political Reform Conference was organised by the President Obasanjo Administration in 2005 while the second one simply known as the 2014 National Conference was organised by the President Jonathan Administration. The reports of both conferences are still gathering dust in the national

made (and continue to be made) to amend it. For example, in 2017 alone, the Nigerian Senate proposed 32 new amendments to the Constitution. Only five survived at the end of the day.[111] Currently, there are nothing less than eight bills proposing amendment of different provisions of the Constitution before the House.[112]

Thus, on how best the legitimacy crisis of the CFRN 1999 be remedied, two options readily surface. First, is to continue the current drive towards amendment by utilising the relevant clause of the constitution. The second option is to jettison the constitution completely in favour of a new one.

The first option is presently favoured by the bearers of power who understandably are desperately looking for how to save the fortunes of the CFRN 1999, in a bid to thereby save their own vested interests in the polity. It is crucial to note that many prominent members of the current ruling party had while in the opposition[113] been vociferous in demanding the abandonment of the CFRN 1999 in favour of a new one negotiated and approved at a Sovereign National Conference (SNC).[114] It is interesting that since their party came into power in 2015, nothing has been done about the SNC.

So, if Nigeria continues on the path of reforms through constitutional amendments, will the CFRN 1999 thereby overcome its legitimacy crisis? It is undeniably difficult to answer this question in the positive. It holds however that a disinclination to put the process of convoking

archives where they are kept. President Buhari has in fact reportedly vowed not to implement the report of the 2014 conference despite the agitation of some that he should.

[111] See 'Full list of constitution amendments by senate', *The Punch*, 27 July 2017.

[112] This figure is arrived at by using the bill tracker tool on the website of the National Assembly. See <htttps://www.nassnig.org/documents/bills>.

[113] Notable names are Prof Yemi Osinbajo (currently the Vice President), Asiwaju Ahmed Tinubu (a national leader of the All Progressives Congress), and Dr. Kayode Fayemi (Governor of Ekiti State). See 'Fayemi, Anyaoku, Osinbajo canvasses sovereign national conference' available at <https://ekitistate.gov.ng/fayemi-anyoku-osinbajo-cavasses-sovereign-national-conference/>.

[114] See A Momoh, 'The Philosophy and Theory of the National Question' in A Momoh and S Adejumobi (eds), *The National Question in Nigeria: Comparative perspectives* (Routledge, London, 2002) 21; E Edosa, 'National Integration, Citizenship, Political Participation and Democratic Stability in Nigeria' in U Usuanlele and B Ibhawoh (eds) *Minority Rights and the National Question in Nigeria* (Palgrave Macmillan, 2017) 196–97.

a SNC into place is itself sufficient to disclose a disinterest in an open, frank, and honest discourse on the basic governance issues that afflict the Nigerian polity not to talk of addressing them.

The second option is to discard the CFRN 1999 in favour of a new constitution that meets the genuine yearnings of the peoples of Nigeria. This is captured in the call for a SNC. Indeed, the clamour for a SNC goes beyond any possible cosmetic changes to the constitution since these may never adequately address underlying factors such as growing ethnic tensions and distrust.[115] The clamour goes to the very essence and terms of the Nigerian state which are expected to be robustly discussed and renegotiated at the conference and it calls for a radical paradigm shift in constitutional engineering.[116]

How does the idea of a SNC stand in constitution making terminology? Hannah Arendt[117] has identified three ways constitutions tend to emerge historically. She posits that constitutions 'can be products of a long process of organic evolution, acts of an already established government, or created by revolutionary assemblies in the process of constituting a government.'[118] Andrew Arato on his part identifies five different mechanisms of making constitutions in modern times. These are, constitution making through the constitutional convention, the sovereign constituent assembly, normal legislature, the executive, and evolutionary process.

Since the SNC is conceived as an autonomous body which decision may only be subject to ratification by the people at a referendum, it may be said that it would fit into either Arendt's

[115] S Adejumobi, 'The Military and the National Question' in Momoh and Adejumobi (n 114)169-171; EE Osaghae, 'The Federal Solution and the National Question in Nigeria' in A Momoh and S Adejumobi (n 114) 228.
[116] That is, a radical paradigm shift, in the context of the Nigerian constitutional history.
[117] H Arendt, *On revolution* (Viking Press: New York 1963; Faber & Faber, 1964; 2nd ed., rev, 1965; Pelican Books, 1973; 1977; re-print, Penguin Books 1990).
[118] See A Arato, 'Forms of Constitution Making and Theories of Democracy' (1995-1996) 17 *Cardozo Law Review* 191, 194.

revolutionary assembly or Arato's sovereign constituent assembly. This nowhere denies the fact that all constitutions, in a sense, are products of the 'evolutionary process' of particular societies. The sense here is when the term is considered in its historical sense; the attribution of the term to unwritten constitutions notwithstanding. In this sense, written constitutions no doubt are products of history; of an historical moment with peculiar socio-political interplays.

The SNC, nevertheless, seems to sync more with the idea of a sovereign constituent assembly. Here, important questions bordering on the validity and legitimacy of the resultant constitution rest on the determination of certain factors. These factors, according to Jon Elster, are multidimensional.[119] First, is the manner of constituting the assembly, a matter he believes raises the problem of 'upstream legitimacy'. The problem of 'process legitimacy' on the other hand concerns the nature (democratic or otherwise) of decision-making rules adopted by the assembly. Others are: whether the resultant constitution is for the 'common good' or an outcome of elitist bargaining; whether or not the assembly's deliberations are public; and whether or not the constitution is ratified by popular votes at a referendum ('downstream legitimacy').

These questions are somehow related to *pouvoir constituent* as espoused initially by Sieyès[120] and consequently by Schmitt;[121] the theory that locates sovereignty (all powers) in the people.[122] Constituent power, in this regard, simply refers to 'the power to establish the constitutional order of a nation.'[123] While sovereignty (constituent power) in this model inheres in the people, power to make (consult, negotiate, argue, discuss and draft) constitutions is

[119] J Elster, 'Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea' (1993)71 (1-2) *Public 77Administration* 169, 178–79.
[120] EJ Sieyès, *What is the Third Estate?* trans M Blondel (1789) SE Finer (ed), (Pall Mall Press, London, 1963) 121–122.
[121] C Schmitt, *Constitutional Theory* trans Jeffrey Seitzer trans (Duke University Press, Durham, 2008) 94.
[122] Albert (n 108) 72.
[123] Y Roznai, '"We the people", "oui, the people" and the collective body: perceptions of constituent power' in Jacobsohn & Schor (n 108) 313.

vested in an autonomous constituent assembly which exercises this power as deemed fit. In this way, the constituent assembly after successful deliberations and drafting submits the constitution to its principal (the people) for ratification in a 'national, majoritarian referendum.'[124]

According to Sieyès, the people exercise their constituent power in two ways. First, is through normal legislative assembly and second, is through revolutionary constitutional assembly which in exercise of its sovereignty operates outside the existing constitutional order to constitute a new one according to its light.[125] The Constitution thus derives its authority from the constituent power and not otherwise.[126]

To Schmitt, the sovereignty of the constituent assembly is further exercised in it not being subject to any other governmental authority as it during the pendency of constitution making stands as the one vested with constituent as well as legislative, executive and judicial powers. Is he then proposing some kind of tyranny of a few? Not really as long as the assembly is completely identified with the people on whose behalf it subsists.[127]

As put by Arato,[128] the model of constitution making considered fully democratic by Schmitt consists of five elements. All previously constituted powers are first dissolved, followed by a popularly elected or acclaimed assembly with a plenitude of powers. Third, the assembly begins to function as the government on a provisional basis. Next, the constitution drafted is

[124] Arato (n 118) 203. See also R Stacey, 'Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process' (2011) 9 (3-4) *International Journal of Constitutional Law* 587; M Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218; M Loughlin, 'On constituent power' in MW Dowdle and MA Wilkinson (eds) *Constitutionalism beyond liberalism* (Cambridge University Press, Cambridge, UK, 2017) 151–175.
[125] T Paine, *Rights of Man: Being an answer to Mr Burke's attack on the French Revolution* (J.S Jordan: London 1791) 122.
[126] M Duverger, 'Legitimite des gouvernements de fait' (1948) *Revue du droit publique* 78. See also J McClellan & ME Bradford (eds), *Jonathon Elliot's debates in the several state conventions on the adoption of the federal constitution as recommended by the general convention at Philadelphia in 1787* (J. River, Cumberland VA, 1989) 432.
[127] Arato (n 118) 202.
[128] Ibid 203.

offered for a national, popular referendum and finally, if ratified, the assembly becomes dissolved as a new government is duly constituted under the Constitution.[129]

It may be said that this model presents three main implications.[130] First, is that new constitutions should not be made by ordinary legislative bodies but by especially constituted constitutional conventions. Second, the constitutional making process should particularly be participatory. This, as espoused by Ackerman,[131] is a kind of higher track politics. The third implication concerns the independence or what some designate as the sovereignty of the constituent assembly.[132]

It seems reasonable to assert that the democratic and impartial nature of this model, if utilised for the SNC, may go a long way in ensuring that sectional, selfish or banal interests are eschewed; that the resultant Constitution will only contain provisions which advance common societal goals. This in turn may ensure stability and progress of the polity. This position founds upon the reality of reaching consensus across ethnic lines in order to achieve an inclusive constitutional order.[133]

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[129] See A Arato, 'The link between revolution and sovereign dictatorship: Reflections on the Russian Constituent Assembly' (2017) 24 *Constellations* 493, 496 where the author gives the essentials of this revolutionary constitution-making model as follows: 1. As in the doctrine of Sieyès and Schmitt, the constituent assembly is a complete and legitimate stand-in for the constituent power of the people or the nation in 'the state of nature.' 2. As such, the assembly is subject to no constitutional rules, and is legally unlimited. 3. As there are no prior procedural rules, a constituent assembly has only the unworkable choice of deciding unanimously and the almost inevitable option of making decisions through a simple majority. 4. Having electoral legitimacy, the assembly would supersede any previous provisional government produced by the means of an insurrection, and a new one would have to be, in effect, its own executive committee. He thereafter concluded that 'a constituent assembly after the Bolshevik insurrection, under the prevailing theoretical assumptions as well as Russian conditions in 1917 and 1918,' could not be said to result in 'representative and direct democratic forms or any other form of constitutional government.'

[130] See D Landau, 'Constitution-Making Gone Wrong' (2013) 64(5) *Alabama Law Review* 923, 927.

[131] See B Ackerman, *We the people. Volume 1: Foundations* (Harvard University Press, Cambridge, MA 1991).

[132] Landau (n 130).

[133] This, undoubtedly requires the kind of sincere discussions, negotiations and compromises that characterised the South African and Kenyan constitution making experiences.

Solongo Wandan[134] who termed constitution making based on recognition of *pouvoir constituent* as the democratic-originalist position has however identified a contrasting model named the democratic-constructivist position. The democratic-constructivists deny the existence of any 'logical and necessary relation between popular democratic origins and constitutional democratic outcomes.'[135]

They contend that the 'self that gives itself a Constitution'[136] is not a pre-existing agent but one constructed as part of the constitution making process. As put by Hahm and Kim,[137] it is definitely not a 'pre given, clearly bounded, and self-sufficient agent prior to the drafting of the constitution.'

Supporting their position from historical and empirical bases, the democratic-constructivists contend that no 'democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup.'[138] They also point to the international character of modern constitution making as negating the concept of a 'pre-existing unified constituent agent'.[139]

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[134] S Wandan, 'Nothing out of the Ordinary: Constitution Making as Representative Politics' (2015) 22(1) *Constellations* 44.
[135] Ibid 47.
[136] Ibid.
[137] C Hahm and SH. Kim, 'To make "We the People": Constitutional Founding in Postwar Japan and South Korea.' (2010) 8 *International Journal of Constitutional Law* 800.
[138] See P Russell, *Constitutional Odyssey: Can Canadians become a Sovereign People?* (1993) 106. See also J Widner 'Constitution writing and conflict resolution' (2005) 94 *The Round Table* 503–18 (who asserted that about 200 constitutions came up between 1975 and 2003 in countries experiencing one form of conflict or the other as part of the peace process).
[139] Wandan (n 134) 47. Other negating ideas in support are as contained in the concepts of: 'constitutional borrowing' [See L Epstein and J Knight, 'Constitutional Borrowing and Non Borrowing' (2003) 1 *International Journal of Constitutional Law* 196; N Tebbe & RL Tsai, 'Constitutional Borrowing' (2010) 108 *Michigan Law Review* 459; and M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, New York, 2012)]; 'diffusion of constitutional ideas' [see H Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, Cambridge and New York, 2000); Z Elkins, 'Constitutional Networks' in M Kahler (ed), *Networked Politics: Agency, Power and Governance* (Cornell University Press: Ithaca 2009) 43–63]; 'migration of constitutional ideas' [see F Schauer, 'On the Migration of Constitutional Ideas' (2004) 37 *Connecticut Law Review* 907; S Choudhry, *The Migration of Constitutional Ideas* (Cambridge University Press: Cambridge and New York:

The democratic-constructivists' rejection of the constituent power theory however needs to be approached with caution especially in its consideration of people who make constitution for themselves as agents. This is particularly so as a careful reading of the constituent power construct shows a clear distinction between it and the concept of constituted power as previously ascertained.[140]

The people in whom constituent power inhere are thus agents of no one. Instead, a principal-agent relationship exists between them and constituted powers which manifest as the constituent assembly or as the constituted government.[141]

As previously asserted, the constituent assembly model thus presents some attraction for the advocated SNC. However, to what extent would a sitting government agree to its dissolution for a constituent assembly to assume and exercise plenary state powers? First, it is obvious that the government may be more persuaded to go this way provided its dissolution occurs at the end of its term than at any other time. A government may equally be so persuaded provided the ruling party is confident of being able to significantly influence the composition of the constituent assembly at a free and fair elections. Third, the political will to unequivocally make a people-driven constitution must be particularly strong. The fourth and least desired option is for the government to be forced to concede to it through a revolution.

A revolution is the least desired option in as much it is aimed at hijacking governmental powers by force beyond the extant provisions of the constitution. It in this sense, does not matter

2006);]; and total 'constitutional imposition' [see N Feldman, 'Imposed Constitutionalism' (2004) 37 *Connecticut Law Review* 857; UK Preuß, 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization' (2006) 51 *New York Law School Law Review* 467; JA Their, 'The Making of a Constitution in Afghanistan' (2006) 51 *New York Law School Law Review* 557; Z Elkins et al, 'Baghdad, Tokyo, Kabul: Constitution Making in Occupied States' (2007) 49 *William & Mary Law Review* 1139; and A Arato, *Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press, New York, 2009)].

[140] Arato (n 118) 202.

[141] Ibid.

whether or not the revolution is a bloody one. Two reasons for the undesirability of this option may here suffice. First, such a recourse offends current norms of international and regional law such those contained in the African Charter on Democracy, Elections and Governance.[142] Secondly, Nigeria's experience, just as same of many other African countries, has clearly indicated the futility of hoping any good will come forth from any government that comes into power through sheer force. This however does not mean a revolutionary movement within the confines of the law is not possible.

Although attempts at defining political will may be problematic, the term surely connotes the extent of readiness or willingness on the part of the government of the day to embark on a particular policy direction or outcome.[143] The question may then be asked as to what factors may determine the presence or absence of the political will to convoke the SNC in Nigeria? The crystallisation of the political will in this direction may no doubt be easier in the presence of ideological persuasion among notable leaders.

As previously stated, there does seem to be some persuasion among various leaders across the political spectrum that addressing the legitimacy question of the CFRN 1999 is to frontally confront the fundamental problems confronting the Nigerian society; without which the quest for a cohesive and development-oriented society may not be kickstarted. In fact, a new political movement which announced its birth on 1 July 2020, also expressed its commitment to initiate:

> A new ideological mass Movement … to embark on immediate mass mobilisation of the nooks and crannies of the country for popular mass action towards political

[142] See articles 2, 3, 5, & 23,

[143] See Linn Hammergren, 'Political Will, Constituency Building, and Public Support in Rule of Law Programs' (Center for Democracy and Governance Bureau for Global Programs, Field Support, and Research U.S. Agency for International Development, 1998) available at <https://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Political-Will.-Constituency-Building.-And-Public-Support-in-Rule-of-Law-Programs>; LA Post, ANW Raile and ED Raile, 'Defining Political Will' (2010) 38(4) *Politics and Policy* 653; D Abazović and A Mujkić (eds), Political Will: A Short Introduction Case Study - Bosnia and Herzegovina (Friedrich-Ebert-Stiftung, Sarajevo, 2015).

> constitution reforms that is citizens-driven and process-led in engendering a new Peoples' Constitution for a new Nigeria that can work for all.[144]

Among the notable names in the new movement are Former Speaker of the House of Representatives, Ghali Na'abba; former Deputy Governor of the Central Bank, Dr. Obadiah Mailafia; Col. Abubakar Umar (retd.), Dr Oby Ezekwesili; Prof Jibo Ibrahim; Yabagi Sanni; Amb, Nkoyo Toyo, Isa Aremu, Prof Chidi Odinkalu, and Senator Shehu Sani.

How successful will the conceived 'idealogical mass Movement' be? Obviously, only time will tell. In all, it may be said that although the road to a democratic and legitimate constitution may be tedious and long, it is one that must be certainly traversed in as much as the activating factors in the Nigerian polity may not be otherwise settled.

There is however a snag in following the constituent assembly model for the convening of the SNC. This is because the conceived plenary powers of the SNC does not extend to the exercise of governmental (legislative, executive and judicial) powers. Rather, its powers are limited to giving the country an acceptable constitutional foundation. This will lead to a consideration of the normative theory of post sovereign constitution making or round table model advanced by Arato.[145]

The model seeks to synthesise the best features of the two main democratic models of constitution making via constitutional convention and constituent assembly.[146] The round table model prescribes a two-level process where an interim Constitution which binds the

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[144] '2023: Na'abba, Agbakoba, Utomi, Ezekwesili, others float new political movement' (*The Punch*, 1 July 2020) available at <https://punchng.com/2023-naabba-falana-utomi-ezekwesili-others-float-new-political-movement/>.
[145] A Arato, 'Redeeming the Still Redeemable: Post Sovereign Constitution Making' (2009) 22 *International Journal of Politics, Culture and Society* 427, 429; --- 'Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making' (2012) 1 *Global Constitutionalism* 173. See also A Arato, Post Sovereign Constitution Making: Learning and Legitimacy (Oxford University Press, Oxford, 2016).
[146] Arato 'Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making' (n 145) 193.

constitutional makers is first made before the final Constitution is ultimately made. A constitutional court is also established[147] to ensure the makers of the final Constitution complies with all rules and procedures prescribed in the interim constitution.[148]

While the makers of the interim Constitution may be undemocratically constituted, the makers of the final Constitution must be democratically determined. The latter assembly, like the first, is also not sovereign.[149] This model emerged from constitutional making experiences of Spain between 1975 and 1977, some countries of central Europe between 1989 and 1990, and South Africa from 1991 to 1996.[150]

The model, according to Arato,[151] is noted for 'substituting principles like pluralistic inclusion of the main political forces, publicity and adherence to the rule of law' to solve the problem of democratic legitimacy.[152] Indeed, important principles to observe in any legitimate democratic constitution making process have been identified as consensus, plurality of democracies, publicity, reflexivity and the veil of ignorance.[153]

The round table model may obviously not totally apply to the Nigerian situation. However, borrowing from its principles and same of the constituent assembly model may prove useful. As previously discussed, it is not going to be a mean feat for a government under the current constitution to agree to the convening of the SNC. Assuming that the combination of factors such as political will and the confidence of the government to have a big say in the deliberations of the SNC, makes the government willing to commence the process of making a new constitution, it is most likely that it, and not another government, would desire to go down in

[147] That is, where none exists previously.
[148] Arato, 'Redeeming the Still Redeemable: Post Sovereign Constitution Making' (n 144) 430–31.
[149] Arato 'Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making' (n 145) 194.
[150] Arato, 'Redeeming the Still Redeemable: Post Sovereign Constitution Making' (n 145) 431.
[151] Ibid.
[152] See Roznai (n 123) 295.
[153] Arato (n 118) 224–230.

history as the one that fulfils the long-standing desire for a truly autochthonous and legitimate constitution.

Conceptually therefore, it makes sense to regard the current constitution as an interim one, so that the next stage for the commencement of the final constitution can be commenced. Indeed, the conclusion of the CDCC that a fair reading of the signals coming from a generality of the Nigerian people is a total rejection of the 1995 Constitution in preference for the 1979 Constitution (with amendments) should have at best been taken as tentative. It should have been understood as a recommendation for a kind of stop-gap constitutional arrangement to ease out the military and successfully transit to civilian rule.[154]

The constitutional document emerging from such an arrangement should thus have at best been an interim one. Such a provisional Constitution according to Milan Petrović,[155] gives the state 'the legal organization it needs and, on the other, the question of legitimacy of the constitution is put off until the proclamation of the intended, full constitution.' Thus, taken that the CFRN 1999 is an interim constitution, the government can simply amend it to provide for the convening of the SNC within a reasonable timeline and the expiration of this constitution upon the ratification of a new one by the peoples of Nigeria at a referendum.

However, the SNC unlike the latter assembly of the round table model must be autonomous and unlike the assembly under the constituent assembly model, it must not be vested with powers beyond that of making a new constitution. As contended by Ebeku,[156] such a democratic and all-inclusive conference is ironically[157] the recipe to avoid disintegration by

[154] See Osipitan (n 12) 36.
[155] Petrović (n 11) 20.
[156] Ebeku (n 6) 231.
[157] It is ironic because the main reason given against the convening of such a conference is that it might lead to the disintegration of the country. It however holds to reason that except such a conference is held to accommodate differences and remedy past injustices, current systemic conflicts in the polity threatening the country's corporate existence might eventually culminate in her disintegration.

ensuring that all issues confronting the health of the political union are robustly discussed and resolved in the national interest.

A legitimate constitution therefore is one that the people for which it is made identify with; one they recognise as their own, and to which they have a sense of obligation to not only conform with its norms but to also cherish and defend. Certainly, not one which even the political actors trample upon[158] and only selectively decide the part to enforce in particular circumstances. The making of such a constitution is the basis upon which a reasonable expectation of the good governance of the state can be based. The essence of this position is captured in the following words by Ilufoye Ogundiya:[159]

> The state that has been under the control of corrupt civilians and military rulers who had fed ferociously on the economy and resources of the state with reckless abandonment cannot enjoy the support of the people. The consequence is glaring-poverty of legitimacy.

VII. Conclusion

This article has adopted a theoretical and pragmatic approach in revisiting the legitimacy crisis facing the Nigerian 1999 Constitution. The contention in doing this is that a rigorous application of theoretical perspectives is necessary in considering the issue of constitutional legitimacy and in demonstrating the consequence of a constitution that is low on the legitimacy spectrum on the 'health' of the polity.

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[158] A recent example is the blatant breach of the constitutionally guaranteed right to freedom of expression including the right to access and disseminate information by the decision of the Nigerian President to not only ban twitter operations in Nigeria but to also prosecute any Nigerian that persists in using the medium. See CFRN, s.39; Anietie Ewang, 'Nigeria's Twitter Ban Follows Pattern of Repression – Government Should End Restrictions on Free Expression' (*Human Rights Watch*, 7 June 2021) available at <https://www.hrw.org/news/2021/06/07/nigerias-twitter-ban-follows-pattern-repression>; Danielle Paquette, 'Nigerians could get arrested for tweeting. They're protesting on Twitter anyway' (*Washington Post*, 7 June 2021) available at <https://www.washingtonpost.com/world/2021/06/07/nigeria-twitter-ban-buhari-lawsuit/>.

[159] IS Ogundiya, 'The Cycle of Legitimacy Crisis in Nigeria: A Theoretical Exploration' (2009) 20(2) *Journal of Social Sciences* 129, 137.

While locating the essence of the discourse in the country's historical facts and plural nature as activated by ethnic divisions and tensions, it becomes obvious that a legitimate constitution in such a clime must be one to which there is general agreement, one that is people driven and that is inclusive. The non-democratic and non-participatory nature of the process adopted in making the CFRN 1999 has indeed been its bane and it does not seem it will ever overcome its legitimacy crisis despite the frenzied attempts to amend it by the political class.

Buying into the claims of the consent basis of the discourse on constitutional legitimacy, a legitimate constitution that will meet the yearnings of the Nigerian peoples may surely be made by adapting principles of the constituent assembly model and the round table model. In this wise, the CFRN 1999 is considered an interim constitution specifically made for the purpose of enabling Nigeria to transit from military rule to civilian rule. This satisfies the first stage of the round table model.

Recognising the *pouvoir constituent* which inheres in the Nigerian peoples, the next stage would be the amendment of the constitution to permit the convening of the SNC towards the making of a new constitution. The SNC, contrary to the second assembly of the round table model, should however be autonomous. Though this syncs with the constituent assembly model, yet it does not totally as the SNC may not exercise plenary governmental powers. Its autonomy relates only to the making of a new constitution subject only to ratification by the peoples at a referendum based on universal adult suffrage.

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