**A TERM PAPER ON THE LOOPHOLES IN THE NIGERIAN CONSITUTION AND HOW IT HAS AFFECTED DEMOCRACY**

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*POL104 Assignment: Constitution is important for the consolidation of democracy. However, the making of Nigeria’s constitutions have been under two political dispensations that have anti-democracy tendencies, and this has been a great impediment to democratic governance in Nigeria. Examine some of the loopholes in Nigeria’s constitutions over the years that have affected democracy in Nigeria.*

A constitution is the foundation of a legal and political system, it is a set of man-made laws that is created as a blueprint for a state. A nation-state cannot move forward without a suitable constitution peculiar to the state itself and until this is done, the state may become a failing or a failed state. Hence, the importance of this term paper which aims at exploring the ways in which the Nigerian constitution is hindering the democratic governance of the country.

Constitutions performs the following essential functions:

1. As a blueprint of inter-governmental relations, a constitution sets forth the general parameters of legislative, executive and judicial powers. It creates preconditions for a well-functioning democratic order, one in which citizens are genuinely able to govern themselves.
2. As a protocol of survival and continuity for any social group, a constitution ensures that no one attains salvation or offers a programme of salvation to the group by another route; this means that the Constitution is the highest authority in the state and everybody is subject to the Constitution.
3. A constitution embodies fundamental principles of humanity and respect for human rights to control and constrain the exercise of governmental power. Fundamental human rights are qualifications on the powers granted by the people to the government.

Ideally, constitutions should be formed on mutual agreement since society is formed through a social contract. People must mutually agree to live together and mutually agree on the terms of that compact before translating that agreement into a written code which we know as the Constitution. When we invoke “We the people” in a constitution, there is an assumption of a commonality of purpose and destination. What holds people together is not the thread of a constitution, but certain beliefs common to most members of a society; what we know as national consciousness. Thus, the making of a constitution is based on, or presupposes, aprior agreement on some fundamental principles which, even if unwritten, makes possible and precedes the peoples’ consent to the written code.

Nigeria has come a long way in its political and constitutional evolution. Nigeria has enacted roughly five constitutions between independence and now, though one was inoperative: the 1960 (Independence) Constitution; 1963 (Republican) Constitution; 1979 (Second Republican) Constitution; 1989 (Babangida) aborted Constitution; and 1999 Constitution (as amended in 2011). Elaborate and often expensive constitutional conferences and/or constituent assemblies preceded the making of these constitutions.

The 1999 Constitution is an adulterated version of the 1979 Constitution, written in secrecy by Professor A. Yadudu for General Abdulslami Abubakar who decreed it into existence in 1999. It has the imprint of authoritarianism written all over it, with no consideration to the genuine desires of the Nigerian people. There was not even the civility of a Constituent Assembly or a referendum. In simpler words, the Constitution was drawn without concern for and agreement of the people. The nation’s attempt at constitutional engineering have failed to bring about seismic changes to the polity due to the several pathologies.

The Nigerian constitution has at all time, posed several challenges to democracy which ranged from form of government, structures of government, devolution of powers, revenue sharing, resource control, state and local government creation, boundary adjustment, state police and fiscal federalism, to local government elections, indigeneship, gender equality and children’s rights, amongst others.

The following are some of the anti-democratic challenges posed by Nigeria's constitutions:

**1. Neo-patrimonialism**

The Nigeria State has striven to mimic Western democracy and liberalism, which presumes, for example, that a State should permit a vibrant civil society and a free press, with organic constitutions grounded on the soil and clearly defining the powers, rights, and responsibilities of all participants. Truth be told, the Nigerian State possesses juridicial characteristics of statehood without its empirical and institutional features. Nigeria is a patrimonial, predatory, patronage and vampire state. What today is called ‘Nigeria’ is what the British decided was Nigeria. We live in what scholars call “imagined communities”, where “members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion”.

There is everywhere a crisis of social disintegration and a breakdown of tribal customs; in short, “a deepening structural malfunction – between an impoverished countryside and an indigent ‘urbanism’”. Public officials, even at the highest levels, while preaching patriotism are busy serving particular, sectional, religious interests rather than the common good. The Preacher gains few proselytes by instructions which his own behaviour contradicts. Nigerian politics breed personality cults, which are aided by a vast patronage network in rent-seeking State already suffering from resource curse. Government by patronage undermines accountability and transparency in the management of public affairs.

Clearly, any attempt at a true constitutional engineering in Nigeria must first address the patrimonial, predatory and vampire State structure. It is a foundational imperative. This is why some of the recommendations contained in the 2014 National Conference Report makes good sense in law and logic. The recommendations touch on several issues, including citizenship, immigration and related matters; civil society organisations, labour, youths and sports; environment; law, judiciary, human rights and legal reform; land tenure matters and national boundaries; politics and governance; public service; social sector; and religion; and others.

**2. Republicanism**

The Nigerian Constitution contain contradictory principles. For example, Section 2(1) of the 1999 Constitutions provides: “Nigeria is one indivisible and indissoluble Sovereign State to be known by the name of the Federal Republic of Nigeria”. Thus, Nigeria is both a ‘federation’ and a ‘republic’. The two words do not mean the same thing. The noun ‘republic’ connotes the notion that sovereignty rests with the people or their representatives rather than with a monarch or emperor; there can be no exercise of political power, be it at the centre or periphery, except as determined by the people; and no public resources ought to be deployed in maintaining institutions or offices that are not constituted from the exercise of peoples’ sovereign will.

The extant Constitution has not satisfactorily addressed the inherent contradictions in our political system. Meanwhile, the National Conference Report recommends an advisory, constitutional role for traditional rulers. It also recommends the setting up, at the Federal Level, of a National Council of Traditional Rulers to deal with matters of tradition, culture, and dispute resolution. It urged traditional rulers to keep out of partisan politics.

The U.S. is a true example of a republic. American political thought emphasises a pragmatic view of government. People exist before government exists. Government is an agency created to meet collective needs. The ruler rules only with the consent of the ruled. When this consent is removed, then there is no legal sovereignty. Democracy becomes relevant only as a vehicle for conveying the peoples’ sovereign will. Section 14(2)(a) of the 1999 Constitution provides that “sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority” and that “the security and welfare of the people shall be the primary purpose of government”. This means that sovereignty vests in citizens, not regimes, and manifests in elections conducted fairly, in a manner that does not advantage any candidate; in secret, so that voters are free to choose the candidate that best represents them; in a manner that all adult citizens with full mental capacity, are granted equal suffrage or the right to cast votes of equal weight; and periodically.

The first problem is that the 1999 Constitution itself is not republican, not having its origin from the sovereign will of the people. This dictatorial tendencies probably explain why the political class find it difficult to respect the sovereign rights of Nigerians to determine the country’s political leadership through free and fair elections. It is an open secret that elections in Nigeria have historically been akin to organised crime, with multiple actors pursuing pre- determined outcomes through common enterprise..

In this regard, several reports have recommended an amendment of Section 174(1)(c) of the Constitution with respect to the conduct of elections such as:

1. Section 285 of the extant Constitution should be amended to allow Election Tribunals take interlocutory matters along with substantive petitions within 180 days.
2. Serving judges should preside over election petition tribunals.
3. Governorship election petition should terminate at the Supreme Court.
4. Government should establish an Electoral Offences Commission.

**3. Federalism**

The word ‘federalism’ is derived from the transitive verb ‘federate’, meaning to join together in a federation, or cause various bodies to join together in a federation. Its verb, ‘federating’, means to associate, implying a coming together of states into a league or federal union. Therefore, federalism connotes an arrangement in which political powers are constitutionally shared between the central government and the federating units. It is a device that enables each group in a plural society to look after its own internal affairs free from outside interference. It is also a device for limiting the powers of the centre in order to prevent it from becoming an instrument of total domination.

Some think that federalism encourages centrifugal allegiances and crystallises tribal difference, thereby making it difficult, if not impossible, for people to rise to a higher order where tribe, language, religion, or geography become insignificant. Though federalism “provides a local institutional base for an appeal to tribal or group sentiment”, it is the struggle for political power and the fear of domination that makes people to gravitate towards their base. Recognising one's individuality and affinity need not undermine national loyalties, provided the differences and disparity in economic development and distribution of social goods are not so great and fundamental. True federalism encourages people to think national and act local.

Nigeria’s variant of federalism is both confusing and mystifying. Our federalism is one of concentration of absolute powers at the centre. It is one that is particularly lacking in mutual respect, making it looks like a master-servant relationship. This asymmetrical relationship explains why many of our governors are gadflies, running regularly to Abuja for ‘federal grants’ in the face of dwindling internally generated revenues. The centre – the Federal Government – has become a leviathan, gaining more power almost in the same proportion that States are losing. The reality is that today’s Nigeria is a unitary State masquerading as a federation.

The 2014 National Conference has several recommendations to the constitution as they affect aspects of federalism most pertinent of which is the ‘Devolution of Power’ between the Centre and the federating units.

**4. Resource Control**

Governments sometimes acquire individual, group or community properties for overriding public purposes. Lands may be compulsorily acquired for economic and social programmes, such as the construction of health centres, schools, roads, etcetera. Section 44(3) of the 1999 Constitution, which is an exception to Section 44(1) provides: that the entire property in Nigeria belongs to the Government.

In true democratic contexts, compulsory acquisition of properties must be seen as an exception, not the rule. It does not, and should not, remove the fundamental premise that these properties hitherto belong to individuals, groups, or communities. Indeed, in a true federalism, each entity has a right to exploit its resources for the welfare of its people subject, of course, to payment of commensurate taxes. This is the true meaning of resource control. Consequently, the forceful acquisition of natural resources by the Federal Government was a scam because it was done without consultation with, or agreement of, the people and it deprives the people of their own means of subsistence.

Often, the law enjoins the payment of compensation to ameliorate the injustice that could arise from forceful or compulsory acquisition of properties. Indeed, both municipal and international law mandates compensation for compulsory acquisition of property. Section 44(1)(a) of the 1999 Constitution requires the payment of compensation in the case of compulsory acquisition, inter alia, of any interest in immovable property.

Derivation is not compensation for ecological damage on account of mineral prospecting and extraction, as erroneously peddled in many quarters. The principle of derivation is associated with ownership. It is a form of compensation for dispossessing the oil bearing states of the interest in their immovable properties and depriving them of their own means of subsistence. It simply means an acknowledgement that oil is derived from those states.

The 13 percent derivation however, is another of the injustices enshrined in the 1999 Constitution. The percentage was dictated by military fiat without any consultation with relevant stakeholders. It was not so at the beginning. Section 140(1) of the 1963 Constitution provided that the Federation pay each region a sum equal to fifty per cent of the proceeds of any royalty received by the Federation in respect of any minerals extracted from that Region; and any mining rents derived by the Federation from within that Region.

In keeping with Federalism therefore, States should exercise ownership over all resources in their domain, natural or otherwise, for the benefit of their peoples. They should pay taxes and other royalties to the Federation as is the practice of other true federations.

**5. Constitutional Immunity**

The extant Constitution contains an ‘immunity clause’ under which the President, Vice-President, Governor, and Deputy-Governor are immune from civil or criminal proceedings while in office; indeed, “no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued”. Some argue that doing away with this perverted provision will undermine executive capacity to perform their official functions that the concern of the framers of the Constitution is the chilling effect that civil or criminal liability would impose on the performance of executive duties.

The people certainly do not benefit from this clause in the constitution. It is time to reconsider this clause to help checkmate executive lawlessness and promote responsive and accountable leadership. The National Conference also recommends the removal of the immunity clause.

In summary, the current constitution is fraught with so many imperfections that continues to threaten and derail the sovereignty of the Country. It is essential to explore constitutional devices and adjustments that are aimed at removing weeds so the society can move forward. This makes it imperative for constitution making process to be deliberative and inclusive. The people to whom the constitution will govern must understand it, take an active part in its construction, and ultimately own it. A good Constitution must flow from the people. Trust and pride in the homeland should be rebuilt by involving the people in the process of developing a constitution acceptable to all segments of, and interests in, the country.