

COMMENTS AND VIEWPOINTS ON THE NIGERIAN CONSTITUTION

Submitted
by
The Association of Nigerian Scholars for Dialogue
to
THE CONSTITUTION DEBATE CO-ORDINATING COMMITTEE
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Area 10, Abuja, Nigeria.

INTRODUCTION

The Association of Nigerian Scholars for Dialogue comprises Nigerian intellectuals and academics who are engaged in promoting the well-being of the Nigerian nation by employing their knowledge resources for resolving the nation's problems through dialogue. The Association engages in a praxis that promotes the nation's welfare through scholarly dialogue, rather than through violence and insults. It maintains a web site and issues occasional publications that provide a platform for debates on Nigerian public affairs in the hope that Nigerians' traumatic experiences with military rule will yield to an orderly transition to (a) civil rule and thereafter (b) a democratic regime.

Nothing is more important in the political culture and history of a nation than the Constitution by which its citizens are ruled. Nigerian Scholars for Dialogue therefore view with utmost seriousness the debates that the Military Head of State, General Abdulsalam Abubakar, has asked for under the auspices of Constitution Debate Co-ordinating Committee (CDCC). We assume that General Abubakar wishes to hand over to a civilian regime a constitutional mandate that will enhance the legitimacy of his civilian successor in office. **We note with regret that this difficult task has been given a time span of less than two months.** Our comments and recommendations are offered against the weighty background of this huge responsibility and the need to ensure a successful constitutional transition to civilian rule and a new era of democratic responsibilities.

There is a grave danger that the constitutional process for Nigeria will become a trivial undertaking which is viewed as a ritual that should be ventured into several times in the course of a decade or two. A nation's constitution is its most solemn document. Preparing it is a sacred and weighty undertaking that should not be addressed lightly. The disrespect for the Nigerian Constitution by the history of military rule should not be compounded by an assumption that the supreme law by which Nigeria will be ruled under a democratic order can be rushed through with military dispatch. Nigerian Scholars for Dialogue strongly advise those on whom this solemn responsibility falls to understand the full weight of their charge. If the process and substance of the resulting constitution are damaged, history will judge those entrusted with this sacred duty harshly for endangering the nation's political future. On the other hand, history will be benevolent toward General Abdulsalam Abubakar's regime if he

does the right thing. We plead for a reasoned approach to this serious obligation.

II. FUNCTIONS AND ELEMENTS OF A NATION'S CONSTITUTION: COMPARATIVE EXPERIENCES IN MODERN CONSTITUTION-MAKING

There is urgent need for Nigerians to discuss and understand some general and elementary attributes and meanings of what a constitution is all about. Because of our history of dictatorship under **colonial rule** and **military rule**, Nigerians have been alienated from the constitutional process. We must state these points clearly so that those who are in a position to make pronouncements on the Constitution will understand the parameters of their undertaking.

What is the relationship between Governments and the Constitution?

Constitutions empower governments. It is rule by the laws of the Constitution that confers legitimacy on a government. Unfortunately, because of our history of colonial and military dictatorships, there is a mistaken view in important quarters in Nigeria that it is the Government that empowers the Constitution. We suggest that the Military Government has no authority to empower a Constitution for the people of Nigeria. What it can do is to **decree** an interim Constitution that will enable Nigerians to engage in a full-blown process of constructing a Constitution later in a post-military regime.

The **anomaly** in Nigerian political history is that Nigerian Constitutions were approved by the Imperial Government in Britain in 1960 and by a native Military Government's Supreme Military Council in 1979. These are shameful chapters in our history. The present attempt on the part of the Military Government's Provisional Ruling Council to "approve" or "ratify" another Constitution for Nigeria is sorely mistaken and will be as wrong as General Olusegun Obasanjo's "approval" of the 1979 Constitution. The CDCC must advise General Abdulsalam Abubakar that he has an excellent opportunity to make history by initiating a correct procedure for according full respect to Nigerian's Constitution-making process.

Who are responsible for making a nation's Constitution?

All worthy constitutions are made by citizens and their representatives. Such citizens and their representatives are people who are fully engaged in the Constitution-making process and who understand that their future welfare and that of their descendants will be shaped by the Constitution that they make. They are citizens who are passionate about certain political principles. These citizens agree on certain principles among themselves but disagree with fellow citizens on other issues.

Sadly, Nigerians have rarely had any opportunity for making their own Constitution. Constitutions have largely been made *for* them, rather by their representatives. Under colonial rule there was reasonable consultation. Under military rule, Constitutions have been treated as privileged documents that only those who are close to authorities will handle. For instance, under the late General Sani Abacha, the Nigerian Constitution was treated as a state secret. Even now, despite General Abubakar's more open administration, few Nigerians know what draft Constitutions we are called upon to debate. It is sad that General Abdulsalam Abubakar has decided to base Nigeria's future Constitution on General Sani Abacha's draft Constitution which, from all accounts, was deficient both with respect to its process of making and its

substance and contents. Is it not true that the draft Constitution we are now considering is not generally available to Nigerians? What would be the CDCC's estimate of the percentage of Nigerians who have read the 1995 draft Constitution? There were at least two versions of this Constitution. Those who have read one of them may have read the wrong "unauthorized" version! Even among informed and educated Nigerians the draft Constitution that is being debated remains a mystery. This is in sharp contrast to recent experiences of Constitution-making in South Africa and elsewhere.

The CDCC must understand that Constitution-making is now an international enterprise. The Constitution-making processes in Eritrea, Bangladesh, South Africa, Uganda and several other nations have been closely watched by the international community. These Constitutions and the governments that subsist on them have been accorded respect by the international community because the people and their representatives were involved in their creation. The CDCC must not lead the Nigerian Head of State into a blind path of imposing a Constitution that the international community will not respect because the people have had no significant role in making a military-supervised constitution.

Elements of a Nation's Constitution-Making

There are two aspects of any good constitution that deserve to be highlighted for the benefit of the ongoing constitutional debate. First, the **process** by which the constitution is constructed and then approved is a major portion of any constitutional debate. Second, the **contents** of the constitution, usually stated as articles of the Constitution, are the substance of the Constitution and are intrinsically of the utmost importance. However, the importance of any of these aspects of the Constitution will rapidly diminish if the other is defective. Emphasis on the contents of the Constitution without the process is a poor exercise in Constitution-making.

The processes by which Constitutions are made obviously vary from one political culture to another. For instance, constitutions in federations are complex because the states are individually involved in separate constitution-making in addition to the federal constitution. In unitary political systems, single constitutions are less involved than in federal systems of government. In both instances, however, modern constitutions involve deliberations by all interested parties, including those who seek to protect women and minority interests. Ratification is a special process that allows the various significant elements to exercise veto-power of some degree in the outcome of the constitution. Such ratification exercises are expected to be carried out by means of **referenda** or by way of **legislative acts by representatives** of the people. These processes have usually conditioned the final products and contents of constitutions.

Modern constitutions take years to draft precisely because of such processes. The key terms in any constitution-making in modern times are **compromise** and **negotiations**. Concerned parties with competing vested interests have negotiated for months, sometimes for years, on difficult issues in Eritrea, South Africa and Bangladesh. Compromise on key issues is of the essence of constitution-making. But there is no substitute for negotiations involving aggrieved and interested parties.

What is alarming about the current Nigerian constitution-making is that it is devoid of process. The CDCC's charge is heavily biased in favor of the contents of the Constitution. Will there be any negotiations? If so, what parties will be negotiating? There appears to be a

streak of paternalism which assumes that the 25-member Constitution Debate Co-ordinating Committee will take care of the interests of Nigerians who have grave fears about their political future. In the comparative forum of modern constitution-making such a profile represents an outrage.

We must at least do as well as other recent experiences in constitution-making. *Is the CDCC satisfied that it can do a credible job of advising the Military Government on what the right constitution should be like in a period of less than two months?* What will Justice Niki Tobi and his compeers tell their international counterparts in the inevitable comparisons in international symposia about their experience in constitution-making? Nigerian Scholars for Dialogue strongly urge the CDCC to advise the Provisional Ruling Council that the process compelled by their instructions for conclusions on these weighty matters in a period of less than two months is inadequate. It would be a travesty to the process of constitution-making for the CDCC to short-change Nigerian political welfare by submitting to a process that comparative experiences in modern constitution-making render unacceptable.

Fundamental Assumptions and Principles of Constitutions: Comparative Experiences

There is another area of constitutions that we urge the CDCC to consider carefully in presiding over this rushed debate on Nigeria's constitutional future. Constitutions embody **fundamental assumptions** that underline aspects of the political process concerning which the citizens of a nation have worked out a consensus. Thus, citizens of the United Kingdom understand that their system of government is a monarchy while Americans understand that their democracy is a republic. The citizens of Canada and Germany understand that their systems of government are federal and that they are subject to multiple governmental authorities, while, say, the French live under a unitary system of government. However, citizens espouse various **principles and causes** for running these systems of government that conflict with those advocated by others. Good constitutions pay attention to these common assumptions of a consensus as well as to areas of contention regarding differing principles for realizing the goals of the systems of government chosen by the people.

Constitutions involve **negotiations** and **compromises** among citizens because they need to work out areas of common agreement and then negotiate compromises on contentious issues. Nigerian Scholars for Dialogue had hoped that there would be enough time to revisit these constitutional assumptions and principles in Nigeria as part of an orderly transition from military dictatorship to a democracy. We have grave fears that in this rushed "debate" on the constitution there will be neither negotiations nor compromises because ordinary people and their representatives have been largely ignored. Following military rule in Nigeria, the old constitutional consensus that Nigeria is a **federation** and a **republic** has disappeared. The CDCC has a duty to impress on our military authorities that "federal" and "republic" are constitutional terms that should have consequences for the way the constitution is constructed. The federating units (states in Nigeria) should be equal partners in the making of any constitution. A republic is a nation whose citizens have an active role in choosing the way they are governed. The CDCC should be worried that it is serving as an agency for a military-supervised constitution in which neither the states of the federation nor the representatives of the people will have any significant role in constructing the debates on their future or in ratifying the outcome of the CDCC's deliberations.

III. FUNCTIONS AND ELEMENTS OF NIGERIA'S CONSTITUTION

We have liberally referred to comparative and international experiences in Constitution-making in the last section of our submission because we believe that Nigeria should benefit from other nations' encounters with constitution-making. Obviously, there is very little room for considering other nations' experiences in the compressed time-span of just about two months that the military authorities have given to the CDCC for organizing a debate on a draft Constitution whose existence has been a mystery to many Nigerians. Assuming that the CDCC will be limited to our own domestic considerations by the strict military character of its assignment, we believe nonetheless that there is a great deal in our own history of constitution-making that the CDCC should confront in fashioning recommendations to the military authorities.

Colonial Constitutions and Military Constitutions in Nigerian History

Aside from a legislative and technical change in 1963 in Nigeria's official title from a Commonwealth dominion, whose Head of State was the Queen of England, to our present title of the Federal Republic of Nigeria, civilians have never been in charge of any constitution-making exercises in Nigeria. Our history of constitution-making has been dominated by British colonial officers and Nigerian military rulers. There are important similarities and differences in these two regimes of constitution-making that should be of interest and concern to Nigerians and the CDCC.

Until 1951, colonial constitution-making was in the form of decrees in which Nigerians had little involvement. Frederick Lugard's 1914-18 constitutional exercises, which resulted in the amalgamation of the separate colonies of Southern Nigeria and Northern Nigeria, were carried out without any consent from Nigerians. Provinces and other divisions were thereafter created according to the wisdom of British officials. The attempt by Governor Richards in 1946 to repeat another imposition of a new constitutional order in the post-War period, without any involvement from Nigerians, led to an expression of outrage and agitations for constitutional reforms that would respect Nigerians' viewpoints. These resulted in important changes in the ways Nigerian constitutional affairs were handled by British colonial officers.

The decade of the 1950s, which began with the famous Ibadan Constitutional Conference of 1950, was entirely devoted to working out fresh constitutional arrangements for Nigeria, according to the wishes of Nigerians. Right from 1950, it was clear that there were essential common interests that Nigerians shared and wished to preserve but also nagging and profound differences that had to be negotiated. The 1950s were a decade in which Nigerians learnt to respect others' differences. The most important outcome of the **negotiations** of the 1950s is that Nigerians agreed to adopt a federal system of government in which the constituent units chose their separate paths of governance and political development.

These changes affected the **process** by which colonial constitution-making was carried out in the 1950s. Beginning with Governor-General John Macpherson's "ladder" arrangements for selecting representatives in 1951, constitution-making was initiated from the bottom, moving upwards as it were in a pyramid. The final outcome was the Constitution of 1960 and 1963. Significantly, each of the constituent units of the Nigerian Federation had its own Constitution. For instance, the Eastern Region chose not to have a House of Chiefs, while the West and the North each had a House of Chiefs. The 1960 and 1963 Federal Constitution was, in a real sense, negotiated as a **compromise** from the interests and demands of the

constituent units of the Nigerian Federation. Despite these variations, the British colonial rulers had the last word in "approving" these constitutions.

Military rule altered this constitutional profile profoundly. First, military rule suspended those aspects of the Constitution with which it felt uncomfortable, retaining only those articles and sections of the Constitution that it found useful for its dictatorial purposes. Second, military rule was uncomfortable with the restrictions that a federal system of government imposed on its domain. It chipped away at the federal arrangements that Nigerians had labored to attain in the 1950s. During Mohammed/Obasanjo phase of military rule (1975-79), federalism virtually disappeared. In subsequent regimes, the term "federal" in Federal Republic of Nigeria has become vacuous, just as the term "republic" has become a mere fetish without a meaning. Over-centralization, bordering on the canceling of federalism, is the destructive outcome of military rule in Nigeria. These changes have intruded into the military's attitude towards the Constitution and into its approaches to constitution-making.

Federalism and Constitution-Making

The CDCC and all Nigerians must regard the ongoing debates as a prelude to the restoration of federalism which is the **fundamental assumption** around which all Nigerians have developed a consensus. Even if the CDCC were to feel limited by the restrictive terms of reference dealt to it by Nigerian military authorities, it must not treat lightly references to "federalism" and "federal" in General Abdulsalam Abubakar's instructions. Constitution-making under military rule has breached the spirit of federalism. In a federal system, each constituent unit must be allowed to make its own constitution, establishing at the minimum the machinery for maintaining law and order in its own domain. The current debates offer an opportunity to restore federalism, according to the historic wishes of the Nigerian people.

The ongoing efforts at Constitution-making will be incomplete if it does not involve constitution-making exercises by each of the constituent units (that is, states) of the Nigerian Federation. It is silly to believe that the Federal Government can construct one uniform Constitution for all of them. The grace of the 1963 Constitution is that it embodied the separate Constitutional laws of each of the constituent units of the Federation in pre-military Nigeria.

We realize that Nigerians are fearful that the creation of states under military rule (increasing the numbers from 4 in 1963 to 9 in 1967, 19 in 1976, and subsequently to 37 states at the present time) may have weakened the states. Some even allege that most of these states will not be economically viable. However, we urge all Nigerians to recognize that none of these states is smaller, either in land area or population numbers, than the West African nation of Gambia, a full-fledged member of the United Nations. Nigerian Scholars for Dialogue believe that with a proper revenue allocation formula, each of the existing states of the Nigerian federation will have adequate human resources for upgrading its opportunities in a Nigerian nation. Each should be given a chance to construct its own Constitution that will be compatible with the Federal Constitution but with its own distinction. For instance, those of them that want to have a separate House of Chiefs should so indicate in their Constitution. Those of them that want their own flags in addition to the national flag should be able to adopt their own state flags. All of these choices will enrich Nigeria's diversity, and will not subtract from Nigerian nationhood.

States' Rights

It is appalling that in a federation of Nigeria's complexity, the needs of the states have not been recognized in the current debates. Most Nigerian citizens will live directly under the mandate of State Governments, not the Federal Government. Sadly, we are in a situation now in which the Federal Government is dictating what the states need. Since all state officials are currently appointed by the Federal Military Government or else are subject to sanctions from the Federal Government, there is no representation of the views of the states. Nigeria's budding civil society community does not include any active advocacy on behalf of states. Nor are the political parties that currently vie for control of power from the nation's capital at Abuja overtly concerned with the fate of the states in a federal system of governments. We believe that this is dangerous for the future of Nigeria, since the Constitution may be biased against the states. In order to ensure that the views of states will not be ignored, we suggest their involvement in the constitution-making exercise in two ways. First, each state should be required to create its own constitution. Second, each state must be given an opportunity to vote its approval or rejection of the Federal Constitution.

Approving and Ratifying the Constitution

The terms "approval" and "ratification" have weighty meanings with respect to Constitution-making. We note the following sentence in the announcement setting up the CDCC: **"General Abubakar indicated that the final constitution will be published after its ratification by the Provisional Ruling Council (PRC) before the governorship elections slated for January 1999."** We respect the authority of the Provisional Ruling Council. However, we urge the CDCC to convey to this supreme body the danger in its attempt to "ratify" a constitution which it has also constructed.

Ratification is the final process of a constitution. In a federal constitution, it is expected to be ratified through approval by some pre-defined percentage of the legislatures of the constituent units of the federation. Alternatively, approval by a referendum of adult voters may be required as an indication of ratification. It is unwise for the same body that constructs the constitution to be ratifying it. Yet, that is what will be happening if the Sani Abacha draft Constitution is ratified by General Abdulsalam Abubakar's Provisional Ruling Council. With all due respect, the PRC's attempt is beyond accepted practice and will be laughed at by the international community. Whatever constitution emerges from these exercises can only be legitimately ratified by the Nigerian people and their representatives, not by a military council. In the interest of the honor of our dear country, the CDCC is duty-bound to inform the powerful members of this body of the concerns of Nigerian Scholars for Dialogue on this score.

The Fundamental Nature of Constitutions Versus Legislative Redresses

There is an important difference between the fundamental and timeless issues which constitutions are crafted to address and solve and more ephemeral matters which legislative redresses should handle. Unfortunately, because of prolonged military rule there are myriad legislative matters that await redress. It is alarming that many of these are now being pushed into the constitution. This is unwise and even dangerous for our future political fortunes. We urge the CDCC to ensure that it will advise the military authorities that a Constitution is a handbook that states general principles which are important for the governance of a nation, not a text for handling issues that may be corrected by legislative action.

We observe that a number of the terms of reference on which the CDCC is required to work are concerned with legislative matters. Please see our comments on these in a separate submission.

IV. GENERAL RECOMMENDATIONS TO THE CDCC

There is little doubt that the period of **two months** given by the military authorities to the Constitution Debate Co-ordinating Committee (CDCC) and the Nigerian people to ponder their constitutional future is dangerously inadequate. Constitutions do not yield to the logic of military orders which must be carried out with immediate effect. Nigerian constitutional affairs are already in chaos. Our constitutional malaise may be deepened further by any hurried deliberations and conclusions which the CDCC arrives at and which are then included in a Constitution that is to be "ratified" by the military's Provisional Ruling Council. This supreme body of 27 middle-aged military men (no women) cannot claim to offer a fair representation of Nigeria's diverse interests.

We accordingly urge the CDCC to convey the following recommendations from the Association of Nigerian Scholars for Dialogue to General Abdulsalam Abubakar and the Provisional Ruling Council.

(i) Authorization of an Interim Constitution

We urge that, for the purposes of conducting the affairs of Nigerian Federal and State Governments before a permanent Constitution is made by the people of Nigeria, the Provisional Ruling Council should authorize an Interim Constitution. The Interim Constitution should include the terms and tenure of elected officers at the federal, state, and local levels.

We prefer that the 1979 Constitution be declared an Interim Constitution because it was once operated by a civilian regime. We do not understand why General Abdulsalam Abubakar adopted General Sani Abacha's badly flawed draft Constitution as the base-line from which to construct Nigeria's constitutional future. However, we will work with him if he decides that it remains his choice.

The Interim Constitution should be expanded in such a way as to define a clear time-line for the construction of a new constitution which will include, but not limited to, (a) state constitutional conventions, (b) a national constitutional convention, (c) a ratification process that will validate the Constitution, and (d) elections based on the Constitution.

(ii) Provisional Civil Rule and Responsibility for Constructing a Permanent Constitution

We recommend that the Presidency that emerges from the forthcoming elections shall be designated as a Provisional Civil Rule. Its central task is to ensure that a new Constitution is duly made according to the guidelines set out in the Interim Constitution.

It may be desirable to stipulate that the President who presides over the Provisional Civil Rule shall not succeed himself to a second term. In this way the President will focus on working out a durable constitution.

**(iii) Weighing Models of Interim Constitutions
from Countries with Similar Experiences**

Nigeria should seek to benefit from examples of how countries that had difficult constitutional histories resolved their problems. Many of them have employed the strategy of interim constitutions to provide an adequate space within which to effect a worthy constitutional document. The South African experience is particularly appropriate. That country effectively used a space allowed by an Interim Constitution to resolve difficult constitutional problems. The CDCC should encourage General Abdulsalam Abubakar to turn to South Africa for an example of what may be achieved from patient and methodical planning.

**(iv) Transferring the Machinery of Law and Order
to the States as a Matter of Urgency**

While we recommend that many issues be delayed for resolution under new constitutional arrangements, there is an urgent problem of law and order that cannot wait. It is now clear that it is a mistake to have one civil police formation for a country that is as complex as Nigeria. It violates the spirit of federalism to prevent constituent units of a federal system from participating in the maintenance of law and order. The inability of the Nigeria Police to keep law and order in several areas of the country defeats any notion that the Nigeria Police can maintain law and order in all of Nigeria. Meanwhile, the use of the Nigerian military forces for keeping domestic law and order because the Nigeria Police is unable to do so is unhelpful to both organizations.

We therefore recommend that any states that so wish should be authorized by the Interim Constitution to run their own civil police, with the Nigeria Police coming into areas of federal law or when the states cannot cope with state problems. This is an urgent matter because the Abubakar transition program may be overwhelmed with law and order problems. Any states that desire help in forming new police organizations should be assisted from within Nigeria and by international and foreign agencies experienced in training civil police units.

Signed:

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