Democracy and Constitutionalism in Nigeria under the Fourth Republic, 1999-2007

Shola J. Omotola
failure, environmental degradation the result; his suggestion is that good governance could help alleviate matters. The last article is written by Kaspar Beech, a postgraduate student at Victoria University of Wellington, who recently worked for an MP in Zimbabwe.

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Christopher LaMonica
Yilma Tafere Tasew
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J. Shola Omotola, Department of Political Science and Public Administration, Redeemer’s University Mowe, Ogun State, Nigeria

ABSTRACT

Can a high level of unconstitutionalism coexist with democracy? Most political theorists are likely to answer this poser with an emphatic “NO”. Yet, one of the ironies of democracy under the third wave particularly in Africa is the pervasiveness of constitutions without constitutionalism. This paper offers a case study in Nigeria’s democratisation process to illustrate this irony. It is argued that democracy can serve as the guarantor of constitutionalism depending on the level of political institutionalisation, the existence of democratic political culture, democratic citizenship with democratic mindset and democratic constitution. Unfortunately, these are indices on whose rating Nigeria certainly scores excruciatingly low due largely to the enduring effects of colonialism and prolonged military rule. Hence, the high level of unconstitutionalism-rule by law as opposed to the rule of law - under the fledging democracy. The strongest recommendation of the paper is the need for the institutionalisation of a sustainable regime of social mobilisation and value reorientation at all levels of governance and social interaction.
INTRODUCTION

It is well established in democratic political theory that democracy would engender and promote constitutionalism, where the latter is widely considered to be a cornerstone of democratic theory and practice. It is basically upon this assumption that the notion of democracy as a constitutional government, based on the rule of law - a constitutional doctrine that emphasizes the supremacy of the law as administered by the law court - as against rule by law predicated upon authoritarian tendencies, rests. Kuper and Kuper share this thought when they contend that constitutionalism ensures that the Constitution functions as “an effective and significant limit on government,” becomes “antecedent” to government and those who are governed are constrained by its terms.

However, this assumption about the relationship between democracy and constitutionalism breaks down when we examine the Nigerian experience particularly under the Fourth Republic. This is because the ongoing democratization process in the country, rather than advance the cause of constitutionalism, would appear to have undermined it. This is epitomized by the increasing level of unconstitutional acts at the various levels of government, and/or the manifestations of acts that (could) undermine Constitutionalism and by extension, democracy, as would be shown shortly.

How can high level of unconstitutionalism coexist with democracy? This is one of the several ironies of democratization in Nigeria that tends to threaten democratic deepening and consolidation in the country. In this paper, I offer a case study in Nigeria’s political development to illustrate and explicate this irony, with specific emphasis on the Fourth Republic which began in 1999 when the country re-democratized. It is argued here that democracy can only serve as the harbinger and guarantor of constitutionalism depending on the level of political institutionalization, the existence of democratic political culture and citizenship, good leadership with democratic mindset, and the existence of a democratic Constitution. The absence or weak institutionalization of these forces in Nigeria, which can be partly explained by the protracted rule of the military and attendant culture of militarism and corruption, has served to hamper a full-blown regime of rule of law. I report evidence indicating this claim under the Fourth Republic. The study has important ramifications for the future of democracy and constitutionalism in Nigeria and elsewhere as illustrated in the concluding section of the paper.

ON DEMOCRACY AND CONSTITUTIONALISM

The literature on comparative politics in general and democratization in particular often paints a picture of a symbiotic relationship between democracy and constitutionalism. Andre Mbatu Mangu, a Professor at the Department of Constitutional, International and Indigenous Law at the University of South Africa, was point blank on the connection between the two when he writes that “modern constitutionalism is democratic constitutionalism and modern democracy is a Constitutional one”. Similarly, Njunga M. Mulikita, Vice Chairperson of the Board of the Southern African Centre for the Construction and Resolution of Disputes (SACCORD) also contends that “a democratic Constitution is absolutely imperative in a democracy” for its important roles.

As a concept, democracy is a system of government characterized by the participation of the people through their freely elected representatives, by the recognition and promotion of the basic rights of citizens, including the rights of vulnerable groups such as the minorities. It basically has to do with the ability of the people to
control decision making, which explains why Eghosa Osaghae, a Professor of political science, argues that the central thing about democracy is to ensure that power actually belong to the people. The defining characteristics of democracy include pluralism and multipartyism, including free and competitive politics; popular participation in the political process; rule of law and respect for human rights; and constitutionalism or respect for the “rule of the game.” The process of establishing, strengthening or extending these principles, mechanisms and institutions, which define a democratic regime, is generally referred to as democratization.

But, as Robert Dahl has rightly pointed out, democracy in theory is different from its practices, positing that “having rights and opportunities is not strictly equivalent to using them.” It is therefore important that these rights do not just exist as merely abstract moral obligations, but must be “enforceable and enforced by law and practice.” These constitute Dahl’s two dimensions of democracy, first, as an “ideal, goal, aim or standard”; and second, as a “practice”. This takes us to the concept of Constitutionalism upon which democracy, both as a standard and practice, should rest ideally.

Constitutionalism is a method of organizing governments that depend on, and adhere to a set of fundamental laws. Such basic laws are often articulated in the Constitution of the land, written or otherwise, as an expression of the fundamental philosophy of the political system; a collection of norms and standards by which a country is governed. The Constitution may therefore provide a good foundation of constitutionalism, which is adherence to the letter and spirit of the Constitution, but certainly not its guarantor. Much depends on the constitution making process with respect to its legitimacy, inclusiveness, and empowerment of civil society as well as the prevailing political culture. This suggests the possibility of the existence of a Constitution without constitutionalism, as has been the case is most African countries, where the Constitutions have deviated from well-known principles of democratic Constitution making as enunciated above, coupled with the prolonged rule under military absolutism and autocratic dictatorship. Nevertheless, wherever constitutionalism exists, the Constitution becomes a political force to limit both the government and the governed. This explains why a constitutional government is said to be a “limited government.”

Theoretically speaking, therefore, democracy and constitutionalism are symbiotic in relationship. While the former has its defining elements as earlier enumerated, such elements are defined by the Constitution of the land. But Constitutions are meaningless unless they are adequately enforced according to stipulated regulations. The process and act of doing this represent the whole essence of constitutionalism. This is in turn largely made possible by democracy, whose one of its core pillars is the rule of law. In reality, however, Africa in general and Nigeria in particular presents a paradox. Across the continent, except for some few exceptional cases as the recent Kenya referendum, during which the Constitution proposed by the government of President Mwai Kibaki was rejected and the aborted “third term” agenda in Nigeria, which sought to elongate President Obasanjo’s tenure beyond the statutory two terms of four years each, constitution making/amendment has become a ritual in the democratization process. As Njunga Mulikita has rightly noted:

Many African countries have experienced constitutional instability since independence because Constitutions have lacked moral authority. All too often, when a constitution review commission is set up, governments have tended to appoint commissioners who are sympathetic to the government of the day. If the general public takes the view that the commissioners are sympathetic to the ruling party, they will shun the constitution-making exercise as a government stage-managed charade... when a constitutional review body submits
its findings and recommendations, sitting governments have chosen
to accept only those recommendations which they find to be
politically expedient. In some cases, governments have been known
to ignore about 70% of original submission in the white paper that
normally forms the blueprint around which the evolving Constitution
is to be finalized.\textsuperscript{14}

Under this kind of situation, where the citizens have been reduced to
mere “consumers”, with limited or no say in the decision-making
process, democracy can hardly facilitate constitutional government
based on the rule of law. For democracy and constitutionalism to be
mutually reinforcing, the constitution making/review process should
be democratic, allowing various interest groups adequate space to
participate in the process in an open and transparent fashion. This
gives room for the ownership of the project by the people, a feat that
legitimizes the exercise. It is only when the constitution is rooted in
society that it commands people’s respect and loyalty, making the
implementation less problematic and vice versa.

**NIGERIA’S CONSTITUTIONAL HISTORY**

Any attempt to effectively grapple with the deepening crisis of
constitutionalism in Nigeria can not but reflect on the history of
constitutional development in the country. Indeed, the history of
constitutionalism in Nigeria is nothing more than the history of
constitution making. The constitution making process and the extent
to which it is democratic and legitimate through the use of available
openings, institutions that are embedded in society are the cardinal
ingredients of constitutionalism. Going by its experience and fact of
history, Nigeria is in gross deficit with regard to these virtues that
engender constitutionalism, which largely explains why the country
has, since the colonial days, been plagued by a deepening crisis of
constitutionalism. This crisis is partly reflected by the high rate of
constitutional turnover in the country, an evidence of constitutional

instability as well as the alarming rate at which citizens; including the
governor, violate the law of the land. We will return to this.

It would be recalled that Nigeria was a colonial creation. Its
constitutional development was, accordingly, shaped and driven by
colonial interests to a very large extent.\textsuperscript{15} From the outset, the
colonial escapade was largely exclusionary and divisive, alienating
the mass of the people from any form of involvement in the politics
and policy processes of government. The agitation by the Nationalists
may have forced some moderation, resulting in the movement from
the Nigerian Council of 1914 to the Clifford Constitution of 1922,
under which an expanded legislative council was established in 1923.
However, the Council turned out to be merely a charade, conceding
no power to the subjects. This exclusionary foundation sets the
tonality of the “constitutional imperialism” that was to follow, first
under the colonial government, and later in the post-independence era
of the new states across Africa.\textsuperscript{16}

As it happened, all subsequent Constitutions during
colonialism in Nigeria - Richard Constitution (1946), Macpherson
Constitution (1951), Lyttleton Constitution (1954) and Constitutional
conferences, including the 1960 Constitution that ushered the country
to independence followed similar trends. Some notable features of
these Constitutions, which served to mitigate constitutionalism were
that they were not only handed down from the above and imposed on
the society, creating severe crises of ownership and legitimacy for
them, but also vested the power of veto in the Governor, later
Governor General. The Macpherson Constitution that radiated flashes
of consultations with various groups and interests across the country,
could also not be regarded as the “people’s Constitution”, as the
Governor General still retained his power of veto, not necessarily
bound by the provisions of the constitution and/or laws made by the
legislature, besides its inherent contradictions.\textsuperscript{17} The various
Constitutional conferences that were held in the immediate pre-
independence period, such as the London and Ibadan Conferences of 1957 and 1958 respectively, were also an entirely elitist affair, with little or no inputs from the people. It was under this condition that Nigeria, like most other ex-colonies in Africa, was ushered into independence.

By all standards, it then follows that the Constitution, which colonialism bequeathed to the country at independence in 1960, was every thing but democratic, creating in its wake a vacuum of ownership and legitimacy. However, the attainment of independence had kindled new hopes among Nigerians for the effective domestication of inherited socio-political structures, including the Constitution through democratic processes. Unfortunately, this was not to be so because the new elite of power that took over from the colonial lords had already been incorporated into the colonial ways of doing thing. As such, rather than initiate genuine processes of constitutional engineering that would engender a democratic political future, their primary concern would appear to be that of self-preservation. In the wake of attendant constitutional crises, it was not surprising to see, one country after the other, having their inherited democratic edifices scathed and collapsed.

This development marked the entry point of the military into politics in Nigeria (Africa), with devastating consequences for constitutional engineering and constitutionalism. Across Africa, the military is known for its reliance on constitutional engineering as a way of drawing legitimacy to their rule; and perhaps, also as a strategy to elongate their stay in office. This was particularly the case in Nigeria where the military drafted new Constitutions for the country on four different occasion - 1979, 89, 95 and 1999 - between 1979 and 1999. This depicts a high level of constitutional instability (5 years on the average). Yet, the dominant features of this constitutional engineering, like their colonial predecessors, were exclusion, alienation and imposition. While constitutional conferences/committees were put in place to oversee their affairs, in most cases, most members of such conference/committees were not people’s representative as they were nominated by the military Head of state. Worse still, the outcome of such conferences were never subjected to referendum through which the people can claim ownership of resultant documents - the Constitution. In extreme cases, some clauses perceived to be inimical to the interest of the military Heads of State were substituted with new ones before decreeing the draft into a Constitution.

It was, perhaps, for the foregoing and related reasons that while Nigeria, though well known by its continuous search for an enduring Constitution, is equally known for its deepening crisis of constitutionalism, what Julius Ihonvbere referred to as “constitution without constitutionalism.” It is within this context that the ongoing African debate on democracy was initiated in the early 90s. It was hoped that the new environment of democracy, precipitated by what is famously known as the “third wave” of democratization would engender a sustainable regime of constitutionalism where the rule of law, rather than rule by law, would prevail. Such expectation was, perhaps, predicated upon the assumption that, as a participatory system of governance, the search for new democratic Constitutions would be people-driven, people-owned and people-executed through an inclusive, participatory, open and transparent processes. To what extent have these expectations been met in Nigeria?

(UN)CONSTITUTIONALISM UNDER THE FOURTH REPUBLIC

Nigeria’s triumphant transition to democracy in May 1999 after all hopes had almost been lost with the annulment of the 12 June, 1993
President election, one adjudged as the freest and fairest in the country’s annal of electoral history, followed by the self-succession bid of the Abacha regime (1993-1998), resuscitated hopes for another dawn of democracy precipitated on democratic ideals. Among other expectations, Nigerians hoped, given the expected opening and expansion of the political space for democratic discussion, deliberation, disagreement and consensus-building, that democracy would promote constitutionalism and the rule of law. Eight years after, it would appear that these expectations have been largely squandered. In the politics and policy processes of the country since 1999, violation of the Constitution has become very pronounced.

To begin with, the attempt to review the 1999 Constitution upon which the democratization processes are anchored leaves little or no room for a new era of constitutionalism in the country. It would be recalled that the 1999 Constitution was an amended version of the still-born 1995 Constitution. It was this document the Abubakar Abdusalami regime hurriedly tinkered through a Constitutional Debate Coordinating Committee (CDCC) headed by Justice Niki Tobi, with barely two months for the exercise. Consequently, the CDCC could not make widespread consultation and organise public hearing properly. In all, what the CDCC ended up producing as a draft Constitution was far from being the people’s Constitution, as the new draft, like its 1995 progenitor, was not people-driven. Besides its conflicting provisions on a number of issues, a worrisome feature of the Constitution is the over-concentration of political power in one person - the President - resulting in the “Presidentialisation” of the state and its politics and policy processes. This laid the foundation of the constitutional crises that were to follow under the Fourth Republic.

As public criticisms and clamour for a review of the Constitution through a Constitutional conference heighten, the President had to set up a Presidential Technical Committee (PTC) in August 2000 with a mandate to collect views and recommend ways of making the 1999 Constitution workable towards the promotion of national unity. In it’s report, the PTC admitted that there were serious inadequacies in the 1999 Constitution that needed to be redressed. This was, however, insufficient to douse public demand for a national conference. As the tempo heightens, the President succumbed in February, 2005 by setting up the National Political Reform Conference (NPRC) to debate those inadequacies, along with other national questions and suggest the way forward. But from the beginning, it was apparent that these initiatives were far off the mark of peoples expectations. For one thing, all members of the NPRC were selected by the President and State governors. For another, there were “no go areas” in the terms of reference of the NPRC, although the President vehemently denied this. As it turned out, however, the report of the NPRC, which the President presented to the National Assembly on 22 July, 2005 for deliberation with a view to incorporating the document into the Constitution, could not see the light of the day. This signals the illegitimacy of the NPRC ab initio.

28 Popular opposition to it was so strong that the Pro-Democracy National Coalition (PRONACO), led by veteran nationalist, Chief Anthony Enahoro, who is remembered for moving the famous motion for internal self government in 1956 and Professor Wole Soyinka, (both rejected their nomination into the NPRC by the President), had threatened to organize a parallel Sovereign National Conference (SNC), that would be owned and driven by the people. Although, this is yet to hold due largely to internal wrangling, showing the limits of civil society in Nigeria, the boycott by these respected democrats and their subsequent formation of PRONACO may be an indication of public dispiritiness in the NPRC.

Beyond the crisis of constitutional engineering, there have been several cases of unconstitutional acts especially at the official level. It is ironic to see that despite the promise of the new democracy and government to restore a sustainable regime of human
rights, there have been several instances where the basic rights of citizens, including the freedom of the press, have been violated. The press can be said to be free when it can act independently, within its statutory and ethical standards, without interference from any quarters. This is partially assured in section 36 of the 1999 Constitution which states that “every person shall be entitled to freedom of expression, including freedom to hold opinion and to receive and impart ideas and information without interference.” Although the section does not specifically mention the press, all the rights it concedes to citizens would be hard to accomplish, if not impossible without a free press. However, these have been honoured more in the breach. For example, Governor Lam Adesina banned the Comet correspondent in Oyo State from the Government House in 2002 for writing unfavourable reports about his administration. Again, the State House Correspondent of the Monitor newspaper, Cyril Mba, was expelled from Aso Rock (Presidential Villa) by President Obasanjo over a write-up in the latter’s column entitled “OBJ forces Ministers to Pray” in September 2003. The President also shut down Insider Weekly magazine in September 2004 without first obtaining a court order because of what they called “negative, false and malicious” publications about the government. Tribune’s reporter, Yemi Giva, who holds Bachelor and Masters of Arts degrees, as well as LL.B in Law, all from the University of Ibadan, and who had been covering Aso Rock for the past four years, was suddenly expelled from the Villa for “not qualifying” to cover the place.

The list seems to be endless. It is such that Human Rights Watch, in a 40-page report entitled “Renewed Crackdown on Freedom of Expression” documents in details basic violations of press freedom in Nigeria. The report decries President Obasanjo’s use of violence and intimidation to silence its critics including the media. It notes further that opposition leaders, political protesters and journalists have all fallen foul of the security forces. Its Executive Director, African Division, Peter Taxirambuddle stated further that “even though military rule has ended, Nigerians still cannot express themselves freely without fear of grave consequences.” These travails of the press under “democracy” represent rule by law, not of law.

The 1999 Constitution vests the powers over local government in the State Houses of Assembly (SHA). Section 7 (1) of the Constitution is categorical about this when it states that:

The system of local government by democratically elected local government is under this Constitution guaranteed, and accordingly, the government of every state shall, subject to section 8 of this Constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.

Despite the unambiguity of this provision, the federal government has severely violated it since 1999. The most notable of such instances are the issues of the 2003 attempt by President Obasanjo to reform local government system nationwide and the attempt to create new local government areas (2002-2003) by some states. It was in a national broadcast on 18 June, 2003, barely three days to local government elections slated for 21 June that the President announced the intention to reform the local government system. The reason, according to him, was “to incorporate an efficient and participatory framework that should maximize the utilization of scarce resources available to governments.” Although, there is no gainsaying corruption is rampant at the local government level in the country. However, the truth of the matter is that the President does not have the constitutional power to initiate such reforms. In fact, by virtue of section 7(1) of the 1999 Constitution, it is not mandatory that all local governments in the country be uniform in composition and structure, as long as the SHA of each state legislates in support of whatever is on ground.
Yet, a more worrisome dimension was the timing and the manner in which the vacuums created by the postponement of local government election were filled. As noted earlier, the reform was announced three days to election at local government level, signaling its inevitable postponement. Moreover, the duly constituted councils were disbanded, having been in office for their statutory three years. To avoid vacuums, the President directed that Caretaker Committees be put in place, which was constituted by appointment/selection, as opposed to the constitutional requirement of election. This not only represent a gross violation of the Constitution, but has also been seen as a deliberate design by the presidency to reposition the ruling People’s Democratic Party (PDP) for the local government election, its tactics in the previous elections having been exposed.\textsuperscript{35}

The attempt by some SHAs to exercise their rights by creating new local councils in their respective states also readily comes to mind. While many states attempted to exploit the provision of section 7(1) of the 1999 Constitution, the case of Lagos State stands out as the most controversial. This is because while all the states that created new councils between 2002 and 2003 reverted to the old order at the instance of President Obasanjo (eg. Kogi, Kwara), who insisted on not recognizing and funding them, Governor Ahmed Tinubu of Lagos state stood his ground. This resulted in intergovernmental crisis between the federal government and Lagos State due largely to the drastic and unconstitutional decision of the President to withhold statutory allocations to all local governments in Lagos State, including the old ones recognized by the 1999 Constitution for more than two years because elections were held into the new councils.\textsuperscript{36}

If this represents grave constitutional violation, the crux of the matter came with the judgment of the Supreme Court of Nigeria that the allocation be released to Lagos State. Despite this judgment, the President still insisted for a very long time that the only condition for that was for the new councils abrogated. It was not until these councils were converted to Development Areas that the President started releasing the accumulated grants installmentally. These not only represent the violation of the autonomy of local government in Nigeria, but also a reflection of the extent to which this government holds the judiciary in contempt. If the apex court of the country could be so treated, what is the fate of lower courts and the common man? The unprecedented pace of impeachment across the country has also manifested several cases of constitutional abuses.\textsuperscript{37} At all levels - federal and state - the impeachment of public officers or its threats have always deviated from the constitutional requirement. This was well demonstrated on 13 August 2002 when the House of Representatives attempted to impeach the President for alleged constitutional breaches. The trend has assumed the dimension of a scourge at the state level where impeachment has been perverted and used as a weapon for settling political scores. Although, there is no gainsaying the misdeeds of most of these office holders in manners scornful of the Constitution, the anachronistic manners in which impeachment motions are moved and prosecuted seem worse. This was the case in Bayelsa, Oyo, Ekiti and Plateau states where the Governors - Diepreye Alemesegha, Rasheed Ladoja, Ayo Fayose and Joshua Dariye, respectively, were impeached in unconstitutional ways. In Oyo State, for example, Ladoja was not given time to defined himself. Besides, there was a court injunction stopping the composition of the impeachment panel but was not respected. Above all, the session under which the recommendation of the panel was taken and the Governor impeached did not satisfy constitutional requirements especially with respect to two-third majority.\textsuperscript{38} This has been validated as a competent court of law has recently annulled the processes that led to the removal of the Governor. In Plateau State, Dariye was removed under a session inappropriately convened and without quorum, let alone two-third majority. In fact, nothing corroborates this better than he facts that all the governors
impeached so far except the of Bayelsa state, Diepreye Alemesiegha, have had their impeachment nullified and restored by competent courts of law for their arbitrary nature. Reflecting on these constitutional abuses, Adeyemi Ikuforiji, Speaker of the Lagos State House of Assembly, queried in an interview with Saturday Punch that;

How on earth can an honourable member, worth his salt, get up by Sam to go into the hallowed chambers of the assembly to pronounce a sitting governor impeached? If you hold sacred the institution, if you hold sacred the Constitution of the Federal Republic of Nigeria and the rules of the house, you know the time that the house should convene.39

The Fourth Republic has also witnessed the unconstitutional use/deployment of the military. Two instances expressly capture this phenomenon. One was the deployment of the military to Odi, a small village of about 15,000 people in the oil-rich Bayelsa State, for what has been equated with genocide, in retaliation of the killing by militants in the area of security men deployed to the region for security purposes. Saka Biam, another village in Benue State suffered the same fate for similar reasons. If one is not so bothered about the massive violation of rights of the people, including arson, rape, torture and death, which these acts brought, one must definitely be perturbed about the fact that the deployment was carried out without the approval of the National Assembly as demanded by the Constitution. These acts were eventually parts of the seventeen-count charge (articles of impeachment) in the impeachment motion against the President in 2002.40

Yet, the President has on two different occasions violated the “emergency power” provisions of the 1999 Constitution. Whereas, the Constitution under its miscellaneous provision in Part II, Subsection I of Section 305 provides that “subject to the provision of

this Constitution, the President may by instrument published in the Official Gazette of the Government of the Federation issue a proclamation of a state of emergency in the federation or any part there of.41 However, this can only be done on conditions. These include if the federation is at war; is in imminent danger of invasion; there is actual breakdown of public order or public safety; and if there is a clear and present danger of an actual breakdown of public order, etc.42 While it may be debatable as to the existence of any of these conditions in the cases of Plateau and Ekiti States where the President has used this power, legal experts are unanimous in their declaration that the President’s action was constitutional.43 In some quarters, it was even contended that the crisis that led to the declaration of state of emergency were politically motivated and fuelled by the President for some selfish interests. Real or imagined, the concern relates to the unconstitutional applications of Constitutional provisions.

Above all, nothing seems to capture the insensitivity of the managers of the fledgling democracy to constitutionalism than the “aborted” third term agenda. The third term agenda was a carefully crafted constitutional amendment programme aimed at prolonging President Obasanjo’s tenure in office beyond the statutory two terms of four years each. The failure of this agenda at the 2005 NPRC meant that the only avenue to enforce it was the National Assembly. In the course of the debate, the President, through the Chairman of the PDP, Colonel Ahmadu Ali (Rtd), deployed all resources at their disposal, including money, intimidation, harassment, etc. to pursue the agenda. However, the unity of purpose which the agenda generated among pro-democracy groups, human rights activists, opposition elements, and social movements across the country saw to the defeat of the bill during its second reading in both the Senate and House of Representatives. If the bill had scaled through, President Obasanjo would have continued in office in May 2007 for a third term. The fact that the agenda could even be initiated and
championed through the instrumentalities of the state and the ruling party, is an indication that the President and most of his close associates have little or no regard for the rule of law. Democrats should learn to accept constitutional term limits to their tenure. As it is now, the fear is still out there regarding the possible reincarnation of the third term agenda in another form. The foregoing illustrates very graphically the high level of unconstitutionalism characteristic of Nigeria’s Fourth Republic. Why has it been so?

UNDERSTANDING THE PROBLEM

The deepening crisis of democratization and constitutionalism in Nigeria can be explained by a number of factors. First is the colonial origin and character of the Nigerian Constitution inherited at independence. Essentially, the Constitution under colonialism was an instrument of alienation and exclusion of the society from governance. This was to be complicated by the fact that the new elite that took over power at independence had already been indoctrinated into the colonial ways of doing things. As such, they sought to exploit the constitutional processes to advance their selfish interests. The attendant contradiction, such as the crises of ownership and legitimacy, largely contributed to military intervention in politics, but, as it has turned out, the advent of the military into politics, rather than being corrective as claimed, had been counter-productive. Apart from other vices, the prolonged rule of the military in Nigeria, as elsewhere in Africa, had had profound effects on democratic constitutional development. Not only did they suspend the Constitution and rule by decree, but also their attempts at constitutional engineering, which was usually a critical element of their civil-transition programmes, were known to have fallen short of acceptable standards earlier discussed. As Ben Nwabueze sums it up:

The problem of Constitutionalism in Africa is three fold. One is the origin of the Constitution in Africa as an institution and an imposition. Two is the character that is stamped on the Constitution by colonialism as an instrument for autocratic control. And three, the frequent overthrow of the Constitution through military coups followed by prolonged military rule under military absolution.

The combined effects of colonialism and military rule especially on constitutionalism have been preponderantly manifest. Beyond the marginalization/exclusion of popular voices from the constitution-making processes, they have equally brought about the weak institutionalization of political institutions which, ordinarily, should serve to energize the processes of constitutional engineering and constitutionalism. Most notable of these socio-political institutions include political parties, including opposition parties, the judiciary and legislature, civil society, and the mass media. Ideally, these institutions should serve as oversight bodies with moderating effects on government’s actions and inactions. However, this was not to be so because of the excruciatingly poor human rights condition under successive military regimes in Nigeria, including the close to zero level of toleration of political opposition. While the new environment of democracy would appear to have expanded the political space for renewal, the process of regeneration of these basic infrastructures of democracy would appear to have suffered reverses on several occasions. The most notable of these relates to what has been referred to as “violence against democracy” in Nigeria whereby institutions and related actors that have been saddled with the responsibilities of nursing the democracy project have become highly incapacitated to do so most especially by the state. For examples, Nigerian parties are not ideologically driven. Rather, they largely depend on forces of identity particularly ethnicity and religion for political organization and mobilization. Civil society organizations are polarized along ethnic divides, urban biased and like political parties lacked internal discipline, accountability and democracy. The
mass media have been gripped by corruption, which disempowers it from upholding the truth in its activities, etc. These problems, which are largely rooted in the state, have not enabled these institutions the ability to play their roles in ways that strengthen democracy.

A related dimension of the problem of constitutionalism in Nigeria, which is also largely a consequence of prolonged liminary rule, has to do with the absence of democratic political culture and democratic citizenship. Having experienced military absolutism for three decades (1966-79; 1984-99) out of 39 years of its post-independence existence in 1999 when it returned to democracy, Nigerians have had more contact with the military ways of doing things. One basic feature of military rule in Nigeria was the suspension of the Constitution. In its place were the use of Decrees and Edicts at the national and state levels respectively. This would seem to have aided the militarization of the state and society, that is a situation whereby Nigerians have come to believe and rely heavily on the use of force, the rule by law, at the costly expense of rule of law associated with democracy, with little or no room for democratic deliberations, discussions, agreement and disagreement. This vacuum was already so penetrating by 1999 when the country returned to the paths of democracy. It is therefore not too surprising to see how Nigerians, both high and low, leaders and followers, have largely squandered the opportunities offered by the nascent democracy, notably the expansion of the democratic political space for conflict management and consensus-building. This may not be unconnected with the inherited culture of violence bequeathed to the state and society by prolonged years of military rule. This absence of democratic political culture may have created a vacuum/deficit of democratic citizenship, that is, democrats with democratic mindset, who are willing and able to do things according to democratic principles.

The deepening crisis of democratic citizenship seems to have added to the already festering problem of leadership afflicting the country. For the better part of its post-military experience since 1999, the national leadership and even at other levels of governance have assumed a god-father figure, who have answers to all national questions.49 The result, as we have seen, is the predominance of the rule by law, at the costly expense of the rule of law, with severe ramifications for constitutionalism. These include the “messianic” interpretation of “self” by most leaders, for example, the botched attempt to elongate the statutory tenure of office of public office holders particularly the President so as to enable them finish the “good works” he has initiated.50 The perception, which is largely a reflection of the quality of leadership, may have also served to complicate the issue of constitutionalism in Nigeria under the Fourth Republic.

Above all, the crisis of constitutionalism in Nigeria is largely a reflection of the failure of the state. Ideally, the state has responsibility for the maintenance of law and order and the provision of social and infrastructural amenities for the people. It is only when the state discharges these roles effectively and adequately that it can remain in good standing with the people. Unfortunately, the Nigerian state has over the years become too “soft” economically, giving its economic fluctuations and misfortunes, which do not enable it to meet these challenges. In the process, the people can not but device alternative means of coping, including the legal and the illegal. It is these alternative sources of survival that first elicit support and loyalty from the people, before the state. This partly explains why most Nigerians find it to circumvent and/or violate the law of the land. In order for it to demonstrate that it is still in charge, the state, most often also devises strategies, including unconstitutional ones, to force the citizens into obedience. As this cycle continues, the level of unconstitutionalism tends to heighten.
CONCLUSION: THE FUTURE OF DEMOCRACY AND CONSTITUTIONALISM

What does the future hold for democracy and constitutionalism in Nigeria? Going by the preceding analysis, one may have to be circumspective in his projection. On the one hand, it appears as if the future of constitutionalism is very bleak, given the rampant cases of abuse of the rule of law as enunciated above. Such abuses have had negative impacts on the political and democratic development of the country in many respects. First, rather than promote constitutionalism, the democratization process would appear to have taken a reversed order, engendering anti-constitutional acts. Second, the high level of unconstitutional acts has also seen to the violation of the fundamental human rights of citizens, including the right to dissent and press freedom as a core element of democracy. Above all, it has also questioned the very foundations and significance of political representation in liberal democratic theory. Arising from the foregoing is the crucial challenge of recapturing these concepts - democracy, human rights, political representation, and constitutionalism - in manners that put them in tune with the expectations/demands of state and society. But, given the fact that the roots of these violations are known as earlier indicated, it can be expected that adequate measures will be taken to address them appropriately. There are a number of indications that portray good prospects for this.

First, the democratization process, despite its fluctuating fortunes, holds some prospects for the promotion of constitutionalism. This optimism is predicated upon the fact that the local and external forces that precipitated the democratization process in the first instance are still very much around, though at a seemingly lesser level of exertion. Locally, the expansion of the political space has ensured the eruption of Civil Society Organizations (CSOs) that are committed to the promotion of democracy, good governance and human rights. Externally, the international aid conglomerates continue to link their development assistance, Foreign Direct Investment (FDI) and debt relief to being democracy compliant. With these forces intact, there are reasonable prospects that the democratization process will not suffer from reversal waves, erosion and/or breakdown. If this holds, there will be ample opportunities for readjustments which the process may demand on its paths to the evolution of democratic political culture and citizenship. Certainly, democratic development is a continuous adventure that requires adequate time to nurture.

Second, the existence of institutionalized frameworks at the international and regional levels for the enthronement and evaluation of the extent to which a government is democratic and good, offers another possibility for a new regime of constitutionalism. In this respect, the New Partnership for Africa’s Development (NEPAD) and the African Peer Review Mechanism (APRM) are particularly very relevant. Though relatively young to evaluate, both the NEPAD and APRM are instrumentalities of the African Union through which it sought to promote good governance and sustainable democracy and development in Africa. The existence of these frameworks can be explored by countries genuinely desirous of consolidating democracy and development in Africa. What needed to be done is to ensure the effective workability of these frameworks for the deepening of the democratic roots in the country. This can be done by domesticating these documents at the national, state and grassroots levels of governance in the country. The implication is that it is Nigerians that must exploit the opportunities offered by these institutions for democratic deepening, not waiting for the AU to come and execute them. Giving the seeming indifference/biased attitude of the AU to the Zimbabwean crisis, it is not clear yet whether the AU has the political will to experiment these instrumentalities adequately.
Beyond these prospects, however, there is need to be more inward-looking by devising means of strengthening weakly institutionalized institutions of state and society. In this case, political parties, CSOs, the judiciary and legislature and the mass media at all levels would have to be reformed to attune them to the demands of a democratic society. Such a reform should address the fundamental question of internal democracy in these institutions, their funding and internal oversight devices. Once these are internally secured, the tendencies are that they may radiate similar traits in their relations with the state and/or society. Whatever the options, however, they must be pursued within a broader framework of social mobilization and value reorientation targeted at the citizens at all levels of governance - national, state, local, communities and families. It is then that the democratization process may help to develop democratic political culture and citizenship capable of engineering constitutionalism.

REFERENCES


32. Section 7(1) of the 1999 Constitution of Nigeria.


42. Section 305(3) of the 1999 Constitution of Nigeria.


