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THE CONCEPTUALIZATION OF POPULAR SOVEREIGNTY WITHIN THE CONTEXT OF THE NIGERIAN CONSTITUTION: BETWEEN SYMBOLISM AND REALISM

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ABSTRACT

The people are the reason government exists, hence, without any equivocation; the people are the principal while the government is a mere agent. This underscores the reason for the Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as altered) declaring that sovereignty belongs to the people of Nigeria from whom government through it derives all its powers and authority. In this paper, it is argued that, in practice, popular sovereignty termed as the consent, will, and participation of the people has no similarity with the exact popular will and participation expressed by the Constitution. The accentuation of this assertion is predicated on the notion of the general will of the people as reflected in the spirit of the Constitution. Thus, this paper aims at deconstructing the theoretical principle of popular sovereignty and its impact on Nigerian polity as well as investigating the relationship between it and the Constitution. While adopting the doctrinal approach, this paper found that the express mention of the people as the ultimate authority by the Constitution is a welcome idea, but this is nonetheless respected by the Government except perhaps during elections. To strengthen this provision, a full fledge autochthonous Constitution that reflects the will and aspirations of the various nationalities is recommended.

Keywords: Popular sovereignty, Nigerian constitution, Fiction, Fact, Non-justiciability

INTRODUCTION

Governance of any nation through the use of a constitution has become a universal practice such that the question that often comes to mind is how has the constitution reflected the wish and aspiration of the people. In the African context, sequel to the attainment of political independence, governance through a Constitution usually expresses the wish of the people

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to govern themselves as a means of showing that the collective will of the people is indispensable.[2]

As noted by Sagay[3], the CFRN, 1999 has been dogged by problems and controversies right from the moment of its promulgation as well as coming to force in May, 1999 such as being fraught with deceit where it proclaims, "WE THE PEOPLE of the Federal Republic of Nigeria… HEREBY MAKE, ENACT AND GIVE TO OURSELVES THE following Constitution…" This position has also been supported by Falana and Nwabueze.[4] The reservation was premised on the non-inclusion of the majority of Nigerians in the processes that led to the making and adoption of the document.[5] Besides, to show how the consent and collective power of the people is so sacrosanct in any democratic setting, the Constitution has vested the people with sovereignty through which the constitution itself derives its power.[6]

An insight into the political structure and administrative style of governance in Nigeria negates the democratic norm of power belonging to the people. It can be said that in Nigeria, what stands as the representation of the will of the people holds no bearing towards the actual popular will, as represented and expressed by the Parliament.[7] Indeed, we are confronted by the clarity of a situational contradiction in which, the will of the Executive branch of government becomes an obstruction to that of the popular will.[8] In an expressive context, the actual power configuration between the government and the people subverts a part of the fundamental objectives and directive principles of State policy of the constitution as inter alia stated: "It is hereby, accordingly, declared that- sovereignty belongs to the people of Nigeria from whom government through the Constitution derives all its powers and authority"[9]

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2 Adapted from JA Yakubu, *Trends in Constitution Making in Nigeria* (Demyaxs Law Books, 2003) 1
3 Centre for Constitutionalism and Demilitarism, *Constitutionalism and National Question* (Panaf Press 2000) 40
4 F Falana, 'Constitutionalism and the Invention of the Nigeria State' (Paper presented at the Nigerian Bar Association Lecture, Lagos, Lagos Airport Hotel, Ikeja, 15th January, 2009) 11; BO Nwabueze, *Constitutionalism in the Emergent States* (London, Hurst & Co, 1973) 51
5 AA Idowu, 'Problems of the Nigerian Constitutions and Constitutional Problems of Nigeria: Workable solutions' (Inaugural Lecture delivered at Oduduwa Hall, Obafemi Awolowo University, Ile-Ife, Nigeria on 26th September, 2017) 24
6 Section 14(2) (a)
7 KO Emecheta, Power to the People: An Inverse Role in Nigeria's Politics and Governance (2016) 11 (2*) International Journal of Area Studies* 83
8 Ibid.
9 Sec. 14 (2) (a) of Constitutional of Federal Republic of Nigeria (CFRN), 1999 (as altered)

Some salient questions do come to the limelight in view of the purported sovereign power vested on the people. Such issues of whether in reality the people possess such power; can the people come together to set aside any act of the government considered to be self-seeking by the government officials; in the context of its usage, what is the jurisprudential implication of vesting the people with sovereignty and amongst other issues? In order to address some of these issues, while adopting a doctrinal methodological approach, this paper seeks to appraise the concept of sovereignty and its dimensional categorisation; examine the jurisprudential notion of popular sovereignty; reflect on the import of the constitutional provision vesting the people with sovereign power and ultimately consider the imperative for an autochthonous constitution for the nation.

THE CONCEPT OF SOVEREIGNTY AND ITS DIMENSIONAL CATEGORISATION

A well-known accepted principle is that political sovereign inheres with the people and as such, the people reserve the right to determine by themselves how best they want to be governed.[10] The word "sovereignty" is coined from the Latin word "*superanus*" which originally means supreme power.[11] It implies the supreme power of the State over all individuals and associations within its territorial limits.[12]

In the era of Hobbessian-Leviathanic monarchism, sovereignty lay with the Kings or Queens. During the ecclesiastical period of the reign of the Pope in Rome, the custodian of sovereignty was the Pope.[13] In a modern democracy that is predominantly subscribed to by almost all countries across the globe, the idea common to all is that the people are self-governing. Being self-governing is believed to be subject to the will of another and so not to be free.[14] It seems reasonable to assume that a democratic nation, a self-governing people, would want to make sure that the Constitution, the basic foundation of government, and relations between the people and government, provide for and protect self-government and hence democracy.[15]

In the Austinian famous definition, the concept of sovereignty is conceived: "…if a determinate human superior, not in a habit of a like superior, receives habitual obedience

10 ibid. at 150
11 Britannica, 'Sovereignty' <https://www.britanica.com/topic/sovereignty>accessed 3 January 2022
12 JM George, "Doctrine of Sovereignty"
<https://www.lawctopus.com/academike/doctrine-of-sovereignty/ > accessed on 4 February 2022
13 ibid
14 GJ Gailigan,'The Sovereignty Deficit of Modern Constitutions' (2013) 33 (4) *Oxford Journal of Legal Studies* 703
15 ibid

from the bulk society, that determinate superior is sovereign in that society, society (including the superior) is a society political and independent."[16] Every positive law (or every law simply and strictly set, directly or circuitously, by a sovereign individual member or members of the independent political society author is supreme.[17] It is thus the fundamental assumption of the School of Jurisprudence and of the English writers and Political Science scholars who follow the path marked Hobbes, Bentham, and Austin, that in every society sovereign power always resides in certain persons.

Therefore, every positive law, or every law simple and strictly so-called is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society where that person or body is sovereign or supreme. The test of sovereignty as stressed by Austin is habitual obedience to a superior, not obedience by all inhabitants, but by a majority of the members of the community. This superior cannot be a general will but it must be some determinate person or authority which is itself subject to no legal restraints.

Austin contends that the federal government (in a federal arrangement like Nigeria) is neither sovereign itself nor part of the sovereign.[18] Its powers having been delegated to it by individual State governments, "it is not a constituent member of the sovereign government, but merely its subject-minister".[19] Thus, the real sovereign is the united body of the State governments – they are sovereign in each of the States and the federal State. He concludes by equating with the electorate and the government. Perhaps, this account for the express provision under section 14 (2) (a) of the 1999 Constitution that sovereignty belongs to the people of Nigeria.

Harrison[20] in his analysis of sovereignty and law asserts that two propositions are thrown up:

a. The source of all positive law is that definite sovereign authority that exists in every independent political community and therein exercises *de facto* the supreme power, being itself unlimited, as a matter of fact, by any limits of positive law.

16 Austin's Lectures on Jurisprudence, Lecture VI., vol. i. p. 226 culled from David G. Ritchie, On the Conception of Sovereignty (1891) 1 *The Annals of the American Academy of Political and Social Science* 385
17 ibid
18 Adapted from F Adaramola, *Jurisprudence* (4th edn,, LexisNexis, 2008) 117
19 Ibid.
20 F Harrison 'The English School of Jurisprudence' xxiv (1878) *Fortnightly Review*, 484

b. Law is a command relating to the general conduct of the subjects, to which command such sovereign authority has given legal obligation by annexing a sanction, or penalty, in case of neglect

In the view of Jean Bodin, sovereignty connotes, "supreme power over citizens and subjects, unrestrained by law"[21]. In the assertion of Austin, a determinate human superior is not in a habit of obedience to a like superior, receiving habitual obedience from the bulk of a given society.[22] Applying the notion of the British Constitution, Dicey finds it necessary to distinguish between "legal sovereignty" from "political sovereignty."[23] In every society, there is an unseen power behind legal sovereignty. This unseen power is known as political sovereignty, which is expressed in many forms like public meetings, processions, and demonstrations. If the laws of the legal sovereign are immoral, this unorganized power of political sovereignty can compel the legal sovereign to bow down. Thus, political sovereignty is unseen and a bigger command. It is the revolutionary power of alert and conscious people. History has shown several instances of this revolutionary political sovereignty destroying the legal sovereign. Cases in point include Czar Nicholas of Russia who was overthrown by Lenin's political sovereignty in 1917, Chiang Kai-Shek of China destroyed by the leadership of Mao-Zedong, and similar events which happened in Iran, South Africa, and Rhodesia against despotic regimes.

It is the fear of this sovereignty, which keeps the legal sovereign tight and alert. If legal sovereignty has to survive, then it must work in close cooperation with political sovereignty. In a representative democracy, the difference between legal and political sovereignty can be seen clearly, since the representatives of the people (government) are the legal sovereign and the electorate are the political sovereign. But in a direct democracy, this difference is not seen since the people (political sovereign) are also the legal sovereign as they make laws themselves. In socialist countries like China and Russia, participation through organized mass organizations is enough to end the difference between the legal and the political sovereign.

Simultaneously, sovereignty also involves the idea of freedom from foreign control, i.e., the independence of the State from the control or interference of any other state in the conduct of its international relations.[24] This is what is called external sovereignty whereby a state

21 Adapted from S I. Benn, 'the Uses of 'Sovereignty' (1955 *Sage Journals* (1955) vol 3 (2) at p. 109
22 John Austin, *Lectures on Jurisprudence* (5th edn. reprinted 2014, the Lawbook Exchange) 221
23 AV Dicey, *Introduction to the Law of the Constitution* (9th edn. Macmillian Co, Ltd 1939) 72
24 ibid.

has the power to independently determine its foreign policy and has the right to declare war and make peace. At the same time, external sovereignty implies that each state, big or small, because of its sovereign status is equal to every other state. It can command no other State and it cannot itself be commanded by any other State. This concept has, however, without doubt, suffered a good deal of qualitative and quantitative reversals, especially since the end of World War II[25]. Whilst commenting on the Russia-Ukraine crisis, Mimiko[26] opines that it is misleading to create the impression that sovereignty is still wholly sacrosanct in today's global system. This Doctrine technically recognises the 'right' of every Great Power to carve a sphere of influence for itself[27]. Over the years, sovereignty has also been accepted and recognised as an essential attribute of a State. Internal sovereignty is the supreme or absolute power a State has within its territory. This power enables the State to make laws and political decisions that are binding on all individuals and groups within its jurisdiction and the State has the power to punish violators of such laws.

According to Rosseau, sovereign power is absolute, supreme, non-transferable, permanent, united, and indivisible and it originates from the people[28]. Rosseau's social contract theory describes the people's place, part, and privileges in a political community as a contract that enables the people to give their loyalty and support to the government as their representatives in whom the government is expected to ensure that the people are secured and the society is in order[29]. This connotes the idea of popular sovereignty in a democratic system of government.

Popular sovereignty has been defined as the condition when the will of the people is the "supreme authority in the state".[30] Following this conception, there is no authority above the

25 Femi Mimiko, "A realist snapshot on Ukraine :*The only enduring solution to the Ukrainian question, if you will, is akin to what saved the world from a nuclear confrontation over Cuba in 1962"<https://www.premiumtimesng.com/opinion/analysis/513806-a-realist-snapshot-on-ukraine-by-femi-mimiko.html> accessed on 25 February, 2022*

26 ibid.

27 ibid. At any event, Western arguments here, that none should constrain Ukrainian sovereignty, as it relates to its right to choose its friends, flies in the face of the Monroe Doctrine, once espoused by Washington

28A Biswas, 'Meaning, Characteristics, and Types of Sovereignty' <https://schoolofpoliticalscience.com/meaning-and-types-of-sovereignty> accessed on 3 August, 2021.

29 KO Emecheta, 'Power to the People: An Inverse Role in Nigeria's Politics and governance' [2016] 11 (2) *International Journal of Area Studies*
<https://www.reserachgate.net/publication/313784470_Power_to_the_People_An_Inverse_Role_in_Nigeria's_Politics_and_Governance > accessed on 3 July 2021

30 L Beckman , 'Popular Sovereignty facing the deep State: The Rule of Recognition and the Powers of the People' (2021) 24 (7) *Critical Review of International Social and Political Philosophy* 954

people and this is traditionally understood to mean that the authority of the people is above the constitution. Legal validity, though admittedly still debated, is here understood along Hart's "rule of recognition"[31] according to which the validity of norms ultimately depends on the social practices of public officials. Though presumably uncontroversial that democratic people are entitled to remake the constitution, the powers of the people concerning the substance of the law are nevertheless limited to decisions of legal validity.

However, in the modern era of republicanism and democracy, sovereignty inheres with the people; the citizens of the State. It cannot be delegated nor transferred even temporarily to government officials.[32] The idea of the social compact has as well experienced modernisation. This idea as explained by Rousseau[33] is one entered by the citizens with themselves for self-preservation. This notion of a social contract from the perspective of Paine[34] does not amount to the surrender of sovereignty to a class of people. According to Paine, there is no such thing as the idea of a compact between the people on the one side and the government on the other side to preserve and constitute a government. To suppose that any government can be a party in a compact with the whole people is to suppose it to have existed before it can have the right to exist. The only instance in which a compact can take place between the people and those who exercise the government is that the people shall pay them while they choose to employ them. No matter what may be its preconceived advantage, any process by which an existing Legislative Assembly (whether elected or otherwise), without a prior popular mandate to enact a constitution, purports to make a constitution, cannot be a reflection of the popular will of the people. This is because its mandate is primarily reflected in the law-making function according to the provisions and limits of the existing Constitution.

The idea of popular sovereignty has been argued in some quarters to have failed to thrive in Nigeria due to the present conflict between the will of the people and the will of the government.[35] There appears to be a contradiction between what is expressed as popular

31 ibid.
32 CU Anyanwu 'Of Sovereignty, Grundnorm, Autochthonous Constitution, Conferences and the Stability of a Decolonized Federal State' in M.M. Gidado, et al. (eds) *Constitutional Essays in Honour of Bola Ige* (Enugu: Chenglo limited) 25
33 Jean-Jacques Rousseau, *The Social Contract* (Worldworth Classics of World Literature, translated by H.J. Tozer 1998)14; J Rawls, *A Theory of Justice* (Oxford University Press, 1999) cited in CU Anyanwu, above at note 10 at 26
34 B Kucklick, *Thomas Paine: Political Writings; The Right of Man: Cambridge Text in the History of Political Thought* (Cambridge University Press 1999) 187
35 El Amah, 'Nigeria—The Search for Autochthonous Constitution' (2017) 8 *Beijing Law Review* 151

sovereignty by the CFRN, 1999 (as altered) and what is being expressed as popular sovereignty in reality as the will and participation of the people are sometimes obstructed by the will of the government.

THE JURISPRUDENTIAL NOTION OF POPULAR SOVEREIGNTY

In a democratic regime, the idea of popular sovereignty is the supreme authority in the State which underlies the core existence of participatory governance. Although, the collective will of the people's supremacy is not restricted to participation in the making of collective decisions; it also presupposes that the people in her collectivism should be the authority for the institution's decisions. The people are the hallmark of "constituent power", the body that authorises and create the "institutional arrangements through which they are governed"[36] In other words, the powers of the people are superior to those established by the legal and political system and that they are exercised by the officials that populate it. The affirmation of the sovereign people entails the "subordination of the State to the popular will".[37] The people are imagined as "the master" of the State.[38]

The doctrine of popular sovereignty implies that the people are above the law. Thus, the very idea of popular sovereignty offers a welcome source of inspiration for populist attacks on 'the deep state' and the 'unelected and unaccountable' powers of legal institutions. In this reading, the tension between the people and their representatives, on the one hand, and the law, the judges, and public officials, on the other, is a tension between conflicting understandings of the democratic ideal. One way to resist this inference is by challenging the above reading of popular sovereignty based on normative theories of democratic legitimacy. The claim would be that a defensible interpretation of popular sovereignty does not require that the will of the people is the "supreme authority" of the State. It does require, however, that the constitutional and political framework conforms to principles that could be justified to the people subjected to it.

Furthermore, by this theory of popular sovereignty, the people are believed to have the supreme power and they are the source of all powers. It means that the sovereignty of the State is not based either on God or on naked power, but only on the people's will. This

36 A Kalyvas, 'Popular sovereignty, democracy, and the constituent power' cited in Ludvig Beckman, above at note 8 at 954
37 R Post, 'Democracy, Popular Sovereignty and Judicial Review' (1998) 86 *California LawReview* 437
38 B Yack, 'Popular Sovereignty and Nationalism' (2001) 29 *Political Theory* 527

sovereignty is an essential element of democracy[39]. Popular sovereignty within the purview of democracy means that the government derives its power from the people for the benefit of the people.[40] All organs of the government, whether it is the executive, the legislature, or the judiciary, derive their power and authority from the will of the people taken as a whole. Accordingly, the idea of popular sovereignty implies that the supreme power in the State rests with the people. The Preamble to the Constitution of the Federal Republic of Nigeria, 1999 (as altered) has attested to this fact where it begins with the phrase, "WE, THE PEOPLE of the Federal Republic of Nigeria" and ends with the phrase, "DO HEREBY MAKE, AND GIVE TO OURSELVES the following Constitution".[41] This is more reinforced in section 14 (2) (a) of the Constitution stating emphatically that "It is hereby, accordingly, declared that sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority."

In modern times, the development of sovereignty as a theory coincided roughly with the growth of the State in terms of power, functions, and prestige. In the nineteenth century, the theory of sovereignty as a legal concept (i.e. sovereignty expressed in terms of law) was perfected by John Austin, an English jurist. He is regarded as the greatest exponent of the "Monistic theory of sovereignty."[42] It is called the Monistic Theory of Sovereignty because it envisages a single sovereign in the State. The sovereign may be a person or a body of persons.[43]

The theory of Austin has been strongly criticised by many writers like Sidgwick, Sir Henry Maine, and others. The main point of the criticisms against Austin's theory is that the theory is inconsistent with the modern idea of popular sovereignty. They posit that in his fascination for the legal aspect of sovereignty, Austin completely loses sight of popular sovereignty according to which the ultimate source of all authority is the people.[44] Besides, sovereignty may not always be determinate. It is very difficult to locate the sovereign in a federal state.

39 Democracy, according Abraham Lincoln was defined as the government by the people, from the people and for the people.
40 The Coalition Provisional Authority, 'Basic Elements of Democracy'<https://govinfo.library.unt.edu/cpa-iraq/democracy/popular_Sovereignty.htm> accessed on 3 August2021
41 Preamble to the Constitution of the Federal Republic of Nigeria, 1999 (as altered)
42 JM George, above at note 16
43 ibid.
44 L J Harold, *Grammar of Politics* (G. Allen & Unwin 1967) 49

For example, in Nigeria, sovereignty resides neither with the President nor with the Legislature; it resides with the people as expressed in the Constitution.[45]

The essential attributes of popular sovereignty include:

a. Sovereignty resides in a distinct person or a defined body which is the supreme source of power.
b. The sovereign has power above others to make laws. Every law made by a sovereign binds all within the territory of the state.
c. The organs of government of the State derive all their power and authority from the sovereign body. Although the people obey the government, that does not make the government the sovereign source of power and authority of the State.
d. The major goal of sovereignty is to ensure and protect the welfare and well-being of the people.
e. There must be effective and popular participation of the people in all divisions of the government of the State.

REFLECTIONS ON THE IMPORT OF POPULAR SOVEREIGNTY UNDER THE CFRN, 1999 (AS ALTERED)

The idea of popular sovereignty in the Nigerian Constitution opens with the preamble phrase "WE THE PEOPLE OF THE FEDERAL REPUBLIC OF NIGERIA…DO HEREBY MAKE, AND GIVE TO OURSELVES the following Constitution." This phrase connotes that Nigeria is a sovereign State and the basic law that regulates the affairs of the State originated from the people. This implies that the people of Nigeria are the supreme lawmakers. It is the duty and responsibility of all organs of government and authorities of the State to conform to and apply the provision of this constitution applicable to them. Section 14 of the Constitution of the Federal Republic of Nigeria 1999 (as altered) states that:

> *(1) It is hereby, according, declared that:*
> *(a) Sovereignty belongs to the people of Nigeria from whom government through this constitution derives all its powers and authority;*
> *(b) The security and welfare of the people shall be the primary purpose of government: and*

45 S. 14 (2) (a), CFRN, 1999 (as altered)

> *(c) The participation by the people in their government shall be ensured in accordance with the provision of this constitution.*

By the section stated above, it can be deduced that the people of Nigeria are the source of power and authority of the State, and all the arms of government which include the executive, legislature, and judiciary derive the power and authority to perform their various functions from the will of the people of Nigeria. The essence of popular sovereignty is that the authority and power of the State are as a result of the choice of the people. Following the above provision, it is certain that the government is a result of the people's consent and the government is expected to ensure active representation of the governed.

An essential element of popular sovereignty as provided for in the 1999 Constitution of the Federal Republic of Nigeria (as altered) implies that the people of Nigeria have the right to vote for the candidates of their choice into the various divisions of government through free and fair election processes. The composition of the Government of any of the States, Local Councils, or any of these agencies of such Governments or Councils, and the conducts of the affairs of the Government or Council or such agencies shall be carried out in a such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation[46].

Section 117 (2)[47] provides that "*Every citizen of Nigeria, who has attained the age of eighteen years residing in Nigeria at the time of registration of voters for purposes of election to any legislative house, shall be entitled to be registered as a voter for that election".*

Section 178 (5)[48] provides that "*Every person who is registered to vote at an election of a member of a legislative house shall be entitled to vote at an election to the office of the Governor of a state".*

Section 132 (5)[49]provides that "*Every person who is registered to vote at an election of member of a legislative house shall be entitled to vote at an election to the office of the Governor of a state".*

Therefore, the consent of the people through their elected representatives, who become the source of all political powers of the state, brings about the creation of government and

46 ibid. S.14 (4)
47 ibid. S. 117 (2)
48 ibid. S. 178 (5)
49 ibid. S. 132 (5).

vests them with the power and authority of the State. This gives Nigerians the chance to influence the political (democratic) decision-making process by exercising their voting rights, and it enables them to participate in building a governmental structure of the State. The legitimate power of government is granted by the people. The government as the people's representatives is accountable to the people as provided for in Section 15 (4) & (5) of the 1999 Nigerian Constitution (as altered), as they are expected to foster a feeling of belonging and involvement among the various people of Nigeria, to the end that loyalty to the nation shall override sectional loyalties, and the State shall abolish all corrupt practices and abuse of power.

The government created by the people of Nigeria is expected to respect and protect the fundamental rights provided for in Chapter IV of the Nigerian constitution[50] which are the inalienable rights of the people. Kayode Eso JSC, in *Ransome Kuti* v *Attorney General of the Federation,*[51] said "Fundamental rights are rights which stand above the ordinary laws of the political society itself. It is a primary condition to a civilized existence". Where the fundamental right of the citizen is being infringed upon by the government or any other person, the citizen has the right to seek redress in the court against such actions that may amount to infringement of his fundamental rights.[52] This is a means by which the people check the abuse of power of the government.

The principle of popular sovereignty which is attributed to the system of government practised in Nigeria as stated in the preamble of the Constitution of Nigeria 1999 (as altered), made a significant reference to the people of Nigeria as those who determine the laws, government and other decisions which are made to reflect the spirit of the people theoretically. In reality, the constitution does not reflect the spirit and will of the people in various ways. Although, the preamble of the 1999 Nigerian Constitution (as altered) claims that the Constitution of Nigeria was created by the people, which implies that the people of Nigeria were directly the makers of the Nigerian constitution. In reality, no record sincerely shows the direct participation of the people of Nigeria in the law-making process. This means the Nigerian constitution was not originally made by the people and this questions the background of the Nigerian system of government. The people are denied public participation in the amendment and ratification process of the Nigerian Constitution. The people also lack full participation in the process of making other laws that regulate the affairs

50 ibid. Chapter IV
51(1985) 2 NWLR (PT.6) 211.
52 S. 46 of the CFRN, 1999 (as altered)

of the State, though the constitution permits them to elect representatives to make laws on their behalf, these representatives most times do not engage the people to seek their input on the legislations.

Corruption and abuse of power by the organs of government have caused a shift from popular sovereignty to absolute sovereignty[53]. The executive arm of government has subjected popular sovereignty to threat as it asserts absolute power and authority over the people. The government claims more power than the people and sometimes, their major goal is for their selfish interests and not to ensure security and promotion of the welfare of the people. The Nigerian government is not loyal to the people. Corruption in electoral processes is also a factor that limits the effectiveness of popular sovereignty in Nigeria, as the elected representatives are not the will of the people. Manipulation of electoral results and failure of government to ensure that free and fair election is conducted enables representatives elected without the people's consent to rule over them. The government also uses force and violence to secure the people's cooperation, support, and participation in election processes.

Furthermore, the idea so declared as the sovereignty of the people by the Constitution falls within the provisions of Chapter II of the nation's Constitution which has been caught up in the web of the non-justiciability clause under section 6 (6) (c) of the Constitution. It provides as follows:

> the legal powers bestowed in the courts shall not, but as otherwise provided by this Constitution, extend to any matter or question as to whether any act or lapse by any authority or individual or as to whether any law or any judicial verdict is in conformity with the Fundamental Objectives and Directive Principles of State Policy preserved in chapter II of the Constitution.

Thus, the entire chapter II of the Constitution is enervated as it is rendered non-justiciable. This position as remarked by Nwatu is a dislocation of the foundation of the whole edifice of the Nigerian nation-state.[54] It is, however, instructive to note that item 60 of the Exclusive

53 This means that the people of Nigeria are only sovereign in name and not in reality, as the power is enjoyed by the government making then unaccountable to the people.
54 SI Nwatu, 'Legal Framework for the Protection of Socio-Economic Rights in Nigeria' (2011-12) 10 *Nigerian Juridical Review* 32

Legislative List vested the National Assembly with the authority to establish and control authorities for the advancement and enforcement of the reflection of the provisions of the Fundamental Objectives and Directive Principles of State Policy.[55] In *Attorney General of Ondo State v. Attorney General of the Federation & Ors*,[56] the Supreme Court ruled that section 4 (2) of the 1999 Constitution provides that the National Assembly possesses the power to make laws for harmony, order, and decent administration of Nigeria, and by article 60 (a) of the exclusive legislative list, it is entrusted with the power to legislate on matters within Chapter II of the Constitution. Mowoe[57], whilst holding a contrary view to the above position taken by the Supreme Court, declares that the decision of the apex court makes nonsense of section 6 (6) (c) of the Constitution.[58] Also, the power of the National Assembly to legislate concerning item 60 (a) of the exclusive legislative list is limited to the "establishment and regulation of authorities for the Federation or any part thereof to enforce and promote the observance of the Fundamental Objectives and Directive Principles". Thus, the phrase "enforce the observance" of the provision of Chapter II 'is probably to be achieved not just through such established authorities but also through the investigative and other regulatory powers of the National Assembly.'[59] These submissions by Mowoe have been criticised by Nwatu while asserting that section 6 (6) (c) will only suffice in the non-appearance of any provision to the divergent in the Constitution.[60] The joint reading of article 60 (a) of the exclusive legislative list and section 4 (2) of the Constitution constitute an exclusion to the rule of non-justiciability of Chapter II in section 6 (6) (c) of the Constitution.[61] Thus, the decision of the Supreme Court has effectively opened a new vista in the quest to give the socio-economic rights enshrined in Chapter II constitutional strength.[62]

So, what the Constitution has done in consequence of this provision concerning article 60 (a) of the exclusive legislative list and section 4 (2) is to set a robust agenda for legislative action in addressing issues of socio-economic rights.[63] Also, the Oath of Office of Public Officers in the Seventh Schedule of the Constitution listed the provisions of chapter II as

55 In Part I of the Second Schedule to the CFRN, 1999 (as altered)
56 [2002] 9 NWLR (Pt. 772) 222
57 KM Mowoe, *Constitutional Law in Nigeria* (Lagos, Malthouse Press Ltd. 2008) 275-276
58 ibid.
59 ibid.
60 SI Nwatu, (n 53) 33
61 ibid.
62 ibid.
63 ibid.

those that the affected political office holders should not undermine.[64] It is thus expected of every public official who has sworn to ensure the preservation of the Fundamental Objectives and Directive Principle of State Policy to take positive steps for the protection and implementation of chapter II provisions. The implication of the foregoing is to accord respect to the popular will of the citizenry.

Therefore, by implication, the constitution has been able to provide an alternative way to make the government accountable to the people by way of public declaration that those rights that were hitherto non-justiciable are not to be jettisoned. Those loft aspirations and visions of the nation are to be pursued with vigour whilst the people reserve the right and power to vote out political officers who failed to give effect to those provisions when presenting themselves for re-election. The provision also imposes a moral burden on whoever has sworn the oath of office as a public officer under the constitution to ensure that such objectives and directive principles of State policy do not remain mere aspirations.

EVOLVING AN AUTOCHTHONOUS CONSTITUTION FOR NIGERIA

Agitation for a homegrown and all-embracing Constitution for the country has been on the front burner in recent times. As a multinational entity, the current constitutional regime has been queried not only because it has not accommodated the diverse interests of the polity, but also because it was promulgated into law by the military.[65] In addition, the preamble has been tagged a fraud by the people it purportedly derived its authority and mandate from. As a result of the importance of a constitution and its strict enforceability, most States involve their citizens in the constitution-making process.[66] This is carried out through a representative body elected directly by the citizens for constitution-making. A constitution that evolves from this process is regarded as autochthonous having been made by the people themselves. In the words of Visser and Bui[67], the autochthonous character of a constitution syncs with the concept of the sovereign status of a State, an expression of the sovereign will of its peoples. As contended by Udombana[68], paraphrasing

64 These include the President, Vice-President, Governor, Deputy Governor, Minister, Commissioners and host of others

65 JE Edet, "The Making of a 'Home-Grown' Constitution"
<https://www.thisdaylive.com/index.php/2021/08/01/the-making-of-a-home-grown-constitution/ > accessed on 25 February 2022

66 EI Amah, (n 34) 142

67 M de Visser and NS Bui, "Globalised Constitution-making in the Twenty-first Century: Evidence from Asia" (2019) 8(2) *Global Constitutionalism* 302

68 NJ Udombana, 'Arise, o compatriots: An Analysis of Duties of the Citizen in the Nigerian Constitution' (2002) 34 *Zambia Law Journal* 27–28

Nwabueze[69], autochthony constitutes the "source of constitutional authority". A constitution can thus be deemed autochthonous where its substantive content is freely agreed upon and adopted by the people either in a referendum or through a constituent assembly popularly elected for the purpose[70]. This is notwithstanding that the constitution is subsequently promulgated by existing authority, in the interest of formalism and regularity.

The actual participation of the common citizens in the promulgation of a statute that would be binding on them would legitimise not only the process but also the outcome. The necessity for the legitimacy of a constitution need not be over-emphasized as its importance is also the reason why most written constitutions are commenced with the phrase "we the people", which signifies the participation of the citizenry and their intention to be bound by the provisions contained in the constitution.[71] In the case of Nigeria, the recurring of such phrase in the preamble to all her constitutions, past and present are nothing more than mere ornamental cosmetics. This and many other reasons prompt the interrogation of the legitimacy of Nigerian constitutions which ultimately has prompted the public call for a sovereign national conference to be convoked to discuss some of the fundamental tenets upon which the continuing existence of the corporate Nigerian entity should be built.

Furthermore, it is instructive to note that efforts have been made through National Conferences to recommend a new Constitution for Nigerians, and successive National Assemblies had also attempted to alter some provisions of the 1999 Constitution. However, in the words of Idowu[72], "These instances of trials and errors which had not met the aspirations of Nigerians have prompted relentless agitations for complete restructuring and overhauling the entire structure of the government of Nigeria under a different Constitution and a federalist arrangement called, 'The Federalism." In his submission, he recommended an evolution of a new constitution that will meet the Nigerian imprimatur instead of dissipating energy and useful resources on periodic amendments of the 1999 Constitution which is a military Decree No.24. of 1999 but hitherto being masqueraded as a constitution[73]. There is no gainsaying that where the people's decision is ultimate, the

69 BO Nwabueze, *The Presidential Constitution of Nigeria* (C. Hurst, London 1982) 1–7
70 NJ Udombana, (n 67)
71 ibid.
72 AA Idowu, "Problems of the Nigerian Constitutions and Constitutional Problems of Nigeria: Workable Solutions" (Inaugural Lectures Series 308 delivered at Oduduwa Hall, Obafemi Awolowo University, Ile –Ife, Nigeria on 26th September 2017) 46
73 ibid. at 50-51

structural foundation upon which they are to be governed must be as dictated or agreed by them and not imposed externally. This may take the form of a referendum or direct voting.

Although, there cannot be multiple sovereignty in a State at a time. The argument has been that the constitutional law has ascribed supremacy to the constitution[74] and there cannot be a sovereign national conference. It has been argued that all resolutions passed by the National Conference have to be subjected to debate at the National Assembly before such could be passed into law, thus, subjecting the people's decisions to the minority's whims and caprices. It is to avert this hurdle that the proposed new Constitution will cure this defect. In addition, the proposed new Constitution should be passed into law shortly before the end of the tenure of the National legislators to forestall any probable interregnum.

CONCLUSION

This paper has revealed the importance of the provision of CFRN, 1999 (as altered) which declares that the people are vested with the absolute or ultimate power (sovereignty) as this has provided the plank to test the validity of all governmental power and authority in line with the intendment of the Constitution.[75] It further analyses what the constitution portrays in the Nigerian polity not only in theory but as well as in practice. Given the various hues and cries across the nooks and crannies of the country calling for a redesigned federal system, the paper argues that the non-justiciability clause under section 6 (6) (c) of the constitution should be expunged whilst allowing the court to use its discretionary power to make purposeful pronouncements on the items so covered under the chapter II of the constitution. this idea within the context of the nation's constitutional law. This is to deepen the democratic tenets of the polity.

In a nutshell, the principle of popular sovereignty which is reflected in the preamble and Section 14 of the 1999 Constitution of the Federal Republic of Nigeria (as altered) is vague, unrealistic, and a tool of deception. The people in any polity remain the source of any power so vested in the government. In the context of the drafting of the 1999 Constitution which has been the *grundnorm*, the collective will of the people to have the document as expressed in the preamble is missing. The idea of giving the people an opportunity to discuss issues intended to be enshrined in the constitution to make the document *factum populis*[76] is very germane to reflect the intendment of the legal instrument.

74 S. 1 of the CFRN, 1999 (as altered)
75 S. 14 (2) (a)
76 Literarily means "Deed of the People"

In addition, just as the ultimate destiny of Nigerians lies in the hands of the government to ensure good governance at all times, so also the destiny of effective application of laws and constitutional adjudication lies in the sovereignty of the people. Perhaps, this underscores the importance of periodic general elections to elect political leaders at all tiers of government.

It has been observed that for the principle of popular sovereignty to reflect in the Nigerian system of government, there is a need for good governance and participation of every member of the state. With a new Constitution that emerges from the collective aspirations and wishes of Nigerians, mutual distrusts, unhealthy rivalries, widespread corruption, and ethnic clashes would be brought to a minimum level. In addition, a participatory government will be engendered where the basic norms reflect the collective desires of the various nationalities in the Nigerian entity.

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