THE CONSTITUTIONAL STRUCTURE AND AUTOCHTHONY OF NIGERIA AND GHANA

Adewale Duyilemi, Omoniyi

ABSTRACT

The question of constitutional autochthony in African democratic system remains unanswered, not by scholars but by the political leaders of African countries. Constitutional autochthony is simply the consideration of home grown ideologies developed on the soil of the political subject. This is better expressed as the customary principles which is borne out of pre-colonial traditional culture, custom, norms and social behavior. The question of constitutional autochthony mostly arise in the constitutional structure of countries with colonialism experience. This paper is meant to examine the structure and autochthony of the constitutional developments of Nigeria and Ghana. This paper x-rays the factors that are responsible for Nigeria's successive government to continually maintain the constitutional elements and structure which the colonial masters handed over to them; while Ghana on the other hand, is able to take speedy effort in 1958 to alter the inherited constitutional contents and replace it with more satisfying local ideologies and contents. This paper also finds out that system of government, ethnicity and population of a country will play cogent roles in the determination of its constitutional structure and autochthony.

INTRODUCTION

The topical issue of constitutional structure and development in African countries is an ongoing global discourse, and scholars hold several points of view as to whether native African indigenous people contributed significantly in the formation of the laws that regulate their affairs. Also, a salient question to be asked is whether the constitution of African countries evolved out of native customs and traditions or it is the acceptance of western or foreign rules codified to satisfy the immediate curiosity and future needs of colonial masters. Constitutional structure and

development is a prominent element of national development. It defines the identity of the ruler and the governed. It is a yardstick to measuring civility and stability. To a large extent, it gives orientation of a country to people outside it and defines the system of relationship of a country with other countries. This paper focusses on the constitutional structure and developments in Nigeria and Ghana. It examines how the constitutions of these countries were created and the fractions of native rules and customs of the local people that were considered while enacting it. The chief aim of this paper is to compare the constitutional autochthony which is the native traditions of these countries in relations to their constitutions. As a matter of evaluation, the paper considers the proposition found in the doctrinal support of the influential theory propounded by a legal philosopher, Hans Kelsen, in which he concluded that the basic norm (grundnom) of the imperial predecessor will always be at helm of the legal system of the liberated colony, despite legal transfer of power.[1] This paper further dabbles into the historical governance of the local people in the selected countries and arrives at a submission on the level of constitutional autochthony in the constitutional development of these countries.

CONSTITUTIONAL STRUCTURE AND DEVELOPMENT IN PRIMITIVE NATIVE AFRICA

Every society, primitive or civilized is governed by rules, which the members of the society regard as the standard for behavior. In ancient or primitive societies, the obligatory rules of human conduct usually consist of customs, that is, rules of behavior accepted by members of the community as binding among them. In the primitive society, there is no centralized system for enforcement of rules; Customs are usually unwritten, it constitutes obligatory rules, and eventually constitutes law.[2] In traditional African society, traditional usages and customs metamorphosed into law. It changes often unconsciously with the changing social, economic and religious ideas, and other needs of the people. Obedience to such customs is secured by way of social pressure and rarely by traditional judicial actions.[3]

In the traditional African setting, whether the society is a monarchy or gerontocracy, one common denominator is the constant aspiration towards the democratic principles in constitutional

[1] "India's benign constitutional revolution". The Hindu. 2013-01-26. ISSN 0971-751X. Retrieved online via https://en.wikipedia.org/wiki/Constitutional_autochthony on 27/8/2020
[2] Elias T.O. (1956), The Nature of African Customary Law
[3] Okany, M.C (1992) Nigerian Commercial Law, Africana-Fep Publishers Limited, Lagos

governance. For example in Nigeria, the different autonomous ethnic groups have their own systems of justice administrations. They are informal and largely based on unwritten customary Laws, and Sharia written Laws. These laws are not only humane and flexible but also served the purpose of justice and the society.[4] The empires in the North and Kingdoms in the South Western Nigeria were chiefly societies. Though, authority was exercised along vertical lines; authoritarian and despotic in nature. The legal system was centralized; exercise of judicial power was territorially delimited, and coercive.

Analytically, there were features of democracy in the African traditional and constitutional system. For example, monarch would hold consultations with their council of chiefs, queen mothers, priestly officials, secret cult groups and others. In the Northern Nigeria, powers were decentralized among Emirs, *Serikis* and other delegated officers, in Additions, several indigenous groups and institutions played the role of checks and balances.[5] Obviously, there were conformities with social norms, and this was reinforced by the strong belief in myths, dogmas and ancestral spirits.[6]

An Anthropological researcher, Robson, remarked that:

> *"Primitive folk were not living in custom-bound trance as many would have us believe. They had neither judiciary, legislative nor the police. They did have an appreciation of shades of legal liability greater than has been conceived."*[7]

African countries before colonialism, is subject to motives of expediency, adaptable to time, socio-economic change and altered circumstances; it reflects what is acceptable to the society without entirely losing its individualistic character; it is the custom, tradition and history of the subject people, and people recognize it as binding and enforceable; it has been applied from ancient days, passing as such from hand to hand and from one generation to another.[8]

Most African countries did not have a constitutional history before colonialism. These African countries operate solely on norms, tradition and customs. Although, their primitive system of government create rooms for executive, legislative functions. There might be fusion or

[4] Smith S. (1976) Welfare and Diplomacy in Pre-colonial West Africa, 2nd edition, The University of Wisconsin Press.
[5] Nigerian Legal system II, National Open University of Nigeria. p.4
[6] Ibid p. 5.
[7] Ibid p.7
[8] Smith S. (1976) Welfare and Diplomacy in Pre-colonial West Africa, 2nd edition, The University of Wisconsin Press.

concentration of such powers (Executive, legislative and judiciary) into the hands of an absolute monarch. This also does not rule out the fact that some African primitive institutions play the role of checks and balances. The local inhabitants or indigenous people have a traditional structure and machinery through which the setting is run. Fortunate enough, African countries before colonialism, obey traditional rules in which African societies were socially stable and relatively peaceful.

The British, French and other colonial masters took advantage of the unwritten constitutional structure in Africa and later bequeath to these countries, constitutions that were heavily influenced by the colonizers.[9] Although, the African Charter on Human and People's rights creates room for typical African elements, in order to give the legal system arising from the bequeathed constitution more legitimacy for Africans.[10] After independence, All African countries have written constitutions, but a culture of constitutionalism is often missing, i.e. a practice in which heads of state voluntary leave office after an electoral defeat or completion of their constitutional terms, and where citizenship prevails over ethnicity.[11]

Likewise in Ghana, there was a traditional governance structure which guided and kept the order of relationship between leaders and followers. For example, in the tribe of Akan, a prominent ethnic group in Ghana, their system made provision for a Council of Elders. The Council of Elders comprised the most senior Captains of Asafo Companies. It included representatives of the various clans, and the heads of the leading lineages of the community. The political power of the state ultimately resided with the people, however, it was held by the Council of Elders. Before laws and regulations were made and implemented, the Paramount Chief had to consult the Council of Elders, Senior Chiefs and Divisional Chiefs.[12] There is a primitive way of checking the excesses of the leader, right from the point of taking the oath of office to the point of abdication or termination. For instance, at the ceremony to install a chief, the chief was made to swear an oath

[9] The African centre, Leiden, assessed and retrieved online via https://www.ascleiden.nl/content/webdossiers/african-constitutions on 27/08/2020
[10] West African Institute Articles, Assessed and retrieved online on 27/08/2020 via https://wai-iao.ecowas.int/index.php/en/useful-data/constitution-of-the-west-african-states
[11] West African Institute Articles, Assessed and retrieved online on 27/08/2020 via https://wai-iao.ecowas.int/index.php/en/useful-data/constitution-of-the-west-african-states
[12] Akan precolonial Political administration, assessed and retrieved online on 28/8/2020 via https://nigerianscholars.com/tutorials/pre-colonial-political-systems/the-akan-pre-colonial-political-administration/

to abide by the requirements of his office. For the benefit of doubt, his duties were again spelt out. Some of the pieces of advice given to him included the importance of consulting Council of Elders and seeking their consent. This requirement to consult was a democratic feature in the Akan pre-colonial period.[13]

From the analyses of the ethnic groups mentioned above, it would be seen that, prior to European colonization in the late 19th century, Africa had a very long history of state building as well as a rich variety of social formations that were decentralized or stateless. Some of the first examples of state formation in human history developed in the Nile River valley in the 4th millennium BCE.[14] Nevertheless, during most of Africa's precolonial history, a significant portion of African people lived in small-scale, egalitarian societies in which government was more a matter of consensus among the entire adult population than rule by an elite few. One of the major contributions that historians of precolonial Africa have made is to demonstrate the enormous variety and complexity of precolonial African political systems and to challenge the notion that political complexity only exists in centralized states.[15]

The African native colonies, operated a political organization that was so structured that they can today be likened to some of the local government systems in the world. They ran a political structure that would be headed by a Paramount Chief. The Paramount Chief was selected from among the descendants of the founder of the territory of the Chiefdom. Normally, the one selected was the eldest surviving descendant of the founder of the chiefdom. The main duty of the Paramount Chief was to ensure the maintenance of law and order in his chiefdom.[16] The Paramount Chief was assisted in his functions by a Council. This Council consisted of a Speaker, Sub-Chiefs, Title Holders and Village Heads. The functions of the Council were to help ensure law and order,

[13] Akan precolonial Political administration, assessed and retrieved online on 28/8/2020 via https://nigerianscholars.com/tutorials/pre-colonial-political-systems/the-akan-pre-colonial-political-administration/

[14] Connah, Graham. (2001) African Civilizations: An Archaeological Perspective. 2nd ed. Cambridge, UK: Cambridge University Press.

[15] Rebecca Shumway, (2016) Precolonial Political Systems, assessed and retrieved online on 28/8/2020 via https://www.oxfordbibliographies.com/view/document/obo-9780199846733/obo-9780199846733-0100.xml

[16] Thompson, Bankole (1986). "The Republican Constitution of 1971: The Quest for Constitutional Autochthony". The Constitutional History and Law of Sierra Leone (1961-1995). University Press of America. pp. 107–145. ISBN 978-0-7618-0473-4.

settle land disputes, enforce the laws of the land, punish those who broke the law and take major political decisions for instance, going to war.[17]

Customarily, custom and native law and its enforcement system was the only legal system that existed among the indigenous peoples and communities in Africa before the colonialists arrived. Sir Henry Morton Stanley, the British journalist, parliamentarian and explorer, in an African survey published in England, described Africa thus:

> *"It would be a mistake to assume that primitive Africa made no provision for the decision of contentious issues. There existed everywhere a recognized means of securing decisions on them, beginning with arbitrations by family heads, or heads of kin groups, and ending with the more formal adjudication a chief, or a chief and his council, or some form of clan or tribal head. If these tribunals have their limitations, they nevertheless seem to have been accepted as dispensing justice to the general satisfaction of those who sought their decisions. But the procedure of trial differed widely from that practiced in the present colonial courts."*[18]

From community to community, family heads settle disputes informally in the immediate and extended family system, or kings and other rulers in sat in council with their chiefs as court and heard and settled disputes and claims and generally administered justice in such communities, before other systems of law came to displace or modify the system., as the case may be.[19]

From the analyses of the mentioned African ethnic groups, it would be seen that the roles of family heads and council of chiefs cannot be done away with. Their roles comprised judicial and executive functions which were customarily performed to the sanity of clans or ethnic group. The legislative function of enacting laws was one of the responsibilities of a king or chief; these laws were enacted based on the changing values, culture and orientations of the traditional society.

---

[17] The Mendes Pre Colonial political systems, assessed and retrieved online on 228/02/2020 via https://nigerianscholars.com/tutorials/pre-colonial-political-systems/the-mende-pre-colonial-political-administration/#:~:text=The%20Mende%20Pre%2DColonial%20Political%20System,people%20found%20in%20Sierra%20Leone.&text=Their%20political%20organisation%20was%20so,the%20Mendes%20was%20called%20Chiefdom

[18] Ese Malemi, (2012) The Nigerian Legal System, 4th ed., p. 64, Princeton Publishing Co, Lagos

[19] Ibid p. 65

Similarly, the Times of London of July 17, 1886 published the observation of Sir John Marshall, a director of the Royal Niger Company, it succinctly put the observation thus:

> *"Sir John Marshall's suggestion at a recent conference at the exhibition that the management of these colonies could be left in the hands of white trading community is one well of consideration. His testimony to the efficiency with which the natives administer their own laws is very striking. He has sat beside native judges and witnessed, with admiration, the administration of their own justice."*[20]

Looking critically into the pre-colonial political dispensation of the African people, it is clear, from the accounts of both local and foreign authors that Africans had set of rules and methods of administering those rules among themselves. These rules were products of customs that were dynamic, and moved with time. African traditional societies had flexibility and adaptability as great dynamics that enabled these rules to survive and retain its place as a system of law among indigenous people. The flexibility, in particular, truly made the rules a mirror of society and reflected what the society accepted at a given time as its custom, practice, tradition or way of life.

KEY CHARACTERISTICS OF CUSTOMARY LAWS IN AFRICAN CONSTITUTIONAL DEVELOPMENT

In the primitive African political system, the custom, a local law was simple and homogeneous but as settlements expanded into kingdoms and empires, they became heterogeneous.[21] The coming of British imperialists however, redefined the legal systems and political structures of African countries.

The rules with which the African people governed themselves before colonialism was codified to be customary laws, and allowed to be operational in the constitutional development of African countries. The legal and constitutional basis of customary law in Nigeria is section 315(3)-(4)(b) and (c). By virtue of these provisions, customary law is presented as an "existing law" which is in force immediately and after the coming into force of the 1999 constitution of Nigeria.[22] Although,

[20] The nature of African customary Law, 1956
[21] Smith, S. (1976) Welfare and Diplomacy in Pre-colonial West Africa. University of Wisconsin Press
[22] Ese Malemi, (2012) The Nigerian Legal System, 4th ed., p. 67, Princeton Publishing Co, Lagos

these customary law like other sources of law is subject to necessary modifications so as to bring it into conformity with the Nigerian Constitution. Before the colonial imperialists came, chiefs, council of elders, kings and other players in the administration of custom and justice applied the rules in line with the best practice of social change and societal needs. This in time, helped greatly to administer the societies. This is the flexibility and adaptability of these custom, rules and norms.

Ese Malemi in his book, the Nigerian Legal System, fourth edition enlisted five attributes or elements of customary law. These are:

1. It must be in existence at the material time: A customary law, must be in existence at the relevant time, it is sought to be relied on as a binding custom. Where a custom is not existing at a given material time, then, it is dead and cannot have a force of customary law.
2. It must be flexible: customary law is dynamic and elastic. It changes with time within the society that observes it. It is truly a mirror of accepted practice, way of life of a people.
3. It must enjoy general application among the people: for a custom to obtain the force of law, it must enjoy general application among the people as binding custom. The custom must not just be a practice that some members of the community habitually observe of their own volition, but it must be a binding obligation which is capable of being enforced by members of given community among themselves in an appropriate situation which calls for it, eventhough, such enforcement may be demanded and observe in a milder form.
4. It must be accepted as a binding custom: A custom will only be accepted as a customary law if it enjoys the assent, recognition or acceptance of the people as a valid custom which is obtainable in such community.
5. It is largely unwritten, partly unwritten or partly written: in many parts of pre-colonial Africa, custom was largely unwritten. It was a way of life; the system that people are born with, grow with and live with.[23]

Smith, in his book, Welfare and Diplomacy in Pre-colonial West Africa, added one other element to the five elements expressed by Malemi. He added that to be a customary law, it must be custom has been established from the ancient day, reasonable and obligatory.[24]

[23] Ibid p. 73
[24] Smith S. (1976) Welfare and Diplomacy in Pre-colonial West Africa, 2nd edition, The University of Wisconsin Press.

It is clear and revealing from the thoughts of scholars that customary law in this paper, is the custom of the African people which is later codified to become a source of the constitution that binds them. Dufus J, in describing African customary law, succinctly put it thus:

> *"Customary law may be defined as the unwritten law or rules which are recorginsed and applied by the community as governing its transactions and code of behavior in any particular matter. This law is unwritten and I agree with the above passage from Lioyd's book that it owes its authority to the fact that the custom has been established from the ancient days."*[25]

Similarly, Elias CJN reviewing the unwritten nature of customary law in Zaidan v Mosheen said that:

> *"Customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria, but is enforceable and binding within Nigeria as between the parties subject to its sway"*[26]

This paper agrees with the viewpoints of mentioned scholars expressed herein. It believes in these key elements of customary law in the constitutional development of African states. However, application of these custom in the constitution and its acceptance in administration of justice by modern courts in the modern African societies will help to ascribe ingeniousness to scholars' impressions of customary law which is the main determinant of constitutional autochthony.

THE PRINCIPLE OF CONSTITUTIONAL AUTOCHTHONY

In the communal legal system which obtained before the advent of modern legal systems, customary law was the law being practiced and it enjoyed support and respect from the subject. The communal courts acted on the basis of customary law and their sanctions were backed by coercion that was derived from custom which is implemented by designated bodies like the youth, priests and others.[27] However, it is still a public debate as to really conclude whether the ancient custom and today custom enjoy the privilege of automatic enforcement in the modern court

[25] (1963) WNLR 95 at 97
[26] (1973) II SC 1 at 2
[27]

systems as was the case in the days when communal and village courts held sway, applying customary principles backed by the necessary coercive machinery of the community without being subject to validity test which invariably is the custom of another people or ethnic group.

Constitutional autochthony is the process of asserting constitutional nationalism from an external legal or political power. The word 'autochthony' originated from the Greek word, It usually means the assertion of not just the concept of autonomy, but also the concept that the constitution derives from their own native traditions. The autochthony, or home grown nature of constitutions, give them authenticity and effectiveness.[28] Constitutional autochthony simply means that the laws being put together, sprang from the land.

Africans constitutions were first delivered to them by their colonial masters. How much of the laws of these constitutions were fully developed from the custom, traditions and norms of African countries? The provision of customary laws as sources of law in African political system and constitution is a meaningful development, but how well or dominant is the customary law regulating the affairs of indigenous people? Answers to these questions determine to a large extent, the constitutional autochthony of the legal system of a country. For example, in England, judges executed justice according to the norm and custom of England.[29] Later, the custom was translated into law which became the instrument of governance in the country. Constitutional autochthony is optimally applicable when custom or practices of a particular area are recognized. It is pronounced if that custom which existed since ancient times continuously prevails and generally accepted by the people of a country. Constitutional development of a country would be said to be autochthonous if indigenous customary law of that country is in conflict with other foreign law, and yet, the indigenous customary law supersedes and becomes the determination of legal and political questions per time. It is simply the originality of custom, values and traditions in the constitution of a country.

[28] Wheare, Kenneth (1960). The Constitutional Structure of the Commonwealth. Oxford: Clarendon Press. pp. 89.
[29] Slapper, G. (2004). The English Legal System, London: Cavendish Publishing Company.

DOCTRINE OF INFLUENTIAL THEORY: A DEFICIENT PILLAR IN AFRICAN CONSTITUTIONAL AUTOCHTHONY

The doctrine of influential theory as propounded by the legal philosopher, Hans Kelsen, emphasized that it was inconceivable for a legal system to split into two independent legal systems through a purely legal process. One of the implications of Kelsen's theory was that the basic norm (grundnorm) of the imperial predecessor's Constitution would continue to be at the helm of the legal system of the newly liberated former colony despite the legal transfer of power, precisely because the transfer of power was recognized as 'legal' by the Constitution of the imperial predecessor.[30] It can easily be predicted that Hans Kelsen was able to arrive at this point as a result of his careful study of what was transpiring between colonial masters and their colonies in Africa.

Kelsen's conclusion was that even though the colonial masters have handed over the power to the indigenes, they still, gave to them constitution which is an embodiment of their own rules and values.[31] The doctrine of influential theory really presents the true state of operation of the colonial masters while leaving Africa to Africans. They kept in view, the protection of their interest in areas of economic, politics, justice, education, civil service and so on. Their agenda was to continue to be in charge by proxy. This was presented through the composition of constitution. This theory plays out in today's African constitutional development because despite local customs or practices of African countries that have been in existence since time immemorial, and which is generally reasonable and acceptable by the people, the modern political practice in Africa will require that such custom must pass the English man's test of repugnancy and incompatibility, using the English standards.[32] The English standards are simply British's interests, therefore, the reality of the doctrine of influential theory is clearly a deficiency for African countries.

[30] "India's benign constitutional revolution". The Hindu. 2013-01-26. ISSN 0971-751X. Retrieved 28/8/2020

[31] Robinson, Kenneth, Madden, Frederick (1963). "Constitutional autochthony and the transfer of power". Essays in Imperial Government Presented to Margery Perham. Oxford: Oxford University Press. p. 249.

[32] Obilade, O. Nigerian Legal System, Sweet and Maxwell.

CONSTITUTITONAL STRUCTURE AND DEVELOPMENT IN POST INDEPENDENT NIGERIA AND GHANA: THE AUTOCHTHONY QUESTION

NIGERIA

Autochthony, legally speaking, is the home grown custom or rules that are rooted in the practice of native people.[33] By this it is meant that the constitution owes its validity and authority to local legal factors, rather than to the fact of enactment by a foreign legal process. Autochthony was especially important to countries which achieved independence from the former British Empire. Constitutional autochthony required that there be no legal continuity between the formerly supreme colonialist and the newly born state.[34] The experience of Nigeria is that in constituting Nigeria into federation, and subdividing it into three regions, similarity of cultures, ethnicity and language receive little consideration, if at all. The British type of political arrangements still prevailed, generating its good aspects as well as conflicts among the tiers of government.[35]

The general policy of the British colonial administration in Nigeria was to adopt the United Kingdom as a model pre-colonial and post-colonial. The colonial administration attempted to replicate in their colonies in Nigeria and Gold coast (Ghana), the historical development of the English Legal System in a period appropriate to each particular colony.[36] Consistent with this policy, there was a conscious and subconscious omission to take cognizance of 'outside features'. To the colonial masters, everything that was not western was outside and uncivilized.[37] Thus the range of enormous pre-colonial human experiences as well as the native institutional facts that distinguished Africa and Africans as the cradle of civilization were given scant recognition. Rather, the imperialist were committed to making the African believe that he has never been responsible for anything, of worth. In this way, it is easy to bring about the abandonment and renunciation of all national aspirations on the part of those who were wavering, and the reflexes of insubordination are reinforced in those who have already been alienated.[38]

---

[33] Oliver, C (2016) Autochthonous Constitutions, Oxford Constitutional law, assessed and retrieved online on 28/8/20202 via: https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e12

[34] Robinson, Kenneth; Madden, Frederick (1963). "Constitutional autochthony and the transfer of power". Essays in Imperial Government Presented to Margery Perham. Oxford: Oxford University Press. p. 255.

[35] Slapper, G. (2004). The English Legal System, London: Cavendish Publishing Company

[36] Connah, Graham. (2001) African Civilizations: An Archaeological Perspective. 2nd ed. Cambridge, UK: Cambridge University Press.

[37] The nature of African customary Law, 1956

[38] Nigerian Legal System II, National Open University (2009) p. 15

In the early times of Lagos colony, the British imperialists, by ordinance No. 3 of 1863 established English type of courts in Lagos colony, these English courts executed laws and customs of the British. The ordinance No. 4 of 1876 is similar to ordinance No3 of 1863, stated thus:

> *"Nothing in this ordinance shall deprive the Supreme court of the right to observe and enforce the observance or shall deprive any person of the benefit of any law or custom existing in the said colony and territories subject to its jurisdiction, such law or custom not being repugnant to natural justices, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the colonial legislature."*[39]

Invariably, the ordinance expressly empowered the courts to execute the following:

1. The common law of England
2. The doctrine of equity as applicable in England
3. Statute of General Application as at 1st July 1874 (later varied to 1st January 1900)
4. Local enactments
5. Customary laws that were not repugnant to natural law, equity and good conscience or incompatible with the law for the time being in force.[40]

Considering the above mentioned empowerments of the colony court, "customary laws" occupied the last position on the table. Also, it can only be used or applied if it is not repugnant to natural law, equity and good conscience. The condition attached to the usage was also determined by the court, a clear case of excuse not to allow the customary laws to be fully operational in Nigeria. The best chance or argument for survival of customary laws in Nigeria constitutional front is the advocacy for plurality of laws in a typical Nigerian urban center. This occurs where foreign laws of the colonialists, traditional religious codes and indigenous native custom are allowed to operate in the country based on the type and rationale behind contractual relationships and other factors of parties in the transaction.

[39] Ibid p. 23
[40] Ibid p. 17

The conditions attached to the application of these native laws are referred to as the "validity test".[41] That is customary or native laws in Nigeria must satisfy and pass three main tests. These are:

1. The repugnancy test: this means that the law must not go against natural justice, equity and good conscience
2. The incompatibility test: This requires that where a situation is governed exclusively by any law or statute for time being in force, then customary law is to give way for such law to take effect.
3. The public policy test: This is a situation where customary law must not go against the security and welfare of the people.[42]

Right from 1863, it was sacrosanct in the binding laws of Nigeria that customary law would only be applied if it passed the validity test. The intention of the drafters of the constitution is, and has always been that customs of the land should not breach the Nigerian constitution. In same manner, custom, customary festivals and practices, should not tend to lead to a breach of peace, such as assault, battery or damage to property, rather, it should promote the rule of law and justice.

This paper finds it difficult to close the gap of testing the validity of Nigerian customary law with the constitution that is characterized with foreign laws, when it was supposed to be vise-versa in the first place. The foreign laws were supposed to pass validity test within the Nigerian customary law. Although, Nigerian legal system is an integrated system or multiple law system made up of customary laws, statute law and foreign system of laws,[43] yet, of all these sources, it is the Nigerian customary laws that is subject to a form of test before it can function or be applied in situations. This is a relegation with which the Nigerian constitutional autochthony became irrelevant.

Since independence, there was no any Nigerian government that deemed it fit to install autochthony in the imposed constitution. The local contents of the constitution remains a tiny proportion of the laws which is quite assumed to be very difficult to prove and apply in the modern day Nigeria. The dimension of Islamic law as a component of constitutional development in Nigeria does not and will never be a pointer to autochthony in the constitution because the Sharia law is not borne out of the native customs of indigenous people in Nigeria. Though, Sharia law

[41] Ese Malemi, (2012) The Nigerian Legal System, 4th ed., p. 67, Princeton Publishing Co, Lagos
[42] Ibid p. 77
[43] Ibid p. 87

owes its origin to Islamic religion which is the emblem religion of the Fulani jihadists that invaded Nigeria from the North. Upon their establishment on Nigerian soil, Islam was the official religion and sharia laws became official rules used to administer the subject. This is to say that Sharia law was the native custom of the Arabs, it was alien to indigenous people of the northern Nigeria, just as British custom was alien to indigenous people of the Southern Nigeria.

However, taking a critical look at the constitutional development of Nigeria, it will be seen that, apart from the selfish agenda of the colonialists, some other factors like apathy of the people, ethnicity and religion, lack of consensus by the constituent units and lack of political experiences of the local people play crucial roles in the inability of political leaders to close the constitutional autochthony gap.[44] These factors gave the colonialists the opportunity to initiate constitution which primes the doctrine of common law over Nigerian native and customary law. This paper pitches its tent with these scholars that it will be difficult to achieve constitutional autochthony in the constitutional development of Nigeria, considering the ethnic ambitions, population size, federal system of government and schemes to dominate power within the federation.

GHANA

The Political development in Ghana is not much different from the development in Nigeria. The only remarkable difference is the limited ethnic groups and system of government practiced after independence. The United Kingdom handed over a constitution to Ghana while granting it independence, Ghana (Order in Council) 1957 enacted by the queen under her Majesty's power conferred on her by the British Settlement Acts, 1887 and 1945, Foreign Jurisdiction Act, 1890, The Ghana Independent Act, 1957, and all other powers enabling her in that behalf. These constitution, had in certain respect been amended by the Ghana legislature in subsequent years, notably by the constitution (Repeal of Restrictions) Act, 1958.[45]

Ghana attained independence in 1957 with an inherited constitution from the hands of the colonial master, United Kingdom. Ghana, however took a decisive step within one year of its independence,

[44] Chima, C. (2018) The Problem Of Autochthony in Nigeria's Constitutional Democracy
[45] Robbinson, K. (2008) Constitution Autochthony in Ghana, assessed and retrieved online on 29/8/2020 via: https://www.tandfonline.com/doi/abs/10.1080/14662046108446958?journalCode=fccp18

to replace the inherited contents of its constitution with local contents. Eventhough, the repeal was not a complete overhaul, yet, it showed that the Ghanaians were not satisfied with the contents of the constitution and as such, it replaced it. The velocity of Ghana's effort could be attributed to the population and ethnic groups. Ghana has one major tribe and several minority groups. Ethnic groups in Ghana include the Akan at 47.5% of the population, the Mole-Dagbon at 16.6%, the Ewe at 13.9%, the Ga-Dangme at 7.4%, the Gurma at 5.7%, the Guang at 3.7%, the Grusi at 2.5%, the Kusaasi at 1.2%, and the Bikpakpaam a.k.a. Konkomba people at 3.5%. 4.3% of the population is white.[46] The statistics shows the dominance of Akan tribe at almost fifty percent of the population. This constitute majority opinion in Ghana on political and non-political issues. The representation of the Akan is the majority. This afforded Ghana the privilege of quick decision making.

In addition to the ethnicity is the one party system under President Kwame Nkurumah. There was no voice from the opposition, and this enhances quick decision making from the sitting government about issues. This could not be compared to Nigeria where bicameral legislature and cumbersome procedures of law making is required by the constitution. Another indispensable factor is the unitary system of government. Unitary system of government is the concentration of powers in the national government. The common reasons for unitary system of government is usually small land area, homogeneous nature of the people absence of serious tribal differences among ethnic groups, possession of common culture.[47] Unitary system of government is small and easy to maintain; and it gives room for quick decision making.[48] Comparing this with Nigeria which is direct opposite to Ghana in terms of population, ethnicity and system of government, it is easier for Ghana to take quick decision about constitutional amendment than Nigeria with a cumbersome procedures for constitutional amendment.

The question of autochthony in Ghana's constitutional development is answered with an understanding that successive governments in Ghana's history after independence have made successful efforts to reproduce the constitution handed over to them by the colonial imperialist.

[46] "Demographic and Health Survey 2014" (PDF). Dhsprogram.com. published 7 November 2017, assessed and retrieved online on 29/82020

[47] Obilade, O. Nigerian Legal System, Sweet and Maxwell

[48] Robinson, Kenneth, Madden, Frederick (1963). "Constitutional autochthony and the transfer of power". Essays in Imperial Government Presented to Margery Perham. Oxford: Oxford University Press. p. 246

They have been able to inject local elements into the constitution, and above all make it home grown. That is, the constitution is more homely and originated from the soil.

Conclusion

ARTICLE 38(1) of the Statute of International Court of Justice, provides that:

> *"The court whose function is to decide in accordance with international law, such dispute that are submitted to it shall apply… (b) International custom, as evidence of a general practice accepted by law" Nigeria and Ghana were colonized by British. Both countries inherited constitutions from their respective colonial masters."*[49]

From the above, it is clear that customary law is allowed in all spheres of judicial dispensation, it is a cardinal element of constitution which essentially constitutes and determines the constitutional autochthony. There is no doubt that the British presented documents that were created of their customs and tradition (doctrine of common law and equity). Both Nigeria and Ghana understand this agenda and were expected to take steps to make their constitution autochthonous.

Meanwhile, it is important to mention the preamble of a constitution cannot establish the autochthony of the constitution. For example, the preamble of the 1999 constitution of Nigeria, which says "we, the people of Nigeria do hereby make these laws…" does not affirm or answer the question of autochthony of Nigerian constitution, neither does it establish that the constitution is home developed and home grown.[50] Furthermore, scholars have genuinely argued that many of the world countries constitutions, including that of European countries and United States of America, are devoid of autochthony; that is their constitutions were either compositions of drafters who are aliens to the land or the constitution is developed by few minority for the use of the majority whose interests were not even considered while drafting the law.[51] Still, successive political leaders in Europe and United States of America have judiciously adapted the constitutions to promote local agenda and aspirations of their citizens. The level of application and operational

[49] Ibid, p. 240
[50] Ese Malemi, (2012) The Nigerian Legal System, 4th ed., p. 68, Princeton Publishing Co, Lagos
[51] Ibid

conduct of these countries could be said to be largely autochthonous because it protects the local interests and serves the local mechanism of the national governance.[52]

This paper concludes that Nigeria as a colony under the British lost sense of autochthony in its constitutional development and has not been able to close this gap sixty years after independence. The interests of the diverse ethnic groups, lack of unity and focus, religion and federal system of government are chief reasons for the relegation of local contents, which is a constitutional deficiency. Ghana, on the other hand, for size of the country, one party system, unitary system of government and minimal ethnic group, has been able to close the gap of imbalance of contents in its constitution, expunge British's structure and create considerably, an autochthonous constitution.

[52] Chima, C. (2018) The Problem Of Autochthony in Nigeria's Constitutional Democracy