

# **CONSTITUTIONAL AMENDMENT** **- THE WAY TO GO**

## **BEING THE POSITION OF THE NIGERIAN BAR ASSOCIATION (NBA)** **ON THE PROPOSED CONSTITUTIONAL REVIEW** **BY THE NATIONAL ASSEMBLY**

### **INTRODUCTION**

The Nigeria Bar Association (NBA) supports the proposed review of the Constitution of the Federal Republic of Nigeria 1999 by the National Assembly. It is our position that more than anything else Nigeria needs amendment of some important aspects of the Constitution in the interest of democracy consolidation.

Nigeria is a federation, no matter how weak our federal practice has become in succeeding years to 1966. Conceptually federations normally evolve over time. Some have gone through major formal constitutional changes, while others have changed significantly despite largely stable constitutions. Factors such as the creation of new constituent units, urbanization, major demographic and economic shifts, new technologies, major global and domestic political developments, and the experience of democracy have been critical in shaping federal experiences. The Written Constitution remains uniquely central to the organization of any federation.

As rigid as it may be, **the Constitution is evolutionary and dynamic** to a great degree. Constitutional amendment, as the need arises, is part of the typical dynamism of constitutional order to meet the aspirations of a federation. Nigeria is presently at this crucial trajectory. NBA is of the view that the 1999 Constitution, as it is, cannot sustain our present democracy. While we welcome the commitment of President Umaru Yar'Adua to Electoral Reform, we believe Constitutional Reform takes priority. The 1999 Constitution contains good provisions. It also contains both weak and obnoxious provisions and equally admits of several lacunae. Above all the Constitution has legitimacy burden. But the big issue is whether all the aspirations of a people must be reflected in one fell swoop in their Constitution. We think not! The standard practice in older and most contemporary democracies is that constitutional perfection is evolutionary!

### **PRINCIPLES OF AMENDMENT**

Accordingly, NBA identifies two crucial principles of constitutional amendment. These are **Timing** and **Approach**. Under Timing, we suggest that constitutional amendment in Nigeria should be an **ongoing exercise**. As soon as an issue identified as germane for constitutional amendment arises, the

process of a new Amendment ought to be initiated at the National Assembly through a Bill. We feel that since the 1979 Constitution, it has become unnecessary to time constitutional reviews to a special resource and time unfriendly “*Constitutional Conference*” of “*Constituent Assembly*”. A constitutional foundation has been laid. We call for a legislative practice of ‘*Amend-As-You-Go*’ to constitutional amendment.

On Approach, which has great linkage with Timing, NBA believes that **piecemeal amendment** is preferable to **wholesale amendment** in which an existing Constitution is totally jettisoned for a new one. The latter has been our practice. The oldest federation, the United States, has had the same constitution for over 200 years and has made only 27 amendments to it. India has made 94 amendments to its Constitution in 60 years. However, Brazil has had seven Constitutions since independence, Mexico six and Venezuela 26. While some federations have maintained constitutional continuity, others have had breaks because of revolutions or military regimes. Colonial disengagement and Military interruptions may be our excuses for having had 1960, 1963, 1979, 1989 (stillborn), 1995 (stillborn) and 1999 Constitutions! The existing Constitution is a good framework for administration and consolidation of democracy. What we need is not to throw it into a wastepaper basket but to continue to add to it in pursuit of our federal and democracy objectives.

## **PROPOSED AMENDMENTS**

As part of the agenda for the proposed constitutional review, NBA proposes for immediate amendment the following five key aspects of the 1999 Constitution in the interest of democracy consolidation. There may be other areas but these areas can be a good start in order to preserve democracy.

### **1. Sovereignty**

The fundamental trouble with the 1999 Constitution is its lack of popular legitimacy. There are five vital elements of a good Constitution, **Inclusivity** (it must be a product of popular participation), **Authority** (We have to accept the National Assembly as the Convening Authority being the representatives of the people), **Validity** (the Constitution must be validated by “*We the People*” through popular referendum, and **Legitimacy** (only a legitimate Constitution can consolidate and deepen democracy)

The proposed amendment must show and recognize that Sovereignty belongs to the people. The false claim in the Preamble that “*We the People*” made the 1999 Constitution which was clearly made by a few persons should be dealt with once and for all. We now have an

opportunity to popularize and legitimize the 1999 Constitution. There can never be a compromise that Sovereignty belongs to the people.

## **2. Supremacy**

The proposed amendment will consolidate on and strengthen the Supremacy Clause of the Constitution. This is primarily contained in Section 1 of the Constitution which has three subsections. We propose that in addition to the provision of Section 1(1) which provides that the provisions of the Constitution shall have binding force on all authorities and persons, every Nigerian should be expressly conferred with constitutional right to go to Court to challenge constitutional breaches. Without entrenchment of constitutionalism and rule of law and full checks, democracy consolidation will be elusive. The Constitution must not only be declared to but must be seen to be supreme.

Also in addition to the provision of Section 1(2) which prohibits unconstitutional take-over of government, there should be a provision for sanctions for unconstitutional take-over of government. It shall be the inalterable and unavoidable right of the people to punish violators of the constitutional order, and necessity shall not be a defence.

## **3. Institutions Consolidating Democracy**

There are some state institutions that serve as gatekeepers of democracy. They play such key role in administering and consolidating democracy that they must be constitutionally insulated from outside interference and control by any person or organ of state. Chapter 9 of the South African Constitution provides for “*State Institutions Supporting Constitutional Democracy*”. These include the Public Protector (who investigates certain conducts in state affairs), the Auditor-General, the Electoral Commission etc.

Section 158 of the 1999 Constitution declares the Code of Conduct Bureau, the NJC, the Federal Civil Service Commission, the Federal Judicial Service Commission, the Revenue Mobilization and Fiscal Commission, the Federal Character Commission, INEC and the National Population Commission independent. We propose an amendment to enlarge the list to include the Nigeria Police Force, EFCC, ICPC, the Auditor General and the Attorney General of the Federation. Also all provisions on the appointment of the officers, for example of INEC, should be strengthened so as not to weaken or compromise their declared independence. The same goes for funding and operations.

#### **4. Institutions Administering Federalism**

The major challenge of Nigeria's federalism is the tendency over the years to evolve into a centralized power structure in which the centre waxes stronger while the constituent units grow weaker and weaker. While some criticize the tendency as defeating the expected gains of federalism, some have defended the centralized arrangement as necessary for national cohesion. NBA recognizes that Nigeria is too large, too populous and severely plural to be administered on weak a federalism. We therefore propose as middle-ground that certain state institutions crucial to the running of the federal system be constitutionally devolved from the federal level to geo-political structures. Thus groups of States that are geographically homogenous would be constitutionally organized into Geo-Political Regions for more effective federal administration.

'Prisons' is Item 48 on the Exclusive List. However the constitution can empower the Minister of Interior to delegate power to authorities in geo-political zones as part of Institutions administering Federalism to deal with some prison issues. This is only an example. More federal matters can be so devolved under a constitutional clause to make for more effective federal administration. We propose that key institutions that will drive federalism be noted and expressly declared under an amendment to the existing Constitution.

#### **5. Electoral Reform**

NBA believes in Electoral Reform based on a new constitutional structure. This will fundamentally alter the present electoral system. This is because a central electoral commission may have to share power with regional electoral commissions if we adopt regions that are larger, stronger and more viable than the present 36 states. There may not be any good reason why a central electoral body would be supervise over elections into state or regional assemblies. The same reason given about how states may hold the state electoral commission captive to their will also be true of an imperial president and a central electoral commission under the present 1999 Constitution where the president appoints the personnel who preside over his own election. What is needed is a good system matched with good practice which will bring about internalization of federal principles. When the constitution is fairly right, electoral reform issues will be thrown up.

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