

CONSTITUTION AMENDMENT IN NIGERIA: CONCEPTS AND MISCONCEPTIONS

BY

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INTRODUCTION

My association with Ajayi Crowther University dates back to 2007 when I was appointed a member of its Board of Trustees, a position I have held till date. In that capacity I had the privilege to participate at and witness on 26 January 2016 the official commissioning of this magnificent new Faculty of Law Building Complex donated by renowned philanthropists and benefactors Chief Modupe and Chief (Mrs) Folorunso Alakija, an exercise performed by the Primate of the Church of Nigeria, Anglican Communion, The Most Revd Nicholas D. Okoh. I am happy to be here today to address the Law Students in a Faculty of Law Building Complex that is, without any doubt, the best in Nigeria.

When the Vice Chancellor, Rt. Reverend Professor Dapo Asaju requested me to come and give a talk to the Law Students on any topic of my choice, I had no hesitation at all in accepting. The only challenge was what topic I should speak on. This is because there is so much to talk about in Nigeria today (not necessarily a specific Law subject) which should sufficiently attract the interest of the generality of students. Of course, Law students, like Lawyers should and do take interest in current issues of public interest. Amongst the most talked about today are the issues of Corruption, "True Federalism", Fiscal Federalism and Resource Control, Restructuring, Security and the war on Terrorism, State Police, Corruption in the Judiciary and Judicial Reform as well as Constitution Amendment. I have publicly expressed my views on all these in the past at public lectures and newspaper interviews. *(Deepening Democracy In Nigeria Through Law: An Analysis of Some Contemporary Issues in National*

Transformation, Nigerian Institute of Advanced Legal Studies Lecture, 30 November 2010 and Punch newspaper, 16 September 2016).

I have chosen on this occasion to speak on Constitution Amendment because the Constitution, being the fundamental law of the land and hence the ***grundnorm*** holds the key and provides the framework, legal and institutional, within which all other problems confronting our nation can be addressed and resolved.

Since the inception of the current democratic dispensation in 1999, each successive session of the National Assembly has embarked on constitution amendment exercise. The 5th and 6th Sessions of the National Assembly effected some amendments of the Constitution of the Federal Republic of Nigeria 1999. The Constitution actually uses the word “alteration” but I prefer to use the term “amendment” which is more universal in usage. The 7th National Assembly also undertook a very ambitious Constitution review exercise covering well over 100 different matters at great financial cost to the public but the exercise yielded no benefit for the country to the disappointment, if not anger of many. One civil society group was reported to have threatened to sue the National Assembly for the refund of the sum of ₦4 billion naira, allegedly expended on that futile exercise (***Thisday, Monday 8 June 2015, page 53***). There might have been some exaggeration in the amount quoted but it underscores the need to get things right this time around as the 8th National Assembly proceeds with another exercise at Constitution Amendment or Alteration. I am certain that most, if not all, of you would take interest in the process as it unfolds. This consideration and much more, explains my choice of this topic.

It is not possible in an address such as this and within a time frame of one hour to exhaustively discuss every single matter involved in or related to the amendment of the Constitution. I have, however, decided to identify and speak on certain concepts and misconceptions in Nigeria pertaining to the amendment of our Constitution.

The New Webster’s Dictionary of the English Language defines the word “concept” as ***“a thought or opinion, general notion or idea, especially one formed by generalisations from particular examples.*** It defines the word

“misconception” as deriving from the word ***“misconceive”*** which means ***“to misunderstand, interpret mistakenly”***. I use the two words within the meanings of the above definitions.

FUNDAMENTAL CRITICISMS OF THE CONSTITUTION

There is a school of thought which opines that the Constitution is flawed because it is a military decree and hence lacks legitimacy and therefore should be thrown away. Some further argue that what we need is a “Brand New Constitution” and shockingly to me there are some members of the National Assembly who are promising to give Nigerians a “brand new constitution”. Let me address some of these remarks and in so doing highlight some concepts and misconception in order to sharpen our understanding. I shall do so by raising a number of posers some of which may sound rhetorical.

1. Does Nigeria have a Constitution?

Yes, Nigeria does have a Constitution.

2. Should Nigeria have a brand new Constitution?

Nigeria cannot, under the current legal order, have a brand new Constitution. A new Constitution ushers in a new republic and unless the current legal order is overthrown by a revolution-military or civilian-we cannot get a brand new Constitution. Any attempt to subvert or overthrow the current Constitution will amount to the offence of treason. All organs and institutions of government, their powers and responsibilities, including the rights of citizens rest on the Constitution. Without a Constitution in place there will be anarchy where might is right.

3. Is the Constitution a Military Decree?

Although the Constitution of the Federal Republic of Nigeria was promulgated into existence by Military Decree No24 of 1999, the Constitution itself is not a Decree. The Constitution attained its validity once it was accepted as from 29 May 1999 by the people of Nigeria as the legal foundation upon which the current democratic order was founded. The analogy of the booster rocket and the space shuttle is appropriate here.

Once the booster rocket gets the shuttle off the launching pad and into space, it drops out and may plunge into the ocean while the space ship continues on its journey to perform its assigned mission in space. So Decree 24 of 1999 is spent and is no longer the basis of the current legal order but the Constitution itself.

4. Does the Constitution have any defects or short comings?

Definitely, the Constitution is not perfect. Rather it suffers from shortcomings which existed from the time of its framing and others which have become manifest with time and the benefit of experience. Like any other written Constitution, ours recognises that the need may arise from time to time to amend or alter its provisions hence it sets out in section 9 the mode of doing so.

It provides that an Act of the National Assembly for the alteration of the Constitution shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than 2/3 majority of all members of that House and approved by resolution of the Houses of Assembly of not less than 2/3 of the States of the Federation. Where the Act relates to the alteration of the entrenched provisions of Section 8 or Chapter IV of the Constitution (Fundamental Rights provisions) a 4/5 majority of all the members of each House is required.

5. Does the Amendment of the Constitution require the assent of the President?

A Federal High Court in Lagos and the Court of Appeal have decided in relation to the amendments in 2010/2011 that, like any other Act of the National Assembly, Constitution Amendment requires President's Assent. The National Assembly indicated it would appeal the judgments to the Supreme Court but because of the need to bring the amendments into effect before the 2011 general elections it submitted the amendments to the President for his assent. They may have thereby established a precedent. In my view the President's assent is not applicable and unnecessary for the amendment of the Constitution for several reasons.

- a) Not every Act passed by the National Assembly gets assented to by the President, for instance, where the National Assembly by a 2/3 majority of its members, overrides the President's veto. If a Constitution amendment is treated like any other Act, it, already having been passed by a 2/3 or even 4/5, this certainly is enough to override the President's assent, non-assent or veto.

- b) Constitution amendment is a legislative exercise that involves the Houses of Assembly of the States. A President has no business with a legislative process involving the Houses of Assembly of the States just like governors of the States have no business with legislative acts of the National Assembly.

- c) Suppose the amendment relates to section 8 or Chapter IV of the Constitution which had been passed by 4/5 majority of all the members of each of the Houses of the National Assembly and the President withholds his assent, are the courts saying that the National Assembly would need a 2/3 majority in order to override the President's veto on a Bill they had already passed with a 4/5 majority? This would be illogical and utterly absurd.

- d) The practice in the U.S. offers guidance where the President's assent is not required. Rather, as soon as the required number of States have adopted an amendment it comes into effect at that very moment. It is the approval of the Act of the National assembly by the Houses of the Assembly of the States that brings or should bring a Constitution amendment into effect and not the President's assent and the States need not all adopt the amendment at the same period as is done in Nigeria.

SOME OBSERVATIONS ON THE CURRENT CONSTITUTION AMENDMENT EXERCISE

On 8 December 2016, the Senate Committee on the Review of the 1999 Constitution presented highlights of some of the issues covered in the current amendment exercise. They are –

- Local Government Administration (s.7)
- Distributable Pool Account (s. 162)
- Authorisation of Expenditure (ss. 82 and 122)
- Political Parties and Electoral Matters (ss. 134, 179 and 225)
- Financial Autonomy of States Legislatures (s. 121)
- Status of the Federal Capital Territory (ss.256, 299-302)
- Nomination of Ministers and Commissioners (ss. 147 and 192)
- The Legislature (ss.51, 67,93 and 315)
- The Judiciary (ss.233, 237, 247, 251 and Pt I, 3rd Schd)
- Devolution of Powers (Second Schd Pts I and II)
- Local Government – Change of Name (First Schd).

It is being proposed that each of these or a cluster of them would be considered as separate Acts of the National Assembly in order to have a quick consensus on each amendment. I will comment in some details on two of the items – Status of the FCT and devolution of Power.

STATUS OF THE FCT

The Report presented to the Senate reads - “Under this head, sections 256, 299, 300, 301 and 302 of the a Constitution were amended to create the Office of an elected Mayor for the FCT with powers to administer the FCT ***as if it were a State of the Federation*** (my emphasis) by exercising all the functions presently administered by the Minister of the FCT”.

The proposed amendment in my view will lead Nigeria to unnecessary, avoidable and unintended problems simply because of a misconception or misreading of the provisions of section 299 of the Constitution. For ease of understanding let us consider the provisions of section 299 of the Constitution.

It states “The provisions of this Constitution shall apply to the FCT, Abuja as if it were one of the States of the Federation; **and accordingly** -

- a) all the legislative powers, the executive powers and the judicial powers vested in the House of Assembly, the Governor of a State and in the Courts of a State shall, respectively, vest in the National Assembly the President of the Federation and in the courts which by virtue of the foregoing provisions are courts established for the FCT, Abuja.
- b) all the powers referred to in paragraph (a) of this section shall be exercised in accordance with the provisions of this Constitution; and
- c) The provisions of this Constitution pertaining to the matters aforesaid shall be read with such modifications and adaptations as may be reasonably necessary to bring them into conformity with the provisions of this section” (my emphasis).

When the idea of a new Federal Capital Territory was conceived it was not intended that the Territory would be a State of its own but incrementally the original idea is being twisted and misconceived deliberately or inadvertently to transform the FCT into a state. Section 299 merely set out to explain how the provisions of the Constitution would be applicable to the FCT. It was gratuitous to even introduce the analogy of a State in order to convey the intention as if the readers will not understand simple English. The intendment of the section is clear even without the phrase “as if it were one of the States of the Federation”.

The immediate goal of the Senate Committee appears to be to divest the executive powers in the FCT exercised by the President through a Minister and transfer them to an elected Mayor. Sooner or later the Mayor will need a Council of Legislators and power over the judiciary like governors have in order to be treated “as if it were a State”. Inadvertently, the National Assembly which currently exercises legislative powers over the FCT will have to divest themselves of that power and transfer legislative authority to an FCT legislative Council which the Mayor will sooner or later demand with justification. Ditto for the judiciary. Without realising it the National Assembly, if it passes this

amendment, would end up shooting itself on the foot. The concept of a Mayor for the FCT is an attempt to create a solution to a problem that does not exist – which in the long run will distort and bastardize the original intention in creating a new Federal Capital Territory for all Nigerians. The idea should be dropped.

DEVOLUTION OF POWERS

This concept of devolution of powers is intended to meet the agitations for “true federalism”, fiscal federalism, restructuring, etc. Many hold the view that the main reason for the political and economic problems confronting Nigeria is that too much power is concentrated at the centre as represented by the Exclusive Legislative List. To solve these problems, many argue that power must devolve from the Federal Government to the States, so that the Federal government would concern itself with a few items, like, national currency, foreign affairs, national defence, etc. Devolution of powers should, it is believed, naturally entail devolution of financial resources and so pave the way for fiscal federalism and enhance the capacity of States to function effectively as federating units. From what the Senate Committee has done, it is highly unlikely that the devolution of powers as proposed by it is anywhere near what the proponents of devolution of power will find acceptable. The Committee explaining what it has done, stated that –

“Second Schedule, Part I and II of the Constitution were altered to decongest the Exclusive legislative list to give more powers to States. This enhances the principle of federalism and good governance. It substituted “Post and Telegraphs with “Post and Telecommunications”, and moved **Pensions, Prisons, Railways, Stamp Duties** and **Wages** from the Exclusive Legislative List to the Concurrent List and added Arbitration, Environment, Healthcare, Housing, Road Safety, Pensions, Land and Agriculture, Youths, Public Complaints to the Concurrent List.”

It remains to be seen whether these amendments when passed will satisfy those who agitate for restructuring as it still leaves items such as “minerals and mines” and “police and other government security agencies established by law” in the Exclusive legislative list.

CONCLUSION

I should like to conclude my remarks by distilling a number of points from the presentation.

- 1) The task of building our nation into progress and prosperity will essentially hinge on good ideas which alone can drive good governance. Contestation of ideas must in the end yield to superior argument.
- 2) As the popular saying goes – There is no one-handed lawyer. Every lawyer and law student – indeed the public in general – should know that there are usually two sides to every argument. That is why lawyers would argue on the one hand; and on the other hand. Where there are concepts there may also be misconceptions.
- 3) Get thinking. You must cultivate the ability to think and not accept arguments unquestionably. No position is ever cast in concrete but you must study hard in order to have a good mastery of the subject matter and be able to speak with confidence. Your examiner wants to see from your answer that you understand the principles of law and are able to apply them to real-life situations. It is not so much about getting the correct answer to the question though of course getting the correct answer will give you better grades. Explore beyond your lectures and hand-outs.
- 4) Society is dynamic and so ideas change with time and with changes in society.
- 5) As students in a faith-based University I expect that you will eschew vices that are prevalent in many tertiary institutions across Nigeria.

With hard work, faith in God, good attitude and a dose of good luck the sky will surely be your limit.

I thank you for your audience.