

'National Assembly lacks power to amend constitution'

Analysts are divided on the legality of the ongoing plans by the National Assembly to review the 1999 Constitution. AUSTIN OSARENKHOE examines the issue and concludes that the lawmakers do not possess the power for the exercise.

THERE is an ongoing jamboree by members of the National Assembly to "review" the 1999 Constitution. In fact, they retreated recently to Minna, Niger State, under the aegis of the National Assembly Joint Committee on Constitutional Review for the purpose. The retreat suffered a set-back which led to a walk-out by members of the House of Representatives. Notwithstanding, the senators proceeded with the retreat and pledged to conclude the review next year, while the Representatives decided on a separate review.

Without going into the causes of the wranglings between members of the House of Representatives and the Senate, I think it is time and money-saving to point out straight away that the National Assembly has embarked on a constitutional fiasco *ab initio*.

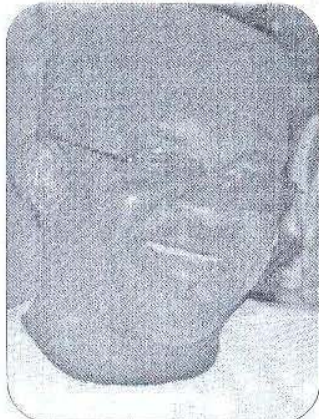
I submit that the purported amendment of the constitution by the National Assembly is *ultra vires*. In very clear and unambiguous terms, I say that the National Assembly lacks the requisite constitutional competence to amend the provisions of the Constitution.

The Preamble to the 1999 Constitution says the people of the Federal Republic of Nigeria made, enacted and gave the Constitution to themselves. The preamble to a statute or Constitution states the source and spirit of the Constitution. I submit that the "People of the Federal Republic of Nigeria" referred to in the Preamble to the 1999 Constitution does not refer to members of the National Assembly, but to the vast majority of Nigerians who, on behalf of their communities, tribes, interests, groups, geo-political zones, participated in the Constitutional Debate organised throughout the country by the Constitutional Debate Co-ordinating Committee whose views produced the 1999 Constitution.

I submit that the provision "The National Assembly shall have power to make laws for the peace, order and good government of the Federation..." in Sections 4(2) and (4) of the Constitution, only relates to matters listed in the Exclusive and Concurrent Legislative Lists to the extent contained in Parts I and II of the Second Schedule to the Constitution. See also Section 315(5) of the Constitution. I submit that the 68 Items in the Exclusive Legislative List over which the National Assembly has Exclusive Legislative power to make laws do not include amendment of the Constitution.

Neither do the 30 Items in the Concurrent Legislative List over which the National Assembly has concurrent legislative power with the Houses of Assembly of states to make laws include amendment of the Constitution. Nor can it be said to be a matter in the so-called Residual Legislative List under Section 4(4) (b) of the Constitution.

I submit that a subject like amendment of the constitution by the National Assembly is *ultra vires*. In very clear and unambiguous terms, I say that the National Assembly lacks the requisite constitutional competence to amend the provisions of the Constitution



• Senate President, Senator David Mark



• Speaker, House of Representatives, Mr. Dimeji Bankole

the constitution is too fundamental to be left to the Residual Legislative List which Section 4(4) (b) of the Constitution purports to be. It would appear that Section 9 of the Constitution was inspired by Section 4(4) (b) of the Constitution. If that is the case, which obviously it is, then it has fallen into the very grave error of seeking to amend the provisions of the Constitution by an Act of the National Assembly, which is a lesser Statute to the Constitution.

No doubt, Section 9 of the Constitution is the section most people would quickly chant as purporting to vest in the National Assembly the power to "alter" the provisions of the Constitution.

I submit that section 9(1) of the Constitution apart from being fraught with legal drafting inelegance and contradictions, is merely a directory power-exercising provision and not a substantive power-vesting provision.

For Section 9(1) to be effective, it ought to have been preceded by a substantive power-vesting provision to the like effect, for example, that the National Assembly shall have power under and by virtue of this Constitution on behalf of the People of the Federal Republic of Nigeria to amend the provisions of this Constitution.

It is trite constitutional law that an act or law cannot amend the provisions of the Constitution. Because, the Constitution is superior to the provisions of an Act or Law. The implication of Section 9 of the Constitution, as it stands, is that the National Assembly would make an Act which would provide that certain provisions of the Constitution have been amended and would specify the nature of the amendments in the Act. This would be sacrilegious. To do so would be to place an Act of the National Assembly over the Constitution, or equate such Act with the Constitution as was insultingly done in the case of the National Youth Service Corps Decree 1993; the Public Complaints Commission Act; the National Security Agencies Act; the Land Use Act under Section 315(5) of the Constitution.

Again, in the light of the preamble to the fact that it was not the National Assembly that made, enacted and gave the Constitution to the People of the Federal Republic of Nigeria, but the People themselves, the National Assembly cannot amend the Constitution in the absence of express authorization by the People themselves. I submit that the mandate the People of Nigeria gave the National Assembly, through the ballot box, is only to make laws for the peace, order and good government of Nigeria or a State thereof, contained in Section 4 of the Constitution.

The mandate does not extend to making a Constitution or amending it, which the

Coordinating Committee vide the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999 to become the current 1999 Constitution.

Thereafter, an amended or revised Constitution would be produced. But if the National Assembly must amend the Constitution on behalf of the people of Nigeria, with whom sovereignty lies, without recourse to the people by any means, the Preamble to the Constitution would have to be amended to include provision to the like effect, for example, that: We the People of the Federal Republic of Nigeria having firmly and solemnly resolved ... do hereby make, enact and give to ourselves this Constitution, and do hereby mandate the Legislative Houses created by this Constitution to amend, in our behalf, this Constitution in accordance with the provisions of this Constitution.

The above provision would obviate the necessity of having to resort to the People constantly through ad hoc Constituent Assembly or Constitutional Debate Co-ordinating Committee or Constitutional Conference each time the need to amend the Constitution arises. But as it is now, Nigeria has no option but to convene a Constituent Assembly or Constitutional Conference or set up a Constitution Amendment Debate Coordinating Committee to give Nigeria an amended Constitution wherein such provisions as above, among others, as to how the National Assembly could amend the Constitution would be included. Any purported amendment of the Constitution as it is now by the National Assembly would be illegitimate and unconstitutional.

At this juncture, it would be pertinent to ask the question: What does the word "proposal" which subsections 9(2) and (3) of the Constitution say should be supported and approved by members of the Legislative Houses mean? B. O. Nwabueze, Learned Author of the book *Federalism in Nigeria* under the Presidential Constitution at page 27 thereof asked a similar question and answered it thus:

This leads to the question what constitutes a proposal? A proposal implies some exercise of power or authority; it implies a decision, though one that carries no finality.

The doctrine of the People as the Source and Prescribed Authority in Constitution-making and amending, contained in the Preamble to the Nigerian 1999 Constitution is brought to the fore, even if latently, by the provisions for approval of the proposal by the People in a Referendum in Section 8(1) (b) of the Constitution on Creation of New States. Creation of New States and the resultant Boundary Adjustments would of a necessity lead to an amendment of the Constitution. I submit therefore that amendment of the Constitution for any purpose whatsoever is of equal fundamentality like State Creation which ought to involve the input of the People, who in the first place, are the Source of the Constitution itself. This should not be done just as a righteous gratification to the People but for the legitimacy or validity of the Constitution-amendment itself. This is the standard Constitutional Practice in other Jurisdictions of the world like United States, Australia, Switzerland and Canada.

Even in Nigeria, the constitutional history, precedent and development had been such that post-independent Nigerian Constitutions had always had the input of the Nigerian people in one form or the other.

On October 4, 1975, a Constitution Drafting Committee was set up to give Nigeria a new Constitution. On October 6, 1977 a Constituent Assembly was inaugurated with

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National Assembly now claims under Section 9 of the Constitution. The People of Nigeria never ceded, delegated nor relinquished to the National Assembly their sovereign Constitution-making power, including the power to amend same. There is a difference between the power to make laws for Government, and the power to make, enact and give a Constitution to a People or State and to amend it.

There is also a difference between a constitution and a Government. Whilst the People donate the power to make laws for the peace, order and good government to the Legislative Houses in periodic legislative elections, held under and by virtue of the Constitution, they however retain for themselves the sovereignty or power to make, enact or give to themselves a Constitution which they often exercise through a Constituent Assembly, Constitutional Conference or Constitutional Debate. See Decree No. 24 of 1999. According to Tom Paine, in his work *Rights of Man* (edited by H. Collins) at page 207:

A Constitution is a thing antecedent to a government, and a government is only the creature of a Constitution. A Constitution is not the act of a government, but of a people constituting a government; and government without a Constitution, is power without a right.

Subsections 9(2) and (3) of the Constitution provide that the 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 for the alteration of the provision of the Constitution is supported and/or approved by the votes and resolutions of a specified number of members of the Legislative Houses. The key preliminary word here is the 'proposal.' The questions are: Who makes the proposal for the alteration of the provisions of the Constitution which members of the Legislative Houses are to support and approve? Are members of the Legislative Houses who are to support and approve the proposal also to make the proposal? Where is the proposal to be made? How is the proposal to be made? Has the National Assembly received such a proposal now? From who and when? What is a proposal?

The National Assembly is not by the Act amending the Constitution. It is only ratifying by a legal instrument what the People did at the Constituent Assembly or Constitutional Debate or Constitutional Conference to become the new or amended Constitution in the same way as the then Provisional Ruling Council, the legislative equivalent of the National Assembly, ratified what the People did through the Constitutional Debate



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the charge to members to review and fine tune the Draft Constitution. On May 28, 1994, Elections were held nationwide to elect members of the Constitutional Conference. On June 27, 1994, the Constitutional Conference was convened and it submitted its Report on June 27, 1995.

On November 11, 1998, the Constitutional Debate Coordinating Committee was inaugurated and charged with the responsibility to coordinate and collate the views and recommendations canvassed by individuals and groups for a new Constitution for Nigeria, which gave birth to the present 1999 Nigerian Constitution.

For the National Assembly which is an integral part of the Government of the Federation of Nigeria to give Nigerians a new or revised constitution as they want to do now would mean the Government of Nigeria giving Nigerians a constitution, whereas it is the People of Nigeria that should give the Government of Nigeria a Constitution; for a constitution at all times ought to be the Act of the people and not the Act of Government. See Tom Paine in his *Rights of Man*, supra; B. O. Nwabueze in his *Federalism in Nigeria Under the Presidential Constitution*, supra.

In amending the constitution however, let us bear in mind what the late Chief Obafemi Awolowo said in the lecture he delivered at the University of Lagos on Friday, February 24, 1967 titled Constitution Making in Developing Countries: "In many parts of the world, the search for a suitable constitution is a perennial exercise.

Because of the effect for good or evil which the working of a constitution is bound to have on the lives of the entire people of a country, and because of the love of power on the part

of various individuals and groups in a society, a disproportionately large number of people always feel called upon and competent to prescribe the requisite formulae for a suitable constitution.

It does not occur to such people that the making of a constitution is a job for experts, and that it requires as much specialised knowledge and skill as the making of a bridge or of a roadworthy motor vehicle. They believe that the only qualifications which they need to have are patriotism, general education, and the urge to power and group partisanship. With the result that, in any country where the search for a new constitution is in progress, there are as many constitutional prescriptions, and as many principles or lack of principles underlying them, as there are articulate group interests.

It is my considered opinion that no suitable and satisfactory constitution can be confidently evolved in this haphazard and free for all fashion. I have used the word 'confidently', advisedly. If a suitable constitution emerged from such a chaotic and inexpert approach, it would be the result of accident pure and simple, not of confident planning and expectation.

I hereby humbly call on the Federal Government to take steps to convene a Constituent Assembly or set up a Constitution Amendment Debate Co-ordinating Committee for the amendment of the Constitution without further delay.

This is the only step that would give credibility and validity to such Constitution-amendment exercise and not the present frolic of the members of the National Assembly that is already enmeshed in controversies.

• **Osarekhoe is a Benin-based lawyer.**



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 ABANDONED VEHICLES IN OUTPATIENT CAR PARK**

This is to inform the general public that twenty nine (29) vehicles have been lying in the Outpatient Car Park of the Hospital for sometime now.

The vehicles are:

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6.	Peugeot 404 P/UP	Blue	Lagos - AE 156 PKJ
7.	BMW	Blue	Lagos - BJ 459 AAA
8.	Kenault	White/Brown	Delta - AL 475 WWK
9.	Mazda 929	Blue	Lagos - CB 544 AAA
10.	V/W Kombi Bus	Yellow/Black	No Number
11.	Opel	Brown	Lagos - EQ 794 AAA
12.	Mitsubishi	Galant	No Number
13.	M/B 190	Grey	Lagos - DX 257 EKY
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28.	Nissan	Blue Bird	Lagos - EF 476 AAA
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