THE PROPOSED ALTERATION OF THE PROVISIONS OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999

PRESENTED BY

LAWYERS ALERT

IN

CONJUNCTION

WITH

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TO THE

SENATE COMMITTEE ON THE REVIEW OF THE 1999 CONSTITUTIONAL

26TH & 27TH MAY, 2021.

BACKGROUND

Recently, the Senate Committee on the Review of the 1999 Constitution invited Memoranda from Nigerians to a 2-day Public Hearing on the "Proposed Alteration to the Provisions of the Constitution of the Federal Republic of Nigeria, 1999" in the Six Geo-political Zones of the country. In response to this call, Lawyers Alert has put together this memoranda highlighting certain alterations that will address some salient provisions of the constitution that have been held to seriously derogated the beauty of the constitution.

The issue of constitutional amendment has lingered in national discourse for so many years, and it comes as a relief that the National Assembly seeks to finally addressed these constitutional issues for the progress of the country. At various times and instances where the issue of constitutional amendment is addressed, there are certain concerns that have repeatedly made the front burner in national discourse. Issues such as the justiciability of Chapter 2 of the Constitution, rights of vulnerable groups, Sexual and Reproductive Health and Rights, gender and that of the ratification of international treaties and conventions amongst others will be addressed in this memorandum**.**

Further to the above, the Constitution of the Federal Republic of Nigeria, 1999 (as amended), and all International Human Rights Instruments as applicable under the Nigerian jurisprudence frown at these violations of rights in line with the Violation Against Persons Act, Administration of Criminal Justice Act, and HIV Anti-Discrimination Act amongst others.

MEMORANDUM ON CONSTITUTIONAL AMENDMENT

The 1999 Constitution has undergone four alterations since it came into force on May 29, 1999. The first second and third amendments took place in 2010, while the third amendment, which is embodied in the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 (Third Alteration Act), came into force in 2011 and the fourth alteration relating to electoral matters in 2017. The 1999 constitution restored democratic rule to Nigeria and is still in effect today. In view of the recent economic, social and political demands of a sovereign state such as Nigeria, it has become pertinent to amend the constitution to suit the current global policies and address the needs for the people. It is central to our collective desire as a nation to evolve a proper and active constitution that will address the needs of the people and is generally acceptable to the people. Some constitutional issues to which amendments are required are discussed in the submission below.

1. **Justiciability of Chapter II: Fundamental Objectives and Directive Principles of State Policy**

The 1999 Constitution of Federal Republic of Nigeria, as amended in Chapter 2 provides for Fundamental Objectives and Directive Principles of State Policy, which include socioeconomic right of persons. Notably, theses rights are important to the citizens of the country and ought to be guaranteed and enforceable. Section 6(6)(c) of the Constitution declares Chapter 2 to be non-justiciable, the section provides thus:

> The Judicial powers vested in accordance with the foregoing provisions of this section –
>
> (c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;

The provisions of Section 6(6)(c) clearly implies that the directive principles of state policy found in the constitution were explicitly considered non-justiciable and unenforceable by the citizens against the applicable authorities. Section 6(6)(c) creates a caricature of the duties imposed by Section 13 of the constitution on the institutions of government to follow the provisions of Chapter II. This restriction of the said rights in Nigeria has undoubtedly

affected the degree of responsibility of government to the people and even our image with in the international community. It also hampers the development and the accountability of government.

The justiciability of Chapter II of the Constitution will encourage transparency and make the government more accountable to the people. Further the separation of human rights into two categories, civil and political rights on the one hand, and physical, social, and cultural rights on the other, is based on concerns against the justiciability of economic, social, and cultural rights.

The Committee on Economic, Social, and Cultural Rights (Committee on ESCR) of the United Nations (UN) provides a benchmark for states seeking to fulfill their international commitments in the area of socio-economic rights. It asks parties to consider two international law standards when dealing with issues related to the domestic implementation of the CESCR.

> The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties, is that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. In other words, states should modify the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.

Flowing from the above, we proposed that the bench mark recommended by the CESCR be adopted to ensure that all rights are provided for and better protect the rights of the citizenry. In addition, certain rights and obligation imposed on states for the benefits of the people should be made enforceable in courts. In the alternative, we propose that the rights in section 15 of the constitution that prohibits discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties and section, section 16,17,19,21 and 22 of the Constitution be incorporated into chapter IV of the 1999 Constitution.

2. **General Application of the provisions of certain laws such as the Violence Against Persons (Prohibition) Act, 2015; HIV/AIDS Anti-Discrimination Act 2014, Discrimination Against Person with Disability Act (Prohibition) 2019 and Administration of Criminal**

Justice Act (ACJA) and the Decriminalization of Petty offences in All States of the Federation.

Certain laws in Nigeria enacted by the National Assembly have no nation-wide application. It is not in doubt that legislations on items listed on the exclusive legislative list have a national wide application while other legislations on those that find themselves on the other legislative lists could be legislated upon concurrently by either the National Assembly or the assemblies of the various states of the Federation. The general implication of this is that beautiful and robust laws passed by the national assembly will have to be domesticated (separately passed) at the states before they become applicable in those states. In this quagmire, a number of well-meaning pieces of legislation passed by the central legislature are left at the mercy of the state assemblies. To avoid this kind of ugly situation in the future, amendment to the constitution should make it possible for the concurrent presentation of some laws passed by the National Assembly to the state assemblies for possible passage and applicability in such states.

Notably, since 2015 when the Violence Against Persons Prohibition Act was enacted by the National Assembly, only 23 states out of 36 states in the Federation has domesticated the Act and passed it as laws in the states. The utilitarian impact of these legislations ought to be considered while determining the scope of their application in all states in the Federation.

Furthermore, it is proposed that the amended Constitution should decriminalize petty offences. On December 4, 2020, the African Court on Human and Peoples' Rights published and delivered an advisory opinion declaring national laws that criminalize vagrancy to be incompatible with human rights standards. The opinion concludes that laws that essentially criminalize homelessness, poverty, or unemployment are overly broad and allow for abuse. The Court held that such laws punish individuals for their status rather than their actions, are a discriminatory and disproportionate State response, and violate numerous human rights – including specific rights of children and women. We propose the decision of the African court should be adopted and implemented, in furtherance to which petty offences should be decriminalise and vagrancy laws should be ousted by the constitution.

3. **The innovation of Public Interest Litigation (PIL) as a tool to achieve social objectives**

It is further proposed that the scope of public interest litigation in Nigeria be expanded vide the constitutional amendment by enabling easy access to courts

for those disadvantaged. It is a known fact that the section 6(6)(b) of the Constitution is the background where the issue of locus standi is hinged in the Nigeria. The section provides thus:

> The judicial powers vested in accordance with the foregoing provisions of this section –
> shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

flowing from the above, Section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) vests the courts established under the section with jurisdiction over all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations **of that person.** A literal interpretation of section 6(6)(b) of the constitution means that the jurisdiction of courts can only be invoked where the suit involves the determination of any question relating to the civil rights and obligations of a person (Plaintiff) whose is directly affected by the civil wrong or obligation. This means that a person with the legal right to approach the court must be able to demonstrate to the satisfaction of the court the personal injury or damage that particular executive or legislative act has caused or is likely to cause him which is over and above what other members of the public will suffer or are likely to suffer by reason of that act. In constitutional matters, legal standing to sue avails only that party who establishes sufficient interest in the subject matter of the action and the violation or likely violation of his interest.

The requirement of locus standi as enshrined in section 6 (6) (b) of the 1999 Constitution has posed considerable challenge to the institution of legal actions in courts by civil society organizations and public spirited individuals for the protection of public interest. Intending litigants in public interest actions are always confronted with objection that the particular legislative or executive act sought to be impugned has not violated their civil rights and obligation so as to vest in them "sufficient interest" to enable them to sue. Locus standi or standing to sue is an aspect of justiciability and as such the problem is surrounded by the same complexities and vagaries inherent in justiciability. The fundamental aspect of locus standi is that it focuses on the party seeking to get his complaint before the court not on the issues he wishes to have adjudicated. In several instances and decisions, courts have invoked the

concept of locus standi and the provisions of section 6(6)(b) to decline jurisdiction in public interest litigations.

Conversely, it has become imperative for the amendment of Section 6(6)(b) of the Constitution to expand the scope of litigation to include public interest litigation to allow well-meaning members of the society and civil society access the court for redress in cases of infraction of rights, interpretation of the constitution or any law so enacted. As an added measure, a conscious and deliberate attempt should be made to relax the rules of standing and procedure and allow access to court by litigants and civil societies organizations to assert the rights of members of the public whose right have been, are been or are likely to be infringed upon.

4. **Application of International Convention and Treaties signed**

Treaties validly signed between Nigeria and other bodies of foreign law do not immediately translate into Nigerian laws without legislative involvement. Such conventions and treaties must be expressly passed into law by the National Assembly in compliance with section 12 of the Federal Republic of Nigeria's Constitution, as amended (the 1999 Constitution) before it becomes applicable. Section 12 of the 1999 Constitution provides thus:

> 12. (1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
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> (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the he Exclusive Legislative List
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> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation for the purpose of implementing a treaty.

As garnered from the provisions of section 12 above, the National Assembly has the mandate to enact the treaties to become law in Nigeria. The National Assembly has not demonstrated adequate commitment to fulfilling its constitutional mandate of converting treaties into domestic legislation. This has not only resulted in weak treaty enforcement in Nigeria, but it has also

deprived the Nigerian legal system of the necessary support and complementarity that those ratified but undomesticated treaties should provide.

It may be inferred that the National Assembly's casual approach toward converting treaties into domestic laws has been attributed to the fact that the National Assembly does not usually accompany the executive during treaty negotiations. Notably, the 1999 Constitution and the Treaties (Making Procedure Etc.) Act 2004 does not specifically place treaty-making powers under the Exclusive List. The process of enacting a treaty into law in Nigeria by the National Assembly is similar to the process of enacting an ordinary bill into law. The only distinction is the omission of the requirement of presidential assent in treaty making. It is important to state that the process of treaty making is therefore very cumbersome and should be amended and enacted to allow easy application of signed international treaties and conventions in Nigeria.

In addition, the requirement of Section 12(3) of the constitution ratification by a majority of all the House of Assembly in the Federation before a treaty can be enacted as law in Nigeria makes a caricature of the entire treaty making process. This clause represents a reasonable stumbling block in the National Assembly's domestication of treaties, since obtaining the ratification of states' Houses of Assembly is almost impossible. There is little wonder that aside the African Charter on Human and Peoples Rights, no other treat or convention has been given legislative backing in Nigeria.

Relying on the principles of direct applicability and direct effect, and the arguments developed around these principles in relation to the obligations of State parties to treaties it is proposed that treaties or convention to which Nigeria is a party, should be given direct application or the processes of the enactment of such treaties should be amended. The National Assembly should be exclusively involved in the treaty making process and the requirement of ratification by state houses of assembly should be dispensed with. In order words, it is proposed that Section 12 of the 1999 Constitution be repealed completely such that any treaty of which Nigeria is a party is justiciable in Nigeria without any legislative interference.

5. **The expansion of the scope and content of the fundamental rights in the Constitution to include Sexual and Reproductive Health and Rights:**

It is proposed that the scope of fundamental right to life's reach should be broaden to include the bare necessities of life, such as sufficient nutrition, clothes, and housing, as well as facilities for reading, writing, and expressing oneself in a variety of ways. The expanded notion of the right to life enabled the court, in its public interest jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of economic, social and cultural rights.

We further propose that the scope of right to life in Nigeria should encompass right to health and Sexual and Reproductive Health and Rights. Significant developments have occurred in the field of sexual and reproductive health and rights (SRHR) globally. However, this is yet to translate into improved status of SRHR in Nigeria especially in the laws and Constitution. Free health care, maternity care and postnatal care should be provided, irrespective of the birth delivery method used. It is further proposed that the National Human Rights Commission should be constitutionally empowered to enforce and implement the provisions relating fundamental rights in the Constitution.

6. **Gender Equality/Increase participation of Women and Vulnerable groups in governance**

The introduction of Gender and Equal Opportunities - GEO Bill, 2016 at the National Assembly came with a lot of accolades, but the said Bill failed at the Senate as the majority of members voted against the enactment of the Bill. The Bill seeks to domesticate relevant parts of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and also prohibit certain practices on women that may be interpreted as unfair. The Bill seeks to achieve the right to equal opportunities for both genders; it also raises the need for Constitutional amendment to give force to some of the issues raised by the GEO Bill. For instance, the right to free healthcare for new mothers and children; and reserving up to 35% of positions in the public sector for women.

It was disheartening when the Senate failed to pass the bill which seeks to address major gender issues in Nigeria. It is further proposed that the certain provision of the Bill should be incorporated in the constitution during amendments. In line with the GEO Bill, we proposed that 35% of positions in public sector and politics should be reserved for women to bring about women inclusion in governance while 15% should be reserved for other vulnerable groups including youths and the persons living with disabilities. The inclusion of women and vulnerable groups in governance should also be extended to

elective positions to spur everyone into action to ensure that women/and other vulnerable persons vie for and win elective positions.

7. **Reform of Chapter III of the Constitution on Citizenship**

Successive Nigerian Constitutions since political independence had emphasized the issues of citizenship and fundamental human rights. Chapter III of the 1999 Constitution especially identifies who a citizen is and how one can become a citizen. Specifically sections 25 to 27 identify how citizenship can be attained in Nigerian. These are by birth, registration and naturalization (Federal Republic of Nigeria, 1999).

In the same vein, chapter IV of the Constitution dwells extensively on the Fundamental Rights of Nigerians irrespective of their ethnicity, location or place of birth (Federal Republic of Nigeria, 1999). Obviously these provisions were meant to act as safeguard against or to provide redress for violations of one's citizenship rights. It would seem however that these provisions did not envisage or perhaps display a total ignorance of situations whereby the enjoyment of citizenship rights will be handicapped or prevented by extraneous considerations such as indigeneity or ethnicity. Even where there are clear provisions on the fundamental rights that Nigerians can enjoy, the situation is not in any way different.

Lofty as these provisions of chapter IV of the constitution are, the reality is far from the ideal. Hence, the contention is that the Constitutional provisions are negated by political consideration in which case there is a focus on what is referred to as indigeneship rights which are either ethnic or subethnic groups' rights. This has exposed the federal system to a certain level of divided or dual citizenship between group rights and individual rights. Consequently, it places group rights over individual rights and hence the rights of ethnic groups particularly of indigenes over citizens.

It has been argued that the problem of citizenship in Nigeria today largely stem from the discriminations and exclusion meted out to people on the basis of ethnic, regional, religious and gender identities. This is because those who see themselves as "natives" or "indigenes" exclude those considered as "strangers" from the enjoyment of certain rights and benefit that they ought to enjoy as Nigerians upon the fulfillment of certain civic duties, such as the payment of taxes.

The indigenes-settlers' problems in Nigeria had become protracted due to the narrow definition of citizenship in theory and in practice, and the desire by the

elite to enjoy the benefits of both indigeneship and citizenship has not helped matters. Thus, rather than playing down divisive tendencies and promoting uniting factors, the reverse has happened; and beyond generating crises of diverse proportions with attendant loss of human and material resources in the past, there is no indication that a worst crisis might not be generated in the future because the fundamental cause of the crises is either being ignored, glossed over or wished away, as if it were capable of solving itself. Hence there is a need to take the bull by the horn and address comprehensively the root cause of the problem.

The **Federal Character** principle was meant to promote unity in diversity while encouraging accommodation at the federal level particularly in term of appointments. However, when it is considered that the Federal Character principle and its ancillaries such as the **quota system** as well as **zoning** among others have promoted mediocrity at the expense of merit particularly with the abuse that characterized its application in civil service appointments, promotion, admission into schools and so on, then it could be seen as a solution that has become problematic. More importantly, the exclusion of Nigerians on the basis of ethnicity or sub-ethnicity and the consequent denial of access to land, education, employment and even political offices could not have been envisaged or perhaps deliberately ignored/glossed over by the framers of the national Constitution.

Remarkably, the Constitutional provisions on citizenship and fundamental human rights should have provided the needed remedy to the indigene-settler dichotomy. Some of the provisions were seriously flawed and even contradictory in some cases wherein citizenship versus Federal Character, and more importantly in the promotion of group rights over individual rights through political concept like indigeneity. Second, because the provisions did not envisage or contemplate some problematic situations. And in essence, citizenship had not, and might not be able to resolve the indigene-settler problem particularly in its present form. Notably, basic principle of modern citizenship seems to be, where you pay your taxes is where your home is, there you demand services and enjoy benefits. In essence, residency defined by a determined number of years and qualified by the performance of such obligation as paying tax should make a Nigerian eligible for citizenship anywhere in the country, irrespective of his ethnicity or place of birth.

There is the need for a re-thinking or a redefinition of citizenship vis-à-vis other limiting factors; apart from involving or introducing changes that are capable of challenging the status quo, a re-thinking or strengthening of citizenship that

will address the problem of indigene versus non-indigene. There is need to build and prioritize national citizenship through a reform of the Nigerian Constitution which involves incorporating the "**Residency Right**" mentioned above into the Constitution. Furthermore, the need to reform section 147 of the 1999 Constitution was suggested which states that those to be appointed as ministers from each state of the Federation must be indigenes of that state. Conversely, in this sense it was suggested that indigenes must be defined as those who meet the residency requirement in any particular state. In this age of global citizenship, becoming a citizen in Nigeria both in words and in fact should not be circumvented by Constitutional provisions.

Conclusion

It is the firm belief of Lawyers Alert and other partners, that adhering to the amendments proposed here will bring the Constitution of the Federal Republic of Nigeria in tandem with current realities.

Thank you for the opportunity.

Signed On Behalf of

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