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Monday, April 8, 2024

Rt. Honorable Benjamin Kalu
Deputy Speaker of the House of Representatives
Chairman, House Committee on Constitutional Review,
Room H331,
House of Representatives White House,
National assembly Complex, Abuja

Dear Mr. Deputy Speaker,

CALL FOR MEMORANDA ON CONSTITUTION REVIEW

Further to your call for memoranda and input into the constitution review exercise presently being undertaken by the House, I am pleased to enclose herein matters for the Committee's consideration.

Background & Introduction

My name is Funso Doherty, and I am a resident of Lagos State which is also my State of Origin and of Birth. I was a Gubernatorial Candidate for Lagos State in the 2023 General Elections and remain actively engaged in Governance matters, particularly as they affect Lagos State.

I am privileged to make this contribution to your work, which addresses matters bordering on the existential, at a critical defining time for our Nation, in keeping with a long history of contribution to political developments in our city, state and Nation by members of the Doherty family of Lagos. These include, among others, service as elected representative for Lagos on the Legislative Council of Nigeria in the 1920's and 1930's (T.A. Doherty) and pursuing litigation (Doherty v Balewa, 1960), all the way to the Privy Council, that established important precedents and judicial interpretations of constitutional provisions on federating principles and the separation of powers.

I. Federal Structure and Devolution of Powers

Section 2 of the Constitution is clear in both its language and foundational intent that Nigeria shall be a Federation consisting of States and a Federal Capital Territory. It is however a fact of history that our existing body of laws, including our current constitution is an amalgam developed through colonial, military and democratic eras whose effect may sometimes be at odds with the intent of Section 2.

It is important therefore that, as a general principle going-forward, the spirit of your law-making must reflect and be guided by the fundamental basis of association outlined in Section 2.

a. Resource Control & Derivation

Section 44 of the Constitution vests ownership and control of mineral resources across the Federation in the Federal Government. The roots of this can be traced to Colonial Ordinances in the early 1900's, the force of which was consolidated and expanded over time, most notably and with far-reaching consequences, by the Petroleum Decree of 1969 enacted by the Gowon Administration during the civil war. Mineral resources and mining are also items on the Exclusive Legislative List, giving the Federal Government exclusive right to legislate on them - which is a distinct matter from the question of who owns the mineral resource.

As a result, the economic benefits of exploiting these resources accrue, in the first instance, to the Federal Government. They are then allocated based on constitutional and other provisions, first to the host states from which the minerals came (the derivation share), and then to the different tiers of Government. The Portion allocated to State Governments is then further shared amongst them based on a sharing formula that considers criteria such as land mass, population etc.

The present derivation share is 13% but has at various times been as high as 50% and as low as 1%.

Both the ownership question and the derivation share have been the source of much conflict and agitation over the years. The host communities and those sympathetic to them have argued for recognition/restatement of their ownership rights on the one hand and/or a higher derivation share on the other.

Comments & Recommendations

It is a manifest travesty and injustice that host communities remain in a state of stark under-development that stands in sharp contrast to the immense wealth extracted from those communities for well over half a century. This is compounded by the widespread and widely acknowledged environmental degradation suffered by these communities that, in many cases, make it impossible for the people to pursue their traditional means of livelihood.

While the choice of state ownership or private ownership of mineral resources are alternative regimes that can legitimately be pursued by different sovereign states, nationalization, acquisition and ownership by a Sovereign Government carries with it a high burden to exploit those resources to benefit the citizens equitably and justly. This is especially so in the case of a Federation. Sadly, it has manifestly not been the case in Nigeria. Accordingly, we recommend:

1. The Derivation Share of Federation revenues should, in the first instance be increased to 25% and then be further raised to 50% via annual increments over the next five years. The recent significant increase in Federal allocation distributions provides a unique opportunity to implement this with mitigated negative collateral impact on non-producing states.
2. The derivation share to each state should be further shared among the State Governments and the Local Governments, also with a derivation component determined at that level.

3. The derivation principle should also be applied for all other identifiable revenues that are federally collected.

4. However, only revenues that are so mandated constitutionally, should be collected by the federal government. Others should remain with the states as federating units and local governments in line with the constitution.

5. The National Assembly should simultaneously institute a process to examine the feasibility, desirability and, if relevant, modalities for reverting ownership of mineral resources in host communities to them.

6. Mineral resources and Mining should be moved to the concurrent list

7. Thereafter, State Houses of Assembly can also legislate and be carried along on Minerals and mining developments within their territories, to the extent allowed by their revised powers as may be provided in the altered constitution

b. Local Government Autonomy

While recognizing States as the primary Federating entities, the Constitution distinctly recognizes local governments, lists them, outlines certain functions for them and makes financial provisions for them.

Local Government Funding

It is intended that local Governments should have autonomy within defined bounds and the wherewithal to operate with such autonomy. Provision for this is made through the instrument of the State Joint Local Government Account into which LGs share of Federal allocations as well as funding from State Governments to the Local Governments are to be paid.

Curiously, Section 162 (7) of the Constitution seems to go even further, purporting to vest the National Assembly with authority to prescribe to a State what proportion of its own "total revenues" should be paid to the local governments. This overreach is inconsistent with Federating Principles and in conflict with Section 7 (6)(b) that provides that the State Houses of Assembly shall make provision for statutory allocation of public revenue to local government councils within the State.

LG funding generally has been an area of conflict and disagreement. States have often been accused of withholding funding from LGs including their Federal allocations.

Local Government System

Section 7 provides clearly that the system of local government by democratically elected local government councils is guaranteed under the constitution. In disregard. of this however, the practice where State Executives sack the leadership of LGs and institute caretaker committees is commonplace, greatly weakening local government capacity and autonomy

Conclusions and Recommendations

1. Local governments should be paid their Federal Allocations directly and the use of a Joint account administered by the State Government for this purpose should be discontinued.

2. Section 162 (7) should be deleted.

3. Section 7 should be expanded to explicitly state that neither the State Government Executive nor the State House of Assembly has the authority to remove, suspend or prevent from sitting an elected local government council member without a valid order from a court of competent jurisdiction.

4. The unlawful suspension, removal from office or prevention from sitting of a democratically elected legislator or local government council member should be considered a Crime against the State. In these circumstances, or, where a democratically elected Council fails to sit, for a period exceeding 90 days, there shall, for purposes of Section 305 (3) (d) of the Constitution, be deemed to have been a breakdown of public order. In consequence:

a) The Federal Government shall be empowered to withhold LG funding from the Federation account to that LG.

b) The President shall be empowered to declare a state of emergency in that local government in line with the provisions of Section 305.

5. Recall procedures should be available and should apply to the LG Council.

6. The functions of local governments should be more clearly outlined and better delineated especially as measures are decisively implemented to secure and protect their funding.

c. State Police

The arguments for State and local Community Policing have been made repeatedly. Fundamentally, and globally, policing is most effective when localized i.e. when police officers belong to, are drawn from and understand well, the community that they are policing.

While there is widespread acceptance of these arguments, the concerns that have been frequently raised about the potential for abuse by State Governments especially Governors who may turn the state police into semi-private militias have been a formidable impediment.

It is my view that for effective law and order, and given the security imperatives, the introduction of state and community policing is inevitable. What the National Assembly should direct its attention to, is identifying means, i.e. structures arrangements and processes of mitigating the possible risks of abuse. In this regard:

Recommendations

1. The Constitution should be amended to allow for the introduction of State Police and Community Police.

2. This amendment should empower States to set up their own internal policing arrangements at state level without need for further Federal legislative action once a bill to that effect is passed by the relevant State House of Assembly.

3. Community Policing may subsequently be introduced subject to the passage of laws to that effect by both the National Assembly and the relevant State House of Assembly.

3. The Nigeria (Federal) Police Force will focus primarily on enforcing Federal laws while the State Police will focus on enforcing all laws within the territory of the State. They will work symbiotically and collaboratively where appropriate, with the NPF taking precedence in the case of Federal Crimes.

4. The Commissioner or Chief of State Police shall be appointed by the Governor acting on the advice of a State Police Commission subject to confirmation of the State House of Assembly.

5. As a check and balance, each Geopolitical zone can be mandated to establish a Regional Police Advisory Board with membership drawn to include some representation from the constituent states within that geopolitical zone as well as some representation from other geopolitical zones. The role of these Boards should be advisory, and they can suggest when action, including Federal action, may be required to address intractable or persistent internal dysfunction or excesses by any individual State Police department. Minimum eligibility for consideration for recruitment and advancement in a State Police department shall be upon attaining 5 years of residency in the State.

II. Electoral Reforms

The 2023 election necessarily produced winners and losers, but there seems to be widespread acknowledgement that, in conduct and process, it fell short of expectations. The various related issues have been widely discussed and canvassed and need not be reproduced here. In this regard:

Recommendations

1. The Constitution should provide that the standard of proof in electoral cases should generally be based on "clear and convincing evidence" and only the related criminal prosecutions should require proof "beyond reasonable doubt".

2. The Constitution should mandate the use of electronic means to transmit and collate election results with a corresponding paper trail for audit purposes.

3. The use of Electronic Voting Machines should also be permissible by the constitution subject to enactment of legislation authorizing same by the National Assembly and provided that audit trails can be established.

4. INEC must publish its final guidelines for the conduct of elections not later than 45 days prior to an election and comply with same. Failure by INEC to comply with its published guidelines in any material respect will be grounds for a fresh conduct of the elections in question.

5. In each state, the materials (ballot papers, polling unit forms, collation sheets) that establish the basis for election results to be announced by INEC should be deposited in the custody of the courts prior to the announcement of election results.

6. The deadline (180 days etc) for completion of election petitions should begin to run from when the full set of documents validly requested by litigants from INEC have been provided.

7. The Constitution should be amended to allow for Independent Candidacy and Regional Political Parties.

III. Land Matters

There has been much debate about the Land Use Act. However well-intentioned it was when introduced, there is widespread agreement that it is no longer fit for purpose and has opened the door for egregious and inequitable acts.

Recommendations

1. The mention of the Land Use Act should be deleted from the Constitution to permit its amendment or repeal by the National Assembly without requiring a constitutional amendment process.
2. Section 44 (1) should be amended to emphasize that compulsory acquisitions of immovable property that entitle the owner to compensation shall include compulsory acquisitions of statutory and customary ownership and occupancy interests in Land, whether developed or not.
3. Section 44 (1) (a) should specify that the entitlement is to "fair and reasonable" compensation to be determined and paid prior to taking possession of the property.
4. The Constitution should provide for review and appeal processes to provide assurance and a check and balance on the unchecked exercise of eminent domain.

IV. Gender Matters

Recommendations

1. The definition of Federal Character should include gender diversity and inclusion of persons living with disabilities.
2. Citizenship provisions for Non-Nigerian spouses of Nigerian citizens should apply to both men and women equally.

V. Child Rights

Recommendations

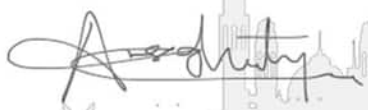
1. The age of consent for marriage should be defined as 18 years in the Constitution.
2. An appropriate list of child rights should be determined and constitutionally guaranteed.

VI. Democratic Structure

As a longer-term exercise, the National Assembly could consider setting in motion a process by which our current democratic arrangements and outcomes can be assessed. Such a review could at the same time consider and assess the relative desirability, practicality or otherwise of alternative parliamentary approaches, proportional representation, majority requirements etc.

I wish you fruitful deliberations in this important task of Nation-building.

Yours faithfully,



Funso Doherty