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A comparative analysis of the constitution alteration procedures in Nigeria and Ghana

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CHAPTER ONE
GENERAL INTRODUCTION

1.1. BACKGROUND TO THE STUDY

A Constitution is a supreme law that births the development or evolution of a nation, by organizing the life of the nation for present and future generations[1]. The Constitution prescribes the rights and duties of the citizens, defines the powers of government, and sets the standards by which the people in a given nation and indeed the international community can judge the performance of government.[2] Many Commonwealth African Countries, including Nigeria and Ghana, commenced their national lives as newly independent states with the Westminster model constitutions gifted to them by the British colonial masters[3], hence they were not initially deeply rooted in constitutionalism. These Westminster model constitutions that were exported to Commonwealth African countries like Nigeria and Ghana were not autochthonous and almost immediately after independence, they jettisoned these Constitutions and adopted new ones to reflect their sovereignty.[4]

[1] J. Hatchard, 'Perfecting Imperfections: Developing Procedures for Amending Constitutions in Commonwealth Africa', [1998] 36 (3) *The Journal of Modern African Studies* 381-398
[2] *Ibid*
[3] *Ibid*
[4] Nigeria made a Republican Constitution in 1963, three years after gaining independence and jettisoned the Nigeria (Constitution) Order-in-Council, 1960. Ghana also made a brand-new Constitution in 1960, only three years after independence.

The 1990s ushered in a new wind of change that blew across Commonwealth Africa and transformed its constitutional landscape in the process. Thus, the impacts of the end of the cold war, and the Harare Declaration[5] of 1991, encouraged many Commonwealth African countries to adopt new Constitutions that involved some degree of participation by the people in an attempt to establish the ethos of constitutionalism.[6] Suffice to note that the Republican Constitution which Nigeria adopted in 1963 did not involve the participation of the people.[7] Nwabueze[8] has also described the 1963 Republican Constitutions as the result of the decision of the Prime Minister and his Regional Premiers who met one day and resolved it was urgent for Nigeria to reproduce the imperial Constitution[9] with the requisite amendments and confer upon it the republican status. The Ghanaian Republican Constitution of 1960 indeed involved the Ghanaian people in the process at the time.[10] However, these new Constitutions provided fundamental rights[11], established countervailing institutions and geared towards promoting good governance and accountability. Another important feature of these new Commonwealth African Constitutions was the introduction of procedural safeguards to preserve the life span of the Constitutions so that they would not be amended the same way like other pieces of legislation passed by the Legislature. The framers of these new Constitutions[12] introduced complex amendment procedures into the Constitutions to guard against retrogressive amendments.

The idea behind the special amendment procedure stems from the special nature of the Constitution as a document that maintains stability in affairs of a nation which if not preserved could be used to undermine the state of affairs which it was designed to preserve originally.[13] Conversely, constant political pressures for incessant constitutional

[5] K Boafor-Arthur, *A Decade of Liberalism in Perspective* in Ghana: One Decade of the Liberal State, K Boafor-Arthur (ed.) (Zed Books ltd, 2007)pp1-20(2)
[6] *Ibid*
[7] J.N. Aduba and S. Oguche, *Key Issues in Nigerian Constitutional Law* (Lambert Academic Publishing, 2014) 90
[8] T Ogowewo, ' Why Judicial Annulment of the Constitution of 1999 is imperative for the survival of Nigeria's Democracy' *Journal of African Law* [2000] (44) (2) 135-166
[9] Nigeria (Constitution) Order-in Council, 1960
[10] The Parliament in Ghana passed the Constituent Assembly and Plebiscite Act, 1960 (No.1) which empowered the Parliament of Ghana under s.2(1) to draft a brand new constitution based on the plebiscite wherein the Ghanaians voted in favour of same. S K Asare, & H K Prempeh, 'Amending the Constitution of Ghana: Is the Imperial President Trespassing?' retrieved from< https://www.researchgate.net/publication/228322929> accessed on 15 July2021,22:56
[11] *Ibid*
[12] Some of these new Constitutions that were passed from the 1990s include the Constitutions of Gambia, Ghana, Lesotho, Malawi, Namibia; *Ibid*
[13] *Ibid*

reforms may render a Constitution vulnerable, but this is relative to the flexibility or otherwise of the formal constitutional amendment procedures.[14]

As the formal organic document that has the force of a supreme overriding law through which a society organizes its affairs[15], a constitution plays a pivotal role in the life of any given nation. This is partly because the Constitution is used to organize the government of a nation, define, and delimit its powers, prescribe the relations between the various organs amongst themselves and the citizens.[16] A Constitution creates stability, hence it is crucial that it transcend generations and promote the ethos of constitutionalism in the life of that nation. It is in light of this that some have argued that certain provisions of a Constitution should not be amenable to amendments or alterations.[17] This is exemplified in the Ghanaian Constitution of 1969 that contained provisions that were prescribed as unalterable, thereby effectively denying the Ghanaians of their inherent right to amend those provisions of that Constitution.[18] While this may have been acceptable under the traditional form of democracy, comparative constitutionalism is vehemently opposed to this view and it is the contention of this study that every provision contained in a Constitution should be subject to amendment when the need arises including the option of remaining in the union as part of a sovereign State. The argument hinges on the influence of powerful transnational norms which recognize the principles of "participatory constitutionalism and communal autonomy".[19] Thus groups should be allowed to demand constitutional reforms which also recognize their inherent right to self-determination.[20] Naturally, the provision in the Nigerian Constitution which makes Nigeria "indissoluble and indivisible" negates the postulations of modern constitutionalism.

[14] R Suberu, 'Managing Constitutional Change in the Nigerian Federation' [2015] (45) (4) *Publius: The Journal of Federalism* 552-579

[15] B. O. Nwabueze, *Constitutional Democracy in Africa* vol.1 (Spectrum Books Limited, Ibadan, 2003) pp36-37

[16] *Ibid*

[17] An example of this is the draft of the Fundamental Constitutions of the Carolinas by John Locke which provided that "these Fundamental Constitutions shall be and remain the sacred and unalterable form and rule of government…forever"; the Ghanaian Constitution of 1also declared certain provisions as unalterable forever.

[18] *Ibid*.

[19] *Ibid*

[20] J Kincaid, Constitutional Change in federal countries: comparative considerations. In *Changing Federal constitutions: lessons from international comparison*, (eds.) A Benz, and F Knupling, (Oplden: Barbara Budrich Publishers 2012) 31-50

It is the contention of this study, in line with the views expressed by modern comparative constitutional scholars,[21] that such a provision be replaced with an exception in form of a secession clause that allows the unity of Nigeria and the like to be subject to negotiation.[22] It may have been preferable to assume that since a Constitution is the glue that binds individual nations, it should contain certain basic institutional structures in that nation which should not be subjected to any form of amendment process. However, this does not give room for one generation to bind the next generation irreversibly in the opinion of Justice Khanna[23]. Indeed, it is a key feature of British parliamentary supremacy, that as supreme as parliament is, it cannot bind future parliaments. A constitutional amendment procedure exists to allow generations perfect unavoidable imperfections that may exist in the Constitution. It is common knowledge that even the Constitutions that are made with the most rigorous procedures are not perfect. Amendment procedures make room to perfect imperfections and make the Constitution adapt to changes and if the procedure is too rigid, it paves the way for people to seek for change through extra-constitutional means.[24] Speaking about the need for amendment procedures in a Constitution, Washington noted that although the United States Constitution[25]is venerated by the friends of America, they acknowledge that it is not perfect but recognize the need to remedy any evil that may arise as a result of unavoidable imperfections.[26]

Many Nigerians consider the 1999 constitution military-driven and that the reference to 'We the people' in the constitution does not truly represent them, therefore leading to various advocacies for change.[27] There have been several attempts at amending the Constitution, with series of setbacks, including litigation on the role of the President, in some cases. In the twenty-two-year life of the Constitution of the Federal Republic of Nigeria, 1999, it has been altered four times, with huge resources being deployed into the process. It has been observed that the constitution review undertaken by the Seventh Assembly (2011-2015), which ran into a logjam despite the huge

[21] Reference Re Secession of Quebec, [1998]2][217

[22] A. Akinrinade, The Ijaw Quest for True Federalism in Nigeria: a bridge building approach through ethnic nationalities. Being a speech delivered at the Ijaw Day celebration, Yenagoa 23, February 2014.

[23] *Kasavananda v State of Kerala* All India Reports , 1973 pp.1849 and 1850, Indian Supreme Court Judgment where Justice Khanna expressly stated that no generation has the monopoly of knowledge; in *Ibid* n1

[24] See the procedure for amending the CFRN, 1999 s.8 and the "Transitional Provisions " in the Ghanaian Constitution of 1979 that were declared unalterable which led to a civil war.

[25] Constitution of the United States of America, 1787

[26] *Ibid*

[27] I. Hassan, 'Nigeria's constitutional reform process: The quest for a people-driven constitution' [2017] IDEA, < https://constitutionnet.org/news/nigerias-constitutional-reform-process-quest-people-driven-constitution> accessed 24 Oct 2021

amount of state resources deployed into the process, represented the first genuine participatory process in constitution making since the country's return to democracy with public hearings held across the six geo-political zones of the federation at both constituency and zonal levels.[28] Nonetheless, one of the amendments proposed the removal of presidential assent from the process of constitutional amendment. This was enough for the then President of the Federal Republic of Nigeria, Dr. Goodluck Ebele Jonathan, to veto the amendments, which were lumped in a single Bill. The resultant effect was recourse to litigation by the National Assembly. The entire process was frustrated, and came to nothing.

This study compares and analyses the formal amendment procedures adopted in the Constitution of the Federal Republic of Nigeria, 1999, and the Ghanaian Constitution of 1992 and determines whether the formal amendment procedures provide sufficient safeguards to protect them from being undermined by retrogressive amendments. It also examines the extent of involvement of the people in the amendment procedure to promote constitutional democracy in Nigeria and Ghana.

The study undertakes a realistic analysis of the procedure for amendment of the 1999 Constitution. It critically considers the arguments concerning the validity of the amendment procedure, while also unveiling the apparent constitutional quagmire on that behalf, with recommendations for improvement.

1.2. STATEMENT OF THE PROBLEM

The need to probe into issues raised above, such as the indissolubility of a nation, level of involvement of the people in constitutional alteration and the requirement of presidential assent, with a view to laying them to rest through comparative analyses, prompted this study.

The Constitution of the Federal Republic of Nigeria emerged into political turbulence and has since been enmeshed in agitations for either drastic amendments or outright replacement. It had been promulgated by the military in an atmosphere of social and political restiveness, and without public debate, because when General

[28] *Ibid*

Sani Abacha, the then head of state, died suddenly on the 8th of June 1998, the country was on the verge of complete disintegration. According to Aguda, continuing well into the regime of his successor, General Abubakar Abdulsalaam, there was an angry, open, and widespread agitation, particularly in the South, for the breakup of the Federation or, at best, for its conversion into a confederation.[29]

Having regard to the manner of emergence of the Constitution of the Federal Republic of Nigeria, 1999, the clamour for its alteration has never ceased. On that basis, each session of the National Assembly since the Fourth Republic embarks on constitution alteration exercise, with areas of focus. The first, second and third amendments to the Constitution were debated and signed into law during the tenure of the sixth National Assembly (2007-2011). The seventh National Assembly (2011-2015) conducted a long-winding review process, but despite significant expenditure, the process ultimately failed after the proposed amendments, which were submitted as a single bill, were vetoed by President Goodluck Jonathan. Taking a cue from its predecessors and wary of a potential presidential veto, the eighth National Assembly (2015-2019) adopted a piecemeal approach to the review process by setting up two separate committees[30], one for the House of Representatives and another for the Senate, with the hope that multiple bills proposing different amendments would have more chance of being passed into law than a single bill. However, not all the amendments could be pushed through before the National Assembly's tenure elapsed. With the efforts so far failing, the groundswell of critical voices and stakeholders continue clamouring for a people-driven constitution to remedy the lack of public representation in the procedure and substance of the military-led process of making the 1999 Constitution.

The process of another amendment to the Constitution in the present Senate began in February 2020, when the President of the Senate, Ahmad Lawan, formed a Committee on Constitutional Review to begin the process of a fifth revision to the Constitution. Many of Nigeria's ethnic nationalities and interest groups believe that the content and character of the 1999 Constitution has been stifling their growth and development. As a result, the current Constitution has been openly rejected by socio-cultural groups, especially those representing various ethnic groups, civil society, and professional groups within the Nigerian polity. Importantly, too, anger remains

[29] O. A. Aguda, *Understanding the Constitution of Nigeria* (M I J Professional Publishers 2000)
[30] I. Hassan, n27

in the polity over what has been termed a historic lie told in the preamble of the 1999 Constitution that "we the people" of Nigeria came together to deliberate upon and collectively approve the nation's constitution, when such debates and genuine public input did not occur at anything like a national level.

1.2.1. Research Questions

With many Nigerians continuing to clamour for a fresh, people-driven template to drive democracy and good governance, even the public engagement efforts of the current review process are unlikely to be far-reaching enough to gain sufficient popular legitimacy and backings for proposed constitutional changes. This raises concerns as to why the lingering challenge has not been addressed since the Fourth Republic. Despite repeated amendment exercises, the criticism of poor public involvement continues. Thus the following questions designed to drive this research to a conclusion:

a. Why has the agitation for constitutional amendment continued despite the series of amendments?

b. How can the public be more involved in the constitution amendment process in order to gain more legitimacy?

c. How can the legislature avoid presidential veto having passed a Constitution amendment Bill?

d. Are there lessons Nigeria can learn from the amendment procedures under the Ghanaian Constitution?

1.3. AIM AND OBJECTIVES

No doubt, a constitution enjoys a special place in the life of any nation, for it regulates not only the exercise of political power, but also the relationship between political entities and between the state and persons. Being the supreme law, it helps to shape the organization and development of society both for the present and for future generations and sets objective standards upon which the people and the international community can judge government performance, thus providing a measure of accountability and transparency in national and local affairs. Since society is dynamic, the need to amend the supreme law is compelling to meet changing circumstances for proper regulation of human behavior. However, the Nigerian experience highlighted above,

shows that there is a dire need for another look at the amendment process to ensure effective amendment with greater public participation for good governance and accountability.

The aim of this research is to examine the relevant provisions relating to constitutional amendment to make practicable recommendations for improvement and the advancement of democracy. Consequently, the following are the objectives of the research:

a. To examine the relevant constitutional provisions relating to amendment of the Constitution in Nigeria and Ghana;

b. To review the extent of public involvement in the amendment process;

c. To unearth the reasons for continued clamor for constitutional amendment despite a series of amendments;

d. To compare the procedure in Nigeria and Ghana with a view to taking useful lessons to improve the process; and

e. To make recommendations for a better procedure which will ultimately lead to a generally accepted procedure for alteration of the Constitution.

1.4. RESEARCH METHODOLOGY

This research adopts the doctrinal methodology. Doctrinal research is the research into doctrines, involving statutory provisions, available literature and case law by application of the power of reasoning.[31] It is the research into law as a normative science; a science which lays down norms and standards for human behavior in a specified situation or situations enforceable through the sanction of the state.[32] It refers to research into law as it stands in the books.[33] This research relied on both primary and secondary source materials. Primary source materials used in this research include the Constitution of the Federal Republic of Nigeria 1999 (As Altered), Constitution of the Republic of Ghana, 1992, Case Law, Senate Standing Orders, House of Representatives Standing Orders and

[31] M.O.U. Gasiokwu, *Legal Research and Methodology*, (Chenglo Limited 2007) 13
[32] *Ibid*
[33] *Ibid*

Resolutions. Furthermore, secondary sources such as text books, articles in learned journals, reports, periodicals, newspapers, internet materials, and reports presented at Seminars and Workshops, press releases, commissioned reports etc were also used. The doctrinal research is the preferred approach because of availability of information on constitutional amendments in Nigeria and Ghana.

1.5. SCOPE AND LIMITATION

Nigeria operates a presidential system of government, comprising a central federal government and states, which are sub-national governments or federating units; each deriving its powers from the Constitution of the Federal Republic of Nigeria, 1999.[34] Under the arrangement, there is the National Assembly and the State Houses of Assembly. On the other hand, Ghana operates a parliamentary system of government in a sovereign unitary republic, comprising regions, with legislative powers vested in the Parliament. This work covers amendment procedures under the Constitution of the Federal Republic of Nigeria, 1999, and Ghana's Constitution of 1992. This presupposes that the territorial scope is Nigeria and Ghana, and the present Constitutions of both countries are the basic laws under consideration. However, the study is limited to the amendment processes without necessarily addressing details of constitution making. Similarly, the study does not cover events outside the stated Constitutions.

1.6. SIGNIFICANCE OF THE STUDY

The legislature that is primarily saddled with the constitutional responsibility of making laws, is the arm of government at the wheel of constitutional amendment. The legislature is not only vested with formal law-making power which tends to shape and influence public policy, but also with the power to oversee the effective implementation of the laws made. However, in Nigeria, there is no current knowledge of the extent to which the legislature has been effective in carrying out the responsibility of constitutional amendment. This research is significant as it provides insights into this issue. The information provided will be helpful to the National Assembly as the study does not only provide information on performance but also on the critical challenges and

[34] Sections 2 and 3 of the CFRN, 1999 (As Amended)

ways of improving on performance. The research is thus indispensable for providing feedbacks and helping to improve the effectiveness of National Assembly in the performance of its law-making function, with particular attention on constitutional amendment. The study is also significant as it provides information on the constraints and the gaps to be filled. Consequently, the National Assembly, Houses of Assembly of States, the executive generally, students, judges, legal practitioners, and legislative researchers among others, will be the beneficiaries of this study.

Apart from the above, this research is significant as it examines the law and practice in Ghana by way of comparative analysis. Overall, the research would result in a robust constitutional framework in the interest of advancement of democracy and good governance in Nigeria, as it addresses the challenges bedeviling constitutional amendment and consequently makes remedial recommendations.

1.7. SYNOPSIS OF CHAPTERS

Chapter one of this work is basically the introductory part, dealing with background to the study, statement of the problem, aim and objectives of the research, research methodology, scope and limitation, significance of the study, and organizational layout now being undertaken under this heading.

Chapter two dwells on conceptual clarification, theoretical framework and literature review. It clarifies concepts that are fundamental to the study, discusses theories used in answering the research questions in order to achieve the objectives of the research, and captured the relevant themes and gaps of the available literature reviewed, with a view to filling such gaps in this study.

Chapter three discusses constitutional alteration in Nigeria, with focus on general law-making powers of the legislature, procedure for alteration of the Constitution of the Federal Republic of Nigeria. Furthermore, this chapter examines constitutional alteration exercises of the eighth and ninth sessions of the National Assembly, and finally discusses legislative-executive relations and its impact on constitutional alteration.

Chapter four concentrates on constitutional amendment in Ghana. It discusses law-making powers of Ghana's Parliament, the procedure for amendment, public involvement in constitutional amendment, the role of the

President and Council of State, the role of the Electoral Commission, and the impact of legislative-executive relations.

Chapter five undertakes a comparative analysis of constitutional amendment procedures in Nigeria and Ghana, using the modes of initiation of amendment, public involvement, extent of participation of the President, and involvement of the electoral umpire as the parameters. Furthermore, the chapter discusses the role of the judiciary in the amendment process as well as the challenges and prospects of constitutional amendment.

Chapter six, being the concluding chapter, deals with summary of findings, recommendations, suggestions for further research, contribution to knowledge and conclusion.

CHAPTER TWO
CONCEPTUAL CLARIFICATION OF KEY TERMS, THEORETICAL FRAMEWORK AND LITERATURE REVIEW

2.1. CONCEPTUAL CLARIFICATION

2.1.1. Alteration and Amendment

According to Black's Law Dictionary, Alteration is an act done to an instrument, after its execution, whereby its meaning or language is changed[35]. Amendment on the other hand is defined as a formal revision or addition proposed or made to a statute, constitution or other instruments[36]. Whereas, amendment appears to be more appropriate for this study, the term used by the Nigerian constitution is alteration while that of Ghana is amendment. It is worthy of note that the Ghanaian Constitution in Article 289(2) used the terms alteration and amendment interchangeably. Thus, in this study, the words alteration and amendment are used interchangeably. Learned authors in constitutional Law such as Ese Malemi also adopts our position above. In his book, while discussing on this issue, he titled it as "Mode of Alteration of the Constitution" but in the body of the work while commenting, he referred to it as Procedure of Amendment"[37].

[35] B. A Garner: *Black's law Dictionary*. West Publication Co, 1990

[36] *Ibid*

[37] Ese Malemi: *The Nigerian Constitutional Law.* 3rd edition, Princeton Publishing company, 2012, pgs 177 & 178

2.1.2. Transparency

As important as the concept of transparency is in the political context, coupled with the growing international interest in promoting it, it is lamentable no commonly accepted definition of the concept exists. Being a multifaceted concept, it is often conflicted with related concepts such as accountability, rule of law, good governance etc. The term 'transparency' refers to openness; clarity; lack of guile and attempts to hide damaging information. The word is used for financial disclosures, organizational policies and practices, law-making, and other activities where organizations interact with the public[38]. According to Hood, transparency is the doctrine that the general conduct of executive government should be predictable and operate according to published (and as far as possible non-discretionary) rules rather than arbitrarily[39]. On its own part, the World Trade Organization states that ensuring "transparency" in international commercial treaties typically involves three core requirements: (i) to make information on relevant laws, regulations and other policies publicly available, (ii) to notify interested parties of relevant laws and regulations and changes to them; and (iii) to ensure that laws and regulations are administered in a uniform, impartial and reasonable manner[40]. This definition includes not only making information available and accessible to stakeholders, but also that laws and regulations are administered and implemented in an impartial and predictable manner[41].

Transparency is a powerful tool in governance as it instills trust and confidence among leadership and followership. It promotes accountability and provides information for citizens about the affairs of government.

2.1.3. Separation of Powers

The doctrine of separation of powers connotes that the various arms of government, the legislature, the executive and the judiciary, should be separated both in functions and personnel. It means that no arm of government should exercise the whole or part of another's power. It is the division of the powers and functions of government among the three independent and separate arms of government to act as a check and balance on one another and prevent

[38] B.A Garner (Ed): Black's Law Dictionary (st. Paul MN, West Publishing co., 2009) p. 1638
[39] C. Hood & D. Herald: *Transparenting Transparency: The key to better Governernce? (*London British Academy, 2006) *p.14*
[40] B. Ana & D. Kaufmann. *"Transparenting Transparency: Initial Empirics and Policy Application"*, World Bank policy Research working paper. 2005, p.17
[41] M. Bauhr & M. Grimes: *"What is Government Transparency? New Measures and relevance for quality of Government" , Department of Political Science, University of Gothenburg Working Paper series, 2012:16, p.4*

the excesses and abuse of powers[42]. The primary purpose of the concept is to guard against dictatorial rule by avoiding concentration of all the powers of government in one hand, or more than one person being involved in more than one of the powers of government or one arm of government exercising control over the other. The doctrine of separation of powers as it is understood today came largely from the work of the French Jurist Baron De Montesquieu in his book *The Spirit of Law* (chapter XI) who studied and expanded the work of John Locke[43].

The Constitution of the Federal Republic of Nigeria, 1999 (As Amended) promotes the doctrine of separation of powers. In Nigeria, these three arms of Government came into existence at the same time and by the same act of creation under the 1999 Constitution. They are triplets born the same day or deemed to be so, performing the functions of government which are basically three, namely, law-making (Legislation); law-enforcement or execution and administration of justice (interpretation of laws and settlement of disputes), by virtue of sections 4, 5 and 6 of the Constitution which vest legislative, executive and judicial powers of the federation in the National and State Houses of Assembly, the President and Governors and the Courts established by the Constitution respectively. Accordingly, in Nigeria, no one arm of government is superior to the other; neither is any subordinate to the other. Each organ is independent within its own sphere of influence[44]. This is also the position under the American constitutional arrangement[45].

2.1.4. Rule of Law

The Nigerian Constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law[46]. It means also that government should be conducted within the frame-work of recognized rules and principles which restrict discretionary power which Coke spoke of as 'golden and straight

[42] A. Appadorai: "*The Substance of Politics,*"(Oxford University Press, 2004) p.137

[43] J. Locke: *Second Treatise on Civil Government (London: A Millar 1690),* Chapter XII. It is generally agreed that the doctrine of separation of power stemmed from the observation of John Locke of the conditions prevalent in the 17th century England. Locke thought that it was convenient to confer legislative and executive powers on different organs of government as the legislature can quickly act at interval while the executive must constantly be at work. He argued that it is foolhardy to give lawmakers the power of executing the laws, because in the process, they might exempt themselves from obedience and suit of the law (both in making and executing it) in their individual interest.

[44] The principle has also been judicially interrupted in cases such as *Kadiya v. Lar & Ors., 1983. LPELR 1643 (SC): Olusi & Anor. V. Obanobi & Ors.*

[45] Under the constitution of the United States of America, Articles I, II and III, thereof create the Legislature, Executive and the Judiciary respectively.

[46] J.N. Aduba & S. Oguche: *Key Issues in Nigerian Constitutional Law* (Saarbrucken, Lambert Academic Publishing, 2014) p.49

met wand of law' as opposed to the uncertain and crooked cord of discretion[47]. The rule of law knows no fear, it is never cowed down; it can only be silenced. But once it is not silenced by the only arm that can silence it, it must be accepted in full confidence to be able to justify its existence. It follows that in the area where rule of law operates, the rule of self-help by force is abandoned. Nigeria being one of the countries in the world, even in the third world which profess loudly to follow the rule of law, gives no room for the rule of self-help by force to operate[48]. Once a dispute has arisen between a person and the government or authority and the dispute has been brought before the Court, thereby invoking the judicial powers of the state, it is the duty of the government to allow the law to take its course or allow the legal and judicial process to run its full course.

The very first attempt to reduce the idea of the Rule of Law to a precise legal form was by Professor A.V. Dicey in his lectures on English Law at the University of Oxford in 1885. His ideas were premised on the British Constitution. He reduced the term "Rule of Law" to the tripartite formula of:

a) That every person must be equal before the law;

b) that all laws are the same; that is, the rights and duties of British subjects are part of the English Common Law and were neither conferred by any statute nor by any special constitution; and

c) That the Rule of Law excludes arbitrary powers. Discretion is however a part of it.

2.1.5. Checks and Balances

Under the separation of powers doctrine, governmental power should not be possessed by one person or body so as to prevent the concentration of power as this may lead to its abuse and to tyranny[49]. Monopoly of power is fatally inimical to democracy and good governance; hence the obvious need for a balance of power among the various arms of government. The ideas of "checks and balances" and "separation of powers" are quite similar,

[47] *Gov. Of Lagos v. Ojukwu (1986) (pt.18)621; Amechi v. INEC (2008) 5 NWLR (pt. 1080)227; and AG. Bendel State v. Aideyan (1989) 4 NWLR (pt. 118) 646. This reasoning was re-echoed in the recent case of shining Star Nigeria Ltd v. AKS Steel Nigeria Ltd. (2011) 4 NWLR 596*

[48] A. Ojo : *Constitutional Law and Military Rule in Nigeria, (Ibadan, Evans Brothers(Nigeria Publishers Limited, 1987)pp. 158-159*

[49] A.F.M. Relacion & G.C. Magalzo: *"System of checks and Balances in the Phillipines Presidential form of Government", J* Multidisciplinary studies Vol.3, No.2, 2014, p.40; Nwabueze B.O: *Presidentialism in common-Wealth Africa (*London & Enugu, C. Hurst & Co, in association with Nwamife Publishers, 1979*) p.30; Ojo A: Constitutional law and military Rule in Nigeria, (Ibadan, Evans Brothers Nigeria) Publishers Limited, 1987) p.156.*

and are foundational to the government of Nigeria and other democratic nations. Just as one does well not to put all one's eggs in one basket, a nation does not to put all its governmental power in one person or one body.

The principle of checks and balances is a corollary of the doctrine of separation of powers, both being for the attainment of smooth running of government. Checks and balances are the core of the rule of law and uphold the separation of powers because they ensure accountability. The principle is in recognition of the fact that absolute separation of powers is capable of ruining the very essence of separation of powers, which is avoidance of dictatorship, oppression and tyranny. By checks and balances, no arm of government is given absolute independence to run its affairs without intervention or interference. Hence, each arm becomes a watchdog against the excesses of the other, thereby ensuring that each arm conducts its affairs according to law. It is a notion that power should be a check to power. This corollary principle is provided by the Constitution to secure coordination between and among the branches of government. In Nigeria, the Courts ensure accountability by hearing challenges to the constitutionality of laws and the actions of the executive. On the other hand, appointment of judicial officers is done by the executive while the legislature confirms some executive appointments[50] and can also remove the executive from office. This constitutional check does not in any way affect independence of the arms of government.

2.1.6. Federalism

There is actually no special brand of federalism peculiar to Nigeria and there is no universally accepted definition or conception of federalism. Whatever their shape, federal institutions are by definition devices to limit the center and the range of federal decisions. Federalism is capable of different meanings and conceptions depending on the perspective and the background of the perceiver. There are writers whose emphasis has been on the form of the constitution and certain institutions and as far as they are concerned the absence of these makes any discussion on federalism futile.[51]

[50] Section 147 and 154 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended)
[51] *Ibid*. p.171.

A school of thought holds the view that federalism is the product of social forces and that the ultimate political structure is dependent on those forces[52]. This research is agreement with the view that "the truth about the federal debate is how to allocate and coordinate political power among units of government, the debate is unending …"[53] The essence of federalism lies not in the institutional or constitutional structure but in the society itself. The Federal government is a device by which the federal qualities of the society are articulated and protected.[54]

From the totality of the above, federalism is an arrangement whereby powers of government within a country are shared between a national country wide government in such a way that each exists as a government separately and independently from the others, operating directly on persons and property within its territorial area with a will of its own and its own apparatus for the conduct of its affairs and with an authority in some matters exclusive of all the others.

2.1.7. Legislature

The legislative institution has been known and identified by various nomenclatures, depending on the system of government. The national legislature is referred to as the 'National Assembly' in Nigeria, 'Congress' in the United States of America and 'Parliament' in the United Kingdom. Despite the differences in the names by which the legislature is known in different countries, there is no controversy as to its definition.

Legislature has been viewed as assemblies of elected representatives from geographically defined constituencies, with law-making functions in the governmental process[55]. On his part, Jewell identifies two features that distinguish the legislatures from other branches of government. He opines that legislatures have formal authority to pass laws, which are implemented and interpreted by the executive and judicial branches and their members normally are elected to represent various elements in the population[56].It is significant to note that legislatures vary in terms of composition, structure and role, from one democracy to the other. The legislature can also be referred

[52] *Ibid*
[53] *Ibid*
[54] *Ibid. P.172*
[55] G. Loewenberg: *"Legislature and Parliaments" in Lipset, S.M (Ed):* The Encyclopaedias of Democracy, vol. (London, Rutledge, 1995) p.736
[56] M.E. Jewell: *The Legislature in the Encyclopaedia Americana International (ed)*Vol.17 (Connecticut, Grolier Incorporated, 1977) p172

to as an official body, usually chosen by election, with the power to make, change, and repeal laws; as well as powers to represent the constituent units and control government[57].

It must be noted that the composition, structure and role of the legislature vary from one democracy to the other. Legislatures are divided into two types, thus: the bicameral and the unicameral legislatures. The unicameral legislature has only one chamber or house while the bicameral legislature has two. Under Nigerian constitutional arrangement, unicameralism operates at the state level which the National Assembly is bicameral in nature, consisting of a Senate and a House of Representatives.

2.1.8. Executive

The executive is the second estate of the realm under the Constitution of the Federal Republic of Nigeria, 1999(As Amended). It broadly refers to the arm of government responsible for implementing or administering laws enacted by the legislature. The term is also used in relation to Ministers from the governing parties who makes policy decisions and are responsible for the administration of government. Executive Government in Western Australia includes the Cabinet, the Executive Council and the Public Sector. The executive powers of the federation reside in the President of the Federal Republic of Nigeria while those of the States reside in the Governors of the various States. The Constitution provides that the executive powers of the Federation "shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation[58]". Such powers shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws[59].

It is important to note that unlike the legislature that operates at different levels at National Assembly and Houses of Assembly of States, the executive is of the same nature at both federal and state levels, as the executive powers

[57] S.A. Lafenwa: *The Legislature and the Challenges of Democratic Governance in Africa*: "The Nigerian case", being a Draft Seminar Paper for Conference organized by the Politics and International Studies Centre for African Studies, University of Leeds on Democratization in Africa: Retrospective and future Prospects, 2003.
[58] Section 5(1)(a),CFRN, 1999(As Amended)
[59] Section 5 (1)(b)

of a State "shall be vested in the Governor of that State and may, subject as aforesaid and to the provisions of any Law made by a House of Assembly, be exercised by him either directly or through the Deputy Governor and Commissioners of the Government of that State or officers in the public service of the State[60]". As it is at the federal level, executive powers of a State extends "to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has for the time being power to make laws[61]".The relationship of the Governor with the Deputy Governor, Commissioners and heads of MDAs is the same as that of the President with the Vice-President, Ministers and other heads of MDAs.

2.1.9. Judiciary

The judiciary is the third arm of government which has the function of interpretation of laws and adjudication. Black's Law Dictionary defines judiciary as "pertaining or relating to courts of justice, to the judicial department of government or to the administration of justice". Furthermore, it states that it is that branch of government vested with judicial power; the system of courts in a country; the body of judges, the bench[62]. Judicial powers of the Federation and States are vested in the Courts established for the Federation and the States under the Constitution[63]. The Courts so established are the superior courts of record.

The 1999 Constitution does not define "judicial power" but it may be basically said to be the power to decide a case or controversy, to pronounce judgment thereon and to provide, whenever required or necessary, for the enforcement of that decision. Judicial power has been defined as "the power which the state exerts in the administration of public justice in contradistinction from the power it possesses to make laws and the power to execute them"[64] . Section 6 of the Constitution distinguishes the judicial power of the Federation from that of a State. It also provides that both judicial powers are vested and exercisable by the superior courts established under the Constitution. This is the direct consequence of the system by which federal laws are administered at first

[60] Section 5(2)(a) of the Constitution
[61] Section 5(2)(b)
[62] H. Campbell *et al. Black's Law Dictionary (*St. Paul, Minn west Publishing Co. 1990) p.849
[63] Section 6 (1)(2)
[64] B.O. Nwabueze, *Judicialism in common-Wealth Africa(*London, C. Hurst, 1997) pp. 1-19

instance by state-courts and state laws are administered on appeal by federal courts. These superior courts are mentioned in subsection (5) as the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory Abuja; a High Court of a State, the Sharia Court of Appeal of the Federal Capital Territory Abuja; a Sharia Court of Appeal of a State; the Customary Court of Appeal of the Federal Capital Territory; a Customary Court of Appeal of a State and such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly and a House of Assembly may make laws[65].

The judicial power as thus conceived refers to the classes of cases or controversies over which a court of law has, or can be, given jurisdiction.

2.1.10. Democracy

Democracy has been defined as government by the people, either directly or through representatives[66]. It refers to government by the people, usually through elected representatives[67]. In Huntington's view, the modern usage of the term democracy as a form of government is defined in terms of sources of authority of government, purpose served by government, and procedures for constituting government[68]. The central procedure of democracy for Huntington is selection of leaders through competitive elections by the people they govern[69]. Huntington's inspiration emerged from Schumpeter's earlier definition of democracy as a system for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote[70]. It has been rightly opined that democracy entails governance system in which leaders are selected through free and fair elections, with institutions that foster a shared distribution of power, and citizens have extensive opportunities to participate in political life[71]. Positions of political power are filled through regular, free, and fair

[65] Section 6(5) of the Constitution
[66] B. Garner (ed): Black's Law Dictionary. Opcit
[67] F. Philip : *The New Webster Dictionary of the English Language, (*International Edition*),(New York, Lexicon International Publishers Guild Group, 2004)p.255*
[68] S.P. Huntington:*The Third Wave: Democratization of the Late Twentieth Century, (*Norman Ok,& London, University of Oklahoma Press, 1991*)p.6*
[69] *Ibid*
[70] J.A. Huntington: *Capitalism, Socialism and Democracy (3rd Ed.)(*New York, Harper & Row, 1950*)p.269*
[71] M.H. Halperin *et al. The Democracy Advantage (New York,Ruetledge, 2005) p.9*

elections between competing parties, and it is possible for an incumbent government to be turned out of office through elections. Freedom House criteria for an electoral democracy include:

1. A competitive, multiparty political system;

2. Universal adult suffrage;

3. Regularly contested elections conducted on the basis of secret ballots, reasonable ballot security and the absence of massive voter fraud; and

4. Significant public access of major political parties to the electorate through the media and through generally open campaigning[72].

A liberal notion of democracy pays concentrates on political and civic pluralism, individual rights, group freedoms and civil liberties against the tyranny of the majority to ensure political equality. Democratic institutions- constitution, laws, values, 'rules of the game and practices', formal accountability mechanisms and sanctions are also central to a democratic polity. These institutions rather than personal authority produce codes and limitations on individuals and societal conduct, with no exception to the legislation across persons. In a democracy, government is only one element in a social fabric of many and varied institutions, political organizations and associations. Citizens cannot be required to take part in the political process, and they are free to express their dissatisfaction by not participating. However, a healthy democracy requires the active, freely chosen participation of citizens in public life. Democracies flourish when citizens are willing to take part in public debate, elect representatives and join political parties. Without this broad, sustaining participation, democracy begins to wither and become the preserve of small, select groups[73]. Apathy and abstention are inimical to democracy.

[72] L. Kekic: "The Economist Intelligence Unit's Index of Democracy", 2007. P.1 available at http://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf (Accessed on 19/1/2017)
[73] Ibid

2.1.11. Constitution

Scholars have no difficulty with the meaning of Constitution, but they describe it in different ways, according to their orientations and the Society in which such Constitution is based. Wheare offers definitions or descriptions that fit all societies. According to him, Constitution can be used in two senses in any political discourse. His first meaning fits properly the British Constitution which is generally said to be unwritten, as follows:

Used to describe the whole system of government of a country, the collection of rules which establishes and regulates or govern the government. These rules are partly legal, in the sense that courts of law will recognize and apply them and partly non-legal or extra-legal, taking the form of usages, understandings, customs, or conventions which courts do not recognize as law but which are not less effective in regulating the government than the rules of law strictly so called[74].

The implication of the above is that a constitution does not have to be fully written in a single document, since it also includes usages, customs or conventions. These are rules that are unwritten but are regarded as binding as a result of their long acceptance and application by the people. Wheare's second definition is appropriate for most countries that have written Constitutions, as follows:

In almost every country in the world except Britain, however, the word "Constitution" is used in a narrower sense than this. It is used to describe not the whole collection of rules, legal and non-legal, but rather a selection of them which has usually been embodied in one document or in a few closely related documents … "The Constitution", then, for most countries in the world is a selection of the legal rules which govern the government of that country and which have been embodied in a document.[75]

Following the above, a constitution recognizes the existence of other laws which regulate the conduct of other activities outside the constitution itself. It means that a constitution is a body of selected laws which are embodied in one document or a few closely related ones. Phillips agreed with Wheare's position when he stated that:

[74] K.C. Wheare: *Modern Constitutions (1st Ed.)(*Oxford, Oxford University Press 1951*)p.1*
[75] *Ibid, p.2*

The word "Constitution" is used in two different senses, the abstract and the concrete. The Constitution of a State in the former sense is the system of laws, customs and conventions which define the composition and powers of organs of the state and regulate the relations of the various state organs to one another and to the private citizen. A "Constitution" in the latter sense is the document in which the most important laws of the Constitution are authoritatively ordained[76].

Obvious from the Phillip's view is the fact that a Constitution is supreme over all other laws of the land as it contains the most important laws. From the above views, a Constitution can be defined as that document containing the ways in which a people want to be ruled within a given territory. The document lays down the organs, their powers, duties, and methods of their Constitution, their relationships, the justice system and in some countries, other things that are deemed fundamental to the corporate existence of the polity.

A Constitution is an organic instrument which confers powers and creates rights and limitations. It regulates the affairs of the nation state and defines the powers of the different components of government as well as regulating the relationship between the citizens and the state. Once the powers, rights and limitations under the Constitution are identified as having been created, their existence cannot be disputed in a court of law, but the extent and implications may be sought to be interpreted and explained by the court. All other legislations take their hierarchy from the provisions of the Constitution, as it is not a mere common legal document.

A constitution is a set of fundamental principles or established precedents according to which a state is governed. The word constitution implies different things in different settings. It is also the name of the instrument containing the fundamental laws of the state; a legislative charter by which a government or a group derives its authority to act. It implies some particular law contained in the respective codes regulating a particular territory[77]. For the purpose of our study, the term constitution will be used to imply the fundamental law, written or unwritten, that establishes the character of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution, and limitations on the functions of

[76] O.H. Phillips & P. Jackson: *Constitutional and administrative Law,* (8th Ed.)(London, Sweet and Maxwell, 2001)p.6
[77] J.N. Aduba and S. Oguche: *Key Issues in Nigerian Constitutional Law, (*Saarbrucken: Lambert Academic Publishing, 2014*)p.5*

different government departments; and by prescribing the extent and manner of the exercise of its sovereign powers.

Constitution, whether written or unwritten, will usually share common features. They will identify the principal institutions of the state- the executive, the legislature and the judicial[78]. In relation to each of these institutions, the constitution will identify the rights and freedoms of citizens, through a Bill of Rights which operates both to protect citizens and to restrict the power of the state. In terms of its nature therefore the constitution can be looked at in term of the scope; the ingredients; the uniqueness; and the characteristics it exhibits.

A constitution of a state usually contains what is referred to as the basic/fundamental/ foundational laws of a state. However, not all constitutional laws are contained in a constitution. Constitutions law may include customs and convention which are sanctioned by public opinion and might not be enforceable in a court of law[79]. Some constitutional laws are also left to the work of legislation by Parliament. Notable however, constitution laws made through legislation may be altered or removed in the same ways as all other acts of parliament are altered or repealed. In terms of qualities, a constitution must be dynamic and durable; compliant with the changes in society in terms of technology but it must not be too rigid to prevent change and not too flexible as to encourage tampering with the basic principles; clear and definite; and clearly define its contents[80]. It should have a clear amendment procedure and must provide for how and when it is to be amended; protect the fundamental rights of the individual; internally consistent and should not contradict itself or other laws. It is also fundamental that a constitution is practical to apply.

2.1.12. TYPES OF CONSTITUTION

2.1.12.1. Flexible and Rigid Constitutions

A constitution may be classified according to the method by which they can be amended. They can either be flexible or rigid. A flexible constitution is that which can be amended like ordinary laws by a simple majority.

[78] *Ibid*

[79] S. Oguche: *Constitutional Quagmire in Kogi state: "Examining Failure of the Legislature and the Judiciary",* Nigerian journal of Legislative affairs, Vol.8 No.2, 2017. Pp70-94 at 72

[80] *Ibid*

Such amendment does not need any special procedure; it is carried out as if ordinary law of the land is being amended. An example is the Constitution of New Zealand which is written but does not require any special procedure for its amendment. A rigid constitution is that which needs a special procedure for its amendment. The intention is to make the amendment receive majority support of the people and disallow few members of the legislature to change the fundamental law of the land. Dicey defines a flexible constitution as "one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body" while a rigid constitution is defined as "one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws."[81]

Dicey viewed a rigid constitution, on the other hand as: One under which laws generally known as constitution or fundamental laws cannot be changed in the same manner as ordinary laws.[82] A further subdivision of rigid constitution is based on whether the special amending procedure is the sole power of the legislature or some agency outside the legislative must be brought in. In the latter case, the constitution may be said to be supreme over the legislature. Also, sometimes parts of the constitution may not be alterable at all. For example, some articles of the German Federal Republic Constitution, 1949 are not alterable. Consequently, the German federal system is protected against changes.[83]

The rigidity of the United States Constitution is manifested in the provision that that no amendment could be made prior to 1808, affecting the First and Fourth Clauses of Section 9 of Article 1 relative to the prohibition of the importation of slaves, and that no State without its consent shall be deprived of equal suffrage in the Senate. The USA's codified Constitution is that it is entrenched**.** In other words, there is a special procedure for amending the law of the Constitution. This procedure is set out in the Constitution itself and is more rigorous than the procedure for making and changing ordinary American laws. The same rigidity is a feature of the Constitution of the Federal Republic of Nigeria, 1999 as sections 8 and 9 make provisions for alteration which are not easy to

[81] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, McMillan, 1885) 12
[82] Ibid
[83] Amendments of the basic principles of Articles 1 (on human dignity) and 20 (on basic principles of state order and the right to resist) are inadmissible (see Article 79).

effect. In fact, the National Assembly does not have constitutional powers to alter the Constitution without the input of the federating states.

2.1.12.2. Written and Unwritten Constitution

A country may either have a 'written' Constitution or an 'unwritten' Constitution. Prof. Wheare disagreed with the use of 'unwritten'. He was of the opinion that when a country is said to have an unwritten constitution it implies that the corpus of all those rules, laws practices and conventions, which are normally necessary for the running of government and are found in written constitutions are non-existent. The contrary, however, is the case even in countries which are said to have 'unwritten' Constitution. Those rules, practices, philosophies, laws and conventions are written down in few places but not in a single document. Hence, Wheare had suggested that "the better distinction is that between countries which have a written constitution and those which have no written constitution, or more simply ...between countries which have a constitution and those which have not."[84]

Where a country has a written constitution, it is possible to point to the document as the "Constitution" of that country. This is a feature of most countries of the world, which as a result of their wish to start afresh or retain some peculiar powers possessed by units before forming a union, decide to have put down the way and manner the powers are shared, rights are protected and government is run, generally for the good of all.[85] A country that is noted to have no Constitution is Britain.[86] This does not mean that all those political philosophies, legal rules, principles of law that are normally found in written Constitution are non-existent in Britain; they are found in various documents and statutes scattered all about in Britain. Hence, Mitchell has said that "by the use of scissors and paste it would be possible to produce out of the statute books a 'Constitution' which would be very nearly complete."[87]

While it is not possible to catalogue these statutes and documents, it is pertinent to mention that the Act of Union with Scotland, 1706, the Parliament Acts, 1911 and 1946, the Supreme Court of Judicature Act, 1925, the Statute

[84] K.C. Wheare: *Modern Constitutions* (1st Ed.) (Oxford, Oxford University Press, 1951) p. 21
[85] J.N. Aduba and S. Oguche, op cit., p.14
[86] K.C. Wheare, pp.13-15
[87] J.D.B. Mitchell, *Constitutional Law* (2nd Ed.) (Edinburgh, Green & Sons Ltd. 1968), p.3.

of West Minster, 1931, the Ministers of the Crown Act, 1937, the Indian Independence Act, 1947, and some earlier statutes,[88] all put together are so important and would collectively constitute the 'Constitution' of Great Britain, where it is to be a single form.

2.1.12.3. Unitary and Federal Constitutions

A unitary constitution is one which defines a centralized system of government without constitutional friction between the national and regional government. It promotes the spirit of oneness among the people and eliminates the feeling of double loyalty to one‘s regional government and then to the national government. The document concentrates powers in the national government and tends to promote a strong and stable government, than a federal system where power is divided between the federal and state governments. An example of this is Ghana, which provides that “the sovereign State of Ghana is a unitary republic consisting of those territories comprised in the regions which, immediately before the coming into force of this Constitution, existed in Ghana including the territorial sea and the air space.”[89] In a federal constitution, power is divided among the states' regions and then the central government gets comparatively more authority and power. Under a written constitution, the constitution will define which powers are exercisable by the central federal government, and which powers are exercisable by the constituent parts- usually known as states of the federation. Ina federal state, powers are usually diffused rather than concentrated in any one body. The constitution has over riding force and any conflict between the federal government and state government will be determined according to the constitution. For centuries, it is common to see most federal constitutions rigid and written. In a federal constitution, there is existence of a rigid form of amending the constitution. Britain has been a unitary state, with on Parliament having ultimate law-making power overall the constituent nations-England, Northern Ireland, Scotland and Wales. Where powers are devolved, to local government and now to the assemblies of Northern Ireland, Scotland and Wales, these powers remain subject to the United Kingdom Parliament‘s ultimate control. Kenya too has a unitary but devolved constitutional set-up.

[88] M. Carta 1215, Petition of Rights 1628, Bill of Rights 1688, Act of Settlement 1700 etc.
[89] Article 4(1)

2.1.13. CONSTITUTION MAKING IN NIGERIA

Nigeria has passed through different phases of constitution making, dating back from the pre-colonial era to the colonial and the post-colonial eras. Britain introduced various types of constitution to help her govern her colonial territories. The first constitution introduced by Britain is the Amalgamation Constitution of 1914 which brought the northern and southern protectorates together.[90] This was not done in consultation of the people but to help Britain reduce administrative cost. This was followed by the Clifford's Constitution of 1922, the Richard Constitution of 1946, the Macpherson's Constitution of 1951, the Oliver Lyttleton's Constitution of 1954, and the Independence Constitution of 1960. The processes of introduction of the various constitutions are worthy of interrogation for the purpose of distilling the intent behind each constitution. For instance, the Amalgamation Constitution that led to the joining of the southern and northern protectorates was achieved through three constitutional instruments, under the authority of colonial office in London.[91]

The Nigeria Council consisting of 36 members, that is the governor, members of the Executive Council, first class residents, political secretaries of the Northern and Southern provinces, Europeans representing various interest like the Chamber of Commerce, banking and mining business and six Nigerians nominated by the Governor as unofficial Members which consisted of two Emirs from the north, the Alafin of Oyo, and one member each from Lagos, Calabar, Benin and Warri area.[92] In 1920 a group of intellectuals formed the National Congress of British West Africa (NCBWA) under the leadership of Lawyer J.E. Casley HayFord to fight for the independence of Gambia, Sierra Leone, the Gold Coast (now Ghana) and Nigeria. They demanded for the Legislative Council in all British West Africa territories and a West African House of Assembly. This pressure led to the enactment of the Clifford's Constitution of 1922. The Constitution created a Legislative Council of 46 members, 27 of whom were official members, including the Governor and 19 unofficial members.[93] Among the unofficial members 15 were nominated by the Governor and only four were elected, three from Lagos and one from Calabar.[94] This was the first time Nigeria elected their representatives. However, poor representation was a feature of this Constitution.

[90] J.N. Aduba and S. Oguche, op cit., p.16
[91] B.O. Nwabueze, A Constitutional History of Nigeria, (C. Hurst & Co. Publishers, 1982) 11
[92] *Ibid*
[93] J.N Aduba and S. Oguche, op. cit., p.17
[94] *Ibid*

During the Second World War, nationalists advocated for a new constitution, and this resulted in a new constitution being proposed on March 6th 1945 by Sir Arthur Richard. It was approved and became known as the Richards Constitution of 1946[95]. It came into operation on the 1st of January 1947. Under this constitution, there was Legislative Council for the whole country composed of the Governor as President, sixteen official members and twenty eight unofficial members, four of them were elected while twenty-four were nominated. This Constitution also created Regional Councils or Houses of assembly for Western, Eastern and Northern regions. The Eastern and Western Regional Councils were unicameral while the Northern Regional Council was bicameral; a House of Chiefs and House of Assembly. However the Regional Councils did not have legislative powers. They were only advisory bodies. The Governor was not bound to accept their recommendations.[96] This angered a lot of Nigerians because the Governor did not undertake consultations before enacting the Constitution. This lack of consultation led to its rejection. The Nationalists toured the country to campaign against the Constitution; raised money with which they proceeded to London but the Secretary of State for the Colonies rejected their reform proposals.

The opposition was immediate and total, Sir Richard left the country a year later. The new Governor Sir Macpherson had no option than to initiate a new constitution. To avoid the mistake of his predecessor, there was wide consultation from villages to the wards, through district and regional levels to the Central Executive Council. Macpherson's Constitution provided for a Central Legislative and a Central Executive Council. The Central legislative arm was renamed House of Representatives consisted of 136 representative members, elected from regional houses and six special members appointed by the Governor to represent interest of the communities that were inadequately represented. The Constitution also provided for regional legislative and a regional executive councils in the North and in the West that were bicameral (made up of two chambers known as House of Chiefs and the House of Assembly). The power of central legislature was unlimited, it could legislate on any matter including those on which the regions had power to legislate.[97] Despite the wide consultation in constitutional

[95] B.O. Nwabueze (n59) p.12
[96] *Ibid*, at p.13
[97] Ibid

making process, it had a major defect, as it encouraged regionalization. Central ministers were to be selected from among the members of regional legislatures, thereby making the ministers loyal to their regions rather than the Nation. Also, Central legislators were selected from among members of the Regional House of Assembly that served as Electoral College. The effect of this was inter regional frictions. To resolve these conflicts, a constitutional conference was called in London in 1953 and later in Lagos in 1954. A new constitution was enacted in 1954, called the Oliver Lyttleton's Constitution in preparation for the country's independence. Oliver Lyttleton was then the Secretary of State for the Colonies. Two constitutional conferences were held in London in 1957 and another in Lagos 1958.

The Independence Constitution of 1960 retained most of the features of the Lyttleton's Constitution. The Queen of England was still the constitutional monarch, and final court of appeal was the Judicial Committee of the British Privy Council.[98] Major defects of the colonial constitution of Nigeria include lack of proper representation of the people, forceful amalgamation which made administration difficult, under estimation of the political elite which led to constant national struggle, the constitution was drafted by British officials to meet Britain's political and economic needs, and this was considered by the people as unjust, deprivation of indigenes from holding political office, and discrimination against the female folks.[99]

Post–Colonial Nigeria

An All Parties Conference held on 26th of July 1963, which birthed the Republican Constitution of 1963 under which Nigeria became a republic. The queen of England ceased to be the Head of State and the Supreme Court of Nigeria became the final appellate court. One would have thought that by gaining independence from Britain, the country would do better in respect of administration but on the contrary, it became worse. Military Coup and counter coup was the order of the day. In fact, the little progress and achievement made during the colonial era experienced a setback. First, the politicians were greedy for power, victimizing one another, riot and chaos was everywhere. This led to a bloody coup, an overthrow of the civilian government in 1966. In 1975, the military

[98] *Ibid*
[99] *ibid*

government under the leadership of Generals Murtala/Obansanjo set up another Constitution Drafting Committee (CDC) made up of fifty appointed member (all male) headed by F.R.A Williams as the chairperson. Chief Obafemi Awolowo declined to be member of the committee therefore the committee was left with forty nine members.[100] The report of the Constitution Drafting Committee was debated by a Constituent Assembly of elected and nominated members. The government appointed Chairman, Deputy Chairman as well as Secretary of the Assembly. The work of the Assembly was reviewed and amended by the Supreme Military Council that issued a Decree (Decree No.25) to enact the 1979 Constitution.[101]

The civilian regime of Alhaji Shehu Shagari (1979-1983) and the Military regime of Generals Buhari/Tunde Idiagbon did not make any attempt at constitution making. However, the General Ibrahim Badamasi Babangida administration, in a bid to making the 1989 constitution, established 2 institutions before establishing the constituent assembly. The first of such was the Political Bureau that was inaugurated on the 13th of January, 1986. The second institution was the Constitution Review Committee which was empowered to review the 1997 constitution of Nigeria in line with the accepted recommendations made by the Political Bureau.

It has to be pointed out that the 1989 constitution is majorly the same as the 1979 constitution except for little changes that was made under the 1989 constitution. It was the intention of the Military government to apply the constitution of the Federal Republic in stages, starting from the local government in 1990 and ending with the Federal Government in 1992 with the result that the whole constitution would be given the force of Law on 4th January 1993; but due to political upheavals leading to the emergence of an Interim Government and later the Military Regime of General Sani Abacha, the Constitution never saw the light of the day.

The Abacha regime inaugurated a constitutional conference in 1994 with over one third of the membership appointed by the military regime. Meanwhile, the election into the Constitutional Conference was boycotted. The Constituent Assembly has been referred to as the most uncommon Assembly in Nigerian history.[102] The whole membership of the assembly was nominees of Abacha regime that was known to be notorious, fraudulent,

[100] Ibid
[101] Ibid at p.14
[102] A. Ojo, *Constitutional Law and Military Rule in Nigeria,* (Ibadan, Evans Brothers (Nigeria Publishers) Limited, 1987) p.162

economic vampires and political charlatan.[103] The regime successfully manipulated the decisions arrived at on the floor of the conference. Another committee made up of 40 nominated individuals was set up to review the report. The report was completed in 1995 (1995 Draft Constitution) but there was no official release until the sudden death of the Head of State.

Following the demise of Late General Sani Abacha, General Abdulsalam Abubakar emerged as the Head of state in May 1989. The 12 months old regime of General Abdulsalam Abubakar promulgated the 1999 Constitution. His transition programme came to an end on May 29th 1999 with the handing over of Power to a democratically elected Civilian Government of Chief Olusegun Obasanjo which also marked the effective date of the 1999 Constitution.

2.1.14. CONSTITUTION MAKING IN GHANA

Modern Ghana, formerly known as the Gold Coast, was the first country in Sub-Saharan Africa to gain political independence from colonial rule in 1956. Following years of British rule that lasted from the early 19thcentury to the mid-20th century, a new legislative assembly elected in 1956 passed a resolution requesting independence for the British colony of the Gold Coast, which was granted on 6 March 1956.[104] Under the Constitution promulgated for the new nation in 1957, a Westminster system of government was established with the prime minister as head of cabinet and the British Monarch as the head of state.

Besides setting up a parliamentary system of government, the 1957 Constitution provided for the representation of chiefs and tribal authorities in the regional councils, converted the legislative assembly to the national assembly, and entrenched clauses relating to its amendments.[105] Amendments to the Constitution in 1960 transformed Ghana into a Republic under a president and set up one party state. The constitutional amendments of 1960 gradually transformed Ghana into a one party state in which fundamental rights and political participation were either severely restricted or completely banned.[106] During these years, Ghana championed the liberation and

[103] *Ibid*
[104] *Ibid*, p.164
[105] *Ibid*
[106] *Ibid*

independence movements across Africa while internally becoming an authoritarian state. The outcome was deep resentment and internal opposition to the Nkrumah regime, resulting in numerous military take-over and unstable military regimes in 1966, 1969, 1972, 1978, 1979, and 1981.

Following the continuous downward spiral of the country under the successive military regimes, Flight Lt. Jerry Rawlings of the Armed Forces Revolutionary Council (AFRC), which had been responsible for the 1979 coup d'état, successfully staged another in 1981. The AFRC, though often criticized, considered itself on both occasions as responsible for restoring a sense of responsibility, direction, morality, and accountability in the development of the state.[107] The coup d'etat of 1981 set out to implement far reaching reforms that set the country back on the path to democracy and development. It suspended the 1979 Constitution as well as its institutions. A nine member Provisional National Defense Ruling Council (PNDC) with legislative and executive powers was set up to preside over the reforms. To directly develop and implement the strategy for democratic restoration, a National Commission for Democracy (NCD) was established.[108] The PNDC also decentralized government by setting up elected regional assemblies and elected district assemblies to bring the government closer to the people.

In line with its vision of fully restoring the country to a democratic system of governance and also spurred by similar democratic trends across the region in the 1990s, the PDNC authorized the NDC to embark on a public consultation process designed to collect, analyze and collate Ghanaians views on the form of state they desired.[109] The process led to a report which resulted in the appointment of an inclusive 258 member Committee of Experts to draw up constitutional proposals for consideration by a Consultative Assembly. The Assembly prepared a draft constitution based on proposals submitted to it by the PNDC, as well as previous constitutions of 1957, 1969 and 1979, and the report of the Committee of Experts. The final draft constitution was unanimously approved by the people in a referendum on 28 April 1992.[110] This Constitution, also known as the Constitution of the Fourth Republic was promulgated in January 1993.

[107] J.N Aduba and S. Oguche, *op. cit*, p.18
[108] *Ibid*
[109] *Ibid*
[110] *Ibid* at p. 19

The Constitution of the fourth republic, promulgated in 1993, provided for the reinforcement of the unitary nature of the state while allowing for decentralization and local government; a US style presidential system of government with an executive president elected for a four year term, renewable once; and greater press freedom and fundamental rights guaranteed. This Constitution, which survived for eighteen years is currently being reviewed, following the elections of John Atta Mills in 2008. In 2008, John Atta Mills won the presidential elections on a platform of, *inter alia* modernizing the Ghanaian constitution. In keeping with the promise, the government established a Constitutional Review Commission in January 2010. The Commission submitted its report on the 11th of December, 2011, and the government subsequently issued a White Paper in line with the provisions of the Constitution.[111] While the White Paper does not activate a constitutional change, it is towards amendment of the Constitution.

2.2. THEORETICAL FRAMEWORK

2.2.1. Legal Transplant

Legal transplantation is a system of legal borrowing, importation, reception and taking. It refers to the transfer of rules, principles, and legal concepts from one or more than one legal system to another legal system. The legal system borrowing laws can be called the recipient system while the legal system lending laws can be called the donor legal system. The lending system may be an existing legal system or a past legal system. The recipient legal system should be an existing one or a system at its initial stage of development. Legal borrowing can involve a single legal rule; it can be a massive borrowing. Appreciating legal transplantation is important to conduct legal research, as it enables you trace the right sources of the laws of a given country.

The term “Legal transplants” is commonly used to designate the dissemination of legal models from an exporting legal order to a receiving one. In a wider perspective, reception, transplants, or borrowings may either refer to the process, or to the results of a project of legal reforms, which is in turn initiated by a plan of legal change based upon an imitation of laws, doctrines and theories, and judicial decisions, already in place in different legal orders.

[111] Article 280(3)

Within the fabric of such terminology, the notion of legal transplants has been, for the last four decades, most central.

Understanding the pattern, meaning and significance of the circulation of legal paradigms and ideas across national frontiers is a central theme in comparative law.[112] It has recently attracted a great deal of academic interest, especially under the impulse of studies on globalization,[113] convergence among legal systems,[114] and on the unification of private law. Many themes and views have emerged, but, for the most part, the debate has been centered on the appropriateness of describing and explaining the phenomenon in terms of legal transplants. There is disquiet both as to this mode of innovation in law and as to the conceptual framework suggested by the terminology.[115] In particular, it has been claimed that that borrowing and imitation are not relevant in understanding the pattern of legal evolution[116] and that "since a transplanted institution continues to live on its old habitat as well as having been moved to a new one, the choice of the word transplant is inappropriate".[117]

The legal transplant theory becomes relevant to this study in the context of its cross-country nature between Nigeria and Ghana. Under this, relevant constitutional provisions of both countries are interrogated with a view to importing useful practices for improved constitution alteration processes.

2.2.2. Constitutionalism

Constitutionalism means that the constitution is supreme, and it binds every state authority established and exercising power under the constitution including the powers to enact legislations[118], interpret the law and the enforcement of it. On the other hand, constitutionalism denotes a much more profound political process that transcends a simple adoption of a constitution by a given country. It essentially entails the existence of a political

[112] D.A. Westbrook, "Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless" (2006) Harv Int'l LJ 58, p. 493
[113] H.M. Watt, "Globalization and Comparative Law" in Reinmann, M. and Zimmermann, R. (eds) *The Oxford Handbook of Comparative Law* (OUP, Oxford, 2006) 578
[114] B.S. Markesinis, (ed) *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (OUP, Oxford, 1994)
[115] G. Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 MLR 10
[116] P. Legrand, "The Impossibility of Legal Transplants" (1997) 4 Maast J Eur & Comp L 111
[117] E. Orucu, "Law as Transposition" (2002) 51 ICLQ 205 at 206.
[118] M. Bazezew*, "MIZAN LAW REVIEW Vol. 3 No.2, September 2009, 358-369; M.T. Ladan, *Introduction to Jurisprudence: Classic and Islamic*, (Lagos, Malthouse Press Limited, 2006) p. 221.

culture in a given country that translates the constitution into a living and lived experience by both the government and the governed. In a nutshell, therefore constitutionalism is concerned about all the various dimensions of statecraft and governance – from the seemingly mundane, to the great and vexing issues of political and economic management in a world that has increasingly become smaller.[119] This work is an examination of the operation of constitutionalism in Nigeria and Ghana from a comparative perspective. In so doing, the work segments the Nigerian and Ghanaian perspectives for ease of discussion.

Constitutionalism has never meant government enfeebled by divisions within itself; it has meant government limited by law. Constitutionalism suggests the existence of a constitutional government, a government which derives its authority from a constitution and which administers state affairs in accordance with a constitution. Constitutionalism simply put, means the constitution is a supreme law and it binds every state authority established and exercising power under the constitution including the power to enact legislations. The effect of this is that any law passed by the legislative arm of government or any action of other governmental authorities shall be declared null and void to the extent of its inconsistency with any provisions of the constitution or if it violates any of the constitutional limitations. The Constitution of the Federal Republic of Nigeria, 1999 (As Altered) contains provides for the Supremacy of the Constitution whereby it has binding force on all authorities and persons throughout the Federal Republic of Nigeria, and if any other law is inconsistent with its provisions, it shall prevail, and that other law shall to the extent of the inconsistency be void.[120]

A government is limited by law when all the levels and arms or branches of government observe the limitations imposed on their functions and powers by the Supreme law of the land; when they respect the tenets of constitutionalism; and comply with the requirements of the rule of law or due process of law as opposed to arbitrariness or abuse of power.

Constitutionalism holds that the process by which the constitution is made is as important as its content. Like many African countries, the constitution in Nigeria was not made by the people in an inclusive, participatory,

[119] J. Oloka-Onyango (ed.): *Constitutionalism in Africa: Creating opportunities, Facing Challenges* (Kampala, Fountain Publishers, 2001) p.3
[120] Section 1

transparent, informed and representative process of all stakeholders as opposed to a document drawn up by a few elites (military and civilian). This flawed process of constitution making is largely part of the fundamental weaknesses of constitutional democracy in Nigeria. It should be noted that sovereignty ultimately belongs to the people, as declared by Nigerian Constitution, from whom government through this constitution derives all its powers and authority.[121]

The Philosophy here is inherent in the dynamic principles of change. Although natural laws are themselves immutable, human nature is dynamic and changes are inevitable. Studies in law and society show that society is permanently in a flux. Therefore Law, *a fortiori*, constitutions are needed to guide and gird society. Such laws must be certain and predictable but not immutable, otherwise the entire system would choke and break down. The need for certainty and predictability also inform the need to clearly set out how changes in such laws are to be made so that society is not governed by impulses and citizens are not ambushed.

2.3. LITERATURE REVIEW

The need for this study is strengthened by the gaps in the existing literatures, which are disclosed by the research conducted. This literature review focuses on books and articles written by learned authors on various aspects of constitution making and amendment as disclosed hereunder. The author based approach I adopted in this review.

Odeleye in his work, 'Constitutional Amendment under the 1995 Federal Democratic Republic of Ethiopia Constitution and the Constitution of the Federal Republic of Nigeria 1999 (As Amended)'[122] undertakes a comparative analysis of amendment procedures in both countries. The author classifies amendment procedure under both Constitutions into general and special amendment. The author maintains that while special amendment relates to the provisions of fundamental rights and the Article/Section that provides for amendment itself, general

[121] Section 14(2)(a)

[122]D.O. Odeleye, 'Constitutional Amendment under the 1995 Federal Democratic Republic of Ethiopia Constitution and the Constitution of the Federal Republic of Nigeria 1999 (As Amended)' [2012] 2 & 3, *Abuja Journal of Public and International Law*, 588-599

amendment covers other provisions of the Constitution.[123] According to him, constitutional amendment is not treated like an ordinary Bill, being an extraordinary Act of the National Assembly. He contends that constitution amendment procedure should set a balance between the inherent need to adapt to changes in the society and ensure stability and necessity to bar regressive gold-digging alteration. He therefore, recommends amendment of the Nigerian Constitution to make provision for the direct involvement of the citizens. He equally recommends that section 9 of the Constitution should be amended to expressly exclude or include the need for presidential assent. The limitation of this work however, is that it does not address the amendment process in Ghana along with the position in Nigeria. This gap will be effectively filled by this study.

Aduba and Oguche in their book, *Key Issues in Nigerian Constitutional Law*[124], address some key concepts such as Government, Constitution, presidentialism, separation of powers, rule of law and federalism. On separation of powers, the authors express the view that the theory merely means that a different body of persons is to administer each of the three departments of government; and that no one of them is to have a controlling power over either of the other. Such separation is necessary for the purpose of preserving the liberty of the individual and for avoiding tyranny.[125] They contend that Nigerian Constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary power.[126]

The authors express the view that one of the most important constitutional innovations brought into constitutionalism in Nigeria is the power given to the legislature to call the executive to order and good governance through the power of investigation.[127] The shortcoming of this work is that it does not specifically examine the constitutional alteration process, which this work addresses. To that extent, this research fills the gap in the work.

[123] *Ibid*, p.594
[124] J. N. Aduba, and S. Oguche, *Key Issues in Nigerian Constitutional Law* (Lambert Academic Publishing, 2014)
[125] *Ibid*, 45
[126] *Ibid*, p.50
[127] *Ibid*, p.285.

In his work on constitutional amendment, Richard[128] argues that written constitutions may be informally amended in various ways, such as judicial interpretation, statute, or executive action. The author maintains that in addition to the above, written constitutions may also be informally amended by desuetude. According to him, informal amendment by constitutional desuetude occurs when a constitutional provision loses its binding force upon political actors because of its sustained nonuse and public repudiation by political actors. Though it is a species of informal amendment, constitutional desuetude possesses unique properties, as it reflects the informal repeal of a constitutional provision because of the establishment of a new convention. Despite its obsolescence, the desuetudinal constitutional provision remains entrenched in the constitutional text. Consequently, although informal amendment generally leaves the constitutional text entrenched, unchanged and politically valid, this variation of informal amendment leaves the text entrenched and unchanged but renders it politically invalid. The author, therefore, illustrates and theorizes the phenomenon of informal amendment by constitutional desuetude with reference to the Canadian Constitution, while also constructing an analytical framework for identifying constitutional desuetude in other jurisdictions. He distinguishes constitutional desuetude from other forms of obsolescence and explores the costs of constitutional desuetude. A major limitation of this work lies in the fact that it neither addresses the amendment processes in Nigeria nor Ghana, which is the focus of this research.

In his work titled "Nigeria-The Search for Autochthonous Constitution",[129] Amah, examines the clamour for a Sovereign National Conference, which has been a topical issue in the Nigerian media and in the public discourse. He dismisses various arguments as to why a Sovereign National Conference is not attainable in the present democratic Nigeria are far from reality. This work x-rays the history of Nigerian constitutions making and the resultant consequence of her inability to evolve an autochthonous Constitution. It argues that the power of the sovereign people of Nigeria to make a Constitution by themselves through a constituent assembly elected for the purpose, subject to a referendum by the people could not have been taken away by the provisions in the 1999 Constitution of Nigeria for parliamentary constitutional amendments. It opines that the mandate given to the President and the Legislators to amend the Constitution is a limited mandate and is not meant to substitute the

[128] A Richard, 'Constitutional Amendment by Constitutional Desuetude' [2014] 63(3) The American Journal of Comparative Law , 641-686

[129] E.I. Amah, , 'Nigeria-The Search for Autochthonous Constitution' [2017] 8 (1) Beijing Law Review

people as the repository of constituent power. Finally, the work concludes that only an autochthonous constitution can salvage the country from her present political, ethnic and economic quagmire. This work did not however address the amendment procedures of constitutions which gap is effectively filled by this research.

In his work titled "The Contradictions of Constitution-Making in Nigeria",[130] Eresia-Eke contends that constitution-making is a popular but poorly understood concept. According to him, there are many speculations about the impact of different design processes on constitutional outcomes. Much of the debate reduces to the question of who is involved in the process and for what intent? Along this line, the author considers two central issues. The first is the problem of institutional self-dealing, or whether governmental organs that have something to gain from the constitutional outcome should be involved in the process. The second deals with the impact of public involvement in the process. He maintains that both issues have clear normative implications and are amenable to straightforward social scientific analysis. This work undertakes surveys of the relevant research on constitution-making, describes the conceptual issues involved in understanding it, reviews some claims regarding the process, and presents a set of baseline empirical results from a new set of data on the content and process of constitution-making. The work concludes that owing to the need for an ideal constitution (one which emanates from the people themselves), and for democracy to succeed in Nigeria and elsewhere, the errors in the constitution-making processes must be corrected. It should be made to function ideally, incorporating both the political and legal aspects of its provisions. Where this is achieved, it would help to protect the individuals against violations of their right as well as against unjust regimes. However, the work does not discuss the alteration process which is what this research did.

On his part, Abioye[131] maintains that the African continent has been besieged a by vast range of problems in modern times, including abnormally high levels of poverty; incessant outbreaks of war; ineptitude of its leaders and their reluctance to relinquish power; corruption; and persistent under-development. These problems stem principally from the failure of good governance on the continent, and further exacerbated by the inability of the

[130] A. Eresia-Eke, 'The Contradictions of Constitution-Making in Nigeria' [2019] 6 (4), African Research Review
[131] F.T. Abioye, 'Constitution-making, Legitimacy and Rule of Law: A Comparative Analysis' [2011] 44(1) *The Comparative and International Law Journal of Southern Africa*, 59-79

law to rule, and to provide a conducive environment for growth and nation building. The article traces one of the reasons for the continued failure of the rule of law in Africa to the foundational law in most African countries, the constitution, and in particular, the way in which the constitution is made. According to the author, when there is no common or unifying factor amongst a people; when the people of a country are not allowed to contribute to the constitution-making process; and when they do not therefore identify with the constitution itself, it loses legitimacy in their eyes. Compliance with the constitution and with other laws emanating from it becomes a factor of the threat of sanctions or use of force. The paper finally validates the assertion that the ultimate test of the ownership of the constitution making process is that its product (the new constitution) is genuinely observed as a self-binding commitment. The gap of the paper is the restriction of the constitution making without addressing the crucial amendment process which this study addressed.

Writing on the significance of constitution-making, Landau[132] argues that scholars and policy-makers need to shift focus from the moment at which the break with the old regime occurs towards the moment at which new constitutional orders are constructed. He contends that the constitution-making process in some countries, is likely to determine in large measure what these new regimes are likely to look like. In particular, the author draw off of a case study of the 2009 military coup in Honduras, which was provoked by ex-President Zelaya's attempt to call a constituent assembly, to make two points. First, both constitutional theory and international law and politics have allowed constitution-making processes to occur in a vacuum - neither provides any real restraints on these processes. Second, the main risk of constitution-making is that powerful individuals or political parties use either real or manufactured majorities to impose constitutions on the rest of their societies. He concludes that an urgent task in constitutional design and theory is therefore to construct models that will constrain this kind of constitution-making, and to find ways of enforcement. While this literature provides a good insight on constitution-making, it does not address amendment processes to be of direct relevance. Furthermore, it does not address the peculiarities of Nigeria and Ghana, which is a major gap filled by this research.

[132] D. Landau, 'The Importance of Constitution-Making' [201]) 89(3) Denver L. Rev. 611-633

Writing on participatory constitution-making, Choudhry and Tushnet[133] look back to the late eighteenth century, since when constitutions have been understood as emanations of the will of "the People," as the ultimate expression of an inherent popular sovereignty. According to them, in the form of theories of constituent power, accounts of constitutional foundations blended notional or conceptual "descriptions" of the People, which anchored the political legitimacy of constitutional orders in the idea of hypothetical consent, with empirical claims that the nation's actual people were represented in constitution-making processes through elected delegates and thereby were the authors of and gave consent to its fundamental law.[134] As part of the third wave of democratization, there was an important shift in what popular participation consisted of - from indirect participation by elected representatives to direct, popular participation in the constitution-making process. The authors finally take the view that, as a matter of constitutional process, this having led to the growing practice, and expectation, that major constitutional changes should be ratified through referenda. Like the previous literatures, this work does not specifically address constitution alteration process in Nigeria or Ghana. This gap is adequately covered by this present research.

In their work titled 'Amending the Constitution of Ghana: Is the Imperial President Trespassing?'[135] Asare and Prempeh restate that parliament is unique among the institutions of the Constitution in being the only body whose membership straddles the diverse political and regional demography of the nation. In their view, the President, though elected by a national electorate, is elected on the ticket of a single party and is generally identified with that party and perceived as promoting the policy preferences and legislative agenda of his party. In contrast, the Parliament of Ghana's Fourth Republic draws its membership from diverse and rival shades and aggregations of political opinion and interests, as represented by the political parties. In addition to its politically or ideologically representative character, Parliament also represents, like no other body does, the full range of the nation's regional and ethno-cultural diversity.[136] The authors argue that this latest extension of the Ghanaian President's

[133] S. Choudhry, M. Tushnet, 'Participatory constitution-making: Introduction' [2020] 18(1) *International Journal of Constitutional Law* 173-178
[134] *Ibid*, 175
[135] S. K. Asare and K. Prempeh 'Amending the Constitution of Ghana: Is the Imperial President Trespassing?' [2010] AJICL 1-36
[136] *Ibid*, 21

prerogatives is both ill-advised and of dubious constitutionality. In our view, Parliament, not the President, is the legitimate and proper constitutional body to initiate and determine the timing and content of constitutional review in Ghana. However, they caution that, particularly when it comes to altering the fundamental law of the land, agreement on matters of substance must not be allowed to cloud or subvert fidelity to sound process. Taming the imperial presidency in Ghana, as in the rest of Africa, must begin with wrestling away from presidents the power to determine whether, when and how constitutional change shall proceed. The limitation of this work is its restriction to the powers of the President in the amendment process in Ghana. The present research effectively covers this gap by examining the entire amendment process, not just the role of the president.

In his paper titled 'The expressive function of constitutional amendment rules'[137], Albert takes the position that the current scholarly focus on informal constitutional amendment has obscured the continuing relevance of formal amendment rules. He returns attention to formal amendment in order to show that formal amendment rules (not formal amendments but formal amendment rules themselves) perform an underappreciated function: to express constitutional values. Drawing from national constitutions, in particular the Canadian, South African, German, and United States constitutions, he illustrates how constitutional designers may deploy formal amendment rules to create a formal constitutional hierarchy that reflects special political commitments. That formal amendment rules may express constitutional values is both a clarifying and a complicating contribution to their study. The work clarifies the study of formal amendment rules by showing that such rules may serve a function that scholars have yet to attribute to them; yet it complicates this study by indicating that the constitutional text alone cannot prove whether the constitutional values expressed in formal amendment rules represent authentic or inauthentic political commitments. Despite the significance of this work in providing insight to the discourse on constitutional amendment, it neither covers the alteration process in Nigeria nor the amendment process in Ghana, as this research did.

[137] R. Albert 'The expressive function of constitutional amendment rules' [2015] 2 (1) Rev. Investig. Const. 67-93

Writing on the amendment process of the United States Constitution, Dellinger[138] opines that the conventional view of article V is that it leaves the task of resolving amendment process issues entirely to Congress. He contends that judicial abstention from involvement in amendment process disputes is dictated neither by the text of article V nor by actual congressional practice nor by the weight of relevant precedent and that it is subversive of the clarity and regularity essential to legitimate constitutional change. Consequently, he develops a model of judicial review of amendment process issues as an alternative to the orthodox vision and applies this model to several contemporary amendment process controversies. He concludes that in the construction of article V, the courts should recognize that the provision only imperfectly achieves policy objectives such as the ascertainment of contemporaneous consensus, and that clear standards for changing the fundamental law are of central importance to the integrity of constitutional government. Unlike open-textured provisions of the Constitution, article V should be viewed as a set of formal rules rather than as the embodiment of vague policy objectives.[139] This work, like others, does not address the Nigerian and Ghanaian positions, as it focuses on article V of the US Constitution and the interpretative function of the courts.

In another work on Article V of the US Constitution, which specifies how the Constitution may be amended, Strauss contends that notwithstanding all the attention that constitutional amendment received, the constitutional order would look different if a formal amendment process did not exist. He maintains that at least since the first few decades of the Republic, constitutional amendments have not been an important means by which the Constitution, in practice, has changed, as many changes have come about without amendments. In some instances, even though amendments were rejected, the law changed in the way the failed amendments sought. Several amendments that were thought to be important in fact had little effect until society changed by other means. He discloses that other amendments did little more than ratify changes that had already come about in other ways. If this thesis is correct, it suggests that precedents and other traditions are often as important as the text of the amended Constitution; that political activity, in general, should not focus on proposed constitutional amendments;

[138] W. Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process ' [1983] 97(2) Harvard Law Review, 386-432
[139] *Ibid* 432

and that American constitutional law is best seen as the result of a complex, evolutionary process, rather than of discrete, self-consciously political acts by a sovereign People. Like many other literatures, this focus on article V is restrictive for the purpose of this research, as it does not cover textual amendment processes, which forms the focus of the present research.

Nwabueze, in his book, Constitutional Democracy in Africa[140], undertakes a critical survey of the nature of constitutional democracy as practiced in Africa. The book focuses on a discussion of constitutional institutions, structures and devices of a general nature necessary for a proper understanding of democracy in Africa. It commences with an analysis of the concept of constitutional democracy itself and goes on to identify essential institutions and principles of democratic government as free and fair elections on a universal adult franchise and the responsibility and accountability or answerability of the rulers to the people. The book contends that the necessary devices for limiting government are a constitutional guarantee of the basic rights of the individual, separation of powers and federalism, amongst other forms of limitations, while the mechanisms for the exercise of power are legislation and executive action. On the question of separation of powers, the author contends that constitutionalism requires for its efficacy a differentiation of governmental functions and a separation of the agencies which exercise them, for "the diffusion of authority among different centers of decision-making is the antithesis of totalitarianism or absolutism."[141]He contends that in the light of the practice and exigencies of modern government, governmental agencies are multi-functional; some over-lapping in the functions of the various agencies being inevitable. The deficit of Nwabueze's work is that it does not specifically address the challenge of constitution alteration, and only relevant in the structures, powers and organizing principles of government.

In their work, Dunmoye, *et al*[142]examine Nigerian democracy and the role of the National Assembly, with emphasis on the centrality of the National Assembly to democracy in Nigeria. They focus on the contentious issue of federalism and undertake a historical incursion into the practice of federalism in Nigeria, unveiling that major

[140] B. Nwabueze, *Constitutional Democracy in Africa, Vol.1* (Spectrum Books Limited, 2003)
[141] *Ibid*, p. 243; see also M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press, 1967) p.10
[142] A.A. Dunmoye,, *et al*, *National Assembly: Pillar of Democracy*, (Nigerian Legislatures, National Assembly, 2007)

threats to the federalism in Nigeria include religious intolerance, the emergence of ethnic militias and the problem of perceived marginalization by some constituent units of the federation. On the practice of democracy in Nigeria, the authors explain its principles with its core values which include free and fair election, independent judiciary, respect for fundamental rights and respect for the rule of law. The authors examine the role of the legislature in socio-cultural change. This work also examines the committees of the legislature and note that a good committee system is an important primary source of effective legislative leadership and that legislative committees constitute popular yardstick for measuring the effectiveness of legislative systems in many democratic political systems. The work reveals that the Committee system of National Assembly has exhibited some degree of weakness, hence the urgent need to reform the committee system for enhanced practice.[143] The authors also highlight the general functions of the legislature and concede that the legislature is a critical arm of government, with extensive and far-reaching functions which may not be restricted to the subject matters examined in their work.[144] This underscores the imperative of our present research. Despite the above content, this work merely highlights the functions of the legislature without discussion of the constitution alteration process, which forms the focus of the present research.

According to Lawal[145], most written constitutions usually contain special procedures for their amendment to be able to adjust to future needs and prepare for unforeseen circumstances. The author examines the constitutional amendment procedure in Nigeria and the requirement of presidential assent. He contends that while there is a consensus on the necessity of the presidential assent before a legislative bill can become law, the need for a presidential assent to validate a constitutional amendment is not devoid of controversy. On the one hand are those who believe that the assent of the President is unnecessary to validate a constitutional amendment. On the other hand are those who believe that the presidential assent is indispensable in any constitutional amendment in Nigeria. Aggregating the contending views, the author contends that by the provisions of the Constitution of the Federal Republic of Nigeria, the Nigerian Constitution is only to be "altered" or amended by an "Act of the

[143] *Ibid*, p.260
[144] *Ibid*, p. 197
[145] I.B. Lawal, 'The Review of the Constitutional Amendment Procedure and Presidential Assent in Nigeria', [2015] 7(5) JLCJ 26-30

National Assembly".[146] This automatically makes any constitutional amendment in Nigeria to be subject to all procedural requirements for validating any Act of the National Assembly. He concludes that, since any bill of the National assembly cannot validly become an Act without the assent of the President, therefore, as already contended, presidential assent is a *sine qua non* for any valid constitutional amendment in Nigeria. As significant as this work is to the present research, it does not cover the process of alteration. Besides, it does not discuss the procedure in Ghana, as the present research did.

In his article titled 'Managing Constitutional Change in the Nigerian Federation', Zuberu[147] writes that since making the transition from military to civilian rule in 1999, Nigeria has witnessed intensive, but largely unfulfilled, pressures for comprehensive federal constitutional change. The article analyses the multiple ethno-political drivers and institutional themes of Nigeria's constitutional struggles, the conflicting approaches to federal reform by governmental, civic, and ethno-regional groups, and potential pathways to a more effective governance of the country's constitutional challenges. It contends that incremental constitutional change and non-constitutional renewal, including benign constitutional transgressions and creative legislative and judicial interventions, offer the most feasible path to federal accommodation and development in Nigeria in the absence of national consensus on the desirability and modality of wholesale, mega-constitutional reform. The article concludes that constitutional change has been taking place in Nigeria in an incremental fashion and that there are real advantages to proceeding and continuing in this manner. The limitation of this article for the purpose of this research is that it does not examine the process of constitution alteration and the attendant challenges. These gaps are effectively covered by this research.

Igbuan,[148] in his study examined the gamut of the powers vested in the president, particularly as exercised since the coming into being of the 1999 constitution. He wrote that the 1999 Nigerian Constitution vested executive powers in the president, who is the chief executive. And similarly, the 1999 Constitution confers on the president,

[146] s 9(2) and (3)
[147] R. Zuberu, 'Managing Constitutional Change in the Nigerian Federation' [2015] 45(4) Pages, 552-579
[148] W. Igbuan, *A critical analysis of presidential powers under the 1999 Nigerian Constitution* (2011) Being a thesis submitted to the post graduate school of the Ahmadu Bello University, Zaria in partial fulfillment of the requirements for the Award of the Master of Laws (LLM.) Degree.

the power to assent bills and modify existing laws. Even though there is provision for delegation of powers, such delegates act only for and on behalf of the president, hence such acts are acts of the president. He further stated that in a country like Nigeria, whose history, especially as regards executive presidency dates back only to 1979, it is obviously difficult to attempt to imbibe the political model of United States of America whose executive presidency is centuries old, without obstacles. That when such powers conferred by Section 5, 58 and 315 as well as other specifically granted powers in the constitution are vested in one man called the president without effective checks and balances, and without a clear frontier as in Section 5 (1)(b), the tendency is that such powers will be misused.[149] This work is significant for the purpose of this research, as it brings to the fore the role of the President in law making. However, the work suffers limitations for the purpose of this research in that it does not interrogate alteration process of the Constitution and the impediments, which the present research undertakes.

Writing on constitution-making and constitutional rule in Ghana, Frempong[150] restates that a constitution enjoys a special place in the life of any nation; a fact which makes constitution-making and constitutional practice a useful starting point for analyzing the government, politics and development of any state. He added that a constitution regulates not only the exercise of political power, but also the relationship between political entities and between the state and citizens. With this at the backdrop, he examines the trajectories of constitution-making and constitutional practice in Ghana over the half-century since independence, taking into consideration issues like what accounted for the quick succession and varied nature of constitutions in Ghana over the last fifty years, as well as the inclusiveness of the various constitution-making exercises and their impact on the practice of constitutional rule in Ghana. However, this work does not specifically discuss the amendment process as enshrined in the Constitution of Ghana, which is the focus of the present research.

On their part, Gyampo and Graham[151] maintain that Ghana's 1992 Constitution is a hybrid arrangement that combines some features of both the US Presidential and British Westminster systems of Government. Having modeled three different constitutions along the lines of both systems since 1960, there emerged the preference for

[149] *Ibid*, 1

[150] A. Frempong 'Constitution-Making and Constitutional Rule in Ghana'[2007] < https://studylib.net/doc/7410622/constitution-making-and-constitutional-rule-in-ghana> accessed

[151] E. V. Gyampo and E. Graham, 'Constitutional hybridity and constitutionalism in Ghana' [2014] 6 African Review 138-150

constitutional hybridity in 1992. This was based on the assumption that the best constitution is a mixed system that borrows from the features of the two main systems of government. Nevertheless, after over 20 years of operation, this study shows that Ghana's 1992 Constitution upsets the balance of power between the arms of government, particularly between the executive and legislature and in favor of the former in a manner that undermines constitutionalism. This paper discusses the specific arrangements and provisions of the hybrid constitution and how they facilitate the exercise of unbridled as well as unmitigated executive power. It makes a call for the abolition of the hybrid system and an adherence to either of the two main systems, but not both. Like the preceding literature, this work does not address the amendment procedure in Ghana. This gap is adequately filled by the present research.

In their work, Ginsburg, Elkins and Blount[152] view Constitution-making as a ubiquitous but poorly understood phenomenon. According to them, there is much speculation but relatively little evidence about the impact of different design processes on constitutional outcomes. Much of the debate reduces to the question of who is involved in the process and when. The authors consider two central issues in this regard. The first is the problem of institutional self-dealing, or whether governmental organs that have something to gain from the constitutional outcome should be involved in the process. The second has to do with the merits of public involvement in the process. Both of these concerns have clear normative implications and both are amenable to straightforward social scientific analysis. This article surveys the relevant research on constitution-making, describes the conceptual issues involved in understanding constitution-making, reviews the various claims regarding variation in constitution-making processes, and presents a set of baseline empirical results from a new set of data on the content and process of constitution-making. Notwithstanding the significance of the work to the present research, it does not address constitutional amendment issues which form the central focus of this research.

In her work titled ‘Designing a Constitution-Drafting Process: Lessons from Kenya’[153] Bannon examines Kenya’s recent constitution-writing experience as a case study for designing constitution-drafting processes in emerging democracies. This work discloses that a few years after Kenya's constitutional review process began, and after a

[152] T. Ginsburg, Z. Elkins, and J.Blount, ‘Does the Process of Constitution-Making Matter?’ [2019] 5 Annu. Rev. Law Soc. Sci. 1-23
[153] A. L. Bannon, ‘Designing a Constitution-Drafting Process: Lessons from Kenya’ [2017] 116(8) Yale Law Journal, 1824-1872

highly acrimonious drafting period, Kenyans roundly defeated a proposed new constitution in a national referendum. This work describes Kenya's experience and considers six lessons on designing a constitution-drafting process. It then proposes how a constitution-drafting process in a country like Kenya might have been more effective. The work maintains that constitution-writing will continue to be important throughout the world, as new democracies emerge and citizens demand institutions that match their aspirations. The work shows how procedural choices can play a critical role in determining the legitimacy and efficacy of a country's constitution. It finally concludes that Kenya's experience should be a cautionary tale but, in its own way, also a source of inspiration. The weakness of this work for the purpose of the present research is its restriction to constitution drafting in Kenya. It does not address the amendment process in Nigeria or Ghana, and this forms a huge gap that the present research fills.

On his part, Lenowitz[154] contends that the ratification referendum is the most common and recommended means of concluding a constitution-making process. The paper questions its desirability by undercutting the procedure's most popular justification: to provide a means for the popular sovereign, the constituent power, to enter the constitution-making process and make the constitution its own. It canvasses the argument that this justification fails because taking popular authorship seriously in the one-shot setting of constitution making requires that citizens be capable of understanding and evaluating the constitution, and that voters should be expected, through no fault of theirs, to lack the technical and complex information needed to do so. If there are good reasons to submit constitutions to referendums, these do not include those that hand wave toward the importance of popular sovereignty. The author takes the view that either the procedure should be dropped from constitution-making best practices, or a new more convincing justification needs to be given. This work is vital to a discourse on constitution making but suffers limitation for the present research in that it falls outside the ambit of constitutional amendment, especially in Nigeria and Ghana, which this research addresses.

[154] J. A. Lenowitz, 'The People Cannot Choose a Constitution: Constituent Power's Inability to Justify Ratification Referendums' [2021] 83 (2) The Journal of Politics, 617-632

Writing on codification of entrenchment clauses in contemporary constitutions, Hein[155] contends that almost all contemporary constitutions are entrenched, with the implication that they are harder to amend than ordinary laws. The author further discloses other hurdles that "Entrenchment clauses" raise. They make amendments to certain parts of a constitution or amendments under certain circumstances either more difficult than "normal" amendments or even impossible. Such provisions are common around the world and in all types of political systems. Nevertheless, they are highly controversial from a normative point of view since they may be seen either as adequate means for protecting human rights, democracy, and the rule of law or as illegitimate restrictions on democratic sovereignty. Against this background, the article examines the factors that influence the codification of entrenchment clauses in contemporary constitutions. It analyzes 210 national constitutions adopted from 1975 until 2015, while focusing on factors describing historical legacies, the political and social context of constitution-making, and characteristics of the newly established constitutional order. The article shows that the state of democracy has almost no significant influence on the decision for or against entrenchment clauses. Instead, historical path dependencies and contingent procedural decisions on the constitution-making process predetermine that constitutional choice to a large extent. This work is of immense importance to the research, but suffers a fundamental limitation in that it does not cover process of constitutional amendment under the Nigerian and Ghanaian Constitutions. This limitation is adequately covered by the present research.

Writing on constitution-making and its legitimacy, Regassa's work[156] describes the making of the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE) and analyzes its implications for legitimacy. It contends that legitimacy of the constitution, which fosters fidelity to it, can (as one among other factor) help bridge the gap between constitutional design and constitutional practice. By making a process-content-context analysis of the constitution, it argues that the Ethiopian constitution which had a weak original legitimacy, can earn a derivative legitimacy through aggressive implementation. Aggressive implementation, it is maintained, demands fidelity to the constitution. Fidelity and other components of a redemptive constitutional practice (such

[155] M. Hein: 'Impeding constitutional amendments: why are entrenchment clauses codified in contemporary constitutions?' [2019] 54 Acta Politica 196-224

[156] T. Regassa, 'The making and legitimacy of the Ethiopian constitution: towards bridging the gap between constitutional design and constitutional practice'[2010] 23 AFRIKA FOCUS 85-118

as creative constitutional interpretation, constitutionally informed legislation, positive constitutional amendment, and constitutionally responsible voting) help deal with the perennial question of how to bridge the gap between constitutional design and constitutional practice in Ethiopia and beyond. The work concludes that the gap can be filled only through legitimacy, constitutionalism, and efficacy. For this, redemptive constitutional practice, conducted through the instrumentality of constitutional fidelity, is recommended. This work is significant in that it addresses constitution making, which is relevant to the present research. However, it does not cover amendment of the Constitution and the attendant challenges, which this research adequately covers.

Writing on constitution-building and public participation, Saati[157] promotes the view that constitution-building is one of the most salient aspects of transitional processes, from war to peace or from authoritarian rule, in terms of establishing and strengthening democracy. The paper identifies the circumstances under which constitution-building can strengthen democracy after violent conflict and during transitions from authoritarian rule. The paper concedes that the actions and relations of political elites from opposing political parties when making the constitution has bearing on the state of democracy post promulgation, but that the careful sequencing of public participation in the process can be of relevance as well. It undertakes a systematic analysis of seven empirical cases and focuses the investigation to the type of constitution-building body that has been employed, as well as the stage of the process when the general public has been invited to participate. The paper also discusses the potential need for political elites to have negotiated a number of baseline constitutional principles prior to inviting the general public to get involved in the constitution-building process and concludes that this is an area of research in need of further in-depth empirical case-studies. It concludes that popularly elected constitution-building bodies tend to include a broad range of political parties and that they, additionally, tend to have rules of procedure that encourage compromise and negotiation, whereas appointed bodies are dominated by one single party or one single person and do not have rules of procedure that necessitate compromise. This paper is significant to this research, but also suffers the limitation of not addressing the constitution amendment processes in either Nigeria or Ghana. This gap is adequately filled by the present research.

[157] A. Saati, 'Constitution-Building Bodies and the Sequencing of Public Participation A Comparison of Seven Empirical Cases', [2017] 10(3) JPL 13-25

In his book titled “On Legislatures"[158], Loewenberg contends that legislatures seem to have the characteristics of other things we love: we can't live with them but we can't live without them.[159] He is of the view that legislatures are puzzling institutions as it is a collection of several hundred members who are nominally equal to each other and who are able to reach a decision. Loewenberg asserts that the concept of representation is difficult to clarify, but it is so intimately related to a legislative institution that is bound to appear and reappear in the study of legislatures.[160] He views legislatures as links between governments and the public and, in that regard, contends that although parliaments existed centuries before the advent of democracy and nation states, elected parliaments are today a defining characteristic of democracy and national independence. He contends that the capacity of legislatures to control actions of the executive is inherent in their lawmaking powers. On this note, the author argues that "legislatures have been the chosen instruments of democratization because giving their members the power to make laws presumably gives them the capacity to control the executive branch of the government."[161] He is of the view that all other things being equal, the legislature's control can be greater in presidential systems, in which the legislature is separate from the executive, than in parliamentary systems. The weaknesses of this work it that it does not specifically cover the role of the legislature in constitutional amendment. The present research, which is a comparative analysis of constitution amendment processes in Nigeria and Ghana, adequately fills the gap.

Another author, Strauss[162], gives a compressed account of legislative process. He discloses that in the U.S. Congress, bills, including those for constitution amendment, may originate in either the House of Representatives or Senate and they must pass both in identical form. The author further discusses committee consideration and report wherein he discloses that once a bill has been formally introduced in either house of the legislature, it is ordinarily referred to the committee of that house that has responsibility for its legislative subject matter. He further notes that once reported out of committee, a bill may be called for debate on the floor of the chamber. In Congress, the timing and nature of the debate is regulated in both chambers, much more formally in the House of

[158] G. Loewenberg, *On Legislatures* (Taylor and Francis, 2019)
[159] *Ibid*, vii
[160] *Ibid*, 25
[161] *Ibid*, 84;see also M. Zander, *The Law-Making Process* (6th edn, Cambridge University Press 2014)
[162] P. Strauss, *Legislation: Understanding and Using Statutes* (Foundation Press, 2016)

Representatives than in the Senate. While discussing the emergence of purposive and history-oriented interpretation, the author addresses changing legal institutions and changing judicial approach to statutory materials. He notes that the attitude of the courts toward statute law presents a contrast to that of the civilians who have been more ready to regard statutes in the light of the thesis of the civil war that its precepts are statements of general principles, to be used as guides to decision. The limitation of this work lies in its restriction to the United States of America, and it's not specifically addressing amendment processes. Besides, the work does not relate to the processes in either Nigeria or Ghana, which the present research addresses.

Writing on the National Assembly, Nnamani[163] undertakes an expository analysis of the role of the National Assembly in Nigerian democracy. The article examines the functions of the legislature in a democracy with particular emphasis on issues such as representation, oversight, lawmaking and public hearing on bills and petitions. It calls on the National Assembly to be conscious of those vital functions and, as representatives of the people, legislators need to feel the pulse of the people and feel the people's concern in the policy/decision making process, which can only be achieved if they are in constant touch with their constituencies and keep them duly informed of their activities and government policies.[164] Nnamani's article is limited in scope for the purpose of the present research. It only highlights the functions of the legislature and gives statistics of bills sent to the President for assent from 1999 to 2006 as well as public petitions and motions moved. It does not address the role of the National Assembly in the constitution alteration process, and the attendant challenges. This gap is effectively covered in this research.

Eze, in his work titled 'A Legal Framework for Executive-Legislative Relations in Nigeria'[165], examines the constitutional framework governing the relationship between the legislature and the executive. It demonstrates that while the Constitution assigns the primary role of lawmaking to the legislature and that of executing the laws to the executive, there is no absolute separation of powers. This is because to enthrone a system of checks and balances, there are various areas where the legislature shares in the functions of the executive as in the case of

[163] K. Nnamani,, 'The National Assembly in Perspective' [2006] 1(1) NJLA, 1-89
[164] *Ibid*, 1
[165] O. Eze, 'A Legal Framework for Executive-Legislative Relations in Nigeria', [2006] 1(1) NJLA, 90-111

approval of the appointment of certain public officers, and the executive partakes of the legislative faculty in giving assent to bills passed by the legislature. The author canvasses that there are also areas of joint exercise of functions as in the case of declaration of state of emergency. Executive-legislative relations discussed in this work are significant to this research because constitution alteration requires collaborative efforts of both arms of government. Consequently, alteration or amendment process suffers where the relationship existing between the two arms is strained. However, like Nnamani's work above, Eze's work does not deal with the constitution alteration process, which forms the basis of the present research.

Writing also on Executive-Legislative relations, Odock[166] assesses the Constitution of the Federal Republic of Nigeria 1999 from the perspective of the concept of separation of powers and the models of inter-governmental relations, which is the product of the distribution of legislative, executive, and fiscal powers among the three tiers of government: federal, state and local government on the one hand; and the relationship between the legislature and the executive on the other. Using the concepts of executive dominance and legislative deference or compliance, the paper adduces evidence to the effect that although legislative-executive relations in Nigeria since 1999 evolves mainly in the perspective of deference in favor of the executive there appears to be a tendency towards greater legislative defiance or non-compliance. The four main areas where this interface is played out include the budget process, foreign policy, agenda setting and national security. The paper concludes by recommending that legislative-executive relations in future focus on streamlining the organization of powers, how to convey democratic accountability and accommodate diversity, to minimize conflicts. The significance of this work lies in the fact that constitution alteration in Nigeria requires input of the various States, and this underscores the imperatives of smooth intergovernmental relations. Nevertheless, like Eze's work above, this work is restricted to legislative-executive relations and does not deal with the constitution alteration process, which is the crux of the present research.

[166] C.N. Odock, 'Legislative-Executive Relations under the 1999 Constitution of the Federal Republic of Nigeria: From Deference to Defiance', [2012] (4) (2) NJLA.28-64

In her work on constitutional amendment and revision, Janice[167] expresses the view that state constitutional amendment and revision procedures differ substantially from formal procedures for amending the U.S. Constitution. According to her, popular participation and frequent change in state constitutions contribute to significant differences between state and national constitutional politics. State constitutions are widely perceived to be "political" documents, whose amendment is not much different from ordinary legislative and electoral politics; the U.S. Constitution being regarded as relatively permanent and "above politics." She dismisses the idea of either being wholly accurate; differences between state and national procedures and politics being at issue in the recent revival of state constitutions as sources of civil rights and liberties. Her analysis of constitutional amendments suggests that use of the ballot proposition, which is unique to the states, tends to restrict civil rights somewhat in criminal justice while somewhat expanding support for new rights in other areas, including those not fully protected by the national government. She concludes that the states have established mechanisms for direct popular participation in the amendment and revision of state constitutions on a scale unmatched by the federal government. The gap in this work is its restriction to the U.S, which is outside the scope of this research.

In his Article on people's involvement in constitutional amendment, Monaghan[168] examines the tensions inherent in the "neither wholly national nor wholly federal" constitutional order created in 1789. 3The paper also dispels the notion that historical revisionism can erase the many democracy-restraining features of the Constitution. In doing so, the article focuses primarily on Article V (the amending provision-which illuminates the state-oriented compromises and democracy) restraining features that were built into the Constitution. The paper offers a response directly to Professor Akhil Amar, who advanced a claim that despite Article V, the Framers intended that a simple majority of a national "We the People" could amend the Constitution.[169] Dismissing the claim, which is described as appealing but historically groundless, the paper maintains that Professor Amar's claim suffers from two deep flaws: It ignores the crucial role re- served for the states in the newly established constitutional order, and it also ignores the fact that the Constitution nowhere contemplates any form of direct, unmediated lawmaking

[167] J. C. May, 'Constitutional Amendment and Revision Revisited', [2020] 17(1) NCLJ 153-179
[168] H. P. Monaghan, 'We the People[s], Original Understanding, and Constitutional Amendment', [2019] 96 (1) Columbia Law Review 121-177
[169] A.R. Amar: 'The Consent of the Governed: Constitutional Amendment Outside Article V', [1994] 94 Colum. L. Rev. 457

or constitution-making by "the People." Notwithstanding the significance of this work to the research, it suffers some limitations in that it does not examine the procedure for constitutional amendment. Secondly, it is restricted to the U.S. Constitution, and does not cover the process in Nigeria and Ghana. These gaps are effectively covered by this research.

Negretto[170], while discussing the logic of constitutional change in Latin America, maintains that since 1978, all countries in Latin America have either replaced or amended their constitutions. Explaining what informs the choice between these two substantively different means of constitutional transformation, the article argues that constitutions are replaced when they fail to work as governance structures or when their design prevents competing political interests from accommodating to changing environments. According to this perspective, constitutions are likely to be replaced when constitutional crises are frequent, when political actors lack the capacity to implement changes by means of amendments or judicial interpretation, or when the constitutional regime has a power concentrating design. The article further argues that the frequency of amendments depends both on the length and detail of the constitution and on the interaction between the rigidity of the amendment procedure and the fragmentation of the party system. It finally provides statistical evidence to support these arguments and discusses the normative implications of the anal. The article concludes that constitutional origins may affect constitutional reform strategies, and that a constitution of revolutionary origins or one sealed by a national pact may be more likely to survive than one that is perceived to be the outcome of a self-interested bargain among political elites detached from the concerns of ordinary citizens. Consequently, public trust in representative institutions and constitutional courts may also affect the choice of means to change a constitution. The restriction of this work to Latin America is a major gap for the purpose of this research, as it does not discuss the position and procedure in either Nigeria or Ghana. This research covers this gap effectively.

Writing on the amendment of the U.S. Constitution, Marshfield[171] expresses the view that amendment rules contain a great deal of substance that can be relevant to deciding myriad constitutional issues. He maintains that,

[170] G. L. Negretto, 'Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America' [2021] 46 (4) : Law & Society Review 749-779

[171] J. L. Marshfield, 'Amendment Creep' [2018] 115 (2) Michigan Law Review 215-276

indeed, judges have explicitly drawn on amendment rules when deciding issues as far afield as immigration, criminal procedure, free speech, and education policy. He contends that, although largely unnoticed by scholars, amendment rules may be creeping into other areas of constitutional law. He further provides the first systematic investigation and assessment of "amendment creep" - the phenomenon where judges explicitly draw on amendment rules to interpret constitutional provisions unrelated to formal amendment. The author concludes that federal and state amendment rules contain constitutional substance that can assist judges and lawyers in resolving many diverse constitutional disputes. Based on an extensive review of relevant Supreme Court and state high court opinions, he constructs a typology of amendment-based arguments. He then concludes that amendment creep is an extension of a familiar form of constitutional reasoning known as structuralism, and that it may have several normative benefits for constitutional adjudication - such as promoting overall constitutional coherence and ensuring that judges consider the democratic values that amendment rules embed in the constitutional framework. Like other works cited above, this work suffers the limitation of being restricted to the US, without addressing the situation in either Nigeria or Ghana. This ground is effectively covered in this thesis.

In his work titled "Status and Role of the Legislature in a Democracy"[172], Bamidele establishes the fact that the head of the Legislature, the first arm of government, is made to take its position behind the President or the Governor as the case may be, because of the position of the former as Head of State of Nigeria or Head of State within Nigeria, not because he is Chief Executive. The Legislature is therefore, the number one arm of government in any democratic State. The author contends that the current low esteem in which the Legislature, particularly the National Assembly, is held, arises, not from lack of legislative primacy, but from its exhibition of negative values and practices, grossly against the interest of Nigeria and Nigerians. On separation of powers and democratic governance, he discloses that any system of Government based on the Rule of Law and Democracy must consist of three great arms, the Legislature, the Executive, and the Judiciary. This division of labour is a condition precedent for the supremacy of the Rule of Law in any society. The doctrine of Separation of Powers advocates the independent exercise of these three governmental or constitutional functions, by different bodies of

[172]M.O. Bamidele, "Status and Role of the Legislature in a Democracy", https://arinze198.wordpress.com/2010/08/16/status-and-role-of-the-legislature-in-a-democracy/ (Accessed on 30/10/2021

persons, without interference or control or domination, by one on the other or others.[173] He however, recognizes that there can be no complete separation of powers in which there is no interaction whatsoever between the three great arms of government. Indeed, they all function or should function by mutual co-operation. It is the executive, for example, that is charged with the enforcement of judicial Orders. The doctrine simply means that the same body or person should not be in control of more than one arm.[174] The author finally highlights the basic legislative functions as provided by the Constitution of the Federal Republic of Nigeria, 1999 (As Amended). The weakness of this work is that it is limited to the doctrine of separation of powers and general functions of the legislature. It does not specifically examine constitutional alteration process in Nigeria, which is the crux of this research.

The various gaps identified reinforce the reason and basis for this study. Thus the said identified gaps are filled in this work.

CHAPTER THREE
PROCEDURE FOR ALTERATION OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999

Amending the Constitution of the Federal Republic of Nigeria 1999[175] has *ab initio* not been free from controversies. The latest controversy on the amendment of the 1999 Constitution relates to whether the assent of the President of the Federal Republic of Nigeria is necessary before any purported amendment to the constitution can become effectual.[176] As can be imagined, there are two views on the matter.

[173] Concentration of government powers in the hands of one individual is the very definition of dictatorship, and absolute power is by its very nature arbitrary, capricious and despotic. The executive function of government the maintenance of peace, order, the security of the state, the provision of social welfare, etc. has an inherent tendency towards arbitrariness. Its arbitrariness is greatly accentuated and legitimized where the function of law-making is also reposed in the same hands.

[174] There can be no complete separation of powers in which there is no interaction whatsoever between the three great arms of government. Indeed, they all function or should function by mutual co-operation. It is the executive, for example, that is charged with the enforcement of judicial Orders. The doctrine simply means that the same body or person should not be control of more than one arm.

[175] Hereinafter referred to as the "1999 Constitution".

[176] A. Daniel, 'Senators disagree over assent to new constitution', *The Guardian* (Lagos, Nigeria, 17 June 2010) 1; A.M. Jimoh *et al*., 'Cracks in legislature over presidential assent to amended constitution, others', *The Guardian* (Lagos, Nigeria, 21 July 2010) 1

The first group consists of those who contended that the assent of the President is necessary before an amendment to the 1999 Constitution can be effectual.[177] This group (hereinafter referred to as the "President-must-assent" group) further contends that any purported amendment to the 1999 Constitution without the assent of the President would not be "binding on the community." Some of the proponents of this school of thought have even resorted to litigation to pursue their position.[178]

On the other hand, the second school of thought (hereinafter referred to as the "President-need-not-assent" group) contends that the assent of the President is not required to effect an amendment to the 1999 Constitution. Predicating its position on Section 9 of the 1999 Constitution, proponents of this school of thought insist on a strict and scrupulous adherence to the provision of Section 9 which they contend is sufficient in determining the procedure for amending the 1999 Constitution.[179] Interestingly, the leadership of the National Assembly and most of the members of the National Assembly are of this view.

The constitution of any country is a living document. It is intended to capture the essence and wishes of the people it governs. To this end, it is the *grundnorm*, the supreme law. It is the law from which every other law in the country derives its authority, authenticity and legitimacy. This is evident in Section 1(1) of the 1999 Constitution which authoritatively stipulates that the "Constitution is supreme, and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria." In Section 1(3), it further provides that if "any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."[180] In view of the fundamental nature of the constitution

[177] D.I. 'Nwabueze: President Must Sign New Constitution', *ThisDay* (Lagos, Nigeria 22 July 2010) 10; B. Nwabueze, 'Why President must sign constitutional amendment into law', *The Guardian* (Lagos, Nigeria, 26 July 2010) 9; B. Nwabueze, 'Why President must sign constitutional amendment into law', *The Guardian* (Lagos, Nigeria, 27 July 2010) 9; L Ughegbe, D. Oladimeji and A. Amzat, 'Constitutional review invalid without President's assent, says SANs', *The Guardian* (Lagos, Nigeria, 27 July 2010) 5 (pointing out that some named senior members of the legal profession in Nigeria are of the view that the signature of the President is a pre-requisite to the validity of the amendment to the 1999 Constitution); A. Izinyon, 'President assent mandatory in Constitution amendment', *The Guardian* (Lagos, Nigeria, 24 August 2010) 79.

[178] D. Iriekpen, 'Amended Constitution: Another Battle Front Opens', *THISDAY* (Lagos, Nigeria 4 August 2010) 20; D. Iriekpen, 'Barrage of Suits Threaten Amended Constitution', *THISDAY* (Lagos, Nigeria, 23 August 2010) 20.

[179] A. Alemma-Ozioruva, 'New constitution doesn't need President's assent, says ex-Senator', *The Guardian* (Lagos, Nigeria 18 August 2010) 5 (where it was reported that an erstwhile Chief Whip of the Senate insists that the amended Constitution by the National Assembly does not need the assent of the President to become effective.); B. Nwannekanma, 'Presidential assent on amended constitution? No!', *The Guardian* (Lagos, Nigeria, 24 August 2010) 77.

[180] *Ugwu v Ararume* (2007) 12 NWLR (Part 1048) 367 SC; *A-G Federation v Abubakar* (2007) 8 NWLR (Part 1041) 1 SC; *Capital Bancorp Limited. v SSL Limited* (2007) 3 NWLR (Part 1020) 148 SC.

and the dynamic nature of society, it is not difficult to imagine that situations would arise requiring some provisions of the constitution to be amended. Several reasons can be adduced for this. It could be because new situations not contemplated by the constitution have arisen which needed to be accommodated. It could also be due to challenges encountered in the implementation of the constitution which were not envisaged by the drafters of the constitution. Constitutional amendment could become necessary because of other societal dynamism: changes in technology, changes in the administrative structure of the country, the need to accommodate the interests of some segments of the society, etc. The reasons for requiring amendments to a constitution are numerous. Thus, it is crucial that every constitution makes provision for how it could be amended. Not surprisingly, the constitutions of most, if not all, countries contain provisions on the process for their amendment. Even though constitutional amendment is universally acknowledged, there is no uniform constitutional amendment process that is universally applicable. Different countries have adopted different processes for the amendment of their respective constitutions.

One major feature of the constitutional amendment processes common to all those found in different constitutions is the fact that the consent of the people must be obtained in respect of the amendment. This is not unusual. If the constitution is to govern the affairs of the people, it is appropriate that they should have some say in its enactment and amendment. However, the consent of the people need not be directly given. They could be deemed to have consented if their duly elected representatives consent. Thus, in some, but not all, cases the amendment process includes a referendum being taken to get the approval of the people. In some other situations, both the federal legislative organs and the states/provincial legislative organs are involved. Some others treat the amendment of the constitution as a special process such that the Act enacted to effect the changes need not be assented to by the President, as he would with ordinary legislations passed by parliament. Some other countries requiring the assent of the President, deny him the power to veto constitutional amendments. This lack of uniform, universal procedure for constitutional amendment has thrown up some challenges. The constitution is the only source of the process for its amendment. Where the language of the constitution on the amendment provision is ambiguous, then

confusion and controversies are bound to arise. The courts may have to be resorted to in an attempt to resolve the controversies surrounding the interpretation of the amendment provision.

3.1. LEGISLATIVE POWERS AND PROCESS

Under the Constitution of the Federal Republic of Nigeria, 1999 (as altered), the legislative powers of the Federal Republic of Nigeria in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.[181] In furtherance of this, the National Assembly is further empowered to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the exclusive legislative list set out in part 1 of the second schedule to the Constitution.[182] This explains the nature of the powers vested in the National Assembly. Thus, the powers to make laws for the stated purposes is the crux of the power grant to the National assembly, and the scope of the power is delineated further when it is limited "to any matter included in the exclusive legislative list", and as provided for under the various provisions in the Constitution. Section 4 puts no one in doubt as to the extent of legislative powers of the National and State Assemblies in the peculiar federal system of government in Nigeria.

It is generally believed that law making is the main function of the legislature. In its law-making function, the legislature is guided by the provisions of the Constitution and the Standing Orders. The procedure to be followed when a bill is being processed depends on the type of the Bill. It may be a government or executive bill, private bill, ordinary bill or money bill. A government or executive bill is that which emanates from the government, while a private bill comes from a member of the House. In a presidential system, particularly under the 1999 Constitution, a government or executive bill is introduced into the House by the Leader of the House, while a private member's bill is sponsored by the member introducing it to the House. If a private bill, leave of the House must be obtained before such is allowed to be introduced.[183]

[181] Section 4(1)
[182] Section 4(2)
[183] R.A. Ahmadu & N. Ajiboye. (eds.), *Legislative Practice and Procedure of the National Assembly* (Ibadan, Intec Printers Limited, 2004) pp. 53-54

A money bill is a bill relating to appropriation or any bill for payment, issue or withdrawal from the Consolidated Revenue Fund or any other public fund of the Government or a bill for the imposition of or increase in any tax, duty or fee or any reduction, withdrawal, or cancellation thereof.[184] Any bill that is not a money bill is an ordinary bill. While other forms of money bill may be introduced into the House by any other person; it is the President[185] or the Governor[186] that introduces the Appropriation Bill into the House.

The process of law making generally requires a long period of deliberation and consideration of the many interests and implications of the bill. Each bill is assigned a number, read by title only and sponsored. All bills are numbered or marked according to their chamber of origin. For example, a bill from the House of Representatives is marked HB (House Bill) while the one from the Senate is marked SB (Senate Bill). An executive bill is marked with "Executive" printed on the title page of the bill. It is printed tiny and to the right-hand side of the page. The law-making process commences with first reading which involves reading of the long title of a Bill by the clerk of the relevant House. This is followed by second reading, which is the stage where the sponsor of the Bill leads debate on the general principles of the Bill. Here, members are allowed to debate on the Bill to determine its suitability. After this, where the Bill receives support of most members, it is referred to the relevant standing committee for detailed consideration, and reporting. When the Committee files its report to House, the third reading takes place after which the Bill is passed and sent to the other House for concurrence. Concurrence here involves a repetition of the process, and where the Bill is passed in identical form, it is harmonized and transmitted to the President of the Federal Republic of Nigeria for assent.[187]

3.2. MODE OF ALTERING PROVISIONS OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999

3.2.1. *Power to Alter*

The power to alter the 1999 Constitution is conferred by Section 9(1) thereof which succinctly provides that the "National Assembly may, subject to the provision of this section, alter any of the provisions of this Constitution." However, the exact process of amendment depends on the subject-matter of the amendment. The method already

[184] Section 59(1).
[185] Section 81.
[186] Section 121
[187] Section 59

tested is that contained in Section 9(2). Perhaps, due to the novelty of democratic constitutional amendment in the country, there are virulent and vociferous views on the interpretation to be given to the provision of the subsection. The main controversy is whether the assent of the President is necessary to make any amendment of the 1999 Constitution as provided under Section 9 (or any other section for that matter) effectual.

Another provision on the process for the amendment of the Constitution is as follows:

> An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.[188]

The effect of the above provision is to further entrench the provisions of Sections 8 and 9 and Chapter IV of the 1999 Constitution by making them much more difficult to amend than other sections of the Constitution.

The other provisions of the 1999 Constitution which would occasion amending the 1999 Constitution are contained in Section 8 which deals with the creation of new States,[189] boundary adjustment as between two or more States,[190] creation of new local government areas within a given State,[191] and boundary adjustments as between two or more local government areas in a given State.[192] It is contended that Section 8 is relevant in respect of the amendment of 1999 Constitution in view of the fact that if any of the enactments contemplated by the section is successfully enacted, it would result in the alteration of relevant portions of Section 3 and Parts I and II of the First Schedule of the 1999 Constitution. A critical review of the provision of Section 8 reveals that it has great potential to stir up another constitutional controversy because its provision is inelegantly drafted and thus lacking in much-needed clarity[193]. Besides the requirements are too cumbersome and near impossible to accomplish hence no new states have been created by Civilians under the 1979 and 1999 constitutions.

3.2.2. Alteration of General Provisions

Alteration of non-entrenched provisions otherwise referred to as general alteration is anchored on section 9(2) of the Constitution which provides that 'An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National

[188] S. 9(3)
[189] 1999 Constitution, s. 8(1).
[190] *Ibid*. s. 8(3).
[191] *Ibid*. s. 8(3).
[192] *Ibid*, s. 8(4).
[193] J.N. Aduba and S. Oguche, *Key Issues in Nigerian Constitutional Law* (Abuja, NIALS, 2014) 216

Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.'[194] A fundamental feature of general amendment under section 9(2) is the requirement of two-thirds majority. It should be noted that two-thirds majority here is that of the entire house, not of those present. This is the same requirement when it comes to removal of President and Governor under sections 143 and 188 respectively.[195]

3.2.3. Alteration of Special Provisions

The Constitution draws a line between entrenched and non-entrenched provisions in terms of alteration procedure. Entrenched provisions for the purpose of alteration procedure are sections 8, 9 and Chapter IV. Alteration of entrenched provisions is contained in section 9(3), and this relates to alteration of sections 8 and 9, and chapter IV of the Constitution. By this provision, sections 8 and 9 and Chapter IV which provide for creation of new states and boundary adjustment, mode of altering provisions of the Constitution itself and fundamental rights, respectively are entrenched or special provisions. The implication is that the alteration procedure is more cumbersome than that of general/non-entrenched provisions. Under the alterations procedure of entrenched provisions, the two-thirds majority threshold is extended to four-fifth majority. As it is with non-entrenched provisions, four-fifth majority is that of the entire members of the House, and not those present at the relevant time. Consequently, for the purposes of section 8 of the Constitution and of subsections (2) and (3) of section 9, the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in sections 48 and 49 of this Constitution.[196]

Looking at the express provisions of section 9 regarding alteration procedure of both entrenched and non-entrenched provisions, the number of legislators is reckoned with, especially those giving blessing to the proposed alteration. The implication is that legislators must vote to determine those in favour and against, and this cannot be determined by voice vote. One of the reasons advanced by President Goodluck Ebele Jonathan for exercise of veto over the 2015 Fourth Alteration Bill was that the National Assembly had failed to prove that it had complied

[194] Section 9(2)
[195] *Awolowo v. Shagari* (1979) ALL NLR 1201, *Dapianlong v. Dariye* (No.2) (2007) 8 NWLR (Pt. 1036) 332, and *Adeleke v. Oyo State House of Assembly* (2007) ALL FWLR (Pt.345) 211
[196] Section 9(4)

with the stringent requirements of section 9(3) of the 1999 Constitution as it had not accompanied the requisite votes and proceedings of both Houses with the Fourth Alteration Bill that was transmitted to him to prove that the alterations were supported by at least a four-fifths majority of all the members of the Senate and the House of Representatives in line with the aforementioned section. The President also raised the concern that the legislators resorted to voice vote in the process.[197] To buttress the allegation of non-compliance with section 9(3) of the Constitution, the National Assembly failed to accompany the Fourth Alteration Bill with the Votes and Proceedings of the House as evidence of compliance.[198] Another legislative disaster was resort to voice vote by the National Assembly, which could not have determined the number of legislators in favour of the proposals for the purpose of the two-thirds and four-fifth thresholds provided by the Constitution. This, surely, is an affront to legislative process.

3.2.4. The Role of the Houses of Assembly of States

One the requirements of Constitution alteration, whether entrenched or non-entrenched is the participation of the States in the process. A Bill for alteration of the Constitution passed by both Houses of the National Assembly does not enjoy constitutional validity unless it supported by at least two-thirds of all States.[199] It should be noted that the inputs of the States is through the Houses of Assembly. The Houses of Assembly are not required to pass the Constitution Alteration Bill in the normal law-making procedure, but mere approval by a resolution. The implication is that each House of Assembly is expected to either approve or disapprove the Bill as passed by both Houses of the National Assembly, by a simple majority of all its members. Consequently, an alteration Bill passed by the National Assembly and forwarded to a House of Assembly is not required to undergo any legislative process but a mere approval or disapproval. Hence, two-thirds majority of all the States is needed to give life to an alteration Bill passed by the National Assembly. For the avoidance of doubt, the favourable resolution of the Houses of Assembly of the relevant number of States is very crucial. It is this favourable resolution from the

[197] S. Oguche, 'Constitution Amendment Stalemate in Nigeria: The Constitution (Fourth Alteration) Bill 2015 in Perspective', [2015] 7(2) NJLA, 37
[198] *Ibid*
[199] Section 9(2) and (3)

Houses of Assembly of the relevant number of States that confers authority and validity to the amendment to the constitution passed by the National Assembly. Where the two-thirds threshold is not met, the alteration Bill fails.

3.2.5. Meaning and Effect of Two-Thirds and Four-Fifths Majority

In the case of the amendment of Section 8,[200] Section 9,[201] and Chapter IV[202] of the 1999 Constitution, the matter must be first tabled in the different Houses of the National Assembly where, by virtue of Section 9(3), each of the Houses, acting separately, must approve the amendments by four-fifths majority of all the members of the House concerned.[203] That is to say, at least 88 members of the Senate and 288 members of the House of Representatives.[204] Thereafter, the proposed amendment is sent to the Houses of Assembly of the States for approval. The amendment proposal is deemed to have been passed (that is to say, become an Act of the National Assembly) if it is approved by resolution of not less than two-thirds of the Houses of Assembly of the States. This means 24 States.[205] No further act is required to transform the approved bill to an Act of the National Assembly. In the words of Honourable Justice E.N. Nnamani, "this is because immediately the proposal is passed by the National Assembly and in the required number of states' Houses of Assembly (i.e. two thirds of all such Houses in the federation), the proposal translates into an integral part of the subsisting constitution."[206]

Section 9(1) of the 1999 Constitution, which confers on the National Assembly the power to amend the constitution, stipulates that such power of the National Assembly is subject to Section 9, not any other section of the constitution. It is in a bid to accommodate this special practice in respect of the amendment of the constitution that the definition of an "Act" is equated with the definition of an "Act of the National Assembly" and the definition is made to include "any law which takes effect under the provisions of this Constitution as an Act of

[200] This section relates to the creation of new States, boundary adjustment as between two or more States, creation of new local government areas and boundary adjustment as between two or more local government areas.
[201] This is the amendment provision itself.
[202] This chapter contains the provisions relating to fundamental human rights.
[203] 1999 Constitution, s. 9(4).
[204] By virtue of section 48 of the 1999 Constitution, the total membership of the Senate is 109. Section 49 thereof provides that the House of Representatives shall consist of 360 members.
[205] By virtue of section 3(1) of the 1999 Constitution, there are 36 States in Nigeria.
[206] E.N. Nnamani, 'A Comparative Analysis of the Procedure for Alteration of Federal Constitutions: Nigeria and the United States in Perspective', (2010) 1 *EBSU Journal of International Law and Juridical Review* 264, 268.

the National Assembly" in addition to "any law made by the National Assembly".[207] This double barrel definition of an "Act" is lacking in the definition of a "Law" in respect of the Houses of Assembly of States.

In respect of the amendment of any other section of the 1999 Constitution, the position as highlighted above is applicable except that the majority required in each House of the National Assembly is a two-thirds majority.[208] That is to say, at least 73 members of the Senate and 240 members of the House of Representatives.

It is obvious from Section 9(1) of the 1999 Constitution that no part of the said constitution is beyond amendment. What is important is that the right procedure is followed in every amendment as stipulated in Section 9 of the 1999 Constitution.

3.3. PRESIDENTIAL ASSENT

There are, as previously noted, two contending schools of thought on the issue of the necessity of the assent of the President to a Bill of the National Assembly to alter the 1999 Constitution under the terms of Section 9. One view is that the assent of the President is required while the other view is that no such assent is necessary. The points raised by the proponents of either contention are vast and, therefore, deserving of dispassionate, elaborate and keen consideration.

3.3.1. *Mandatory Requirement of the President's Assent*

There are several arguments advanced by the proponents of the view that the President's assent is a pre-requisite to a valid amendment of the 1999 Constitution. Many distinguished senior members of the legal profession in Nigeria are of this view.[209] A notable proponent of the view that the assent of the President is necessary for the validity of the amendment to the 1999 Constitution is Nwabueze, whose widely publicized, masterfully-prepared treatise[210] on the subject is titillating. The strong points of the President-must-assent group are well-captured in

[207] 1999 Constitution, s. 318(1).
[208] *Ibid*, s. 9(2).
[209] J. Ameh *et al.*, 'Amended constitution controversy: Akinjide, Sagay, others differ on legality', *SUNDAY PUNCH* (Lagos, Nigeria 1 August 2010) 2.
[210] B. Nwabueze, 'Why President must sign constitutional amendment into law', *The Guardian* (Lagos, Nigeria, 26 July 2010) 9; B. Nwabueze, 'Why President must sign constitutional amendment into law', *The Guardian* (Lagos, Nigeria, 27 July 2010) 9.

the paper. These points would be critically reviewed seriatim with a view to ascertaining their veracity, relevance and strength.

3.3.2. *President Represents Nigeria*

It has been contended that the President as Head of State represents or incarnates the artificial entity known as Federal Republic of Nigeria and this makes it necessary that he should be part of the process for altering the basic law of the country. Without doubt, the President is the head of the country, but that does not mean that he must necessarily assent to every law that is made by the National Assembly for its validity. The 1999 Constitution provides for situations when the Acts of the National Assembly can be enacted despite the objection and absence of the assent of the President. The obvious, but not necessarily only, examples are Section 58(5)[211] and Section 59(4)[212] of the 1999 Constitution. Thus, the power granted to the President by the Constitution to assent to Bills of the National Assembly before they become Acts is neither without exceptions nor absolute. Nevertheless exceptions do not detract from the authority and power of the President.

3.3.3. *Section 9 Being a Re-affirmation of Sections 4(1) and (2)*

The contention is that the power conferred on the National Assembly by Section 9(1) of the 1999 Constitution to "alter any of the provisions of this Constitution" is only a re-affirmation of the power conferred on it by Section 4(1) and (2) to "make laws for the peace, order and good government of the Federation or any part thereof" on matters within federal legislative competence. Consequently, it is further contended, the power of the National Assembly to alter the 1999 Constitution conferred by Section 9 is subject to and limited by the provisions of the 1999 Constitution, especially Sections 58[213] and 59. This contention cannot stand the test of the 1999 Constitution. It is conceded that there is a link between Section 4(1) and (2) and Sections 58 and 59, but it is inappropriate to link Section 9 to either 4(1) or (2) or Section 58 or 59. Section 4(1) and (2) clearly relate to the exercise of federal

[211] In respect of general bills passed by the National Assembly.
[212] In respect of money bills passed by the National Assembly.
[213] Olisa Agbakoba v National Assembly and another (unreported) Suit No.: FHC/L/CS/941/2010 of 8 November 2010). The case is discussed further below.

legislative power. It is therefore appropriate to link the subsections to other provisions of the 1999 Constitution, notably Sections 58 and 59, which make provision concerning the modes of exercising federal legislative powers in respect of general bills and money bills respectively by the National Assembly. Linking Section 9 to Section 4(1) and (2) and consequently Section 58 is inappropriate. The basis for this contention is the fact that constitution amendment is not a federal legislative matter. This is obvious from the fact that it is not listed in the Exclusive Legislative List set out in Part I of the Second Schedule to the 1999 Constitution. It is also not listed in the Concurrent Legislative List set out under Part II of the Second Schedule to the 1999 Constitution.

However, since the amendment of the 1999 Constitution is an exercise of legislative power, it must derive its root from Section 4 as rightly inferred by Professor Nwabueze, but the relevant subsections are not (1) and (2). The involvement of the National Assembly and the Houses of Assembly of the States in the amendment of the 1999 Constitution as conferred by Section 9 is based on Section 4(4) (b)[214] and Section 4(7) (c).[215] It must be pointed out that the paragraphs provide for "any other matter with respect to which it[216] is empowered to make laws in accordance with the provisions of this Constitution." The question then is: what other provisions of the 1999 Constitution empower the National Assembly or the Houses of Assembly of the States to make laws? Section 9 is such a provision. *Undoubtedly, this patently points out that Section 9 is a special constitutional provision. It is outside the purview of Section 58. It is a special provision stipulating a special process for amending the 1999 Constitution. It is self-sufficient and subject only to itself.*[217]

3.3.4. *Reference to the "Act of the National Assembly" in Section 9*

A formidable argument in support of the contention of the President-must-assent group is the reference to "Act of the National Assembly" in Section 9(2). The basis of the argument is that since the provision stipulates that an Act of the National Assembly is relevant for constitutional amendment, then this introduces into the process the manner and form prescribed by Section 58 for the exercise by the National Assembly of its power to make laws, which must be by means or in the form of an "Act". The definition of the term "Act" is crucial in this regard. The

[214] This is relevant in respect of the National Assembly
[215] This refers to either the National Assembly or the Houses of Assembly of the States as relevant.
[216] 1999 Constitution, s. 9(1).
[217] Italics is for emphasis

1999 Constitution provides as follows: "Act" or "Act of the National Assembly" means any law made by the National Assembly *and includes any law which takes effect under the provisions of this Constitution as an Act of the National Assembly*."[218]

In contradistinction, the same subsection defines a "Law" to mean "a law enacted by the House of Assembly of a State". If the intention of the drafters of the 1999 Constitution was to make an "Act" or "Act of the National Assembly" to refer only to Acts enacted by the National Assembly under the terms of Sections 58 and 59, there would have been no need for the difference in the format of the definition of an "Act" and a "Law". It would have been sufficient and convenient to define an "Act" or "Act of the National Assembly" to mean simply and precisely "any law made by the National Assembly". It is, therefore, reasonable to imply that there must be a reason for the difference in definition format for the terms "Law", in respect of the Houses of Assembly of States, and "Act" or "Act of the National Assembly". This contention is fortified by the facts, primarily, that the terms "Act" and "Act of the National Assembly" have the same definition; and, secondly, by the inclusion of the phrase "any law which takes effect under the provisions of this Constitution as an Act of the National Assembly" in the definition of an "Act" or "Act of the National Assembly". It is contended that this phrase emasculates in its entirety the contention of the President-must-assent group. It is noted that Professor Nwabueze in referring to the definition of an Act or Act of the National Assembly in his treatise conveniently left out this portion of the definition. The purpose of inserting the phrase "any law which takes effect under the provisions of this constitution as an Act of the National Assembly" in the definition of the terms "Act" and "Act of the National Assembly" is, it is humbly posited, to accommodate situations where bills of the National Assembly will transform to an Act outside the purview of Sections 58 and 59 of the 1999 Constitution. This is relevant in the case of constitutional amendment under Section 9 where the Bill of the National Assembly becomes an Act without the assent of the President. Clearly, the 1999 Constitution contemplates an Act outside the purview of Sections 58 and 59 for the purpose of amending the constitution.

[218] s. 318(1)

3.3.5. *Amendments Sent to the States as Constitution (First Amendment) Bill*

Using the first alteration as the benchmark, the contention is that since the Constitution alteration proposals of the National Assembly were sent to the Houses of Assembly of the States as Constitution (First Amendment) Bill, it is conclusive that what was produced by the National Assembly is a Bill and not an Act. Such a conclusion is untenable. This is so because until the amendment, as passed by the National Assembly, is approved by two-thirds of the Houses of Assembly of the States, it does not become an Act. Under the terms of Section 9, it is the ratification of the proposal by the required majority of the Houses of Assembly of the States that transforms the Bill into an Act; in the same manner that the assent of the President in respect of ordinary bills made pursuant to Section 58 or money bills made pursuant to Section 59 transform bills to Acts. Furthermore, in all circumstances, except in the excepted cases under Section 58(5) and Section 59(4), the output of the National Assembly is always in the form of a bill. The bill of the National Assembly transforms to an Act by the acts of those external to it. In the case of ordinary or money bills, by the assent of the President; in the case of constitution amendment bills, by the ratification of two-thirds of the Houses of Assembly of the States, that is, 24 States' Houses of Assembly. This is the true position in respect of Section 9(2) and (3). It must be added that if it were to be accepted that it is an Act, (As properly so defined) that was intended under Section 9, then the National Assembly would have to pass all amendment proposals as bills to the president, who must also assent to it, or same is passed under Section 58 (4) for the proposals to become an Act; then such an Act would then be subject to the procedures under Section 9. This has not been the practice because that is not the proper meaning of an Act under that Section.

3.3.6. *Interpretation Act*

The contention by the President-must-assent proponents is that by virtue of Section 318(4) of the 1999 Constitution, "the Interpretation Act[219] shall apply for the purpose of interpreting the provision of this Constitution", and so the 1999 Constitution is subject to the provision of Section 2(1) of the Interpretation Act which provides that "an Act is passed when the President assents to the Bill for an Act whether or not

[219] Cap. I23, Laws of the Federation of Nigeria 2004. This legislation shall hereinafter be referred to as the "Interpretation Act".

the Act then comes into force." This argument is not as impressive as it seems because the provisions of the Interpretation Act are neither absolute nor conclusive. This is evident from Section 1 thereof which stipulates that the Interpretation Act "shall apply to the provisions of any enactment except in so far as the contrary intention appears in this Act or the enactment in question." In addition, Section 37(2) of the Interpretation Act further provides that "nothing in this Act shall be construed as purporting to prejudice the provisions of the Constitution of the Federal Republic of Nigeria 1999." Thus, even though it is conceded that by virtue of Section 318(4) of the 1999 Constitution, the Interpretation Act is relevant in the interpretation of the said Constitution, by virtue of Sections 1 and 37(2) of the Interpretation Act where a provision of the Interpretation Act is inconsistent with a provision of the 1999 Constitution, the provision of the 1999 Constitution prevails. This is the conclusion that can be reached from an unbiased interpretation of Sections 1 and 37(2) of the Interpretation Act. This is in accord with the literal rule of statutory interpretation that has enjoyed judicial approval and worldwide application.[220] Furthermore, such conclusion is consistent with the notion of the supremacy of the 1999 Constitution which is provided for by the 1999 Constitution itself [221] and approved in a plethora of judicial decisions.[222] Where the 1999 Constitution has made any provision that departs from the provision of Section 2(1) of the Interpretation Act, Section 2(1) of the Interpretation Act becomes irrelevant in the interpretation or construction of that provision. Put differently, Section 2(1) of the Interpretation Act is irrelevant in determining those instances when a bill transforms to an Act without the assent of the President. For the avoidance of doubt, examples of such instances include the situations under Sections 58(5), Section 59(4) and, yes, Section 9(2) and (3).

3.3.7. *Acts Authentication Act*

[220] *Araka v Egbue* (2003) 7 SC 75; *Amokeobo v. I.G.P* (1999) 6 NWLR (Pt. 607) 467; *Niger Progress Ltd v. Ekeogu Aliri* (1991) 3 NWLR (Pt. 179) 258; *Niger Progress Limited v. North East Line Corporation* (1989) 3 NWLR (Pt. 107) 68; *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377; *African Newspapers Ltd. v. The Federal Republic of Nigeria* (1985) 2 NWLR (Pt. 6) 137; *Okumagba v. Egbe* (1965) 1 NMLR 62.

[221] 1999 Constitution, s. 1(1) and (3).

[222] *Aminu Tanko v The State* (2009) 4 NWLR 430 SC; *J.A. Adekoye & ors v. Nigerian Security Printing and Minting Company Limited* (2009) 5 NWLR 322 SC; *Ansa v. R.T.P.C.N.* (2008) 7 NWLR (Pt.1086) 421 CA.

The President-must-assent group cites the Acts Authentication Act[223] against the definite and sufficient provision of Section 9. According to Nwabueze, the Acts Authentication Act:

> . . . requires laws passed as Acts by the National Assembly, in order to be binding on the community, to be authenticated, not only by the signature of the President, as the Head of State and embodiment or incarnation of the Federal Republic of Nigeria, but also by the President causing the public seal of the Federation to be affixed on them, and by the Clerk of the National Assembly causing a copy thereof to be published in the Federal Gazette; one copy of every Act, duly authenticated and numbered as provided by the Act, shall be delivered to the President of the Republic and another copy to the Chief Justice of Nigeria for enrolment in the Supreme Court. Unless there is compliance with the provisions of the Acts Authentication Act regarding . . . authentication by the signature of the President, the affixing of the public seal of the Federation, publication in the Federal Gazette, the Chief Justice of Nigeria cannot enroll in the Supreme Court, the Constitution (First Amendment) as an "Act" or law made by the National Assembly pursuant to Section 9 of the Constitution. Law-making is a vital and serious act of state, requiring therefore to be duly authenticated in the manner provided by the Acts Authentication Act before such law can become operative as law governing the lives and affairs of people in society under the principle of Rule of Law. [224]

Even on the strength of the provisions of the Acts Authentication Act (and the rule of law), this argument is, with the greatest respect, at best fallacious. In the first place, the Acts Authentication Act which is being cited to challenge the express provisions of the 1999 Constitution exists because of the strength of the 1999 Constitution. Beyond the issue of relying on the potent power of constitutional supremacy to counter this argument, it must be pointed out that the Acts Authentication Act, being a statute that was first enacted as Act No. 50 of 1961 with a commencement date of 1 January 1962, pre-dates the 1999 Constitution. Its continued existence today is by the grace of the savings provision of Section 315 of the 1999 Constitution which provides as follows:

> Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws.[225]

It is curious that the Act that was saved by the 1999 Constitution is now being cited to contradict an express provision of the said constitution in spite of the fact that Section 315(1)(a) of the 1999 Constitution requires the Acts Authentication Act to "have effect with such modifications as may be necessary to bring it into conformity with the provisions" of the 1999 Constitution. Secondly, and this point was conveniently not mentioned by the

[223] Cap. A2, Laws of the Federation of Nigeria 2004. This enactment shall hereinafter be referred to as the "Acts Authentication Act".
[224] Nwabueze (n 178) 'Why President must sign constitutional amendment into law', *The Guardian* (Lagos, Nigeria, 27 July 2010) 9.
[225] 1999 Constitution, s. 315(1)(a).

revered learned Professor of Law, by virtue of Section 1(4) of the Acts Authentication Act, nothing in the provision of Section 1 of the Acts Authentication Act "shall abrogate any special requirements prescribed for the entrenched sections" of the 1999 Constitution. Any attempt to detract from express provisions of the 1999 Constitution by relying on the Acts Authentication Act cannot and will not stand. It is trite law that the constitution is the supreme law of the land; the *grundnorm*. It is the foundation for the validity of other legislations. Its provisions are beyond challenge. In fact, its provisions are the basis for challenging the provisions of other legislations. Any attempt to invalidate a constitutional process or provision through reliance on the provisions of any other legislation is a manifest misunderstanding of the nature of constitutionalism. In every constitutional democracy, the constitution is the real deal, the big deal, the law of laws, and truly "The Ultimate Legislation". Every institution of governance, the government, the parliament and even the judiciary derive their existence, authority and validity from the constitution. It dictates the framework. It stipulates the guiding principles. Everybody must comply with its provisions, as failure to do so occasion grave consequences.

3.3.8. *Subsequent Passing of the Alterations by the National Assembly*

The President-must-assent proponents contend that the constitution alteration process is a two-stage process. In support of this postulation, Nwabueze remarked as follows:

> . . . The amendments proposed by the National Assembly will still need, after they have been approved by resolutions of the required number of the State Houses of Assembly to be passed by each of its two Houses. This seems the correct interpretation.

It is difficult to understand how such so-called two-stage process can be inferred from the straight-forward provisions of Section 9(2) and (3). Available evidence suggests that there was a deliberate attempt by the drafters of the 1999 Constitution to avoid the two-stage process. It is worthy to note that the provision of Section 9 of the 1999 Constitution was lifted in its entirety, with the exception of minor modification to Section 9(4), from Section 9 of the Constitution of the Federal Republic of Nigeria 1979.[226] However, the equivalent provision in the Constitution of the Federal Republic of Nigeria 1989[227] is different from the pro-visions in both the 1979 and

[226] Hereinafter referred to as the "1979 Constitution".
[227] Hereinafter referred to as the "1989 Constitution".

1999 Constitutions. Section 10(2) of the 1989 Constitution, which is the equivalent of Section 9(2) of the 1979 and 1999 Constitutions provides as follows:

> A bill for an Act of the National Assembly for the alteration of this Constitution, not being an Act to which Section 9[228] of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

It is instructive that Section 10(2) of the 1989 Constitution started with the phrase "A bill for", which was introduced for the first time in the 1989 Constitution. However, in the 1999 Constitution which came after the 1989 Constitution, the phrase was dropped. Two questions, therefore, must be answered. The first is: what is the essence of the use of the phrase in Section 10(2) of the 1989 Constitution? The second question is: what was intended to be achieved by the removal of the phrase in the 1999 Constitution? In response to the first question, it is sub-mitted that the purpose of the introduction of the phrase into the 1989 Constitution was to institute the two-stage process in the amendment of the constitution. This conclusion is logical since there would be no need to depart from the wordings of its equivalent subsection in the 1979 Constitution. Thus, and in answer to the second question, reverting to the 1979 Constitution text in the 1999 Constitution irresistibly leads to the conclusion that there was a deliberate decision to do away with the two-stage process of constitution amendment. This conclusion is fortified by the fact that the phrase was retained in Sections 8(3), (4) and (5) of the 1999 Constitution, but also dropped from Sections 8(1) and (2).

Consequently, to contend, as the President-must-assent proponents do, that Section 9(2) of the 1999 Constitution contemplates a two-stage process in constitution amendment is, with profound respect, an attempt to distort the country's constitutional history. The two-stage process being canvassed cannot stand. The other points made by Professor Nwabueze in further support of the two-stage process are in relation to the use of the expression "shall not be passed" and the word "proposal" in Section 9(2). This can readily be dismissed as merely a matter of style. The English language is permissive of different words for, and styles of, saying the same thing. The choice of

[228] This is the equivalent of section 8 in the 1979 and the 1999 Constitutions

words and style of expression are dependent on the writer. The same meanings can be conveyed using different words or expressions or styles. That is a great beauty of English language, the language of the 1999 Constitution.

The President-must-assent proponents are quick to disparage any reference to the practice in the United States in relation to constitution amendment. According to Nwabueze,[229] the reference to the Constitution of the United States or their practice is:

> . . an unfortunate penchant on the part of our National Assembly to rely on Americana practice or precedent for support for all sorts of ill-informed and ill-founded propositions, without regard to their applicability in the different context of Nigeria. In the particular case under consideration, the reliance is misplaced because it ignores the circumstances of the origin of the U.S. Constitution which make the process for its amendment wholly inapplicable in Nigeria.

There is no denying the fact that our presidential system of government is modelled after that of the United States.[230] Similarly, our 1999 Constitution is substantially similar to the 1979 Constitution which was modelled after the Constitution of the United States.[231] Reliance on the practice in the United States cannot, there-fore, be ruled out of place.

Admittedly, both constitutions are not exactly the same in every respect. Thus, the 1999 Constitution cannot operate exactly as the American Constitution does, but that does not imply that the benefits of useful practices found in the United States should be abandoned because it would be criticized as misplaced. The argument that the word "Act" was not used in Article V of the Constitution of the United States and as a result, among other reasons, that the assent of the President of the United States is not relevant in constitutional amendment is misplaced. Section 318(1) of the 1999 Constitution defined the term "Act". As has been noted earlier, the definition is broad enough to accommodate an Act that did not comply with the processes stipulated in Sections 58 and 59.

[229] Nwabueze (n 27)

[230] G. Robbers (ed.), *Encyclopedia of World Constitutions* (Facts On File, Inc., New York, 2007) 672 (where it was stated that the Constitution Drafting Committee in respect of the 1979 Constitution considered the Western parliamentary system of government unsuitable for the country and consequently "recommended a departure in favour of the American presidential system of government, which provided for an executive president at the federal level and an executive governor at the state level.")

[231] M.E. Ackermann *et al.* (eds.), *Encyclopedia of World History, Volume VI – The Contemporary World: 1950 to the Present* (Facts On File, Inc., New York, 2008) 314 (where it was stated that in "1979 Obasanjo produced a new constitution based on the U.S. model and prepared for elections to return the country to civilian rule.").

The arguments of the President-must-assent group superficially appear weighty, but a dispassionate consideration of the issues and circumstances sends them collapsing like a pack of badly stacked cards. That point is obvious from the critical appraisals of their propositions above. It is, for balance and fairness, appropriate to consider the grounds for contending that the assent of the President is irrelevant in the amendment of the 1999 Constitution. It must be pointed out up front that some of the grounds have been revealed in the critical appraisal above, but there are some more grounds yet unexplored or some further elucidation to be added to previously canvassed points.

3.4. Assent of the President not being a Requirement

There exist unassailable reasons to hold that that the assent of the President is not necessary to amend the 1999 Constitution. These would now be considered.

3.4.1. The Import of Section 58 of the Constitution

As has been shown above, it does seem that the President-must-assent champions allowed themselves to be misled by relating the power of the National Assembly to amend the constitution with the general law-making powers of the National Assembly conferred by Section 4(1) and (2). Such linkage is erroneous. The irrelevance of Section 58 of the 1999 Constitution in the process of amending the constitution is very clear. The first proof is the marginal note to the section which is "Mode of exercising Federal Legislative power: General".[232] From the marginal note to Section 58, it is evident that it is a provision for the regulation of the general powers of the National Assembly to make laws for those matters under the Exclusive Legislative List and Concurrent Legislative List. Constitution amendment is not a federal legislative exercise, strictly speaking, since the Houses of Assembly of the States are involved and crucial to the process. Even if the entire 469 members of both Houses of the National Assembly pass a bill for constitutional amendment and the resolution of the requisite number of the Houses of Assembly of the States approving it is lacking, the amendment of the constitution fails. The realization of the special nature of constitutional amendment, distinct from the other legislative powers of the National Assembly, necessitated the pro-vision of Section 9(1) which confers the power to amend any part of the constitution on the National Assembly. That subsection went further to expressly stipulate that the power is subject only to Section 9. To

[232] This is different from that of section 59 which deals with the mode of exercising federal legislative power in respect of money bills.

complete the self-sufficiency of the section, the unique mode of determining the level of majority required for purposes of the section is stated in the section.[233]

It may be contended that marginal notes or headings in legislations do not form part of the provisions of the statute.[234] That is true, but they are useful in determining the intention of the makers of the statute. In the case of *Uwaifo v. Attorney-General of Bendel State*,[235] Idigbe, JSC, adopted the words of Upjohn, LJ, in *Stephen v. Cuckfield Rural District Council*[236] when he said:[237]

> ... though in modem times marginal notes do not generally afford legitimate aid to the construction of a statute, at least it is permissible to consider the general purpose of a section and the mischief at which it is aimed with the marginal notes in mind.

This position has been re-affirmed by the Supreme Court in other subsequent cases.[238] In addition, the provision of Section 58(3) is in conflict with Sections 9(2) and since it contemplates that when a bill has been passed by both Houses of the National Assembly, it should be sent to the President for assent whereas Section 9(2) and (3) requires such a bill to be sent to the Houses of Assembly of the States. The logical resolution of this conflict lies in the fact that Section 58 provision applies to a different law-making power of the National Assembly while Section 9 relates to another special law-making power of the National Assembly involving the Houses of Assembly of the States.

Interestingly though, in the case of *Olisa Agbakoba v National Assembly and another*,[239] Justice Okechukwu Okeke in agreeing with the proposition that Section 58 of the 1999 Constitution is relevant in the amendment of the constitution declared that the Constitution of the Federal Republic of Nigeria (First Amendment) Act 2010 passed by the National Assembly "remains inchoate and lacks the force of law until it is presented to the President of the Federal Republic of Nigeria for assent."[240] Expectedly, the National Assembly has appealed against this

[233] I999 Constitution, s. 9(4).
[234] Interpretation Act, s. 3(2).
[235] (1982) 7 S.C. 124.
[236] (1960) 2 QB 373 at 383.
[237] At pages 187–188
[238] *Oloyo v. Alegbe* (1983)2 S.C.N.L.R. 35; *Yabugbe v. C.O.P.* [1992] 1 NSCC 651; and *Attorney-General of the Federation & 2 ors v. Alhaji Atiku Abubakar & 3 ors* (2007) 8NWLR (Part 1041) 1SC.
[239] Unreported. Suit No. FHC/L/CS/941/2010 of 8 November 2010
[240] *Ibid.* at p. 48 of the certified true copy of the judgment.

judgment.[241] Nevertheless, the President has assented to the amendment[242] in line with the judgment of the Federal High Court. The National Assembly, how-ever, has vowed to continue with its appeal against the decision of the Federal High Court, Lagos, which is pending before the Court of Appeal.[243]

3.4.2. Overriding Majority Votes

The process of passing the amendment bill in the different Houses of the National Assembly is the same with the case of Section 9(2), and stricter in the case of Section 9(3) than, the voting requirement to override the veto of the President under Section 58(5). This faults the argument that Section 58 applies to constitutional amendment. Thus, to resort to Section 58 in constitutional amendment is tantamount to taking two tablets of a common pain killer to cure a headache for which a few moments previously one has been injected with a very powerful prescriptive drug by a physician for the same purpose.

3.4.3. Special Constitutional Provision

Section 9 should be seen for what it is: a special, self-sufficient stipulation for the amendment of the 1999 Constitution, subject only to itself[244] in its entirety, including its amendment.[245] Any contrary understanding is untenable in a textual constitutional basis.

3.4.4. Subjecting Section 9 to 58

If the intention of the makers of the 1999 Constitution was to make Section 9 subject to Section 58, such intention would have been clearly indicated either in Section 9 or in Section 58. Alternatively, the phrase "subject to this constitution" would have been used in Section 9 instead of the phrase "subject to this section" which was used in

[241] K. Akogun, O. Nzeshi and C. Okafor 'Constitution: N'Assembly Files Notice of Appeal', *THISDAY* (Lagos, Nigeria 9 November 2010). Available at http://www.thisdaylive.com/arti-cles/constitution-n-assembly-files-notice-of-appeal/74572/ accessed 21 January 2022.

[242] Ahamefula Ogbu, 'President Signs New Constitution', *THISDAY* (Lagos, Nigeria 11 January2011). Available at <http://www.thisdaylive.com/articles/president-signs-new-constitution/84725/> accessed 18 January 2022 and Madu Onuorah, 'Jonathan signs amended 1999 Constitution', *THE GUARDIAN* (Lagos, Nigeria 11 January 2011). Available at http://www.ngrguardiannews.com/index.php?option=com_content&view=article&id=35153:jonathan-signs-amended-1999-constitution&catid= 1:national&Itemid =559 accessed 20 January 2022.

[243] Davidson Iriekpen, 'Constitution: N'Assembly Appeal Subsists', *THISDAY* (Lagos, Nigeria 12 January 2011). Available at http://www.thisdaylive.com/articles/constitution-nassembly-appeal -subsists/84750/ accessed 27 January 2022. It is safe to assert that the last has not been heard on this vexed issue of the amendment of the 1999 Constitution.

[244] 1999 Constitution, s. 9(1).

[245] *Ibid*, s. 9(3).

Section 9(1). It is interesting to note that the expression "subject to this constitution" was used 38 times[246] in the 1999 Constitution, but was not used in Section 9; instead what was used in Section 9 was the more restrictive expression "subject to the provision of this section".[247] For the abundance of evidence, it must be pointed out that "the expression 'subject to' is often used in statutes to introduce a condition, a proviso, a restriction, a limitation."[248] The Supreme Court captured the true impact of the phrase when it observed thus:

> The effect is that the expression evinces an intention to subordinate the provision of the subject to the section referred to which is intended not to be affected by the provisions of the latter. . . . In other words, where the expression is used at the commencement of a statute . . . it implies that what the sub-section is 'subject to' shall govern, control and prevail over what follows in that Section or Sub-section of the enactment. [249]

The drafters of the 1999 Constitution were aware of the implication of the use of the expression "subject to" and they used it as preferred in Section 9(1). If they had wanted to subject Section 9 to Section 58, they would have clearly stated so with the use of the expression "subject to Section 58" or "subject to this constitution", instead they chose "subject to this section". To contend that Section 9 is subject to Section 58 is to introduce into the constitution words that are not there; words that are obviously not intended to be in Section 9.

3.4.5. The Terms "Act" and "Act of the National Assembly"

The point has earlier been made about the difference in the format of the definition for the terms "Act" or "Act of the National Assembly", on the one hand, and "Law" on the other hand in Section 318(1) of the 1999 Constitution. It may be argued that the phrase "any law which takes effect under the provisions of this Constitution as an Act of the National Assembly" in the definition of the terms "Act" or "Act of the National Assembly" was included in the definition to save federal enactments that were in force before, and are to remain in force after, the coming into force of the 1999 Constitution. Such argument is untenable since there is no equivalent phrase in the definition of the term "Law" to save pieces of State legislations that were in force before, and are to remain

[246] The expression appears in ss. 5(1); 5(2); 7(6); 43; 46(2); 49; 60; 64(3); 77(1); 88(1); 91; 101; 105(3); 117(1); 128(1); 135(1); 154(1); 170; 173(1); 180(1); 198; 207; 214(2); 216(1); 233(5); 239(1); 240; 243(a); 251(1)(q); 286(1); 305(1); 313; 315(1); paragraphs. 1, 2, 18 of Part II of the 2nd Schedule and paragraphs 6(b) and 11(1) of Part II of the 3rd Schedule of the 1999 Constitution.

[247] It is worthy of note that this is the only time such expression was used in the entire constitution. Also, the expression "subject to section . . ." was used five times in the constitution; that is, in ss. 7(1); 215(1) (a); 233(6); 307 and 309.

[248] *Thompson Oke* v. *Robinson Oke* (1974) 1 All N.L.R. (Pt. 1) 443 at 450. See also *Clark Ltd. v. Inland Revenue Commissioners* (1973) 2 All E.R. 513 at 520; *Akisatan (Apena of Iporo) & Ors. v. Akinwande Thomas & Ors.* (1950) 12 W.A.C.A. 90; *Ngige v Obi & Ors* (2006) 14 NWLR (Part 999) 1.

[249] *Tsokwa Oil Marketing Co. Nigeria Limited v. Bank of the North* Limited (2002) 11 NWLR (Part 777) 163.

in force after, the coming into force of the 1999 Constitution. There is no other explanation that can be adduced for the inclusion of the phrase in the definition of the term "Act of the National Assembly" other than to accommodate constitutional amendment legislation, which by Section 9 are not required to be presented to the President for his assent for validity and effectiveness. This contention is strengthened by the fact that the same paragraph of the subsection defines both "Act" and "Act of the National Assembly". The irresistible conclusion is that a dispassionate interpretation of the term "Act of the National Assembly" would reveal that it contemplates Acts that are not ordinary or regular enactments under the terms of Section 58. It contemplates Acts of the National Assembly made under Section 9 without the assent of the President. By virtue of the definition of the terms "Act" and "Act of the National Assembly" in Section 318(1) of the 1999 Constitution, both forms of enactment are valid, potent, and effectual. They are the same in terms of the regularity of their enactment, the validity of their enforcement, and the certainty of their establishment.

3.4.6. Interpretation of Statutes

In the interpretation of statutes, including a constitution, there are some basic guides to be followed. These are well-enunciated by the courts over the years and are consistent with international best practices. In the first place, the provisions of the statutes should be read together as a whole. In other words, a section should not be read in isolation.[250] However, for the sections of a statute to be read together, the provisions to be read together must be related. That is the circumstance under which they would be relevant in shedding light on the intention of the drafters of the legislation. In the instant case, can Sections 9 and 58 be said to be related so as to warrant their being read together in relation to understanding the position of the 1999 Constitution on its amendment? The obvious, conscientious, and sagacious response would certainly be in the negative. As noted earlier on, Section 9 is a special, self-sufficient constitutional provision dealing with the unique and special situation of amending the 1999 Constitution. On the other hand, Section 58, which is the national equivalent of Section 100 in respect of the legislative power of the Houses of Assembly of States, deals with the procedure for passing bills in the National Assembly in respect of federal matters. This fact is evident from the marginal note to Section 58.

[250] *Rivers State Government of Nigeria v Specialist Konsult* (2005) 7 NWLR (Part 923) 145 SC; *Omin III v Governor of Cross Rivers State* (2007) 41 WRN 158 CA.

Secondly, it is a fundamental and universal principle in statutory interpretation that words used in statutes should be given their ordinary, natural meaning unless doing so will lead to some absurdity.[251] If Section 9 is given its natural meaning, the irresistible conclusion would be reached that it is not linked to any other section of the 1999 Constitution in relation to the amendment of the said constitution. The fact that reading Section 9 in isolation will result in the assent of the President being irrelevant in constitution amendment is not absurd. By not requiring the assent of the President for a valid and conclusive amendment of the constitution, Nigeria will be in good company with the United States.[252]

3.4.7. *Absurdity*

The proposition that the amendments to the 1999 Constitution should be sent to the President for his assent, without which they would be invalid and ineffectual, smacks of some absurdities. First, it is absurd to subject constitutional amendments that have enjoyed such extensive, expensive and expansive endorsement of the people through their elected representatives in the legislative arm of government, at both national and state levels, to the whims and caprices of an individual, albeit, the President. It is true that the President, too, was elected by the people and is therefore equally representative of the people. But it is equally true that the President is not as close to the people as are their representatives in the legislature, especially the Houses of Assembly of the States. Indubitably, there-fore, a situation that places the ultimate decision regarding the validity of amendments to the constitution in the hands of an individual, the President, over and above the collective decision of the people through their widespread representation is an awful absurdity.

Second, if the President refuses to assent to the amendments to the constitution, does that not lead to an awkward situation where one man, albeit the President, is standing against the wishes and aspirations of a larger majority of the people? Such a situation seems rather despotic and authoritarian. It is certainly not democratic. In a true democracy, the majority would always have its way, while the minority would have its say. To present the amendments to the President for his assent is to set him up against the people: that is what his refusal to assent to

[251] *Texaco Panama Inc v SPDCN Limited* (2002) 5 NWLR (Part 759) 209 SC.
[252] Constitution of the United States, Art. V.

the amendments would amount to. Thus, for fear of not going against the wishes of the people, he would be compelled to assent to the amendments. This puts the President in the embarrassing position of being unable to exercise a power (power to veto the amendments) he apparently should have. That is another awful absurdity.

The constitution did not also say what should happen if the president refuses assent because it did not provide for presidential assent.

Third, it may be argued that the President's veto can easily be overcome under the terms of Section 58(5). Such a contention lacks merit in the sense that it amounts to administering an inferior medication to cure a malady against which a much more superior medicine has already been administered. That is an awful absurdity.

Fourth, as has been contended by the Attorney-General of the Federation, seeking Presidential assent to amendments is a mere surplusage which does not remove anything from the authority and powers of the National Assembly and therefore should be obtained.[253] With the greatest respect to the learned silk, the issue is not a case of "mere surplusage". There is a more fundamental issue involved: laying a dangerous precedent that has no root in the text of the constitution. That is also an awful absurdity.

3.5. PERSPECTIVES ON CONSTITUTION ALTERATION

There is no universal standard on, or procedure for, constitutional amendment. This absence of a global best model means that every country designs its peculiar procedure. There are some similarities between the constitutional amendment procedures of some countries, however. A review of the constitutions of some countries reveals a potpourri of procedures ranging from the casual to the unusual.

In fact, some countries prohibit constitutional amendment, providing instead for the adoption of an entirely new constitution in place of amendments to the existing constitution.[254] There are instances where limits are placed on

[253] O. Nzeshi and T. Soniyi, 'AGF: Amended Constitution Requires President's Assent', *THIS-DAY*, (Lagos, Nigeria 28 July, 2011)
[254] Austria, Bulgaria, the Russian Federation, Spain and Switzerland.

constitutional amendments. These limits may be temporal, such as prohibiting the amendment of the constitution during periods of emergency (that is, during war, application of martial law, state of siege, etc.)[255] or until after a certain period of years since the last amendment.[256] There are also cases of substantive limitations to constitutional amendment, such as where certain provisions are excluded from being subject to any amendment[257] or where amendments are only possible through qualified procedures requiring an increased majority of votes in parliament (the so-called supermajority), such as two-thirds[258] or three-fourths,[259] a referendum,[260] approving a resolution from federating units (in the case of a country with a federal system of government),[261] dissolution of parliament,[262] and the election or convening of a special body to adopt the amendment.[263] Some constitutions even stipulate who can initiate constitutional amendments.[264]

In Nigeria not all the above situations are covered. That does not make the constitutional amendment process inferior or inchoate. Section 9 of the 1999 Constitution lays down a complete procedure for its amendment despite the unjustified and unjustifiable contention of the President-must-assent champions.

[255] For example, Albania, Belgium, France, Lithuania, Portugal, Romania, Spain, and Ukraine
[256] The Portuguese and the Greek constitutions stipulate that the constitutions may only be amended after a lapse of five years since the last amendment. However, in Portugal the Parliament may override this with four-fifths majority.
[257] For example, Article X of the Constitution of Bosnia and Herzegovina provides that "no amendment to this constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this constitution or alter the present paragraph." See also Article 139 of the Italian Constitution.
[258] For example, Albania, Germany, Hungary, Lithuania, Portugal, Romania, Slovenia, and Ukraine
[259] For example, Bulgaria, Liechtenstein, and Sweden
[260] For example, Denmark, France, Iceland, Ireland, Japan, Lithuania, Poland, Romania, Spain, and Switzerland.
[261] Constitution of the United States, art. V.
[262] For example, the constitutions of Denmark, Iceland, the Netherlands and Spain provide for the dis-solution of Parliament after a first adoption of the amendment.
[263] The Bulgarian constitution requires elections for a special body, the Grand National Assembly, for adopting a new constitution or for amending specific provisions. The establishment of this special body leads to the dissolution of Parliament.
[264] Generally, all constitutions give Parliament a right to initiate the amendment procedure, but differ in the number of members of Parliament that can initiate amendment to the constitution. Others who can initiate amendments are the Head of State (Bulgaria, Croatia, and Ukraine), and the Government (Belgium, Croatia, Liechtenstein, and Slovenia). In several countries, the procedure may be initiated by referendum (Liechtenstein, Lithuania, Romania, Slovenia, and Switzerland). Local authorities too are not left out. In Liechtenstein, the communes themselves have the right to initiate amendment if at least four communes are in support.

CHAPTER FOUR
ANALYSIS OF THE PROCEDURE FOR CONSTITUTION ALTERATION IN GHANA

4.1. Procedure for Amendment of the Ghanaian Constitution

Chapter 25 of the Ghanaian Constitution prescribes the procedure for amending the Constitution. The Ghanaian Parliament is also vested with the power to amend the Constitution[1] as is the tradition in countries that have adopted constitutional democracy including Nigeria. The procedure for amending the Ghanaian Constitution is circumscribed by prescription of the Articles as entrenched and non-entrenched provisions. Amendment of the Ghanaian Constitution involves the Parliament, the Council of State, the people, the Electoral Commission, and the President. This shows that each has a defined role under the Constitution. This chapter undertakes an analysis of the relevant constitutional provisions relating to the procedure for the amendment of the Constitution of Ghana. It further analyses the extent of public involvement and the nature of the role of the various arms of government in the amendment process. The procedure for amendment of the Ghanaian Constitution is determined by the nature of the provision being amended as the provisions of the Constitution are grouped into entrenched and non-entrenched provisions, the former requiring a more rigid amendment procedure than the latter. Predicated on the analysis of the procedures, conclusions are drawn for to form the basis of comparative analysis in chapter five.

4.2. AMENDMENT OF ENTRENCHED PROVISIONS

Entrenched provisions are those that are expressly listed in the Constitution.[2] These provisions are:

a. The Constitution: articles 1, 2 and 3;

b. The Territories of Ghana: articles 4 and 5;

c. The Laws of Ghana: article 11;

d. Fundamental Human Rights and Freedoms: Chapter 5;

e. The Executive: Chapter 8;

f. Representation of the People: articles 42, 43, 46, 49, 55 and 56;

g. The Legislature: articles 93 and 106;

[1] The Constitution of the Republic of Ghana, 1992, Article 289(1)
[2] Article 290(1)

h. The Judiciary: articles 125, 127, 129, 145 and 146;

i. Freedom and Independence of the Media: article 162, clauses (1) to (5);

j. Finance: articles 174 and 187;

k. Police Service: article 200;

l. The Armed Forces of Ghana: article 210;

m. Commission on Human Rights and Administrative Justice: articles 216 and 225;

n. National Commission for Civic Education: article 231;

o. Decentralization and Local Government: articles 240 and 252;

p. Chieftaincy: article 270;

q. Code of Conduct for Public Officers: article 286

r. Amendment of the Constitution: Chapter 25; and

s. Miscellaneous: articles 293 and 299

Amendment of the Constitution is through the procedure of bills. It is a mandatory constitutional requirement that a bill for the amendment of an entrenched provision is referred to the Council of State by the Speaker of Parliament before Parliament proceeds to consider it. The referral is for the Council to give its advice on the bill. The advice of the Council of State is time bound as it is required to be rendered within thirty days after receiving the bill.[3] The Constitution is silent on the fate of a bill that receives a negative advice of the Council of State. Furthermore, it is unclear whether the bill process continues notwithstanding the nature of the advice of the Council of State. However, it is required that upon the advice of the Council of State, the bill shall be published in the Gazette but shall not be introduced into Parliament until the expiry of six months after the publication in the Gazette.[4]

Upon the expiration of the six months period, the bill undergoes its first reading in Parliament. However, it shall not be proceeded with further readings unless it has been submitted to a referendum held throughout Ghana. This means that no amendment of an entrenched provision of the Ghanaian Constitution takes place without the input

[3] Article 290(2)
[4] Article 290(3)

of the people. The referendum is required to meet a minimum standard before such amendment can be proceeded with. Consequently, at least forty percent of the persons entitled to vote must have voted at the referendum and at least seventy-835five percent of the persons who voted cast their votes in favour of the passing of the bill.[5] In the words of the Constitution, 'where the bill is approved at the referendum, Parliament shall pass it.'[6] The effect of this provision is the sovereignty of the people being restated. The word 'shall' in the provision carries a mandatory effect to divest the Parliament of any discretion where the constitutional threshold of seventy-five percent of the minimum of forty percent approves the amendment in the referendum. It becomes a constitutional violation for the Parliament to do otherwise, as what is constitutionally required of the Parliament is to merely give legislative effect to the will of the people expressed at the referendum. Accordingly, where a bill for the amendment of an entrenched provision has been passed by the Parliament in accordance with article 290, 'the President shall assent to it.'[7] The implication here is also that the President has no veto power where an amendment bill is duly passed according to the prescribed procedure.

4.3. AMENDMENT OF NON-ENTRENCHED PROVISIONS

Amendment of a non-entrenched provision of the Ghanaian Constitution is less rigid than an entrenched provision. There are two basic preconditions for its being introduced into Parliament, thus: it must have been published twice in the Gazette with the second publication being made at least three months after the first, and at least ten days have passed after the second publication.[8] After the publications, the Speaker shall, after the first reading of the bill in Parliament, refer it to the Council of State for consideration and advice and the Council of State shall render advice on the bill within thirty days after receiving it.[9] Where Parliament approves the bill, it may only be presented to the President for his assent if it was approved at the second and third readings of it in Parliament by the votes of at least two thirds of all the members of Parliament. Where the bill has been passed in accordance with this article, the President is under a mandatory obligation to assent to it. It is obvious from the above that an

[5] Article 290(4)
[6] Article 290(5)
[7] Article 290(6)
[8] Article 291(1)
[9] Article 291(2)

amendment of a non-entrenched provision does not require a referendum being conducted. Hence, this procedure is less cumbersome and does not directly involve the voting public.

On the role of the President as stated above, the Constitution does not give him veto powers where the amendment has followed the procedure laid down in articles 290 and 291. However, it is a precondition for presidential assent an amendment bill presented to the President for assent is accompanied by a certificate from the Speaker that the provisions of this Constitution have been complied with in relation to it. However, where the amendment relates to an entrenched provision, the accompanying certificate must come from the Electoral Commission, signed by the Chairman of the Commission, and bearing the seal of the Commission, that the bill was approved at a referendum in accordance with chapter 25 of the Constitution.

4.4. ISSUES IN THE AMENDMENT PROCEDURES

The primary difference in the procedures of amendment of the two classes of constitutional provisions is that, while an amendment of an entrenched provision must secure the approval of a super-majority (75%) of voters in a national referendum (with a minimum voter participation rate of forty percent of registered voters), amending a non-entrenched provision requires the approval of only a super-majority of legislators. In each case, before an approved amendment comes into effect it must have received the assent of the President. Importantly, however, the constitution makes the President‘s assent mandatory, and thus merely a ministerial act, once a proposed amendment has secured the requisite popular or legislative approval.[10]

The scheme for amendment outlined in chapter 25, read in light of the constitution as a whole, offers strong support for the proposition that it is Parliament, not the President that is supposed to set the agenda and initiate the process of constitutional revision. First, article 289(1) expressly designates Parliament, and Parliament alone, as the body that may, by an Act of Parliament, amend any provision of this Constitution. Unlike the 1960 Constitution of Ghana, which defined the term ―Parliament to include both the President and the legislature (then

[10] Fourth Republican Constitution, Article 290 (3).

called the National Assembly) acting jointly.[11] Under the current Constitution, Parliament refers to the legislature alone.[12] Admittedly, an Act of Parliament, which, under article 289(1), is the prescribed form a constitutional amendment to take, is technically the product of the Parliament and the President acting together. However, as we have already stated, when it comes to amending a provision of the 1992 Constitution, the constitutionally prescribed division of labor assigns to the President is only back-end role of assenting to a pre-approved amendment.

Second, it is important to emphasize that the extent of the Ghanaian President's constitutional authority is limited to powers expressly granted him by the Constitution (including those incidental powers necessary for the accomplishment of the express powers)[13] plus those powers properly delegated to him under constitutionally valid statutes. The Fourth Republican Constitution of Ghana does not create a President of unlimited power. Similarly, the President does not inherently possess the constitution's residual power, or the remainder of the power that is not expressly or impliedly allocated under the Constitution. All such residual power is, of necessity, reposed in Parliament, to be exercised by it, as and when needed, through the passage of appropriate legislation. The President is constitutionally the sole repository of the executive authority of the State, but that power is the power to enforce enacted laws, not to make or change them. With regard specifically to who gets to initiate new law, the Constitution is always quite clear when the intention is to have the President, and only the President to originate particular kinds of legislation. This is the case, for example, with bills relating to public finance.[14] Thus, for instance, in article 174 (1), the constitution states that no taxation shall be imposed otherwise than by or under the authority of an Act of Parliament. To forestall disputation as to when and by whom a bill of taxation is to be originated, Article 179 (1) specifically empowers and commands the President to cause to be prepared and laid

[11] First Republican Constitution, Article 20 (1) stipulates —there shall be a Parliament consisting of the President and the National Assembly.

[12] Fourth Republican Constitution, Article 93 (1) —There shall be a Parliament of Ghana which shall consist of not less than one hundred and forty elected members, and (2) Subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution

[13] Article 297(c) of the Constitution provides, "In this Constitution and in any other law where a power is given to a person or authority to do or enforce the doing of an act or a thing, all such powers shall be deemed to be also given as are necessary to enable that person or authority to do or enforce the doing of the act or thing."

[14] S.K. Asare "Amending the Constitution of Ghana: Is the Imperial President Trespassing?' [2010] African Journal of International and Comparative Law, p.18

before Parliament at least one month before the end of the financial year, estimates of the revenues and expenditure.[15] Similarly, in Article 108, the constitution clearly bars Parliament from proceeding on bills that impose charges on the consolidated or other public funds, unless the bill is introduced by, or on behalf of the President. The express delineation in the constitution of those specific instances where legislative initiative belongs to the President implies, following the maxim *expressio unius est exclusio alterius*, that in all other cases the origination of legislative action must remain with the legislative body itself. Thus, when Article 289 (1) expressly designates Parliament as the body that may amend any provision of the constitution, and does not designate the President as the one who must introduce a bill of amendment, it must be understood that the origination power in matters of constitutional amendment remains with Parliament.[16] Not only that, but also no extra-parliamentary body is empowered to do any preparatory work for Parliament, unless Parliament itself has validly authorized such a body.

Other elements of the mechanics of constitutional amendment outlined in chapter 25 support our conclusion. Notably, as to both entrenched and non-entrenched provisions, Article 290 requires the Speaker of Parliament to refer a bill for amendment of a provision of the Constitution to the Council of State for its advice before further action on it may be taken by the Parliament. What is significant about this requirement, that Parliament obtains the advice of the Council of State on a bill to amend the Constitution, is that it is the only time in the entire Constitution when the Council of State is specifically required to render advice to Parliament, rather than the President, on a pending legislation. Throughout the rest of the Constitution (that is, when the matter does not pertain to an amendment of the Constitution) the role of the Council of State is to advice the President on a broad range of matters and actions constitutionally assigned to the President.[17] The fact that, in the specific instance of a proposed amendment to the Constitution, the Council of State is brought into the process (and early) to offer its advice to Parliament must mean something, and we would argue that it means two things: first, that legislation to

[15] As another example, Article 82(1) is of the form ―Parliament may, by a resolution supported by the votes of not less than two-thirds of all the Members of Parliament, pass a vote of censure on a Minister of State. It will be straining logic to intolerable limits to argue somehow that because there is no explicit reference to who can originate such a bill of censure; it follows that the President must set the agenda for bills of censure.

[16] Asare (n14)20

[17] Indeed Article 89(1) states that the role of the Council of State is ―to counsel the President in the performance of his functions

amend a provision of the Constitution is constitutionally different from ordinary legislation; hence, the vastly different legislative processes; and, second, that Parliament is the primary actor and agenda-setter when it comes to proposals to revise the constitution.

It is not enough to argue, in rebuttal, that, under the current arrangement announced by the President, Parliament still has an opportunity and the responsibility ultimately to consider and approve the draft Bill that would result from the work of the Constitution Review Commission.[18] The crucial issue here is who determines if and when there would be a constitutional review as well as the agenda for such review. It matters little that Parliament will inevitably get its say before any proposed amendment can pass or that a parliamentary super-majority is required to approve a proposed amendment. As experience has shown, Presidents in the Fourth Republic have had little difficulty getting Parliament to ratify whatever presidential initiatives are placed before it. Ultimately, it is who determines if and when the constitution must be reviewed and who sets the agenda and timetable that matters. In addition to drawing support from structural inferences based in the text of the Constitution, the case for regarding Parliament, not the President, as the primary actor and initiator in the area of constitutional review also rests on strong policy considerations.

First, Parliament is unique among the institutions of the Constitution in being the only body whose membership straddles the diverse political and regional demography of the nation. The President, though elected by a national electorate, is elected on the ticket of a single party and is generally identified with that party and perceived as promoting the policy preferences and legislative agenda of his party. In contrast, the Parliament of Ghana‘s Fourth Republic draws its membership from diverse and rival shades and aggregations of political opinion and interests, as represented by the political parties. In addition to its politically or ideologically representative character, Parliament also represents, like no other body does, the full range of the nation‘s regional and ethno-cultural diversity. This superior representativeness of the legislature, in both the political/ideological and the demographic

[18] Asare (n14)20

senses, makes it the body best suited to set the agenda for the revision or amendment of the document that defines the basic rules of the game‖ for the organization, exercise and control of power within the state.

The multi-party character and composition of Ghana's Parliament, as opposed to the single-party face of the presidency, assumes even greater significance when viewed in the light of the super-majority threshold that a proposed constitution must clear in the legislature or the national referendum to be approved. This high super-majority threshold means that, unlike ordinary legislation which can be enacted with a simple one-party majority, a proposed constitutional amendment cannot see the light of day unless it can garner strong bi-partisan support among legislators or the national electorate. The way to assure and build the necessary degree of bipartisan support and cooperation for a constitutional revision agenda is not to run it as a single-party/presidential agenda until the process has advanced to a point when bi-partisan co-optation may well be too late. At a minimum, the majority and minority parties in Parliament must have an equal opportunity early in the process to put forth their own plans and priorities for constitutional reform, rather than have the President and his party hijack the process from the beginning and hope, in the end, to win over the opposition party. Securing the necessary super-majority or bipartisan consensus for constitutional reform might prove unnecessarily difficult to accomplish if the opposition party does not regard the reform project as a joint enterprise from the start. The only way to ensure that is for the process of constitutional review to originate in Parliament, not outside it.

Furthermore, the Parliament of Ghana is already structured internally to handle matters related to constitutional and legal reform. Among the committees of parliament is a Committee for Legal and Constitutional Affairs. There are also committees on the judiciary and on various other functional areas of government. Parliament can therefore easily and efficiently manage the business of constitutional review by parceling out the various constitutional review proposals of different political parties to appropriate functional-area or subject-matter committees. Thus, any efficiency advantage that a presidentially-appointed commission might be expected to have over Parliament, on account of the latter's unwieldy size, is easily overcome by using the legislature's committee system to handle the business of constitutional review. The parliamentary committee approach has other advantages. Under article 103(6) of the constitution, parliamentary committees must be so constituted as to reflect the different shades of

opinion in Parliament.[19] This degree of bi-partisanship and inclusiveness is not guaranteed in a presidential commission, which is composed solely of personal appointees of the President. Parliamentary rules also enable the committees of Parliament to hold public hearings and to receive or solicit input and submissions from experts and the general public as well as engage the services of consultants just like an extra-parliamentary commission appointed by the President. Additionally, committees of parliament have the same subpoena and other evidence-gathering powers and privileges as would a presidential commission. In short, there is no unique advantage that a presidentially-appointed constitution review commission brings to the process that Parliament, acting through its committees, lacks.

On the other hand, Parliament has certain advantages, apart from its superior democratic legitimacy and representativeness, which a presidential commission cannot match. Unlike commissions that are appointed by the President on an ad hoc basis, Parliament is a permanent constitutionally established body. Placing Parliament in charge of constitutional review will thus enable it to develop, over time, the appropriate institutional competence and memory, as well as accumulate a body of knowledge and related resources, in the area of constitutional review.

This opportunity for institutional development and growth, which a historically enfeebled Parliament, like Ghana's, desperately needs, is lost when Members of Parliament yield or concede the initiative in constitutional review to an ad hoc, extra-parliamentary commission established at the pleasure of the President. Ultimately, it is a waste of scarce national resources for presidents to empanel *ad hoc* commissions for tasks that Parliament is competent and well organized to accomplish. Outsourcing constitutional review to an ad hoc commission, bringing Parliament in at the end only to approve a done deal, reduces the legislative chamber to a rubber-stamp, which ironically is one of the ailments that the current review is asked to cure.

In addition, placing Parliament in the driver's seat in matters of constitutional review would ensure that the decision whether to commence or undertake a review of the constitution is decentralized rather than left to sole

[19] Fourth Republican Constitution, Article 103

discretion or will of the President. A constitutional review process that is triggered only if the President desires it leaves the possibility and timing of constitutional change hostage to presidential inertia or disinterest. This is particularly likely to be the case where changes may be desired in the constitution in order to constrain executive or presidential power. In fact, particularly in new African democracies like Ghana, where a tradition of presidential hegemony continues to cast a dark shadow on current efforts to institutionalize constitutionalism, limiting executive power and discretion is often one of the primary goals of advocates of progressive constitutional reform. In such situations, allowing the presidency to capture the process and agenda for constitutional change is the surest way to frustrate and undermine progress toward constitutionalism. Where Parliament is the initiating body, the process of constitutional reform could be triggered by more than one person or party, as long as certain predetermined conditions (that could be set forth in the standing orders of Parliament) have been met.

Finally, it has been contended that the history of presidential abuse of the amendment power in Ghana, counsels against leaving the President in charge of determining the timing of, and setting the agenda for, constitutional reform.[20] The immediate post-independence experience, especially under the First Republic, is particularly instructive in this regard. Every single constitutional amendment that was made under the Independence Constitution and, later, the Constitution of the First Republic (1960, as amended in 1964) was made at the behest of Nkrumah, in his capacity, first, as Prime Minister and, later, as President. Nearly all of these constitutional changes were in reaction to developments and events, including judicial rulings, which Nkrumah perceived as challenging his supremacy or threatening his hold on power.[21] Importantly, the successive amendments had, both individually and in the aggregate, the purpose or effect of consolidating more and more power in the hands of a single individual, enfeebling the legislature, judiciary and opposition parties, and eventually installing a one-party state and a dictator with an indefinite tenure.

[20] Asare (n14)28

[21] B.H William: *Law and Social Change in Ghana*, (Princeton University Press, 1966); Prempeh, H.K., Toward Judicial Independence and Accountability in an Emerging Democracy: The Courts and the Consolidation of Democracy in Ghana Institute of Economic Affairs, Accra (1997), pp. 31-33.

Although Ghana's current constitution has installed certain substantive and procedural firewalls to prevent a recurrence of some of the experiences under the First Republic, to cede to the president discretionary control over whether and when the constitution may be amended is to trust a single individual with too much power over the pace and fate of constitutional change in the country and thus reflects a failure to heed the lessons of history. Notably, the few amendments that have so far been made to the 1992 Constitution were made at the initiative of then President Rawlings.[22] It is doubtful that any of these earlier amendments to the current constitution was meant to strengthen the foundations of Ghanaian constitutionalism. In fact, a set of these amendments was pushed through by President Rawlings to reconfigure the presidency more firmly as a unitary executive by shifting to the President certain formal roles which the constitution had originally assigned to the Vice-President. This rebalancing of power between the president and the vice-president came in the wake of a rift between President Rawlings and his first Vice-President that grew worse, more public and more personal with time. Locating the power to initiate and set the agenda for constitutional review in Parliament, instead of the President, does not mean that the President would be denied the opportunity of a meaningful participation in the process or that his role must be limited to the perfunctory one of assenting to a fait accompli. There are multiple avenues for the President to make substantive input into, or help shape the content of, a constitutional reform agenda that is before Parliament. First, the President can transmit his administration's views and proposals directly to Parliament, to be considered, along with others, at the start of the process. Second, as a majority of the President's Ministers are, under the current constitution, also Members of Parliament, the President already has dependable agents in Parliament who can readily adopt and sponsor the administration's own preferred agenda, in competition with those of other parties, on the floor of the House. Third, the President's views on constitutional reform can be adequately represented in Parliament by his party, which is typically the majority or single largest party in Parliament. Minority parliamentary parties would lack a similar ability to influence the setting of the constitutional reform agenda, from the beginning, if the initiation of the process and the agenda- setting were to be located in the presidency or in an extra-parliamentary ad hoc commission set up by the president.

[22] Asare, S.K., op cit., p.29

CHAPTER FIVE

COMPARATIVE ANALYSIS OF THE PROCEDURES FOR CONSTITUTIONAL AMENDMENTS IN NIGERIA AND GHANA: CHALLENGES AND PROSPECTS

Amending the constitution of any country is usually a rigorous and complex process.[23] However, the complexities of constitution alteration depend on the provisions on the constitution in terms of procedure. The authority to amend a national constitution is usually derived from that same constitution. If a constitution is constitutional, it is amenable and amendable according to its prescription.[24] In the words of Honorable B.E Everett Jordan, Chairman of the United States Committee on Rules of Administration, even though we should ordinarily and naturally revere the constitution, it is nonetheless "changeable too because the circumstances in which it must function require an adaptation of institution and refitting of modes of doing things".[25] Indeed no constitution is intended by its makers to be static. Instead, it is envisioned that the constitution would "endure forages to various crises in human affairs."[26] Thus, a constitution amendment is the surest way to assure the adaptation of a valid constitution to the changing tides in human affairs.[27] It is also generally accepted that a valid constitution creates the power of the state and the limitation on such powers.[28]

Thus, in practical terms, the cause of government is charged, changed, or challenged by the written constitution.[29] The constitution thus becomes far more than just a broad discretionary mandate on the powers and duties that elucidate general affection and regard. In essence, provisions on constitution alterations in Nigeria and Ghana are derived from their national constitutions and comparing constitutional provisions of both nations is essential to discussions in this paper. Even though both countries inherit their constitutions from Britain, there seems to be a

[23] E. Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton University Press, 2013) 23.
[24] A. Richard 'America's Unamendable Constitution' (*Cato Unbound*, 11 December 2015) <https://www.cato-unbound.org/2015/12/11/richard-albert/americas-unamendable-constitution> accessed 29 Dec 2022.
[25] W.T. George 'Jordan, Benjamin Everett' (*NC Pedia*, 2011) <https://www.ncpedia.org/biography/jordan-benjamin-everett> accessed 29 Dec 2022.
[26] P. Jaroslav *Interpreting the Bible and the Constitution* (Yale University Press, 2008) 8.
[27] A. Tunji 'Constitutional Amendment and Our Democracy' *Nigerian law guru*, <http://www.nigerianlawguru.com/articles/constitutional%20law/CONSTITUTIONAL%20AMENDMENT%20AND%20OUR%20DEMOCRACY.pdf> accessed 10 Jan 2023.
[28] *ibid*.
[29] United States, *Constitution: With Amendments and the Constitution of the State of California* (Johnston 1893).

difference in their local provisions on constitution alterations.[30] While the Ghanaian constitution adopts a flexible approach,[31] the Nigerian constitution is more bureaucratic, with cumbersome hurdles inserted therein.[32] The framers of these Constitutions[33] introduced complex amendment procedures into the Constitutions to guard against retrogressive amendments. The idea behind these special amendment procedure stems from the special nature of the Constitution as a document that maintains stability in affairs of a nation which if not preserved could be used to undermine the state of affairs which it was designed to preserve originally.[34] Conversely, constant political pressures for incessant constitutional reforms may render a Constitution vulnerable, but this is relative to the flexibility or otherwise of the formal constitutional amendment procedures.[35]Therefore, chapter compares and analyses the formal amendment procedures adopted in the CFRN, 1999 and the Ghanaian Constitution of 1992 and determines whether the formal amendment procedures provide sufficient safeguard to protect them from being undermined by retrogressive amendments. It also examines the extent of involvement of the people in the constitutional amendment procedure to promote constitutional democracy. It finally highlights the role of the judiciary in the amendment process.

5.1. PROCEDURE FOR ALTERING THE NIGERIAN AND GHANAIAN CONSTITUTIONS

The procedure for amending the Nigerian and the Ghanaian Constitutions[36] are unique with certain strikingly similar attributes as elucidated in this study. Historically, Nigeria and Ghana share a common legal heritage[37] having been colonized by the British Government. Briefly, both Nigeria and Ghana experimented with the Westminster model of parliamentary system upon gaining independence.[38] Under the Westminster model, the procedure vests the power to amend the Constitution in the Parliament as the 'guardian of the Constitution'. All

[30] T.H. Gedion 'The Fourth Constitution-Making Wave of Africa: Constitutions 4.0' (2014) 28 Temple International & Comparative Law Journal, 185–190.
[31]Constitution of the Republic of Ghana (Amendment) Act, 1996.
[32] Constitution of the Federal Republic of Nigeria 1999. (as amended)
[33] Some of these new Constitutions that were passed from the 1990s include the Constitutions of Gambia, Ghana, Lesotho, Malawi, Namibia; ibid n1
[34] Ibid *n1*
[35] R. Suberu 'Managing Constitutional Change in the Nigerian Federation' (2015) 45(4) *The Journal of Federalism* 552
[36] *Ibid*
[37] E.S. Nwauche, 'The Constitutional Challenge of Integration and Interaction of Customary and Received English Common Law in Nigeria and Ghana', retrieved from < https://journals.tulane.edu> accessed on 5 Dec 2022, 14:18
[38] Nigeria gained independence from the British Government in 1960; this was three years after Ghana had already become a sovereign nation in 1957.

amendments to the Constitution required a super majority of two-thirds of the entire membership of the Parliament in addition to two-thirds majority of the membership of the Regional Assemblies regarding the creation and transfer of territories in Nigeria and chieftaincy and other affairs bothering on the Regional Assemblies in Ghana.[39] With each successive Constitutions[40] adopted by both countries coupled with military interruptions, the constitutional amendment procedures have metamorphosed into more rigid procedures with the introduction of entrenched[41] and non-entrenched provisions in each Constitution. Unfortunately, the constitutional amendment procedure under the current Nigerian Constitution[42] has remained undemocratic by limiting the scope of participation of the people to just matters regarding creation of States and local government areas and adjustment of boundaries of States and local government areas.[43] The constitution amendment procedure under the current Ghanaian Constitution[44] is however commended in this study for recognizing the inherent right of the people to participate in the process through the prescription for referendum regarding the amendment of 33 Articles and three chapters under the constitution.[45] The Nigerian Constitution[46] adopts the terms "mode of alteration" while the Ghanaian Constitution adopts the terms "amendment" and "alteration". This study takes cognizance of both terms in the comparative analysis.

The current Fourth Republic Constitutions[47] of Nigeria and Ghana have been bifurcated into entrenched and non-entrenched provisions. The mode of alteration and the amendment of both Constitutions follow the procedure prescribed for the entrenched and non-entrenched provisions. Section 9 of the Nigerian Constitution[48] provides the mode of altering provisions of the Constitution. It vests the National Assembly with the powers to alter any provision[49] of the Constitution. It further provides that "an Act of the National Assembly" to alter the Constitution

[39] Nigeria (Constitution) Order-in-Council, 1960 s.4, Ghana (Constitution) Order-in-Council, Article 32
[40] Nigerian Constitution, 1963, Constitution of the Federal Republic of Nigeria, 1979 replicated by the Constitution of the Federal Republic of Nigeria, 1999. Constitution of Republic of Ghana, 1960, 1969,1972 and 1992
[41] Article 31(2) and (3) under the Ghana (Constitution), 1957 is also an example of an entrenched provision in Ghana's previous Constitution.
[42] CFRN,1999
[43] CFRN, 1999 s.8 which prescribes referendum
[44] CRG,1992
[45] CRG,1992 Article 290
[46] CFRN,1999
[47] CFRN, 1999 and CG, 1992
[48] CFRN,1999
[49] *Ibid s. 9(1)*

must be passed by two-thirds majority of both Houses of the National Assembly and approved by a resolution passed by two- thirds of the State Houses of Assembly before it can be passed.[50] To alter Section 8 and Chapter IV of the Constitution, the Act must be passed by each House of the National Assembly and a resolution passed by at least two-thirds of all the State Houses of Assembly.[51] The National Assembly has relied on this provision to pass five alterations[52] of the 1999 Constitution. The approach or strategy adopted thus far has been incremental amendments as opposed to wholesale adoption of new Constitution (despite the agitation for a brand new Constitution).

The judiciary has also added another requirement to section 9 which was not originally contemplated by the framers of the Constitution. According to the Federal High Court decision in the case of *Olisa Agbakoba v. National Assembly*[53] alterations to the Nigerian Constitution must be assented before it can be considered as validly altered. Judicial arbitration[54] is thus another strategy to achieve constitutional change and is analyzed further below.

On the other hand, Chapter 25 of the Ghanaian Constitution[55] prescribes the method of amending its provisions. The power to amend the Ghanaian Constitution[56] vests on Parliament[57] which replicates the provisions under the Nigerian Constitution[58]. For an "Act of Parliament" to validly amend the Ghanaian Constitution[59], it must be passed in the manner prescribed under Chapter 25.[60] The President must also assent[61] every bill to amend any part of the Ghanaian Constitution after due process. The bill is usually accompanied by a certificate[62] to the effect that all necessary provisions as stipulated by the Constitution have been complied with. The procedure prescribed

[50] *Ibid*, s.9(2)
[51] *Ibid*, s.9(3)
[52] CFRN (First Alteration) Act, No.1, 2010, (Second Alteration)Act. No.2, 2010, (Third Alteration) Act, No.3, 2011 and the(Fourth Alteration) Act, No. 4, 2015
[53] (Unreported Suit No. FHC/L/CS/941/2010 of 8th November 2010)
[54] Comparative constitutional scholars advocate that constitutional reform can be achieved using some strategies like incremental constitutional amendments, judicial interventions, legislative supplementation and whole sale constitutional replacement. See ibidn14.
[55] CRG, 1992
[56] *Ibid*
[57] *Ibid*, Article 289(1)
[58] CFRN, 1999
[59] *Ibid*
[60] CRG, 1992, Article 289(2)(b).
[61] *Ibid*, Article,291(3)(4)
[62] *Ibid*, Article 292

for amending the Ghanaian Constitution[63] is more elaborate than the manner prescribed under the Nigerian Constitution[64]. Indeed, there are lessons worth learning from the provisions of Chapter 25[65].

As observed in the procedure for altering the Nigerian Constitution[66], the Ghanaian judiciary has also introduced an element in the procedure for amending the Ghanaian Constitution[67]. However, the difference between these two sets of judicial intervention lies in the fact that the requirement for presidential assent under section 9[68] introduced by the decision in *Olisa Agbakoba v. National Assembly*[69] is not final. It is then argued that being a decision of a court of first instance, it is still subject to change. This is a radical departure from the decision of the Supreme Court of Ghana in the case of *Asare v. Attorney General*[70] where the Supreme Court has approved activities of the President in what it described as forming part of" pre-legislative activities" of the Constitutional amendment procedure. By virtue of this decision, the President can undertake such "pre-legislative activities". The circumstances surrounding this case and the decision are considered more below. This study argues that this decision is final and can only guide the Parliament to prescribe in clear terms, persons and institutions that constitute part of the procedure for the amendment of the Constitution of the Republic of Ghana 1992.

Modern comparative constitutional scholars recognize the inherent right of citizens to amend every provision of their Constitution.[71] They also agree that the procedure to amend should involve the people by promoting constitutional democracy.[72] Comparative constitutional scholarship advocate that the procedure for altering or amending the Constitution must not be too weak as this is capable of undermining the Constitution and an extremely rigid procedure can only portend dangerous outcome.[73] This is because citizens will seek change through extra- constitutional means. The Nigerian and Ghanaian Constitutions[74] are compared and analyzed to

[63] CRG,1992
[64] CFRN,1999
[65] CRG,1992
[66] CFRN,1999
[67] CRG,1992
[68] CFRN 1999
[69] *Supra*
[70] (Unreported J1/15/2015) [2015] GHASC101(14 October2015)
[71] *Ibid*
[72] Ibid; the Canadian Supreme Court in Reference Re Secession of Quebec
[73] *Ibid*
[74] CFRN,1999 and CG,1992

determine whether the procedures adopted in altering or amending the provisions sufficiently protect them from retrogressive amendments. The role of the people in the amendment procedure under both Constitutions [75]is also compared and analyzed to determine which of the two Constitutions promote constitutional democracy as postulated by modern comparative constitutional scholarship. Finally, judicial arbitration, a strategy adopted to achieve constitutional change is considered particularly with reference to the decision of the Federal High Court of Nigeria in the case of *Olisa Agbakogba v. National Assembly* [76]and the decision of the Supreme Court of Ghana in the case of *Asare v. Attorney General* [77]and its impact on the procedure for amending both Constitutions[78].

5.2. CONSTITUTIONAL SAFEGUARDS IN NIGERIA AND GHANA

Under the Nigerian and Ghanaian Constitutions[79], three major constitutional amendment procedures are adopted: amendment by a special majority of the Legislature (Parliament in Ghana), amendment by a special majority of the Legislature and the approval of special majority of States Houses of Assembly followed by a referendum and a super majority in certain respect.[80]

The Nigerian Constitution[81] prescribes two types of amendment procedure that is like the division under the Ghanaian Constitution[82]. However, while the Ghanaian Constitution[83] clearly states the provisions that are entrenched as distinct from the non-entrenched provisions, this is only implied under the Nigerian Constitution[84]. It is submitted that a scrutiny of the provisions of section 9 of the Nigerian Constitution[85] will reveal that sections 9, 8, and chapter IV are entrenched. Thus, a different procedure is adopted when altering the entrenched provisions from the non-entrenched provisions. An "Act of the National Assembly" to alter the mode of altering the Constitution, create a State or a local government council, adjust the boundary of a State or a local government council or to alter the Fundamental rights of the Nigerian citizen can only be passed if the proposal is approved

[75] *Ibid*
[76] *Supra*
[77] *Ibid*
[78] CFRN,1999 and CG,1992
[79] *Ibid*
[80] See Ibid, s.9 and Chapter 25
[81] CFRN,1999
[82] CRG,1992
[83] *Ibid*
[84] *Ibid*
[85] CFRN,1999

by the votes of at least four-fifths majority of the members of the Senate and the House of Representatives.[86] The Houses of Assembly of at least two-thirds of all the States of the Federation must also approve the proposal through a resolution.[87] This qualifies the Nigerian Constitution as a rigid Constitution.[88]The rigidity of this procedure has its merits and demerits depending on who stands to gain or lose by it. The case of *Attorney General of Lagos State* v. *Attorney General of the Federation*[89] aptly buttresses the rigidity of this procedure. It can also be argued that entrenching some provisions is a safeguard that ensures the situation of key structures in Nigeria remain the same, almost unalterable for a long time. On this score, it is submitted that the procedure adopted to alter the Constitution of the Federal Republic of Nigeria, 1999 provides sufficient safeguard to prevent it from being undermined by retrogressive amendment.

The National Assembly has been able to successfully adopt an incremental strategy to alter the Nigerian Constitution five times. However, the first alteration presented a crossroad in the constitutional development in Nigeria. Having jettisoned the Westminster model constitution in 1979 and embraced the Washington model constitution[90] which was replicated in 1999, the National Assembly was confronted with a challenge regarding the exercise of its constitutional powers under section 9(1)[91]. This challenge was understandable given the fact that the country's democratic development had been interrupted severally by the military denying the National Assembly the opportunity to test and develop its constitutional powers to legislate on critical issues of national development consistently.

The controversy also presented an opportunity to examine the wordings of the alteration provisions closely and diverse views were expressed by lawyers, comparative constitutional scholars and more. The controversy was finally resolved by the courts, and it added another layer to the provisions of Section 9[92]. This study does not support the decision of the court in that regard but respects the decision, nonetheless.

[86] *Ibid*, s.9(3)
[87] Ibid
[88] O. Aguda *Understanding the Nigerian Constitution* of 1999 (MIJ Publishers Lagos, 2000) p.142
[89](2005) 3FWLR (Part 273) p.540 in I B Lawal, ibid.
[90] J.S. Read "The New Constitution of Nigeria, 1979: The Washington Model?" (1979) 2(3) *Journal of African Law*, 131-172
[91]CFRN,1999
[92] *Ibid*

The wordings of Section 9 provide that "an Act of the National Assembly to alter..." This ordinarily presupposes that if it is an "Act", then it is already an existing law and does not require the assent of the President as required for ordinary bills passed by the National Assembly.[93] The controversy surrounding the first alteration of the Nigerian Constitution[94] raged between two schools of thought. The first school of thought argued that the "Act of the National Assembly to alter the Constitution" need not be assented because it was like Article V of the American Constitution[95] which does not require presidential assent. The second school of thought, particularly Prof. Nwabueze, argued that the Nigerian Constitution and the American Constitution have different origins and alterations to the Nigerian Constitution cannot be treated in like manner. However, the controversy was resolved by the Federal High Court.

5.2.1. The Procedure in Ghana

On the other hand, Chapter 25 of the Ghanaian Constitution[96] prescribes the procedure for amending the Constitution. The Ghanaian Parliament is also vested with the power to amend the Constitution[97] as is the tradition in countries that have adopted constitutional democracy including Nigeria. The procedure for amending the Ghanaian Constitution[98] is circumscribed by prescription of the Articles as entrenched[99] and non-entrenched provisions[100]. Under the Ghanaian Constitution[101] before a bill to amend an entrenched provision can be passed, the Speaker of the Parliament refers the bill to the Council of State for advice which must be rendered within thirty days after receipt[102]. It is thereafter published in the Gazette and introduced in Parliament only after six months of the publication[103]. After the bill for the proposed amendment is read for the first time in Parliament, it is then submitted to a referendum to be held throughout Ghana; note that the bill will succeed if 40 per cent of the

[93] CFRN,1999, s.58
[94] *Ibid*
[95] Constitution of the United States of America, 1787; see also the decision of the American Supreme Court in *Hollingsworth v. Virginia* 3 U.S).378 (1798)
[96] CRG,1992
[97] *Ibid*, Article 289(1)
[98] *Ibid*
[99] *Ibid*, Article 290
[100] *Ibid*, Article 291
[101] *Ibid*,
[102] *Ibid*, Article 290(2)
[103] *Ibid*, Article 290(3)

persons entitled to vote at the referendum indeed voted and 75 per cent of them voted in favour of the bill[104]. The Parliament then passes the bill after a successful referendum[105], and the President assents[106] it to complete the process. The procedure for amending the non-entrenched provisions is different. Accordingly, a bill that seeks to amend a non-entrenched provision is first published two times in the Gazette; note that the second publication must be made at least three months after the first publication[107].

After the bill is read the first time in Parliament, the Speaker refers it to the Council of State to consider it and make their advice on the bill within thirty days after receipt[108]. If the bill is approved by the Parliament at the second and third reading by the votes of at least two-thirds of all Members, it is presented to the President for assent[109].

Finally, the bill to amend the Ghanaian Constitution must be accompanied by a certificate from the Speaker to the President and it must state that the provisions of the Constitution in that regard have been complied with[110]. If the bill amended an entrenched provision, then it must be accompanied by a certificate from the Chairman of the Electoral Commission (with the seal of the Commission) stating that the bill was approved by a referendum in compliance with Chapter 25 of the Constitution[111].

From the foregoing, it is submitted that the key institutions and person involved in the procedure for amending Ghanaian Constitution[112] are the Parliament, the Council of State, the people of Ghana (under a referendum) the Electoral Commission and the President. The functions of the persons and institutions under the procedure for amending the Ghanaian Constitution[113] are also clearly defined. There is a responsibility placed on the Speaker of the Parliament to refer the proposed bill for amending an entrenched and a non-entrenched provision of the Constitution[114] to the Council of State for advice The Council of State must render that advice within the stipulated

[104] *Ibid*, Article 290(4)
[105] *Ibid*, Article 290(5)
[106] *Ibid*, Article 290(6)
[107] *Ibid*, Article 291(1)(a)
[108] *Ibid* Article 291(2)
[109] *Ibid* Article 291(3)
[110] *Ibid*, Article 292(a)
[111] *Ibid*, Article 292(b)
[112] CRG,1992
[113] *Ibid*
[114] *Ibid*

timeframe of 30 days. Perhaps, the framers of the Constitution[115] reasoned that the stipulated time frame was sufficient to consider a proposal to amend the Constitution[116] irrespective of the volume of the proposal, the depth of expertise and extent of consultations required before a proper advice based on verifiable facts and statistics can be procured. It is critical for due consideration to be had to every relevant fact before prescriptions of this kind are made owing to the fragile nature of the *grundnorm* to avoid colossal mistakes. Another interesting feature besides the time frame stipulated to perform the tasks assigned under this procedure like the time for publication, the number of persons and votes considered before a valid referendum would have been conducted, is the assignment given to the Electoral Commission. A certificate bearing the signature of the Chairman of the Electoral Commission and the seal of the Commission authenticates the process. Granted that referendums are expensive, this aspect of the procedure for amending the Ghanaian Constitution[117] gives the people a voice and helps them claim ownership of the outcome of the process. This celebrates the ethos of constitutionalism and should be adopted under the procedure for altering the Nigerian Constitution.[118]

Despite the fact the when compared to the procedure for altering the Nigerian Constitution[119], the procedure for amending the Ghanaian Constitution[120] is more elaborate and broadly defines relevant persons and institutions, amending the Ghanaian Constitution has also resulted in controversy. In a similar vein, the judiciary has redefined the procedure for amending the Ghanaian Constitution[121] by the decision of the Supreme Court in the case of *Asare v. Attorney General*[122]. Thus, the procedure for amending the two Constitutions under review now include the decision of the judiciary as a layer in the process. It is also safe to submit that judicial arbitration is also a strategy adopted in amending the Nigerian and Ghanaian Constitutions considered under this study.

[115] *Ibid*
[116] *Ibid*
[117] *Ibid*
[118] CFRN, 1999.
[119] *Ibid*
[120] CRG,1992 chapter 25
[121] *Ibid.*
[122] *Ibid*

5.3. THE ROLE OF THE JUDICIARY: THE CASE OF OLISA AGBAKOBA V. NATIONAL ASSEMBLY AND ASARE V. ATTORNEY GENERAL IN PERSPECTIVE

In 2010, the controversy that arose because of the first alteration of the Nigerian Constitution[123] embarked upon by the National Assembly could not be resolved without the help of the courts. There were equal and opposing views for and against presidential assent before the alteration could assume the force of law. Justice Katsina Alu, JSC[124] attempted to distinguish between ordinary bills passed by the Senate and House of Representatives under section 58[125] from the "Act" referred to under section 9[126] which involves the Senate, House of Representatives and at least 24 State Houses of Assembly in Nigeria. For him, while a court can set aside Acts passed based on section 58[127], once the procedure under section 9(2)[128] are complied with, the court cannot set the "Act" altering the Constitution aside. Again, Soyombo Opeyemi argued that the "Act of the National Assembly" under section 9(2)[129] is *sui generis* and the conflict between both is due to the inability to distinguish between Constitutional law and ordinary legislation as well as a clash of "political cultures between the British parliamentary system and the American presidential democracy". Nwabueze on the other hand argues that it is not right to rely on Article V[130] as the basis for not assenting to the alteration of the Constitution[131] by the National Assembly. He distinguished both based on origins. He further stressed that the American Constitution originated from laws made by the people, not by an Act of Congress or a decree like that of the military government that birthed the Nigerian Constitution" as a schedule to the Decree"[132]. Thus, he emphasized that Congress does not pass amendments but propose amendments that become valid law when ratified[133]. In *Hollingsworth v. Virginia*[134], the Supreme Court of the United States also held that the President of the United State had no part in the making of the Constitution and cannot logically be part of its amendment either. Alex Izinyon also joined issues with Nwabueze in agreeing

[123] CFRN,1999
[124] K. Alu, "Nigeria: Presidential Assent-Justice Okeke missed it", *Daily Independent*, 1 December,2010 p4
[125] CFRN,1999
[126] *Ibid*
[127] *Ibid*
[128] *Ibid*
[129] *Ibid*
[130] Constitution of the United States of America, 1787
[131] CFRN,1999
[132] B.O. Nwabueze "Nigeria: Constitutional Amendment: Presidential Assent is Mandatory (3)" *Daily Independent* 2 August, 2010 p.5
[133] *Ibid*
[134] 3 U.S. 378(1798) retrieved from< https://supeme.justia.com> accessed on 15 August 2022

that the President must assent the alteration of the Nigerian Constitution for it to become valid.[135] These views have been given legal support by Justice Okeke in *Olisa Agbakogba* v. *National Assembly*[136] who ruled in November 2010 that a Constitutional amendment that does not have a presidential assent is null and void. The decision of the Federal High Court in the instant case has however brought a temporary solution to the controversy because it is not the final court and can still be upturned by a decision of a higher or the highest court. The decision has also generated mixed reactions because of the circumstances in the case of *Attorney-General of Bendel State v. Attorney-General Federation &22 Ors*[137] where the presidential assent did not validate the Allocation of Revenue (Federation Account etc) Act[138] which was sent to the President for assent by the Joint Finance Committee by violating the relevant provisions of the Constitution[139]. The question is, how can the absence of a presidential assent on an "Act" to alter the Constitution be null and void if the presence of the presidential assent was still held null and void because it was wrongly procured in the case of *Attorney General of Bendel State v. Attorney General for the Federation &22 Ors*[140]*?* This can only be described as a judicial riddle that will be unraveled in time. It is safe to contend that the last has not been heard regarding presidential assents and constitutional development in Nigeria. However, since the judiciary has added a layer to the procedure for altering Constitution in Nigeria, the procedure for alteration of the Nigerian Constitution under section 9 must be submitted for presidential assent before it becomes effectual just like the procedure for ordinary bills under section 58[141]. Three other alterations have been made to the Nigerian Constitution since the first alteration in 2010 and they have all been submitted for presidential assent.

In a similar vein but different circumstances, the constitution alteration procedure in Ghana also experienced its share of controversy in 2010 when the President appointed a Commission to review and propose amendments to the Ghanaian Constitution in exercise of his powers under Article 278[142]. The Commission was tasked amongst

[135] N. Ofo, "Amending the Constitution of the Federal Republic of Nigeria 1999" (2011) 4, *African Journal of Legal Studies*, 123-148
[136] *Ibid*
[137] (Unreported S.C17/1981)[1981]4(02 October1981) retrieved from <https://nigerialii.org> accessed on 15 August 2021.12:13
[138] Act No.1,1981
[139] CFRN, 1979, ss. 54,55,58 and 149; see generally the case of *Attorney General of Bendel State v. Attorney General of the Federation & 22Ors*
[140] *Ibid*
[141] CFRN, 1999
[142] CRG,1992

other things to get the views of the people in Ghana about the operation of the Constitution[143] and possibly amendments which they may require[144]. A document of the Ministry of Justice also set forth the administration's agenda for constitutional reform particularly forty specific provisions[145]. The final mandate of the Commission was to produce a draft Bill for possible amendments to the Ghanaian Constitution[146]. This action gave rise to a constitutional controversy in Ghana that was finally resolved by the Supreme Court of Ghana. It is important to reiterate that unlike the procedure for the alteration of the Nigerian Constitution[147], the Ghanaian Constitution[148] clearly spells out the institutions involved in the procedure for the amendment process and specifically the extent of involvement of the President[149]. Thus, the action of the President of Ghana raised the question as to whether the President can be involved in what has been described as the front-end of the constitutional process. It is important to briefly state that unlike the controversy that ensued in Nigeria regarding the first alteration, the Ghanaian Parliament had successfully amended the Ghanaian constitution in 1996.

A cursory consideration of the Ghanaian Constitution[150] reveals that it is a hybrid Constitution which has been described as a by Professor Gyampo a "neo-presidential arrangement" that blends feature of the United States Presidential and the British Westminster systems.[151]In his opinion, Ghana has what can be viewed as "constitutional hybridity" (sic) and his assumption is based on the mixture of systems borrowed from the two major systems of Government. He firmly believes that the 1992 Constitution of Ghana is a weak countervailing mechanism to bridle the exercise of power, and this upsets the balance between the arms of government tilting it in favour of the executive against the Parliament in a manner that negates constitutionalism[152]. He castigates the peculiar nature of the Ghanaian Constitution by restating that Hybrid Constitutions facilitate exercise of "unbridled and unmitigated executive power". He further reiterates that this constitutional arrangement makes the

[143] *Ibid*
[144] See generally the terms of reference and the White Paper Report of the Constitution Review Commission by the Constitutional Instrument 2010(C.I.64) available at <https://rodra.co.za> accessed on 26 Nov 2022
[145] *Ibid*
[146] CRG,1992
[147] CFRN,1999, s.9
[148] *Ibid*
[149] *Ibid*, Articles 290(6) and 291(4)
[150] CRG,1992
[151] < ug.edu.gh/new/prof-gyamp> accessed on 26 Dec 2022
[152] According to Gyampo, the theory of constitutionalism postulates a deliberate legal limitation placed on the powers and authority of the person that exercise the power in a fiduciary trust for the people.

President the Commander-in-Chief of the Armed Forces of Ghana, the fountain of honour and mercy and the source of all legislation passed in Ghana as every law passed in Ghana emanates from the presidency considering the provisions of Article 108[153]. For him, this provision stifles legislative initiative as all Bills do have financial implications. Proclaiming that the President is the source of all legislation may be exaggerated but Professor Gyampo's views are compelling.

The circumstances which led to the passing of the Constituent Assembly and Plebiscite Act in 1960 and the active role played by President Nkrumah then, lend credence to the idea that Presidents in Ghana have occasionally participated in the procedure for making and amending Constitutions in Ghana. [154] This reinforces the tradition of "imperial presidency" that exists in Africa including Ghana.[155] This context may be resorted to as a basis to the background surrounding the setting up of the Constitution Review Commission of Inquiry by the President of Ghana in 2010[156]. It may also provide a valid perspective into the reasoning of the Supreme Court in the decision in the case of Asare *v. Attorney General*[157] In a panel of seven with two dissenting decisions, the Supreme Court of Ghana held that regarding the "spirit and the letter of the constitution" explained in the case of *Mc Culloch v. State of Maryland* that if the President can cause bills to laid in Parliament on his behalf under Articles 106(14),108 and 179, then he also has the "implied and necessary powers" under Article 297(c) to get an informed opinion with regards to such bills. The Supreme Court further stated that presenting the views gathered under Article 297(c)[158] to the Parliament inform of a draft bill as a proposal to amend the Constitution cannot be stretching the meaning of Article 289(1)[159]. The Supreme Court also reiterated that since the Ghanaian Constitution under review does not expressly state who will carry on the "pre-legislative activities", relying on the Constitutions of other countries[160] that expressly delineate such provisions defeats the purposive "liberal and benevolent interpretation" of the Ghanaian Constitution. It is submitted that the benevolence of this decision has

[153] CRG,1992
[154] Ibid
[155] H.K. Prempeh, "Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post Authoritarian Africa", available at < https://repository.uchastings.edu> accessed 04 Jan 2023
[156] Constitution Instrument, 2010 (C.I.64)
[157] *Ibid*
[158] The Constitution Review Commission of Inquiry conducted a referendum based on which a draft Constitution to the President which was subsequently presented to the Parliament as proposals for amending the Constitution.
[159] CRG,1992
[160] The plaintiff cited the Constitution of the State of Florida and Kenya to buttress his case

stretched role of the President in the procedure for amending the Ghanaian Constitution beyond recognition. This view is premised on the express provision of Articles 290(6) and 291(3)[161]. However, the decision may still not be judged harshly when viewed against the constitutional history in Ghana.

5.4. CHALLENGES OF CONSTITUTION ALTERATION IN NIGERIA

5.4.1. Domineering Influence of the Executive

The increased domineering influence of the executive over the legislature at both the federal and state levels constitutes a major challenge to the constitution alteration process in Nigeria. The Houses of Assembly of States have become appendages of the executive, thereby robbing them of their independence in general law-making process, including alteration of the Constitution. Experience has shown that legislators do the biddings of the executive, and this is largely attributed to the overwhelming powers wielded by the executive, especially as they (President and Governors) have control of party structures. The implication is that they largely determine the electoral fate of the legislators who would not want to risk losing their seats. Similarly, a view has been canvassed that, governors along with their state legislatures have been the most significant clog in the wheel of the democratic process. For most states, the two arms of government are a united body of willing collaborators with nearly no separation of power or checks and balances as required under the constitution.[162] The implication is that the state legislatures have no independent will to address issues without instructions from their respective Governors.

5.4.2. High Turnover of Legislators and Constitutional Inadequacies

Looking at the tenure of office of the President, and the limits of re-election, the framers of the Constitution of the Federal Republic of Nigeria, 1999, in their wisdom, decided to give value to legislative experience by deliberately refusing to limit the number of times a legislator could be re-elected. Re-election of a legislator should under normal circumstance be based on his or her performance and contribution in law making process, representation, and oversight functions as well as constituency accountability. However, very often, the

[161] CRG,1992
[162] G. Gbadamosi "State governors as unchallenged emperors in the democratic process", The Cable, Nov. 12 2021 <https://www.thecable.ng/state-governors-as-unchallenged-emperors-in-the-democratic-process> accessed 10 Jan 2023

electorates deviate in their perception of these constitutional mandates of a legislator, for some selfish and self-serving expectations. With these attitudes, even if a legislator has made meaningful impact in the chamber, he or she may not be re-elected for the failure to play to their tune. Again, in some places it is about zoning for "chopping" not working for the people.[163] Legislative attrition has been a feature of the National Assembly since the Fourth Republic. In 2019, 64 Senators and 151 House of Representatives' members were not re-elected in the current 9th Assembly.[164] The situation is expected to be worse in the 10th Assembly because of the trend already shown during the primary election in which more than 70% of the Legislators failed to secure return tickets during their party primaries in 2022. Indeed, out of the 30% that secured party-return tickets, many of them may not make it to the 2023 general election, further compounding the already worse situation.[165] The implication of this high legislative turnover is that the National Assembly is composed of a great number of amateur legislators who lack requisite experience to effectively conduct legislative oversight, which is a big loss to Nigerian democracy.

On the other hand, while the Constitution specifies that the State Assemblies are to vote on the amendments carried out by the National Assembly, it fails to provide a timeframe within which that ratification should take place.

5.4.3. Poor Involvement of the Public

Unlike in Ghana where the public is directly involved in the amendment process, the Nigerian public has no direct involvement in the constitution alteration process. There is no constitutional provision directing the involvement of the public in the process. The only way the people can be said to be heard is through public hearings conducted by both Houses of the National Assembly in the process. It is worthy of note that public hearing is not a product of the Constitution by the Standing Orders of the legislative Houses. Even at that, only limited few stakeholders that are invited are allowed to attend. The implication is that the people that the Constitution is meant for do not

[163] R.A. Onuigbo and O.I. Eme "Legislative Turnover in the National Assembly: A Study of the South – East Zone, 1999-2015", (2015) 15(7), *Global Journal of Human-Social Science* 17

[164] O.S. Abubakar, "High Turnover of Lawmakers: Impact and Way Forward", being a paper presented at the 2022 House of Representatives Press Corps, p.3

[165] *Ibid*

really have a voice in the alteration process. This becomes a major challenge as complaints start springing up soon after alterations are successfully completed, with a continued clamour for further alterations.

5.4.4. Corruption

The international image of Nigeria in terms of corruption is extremely poor, going by the position of Nigeria in world corruption index. Corruption is the bane of the Nigerian society, and the passing of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) Act 2000 was seen as a positive step by the legislature in curbing the menace[166], which does not exclude the legislature. Members of the National Assembly have been severally accused of bribery and corruption in the performance of their functions.

At different points in the Fourth Republic, presiding officers of the National Assembly have been removed by legislators on allegations of corruption. Chief Evans Enwerem, Chuba Okadigbo and Adolphos Nwabara were impeached as Senate Presidents on account of mismanagement and corrupt enrichment. The challenge of corruption has been said to be an impediment in the way of constitution alteration as legislators are accused of financial inducements to consider alteration proposals[167].This is inimical to the interest of the nation.

It has often been said that a good number of members of the National Assembly (including legislators at the State levels) pursue pure selfish interests that often inhibit them from combating the challenges of law-making, representation and oversight. Many of them focus on obtaining contracts from the leadership of the houses and even from Chief Executives of the various MDAs their committees are to oversight.[168] Apart the above, many of the legislators have ambitions to contest for leadership positions in the house or membership and chairman of juicy committees. A lot of valuable legislative time is wasted while pursuing these ambitions. This personal interest serves as a challenge to the discharge of their oversight functions, thereby making them to easily

[166] The Act has been judicially validated as constitutional in several cases including: *Olafisoye v FRN* [2005] 51 WRN 52 (SC); *FRN v Anache* [2004] 14 WRN 1 (SC)

[167] M.O.A. Alabi and J.Y. Fashagba: *The Legislature and anti-Corruption Crusade uner the fourth Republic of Nigeria: Constitutional Imperatives and Practical Realities"*, 2010 1(2), *International Journal of Politics and Good Goovernace, p.9.*

[168] N.C. Ewuim et al, "Legislative Oversight and Good Governance in Nigeria National Assembly: An Analysis of Obasanjo and Jonathan's Administration", (2014) 3(6), *Review of Public Administration and Management* p.148

compromise when it comes to contributing meaningfully to debates on the floor of the house.[169] At times, some members resort to absenteeism from the floor of the house and do not participate at all in the proceedings.

5.4.5. Dysfunctional Constituents

The Constitution empowers the electorate to recall erring legislators, both at the National Assembly and Houses of Assembly of States.[170] However, this power is hardly triggered due to docile citizenry. This is partly because the electorate having observed a lot of irregularities in the electioneering processes respond with disenchantment, apathy, and lethargy towards the whole political process. Consequently, the elected officials do not hold themselves accountable to the electorate, even in the face of constitutional provisions that vests the power of recall in the electorate.[171] The electoral frauds, rigging and other malpractices that usually characterize elections into the federal and state offices, have been accompanied by public outcry by the electorate and civil action, such as strikes by labour organizations, public demonstrations and condemnation by civil societies and calls for electoral reforms and reform of the political system. It is hoped that the electorate and various constituents will be able to assert more pressure on the various legislatures to compel them to perform their legislative functions more effectively.

5.4.6. Lack of political will

Political will is a major factor in constitution alteration, and where it is lacking the process suffers since it involves balancing personal, group, ethnic and institutional interests that often prove very difficult to reconcile. According to Ekweremadu[172], self-preservation and political interest eat into the efforts to evolve a people's constitution. An example is the Executive arm finding it difficult to assent to alterations that tend to whittle down the powers of the President. This is exemplified in the failed Fourth Alteration where it was proposed that the assent of the President would not be required to complete a constitution alteration process.

[169] *Ibid*
[170] Sections 69 and 110 of the Constitution
[171] Oyewo, op. cit., p.20
[172] I. Ekweremadu "2021 Constitution Amendment: Expectations and Challenges", being a paper delivered at the NBA-SPIDEL Conference, Ibadan, held on 24th May, 2021.

5.5. PROSPECTS

The challenges of constitution alteration are surmountable. With the advancement of democracy in Nigeria, each arm of government is poised to take its constitutional role seriously with minimal encroachment by others. The controversies surrounding the requirement of assent of the President can be overcome through constitution alteration. However, both the legislature and the executive arms of government must be aware that there is no battle for supremacy in the law making process. Again, the lessons from Ghana can be aggregated to ensure direct involvement of the citizens in the process of altering the Constitution. With the successes recorded with the five alterations, there is hope that the procedure can be strengthened in the interest of democracy in Nigeria.

CHAPTER SIX
SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1. SUMMARY OF FINDINGS

Following the analysis of the procedure for alteration of the Constitution of the Federal Republic of Nigeria, 1999 and the Constitution of the Republic of Ghana, 1992, this research makes the following findings:

a. The Constitution of the Republic of Ghana makes direct provisions for the involvement of the public in the alteration of its entrenched provisions through the conduct of a referendum. Once such an alteration is approved by the voters in a referendum, the Parliament is under a mandatory duty to pass it. Consequently, upon approval by the people, the Parliament does not have legislative powers to decide to the contrary. This implies that such provisions cannot be altered without the approval of the citizens who are eligible to vote and reiterates the fact that sovereignty belongs to the people.

b. The constitution of the Federal Republic of Nigeria is silent on whether the assent of the President is required or not, and this leaves the matter to the interpretative powers of the courts unlike the Ghanaian constitutional provision.

c. The President of the Federal Republic of Nigeria has veto powers over Constitution Alteration Bills duly passed by both Houses of the National Assembly and approved by two-thirds of the Houses of Assembly of States. This power, which has been exercised on many occasions in the Fourth Republic, especially under the present administration, has occasioned a huge financial loss to the nation. Meanwhile in Ghana, the President has no veto powers over a Constitution Alteration duly passed according to the procedure provided in the Constitution of the Republic of Ghana, 1992. The only instance where the President can withhold assent is where the alteration is not accompanied by the required certificate by the Electoral Commission or the Speaker of the Parliament to the effect that constitutional requirements have been satisfied. By implication, the assent of the President of Ghana in the circumstance is merely ceremonial.

d. While the President can initiate a constitution alteration through an Executive Bill that passes through the Bill process of the National Assembly in Nigeria, there is no constitutional provision for a House of Assembly of a State to initiate a Constitution Alteration Bill, hence the involvement of State Assemblies is only to the extent of an alteration bill passed by the National Assembly. The implication is that the input of the Houses of Assembly of States is limited to alteration Bills passed by the National Assembly which is not in tandem with the principle of Federalism.

e. Unhealthy rivalry between the Legislature and the Executive arms of government in Nigeria. This was the case with the 7th Assembly during the aborted 4th Alteration of the Constitution.

f. The involvement of the Council of State by way of advice in the preliminary stage of the alteration of an entrenched constitutional provision under the Constitution of the Republic of Ghana is merely ceremonial. The Constitution does not provide the steps to take in the event of a negative advice by the Council of State, thereby leaving a huge constitutional gap that is subject to judicial interpretations.

6.2. RECOMMENDATIONS

a. The 10th Assembly should, upon inauguration, embark on further alteration of the Constitution of the Federal Republic of Nigeria to make robust provisions for direct involvement of the people in the process of altering the Constitution. This practice provided in the Ghanaian Constitution is a reaffirmation that sovereignty belongs to the people. Consequently, a role should be provided in the Constitution for the Independent National Electoral Commission as it is with the Electoral Commission in Ghana. This will provide a neutral and reliable way of determining the constitutional threshold for public approval to be provided through the alteration.

b. The lacuna in the Nigerian Constitution by not expressly stating the role of the President in the alteration process should be addressed by further alteration. The constitution is silent on whether the assent of the President is required or not, and this leaves the matter to the interpretative powers of the courts. This gap can be addressed by adopting the Ghanaian model.

c. The veto powers of the President of the Federal Republic of Nigeria over Constitution Alteration Bills duly passed in line with the procedure stipulated in the Constitution and transmitted to him for his assent should be whittled down by stating the conditions under which such powers can be exercised. Such powers should not

be available to the President if an alteration Bill has been passed in compliance with the provisions of the Constitution in similitude with the Ghanaian model whereby the President has no veto power if the procedure stipulated in the Constitution has been duly followed in altering the Constitution. This is necessary in view of the politicisation of the process as the State Governors and other interests have been seen to have put intense pressure on the President to withhold assent to Bills duly passed.

d. Nigeria being a federal state, there should be a constitutional provision empowering a House of Assembly of a State to initiate a constitution alteration bill and transmit same to other Assemblies and the National Assembly for consideration and ratification. The present constitutional arrangement makes Houses of Assemblies almost passive participants in the alteration process. The significance of the proposed constitutional arrangement lies in the fact that a House of Assembly is closer to the people and should be able to adequately harness the constitutional needs of the people for an improved constitutional democracy.

e. There should be a healthy legislative/executive relation in the governance architecture of Nigeria. Unhealthy rivalry of the legislature and the executive which has constituted a clog in the wheel of constitution alteration should be addressed by intense orientation programmes for both the legislature and the executive upon inauguration of each legislative Assembly and commencement of each administration. This will ensure a balanced relationship devoid of bitterness in the overall interest of governance, particularly alteration of the constitution.

f. The nature and extent of involvement of the Council of State by way of advice in the preliminary stage of the alteration of an entrenched constitutional provision under the Constitution of the Republic of Ghana should be reviewed. A clear procedure should be provided in the event of a negative advice by the Council. This would avoid leaving the vital component of the Constitution to judicial interpretation as the intention of the legislature is not clear as it is currently composed.

6.3. CONTRIBUTIONS TO KNOWLEDGE

This study has contributed to knowledge through its robust findings and recommendations targeted at enhancing the procedures for the alteration of the Constitution in Nigeria and Ghana. Specifically, the contribution to knowledge of this study is as follows:

a) This research is an effort to add to existing literatures in the field of study.

b) Whereas previous researchers have attempted to analyze and do in-depth study on the procedure for constitutional alteration in Nigeria and Ghana independently, this work is a comparative analysis of the procedure for alteration in both jurisdictions.

6.4. SUGGESTION FOR FURTHER RESEARCH

Further research should be conducted on the possibility of involving the National Council of State in the preliminary stages of the Constitution alteration procedure. This involves a thorough scrutiny of the merits as well as challenges of such an involvement.

6.5. CONCLUSION

The Constitution of the Federal Republic of Nigeria, 1999 and the Constitution of the Republic of Ghana, 1992 are rigid constitutions with cumbersome alteration procedure. Being an organic document, the Constitution is not intended to be immutable since the dynamics of the society necessitates a continued revision of the Constitution to address emerging issues. Some of the issues may not have been envisaged at the time of drafting or promulgation of the Constitution. An example is the death of a candidate when elections have commenced but before a declaration is made and a winner returned, which manifested in Kogi State in 2015. This prompted an immediate alteration process to address the obvious gap in the Constitution.

The rationale for the special alteration procedures of both countries is a reflection of the special nature of the Constitution as a document that maintains stability in affairs of a nation which, if not preserved, could be used to undermine the state of affairs which it was designed to preserve originally. Conversely, constant political pressures for incessant constitutional reforms may render a Constitution vulnerable, but this is relative to the flexibility or otherwise of the formal constitutional alteration procedures. The federal system of Nigeria, the politics of legislative/executive relation and the unchecked veto powers of the President, among others, constitute a clog in the wheel of constitution alteration in Nigeria.

As the grundnorm, the procedure for the alteration of the Constitution needs to be strengthened as it is part of constitution making. The significance of a constitution to democratic governance underscores the need for strengthening its alteration procedure, which must also be seen to be democratic. The findings and recommendations in this research will strengthen the alteration procedure in Nigeria and Ghana, following the comparative analysis undertaken.

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