



**ANALYSIS OF THE PROCEDURE FOR CONSTITUTIONAL ALTERATION UNDER
THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS
ALTERED)**

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Abstract

The Constitution is the fundamental and organic law of a country, which establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers and guarantees individual civil liberties. Being a set of basic laws and principles that a country is governed by, it should take the dynamism of the society into account in order to adequately regulate the society. The inevitable implication is that the Constitution is subject to alterations, to bring it in tune with emerging situations. The challenge however, is the procedure for its alteration, which is usually cumbersome with varying levels of involvement of the public. The fact that the Constitution is for the people requires adequate involvement of the public in its making and alteration process, but this has become a daunting challenge that goes to the question of its legitimacy. On that note, this study sets out to analyse the procedures for the alteration of the Constitution of the Federal Republic of Nigeria, 1999. Consequently, the study examined the relevant constitutional provisions relating to amendment of the Constitution in Nigeria; reviewed the extent of public involvement in the amendment process; and analyses the adequacy or otherwise of the procedures for constitutional alteration in Nigeria. The study found that the provisions of the Nigerian Constitution on the procedure for alteration are inadequate and in dire need of amendment, as there is no provision for express involvement of the public. It also found that lack of express provision regarding assent of the President in the Nigerian Constitution constitutes a major challenge to the alteration process. The study recommended alteration of the Constitution to provide for referendum in order to expressly involve the public in the constitutional alteration procedure in Nigeria. It also recommended that the Nigerian Constitution should be further altered to expressly define the role of the President as regards to assent. The study concluded that the constitutional alteration procedure in Nigeria will be enhanced if the recommendations are implemented.

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Introduction

Amending the Constitution of the Federal Republic of Nigeria 1999¹ 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.² As can be imagined, there are two views on the matter.

The first group consists of those who contend that the assent of the President is necessary before an amendment to the 1999 Constitution can be effectual.³ 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.⁴ 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.⁵

¹ Hereinafter referred to as the “1999 Constitution”.

² 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

³ 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.

⁴ 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.

⁵ 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.



Interestingly, the leadership of the National Assembly and the majority 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 the 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.”⁶ In view of the fundamental nature of the constitution 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 as a result 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

⁶ *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.



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. This paper 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 in that behalf, with recommendations for improvement.

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 is vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.⁷ 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.⁸ 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

⁷ Section 4(1)

⁸ Section 4(2)



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.⁹

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.¹⁰ 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 President¹¹ or the Governor¹² 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

⁹ R.A. Ahmadu & N. Ajiboye (eds.), *Legislative Practice and Procedure of the National Assembly* (Ibadan, Intec Printers Limited, 2004) pp. 53-54

¹⁰ Section 59(1), of the Constitution of the Federal Republic of Nigeria, 1999.

¹¹ Section 81, of the Constitution of the Federal Republic of Nigeria, 1999.

¹² Section 121 of the Constitution of the Federal Republic of Nigeria, 1999.

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 the majority of 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 harmonised and transmitted to the President of the Federal Republic of Nigeria for assent.¹³

Mode of Altering Provisions of the Constitution of the Federal Republic of Nigeria, 1999

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 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.¹⁴

¹³ Section 59 of the Constitution of the Federal Republic of Nigeria, 1999.

¹⁴ S. 9(3) of the Constitution of the Federal Republic of Nigeria, 1999.

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,¹⁵ boundary adjustment as between two or more States,¹⁶ creation of new local government areas within a given State,¹⁷ and boundary adjustments as between two or more local government areas in a given State.¹⁸ 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.¹⁹

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 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.’²⁰ A fundamental feature of general amendment under section 9(2) is the requirement of two-thirds majority. It

¹⁵ 1999 Constitution, s. 8(1).

¹⁶ *Ibid.*, s. 8(3).

¹⁷ *Ibid.*, s. 8(3).

¹⁸ *Ibid.*, s. 8(4).

¹⁹ J.N. Aduba and S. Oguce, *Key Issues in Nigerian Constitutional Law* (Abuja, NIALS, 2014) 216

²⁰ Section 9(2) of the Constitution of the Federal Republic of Nigeria, 1999.



should be noted that two-thirds majority here is that of the entire house, not those present. This is the same requirement when it comes to removal of President and Governor under sections 143 and 188 respectively.²¹

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, 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.²²

Looking at the express provisions of section 9 regarding alteration procedure of both entrenched and non-entrenched provisions, it is clear that 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

²¹ *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

²² Section 9(4) of the Constitution of the Federal Republic of Nigeria, 1999.



Fourth Alteration Bill was that the National Assembly had failed to prove that it had complied 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.²³ 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.²⁴ 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.

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 is supported by at least two-thirds of all States.²⁵ 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

²³ Oguiche, S., 'Constitution Amendment Stalemate in Nigeria: The Constitution (Fourth Alteration) Bill 2015 in Perspective', [2015] 7(2) NJLA, 37

²⁴ *Ibid*

²⁵ Section 9(2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999.

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 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.

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

In the case of the amendment of Section 8,²⁶ Section 9,²⁷ and Chapter IV²⁸ of the 1999 Constitution, the matter has to 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.²⁹

That is to say, at least 88 members of the Senate and 288 members of the House of Representatives.³⁰ 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. That is to say, 24 States.³¹ 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

²⁶ 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.

²⁷ This is the amendment provision itself.

²⁸ This chapter contains the provisions relating to fundamental human rights.

²⁹ 1999 Constitution, s. 9(4).

³⁰ 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.

³¹By virtue of section 3(1) of the 1999 Constitution, there are 36 States in Nigeria.



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.”³²

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 the National Assembly” in addition to “any law made by the National Assembly”.³³ 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.³⁴ 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.

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.

³² 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.

³³ 1999 Constitution, s. 318(1).

³⁴ *Ibid.*, s. 9(2).

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.³⁵ 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-publicised, masterfully-prepared treatise³⁶ on the subject is titillating. The strong points of the President-must-assent group are well-captured in the paper. These points would be critically reviewed seriatim with a view to ascertaining their veracity, relevance and strength.

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 in spite of the objection and absence of the assent of the President. The obvious, but not necessarily only, examples are Section 58(5)³⁷ and Section 59(4)³⁸ 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. The exceptions do not detract from the authority and power of the President.

³⁵ J. Ameh *et al.*, 'Amended constitution controversy: Akinjide, Sagay, others differ on legality', *SUNDAY PUNCH* (Lagos, Nigeria 1 August 2010) 2.

³⁶ 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.

³⁷ In respect of general bills passed by the National Assembly.

³⁸ In respect of money bills passed by the National Assembly.



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 58³⁹ 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 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

³⁹ *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.

based on Section 4(4) (b)⁴⁰ and Section 4(7)(c).⁴¹ It must be pointed out that the paragraphs provide for “any other matter with respect to which it⁴² 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.⁴³

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 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.*”⁴⁴

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

⁴⁰ This is relevant in respect of the National Assembly

⁴¹ This refers to either the National Assembly or the Houses of Assembly of the States as relevant.

⁴² 1999 Constitution, s. 9(1).

⁴³ Italics is for emphasis

⁴⁴ S. 318(1) of the Constitution of the Federal Republic of Nigeria, 1999.



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. He, therefore, deliberately misled himself and came to an unsurprising, misguided conclusion. 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.

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).

Interpretation Act

The contention by the President-must-assent proponents is that by virtue of Section 318(4) of the 1999 Constitution, “the Interpretation Act⁴⁵ 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 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)

⁴⁵ Cap. I23, Laws of the Federation of Nigeria 2004. This legislation shall hereinafter be referred to as the “Interpretation Act”.



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.⁴⁶ Furthermore, such conclusion is consistent with the notion of the supremacy of the 1999 Constitution which is provided for by the 1999 Constitution itself⁴⁷ and approved in a plethora of judicial decisions.⁴⁸ 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).

Acts Authentication Act

The President-must-assent group cites the Acts Authentication Act⁴⁹ against the definite and sufficient provision of Section 9. According to Nwabueze, the Acts Authentication Act:

⁴⁶ *Araka v Egbue* (2003) 7 SC 75; *Amokeobo v. I.G.P* (1999) 6 NWLR (Pt. 607) 467; *Niger Progress Ltd v. Ekeogu v. 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.

⁴⁷ 1999 Constitution, s. 1(1) and (3).

⁴⁸ *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.

⁴⁹ Cap. A2, Laws of the Federation of Nigeria 2004. This enactment shall hereinafter be referred to as 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 enrol 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.⁵⁰

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:

⁵⁰ B. Nwabueze, ‘Why President must sign constitutional amendment into law’, *The Guardian* (Lagos, Nigeria, 27 July 2010) 9.



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.⁵¹

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 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 is fallacious, vexatious, and devious. It 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 legislation. Its provisions/ are beyond challenge. In fact, its provisions are the basis for challenging the provisions of other legislation. 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 occasions grave consequences.

⁵¹ 1999 Constitution, s. 315(1)(a).



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 straightforward 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 1979.⁵² However, the equivalent provision in the Constitution of the Federal Republic of Nigeria 1989⁵³ is different from the provisions in both the 1979 and 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 9⁵⁴ 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

⁵² Hereinafter referred to as the “1979 Constitution”.

⁵³ Hereinafter referred to as the “1989 Constitution”.

⁵⁴ This is the equivalent of section 8 in the 1979 and the 1999 Constitutions



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 submitted 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) and (4) 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 either an exhibition of an unpardonable lack of knowledge of the country's constitutional history or a deliberate attempt to distort same. 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 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,⁵⁵ 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

⁵⁵ Nwabueze, *supra* n. 27.



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.⁵⁶ Similarly, our 1999 Constitution is substantially similar to the 1979 Constitution which was modelled after the Constitution of the United States.⁵⁷ Reliance on the practice in the United States cannot, therefore, 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 criticised 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.

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

⁵⁶ 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.”)

⁵⁷ 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.”).

some more grounds yet unexplored or some further elucidation to be added to previously canvassed points.

Assent of the President not being a Requirement

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

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”.⁵⁸ 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 realisation of the special nature of constitutional amendment, distinct from the other legislative powers of the National Assembly, necessitated the provision of Section 9(1) which confers the power to amend any part

⁵⁸ This is different from that of section 59 which deals with the mode of exercising federal legislative power in respect of money bills.

of the constitution on the National Assembly. That subsection went further to expressly stipulate that the power is subject only to Section 9. To 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.⁵⁹

It may be contended that marginal notes or headings in legislations do not form part of the provisions of the statute.⁶⁰ 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*,⁶¹ Idigbe, JSC, adopted the words of Upjohn, LJ, in *Stephen v. Cuckfield Rural District Council*⁶² when he said:⁶³

... though in modern 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.⁶⁴ 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.

⁵⁹ 1999 Constitution, s. 9(4).

⁶⁰ Interpretation Act, s. 3(2).

⁶¹ (1982) 7 S.C. 124.

⁶² (1960) 2 QB 373 at 383.

⁶³ At pages 187–188

⁶⁴ *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.

Interestingly though, in the case of *Olisa Agbakoba v National Assembly and another*,⁶⁵ 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.”⁶⁶ Expectedly, the National Assembly has appealed against this judgment.⁶⁷ Nevertheless, the President has assented to the amendment⁶⁸ in line with the judgment of the Federal High Court. The National Assembly, however, has vowed to continue with its appeal against the decision of the Federal High Court, Lagos, which is pending before the Court of Appeal.⁶⁹

Overriding Majority Votes

The process of passing the amendment bill in the different Houses of the National Assembly is the same with, in 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

⁶⁵ Unreported. Suit No. FHC/L/CS/941/2010 of 8 November 2010

⁶⁶ *Ibid.*, at p. 48 of the certified true copy of the judgment.

⁶⁷ 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/articles/constitution-n-assembly-files-notice-of-appeal/74572/> accessed 21 January 2022.

⁶⁸ Ahamefula Ogbu, ‘President Signs New Constitution’, *THISDAY* (Lagos, Nigeria 11 January 2011). 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.nguardiannews.com/index.php?option=com_content&view=article&id=35153:jonathan-signs-amended-1999-constitution&catid=1:national&Itemid=559 accessed 20 January 2022.

⁶⁹ Davidson Iriekpen, ‘Constitution: N’Assembly Appeal Subsists’, *THISDAY* (Lagos, Nigeria 12 January 2011). Available at <http://www.thisdaylive.com/articles/constitution-n-assembly-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.

which a few moments previously one has been injected with a very powerful prescriptive drug by a physician for the same purpose. It amounts to a wanton waste of resources and an utterly useless, impermissible absurdity. Such can only be occasioned by ignorance or incompetence, or both.

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 itself⁷⁰ in its entirety, including its amendment.⁷¹ Any contrary understanding is untenable in a textual constitutional basis.

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 Section 9(1). It is interesting to note that the expression “subject to this constitution” was used 38 times⁷² 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”.⁷³ 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

⁷⁰ 1999 Constitution, s. 9(1).

⁷¹ *Ibid*, s. 9(3).

⁷² 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.

⁷³ 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.



restriction, a limitation.”⁷⁴ 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.⁷⁵

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.

Definition of 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

⁷⁴ *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.

⁷⁵ *Tsokwa Oil Marketing Co. Nigeria Limited v. Bank of the North Limited* (2002) 11 NWLR (Part 777) 163.



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 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.

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.⁷⁶ 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

⁷⁶ *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.



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. 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.⁷⁷ 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.⁷⁸

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.

⁷⁷ *Texaco Panama Inc v SPDCN Limited* (2002) 5 NWLR (Part 759) 209 SC.

⁷⁸ Constitution of the United States, Art. V.



Indubitably, therefore, 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.

Secondly, 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 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 an awful absurdity.

Thirdly, 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.

Fourthly, 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.⁷⁹ 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.

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

⁷⁹ Onwuka Nzeshi and Tobi Soniyi, 'AGF: Amended Constitution Requires President's Assent', *THIS-DAY*, (Lagos, Nigeria 28 July, 2011)



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.⁸⁰ There are instances where limits are placed on 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.)⁸¹ or until after a certain period of years since the last amendment.⁸² There are also cases of substantive limitations to constitutional amendment, such as where certain provisions are excluded from being subject to any amendment⁸³ or where amendments are only possible through qualified procedures requiring an increased majority of votes in parliament (the so-called supermajority), such as two-thirds⁸⁴ or three-fourths,⁸⁵ a referendum,⁸⁶ approving a resolution from federating units (in the case of a country with a federal system of government),⁸⁷ dissolution of parliament,⁸⁸ and the election or convening of a special body to adopt the amendment.⁸⁹ Some constitutions even stipulate who can initiate constitutional amendments.⁹⁰

⁸⁰ Austria, Bulgaria, the Russian Federation, Spain and Switzerland.

⁸¹ For example, Albania, Belgium, France, Lithuania, Portugal, Romania, Spain, and Ukraine

⁸² 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.

⁸³ 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.

⁸⁴ For example, Albania, Germany, Hungary, Lithuania, Portugal, Romania, Slovenia, and Ukraine

⁸⁵ For example, Bulgaria, Liechtenstein, and Sweden

⁸⁶ For example, Denmark, France, Iceland, Ireland, Japan, Lithuania, Poland, Romania, Spain, and Switzerland.

⁸⁷ Constitution of the United States, art. V.

⁸⁸ 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.

⁸⁹ 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.

⁹⁰ 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 a number of countries, the procedure may be initiated by referendum (Liechtenstein, Lithuania, Romania, Slovenia,



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 in spite of the unjustified and unjustifiable contention of the President-must-assent champions. The procedure for the amendment of the 1999 Constitution discernible from Section 9 is stated below.

Conclusion

The provisions of the 1999 Constitution on its alteration are seemingly unclear. This defect must be cured. The crucial issue, however, is to ascertain or determine the procedure to be adopted in effecting this redeeming alteration of the 1999 Constitution, given that the alteration procedure itself is the subject of immense controversy. The solution is rather simple and straight-forward, Nigeria being a democratic country. The hallmark of democracy is that the minority will have its say, but the majority will have its way. Thus, the interpretation of the alteration provision of the 1999 Constitution that is supported by a majority of members of the National Assembly should be adopted in altering the provision of the Constitution on its alteration unless there is a contrary judicial decision on the matter.

Subsequent alterations to the Constitution will then follow the new procedure stipulated in the amended amendment provision. It is hoped that the new provision on amendment of the 1999 Constitution would be crafted with sufficient care and skill as to substantially, if not completely, eliminate any ambiguity, confusion or lack of clarity in its stipulations. The amended provision may have to expressly stipulate that the President must assent to any amendments to the Constitution,⁹¹ if that is the intention, or that the assent of the President is not necessary for any amendments to the Constitution to come into force.⁹² Where the proposed amendment to the amendment provision of the 1999 Constitution stipulates that the President should assent before amendments become effective, it may be necessary to stipulate that the President cannot veto

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.

⁹¹ This is also the practice in South Africa. See the Constitution of South Africa, s. 74(9)

⁹² Constitution of Czech Republic, art. 50.

constitution amendment bills presented to him for assent.⁹³ It may similarly be useful to stipulate a time limit for the President to assent to a constitution amendment bill which, if it elapses and the President still has not assented to the bill, the bill automatically, on account of such effluxion of time, becomes law and is deemed to be a duly enacted Act of the National Assembly.

However, if the intention is to retain but clarify the present position to the effect that the President need not assent to a bill for the amendment of the constitution for its validity and effectiveness, all that may be required is to add an additional subsection to the present Section 9. This new subsection which should be Section 9(5) should be worded as follows:

For the avoidance of any doubt whatsoever, all bills passed under this section shall not be presented to the President for his assent and the validity of such bills shall not be affected by the absence of the assent of the President thereto.

The proposed Section 9(5) above would have the effect of eliminating future controversies on the requirement or otherwise of the assent of the President for the validity of any amendment to the 1999 Constitution under the terms of Section 9. This is the way to go. The National Assembly together with the Houses of Assembly of the States have a duty to effect this vital amendment to the 1999 Constitution before the end of the current legislative season in order to lay a robust and controversy-free framework for the next legislative season. This should be seen as a clarion call to safeguard and strengthen the existing constitutional democracy of Nigeria.

The need for the conduct of referendum in the procedure for constitutional amendment should also be clearly stipulated.

⁹³ *Ibid.*, art. 62.