

OVERVIEW OF CONSTITUTIONAL AMENDMENT PROCEDURE IN NIGERIA

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**LONG ESSAY SUBMITTED TO THE FACULTY OF LAW, GODFREY OKOYE
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REQUIREMENTS FOR THE AWARD OF BACHELOR OF LAWS (LL.B) DEGREE OF
GODFREY OKOYE UNIVERSITY, ENUGU.**

JULY, 2026

DECLARATION

I, **OKONKWO JOHNPAUL CHIDIOMIMI**, with registration number **U21/LAW/407**, hereby declare that this work was duly and diligently carried out by me in the Faculty of Law, Godfrey Okoye University, Enugu. The primary and secondary sources used to carry out this legal research, are acknowledged appropriately and referenced herein, within this project. This work is original and has not been submitted in part or in full for the award of any degree in this or any other Faculty within and outside Nigeria.



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APPROVAL.

I, **OKONKWO JOHNPAUL CHIDIOMIMI** with registration number **U21/LAW/407**, do hereby certify that this research done by me, with the direct and diligent supervision of **DR. G. OKEY OMEH**, and has been approved by the Faculty of Law, Godfrey Okoye University, Enugu. Aside from the sources cited and recognized in this project, this research work is an original work and has not been presented in part or in full, for any degree of this University or any other University.

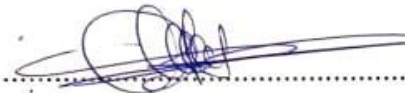


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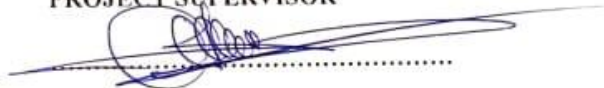
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DEDICATION

This project is dedicated to God.

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I offer my deepest gratitude to the Almighty God, whose infinite grace and unwavering guidance illuminated my path throughout the challenging journey of this research. It is only through His benevolence that I was granted the strength to persevere and bring this study on the **Overview of Constitutional Amendment Procedure in Nigeria** to fruition.

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LIST OF ABBREVIATIONS

AG	Action Group (political party context); Attorney General (legal context)
APC	All Progressives Congress
Art	Article
BVAS	Bimodal Voter Accreditation System
CFRN	Constitution of the Federal Republic of Nigeria
INEC	Independent National Electoral Commission
IPOB	Indigenous People of Biafra
LGA	Local Government Area
LPELR	Law Pavilion Electronic Law Reports
NCNC	National Council of Nigeria and the Cameroons
NCOP	National Council of Provinces (South Africa)
NJC	National Judicial Council
NPC	Northern Peoples Congress
PDP	Peoples Democratic Party
PLAC	Policy and Legal Advocacy Centre

s / ss	Section / Sections
SJLGA	State Joint Local Government Account
SJLGAs	State Joint Local Government Accounts
SC	Supreme Court of Nigeria

ABSTRACT

This study critically analyzes the constitutional amendment process in Nigeria as provided under section 9 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), and pinpoints the legal, political, and institutional challenges that have made meaningful constitutional amendment in Nigeria under the Fourth Republic difficult and unachievable, and makes some practical recommendations for change. Drawing on the colonial constitutional heritage, the study explores how the compounded supermajority threshold requirements of section 9 (two-thirds of both houses of the National Assembly, followed by at least two-thirds of the State Houses of Assembly) came about and how they have been inherited by the military constitutionalism of the past and are being used in practice as a constitutional paralysis device. The doctrinal research method is used, with primary sources such as the 1999 Constitution and amendment acts, judicial decisions, and legislative instruments being consulted, while secondary sources such as textbooks, peer-reviewed journal articles, and Policy and Legal Advocacy Centre institutional reports are consulted. All of this political fragmentation and inter-party rivalry, gubernatorial control over state legislatures, lack of direct popular participation mechanisms, and the costly time and money of every amendment cycle effectively make the formal amendment process unworkable. The Supreme Court in *Attorney General of the Federation v Attorney General of Abia State* is the best example of these structural failures that have replaced adaptation to constitutional principles by the judiciary. Comparing the amendment procedures of the United States and the Republic of South Africa provides some lessons for action: graduated amendment thresholds, popular participation mechanisms, and the role of active judicial scrutiny of the validity of amendments. The study calls for the development of a graduated amendment threshold, a mechanism for a constitutional referendum, a standing commission of constitutional review, more robust judicial review, lower amendment costs, institutionalizing party accountability in constitutional amendment, and the long-term establishment of a participatory sovereign national conference to create a constitution that is popularly legitimate.

CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

The road to constitutional democracy in Nigeria goes way back to pre-independence days, where one can trace a series of colonial constitutions that gradually determined the political structure of a country. These tools laid the groundwork to the federal system in Nigeria starting with *Clifford Constitution* of 1922 that brought in a limited elective principle, up to *Richards Constitution* of 1946 that divided the country into three regions. Their deliberative process proceeded to the *Macpherson Constitution* of 1951 and the *Lyttleton Constitution* of 1954 that provided the regions with increased autonomy and strengthened a federal system. After gaining independence, the 1963 Republican Constitution officially toppled all the links to the British Crown, thus making Nigeria a republic. However, this democratic experiment was not long-lasting and there was a row of military coups which resulted in the periods of the authoritarian regime when the Constitution was often suspended or modified by the military decrees. The period of constitutional turbulence and concentration of power had a significant impact on the federal-state relations and even the national consciousness.

The emergence of the civilian regime in 1979 and 1999 brought about new constitutions, which were to be used in the pursuance of a stable democratic state. The *Constitution of the Federal Republic of Nigeria, 1999*, has been drafted as the law tool of this new democratic era. Nonetheless, the history of post-independence is characterized by a continuous fight to create a stable and fair federation, the fight which has often taken over the main agenda of constitutional change. A range of issues that have driven the appeal of constitutional reform has included the need to have decentralization of power, fiscal federalism and giving autonomy to the units that comprise the federation. The lack of consensus on the management of resources, the formation of state police,

and the devolution of local governments have become areas of pertinent political debate, and have continued to pose a threat to the weak cohesion in the country.

In spite of the common opinion and political consensus on the need of these reforms, the constitutional amendment process has not been very successful in producing concrete results. The inflexibility of the process, which is defined by the inflexible majority rule at the federal and state stages, has time and again stuttered or grounded amendment bills. This has been a systemic breakdown that has created a sense of political stalemate, contributing to citizens' discontent and adding to the argument that the current Constitution is a historical compromise that was not written to face the threats of the future. The unremitting failure to apply the established legal system to address the core national problem has led to a lack of trust between the governed and the government, coupled with the growing ethno-regional tensions that threaten to destroy Nigeria as an entity and democratic establishment. In this light, this paper aims at offering an in-depth analysis of the constitutional amendment process in Nigeria, the challenges involved in it, its consequences in the development of the country, and comparing and contrasting it with other jurisdictions to give a feasible way forward.

1.2. Statement of the Problem

The process of the constitutional amendment in Nigeria, though it is a key legal mechanism used in the development of Nigeria, has always been ineffective in terms of tackling the individual national problems. This inefficiency is a direct consequence of procedural inflexibility and political innuendos that exist in the mechanism. The super majority requirements in both the National and State Assembly have created a political gridlock, which has hindered the genuine

efforts to enact reforms especially around issues that are controversial such the control of resources, state policing and local government freedom. This systemic inability to use the recommended legal framework to develop the Constitution creates an increasingly deficient trust in democratic institutions among the population and sparks ethno-regional tensions, which is the urgent risk to national integrity and democratic solidarization. The issue, therefore, is that the current constitutional amendment procedure provided in Section 9 of the 1999 Constitution which requires a two-thirds majority vote in both the Senate and the House of Representatives, followed by the express concurrence of at least 24 State Houses of Assembly is not a useful mechanism of national development, in fact, it is an obstacle, and its constant inability to make the Constitution meet modern demands leaves even the very existence of the Nigerian federation in doubt.

1.3. Research Questions

The research questions to be used in this study will be as follows:

- 1.3.1.** What are the major procedural and political challenges encountered in the process of constitutional amendments in Nigeria?
- 1.3.2.** What are the lessons that can be learnt by Nigeria from the constitutional amendment procedure in developed jurisdictions such as the United States and the Republic of South Africa?
- 1.3.3.** What reforms or other structures may be embraced to make the constitutional amendment process more inclusive, effective and responsive to the needs of the country?

1.4. Aim and Objectives

This research study intends to present a critical and analytical discussion of the process of making amendments to the constitution in Nigeria under the provisions of the 1999 Constitution. The

research aims at exploring the legal framework, historical analysis, and politics involved to regulate the amendment process to find the challenges within it, and to suggest a factual framework to be effective in reform. In order to accomplish this purpose, the project will have the following specific objectives:

- To examine the basic requirements of constitutional amendments in Nigeria.
- To discuss the main challenges and obstacles, including political and procedural ones, which have regularly hindered effective constitutional amendments in Nigeria.
- To carry out a comparative study regarding how constitutional amendments are done in other jurisdictions.

1.5. Scope and Limitations of the study

This research carefully examined the constitutional amendment process in Nigeria as stipulated in the 1999 Constitution (as amended). The research also examines the legal, political, and procedural barriers, which have hindered the process of constitutional amendments. There is also a comparative analysis of the amendment process in the United States and the Republic of South Africa to be able to draw some lessons regarding the situation in Nigeria. The study, however, cannot give a comprehensive historical account of all attempts to amend the constitution, as well as a discussion of all political events that occurred concerning the debate on the constitution.

1.6. Significance of the Study

The study is beneficial to various parties such as policy makers, legal professionals, scholars and the public at large. To policymakers, the study will provide a critical assessment of systematic

weaknesses in the constitutional amendment process and provide evidence-based, actionable recommendations on how to reform it. The comparative part will create a set of benchmarks of reforms which are possible to achieve and how other federations have been able to succeed in overcoming similar obstacles. To the legal practitioners and scholars, the study adds to the body of knowledge of the Nigerian constitutional law by giving a contemporary and detailed analysis of one of the most significant legal and political processes. It is set to be a good source of information in future research and legal studies. To the general public, the results of the study will de-mystify the intricacy of the constitutional amendment process and thus enable the citizenry to more actively participate in the political debate and demand accountability in the elective representatives they have. The research reveals the acuity of the need of a legitimate and efficacious system of constitutional reform in order to guarantee the cohesion of the national unity and democratic stabilization by pointing out the nexus between the shortcomings of the amendment process and the rising tension of ethno-regionalism.

1.7. Research Methodology

The research pursues the methodology of the doctrinal research, relying upon the vast amount of primary and secondary sources. Legislations that are related in one way or the other to the constitution amendments in Nigeria form the key primary sources. Textbooks, scholarly papers, articles, journals and other relevant publications form part of the secondary sources.

1.8. Literature Review

The prevailing literature on constitutional amendment in Nigeria shares one essential point, that the formal amendment process provided for in section 9 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is in practice, inimical to the changes this federation most

desperately needs. There is a significant and complex body of literature from constitutional law, political science, and comparative constitutional literature that explains the reasons for this resistance and the implications.

The doctrinal basis of any deep analysis of this topic is provided by the trilogy of great works on Nigerian constitutionalism authored by B. O. Nwabueze. The analysis is also provided by the centralist architecture of the 1999 Constitution in Writing, and the Constitution in Nigeria during the Military Rule and Constitutionalism in Nigeria, with Nwabueze cogently arguing that Nigeria's Constitution is, in reality, a military promulgation and, therefore, the words 'We the People' in the preamble is a mere legal fiction and not a constitutional reality.¹ It has structural consequences for the amendment process: a constitution that is not legitimised by the people at the very beginning of its formulation process is left with greatly compounded problems in reaching the sort of political consensus required for the supermajority provision of section 9. In a plural federation based on ethnic and sectional allegiances, T. A. Aguda notes that the two-thirds requirement in the National Assembly and the two-thirds requirement in the State Houses of Assembly has an almost insurmountable political cost, which is worsened by the processes of party politics in Nigeria.²

The political aspects of this burden have been most extensively discussed by Rotimi Suberu in *Federalism and Ethnic Conflict in Nigeria*, the broadest empirical research into the interplay of how regional loyalty, inter-party politics, and gubernatorial influence aid in the stalling of constitutional change in Nigeria.³ A. T. Akinwale extends this analysis to the specific institutional

¹ B O Nwabueze, *The Nigerian Constitution: A Critical Analysis* (Nwaigbo Publishers 1999) 12; B O Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law Publishing 1992) 88–94.

² T A Aguda, *The Challenge of the Nigerian Constitution* (Malthouse Press 2000) 54–56.

³ Rotimi T Suberu, *Federalism and Ethnic Conflict in Nigeria* (United States Institute of Peace Press 2001) 112–121.

context of the Fourth Republic, documenting how the APC legislative coalition's inability to deliver the required two-thirds majority in multiple State Houses of Assembly during the Eighth National Assembly exposed the disjunction between federal party dominance and the realities of state legislative politics.⁴ These are complemented by the accounts of S. S. Ojo, which appears in two related articles in the *Nigerian Bar Association Journal*, in which he identifies party-line voting as the single most reliable predictor of the fate of amendment bills in the National Assembly, and in which he documents the prohibitive financial and temporal costs each amendment cycle costs that, in practice, have consumed several legislative sessions, and several billion naira without producing commensurate constitutional improvement.⁵ F. Adeyemi's account of the failed third-term agenda provides the most instructive case study in how the misuse of the amendment process for personal political advantage can generate a lasting crisis of institutional legitimacy, with consequences that extend far beyond the particular episode.⁶

In addition to the political economy of amendment, there has been a body of scholarship that has taken up cudgels against the procedural vagaries that exacerbate these problems. There have been specialists published on whether or not a constitutional amendment bill needs presidential assent. S. Umezuruike's careful analysis illuminates the competing positions between the National Assembly's consistent view that a bill satisfying all requirements of section 9 requires no executive assent, and the contrary argument that the general legislative assent provisions of the Constitution

⁴ A T Akinwale, 'Federalism and Restructuring in Nigeria: A Legal Perspective' (Lagos University Press 2020) 72–74.

⁵ S S Ojo, 'Legislative Impasse: The Challenge of Amending the Nigerian Constitution' (2015) 28(3) *Nigerian Bar Association Journal* 120, 127–129; S S Ojo, 'Judicial Delays in Constitutional Alteration: Causes and Remedies' (2015) 28(3) *Nigerian Bar Association Journal* 120, 133–135.

⁶ F Adeyemi, 'The Politics of Constitutional Reform: The Third-Term Agenda in Retrospect' (2007) 15(2) *Journal of Nigerian Studies* 78, 88–92.

apply.⁷ This uncertainty has led to legislative delay and uncertainty in the course of each of the successive amendments of section 9 from 1999 to 2018, and how the question of whether to give assent became the focus of the Fourth Alteration (No. 4) Act 2017, which amended section 9, but itself proved constitutionally questionable and thus unresolved, creating the paradox of an amendment to the amendment procedure whose validity remained contested.⁸

Other external reference points are given by the comparative literature. Comparative perspectives are useful, but they can only be used in a context-sensitive manner that is not always demonstrated in the existing comparative literature, which is particularly valuable in this light because of the sensitivity to Nigeria's unique political and historical context. R. Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions* introduces the concept of 'amendment cultures' and notes that without a proper balance between formal amendment and informal change, the latter is likely to balloon out of control and to result in a compensatory expansion of constitutional change, with attendant risks to democratic accountability.⁹ D. C. Omorogbe's comparative analysis draws particular attention to the calibrated, graduated threshold system in sections 74 and 75 of the South African Constitution, under which different categories of constitutional provisions attract different amendment majorities, contrasting sharply with Nigeria's undifferentiated supermajority that applies equal rigidity to provisions of vastly unequal constitutional significance.¹⁰ These comparative perspectives are valuable, though their utility is

⁷ S Umezuruike, 'Presidential Assent and Constitutional Amendment in Nigeria' (2016) 4 *Nigerian Constitutional Law Review* 45, 52–55.

⁸ Policy and Legal Advocacy Centre (PLAC), *Report on the Constitutional Amendment Process* (PLAC 2018) 34–36.

⁹ R Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 52–62.

¹⁰ D C Omorogbe, 'Constitutional Amendment in Comparative Perspective: Lessons for Nigeria' (2017) 1 *Journal of Public Law* 56, 68–72.

conditioned on sensitivity to Nigeria's specific political and historical context, a qualification the existing comparative literature does not always observe.

The most notable recent development in this regard is the Supreme Court ruling in *Attorney General of the Federation v Attorney General of Abia State and 35 Ors*¹¹ which essentially gives the 774 Local Government Areas an independent third tier of government, by interpreting section 162(6) as non-binding on the State, and mandating that funds for local governments be paid to their accounts directly from the Federation Account. It has been described by critics as a “de facto” judicial amendment of the 1999 Constitution without compliance with the formal requirements of section 9, exemplifying precisely the dynamic that Albert identifies in the comparative literature that where the formal amendment process fails consistently, constitutional adaptation migrates to less accountable and less participatory channels.¹²

The literatures are collectively complete but incomplete in this description of the material. Works in the legal and political traditions tend to analyse their respective dimensions in isolation from one another rather than within an integrated framework. The downstream consequences of failed amendments for national cohesion, ethno-regional grievance, and democratic legitimacy have been observed but not systematically evaluated. And the comparative literature, though informative, has not produced a reform framework genuinely calibrated to Nigerian institutional realities. It is to these gaps that the present study is directed.

¹¹ LPELR-62576(SC)

¹² Albert (n 9) 60–62.

CHAPTER TWO

CONCEPTUAL CLARIFICATIONS AND THEORETICAL FRAMEWORK

2.1. Meaning of ‘Constitution’ and ‘Constitutionalism’

The concept of a constitution is best understood not by choosing between competing scholarly definitions but by identifying what those definitions collectively reveal about the relationship between law and political power. The leading authorities in comparative and Nigerian constitutional scholarship converge on a common core: a constitution organises the institutions of government, allocates authority among them, and establishes the conditions on which power may be legitimately exercised. In the Nigerian legal order, these functions are performed by a supreme instrument that stands at the apex of the hierarchy of norms, rendering void any statute or executive act inconsistent with its provisions.¹³

Constitutionalism is conceptually distinct from the mere presence of a constitutional text. A state may possess a written constitution without practising constitutionalism; what the doctrine requires, as the historical trajectory of constitutional thought from ancient Greece through the medieval doctrine of fundamental law to modern liberal theory makes clear, is a genuine commitment to governing within defined legal limits. The commitment is normative, not merely formal: it

¹³K C Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 1.

demands that power be exercised in ways that are bounded, accountable, and answerable to law rather than to the will of those who hold office at any given moment.¹⁴

The critical insight from the tradition of constitutional theory is that formal constitutionality and substantive constitutionalism are not the same thing. A document that organises the organs of government without subjecting them to enforceable restraints is a constitution in name only; it does not realise constitutionalism in the sense that matters. This distinction is directly relevant to the Nigerian experience, where a succession of constitutional instruments — colonial, republican, and military-promulgated — has not been consistently matched by governmental practices that honour the ideal of limited power.¹⁵

The standard against which any constitutional regime must ultimately be judged is whether it realises the rule of law in substance. Three dimensions of that standard are directly relevant to this study: the supremacy of law over arbitrary governmental power; the equal subjection of all persons and institutions, including the executive, to the ordinary law as administered by independent courts; and the practical enforceability of constitutional guarantees through judicial mechanisms that citizens can actually access. It is the gap between these demands and their fulfilment that gives the study of constitutional amendment its urgency in the Nigerian context, since a formal amendment process incapable of delivering structural reform is itself a symptom of a constitutional order that has not yet fully realised the rule of law it proclaims.¹⁶

¹⁴C H McIlwain, *Constitutionalism: Ancient and Modern* (revised edn, Cornell University Press 1947) 21.

¹⁵F Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Berg Publishers 1986) 33.

¹⁶B O Nwabueze, *Constitutionalism in the Emergent States* (C. Hurst and Company 1973) 1. See also A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 39-40.

The CFRN 1999 (as amended) formally embeds all of these commitments: the separation of powers, an independent judiciary, justiciable fundamental rights, and democratic accountability. The question this study addresses is whether the constitutional amendment mechanism — the formal procedure by which those commitments may be updated and improved — is itself adequate to deliver the constitutional renewal that the Nigerian federal order requires.¹⁷

2.1.1. Types of Constitution

There are various ways of classifying constitutions. K.C. Wheare's influential typology distinguishes between written and unwritten constitutions. A written, or codified, constitution consolidates the fundamental rules of government in a single supreme instrument; any legislation that conflicts with its provisions is, to the extent of that conflict, of no legal effect. Nigeria operates under a written constitution in this sense.¹⁸

An unwritten constitution's norms are sourced from a variety of sources, such as statutes, judgments, and constitutional conventions. The United Kingdom is the prime example. James Bryce's distinction between rigid and flexible constitutions is also important. A rigid constitution has a more stringent process of amendment than that required for ordinary law. A flexible constitution can be amended by the ordinary law-making process. Bryce linked rigid constitutions to federal constitutions, where the entrenchment of constitutional arrangements also entrenches

¹⁷T O Elias, *Nigeria: The Development of Its Laws and Constitution* (Stevens and Sons 1967) 75.

¹⁸Wheare (n 1) 4-5. See also O Hood Phillips, *Constitutional and Administrative Law* (7th edn, Sweet and Maxwell 1987) 4.

the allocation of powers between the central government and the constituent parts of the federation.¹⁹

The Constitution of the Federal Republic of Nigeria (1999) is undoubtedly a rigid constitution. It provides for a procedure of amendment that requires two-thirds of all members of both houses of the National Assembly and at least two-thirds of the State Houses of Assembly in section 9. The supremacy of the Constitution, enshrined in section 1(1), has been upheld by the Supreme Court in a line of cases. Another important classification is federal/ unitary constitutions. Nigeria has adopted a federal constitution, which allocates legislative power between the National Assembly and the State Houses of Assembly in the Exclusive and Concurrent Legislative Lists in the Second Schedule to the Constitution.²⁰

2.1.2. History of Constitutional Development in Nigeria

Nigeria's constitutional history is a history of changing political forms and the emergence of an indigenous constitutional order out of the ashes of colonialism. This history is essential to the understanding of the current constitutional amendment process, as many of the problems that are faced today are the outcome of the institutional decisions that have been made over the last century of constitutional development.²¹

Modern Nigeria's constitutional history is said to have begun with the amalgamation of the Northern and Southern Protectorates in 1914 by Governor-General Lord Frederick Lugard. In

¹⁹J Bryce, *Studies in History and Jurisprudence* (Clarendon Press 1901) 145.

²⁰CFRN 1999 (as amended), s 9(2). See also B O Nwabueze, *A Constitutional History of Nigeria* (Longman 1982) 3.

²¹Elias (n 7) 78. The Clifford Constitution of 1922 was the first to introduce elected membership into the Nigerian legislature, creating four elected seats for Lagos and Calabar in the Legislative Council.

1922, the Clifford Constitution marked the introduction of the elective principle, with a Legislative Council containing four elected seats (for Lagos and Calabar) with a very narrow franchise. The *Richards Constitution* of 1946 introduced the first Nigeria-wide Legislative Council and regional councils, but was denounced by Nigerian nationalists for its lack of representativeness.

The *Macpherson Constitution* of 1951, the result of a more consultative process, introduced elected majorities in the central and regional legislatures and a Council of Ministers at both levels of government. Nwabueze calls it the first federal constitution in Nigeria. The deficiencies of the Constitution were revealed by the crisis of 1953, and it was replaced by the *Lyttleton Constitution* of 1954, which created a definitively federal system, vested residual legislative power in the regions, and gave each region its own constitution. The Independence Constitution of 1960 vested full sovereignty in Nigeria and contained a justiciable Bill of Rights. It was succeeded by the Republican Constitution of 1963 that did away with the office of the Governor-General and substituted an elected President.²²

2.1.3. Constitution Making and Amendment under the Military Regime

The place of military government in constitutional development in Nigeria is one of the most unique and constitutionally challenging aspects of Nigeria's political and legal history. Each military coup was followed by the suspension of the constitution, the dissolution of the elected legislature, and the assumption of legislative and executive power by the military ruling elite. The source of constitutional authority for military rule was the very constitution it suspended, as the

²²Nwabueze (n 13) 55-58. The Macpherson Constitution is widely regarded as the first genuinely federal constitution in Nigerian history, in that it introduced elected majorities in the central and regional legislatures and created Councils of Ministers at both levels.

decrees of the military through which it organised its rule were constitutionally invalid under the suspended constitution.²³

The most instructive judicial case on military government in Nigeria was the landmark case of *Lakanmi v Attorney General (West)*²⁴ In which the Supreme Court ruled that a military decree retrospectively sanctioning the forfeiture of property was unconstitutional and invalid. The military government immediately responded by passing Decree No 28 of 1970, which overrode the Supreme Court's ruling and proclaimed the inviolability of military decrees in relation to the courts. This incident highlighted the irreconcilable nature of military government and constitutionalism.

Despite being anti-constitutional, the military in Nigeria embarked on elaborate processes of constitutional drafting as a means of legitimating its eventual retreat from power. The 1979 Constitution was drafted by the *Constitution Drafting Committee (1975-1976)* and the *Constituent Assembly (1977-1978)* and promulgated by Decree No 25 of 1978. The 1999 Constitution was also the work of the Constitution Debate Co-ordinating Committee and was promulgated by Decree No 24 of 1999 with very little popular input. As discussed in the literature reviewed in Chapter One, this method of constitutional promulgation is the main reason for the legitimacy gap that has plagued constitutionalism in the Fourth Republic.²⁵

²³B O Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law Publishing 1992) 3.

²⁴[1971] 1 UILR 201

²⁵Constitution Drafting Committee (Establishment) Decree No 10 of 1975; Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 25 of 1978. See Nwabueze (n 21) 45.

The military also amended the constitutional arrangements via decrees, most notably through the creation of states. From Decree No 14 of 1967, which created 12 states from the then four regions, to the end of the military era in 1999, when the number had reached 36, state creation was used as a means of political control. The legacies of this period - the concentration of power at the centre, the weakness of the legislative arm of government vis-à-vis the executive, and the over-presence of the executive in the governance system - continue to inform the political environment in which the modern amendment takes place.²⁶

2.2. Theories of Constitutional Amendment

Every constitutional order incorporates a set of ideas about why constitutions should be amendable, who has the power to authorise constitutional change, what substantive constraints are placed on the power of constitutional amendment, and what procedural requirements must be met. There are a number of theories in constitutional theory that have sought to answer these questions, and an identification of the major theories is critical both to situate the Nigerian amendment framework against other constitutional theories and to assess the issues considered in the subsequent chapters.²⁷

A conservative tradition, inspired by Edmund Burke and Friedrich Hayek, views constitutions as the crystallisation of collective experience and wisdom. In this tradition, the purpose of a constitution is to conserve the wisdom of experience, rather than to be an instrument of social

²⁶States (Creation and Transitional Provisions) Decree No 14 of 1967; States (Creation and Transitional Provisions) Decree No 27 of 1991. By 1996, the number of states had grown to 36 through successive military decrees.

²⁷R Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 3-5.

change. The conservative taste for rigidity in the process of constitutional amendment is explicable on this account: as Wheare noted, the requirement of special amendment procedures is based on the importance of the constitution and the desirability of making it permanent and enduring. On this view, the rigidity of section 9 of the CFRN 1999 (as amended) is constitutionally justified and may be demonstrated to have been successful in the failure of opportunistic amendment proposals like the attempt by former President Obasanjo to seek a third term.²⁸

The liberal-contractarian view of constitutions, most famously articulated by John Rawls, treats constitutions as social contracts among rational persons who share a common view of constitutional principles. On this view, constitutional amendments themselves must be justifiable to the public at large and must be able to win acceptance across society. This justifies a normative basis for supermajority rules, as a change passed by a bare majority is less likely to be a true change to the social contract. The Kelsenian school of positivism provides a related but somewhat different approach: for Hans Kelsen, the validity of an amendment is determined purely by the prescribed procedure, not by (extra-legal) political legitimacy.²⁹

The theory of constituent power, often associated with the Abbe Emmanuel-Joseph Sieyès, distinguishes between the unlimited power of the people to constitute or reconstitute the political order, the constituent power, and the limited powers of the organs of the political order, the constituted powers. Under this theory, the amendment power of the legislature is a constituted power, which is derived from and constrained by the original constituent act of the people. It cannot

²⁸E Burke, *Reflections on the Revolution in France* (J Dodsley 1790) 29-31; F A Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) 180.

²⁹J Rawls, *A Theory of Justice* (Harvard University Press 1971) 227-229; J Rawls, *Political Liberalism* (Columbia University Press 1993) 231-240.

be exercised to abolish the constitutional order. The theory is relevant in the Nigerian context because the 1999 Constitution was not adopted by an act of the people as constituent power, but by decree of the military, which results in a democratic deficit at the very foundation of the constitutional order.³⁰

Theorists of deliberative democracy, especially Jurgen Habermas and, in the constitutional context, Bruce Ackerman, argue the legitimacy of constitutional decisions depends not just on the formal adherence to procedural requirements but on the substance of the deliberative process. Bruce Ackerman's theory of constitutional moments highlights the difference between normal politics (involving the rule of ordinary majorities) and constitutional politics (involving a mobilised citizenry in higher law-making of greater democratic legitimacy). When applied to Nigeria, this theory highlights the elite and participation-poor nature of the amendment process and the lack of a constitutional referendum.³¹

Theories of function and adaptation focus on the amendment question from a performance point of view. Richard Albert's comparative research shows that constitutional orders develop different cultures of constitutional amendment: some constitutional orders normalise formal constitutional amendment, and in doing so, sustain constitutional relevance; others develop a culture of constitutional veneration that makes formal constitutional amendment politically unpalatable, and drive constitutional adaptation through judicial interpretation. The Nigerian constitutional order is of the latter ilk, as the formality of the constitutional amendment procedure shifts the site of

³⁰E Sieyes, *What is the Third Estate?* (M Blondel trans, Pall Mall Press 1963) 124-128. See also C Schmitt, *Constitutional Theory* (J Seitzer trans, Duke University Press 2008) 75-80.

³¹J Habermas, *Between Facts and Norms* (W Rehg trans, MIT Press 1996) 263-268; B Ackerman, *We the People: Foundations* (Harvard University Press 1991) 6-10.

constitutional adaptation to the judiciary, as in the Supreme Court's Attorney General of the *Attorney General of the Federation v Attorney General of Abia State and 35 Ors* LPELR-62576(SC).³²

Finally, the doctrine of unconstitutional constitutional amendments, fully developed by Yaniv Roznai, suggests that constitutional amendments that are passed in accordance with the formal amendment procedure may nevertheless be invalid if they breach express or implied unamendable features of the constitutional system. The Indian basic structure doctrine, enunciated in *Kesavananda Bharati v State of Kerala*³³, is the most significant judicial manifestation of this doctrine. Whether the Nigerian courts would recognise a similar doctrine - especially given the special threshold set out in section 9(3) of the CFRN 1999 (as amended) for constitutional amendments that affect fundamental rights - presents an important question in Nigerian constitutional law. The above theories collectively serve as the normative language in which the problems highlighted in the next chapter shall be considered.³⁴

³²Albert (n 28) 45-52. Albert identifies amendment cultures as settled patterns of constitutional practice, noting that some systems normalise frequent amendment whilst others develop a culture of constitutional veneration that renders formal amendment politically difficult.

³³AIR 1973 SC 1461

³⁴Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 1-5.

CHAPTER THREE

CHALLENGES OF CONSTITUTIONAL AMENDMENT IN NIGERIA

3.1. Political and Socio-Economic Impediments

The most persistent and pervasive obstacles to successful constitutional amendment in Nigeria are political rather than purely procedural in character. The supermajority requirements provided under Section 9 of the 1999 Constitution - two-thirds of the National Assembly in each chamber, and a subsequent two-thirds of the State Houses of Assembly - would be demanding in any political environment, but would be virtually impossible in a federation of such acute ethnic diversity, of entrenched regional interest, and of the instrumentalisation of political parties as the instruments of factional ambition rather than efficient and systemic governance.³⁵

The socio-economic aspect of this hindrance is also important. In a federation where allocation of federally generated revenues itself is a constitutional lightning rod, any constitutional amendment proposals are always filtered by political participants not on the basis of how well they would improve governance but by how they would affect the relative economic and political status of the different component units. This calculus of distributional benefit has again and again skewed the amendment process, giving the result of an imposition of orthogonal interests that is contrary to the demands of rational constitutional design.³⁶

³⁵Section 9(2) and (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) require a two-thirds majority of all members of both chambers of the National Assembly, and thereafter the approval of resolutions by at least two-thirds of the Houses of Assembly of the States.

³⁶Rotimi T. Suberu, *Federalism and Ethnic Conflict in Nigeria* (United States Institute of Peace Press, 2001) 112-114. See also A.T. Akinwale, 'Federalism and Restructuring in Nigeria: A Legal Perspective' (Lagos University Press, 2020) 67.

3.1.1. Inter-Party Rivalry and Its Impact on Key Amendments

Inter-party competition has played an ultimate role in the failure of various important amendment proposals in the Fourth Republic. The most educative one is the rejection of the third-term constitutional amendment that was pursued by the administration of President Olusegun Obasanjo in 2006. Although the ruling Peoples Democratic Party commanded an overwhelming majority in the legislature, the amendment lost in the Senate in a cross-party coalition of members of parliament who felt that the proposal to extend tenure was a menace to democratic consolidation and also to themselves. The episode showed that the majority of conditions provide structural incentives to the existence of cross-party blocking alliances that can derail even amendment efforts well-endowed by the executive.³⁷

Subsequent exercises of amendments have also restricted the legislative room to reform the laws by inter-party divisions. The PDP-APC polarisation that has prevailed in federal legislative politics since 2015 has added another layer of partisan calculus to the amendment process, where opposition lawmakers have engaged the amendment process as a political arena instead of a serious constitutional debate. What the PLAC has reported is that over the years of exercise of the amendments, we have had a disproportionate number of successful amendments in relation to the number and significance of the bills that have undergone the exercise.³⁸

³⁷F. Adeyemi, 'The Politics of Constitutional Reform: The Third-Term Agenda in Retrospect' (2007) 15(2) *Journal of Nigerian Studies* 78, 88-92. The Senate's rejection of the tenure elongation proposal on 16 May 2006 by 61 votes against the required two-thirds majority is widely regarded as the legislature's most consequential assertion of independence in the Fourth Republic.

³⁸Policy and Legal Advocacy Centre (PLAC), *Report on the Constitutional Amendment Process* (PLAC, 2018) 22-25. The Report documents that between 1999 and 2018, four separate amendment exercises were undertaken by the National Assembly, yielding only a narrow range of successful amendments relative to the volume of bills considered.

3.1.2. Political Will and National Assembly Composition

The success or failure of any process of amending the constitution is based finally on whether the legislature is able to convert political will to constitutional action. In the Nigerian case, the disunited and ethnically colored structure of the National Assembly has always been a challenge to the political goodwill to see through major changes. The association of ethnic and regional loyalty with partisan political calculation, as Aguda notes, makes it an exercise of daunting political challenge to marshal a real supermajority of support to any amendment that involves sensitive distributional issues.³⁹

To make matters worse, there is a high turnover of legislators between successive assemblies. Each general election in Nigeria is characterised by a substantially new National Assembly, and thus the effect of this is that an exercise of amendment has to often be restarted afresh when a new assembly is sworn into office before an old one has been completed. It is this structural disintegration of the political will through legislative tenures that has been a constant source of stalling of amendment bills that have made significant legislative strides.⁴⁰

3.1.3. The Role of Political Parties in the Amendment Process

The key mechanisms by which legislative agendas are determined and legislative majorities formed in a Westminster-based system of legislature are political parties. In Nigeria, however, the leading political parties have never been able to come up with and define consistent constitutional reform programmes that could offer a principled foundation to amendment efforts. A lack of

³⁹T.A. Aguda, *The Challenge of the Nigerian Constitution* (Malthouse Press, 2000) 54-56. Aguda observed that in a plural federation such as Nigeria, the alignment of ethnic and regional calculations with partisan political interest renders the attainment of constitutionally prescribed supermajorities a formidable political task.

⁴⁰See S.S. Ojo, 'Legislative Impasse: The Challenge of Amending the Nigerian Constitution' (2015) 28(3) *Nigerian Bar Association Journal* 120, 127-129. Ojo identifies party-line voting as the single most reliable predictor of the fate of amendment bills in the National Assembly.

programmatic party platforms on constitutional matters implies that individual legislators must navigate the amendments process, guided by individual, ethnic, and regional interests, with no disciplinary effect of a party whip on a coherent reform agenda.

The cross-party floor-crossing phenomenon, which is in itself indicative of weak ideological nature of the Nigerian political parties, further undermines the legislative coalitions that would be required to enable amendment success. A party that has a nominal majority when a given amendment exercise starts may discover that this majority is lost through defections and absences by the time a vote is made on a critical issue. The PLAC report has recorded a number of cases where the amendment bills, which had passed second reading by comfortable majorities, did not pass on final vote because of the collapse of caucus discipline.⁴¹

3.1.4. President's Veto Power

There is a constitutional ambiguity in the relationship between the executive and the amendment process in Nigeria that has existed over time. The National Assembly has always insisted that a constitutional amendment bill, which has passed all the conditions required in Section 9, does not need presidential approval to come into effect. This position has on multiple occasions been challenged by the executive branch, which has left a grey area in the law, allowing successive presidents an informal tool through which to affect - and in a sense to block - the amendment process without the political cost of an actual veto.⁴²

⁴¹See generally B.O. Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law Publishing, 1992) 88-94; PLAC (n 4) 28-30.

⁴²The question of whether a constitutional amendment bill requires presidential assent has been the subject of sustained scholarly and legislative controversy. The National Assembly has consistently maintained that such a bill, having satisfied all requirements of Section 9, does not require executive assent. The contrary view is argued in S.

The Fourth Alteration (No. 4) Act 2017 was an attempt to address this ambiguity by amending Section 9 itself, to expressly state that the assent of the president is not necessary to the coming into force of a constitutional amendment. The solution of this particular ambiguity has not, however, removed the more general issue of the executive influence on the amendment procedure. Party machine control by the executive, the power of the presidency over candidates of the governorship, and even the power of the executive to use financial and political favours as a tool of legislative control all represent types of executive power over the amendment process that exist outside and below the formal constitutional process.⁴³

3.2. Influence of State Governors and Party Politics

The fact that the amendments to the Constitution have to be ratified by two-thirds of the State Houses of Assembly adds an important sub-national level to the amendment process, which is often overlooked in the discussion of the role of the National Assembly.

A decisive veto point can be the State Governors, who hold a pervasive veto in the process of composition and legislative behaviour of their state houses of assembly through the control of candidate selection, party financing, and executive patronage. Their voting in favour or against a particular amendment proposal is often the result of the calculation of the political interest of the state level rather than the evaluation of the constitutional merits of the proposal.⁴⁴

Umezuruike, 'Presidential Assent and Constitutional Amendment in Nigeria' (2016) 4 *Nigerian Constitutional Law Review* 45, 52-55. See also PLAC (n 4) 34.

⁴³The Fourth Alteration (No. 4) Act 2017, which amended Section 9 of the 1999 Constitution to remove the requirement of presidential assent from the amendment process, was itself challenged on the ground that the National Assembly's interpretation of its own amending power was constitutionally questionable: see generally PLAC (n 4) 35-36.

⁴⁴Suberu (n 2) 118-121. The dynamics of state-level legislative behaviour in relation to federal constitutional amendment proposals are shaped by the dual allegiance of state legislators to national party structures and to the particular interests of their constituent states.

The resulting dynamics are complicated and cannot be easily generalised. Governors of states which see a proposed amendment as either advantageous to their own resources or to their own political independence will usually exercise their influence to have it ratified; governors who think a proposed amendment will impinge upon their own powers or on the economic position of their own states will exercise their influence to prevent its ratification. A paradigmatic example of this dynamic can be found in the failure of the financial autonomy amendment (which would have put State Houses of Assembly and Local Government Councils in direct access to the Consolidated Revenue Fund) to receive the necessary state ratification: the amendment was vigorously opposed by the governors who realised that its adoption would have substantially diminished their ability to control other tiers of government.⁴⁵

The fight to get the two-thirds supermajority that is needed in both federal and state levels to get constitutional amendments has revealed the weakness that party dominance heavily contributes to as a predictor of the results in legislative action. Having a majority of state houses of assembly however plus a commanding majority of National Assembly members does not mean that a party has a dependable supermajority in all levels of the legislature at once. The uncertainty of the legislative attendance, the ethnic and regional loyalties, which cross party lines, and the bargaining power of individual political entrepreneurs whose backing must be negotiated separately, all add to the uncertainty in the super majority calculus.⁴⁶

⁴⁵PLAC (n 4) 30-32. The failure of the financial autonomy bill for State Houses of Assembly and Local Government Councils — which had passed both chambers of the National Assembly — to obtain the required state-level ratification in the Fourth Alteration exercise is a paradigmatic example of state gubernatorial resistance to reform.

⁴⁶Akinwale (n 2) 72-74. The APC-led legislative coalition's failure to deliver the required two-thirds majority in multiple state houses of assembly during the Eighth National Assembly illustrates the disjunction between federal-level party dominance and the realities of state legislative politics.

The case of legislative supremacy of the All Progressives Congress (APC) in the Eighth National Assembly (2015-2019) can be instructive in this context. The party was unable to ratify some of the amendment proposals in the Fourth Alteration exercise with the two-thirds majority it needed, despite its majority in both houses of the National Assembly and majority in most state governorships. It showed that formal party control at the federal level does not imperfectly and reliably translate into the type of disciplined state-level legislative assistance that the amendment process demands.

3.3. Procedural and Bureaucratic Challenges

In addition to the political obstacles to constitutional amendment is a combination of procedural and bureaucratic problems which, by themselves, limit the success of the amendment process. These difficulties are institutional in nature, based on the formal construction of the amendment process and the institutional ability of the legislative and administrative bodies which are supposed to administer the amendment.⁴⁷

3.3.1. The Rigidity of the Amendment Procedure and the Difficulty of Securing Majorities

By its very design, the amendment procedure as stipulated by Section 9 of the 1999 Constitution is one of the most cumbersome in comparative constitutional law. The two-thirds majority of all members (not just of members present and voting) of both chambers of the National Assembly implies that absences and abstentions are to the detriment of the amendment. This aspect of the process increases the practical bar to success considerably, since it not only demands that the

⁴⁷J. Bryce, *Studies in History and Jurisprudence* (Clarendon Press, 1901) 148. For the Nigerian dimension, see B.O. Nwabueze, *A Constitutional History of Nigeria* (Longman, 1982) 3-4.

proponent(s) of an amendment overcome the opposition but also rally a high percentage of the entire legislative membership actively in favour of the bill.⁴⁸

On the most sensitive types of amendment - those which involve the core rights, or the amendment procedure itself - the four-fifths requirement of Section 9(3) raises the bar still higher, to a level which in the context of the politics of Nigerian legislative life is practically veto-like. What this structural inflexibility has led to is that the formal amendment process has been shown not to provide the overdue constitutional workaround that the fast-changing political, economic and social environment of the Fourth Republic has consistently required.

3.3.2. Inadequate Public Participation and the Elite-Driven Nature of the Process

The amendment procedure in Nigeria is constitutionally significant in that it is essentially an elite process. The official process of public consultation, consisting mainly of the public hearing organised by the appropriate committee of the National Assembly, has been in practice a mere exercise of consultation with limited substance. Civil society groups, legal academics, and non-governmental organisations have constantly attacked the process of a public hearing as not offering even a pretence of deliberative space in the translation of popular constitutional preferences into amendment results, the substantive content of bills generally decided in advance by the legislative leadership and executive stakeholders.⁴⁹

This is especially true of the absence of a constitutional referendum mechanism. The 1999 Constitution places the power of amendment in the legislature, as opposed to the popular power

⁴⁸Section 9(3) of the 1999 Constitution (as amended) prescribes a four-fifths majority in both chambers of the National Assembly — in addition to state ratification — for amendments touching on fundamental rights or the amendment procedure itself. This provision creates a near-insurmountable threshold for the most sensitive constitutional changes.

⁴⁹PLAC (n 4) 40-43. Public hearings have been held in the course of successive amendment exercises, but scholars and civil society organisations have consistently criticised them as performative rather than genuinely deliberative, with the substantive content of amendment proposals determined well in advance by the legislative leadership.

of constitutional amendment, which is found in the South African constitutional orders and most other federal democracies. The consequence is that it creates an amendment process of which the people, whose name the Constitution claims to represent, are structurally excluded, a weakness that adds to the lack of legitimacy noted in the previous chapters and helps to create popular alienation with the constitutional reform process.⁵⁰

3.4. Major Areas of Constitutional Contention

The shortcomings of the Nigerian constitutional amendment process have been focused on several substantive areas that recur in continuous amendment undertakings. These constitutional areas of contention mirror the most intensive strains of the Nigerian federal system, and their ongoing inability to be resolved via the amendment process has compounded effects on governance, national unity and institutional legitimacy.⁵¹

3.4.1. Issues of True Federalism: Resource Control and State Police

The most enduring note of constitutional reform agitation in the Fourth Republic has been the demand that a more truly federal distribution of powers and revenues should be made. The states of the Niger Delta, which produce oil, have continually lobbied to be allowed an increased derivation formula under Section 162(2) of the 1999 Constitution, and a general set of sub-national interests has agitated to have the competence of legislation devolved on a list of topics now limited to the Exclusive Legislative List. These suggestions have been blocked many times in the National

⁵⁰R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) 52-54; J. Habermas, *Between Facts and Norms* (MIT Press, 1996) 265-267. The absence of a constitutional referendum mechanism in Nigeria contrasts sharply with the position in South Africa, where a range of amendment procedures is calibrated to the significance of the provisions being altered: see sections 74 and 75 of the Constitution of the Republic of South Africa 1996.

⁵¹Section 162(2) of the 1999 Constitution governs the sharing of Federation Account revenues. The demands of oil-producing states in the Niger Delta for a greater share of derivation revenues — historically set at 13 per cent — have been a recurrent and unresolved theme of constitutional politics in the Fourth Republic: see Suberu (n 2) 135-141.

Assembly due to the opposition of states and regions, which have an interest in the status quo of distribution and which are afraid of being disadvantaged by a change.

The idea to set up constitutionally sanctioned state police forces has also been unyielding. Its advocates state that the administrative centralisation of a police force in a federation with an extensive geographical area and with social diversity is a structural obstacle to sound security governance. Opponents - mainly northern states - have expressed the fear of the possibility of governors using state police to suppress political critics. The numerous amendment bills that have failed to pass through this regional divide reflect how the amendment process is always beaten by the impossibility of producing the cross-regional consensus that the supermajority provision demands.⁵²

3.4.2. Local Government Autonomy: A Case Study in Failed Amendments

The issue of local government autonomy is perhaps the most educative case study in terms of the pathology of the Nigerian constitutional amendment process. Although Section 7(1) of the 1999 Constitution guaranteed democratically elected local government councils, the tendency of state governments to dissolve elected councils and replace them with caretaker committees appointed by the executive was rampant during the first 20 years of the Fourth Republic. Legislative proposals to strengthen local government autonomy by constitutional amendment, such as the proposal to ensure that direct access to federal allocations, and the proposal to outlaw the appointment of caretaker committees, were regularly voted down at the state ratification stage,

⁵²The proposal to establish state police forces has repeatedly stalled in the National Assembly, owing principally to the resistance of northern states whose governors feared the use of state police as an instrument of political oppression by state executives: see Akinwale (n 2) 80-83. The Eighteenth Amendment Bill, which would have constitutionally authorised state police, failed to obtain the required state ratification in 2022.

with governors unanimously opposing amendments that would limit their dominance of the third tier of government.⁵³

It is not by way of the constitutional amendment process that the local government autonomy crisis was finally resolved, but by the courts. According to the case of *Attorney General of the Federation v. Attorney General of Abia State & 35 Ors*⁵⁴ The Supreme Court, ruling six to one, directed that Federation Account allocations be paid directly to LGA accounts and declared that the administration of local governments by executive-appointed caretaker committees was constitutionally impermissible. Significant as this outcome is in practical terms, the fact that a structural reconfiguration of local government finance was achieved through judicial interpretation rather than through the constitutional amendment process raises serious questions about the democratic accountability of constitutional change in Nigeria.

3.4.3. Independence of the Judiciary and Electoral Reforms

Judicial independence has been a consistent amendment hot-button issue. The 1999 Constitution under Section 81(3) contains the provision of direct payment of judiciary appropriations under the Consolidated Revenue Fund, but the executive governments of the day have interpreted this as optional instead of mandatory. Proposals to amend the constitution to entrench the financial independence of the federal and state judiciaries have been included in a series of change

⁵³Section 7(1) of the 1999 Constitution guarantees the system of local government by democratically elected local government councils; yet the practice of state governments dissolving elected councils in favour of caretaker committees was endemic prior to the Supreme Court's intervention in the *AG Federation v. AG Abia State* case (n 19). Earlier legislative attempts to cure this problem through constitutional amendment had failed to attract the required state-level support: see PLAC (n 4) 38.

⁵⁴ LPELR-62576(SC)

processes, but have never surfaced out of the legislative process with the backup it would need to be enacted.⁵⁵

The statutory innovation has somewhat made up for the failure of the constitutional amendment process in the area of electoral reform. The Electoral Act (Amendment) Act 2022 brought substantial reforms into the legal framework of elections, such as the use of technological accreditation solutions and the delivery of election outcomes. Nevertheless, the more radical electoral changes that would involve constitutional amendment, such as the introduction of independent candidacy and constitutionalisation of electronic results transmission, have not been realised, and the electoral system is still reliant on statutory provisions which are much more subject to political reversal than guaranteed through a constitutional clause would be.⁵⁶

3.4.4. Impact of Failed Amendments on National Unity and Cohesion

The historical inability of the constitutional amendment process to result in redressing structural grievances of the constituent communities in Nigeria has cost the nation heavily in terms of unity and political cohesion. The perceived injustice of the constitutional system of distribution of powers and revenues directly correlates with the strength of ethno-regional grievances, as the analysis provided by Suberu shows. In cases where constitutional reform is seen to be inaccessible or held hostage by sectional interests, there is a growing tendency by political actors and social

⁵⁵Section 81(3) of the 1999 Constitution provides that the amount standing to the credit of the judiciary in the Consolidated Revenue Fund shall be paid directly to the National Judicial Council for disbursement. Successive executive governments failed to implement this provision in full, and the constitutional amendment bills directed at reinforcing judicial financial independence were among the casualties of the stalled Fourth Alteration exercise: see Ojo (n 6) 130-131.

⁵⁶See the Electoral Act (Amendment) Act 2022, which modified the statutory framework for elections, including the introduction of the Bimodal Voter Accreditation System (BVAS). The more structurally significant electoral reform proposals — including independent candidacy, diaspora voting, and electronic transmission of results as a constitutional requirement — were not achieved through constitutional amendment but were addressed, partially and controversially, at the statutory level.

movements to seek extra-constitutional avenues of pursuing their interests, such as agitation to restructure, secession threats and in some extreme situations, armed conflict.⁵⁷

The secessionist agitations of Indigenous People of Biafra, the resource control grievances of the Niger Delta groups and the revived Yoruba Nation agitations are all, in one way or another, symptomatic of the ineffectiveness of the formal constitutional amendment process to offer a legitimate and effective mechanism to negotiate the new terms of the Nigerian federal compact. These tensions cannot be relieved by the amendment process, which pushes them further down or into more destructive avenues, and the results of this are grave to the stability of democracy and national unity.⁵⁸

3.5. Cost of Constitutional Amendment: Financial and Time Constraints

Constitutional amendment in Nigeria is not only a politically and procedurally gruelling process, but it is also a terribly expensive one that demands extraordinary amounts of money. The amendment exercises necessitate, with every round, convening of popular hearings in the six geopolitical zones of the federation, sitting of joint committees of both chambers of the National Assembly, and clause-by-clause debates in the plenary session, and coordination of the processes of ratification in each of the thirty-six State Houses of Assembly. The cumulative financial burden of these processes, which has been recorded by the PLAC as amounting to a number of billion

⁵⁷Suberu (n 2) 152-155. The correlation between the perceived unfairness of the constitutional distribution of powers and revenues, on the one hand, and the intensity of ethno-regional grievances, on the other, has been documented across a range of empirical studies of Nigerian federalism.

⁵⁸Akinwale (n 2) 88-91. The IPOB secessionist agitation in the South-East, the Yoruba Nation movement in the South-West, and the various armed groups operating in the Niger Delta have each, in different ways, articulated their grievances in constitutional terms, pointing to the failure of the amendment process to address the structural imbalances of Nigerian federalism.

naira per amendment cycle, is a heavy burden on the resources of the people and, in and of itself, has led to a public questioning of the worth of the amendment process.⁵⁹

The time component of the issue is also important. Practically, a full cycle of amendments - between the introduction of an amendment bill and the final ratification by states - has lasted longer than a single legislative session in certain cases and more than half of the four-year term of a legislative assembly. This time limit implies that the complex and controversial amendment initiatives are often outrun by the electoral calendar, before they can be taken to a vote and that the whole process has to start anew with a new assembly that might have new political priorities and composition. Ojo has termed this time-cost dynamic as a structural phenomenon that systematically cripples reform proposals that involve long-term legislative focus.⁶⁰

The total financial and temporal costs of the amendment procedure have a deterrent effect on the constitutional reform; in effect, it is an added deterrent to constitutional reform. The policymakers and the political players who would otherwise agree with a certain amendment would be faced with the possibility of putting in the heavy political capital and the institutional resources in an exercise the aftermath of which is unpredictable and is not within the current political horizon. The result, as the comparative analysis provided by Albert shows, is a compensatory movement to informal constitutional change mechanisms (foremost judicial interpretation) that do not incur the

⁵⁹PLAC (n 4) 44-46. The Report estimated that the cost of each round of National Assembly public hearings, committee sittings, and state-level ratification processes runs into several billion naira, making the constitutional amendment process one of the most expensive legislative undertakings in the Nigerian federal system.

⁶⁰Ojo (n 6) 133-135. Ojo notes that the time required to complete a single amendment cycle — from the introduction of a bill to the conclusion of state ratification — has in practice extended over multiple legislative sessions, spanning in some cases the better part of a legislative assembly's four-year term.

expenses that the formal amendment process does but cast their own grave doubts on the issue of democratic accountability and constitutional legitimacy.⁶¹

⁶¹See Albert (n 16) 60-62. Albert observes, in his comparative analysis of amendment cultures, that a dysfunctional formal amendment process tends to produce a compensatory expansion of informal constitutional change mechanisms, including judicial interpretation, executive action, and constitutional conventions, with attendant risks to the transparency and democratic accountability of constitutional governance.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF CONSTITUTIONAL AMENDMENT PROCEDURES

The comparative study of constitutional amendment procedures has two purposes in the present work. First, it provides a sense of where the Nigerian procedure stands in the field of constitutional design, allowing for an assessment of whether the problems evident in the Nigerian experience identified in the previous chapter are unique to that country or are shared in the constitutional experience of other countries. Second, it provides normative lessons - lessons from the comparative design and practice of constitutional orders other than Nigeria's - that can be taken into consideration in formulating specific recommendations for the reform of the Nigerian constitutional amendment procedure. This chapter thus surveys the experience of the United States of America and the Republic of South Africa as comparative points of reference before highlighting the lessons that can be derived from their experiences for the Nigerian constitutional order.

4.1. Constitutional Amendment Procedure in Nigeria

Section 9 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN 1999 (as amended)) puts the power of constitutional amendment in the exclusive hands of the National Assembly, subject to the onerous requirements contained therein. The procedure is characterised by a "supermajority" approach to constitutional amendment - involving two stages at both the

federal and sub-national level - that makes the Nigerian procedure one of the most stringent in comparative constitutional law.⁶²

At the federal level, the votes of not less than two-thirds of all the members of the Senate and the House of Representatives are required for the passage of an amendment bill. The constitutional term "all the members" is highly significant: the supermajority is calculated based on the total membership of each House and not on those physically present and voting, meaning that absentees and abstentions work against amendment proponents. Once an amendment bill has satisfied this high federal threshold, it must proceed to the next stage, where it is required to be passed by resolutions of the Houses of Assembly of not less than two-thirds of all the States of the Federation. This ratification requirement by the States introduces a federalising element into the amendment process, requiring amendment proponents to assemble support not just in the National Assembly, but also in a sizeable majority of the thirty-six State Houses of Assembly.⁶³

For the most constitutionally sensitive types of amendment - those relating to provisions for the fundamental objectives of state policy and the fundamental rights enshrined in Chapter IV, and to the procedure for this very amendment - section 9(3) imposes an even more stringent threshold of four-fifths of all members of both houses of the National Assembly, as well as the two-thirds state ratification requirement. This tiered approach formalises the notion that some constitutional provisions should be afforded a greater measure of protection against the potentiality of majoritarian amendment than others. But, as this chapter will show, the differentiation provided

⁶²Section 9 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN 1999 (as amended)).

⁶³Section 9(2) CFRN 1999 (as amended). The phrase "all the members" computes the threshold against the full legislative membership and not against members present and voting, so that absences and abstentions count against the amendment proponents. See Policy and Legal Advocacy Centre (PLAC), *Report on the Constitutional Amendment Process* (PLAC 2018) 22.

for in section 9(3) is not as finely graded as would be the case in a fully tiered system, such as those adopted in the comparative jurisdictions, and the four-fifths threshold is in practice so onerous that amendment of the relevant provisions is effectively impossible.⁶⁴

The other distinctive feature of the Nigerian amendment process is the lack of any provision for direct popular input in the amendment process. There is no constitutional referendum provision, and no provision for the involvement of an independent constitutional review body in the initiation or drafting of the amendment proposals. The power of constitutional amendment is solely vested in the existing parliament, with the result that the process is open to capture by partisan political interests, and is formally separated from direct participation by the people. The public hearings that have been conducted as part of previous amendment exercises have served as a degree of consultative engagement with civil society, but the academic and civil society commentary has been scathing of these hearings as being "ceremonial" in nature, with the content of amendment proposals being determined, in practice, by the leadership of the legislature and executive.⁶⁵

The Fourth Alteration (No. 4) Act 2017 cleared up another uncertainty in the amendment process by amending section 9 to make clear that constitutional amendment bills do not require a presidential signature in order to be enacted. The resolution of this particular issue has not, however, removed the legacy of executive control over the amendment process generally, which is exerted informally through control of the party and executive leaderships, gubernatorial influence, and the application of political resources to control both the National Assembly and the

⁶⁴Section 9(3) CFRN 1999 (as amended). The heightened threshold applies where the amendment relates to Chapter I (Fundamental Provisions), Chapter II (Fundamental Objectives), Chapter IV (Fundamental Rights), section 8, Chapter VII, or the amendment procedure itself.

⁶⁵R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 60-62.

State Houses of Assembly. In practice, the amendment process has been undertaken in a series of exercises producing numbered Alteration Acts, the record of which shows a consistent pattern of the number of failed amendment proposals greatly outnumbering the number of successful proposals, and of the most significant structural changes consistently failing to be delivered through the formal amendment process.⁶⁶

Richard Albert has recognised the Nigerian amendment process as one of the most rigid amongst the world's constitutional systems as a result of the cumulative effect of the two-stage supermajority requirement. This rigidity, designed to safeguard the constitutional order against the volatility that was a feature of the military years, has actually given rise to a constitutional order in which formal constitutional amendment has consistently failed to keep pace as an instrument of adaptation, resulting in constitutional change occurring through less democratic processes such as judicial interpretation and executive action. It is against this backdrop that the comparative perspectives of the United States of America and South Africa are relevant.⁶⁷

4.2. Constitutional Amendment in the United States of America

The provision of the Constitution of the United States of America 1787 (US Constitution) dealing with constitutional amendment is found in Article V. The US amendment procedure is significant for Nigeria from a comparative perspective for two main reasons. First, both nations have written, rigid, federal constitutions in the context of a presidential system of government. Second, the framers of the Second Republic Nigerian constitutions borrowed heavily from the American model

⁶⁶PLAC (n 2) 34-36. The Fourth Alteration (No. 4) Act 2017 amended section 9 to resolve the controversy over whether amendment bills require presidential assent, confirming that they do not.

⁶⁷PLAC (n 2) 38-44. Between 1999 and 2023, four discrete rounds of amendment were undertaken, resulting in the First, Second, Third, and Fourth Alteration Acts. The volume of proposals that failed at the supermajority stage in each round substantially exceeded those that succeeded.

in the drafting of the 1979 Constitution and, through it, the CFRN 1999 (as amended). Finally, the American experience offers the longest uninterrupted case study of the operation of a formal constitutional amendment procedure in the modern era, and therefore offers a wealth of experience upon which to draw comparative inferences.⁶⁸

Article V provides for two methods of proposing constitutional amendments, and two methods of ratification, giving rise to four potential combinations. However, in practice, there has been only one combination: proposal by two-thirds of both houses of Congress, and ratification by three-fourths of the states' legislatures (currently 38 of 50 states). Neither of the other two pathways (proposal by a national constitutional convention called upon the application of two-thirds of the state legislatures, and ratification by conventions in three-fourths of the states) has ever been used, and the actual working of the American amendment procedure is therefore much more straightforward than the form of Article V might imply. The three-fourths state ratification rule is structurally similar to the two-thirds state ratification rule in section 9(2) of the CFRN 1999 (as amended), except that it is set slightly higher and is not subject to the same "all members" calculation that increases the practical difficulty of the Nigerian federal stage.⁶⁹

An interesting structural innovation of the American amendment procedure is the express provision in Article V for an unamendable constitutional provision: no state, without its consent, shall be deprived of its equal suffrage in the Senate. This provision, which is itself unamendable without the unanimous consent of the states, is one of the most striking examples in comparative

⁶⁸Article V of the Constitution of the United States of America 1787 (US Constitution). See L H Tribe, *American Constitutional Law* (3rd edn, Foundation Press 2000) vol 1, 22-30.

⁶⁹US Constitution, Art V. See also D E Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution 1776-2015* (University Press of Kansas 2016) 3-7. The national convention pathway, which may be triggered by the application of two-thirds of state legislatures, has never been used in the entire history of the United States.

constitutional law of a provision that is expressly unamendable - a feature that has attracted considerable attention in the work of Tribe, Amar, and others, and that is absent in any express form in the CFRN 1999 (as amended). Whether there are any implicit unamendable provisions of a similar nature in the CFRN 1999 (as amended) is one of the most significant questions of Nigerian constitutional law.⁷⁰

The US's formal amendment record is truly stingy. Of the 27 amendments to the Constitution adopted since its effective date in 1788, 10 have been adopted as the Bill of Rights in 1791; the other 17 have been adopted since then in a span of over 200 years. This is not because of political failure but because the formal amendment procedure is a mode of constitutional development reserved for the most emphatic declarations of popular constitutional will, while the routine proceeding of constitutional development is accomplished by other, more informal channels. The most important of these other means is judicial review. The Supreme Court's assertion of the power of constitutional judicial review in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), initiated a form of constitutional development that has, in fact, been much more important than the formal process of constitutional amendment, allowing for the progressive development of constitutional doctrine across a wide array of topics without the use of Article V.⁷¹

Bruce Ackerman's idea of constitutional moments highlights another facet of this. Ackerman has suggested that the most important moments of American constitutional development - the founding, the reconstruction, and the New Deal - were all informal constitutional moments of

⁷⁰US Constitution, Art V. See also A R Amar, *America's Constitution: A Biography* (Random House 2005) 288-290; Tribe (n 8) 28-30.

⁷¹Kyvig (n 9) 45-52. Albert (n 4) 42-44. Of the 27 amendments ratified since 1788, the first ten (the Bill of Rights) were adopted together in 1791; the remaining 17 have accumulated over more than two centuries at an average of approximately one per decade.

popular mobilisation that resulted in transformative episodes of constitutional change without recourse to the formal Article V amendment process. In this view, the American Constitution is not just the creation of its formal text but of a succession of higher law-making exercises that have changed its substance without changing its words. The comparative implications are clear: the relative rarity of formal change in the United States does not indicate that the constitutional order has not changed, but that it has changed primarily through informal means whose operation depends on preconditions - particularly the existence of a powerful and prestigious judiciary - that may not exist elsewhere.⁷²

The comparative implication for the American experience for Nigeria, therefore, must be qualified. The American capacity for informal constitutional development through judicial interpretation is based on a judiciary that is highly independent, prestigious, and powerful. The Nigerian judiciary, although it has made constitutionally important decisions, is in a political environment in which it is less independent and in which the obstacles to effective enforcement are greater. The simple transplantation of the American model of judicial constitutionalism should not be the goal, nor should it be the primary means of constitutional change in Nigeria; rather, it is necessary to make the formal amendment process less rigid and to make the judiciary more independent, as an adjunct means of constitutional evolution.⁷³

⁷²B Ackerman, *We the People: Transformations* (Harvard University Press 1998) 3-6. Ackerman argues that the New Deal and Civil Rights eras each constituted informal constitutional moments that fundamentally altered the constitutional order without recourse to formal Article V amendment.

⁷³Albert (n 4) 44-46; Kyvig (n 9) 52-55. This institutional and cultural context is critical to the comparative analysis: the success of the American model of constrained formal amendment presupposes a level of judicial independence and institutional authority that must be carefully assessed before the model is recommended as a template for jurisdictions with different political cultures.

4.3. The Republic of South Africa's Amendment Procedure

Perhaps the most relevant foreign example in reforming the Nigerian constitutional amendment procedure is the Republic of South Africa. The South African Constitution of 1996, which was approved by a constituent assembly with an unprecedentedly broad representational mandate, and then certified by the Constitutional Court, exemplifies a graduated procedure for constitutional amendment, framed in accordance with the constitutional importance of the provisions being amended. Its applicability in the Nigerian context is enhanced by the similarities between the two constitutional orders: they are both written constitutions that claim supremacy; they are both part of the African constitutional tradition and must deal with the challenges of plural societies in which constitutional design is inextricably linked to issues of ethnic, regional and linguistic diversity; and they are both, in their own ways, legacies of the constitutional legacies of colonialism and authoritarianism.

The South African Constitution's sections 74 and 75 provide for a three-tiered procedure, in which the threshold that applies depends on the constitutional importance of the provisions to be changed. The first, or highest, tier of the amendment procedure, governed by section 74(1)(a), applies to amendments changing the founding provisions of section 1 (which entrench the republic's commitment to human dignity, equality, the rule of law, and non-racialism) and to amendments changing the Bill of Rights in Chapter 2 or the amendment procedure itself.⁷⁴

Amendments to such provisions demand the support of at least six of the nine provinces in the National Council of Provinces (NCOP) as well as a two-thirds majority in the National Assembly

⁷⁴Constitution of the Republic of South Africa 1996 (South African Constitution), ss 74-75. See H Botha, 'Constitutional Change and Constitutional Amendment in South Africa' (2019) 35(2) *South African Journal on Human Rights* 1, 4-8.

to pass, which is the most rigorous constitutional threshold in South Africa. The second threshold is provided for by section 74(2) and (3) and applies to the amendment of constitutional provisions that do not constitute part of the constitutional values or the Bill of Rights, which requires a two-thirds majority of the National Assembly in addition to a supporting vote of six provinces in the NCOP if provincial interests are involved. The lowest threshold, which applies to ordinary legislation that must be considered by the NCOP - a majority of the National Assembly under section 75 - applies to ordinary legislation that must be considered by the NCOP.⁷⁵

This tiered approach, in which the constitutional amendment threshold is graduated in line with the importance of the provision being amended, is a principled design choice that is in contrast with the relatively monolithic inflexibility of the Nigerian procedure. Consequently, South Africa has been able to amend its Constitution on seventeen occasions between 1997 and 2023 to address matters of genuine constitutional significance without the debilitating dysfunctions that have characterised such efforts in Nigeria, as Henk Botha has shown. Richard Albert has noted that this dynamic amendment culture is itself a function of the graduated structure: by raising the threshold in proportion to the importance of the provision, the South African procedure allows for proportionate adaptation to the South African Constitution, and so lessens the need to seek adaptation to constitutional change through more informal and less accountable methods.⁷⁶

The involvement of the NCOP in the amendment process is especially notable for comparative purposes. The NCOP is the sub-national representation in the national legislative process, and the

⁷⁵South African Constitution, s 74(1)(a). The provisions identified as requiring this highest threshold include the founding values in section 1 (human dignity, equality, non-racialism, non-sexism, and the rule of law), the Bill of Rights in Chapter 2, and the amendment procedure itself. See Botha (n 15) 8-10.

⁷⁶Botha (n 15) 14-18. South Africa has amended the 1996 Constitution on seventeen occasions between 1997 and 2023, covering matters as diverse as land expropriation powers, the composition of the Constitutional Court, and the local government framework.

fact that it is involved in constitutional amendment means that amendments that affect sub-national interests can only be made with the support of a sub-national majority. This institutionalised form of consultation with sub-national units, despite the fact that the South African system is formally a single state, performs the same function as the state ratification process of the American and Nigerian constitutions, but is better integrated into the legislative process and less vulnerable to gubernatorial capture in the way that has marred the operation of the Nigerian state ratification requirement.⁷⁷

Another unique feature of the South African system is the active scrutiny by the Constitutional Court of the validity of constitutional amendments. In *United Democratic Movement v President of the Republic of South Africa (No 2)* [2002] ZACC 21, the Constitutional Court confirmed that it had the power to review whether an amendment had been enacted in line with the constitutional procedure, and ruled that an amendment of the anti-defection provision of the Constitution was invalid because it had been enacted by the lower section 75 threshold rather than the higher section 74(1) threshold that the significance of the provision warranted. This active supervisory role by the Constitutional Court (which extends its original certification jurisdiction to a general supervisory role) is a constitutionally valuable safeguard against the possibility of procedural abuse and a model of court intervention in the amendment process that has yet to be fully developed by the Nigerian courts.⁷⁸

⁷⁷South African Constitution, s 74(3). The NCOP requirement ensures that amendments affecting the provinces cannot be imposed by the national legislature alone but must attract a degree of sub-national consent, institutionalising a form of federal-style consultation within what is formally a unitary state.

⁷⁸*United Democratic Movement v President of the Republic of South Africa (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC). The Constitutional Court held that the amendment of the anti-defection provision required the special section 74(1) threshold and that its enactment through the lower section 75 procedure was accordingly unconstitutional.

Finally, the founding legitimacy of the South African constitutional order is secured not simply by the formal promulgation of the 1996 Constitution but by the depth and scope of the participatory process that was used to negotiate, debate, and enact the Constitution. The two-year constitutional assembly process that involved widespread public hearings, themed working groups, and a final certification process before the Constitutional Court produced a constitutional document whose democratic legitimacy derived from the real, rather than the fictional, claims of constitutions written by decree. This foundational legitimacy has endowed the South African constitutional order with a stock of democratic legitimacy that has allowed it to operate as a framework of shared governance in a divisively plural society. Most importantly, it serves as a stark point of comparison with the continuing legitimacy deficit of the CFRN 1999 (as amended).⁷⁹

4.4. Lessons from the Comparative Analysis for Nigeria

A side-by-side comparison of the constitutional amendment processes of the United States and South Africa provides a series of specific and operational lessons for reform of the Nigerian framework. These lessons are not recommendations for the unquestioning transplanting of foreign constitutional arrangements; they are empirical lessons learnt from the analysis of these arrangements, which need to be contextualised to the Nigerian constitutional history, structure, and culture. The key lessons are briefly summarised below.⁸⁰

The first and most important lesson from the South African experience is the need to distinguish the difficulty of constitutional amendment according to the constitutional importance of the

⁷⁹B O Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law Publishing 1992) 88-94; R T Suberu, *Federalism and Ethnic Conflict in Nigeria* (United States Institute of Peace Press 2001) 152-155.

⁸⁰Albert (n 4) 60-65; Botha (n 15) 18-22; Tribe (n 8) 30-32. The comparative literature consistently identifies three variables as the most significant predictors of amendment success: the design of the threshold, the degree of popular participation built into the procedure, and the role of the judiciary in supervising amendment validity.

provision being amended. The current Nigerian procedure, enshrined in section 9 of the CFRN 1999 (as amended), is an essentially undifferentiated supermajority procedure for amending all constitutional provisions, with the limited, imperfectly fine-tuned, and imperfectly exclusive exception of the four-fifths supermajority for the most critical provisions, prescribed under section 9(3). This blanket inflexibility creates a procedural system that places the same high barriers in the way of amendments with marginal administrative effect as in the way of amendments to the fundamental structure of the federation. The new amendment procedure should follow the South African example in drawing a hierarchy of constitutional provisions, corresponding to priorities in the level of support required for change, such as the highest level required for the change of the most fundamental commitments of the constitutional order (such as the supremacy clause, the federal constitution, the fundamental rights contained in Chapter IV, and the amendment procedure itself), and a lower level of support for the change of more administrative and technical provisions.⁸¹

The second lesson relates to popular involvement. Both the American and South African constitutional orders provide for opportunities - the state convention method in the former, and the process leading to the adoption of the 1996 Constitution in the latter - that reflect the understanding that the people themselves, acting through their representatives, are the most appropriate creators of the most important constitutional reforms. The CFRN 1999 (as amended) does not provide for a constitutional referendum or any other means of popular ratification of constitutional amendments, reserving the power of constitutional amendment to the current legislature. This is especially significant in the Nigerian context, where the 1999 Constitution itself was imposed

⁸¹South African Constitution, ss 74-75; Botha (n 15) 9-12. See also Albert (n 4) 52-55, where the South African tiered model is contrasted with the uniform single-threshold designs of the United States and several African constitutions.

without involving the public by a military regime. The inclusion of a constitutional referendum process, either as an optional means of ratification or as a mandatory requirement for constitutional amendments of the highest level of constitutional provisions, would not only enhance the democratic legitimacy of the most important constitutional reforms but would also provide an avenue for the people, on whom the Constitution is ultimately said to be founded, to participate in the constitutional process.⁸²

Third, the comparative research demonstrates the value of judicial oversight of the amendment process. The US experience highlights the constitutional importance of a judiciary able to interpret the Constitution and to serve as a parallel process of constitutional adaptation to social and technological change. The South African experience highlights the additional importance of a Constitutional Court that can oversee the procedural legitimacy of constitutional amendments, and (at least implicitly) their substantive compatibility with the core values of the constitutional order. In Nigeria, the Supreme Court has exercised its jurisdiction in constitutional amendment matters in a handful of cases, most recently *Attorney General of the Federation v Attorney General of Abia State and 35 Ors LPELR-62576(SC)*, but the extent of the jurisdiction, and in particular whether the courts can invalidate a formal valid amendment (that is, one that formally complies with section 9) that is nevertheless substantively inconsistent with the basic structure of the constitutional order, has yet to be determined. The Indian doctrine of the basic structure of the constitutional order, as articulated by the Indian Supreme Court in *Kesavananda Bharati v State of Kerala, AIR 1973 SC 1461*, and the theoretical arguments for unconstitutional constitutional amendments as advanced

⁸²US Constitution, Art V (ratification by state conventions); South African Constitution, s 74 read with the interim Constitution of 1993 and the Constitutional Assembly process. See Botha (n 15) 3-4; Kyvig (n 9) 3-7.

by Roznai are principled precedents that the Nigerian courts may fruitfully draw upon in the development of an indigenous jurisprudence of constitutional limits on the amendment power.⁸³

Fourth, the comparative study reinforces the argument that a permanent constitutional review commission should be established as an institutional means of identifying problems with the constitution and proposing improvements. The current ad hoc nature of the Nigerian amendment process - in which distinct cycles of amendment activity are initiated and conducted by the ruling leadership of the National Assembly on a politically expedient basis - is responsible for the high costs and the chronic timing problems that have hampered meaningful reform. An institutionally permanent body, with the power to conduct ongoing consultative dialogues with citizens and to prepare technically sophisticated proposals for constitutional amendment which it will submit to the National Assembly for consideration and to the states for ratification, would remove the preparatory work of constitutional reform from the legislative agenda, and would minimise the vulnerability of important constitutional amendment initiatives to be frustrated by electoral change. Albert's comparative study of other countries' amendment cultures bears out the comparative advantage of such institutional mechanisms in terms of enhancing amendment coherence, public legitimacy, and the prospect of turning aspirations for constitutional reform into successful constitutional change.⁸⁴

⁸³*Marbury v Madison* (n 12); *United Democratic Movement v President of the Republic of South Africa (No 2)* (n 19); *Attorney General of the Federation v Attorney General of Abia State and 35 Ors* LPELR-62576(SC). See also Roznai (n 26) 1-5.

⁸⁴Albert (n 4) 62-65. Albert observes that constitutional systems which provide for independent constitutional review bodies — whether permanent commissions or ad hoc constituent assemblies — tend to generate more technically coherent amendment proposals and command a higher degree of public legitimacy than those in which amendment is driven entirely by the incumbent legislative majority.

Fifth and last, the South African experience of a founding constitutional moment of unquestionable legitimacy suggests the most ambitious but important long-term lesson for Nigeria. The continuing legitimacy problem of the CFRN 1999 (as amended), arising from its imposition by military fiat and lack of any significant popular input in the process leading up to its adoption, cannot be wholly remedied through piecemeal procedural reform. The long-term solution, as Nwabueze and Suberu have both concluded, is the convening of a participatory constitutional review process that will enable the Nigerian people to re-found their constitutional order on terms that enjoy popular legitimacy and that reflect the federal realities, democratic aspirations, and consensus of the contemporary polity. In the absence of such a constitutional moment, the more modest reforms identified above - such as the graduated amendment thresholds, a referendum process, effective judicial oversight, and an independent review commission - would together constitute a substantial improvement on the existing system and would go some way to rectifying the structural and legitimacy shortcomings that continue to undermine the effective functioning of the constitutional amendment process in Nigeria.⁸⁵

⁸⁵Nwabueze (n 22) 88-94; Suberu (n 22) 152-155. Both scholars identify the promulgation of the 1999 Constitution by military decree as a foundational legitimacy deficit that can only be fully cured by a genuinely popular constitutional process of the kind that produced the South African Constitution of 1996.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSION, AND RECOMMENDATIONS

5.1. Summary of Findings

The purpose of this study is to critically analyse the procedure for constitutional amendment in Nigeria under the 1999 Constitution in order to identify the legal, political, and institutional factors that have hindered constitutional reform in the Fourth Republic and to make some practical suggestions for reform. The following findings were made.

First, the constitutional amendment procedure provided for in section 9 of the CFRN 1999 (as amended) ranks among the most demanding in comparative constitutional law. The requirement of affirmative votes from no fewer than two-thirds of the total membership of both the Senate and the House of Representatives — calculated against the full membership rather than those present and voting, so that absentees and abstentions effectively count against a bill — followed by ratification in at least two-thirds of the thirty-six State Houses of Assembly, erects a layered supermajority barrier that has repeatedly exceeded the practical political reach of Nigeria's plural and regionally divided federation. For amendments touching on fundamental rights or the amendment procedure itself, the four-fifths threshold in section 9(3) raises this barrier to a level that renders those provisions functionally unamendable in the prevailing political environment.

The constitutional amendment process, therefore, cannot provide the constitutional change demanded and required by the political, economic, and social milieu of the Fourth Republic.⁸⁶

Second, the major obstacles to effective amendment rest in the area of politics. Inter-party competition, the fragmented and ethnically skewed representation of the National Assembly, the strategic calculations of state governors who wield outsize influence in their respective State Houses of Assembly as a result of their ability to reward and punish through the party whip system, and the lack of programmatic platforms for constitutional reform within the political parties have all combined to frustrate the emergence of the multi-regional and multi-party consensus that the supermajority quorum demands. The failed third-term constitutional reform proposal of former President Olusegun Obasanjo, the failure to secure state ratification for the financial autonomy amendment, and the continued failure of state policing and resource control bills are all examples of this structural political obstacle.⁸⁷

Third, the institutional costs of the amendment process operate as an independent structural deterrent to constitutional reform. The financial burden of successive amendment cycles, documented by PLAC as running into several billion naira per exercise, and the temporal reality that a full amendment cycle has in practice outlasted the legislative assembly that initiated it, together produce an environment in which rational political actors weigh the near-certain cost of attempting amendment against the uncertain prospect of success. The result is a systematic bias against reform that is entirely independent of the merits of any particular amendment proposal and

⁸⁶Section 9(2) and (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN 1999 (as amended)). See also Policy and Legal Advocacy Centre (PLAC), *Report on the Constitutional Amendment Process* (PLAC 2018) 22-25.

⁸⁷R T Suberu, *Federalism and Ethnic Conflict in Nigeria* (United States Institute of Peace Press 2001) 112-121.

that no improvement in political will alone can overcome without a fundamental redesign of the process itself. the result that important amendment proposals have been repeatedly lost to the electoral cycle and ⁸⁸

Fourth, underlying all of the procedural and political obstacles reviewed in this study is a foundational legitimacy problem that no amount of procedural reform can fully resolve. A constitution promulgated by military decree without popular participation carries a deficit of democratic authority that compromises both the political willingness to work within the amendment framework and the public legitimacy of outcomes produced by it. This is not merely a rhetorical observation: it explains why calls for a sovereign national conference or constituent assembly have persisted throughout the Fourth Republic as the only remedy for a constitutional order that many Nigerians do not regard as genuinely their own.⁸⁹

Fifth, the consequence of a consistently dysfunctional amendment mechanism is that constitutional change has not stopped — it has simply migrated to less accountable channels. The most consequential illustration of this displacement is the Supreme Court decision in *Attorney General of the Federation v Attorney General of Abia State and 35 Ors* LPELR-62576(SC)- which essentially recalibrated the fiscal relationship between the three levels of government - highlights

⁸⁸PLAC (n 1) 40-44; S S Ojo, 'Legislative Impasse: The Challenge of Amending the Nigerian Constitution' [2015] (28)(3) *Nigerian Bar Association Journal* 120, 133-135.

⁸⁹B O Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law Publishing 1992) 88-94; Suberu (n 2) 152-155.

the significance and the democratic legitimacy constraints of judicial constitutionalism as an alternative to the formal amendment process.⁹⁰

Sixth, the comparative analysis in Chapter Four establishes that the problems catalogued in this study are not inherent to federalism or to plural societies — they are the product of specific institutional design choices that can be reformed. The South African model is instructive not because it offers a ready-made template but because it demonstrates that a graduated amendment threshold, active constitutional court oversight, and a founding constitutional moment of genuine popular legitimacy together create the conditions for a dynamic amendment culture. Nigeria has none of these three conditions in their full form. That is the real finding of the comparative chapter, and it is the finding that most directly informs the reform recommendations.⁹¹

Finally, the elite and exclusionary character of the amendment process is not merely a procedural deficiency — it is the mechanism by which the legitimacy deficit identified in Finding Four perpetuates itself. When constitutional change is determined in advance by legislative and executive leaderships, with public hearings operating as theatre rather than as genuine deliberation, the amendment outcomes produced carry no greater democratic authority than the instrument they amend. The practical consequence is citizen apathy toward constitutional reform and a growing popular conviction that the constitutional order is managed by political elites for political elites — a conviction that feeds the ethno-regional tensions that the amendment process has consistently

⁹⁰*Attorney General of the Federation v Attorney General of Abia State and 35 Ors* LPELR-62576(SC).

⁹¹R Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 44-46; H Botha, 'Constitutional Change and Constitutional Amendment in South Africa' (2019) 35(2) *South African Journal on Human Rights* 1, 14-18.

failed to address. constitutional reform, and has added to the ethno-regional tensions exacerbated by the failure of the process to deliver a constitutional amendment.⁹²

5.2. Conclusion

The constitutional amendment process is the vehicle that enables a constitutional order to renew itself, respond to changing social, economic, and political realities, and demonstrate its democratic legitimacy to subsequent generations. This has not been the case in Nigeria. Despite the formal constitutionalism, the rule of law and democracy secured by the CFRN 1999 (as amended), that constitution has been structurally incapable of functioning as an effective mechanism for the resolution of the political, fiscal, and institutional tensions that have characterised Nigerian federalism since the inception of the Fourth Republic. This is not because of the ambition to amend the constitution but because of the structure and political circumstances of the amendment process. While the supermajority requirements of section 9 are justifiable in theory as a check against opportunistic constitutional change, in practice, they have served as an almost impenetrable barrier to needed reform, resulting in constitutional adaptation occurring primarily through judicial and executive action in ways that have posed unresolved threats to democratic accountability. The fragmented nature of the federation, the game-playing of gubernatorial actors, the lack of party ideology in relation to constitutional matters, and the ethnic/regional divides that cut through legislative majorities have combined to render the formal amendment process ineffective. As a consequence, the gap between the formal text of the Constitution and the practice of Nigerian

⁹²J Habermas, *Between Facts and Norms* (W Rehg trans, MIT Press 1996) 265-267; B Ackerman, *We the People: Foundations* (Harvard University Press 1991) 6-10.

politics has widened to the point of becoming dangerous - a gap which has undermined public faith in the democratic institutions that the Constitution creates.⁹³

The comparative analysis has shown that this need not be the case. There are other federal democracies that have developed amendment procedures that both preserve the stability of the constitution and allow it to adapt to changing circumstances. The point here is not that the Nigerian Constitution should naively mimic its foreign counterparts, but that constitutional amendment can and should be reformed. This lesson is borne in mind in the recommendations below. More importantly, this research shows that procedural reform cannot address the legitimacy problem that affects the very constitution that it seeks to amend. A constitution adopted without popular participation cannot, through piecemeal reform, gain full legitimacy, as a constitution must. For the long-term constitutional well-being of the Nigerian Federation, a new constitutional compact is required - a compact that rests on the citizens' participation, a compact that accurately reflects the constitutional bargain among the constituent units, and a compact that becomes the political reality of governance for all Nigerians.⁹⁴

5.3. Recommendations

Based on the analysis and conclusions just outlined, the following recommendations are made for Nigeria's constitutional amendment process, in terms of their importance.

⁹³Albert (n 6) 60-65.

⁹⁴Suberu (n 2) 152-155; Nwabueze (n 4) 88-94.

i. Introduction of a Tiered Amendment Threshold. Section 9 of the CFRN 1999 (as amended) should be redrafted to replace the more or less uniform supermajority with a tiered amendment procedure similar to that found in the South African Constitution. Three levels should be identified: the most important provisions - the supremacy of the Constitution, the federal system, Chapter IV rights and the Constitution's amendment procedure - should continue to attract the highest threshold; structural provisions concerning the major organs of government should continue to require the current two-thirds supermajority; and more administrative or procedural constitutional provisions should be open to amendment by a two-thirds majority of the National Assembly, without the need for state ratification. This graduated approach to the level of constitutional protection would obviate procedural barriers to urgently needed amendment of the Constitution whilst preserving a high level of protection for the most fundamental commitments of the constitutional order.⁹⁵

ii. Establishment of a Constitutional Referendum Mechanism. The CFRN 1999 (as amended) should be amended to either make it compulsory or provide an alternative avenue for the amendment of the highest level of constitutional provisions through a constitutional referendum. The establishment of a referendum would enhance the democratic legitimacy of the amendment of the highest tier of constitutional provisions and would establish a direct avenue of public participation in the constitutional process, starting to redress the legitimacy deficit of the 1999 constitutional order since its inception.

⁹⁵CFRN 1999 (as amended), s 9(2)-(3); Albert (n 6) 52-55.

iii. Creation of a Standing Constitutional Review Commission. Legislation should create an independent, standing constitutional review commission, tasked with identifying constitutional shortcomings, continually consulting the public, and preparing technically sophisticated proposals for constitutional amendments for the National Assembly to consider. This would separate the preparatory work of constitutional reform from the legislative calendar, lower transaction costs, and provide technically refined and publicly accepted constitutional amendment proposals.⁹⁶

iv. Strengthening of Judicial Supervision over the Amendment Process. The Supreme Court's jurisdiction over the procedural validity of constitutional amendments should be legislated, and it should be encouraged to take an interest in the issue of implicit substantive limits on the amendment power. The doctrine of the basic structure of the Constitution in India and the supervisory role of the South African Constitutional Court are good examples. A Nigerian jurisprudence of constitutional limits on the amendment power would provide a judicially enforceable bulwark against formal amendments that are, in substance, corrosive of the basic constitutional structure.⁹⁷

v. Reduction of the Financial and Temporal Costs of Amendment. The existing system of zonal public hearings should be modified to include both online and local consultation methods that will ensure broader consultation of the public without the full financial burden of the present system. The legislative process for amendments should be insulated from the legislative process to ensure

⁹⁶Albert (n 6) 62-65.

⁹⁷Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 1-5; *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461; *United Democratic Movement v President of the Republic of South Africa (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC).

that amendment bills are not lost in election changes. Some form of carry-over of amendment bills to the next assembly should be established.

vi. **Accountability of Political Parties on Constitutional Reform.** The Independent National Electoral Commission and relevant legislative committees should consult with the political parties to ensure specific constitutional reform commitments are included in parties' manifestos to create an electoral accountability for parties' and candidates' constitutional reform agendas at the general elections. Electoral accountability for constitutional reform would provide incentives for discipline and coherence in constitutional reform.⁹⁸

vii. **Convening of a Broadly Participatory Constitutional Review Process.** In the longer perspective, the Nigerian Government should consider the convening of a sovereign national constitutional conference or constituent assembly of elected and appointed representatives, with the sole mandate to review the core provisions that constitute the constitutional order, and to produce a new draft constitution for popular ratification. South African experience of a constitutional assembly process in 1994-96 that produced a constitution of continuing popular legitimacy shows that such a process is not unattainable and that its outcomes are the result of a mandate of unmatched popular legitimacy.⁹⁹

The proposals, taken as a whole, have a common purpose: to transform the constitutional amendment process from an elite-dominated and structurally weak institution into a participatory,

⁹⁸Ojo (n 3) 133-135; PLAC (n 1) 44-46.

⁹⁹Botha (n 6) 3-4. The two-year constitutional assembly process produced a constitutional text that was subsequently certified by the Constitutional Court of South Africa, a process that conferred on the resulting Constitution a depth of popular and institutional authority that no legislature-promulgated instrument can replicate.

technically competent, and politically legitimate institution of constitutional governance. There is a clear need for such reform. Increasing mismatch between the formal constitution and the politics of the Nigerian federation, the intensification of ethno-regional crises that the failure to successfully amend the constitution has not addressed, and the use of judicial and executive channels of constitutional change are all symptoms of a constitution in crisis. Amendment is the constitutionally anointed saviour. Its reform should, therefore, not be a legislative goal but a constitutional mandate.

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