

Review

The review of the constitutional amendment procedure and presidential assent in Nigeria

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Constitutional amendments are changes or alterations made to a given constitution with a view to improving it. In order to be able to adjust to future needs and prepare for unforeseen circumstances, most written constitutions usually contain special procedures for their amendment. This paper examines the constitutional amendment procedure in Nigeria and the requirement of presidential assent.

Key words: Constitution, amendment, procedure and presidential assent.

INTRODUCTION

What is constitutional amendment?

According to the *Black's Law Dictionary*ⁱ an amendment is a formal revision or addition made to a statute, constitution, pleading order or other instrumentsⁱⁱ. To Okeke, amendment is to alter or repair a thingⁱⁱⁱ (Okeke, 2010). Amendment can be formal or informal. The formal amendment is usually effected by the legislature while the informal ones are usually carried out by the superior courts of recordsⁱⁱⁱ in the process of interpreting the constitution or exercising their power of judicial review (Yadudu, 2000). The courts engage in informal amendments through interpretation when there is *lacuna* or ambiguity in the provisions of the constitution. According to Nwabueze, the power to amend the constitution seems to be the logical starting point^{iv} in a discussion of the "constitutional limitations on government" (Nwabueze, 1985). Many reasons have been advanced for formal amendment of the constitution.

These include communal forces, technical faults and constitutional defects (Okeke, 2010).

Constitutional amendment procedure in Nigeria

The 1999 Nigeria Constitution provides for six types of amendment. There are different procedures for the creation of new states,^{iv} for boundary adjustment,^v a procedure for creating a new local government area^{vi} and a procedure for adjusting existing local government areas.^{vii} There are also separate procedures for amending the entrenched provisions of the Constitution^{viii} and other amendments.^{ix} For the purpose of this work however the omnibus amendment procedure in section 9 of the 1999 Constitution will be examined.

Section 9 of the 1999 Constitution lays down two different criteria for the amendment of vital or entrenched provisions,^x and the amendment of any other part of the

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Constitution. By section 9 (2) of the Constitution an Act of the National Assembly for the alteration of the Constitution not being an Act to which section 8^{xi} applies shall not be passed in either House of the National Assembly unless the proposal is supported by the two-third majority of all members of that House and approved by the Houses of Assembly of not less than two-thirds of all states. The procedure for the amendment of the vital and entrenched provisions is more stringent. Section 9 (3) of the Constitution provides that an Act for the purpose of altering the provisions of sections 9^{xii} and 8^{xiii} or chapter IV of the Constitution "shall only be passed" by either House of the National Assembly if the proposal is approved by four-fifths majority of members of each House and thereafter approved by the resolution of Houses of Assembly of two-thirds of all the states. For the purposes of constitutional amendments and creation of states and local governments the number of members in each House of the National Assembly is the totality of all members constitutionally stipulated to be elected into each House, irrespective of any vacancy.^{xiv} According to Aguda (2000), the above provisions made the constitution quite difficult to amend. He further contends that the "ethnic and sectional factors in the country's politics add to the difficulty" (Aguda, 2000). This, he claims, puts our Constitution in the "category of rigid constitutions" (Aguda (2000)).

Can a state governmentally validly alter the provisions of the Constitution by creating new local government areas without making returns to the National Assembly? This was one of the issues for the determination in *Attorney General of Lagos State v Attorney General of the Federation*.^{xv} In that case the Lagos State Government (plaintiff) enacted the Local Government Area Law No. 5 of 2002 of Lagos State where under, pursuant to section 8 the 1999 Constitution, it created more local governments and thereby increased the number of local government councils within the state from 20 (twenty) to 57 (fifty seven). The state conducted elections into the new 57 local government councils and swore in their chairmen on 19 March 2004 without complying with section 8 (6) of the 1999 Constitution, which requires the each House of Assembly to make returns to each House of the National Assembly, to enable it enact an Act to amend the Constitution and accommodate the newly created local government councils. The Lagos State Government failed to make the returns.^{xvi} Consequently, the President directed that no allocation from the Federation Account should henceforth be released to the local government councils until they reverted to their constituent local government areas specified in Part I of v the First Schedule to the Constitution. The statutory allocation from the Federation Account to Lagos State meant for its local governments was thereby withheld by the Federal Government.^{xvii}

Aggrieved by this development the Lagos State Government instituted 'an action at the Supreme Court

challenging the action of the President in withholding its statutory allocation and compelling the Federal Government (Defendant) to pay immediately all outstanding arrears of statutory allocation payable to the plaintiff, among other reliefs.^{xviii}

The Defendant, after entering appearance, filed a counterclaim where it claimed a declaration that the Plaintiff/Defendant (to the counterclaim) had no power under the 1999 Constitution under the constitution to abolish local government areas established under the 1999 Constitution by altering their names and boundaries by dividing them into smaller units until the National assembly had acted pursuant to the provisions of section 8 (5) of the 1999 Constitution.^{xix}

The Supreme Court held, among other things that:

Although a House of Assembly has the power, by virtue of section 8 (3) of the 1999 Constitution to validly pass a bill creating new local government, before the bill can take and be operative, returns must be submitted by the state concerned to the National Assembly to enable it pass an Act, pursuant to section 8 (5) of the 1999 Constitution, which will amend section 3 (6) of the Constitution and Part I of the First Schedule thereof to accommodate the new local government area created by the state.^{xx} Until the returns are made and the National Assembly passes the consequential Act, the bill creating new local governments cannot take effect, though validly passed ... The Local Government Areas Law, No. 5 of 2002 of Lagos State cannot take effect and be operative and therefore inchoate until the National Assembly passes the consequential Act.^{xxi}

CONSTITUTIONAL AMENDMENT AND PRESIDENTIAL ASSENT

The requirement of the presidential assent to validate and give the force of law to any bill passed by the National Assembly seems to be beyond any shadow of doubt. By section 58 of the 1999 Nigerian Constitution, the power of the National Assembly to make laws is to be exercised by bills passed by both the Senate and the House of Representatives and such bills shall be "assented to by the President".^{xxii} It is further provided that any bill that originates from either House of the National Assembly "shall not become law" unless it has been passed an "assented to in accordance with the provision of this section".^{xxiii} Furthermore, where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or withholds his assent.^{xxiv} If, however, the President withholds his assent and the bill is again passed by two-thirds majority of each House of the National Assembly, the bill shall become law and the assent of the President "shall not be necessary".^{xxv}

While there is a consensus on the necessity of the presidential assent before a legislative bill can become law, the need for a presidential assent to validate a

constitutional amendment is not devoid of controversy. On the one hand are those who believe that the assent of the President is unnecessary to validate a constitutional amendment. According to KatsinaAlu,2010,former Chief Justice of the Federation, section 58 of the Constitution, that talks of Presidential assent, refers only to the Senate and House of Representatives whereas an Act of the National Assembly in section 9 refers to the Senate, House of Representatives and at least 24 State Houses of Assembly in Nigeria (Alu, 2010).He further contends that section 58 refers to ordinary legislation while section 9 refers to constitutional legislation. He maintains that a court can set a side an Act based on section 58 but cannot do so for an Act that is the product of section 9 (2) once all the processes have been dutifully followed(Alu, 2010).Speaking in a similar vein, SoyomboOpeyemi argues that the debate on the desirability or otherwise of the President's assent before an amended constitution can become law is a product of two factors.^{xxxvi} These are: the clash or conflict of political cultures between the British parliamentary system an American Presidential democracy; and the inability to distinguish between a constitutional law and an ordinary legislation.^{xxxvii} He contends that the "Act of the National Assembly" referred to in section 9 (2) of the constitution is *sui generis*.^{xxxviii} This is because such an Act of the National Assembly requires the concurrence of at least two-thirds of the state legislatures but the ordinary Act of the National Assembly, is only passed by the Senate and House of Representatives.^{xxxix} He states further that the reference to the Constitution as "an Act of the National Assembly is just because the power of amendment may be challenged."^{xxx}Said he:

Even the reference to the Constitution as an Act of the National Assembly' is just the power of alteration or amendment by the National Assembly may be (further) called to question. This is because the power of amendments cannot be stretched to include sections 1 and 2 of the Constitution. It is only a (Sovereign) National Conference that can undertake such a weighty exercise. Can the Constitution then be properly said to be an Act of the National Assembly?^{xxxi}

It is humbly submitted that the above views, like the previous one, are erroneous. This is because the provisions of section 9(2) and (3) of the 1999 Constitution are wide enough to cover any amendment to the Constitution. And by the virtue of section 58 of the constitution, the assent of the President is mandatory. Furthermore, section 9 (4) emphasizes the importance of the exercise and its all-inclusive nature by stating that the membership of the National Assembly shall be deemed to be its total membership.^{xxxii} Besides that, there is no other provision that deals with the amendment of sections 1 and 2 of the Constitution nor is there anyone that vests the power of such amendment in a Sovereign National Conference. It must however be conceded that the argument of those who claim that the presidential assent

in unnecessary for a constitutional amendment is erroneously based on article V of the United States Constitution that dispenses with the presidential assent.^{xxxiii}

On the hand are those who rightly believe that the presidential assent is indispensable in any constitutional amendment in Nigeria. One of such persons is Professor B.O. Nwabueze. According to him the reliance placed on the United States Constitution by the opponents of presidential assent to constitutional amendment is misplaced(Nwabueze, 2010).This is because, according to Nwabueze, "it ignores the circumstances of the origin of the United States Constitution, which makes the process for its amendment wholly inapplicable in Nigeria"(Nwabueze, 2010).He further states that the United States Constitution originated as laws, "not by way or by means of an Act of Congress" or, as did the Nigerian Constitution, a "decree enacted by the Federal Military Government which gave force of law to the 1999 Constitution as a Schedule to the Decree;" the United States Constitution originated "as law made by the people"(Nwabueze, 2010).The process used in making the United States Constitution, Nwabueze continues, excludes any question of the President signing it(Nwabueze, 2010).

Nwabueze further contends that the wording of article V^{xxxiv} of the United States Constitution does not give congress the power to 'pass' an amendment, as in the case of ordinary law-making; it only gives the congress power to 'propose' amendment and the amendment so proposed and ratified becomes valid as law by virtue of the revolutionary process used in making the Constitution(Nwabueze, 2010). In *Hollingsworth v Virginia*,^{xxxv} the United States Supreme Court held that just as the President had no hand in the making of the United States Constitution, he cannot logically have a hand in its amendment.^{xxxvi}

To put the argument beyond any doubt, Nwabueze finally submits that the United States Constitution does not have the equivalent of the provision of section 9 (2) of the Nigerian Constitution requiring an amendment to be made only by means of an Act otherwise the assent of the American President "would have been requisite to any valid amendment".^{xxxvii} Corroborating Nwabueze's view, G.N. Okeke is of the view that the argument of those who claim that constitutional amendment in Nigeria does not require presidential assent has 'political undertone'(Okeke, 2010).

In an illuminating elucidation of the provisions of the 1999 Constitution relating to constitutional amendment, Okeke advances copious reasons while presidential assent is a *sine qua non* to any constitutional amendment(Okeke, 2010). These include the fact that section 9 of the constitution, the constitutional amendment is to be made by means of an Act(Okeke, 2010).Okeke states further that the actual passage of the Act

for constitutional amendment is done by the National Assembly after full

Court decisions in *Raynoy v US*^{xlv} where the court held that the enrolment of an Act and its authentication by the

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compliance with the procedural requirements in by section 9 (1) to (3) (Okeke, 2010). The learned author contends further that before a bill or proposal to make a new law becomes an Act after the passage by the National Assembly, it must be assented to by the President as required by section 58 (1) of the 1999 Constitution.^{xxxviii} Okeke finally submits that since section 9 (4) of the Constitution stipulates that the number of members of each House of the National Assembly for the purpose of constitutional amendment shall be the ones specified in sections 48 and 49, this clearly indicates that section 9 is not only subject to section 58 (1) "but also subject to the relevant constitutional provisions on the National Assembly in relation to law making or law amendment".^{xxxix} The above view was rightly confirmed by Justice Okechukwu Okeke of the Federal High Court in *Olisa Agbakogba v the National Assembly*^{xl} on Monday 9 November 2010 when the learned judge rules that constitutional amendment without presidential assent is null and void. There have been mixed reactions to this judgment.^{xli}

IS THE PRESIDENTIAL ASSENT A CONCLUSIVE PROOF THAT AN ACT HAS BEEN VALIDLY PASSED?

This is one of the questions for determination is *Attorney-General of Bendel State v Attorney-General of Federation and Others*.^{xlii} The case involved the Allocation of Revenue (Federal Account etc) Act No 1 of 1981. The constitutionality of the Act was challenged on the ground, among others, that it had not been validly passed by the National Assembly in the manner required by the Constitution. The two Houses of National Assembly had been unable to agree on the Bill. It was consequently referred to the Joint Finance Committee of the National Assembly. The committee resolved the conflict but without any subsequent reference to either House of the National Assembly, the Joint Finance Committee sent the Bill to the President for assent.^{xliii}

The Supreme Court unanimously ruled that the power of the Joint Finance Committee to resolve differences between the two Houses over a money bill gave it no authority to approve amendments over the head of either House, and that the failure to refer the Revenue Allocation Bill to the National Assembly was a violation of the constitutional procedure for making laws.^{xliv} This means that the fact that a Bill passed by the National Assembly in Nigeria has been assented to by the President does not preclude the courts, on application of an aggrieved party, from enquiring whether the Act has been validly passed, and invalidating the same if found to be passed in breach of the constitutional procedures for its passage.

This Nigerian Supreme Court's decision in the above case can be contrasted with the United States Supreme

signatures of the presiding officers and the Head of State are conclusive of its being passed in due form by the legislature, and no other evidence can be used to controvert them.^{xlvi} According to Akande, the effect of the United States Supreme Court's decision is to reduce to "mere formality the justiciability of the constitutional provisions prescribing the manner and form of legislation", since however clear it may be upon evidence that an enrolled Act had not been duly and regularly passed, "the court is bound to reject such evidence."^{xlvii}

As at the time of writing this paper the 1999 Nigerian Constitution had been amended three times and all the amendments were duly assented to by the President. Apart from the first amendment that generated controversies on the desirability of the presidential assent there has been no other need to query the validity of all the amendments duly signed by the President as was the case in *Attorney General of Bendel State v Attorney General of the Federation and Others*^{xlviii} already considered.

Conclusion

Constitutional amendment is necessitated by the need to make the Constitution to be alive to new realities or unforeseen situations that were not originally adequately provided for. These might be due to communal forces technical fault or constitutional defects.^{xlix} Amending processes are meant to effect peaceful changes in order to: "forestall revolutionary upheavals." The ease or difficulty by which a constitution is amended is used in characterizing it as rigid or flexible.

The procedures for amending the constitution vary from one country to another because of historical sociological and cultural differences among countries of the world. In the United States of America the procedural requirement for the amendment are in article V of the United States Constitution. The amendment is by a special constitutional convention that dispenses with the presidential assent. On the other hand, the procedure for amending the 1999 Nigerian Constitution is as laid down in section 9(1) – (4) of the constitution. By section 9(2) and (3) therefore the Nigerian Constitution is only to be 'altered' or amended by an "Act of the National Assembly". This automatically makes any constitutional amendment in Nigeria to be subject to all procedural requirements for validating any Act of the National Assembly. And since any bill of the National assembly cannot validly become an Act without the assent of the President, therefore, as already contended, presidential assent is a *sine qua non* for any valid constitutional amendment in Nigeria.

Conflict of Interests

The author has not declared any conflict of interests.
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ⁱ9th edition 2004 p. 94.

ⁱⁱ*Ibid.*

ⁱⁱⁱ By section 6 (5) of the 1999 Constitution, these include the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja, High Courts of the States, the Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Courts of Appeal of the States, the Customary Court of Appeal of the Federal Capital Territory, Abuja and Customary Courts of Appeal of the States.

^{iv}Section 8 (1) of the 1999 Constitution.

^vSection 8 (2) (a) and (b) of the 1999 Constitution.

^{vi}Section 8 (3) (a) – (d) of the 1999 Constitution.

^{vii}Section 8 (4) of the 1999 Constitution.

^{viii}See section 9 (3) of the 1999 Constitution.

^{ix} See section 9 (2) of the 1999 Constitution; see also Eweluka, D.I.O 2000.

"The Amending Process Under the 1999 Constitution", Ayua, I.A. *et al* (ed) *op cit* pp 30.331.

^x These include sections 8 and 9, and Chapter IV of the 1999 Constitution.

^{xi} This is on creation of new states and boundary adjustment.

^{xii} Mode of altering the Constitution.

^{xiii} This is on creation of new states and boundary adjustment.

^{xiv}Section 9 (4) of the 1999 Constitution.

^{xv} (2005) 3 FWLR (Part 273) p. 540. Other questions for determination include whether the President has the power to withhold the statutory allocation due and payable to the plaintiff, and whether the Local Government Areas Law.

No. 5 of 2002 of Lagos State is invalid without the enactment of an Act of the National Assembly pursuant to section 8 (5) of the 1999 Constitution.

^{xvi} *Attorney General of Lagos State v Attorney General of the Federation. Op cit* p. 540.

^{xvii} *Ibid.*

^{xviii} *Ibid.*

^{xix} *Ibid* at p. 542. The Defendant also sought a declaration that the alteration of the names and boundaries of the local governments and the creation of new ones, and their operation before or without an Act of the National Assembly were "illegal unconstitutional, null and void".

^{xx}Per Uwais, CJN, at p 585.

^{xxi} *Ibid.*

^{xxii}Section 58 (1) of the 1999 Constitution.

^{xxiii}Section 58 (2) of the 1999 Constitution.

^{xxiv}Section 58 (4) of the 1999 Constitution.

^{xxv}Section 58 (5) of the 1999 Constitution.

^{xxvi} Opeyemi, S. 2010. Presidential Assent: Justice Okeke Missed it: at

<http://www.independentngonline.com> / Daily independent/Article.aspx...retrieved on 1 December 2010.

^{xxvii} *Ibid.*

^{xxviii} *Ibid.*

^{xxix} *Ibid.*

^{xxx} *Ibid.*

^{xxxi} *Ibid.*

^{xxxii} Section 48 of the Constitution States that the Senate shall consist of 3 senators from each state and one from the Federal Capital Territory, Abuja, while section 49 states that House of Representatives shall consist of 360 members. This gives a total of 469 members.

^{xxxiii} For a critique of the amendment process under the American Constitution see Mason, A.T. and Beane, W.M. 1978. *American Constitutional Law*. New Jersey Prentice-Hall Inc.

^{xxxiv} Article V of the American Constitution provides that: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several states, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the Legislatures of three fourths of the several states, or by convention in three fifth thereof..."

^{xxxv} 3 Dall (3 U S) 378 (1798).

^{xxxvi} *Ibid* Per Justice Chase at pp. 381-382.

^{xxxvii} Nwabueze, B.O. "Nigeria; Constitutional Amendment: Presidential Assent is Mandatory" *op cit* p. 5. This is in compliance with article I, section 7, clause 3 of the United States Constitution which provides that: "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United State; and before the same shall take effect, shall be approved by him..."

^{xxxviii} The author continues that the argument that section 58 (1) does not regulate section 9 because section 9 is not subject to it is baseless. This according to him, is because section 9 contemplates that constitutional amendment is to be done by means of an Act, and since by virtue of section 58 (1) of the Constitution every Act of the National Assembly requires presidential assent, then the requisite assent must be given before it can be made.

^{xxxix} *Ibid* – at p. 214.

^{xl} Unreported. See *The Punch* 10 November, 2010. P 1.

^{xli} For instance, Katsina Alu, former CJN, argues that the argument that the president must assent to constitutional amendment implies that an individual can veto the collective will of the citizens expressed nationwide through the federal and state legislators. See Alu, Katsina 2010. "Nigeria: Presidential Assent-Justice Okeke Missed it." *Daily Independent* 1 December 2010 p. 4. To Kayode Oladele, the decision can be described as "judicial activism devoid of correct interpretation of the 1999 Constitution". He contends that the Supreme Court should have the final say on the matter. See Oladele, Kayode 2010. "Agbakoba v National Assembly: Supreme Courts Decision is final", *The Punch* 29 November, 2010. 74.

^{xlii} (1982) 3 NCLR 1.

^{xliiii} *Ibid.*

^{xliv} For exhaustive discussion of this case see Akande, J.O. 2000. *Introduction to the 1999 Nigerian Constitution*. Lagos: MIJ Publishers pp. 147-150;

Nwabueze, B.O. 1985. *Nigeria's Presidential Constitution* London: Longman pp. 264-265.

^{xlv} 232 US 310 (1910).

^{xlvi} This seems to have carried the presumption of regularity too far.

^{xlvii} Akande, J.O. *op cit* p. 149.

^{xlviii} (1982) 3 NCLR 1

^{xlix} Okeke, G.N. *op cit* pp. 204-212.

^l Eweluka, D.I.O. *op cit* p. 330.