CONSTITUTIONAL AMENDMENTS IN NIGERIA AND THE UNITES STATES OF AMERICA: ISSUES AND CHALLENGES*

Abstract
The constitutions of Nigeria 1999 and America 1787 in varying terms grant governmental powers to the federal and state governments. The obligations and rights of citizens are provided and protected respectively. There are also procedural steps by which alterations can be made in these respective constitutions. The paper observes that though the similarities are shared structurally between these respective countries, the issue and challenges emanating from constitutional amendment differ. Though there are formal procedural steps to effect amendments provided in the respective constitutions, the gaps in some provisions coupled with inter-play of changing social, political and economic factors among other forces raise issues and challenges in varying degrees thereto. This leads to entertainment of informal amendments by judicial interpretation as a constitutional possibility. Against the foregoing backdrop, the issues and challenges of constitutional amendments in Nigeria and America are examined in comparative terms. It is discovered that the issues and challenges are identifiable as they exists, however solutions to them are more imaginative and speculative than practical.

Keywords: *Amendment, Constitution, Nigeria, United States of America, Issues, Challenges*

Introduction

Governments are put in place by social contract[1], which implies an agreement among members of a society to form and recognize the authority of a centralized government empowered to make and enforce laws governing the members of the society. In absence of this social contract, every man or woman will take matters into their own hands creating a situation that would lead to in the words of *Hobbes* 'A war of all against all', and a world in which 'life was solitary, poor, nasty, brutish and short'[2]. Such a world is alien to human nature so government becomes a necessity. In the context of social contract, the constitution becomes the act of the people not that of government. In fact, social contract in Nigeria and America neigh largely world over refers to the constitution. The American constitution of 1787 and the Nigeria constitution of 1999 have defined the relationships between the people and their leaders for over 200 years and 10 years respectively in these countries. The character of the democratic governmental authority agreed upon by the people via the constitution can be modified or altered. Implicitly in Nigeria as well as America the people can change government authority by changing or amending the constitution[3]. Invariably, the Nigerian constitution and American constitution together with all states of American constitutions[4] provide the means of changing the powers and functions of government; it is conceded that without a provision for change, most constitutions will not survive very long. Revisions may provide a totally new constitution to replace the old one. Courts may alter constitutions by interpreting the wordings of these documents in a new and different ways. Finally, constitution may be changed by formal amendments. In the foregoing contexts, this paper seeks to examine the issues and challenges in constitutional amendment in Nigeria and America. In this direction, the political, social and historical backgrounds as well as other forces that may rear into the fore to impact on our analysis in the Nigeria and America will be considered. Proceed by first clarifying the concepts of constitution; constitutionalism and amendment key concepts in this discourse.

2. Conceptual Analysis: Constitution, Constitutionalism and Amendment

Constitution

A definition of constitution in terms of a single written document that contains the social contract of a nation simpliciter is to construe constitution narrowly. A wider definition of constitution can be deduced from the definition given by Bolingbroke said: 'By constitution, we mean whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs derived from certain fixed principles of reasons … that compose

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[1] An idea that government is a social contract was popularized by thinkers namely; Thomas Hobbes, John Locke and Jean-Jacques Rosseau, see Thomas Hobbes, Leviathan; John Locke Second Treatise on Government, C. B. Macpherson ed., (Indiana Publishing Company); and Jean Jacques Rouseau Basic, Political Writings ed. Donald A. Press (I Hackett Publishing Company).

[2] Thomas Hobbes, Leviathan (ed.) Richard Tack (Cambridge University Press, 1996), cited in J.J. Coleman and others, Understanding American Politics Alternate edition (Longman, 2009) 15.

[3] *Ibid*.

[4] As opposed to Nigerian states American states have their individual state constitutions.

the general system according to which the community have agreed to be governed.'[5] While the basic and narrow meaning of a constitution conceives constitution as 'a document containing, at the very least, a code of rules setting out, the allocation of functions, powers and duties among various agencies and officers of government',[6] the wider meaning accommodates both written and unwritten constitution. The written constitution traces its roots to American constitution of 1787. *Nwabueze* holds the view that a written constitution is a deliberate creation or charter of government while an unwritten constitution is an inheritance.[7]

The nature of a constitution in terms of written and unwritten constitution and; flexible and rigid constitutions bear on amendment processes. A written constitution is usually characterized as a rigid constitution to emphasize difficulty in its amending processes. The rigidity is used in relative terms given the varying degrees of rigidity from country to country that have written constitutions like Nigeria and America. Accordingly, in relation to countries with written constitutions (the rigid constitution) it has been observed that 'some are relatively more rigid than others but there is no constitution that is absolutely rigid in the sense that it admits no change or amendment.'[8] Essentially, the difficulty in amendment that attends rigid constitutions is viewed from the fact that there are laid down procedure in amending such a constitution and the procedure is not ordinary but special. This special procedure may have varying degrees depending on the subject or provisions of amendment as borne out in the 1999 Constitution of Nigeria.[9] Conversely, a flexible constitution usually relates to unwritten constitution but can as well accommodate written constitution in so far as such constitutions are amended or repealed like ordinary law of the land. In this wise, the written constitution does not operate as the supreme law of the land like by express statement or implied from the constitutions of Nigeria and American respectively. Thus it was explained that: 'A flexible constitution can be revoked or amended precisely the same way as an ordinary law can be repealed or amended; such a fundamental or supreme law of the land, for it is not superior to any other law or to the legislature. Two constitutions are usually put into this category – the unwritten constitution of the United Kingdom and the written constitution of New Zealand.'[10]

Constitutionalism

That a constitution is in place in any country does not necessary imply constitutionalism. It is accepted that the concepts of constitution and constitutionalism are inter-linked but they are not coterminous. It is not a tasking scholarly exercise to determine whether a country has a constitution or not as it is a question of an incontestable fact more pronounced in countries with institutionalized written constitutions. It has been reasoned that a determination of 'whether a constitution conforms to the dictates of the constitutionalism cannot be determined without some kind of normative evaluation'.[11] The point being made is that though constitutionalism is readily and most commonly identified with written constitution, but in terms of the principles and ends of constitutionalism, the blueprint is not found in all written constitutions. The foregoing position is strengthened if we consider the fact that a constitution that merely describes the existing system of government as well as the proclamation of the goals of the society, programmes and policies is no less a constitution than the one related ultimately with the concerns of constitutionalism. At this juncture, the question that is germane is what is the concern of constitutionalism or better put the requirement of the idea of constitutionalism? In answer to this question, there is no unanimity among scholars as to what it entails. This is more so, given the fact that there is no singularity or simplicity in identification of political ideas. In any political idea be it relative to models of institutions or instruments, there is always a convergence and divergence of opinions. However, constitutionalism is based on but not limited to the following: popular sovereignty, supremacy of the constitution, representative government, self determination.[12] Flowing from these identified indicators of constitutionalism, we can now appreciate certain tendencies in the definition of constitutionalism. To Bah,

[5] See M. J. Allen and B. Thompson, *Cases and Materials on Constitutional and Administrative Law* (6th ed.) (Blackstone Press Limited, 1990) 3.
[6] *Ibid.* 13.
[7] B.O Nwabueze, *Ideas and Facts in Constitution Making* (Ibadan: Spectrum Books Ltd., 1993) 6.
[8] D. I. O. Ewelukwa, *The Amending Process Under the 1999 Constitution in Nigeria***:** *Issues in the 1999 Constitution.* D. A. Guobadia & A. O. Adekunle, (eds.) (Nigeria Institute of Advanced Legal Studies, 2000) 325.
[9] See s. 9.
[10] Ewelukwa (n. 8).
[11] Norman Dorsen and Others, *Comparative Constitutionalism, Cases and Materials* (USA: Thomson West, 2013) 10.
[12] See Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects in Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspective* (Michael Rosenfield: Duke University Press, 1994) 39, 40 – 42.

Constitutionalism presupposes that there is a constitution in place, that is a fundamental and supreme norm that guarantees the basic rights and freedom of all, and that spells out the powers vested in the government… constitutionalism is not limited to the formal existence of a constitution. It must translate into legal and political acceptance that the constitution is supreme and that constitutionalism values have primacy over all the other norms.[13] To Ewelukwa, a definition of constitutionalism must reflect legal restraint of government and its activities as well as governmental responsibility to the people themselves.[14] In this direction Ogbu recognizes that 'The stipulation of procedure for amendment of a constitution is one of the legal restraint on the government'[15]. It is his further submission that: Since constitutionalism implies the limitation of power by a constitution. It follows that the procedure prescribed by a constitution for its amendment has to be followed; otherwise we cannot really say that the constitution has limited power.[16] The long and short story about constitutionalism is the supremacy of a written constitution in a constitutional democracy. Admittedly, scholars have argued ceaselessly and persuasively that the United Kingdom, New Zealand and Israel that possess no written constitution are still constitutional democracies subjected to unwritten constitution. We do not intend to delve into that foray but for the purposes of the subject of our discussion, we shall approach the idea of constitutionalism from the earlier point submitted in terms of supremacy of the constitution. This is a character of the constitutional democracy shared by both Nigeria and America.

Amendment

The word 'Amendment' has been defined to mean '…to change or modify for the better to alter by modification, deletion or addition'[17]. Conceived in a broad sense if terms of amendment accommodate the word change, then constitutional making or revisions would be regarded as constitutional amendment. A referral to the foregoing definition will not offer us any hope of conceiving revision differently from amendment. Thus, the line of demarcation between constitution making and amending the constitution is not very visible. However, 'from a formal standpoint, constitutional amendments are readily identifiable as much as the constitution itself prescribes how it may be amended.[18] Article V of the U.S. Constitution is clear on the required procedure for effecting amendments'.[19] Conceptually, as well, we can draw a line of demarcation between 'an amendment' and a 'revision'. In Murphy's words: 'The word amend, which comes from the Latin *emendere*, meaning to correct or improve, amend does not mean 'to deconstitute and reconstitute', to replace one system with another or abandon its primary principles. Thus changes that would make a polity into another kind of political system would not be amendment at all, but revision or transformations, in sum, valid amendments can operate only within the existing political system. They cannot deconstitute, reconstitute, or replace the polity. Most constitutional texts authorize only amendments though a few others like, those of Spain and some American states, also provide for revision and the German Basic Law (Art 146) allows for its own replacement by a new text'.[20] In the context of this definition amendments to American constitution of 1787 transforming America from a confederal state to a federal state or that of Nigerian 1963 constitution by 1979 from a parliamentary government to presidential system of government, conceptually will be revisions if not constitution making not amendment. This reasoning will equally apply to amendments to Russian Constitution transforming the countries from socialist society to a democratic free-market economy. In other words amendments properly so called can only be valid amendments when it operates within the existing political system. To all intents and purposes constitutional amendments essentially dealing with supreme law of a nation requires greater consensus or some more forceful authoritative imprint than ordinary law making. Against the foregoing perspective, constitutional revision and constitutional amendment assume or become replications of constitution-making at least. In that case it should be placed on a pedestrian higher than enacting ordinary legislations in terms of bringing above-adaptation and changes.

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[13] I. Bah, *Harnessing Past Lessons to Build the Future*. Osiwa News, A Quarterly Publication of Open Society Initiative for West African, July, 2007. 6.

[14] D. I. O. Ewelukwa, *The Rule of Law in Action* (200 – 2001) NJR Vol. 8 1 at 4.

[15] N. O. Ogbu, 'Constitutionalism and Constitutional Appraisal of the Procedure for the Recent Amendment of the 1999 Constitution', *NJI Law Journal*, 2010 Vol 1. At 103.

[16] *Ibid*.

[17] B. A. Garner (ed), *Black's Law Dictionary*, 8th ed., (United States of America: Thomson West, 2004) 90.

[18] Dorsen (n. 11) 89.

[19] The Nigerian Constitution of 1999 as amended in Sections 9 provides how the constitution can be amended as well.

[20] W. F. Murphy, 'Merlins Memory: The Past and Future Imperfect of the Once and Future Policy', in *Responding to Imperfection: The Theory and Practice of Constitutional Amendments* (Stanford Levinson ed.) (Princeton: Princeton University Press, 1995) 163, 177.

3. Formal Amendment Process

Inherent in most written constitutions are provisions for amendment which subsists as a sign of recognition of need for change by the framers of the constitution. It has been observed referring to American Constitution of 1787 that 'Article V of the constitution represents the framers best effort to reconcile the need for change with the desire for stability in government structures'.[21] As well, it was Madison who stated that the amending procedures are designed: To equally guard against that extreme facility, which would render the constitution too mutable, and that extreme difficulty which might perpetuate its discovered faults.[22] For the additional reason that 'there is no perfect constitution anywhere in the world'[23], both constitution of United States of America and Nigeria provide formal amendment procedures. For example, in American constitution under Article V two stages amendment process is created: proposal and ratification. Both are necessary for an amendment to become part of the constitution. The constitution provides two alternatives for completing each stage. These procedures are as stated there under after proposal as follows: (a) Passage in House and Senate by two-thirds vote of the legislature of three-fourth (thirty-eight) of the states, (b) Passage in House and Senate by two-third votes then ratification by convention called for the purpose in three fourth of the states, (c) Passage in a national convention called by congress in response to petitions by two-thirds of the states, and (d) Passage in a national convention as in (3); then ratification by convention called for the purpose in three-fourth of the states. On her own part, the 1999 constitution of Nigeria provides for six types of amendment. Confirming this *Ewelukwa* said: There are separate procedures for creating new states, for adjusting the boundaries of states, for creating new local government areas and for adjusting the boundaries of local government areas… for amending the entrenched provisions such as the provisions relating to human rights guarantee … finally … for altering any other provisions of the constitution (i.e. not being a provision covered by the amending process mentioned above.[24]

Essentially, it is the National Assembly that is only constitutionally empowered to alter the provisions of the 1999 constitution by an Act as provided under section 9. However, such alterations will subsists in the following circumstances as constitutionally provided. Section 9(2) An act of the National Assembly for the alteration of this constitution, not being an Act to which section 8 of the constitution applies shall not be passed in either House of National Assembly unless the proposal is supported by the votes of not less than two thirds majority of all the members of that House and approved by resolutions of the House of Assembly of not less than two-thirds of all the state. Section 9(3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the Houses. Section 9 (4) For the purpose of section 8 of this Constitution and of subsections (2) and (3) of this section, the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in section 48 and 49 of this Constitution.

4. Informal Amendments: Judicial Interpretation

Having understood that the function of the judges is to decide what the law is in disputed cases, Wheare reasoned that since the constitution is part of the law, it also falls within the purview of the judges[25]. In his precise words in a situation where: 'It may happen that there appears to be some conflict between the law of the constitution and some other rule of law or some action, whether of the legislature or of the executive, if the judges are to decide what the law is in such a case, they must determine the meaning not only of the rule of ordinary law but also of the law of the constitution. And if, in terms, a constitution imposes restrictions upon the powers of the institutions it sets up then the courts must decide whether their actions transgress those restrictions, and in doing so, the judges must say what the constitution means'.[26] To give judicial leverage to the above statement however not without logical justification of the powers of court to declare what the constitution means even when there is no express

[21] T. E. Baker & T. S. Williams, *Constitutional Analysis in a Nutshell*, 2nd ed. (St. Paul, MN-USA: Thomson West, 2003), 41.

[22] James Madison, Federalist Paper No. 43 Quoted in *The Federalist Papers* Clinton Rossier, ed. (New York: New American Library, 1961) No. 43, 278.

[23] A. Oluyede, & D. O. Aihe, *Cases and Materials on Constitutional Law in Nigeria* (2nd ed) (Ibadan: University Press Plc, 2003) 817.

[24] Ewelukwa (n. 8)

[25] K. C. Wheare, *Modern Constitutions* (2nd Edition) (London: Oxford University Press, 1966) 100.

[26] *Ibid.*

constitutional authority to that effect, the 1803 case of *Marbury v. Madison*[27], becomes instructive. In declaring an act of congress void, Chief Justice Marshall said:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution disregarding the law, the court must determine which of these conflicting rules govern the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

The gravamen of the issue is that every institutional creations of the constitution must act *intra-vires* of such powers. By the character of the courts implicit in their functions, they are properly suited to define the operating parameters of such constitutional creation including the judicial arms (courts) themselves; as it were detecting *ultra vires* acts as well. This is what gave rise to power of courts to interpret the constitution. In the America scenario just scrutinized above, it is clear that the power of court to interpret the constitution is an inference from the constitution and from the nature of the judicial function. However, in Nigeria this duty of the court finds an explicit expression from the constitution itself which by its preamble pronounces itself to be the supreme law.[28] It should be mentioned that the Nigerian and American examples above that are in terms of express and implied constitutional provisions of the constitutional interpretative powers of the court do not hold true in every country. The better proposition will be that the interpretative or better put the judicial review powers of the courts varies in extent from country to country, however, in accordance with the terms of the respective constitutions. In somewhat generic sense, the courts do not take the initiative in activating its constitutional interpretative roles. As *Wheare* puts it mildly, 'It interprets a constitution only when, in course of proceedings before it upon a case, a question arises concerning the meaning of the constitution'[29].

At this juncture, having set out the background above, we now focus on the subject of our enquiry that is our journey of discovery in determining how judicial interpretation decision can change a constitution. For the sake of scholarly and logical discussion, we can ascribe the courts with the powers of amending the constitutional informally through judicial interpretation, but it will be safer to emphasize first and foremost the fact that the courts cannot amend the constitution albeit formally. In our narrow conception of what amendment means in terms of alteration by deletion or addition the court cannot effect a constitutional amendment irrespective of the canon of interpretation deployed for that purpose. Deletion or addition are the words the courts cannot employ in exercise of their interpretative powers expressly as by deletion or addition of words to the text of a constitution the courts will be acting within the terrain of formal amendment – the exclusive preserve of the legislative branch. In this direction, Wheare sounded a note of warning when referring to the courts and their inability to formally change a constitution said: 'They cannot change the words, they must accept the words, and so far as they introduce change, it can come only through their interpretation of the meaning of the words. Courts may by a series of decisions, elaborate the content of a word or phrase; they can modify or supplement or refine upon their previous decisions; they may even revoke or contradict previous decisions. But throughout, they are confined to the words of the constitution'[30].

In the context of judicial interpretation it is conceded that with the availability of different construction techniques or mechanism, judges faced with vague or ambiguous words, will have the latitude to supply from their own minds true intent of the framers of the constitution. It is equally conceded that judges are flesh and blood as such may be changeable in their opinions given their fallible nature as 'human beings in their most infinite telepathy'[31]. It is also true as Wheare observed that 'refined distinction and technical niceties may appear to do violence to common usage and common sense … and judges may exceed their proper functions'. For the reasons we conceded above, the system of judicial interpretation may be under the spotlight facing barrels of scholarly criticisms and denunciations. This indeed had been the order of the day with many sympathizers following the famous decision of

[27] 5 U. S. (1 Cranch) 137, 2 L. ED. 60 (1803) *The case is fully cited and discussed* in Braveman, W. C. Banks and R. A. Smolla, *Constitutional Law: Structure and Rights in our Federal System* (3rd ed.) (New York: Mathew of Company Incor., 1996) 23.
[28] Wheare (n. 25) 102.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

the American Supreme Court in the case of *Marbury v. Madison*[32]. However, it suffices to state that the notion of courts by their interpretative process embarking on secret function of law making has the colour of an erroneous notion. Such imputation is a wrong characterization of the courts inherent powers which is devoid of law making. The correct preposition should be and remain that the primary function of the court is to interpret the law and not to amend the words of a statute or constitution. As such the result of the exercise of the legitimate interpretative function of the court however it brings about changes in pre-conceived meanings of a constitution cannot be imputed to the court as having an inherent power of secret law making function. Our exposition of the act of judicial interpretation or an informal amendment process cannot be judged best if we do not make as part of our recipe some concrete cases for proper digestion. This will be limited to America and Nigerian the subjects of our enquiry.

5. American Experience

The American constitution is crafted with precision and not greatly detailed like the Nigerian constitution. As such mere changes in economic, social and technological conditions had given rise to an enhanced power of the central government by judicial interpretation without the actual words of the constitution being altered. Essentially, the courts by sheer mastery of art and science of conceptions of words, the words in an old constitution can be construed to embrace new conditions and address contemporary concerns circumstances. The first case in point we shall examine is the case of *Gibbons v. Ogden*[33] where the Supreme Court in 1824 was called upon to interpret the words of the constitution regarding inter-state commerce. The words according to the constitution are to the effect that congress shall have power to regulate commerce among the several states'. The Supreme Court through Chief Justice Marshall in rejecting the proposal submitted to it to adopt a strict construction, in other to limit the word commerce to traffic, to buying and selling, or the interchange of commodities to exclude navigation held that: 'This would restrict a general term, applicable to objects, to one of its significations. Commerce, undoubtedly, its traffic, but it is something more; it is intercourse. It describes commerce intercourse between nations, and parts of nations, in all its branches and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on admission of the vessels of the one nation into the ports of the other, and he confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling or of batter'.[34] On the issue of what commerce 'among the several states' meant leaves no doubt in the mind of the court that it must include a form of power of regulating commerce inside a state. Thus, the court held that contextually: 'The word 'among' means intermingled with. A thing which is among other is intermingled with them. Commerce among states cannot stop at the external boundary line of each state, but may be introduced into the interior'.[35]

The limitation to the foregoing is gleaned from the courts assertion that: 'It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary comprehensive as the word 'among' is. It may very properly be restricted to that commerce which concerns more states than one… the completely internal commerce of a state, then, may be considered as reserved for the state itself'.[36] As to what 'regulate mean the court held that:

> 'This power like all other vested in the congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.'[37] The sum total of the decision in *Gibbons v Odgen* is the widening of the meaning of the words under scrutiny. Interestingly, many decades after successive cases where the court have been called upon to decide where inter-state commerce ended and intra-state began, a causation approach had been adopted, nevertheless, the powers of the congress have been extended on every occasion. This has always been the situation despite the fact that such a question has tasked many a judge to answer for the reason explained by Wheare that 'the industrial, commercial, and transport revolution, which converted the United States into one closely inter locked economic and social system, made it extremely difficult to answer this question'[38]. Courts extended commerce powers of the congress by interpreting into their powers situation where inter-state and

[32] *(n. 27).*
[33] 22 US (9 Wheat) 1.6 L. Ed. 23.
[34] Ibid. 189 – 91.
[35] Ibid.
[36] Ibid, 194 – 5.
[37] Ibid 196.
[38] Wheare (n. 25) 107.

> intra-state transactions are related[39] and when such relationships allows such control to protect the commerce from burdens and obstruction[40] as well as protection from against discrimination interstate commerce[41].

We have earlier observed that the terms of the letters of the constitution may remain unaltered contextually or by way of formal amendment yet by act of judicial interpretation meanings can be read differently. The American Supreme Court in *Plessy v. Ferguson*[42] and *Brown v. Board of Education*[43] offer classical examples. *In the Ferguson's case,* the Supreme Court in 1896 declared that racial segregation was legally permissible under the constitution. Nearly 60 years later in *Brown's case*, the court concluded the opposite. Quite remarkably, it was observed that 'the language of the constitution had not changed in the meantime with regard to this issue, yet the court, with different members, in a different time, read the meaning of the constitution differently'.[44] It is clear from decision of American Supreme Court that amendments to constitution are produced when the constitutional text remains the same, but the meaning of the text is read differently. This type of amendment is viewed as soft amendment imbued with an inbuilt additional adaptability to the system which in essence represents the goals of the framers of American constitution.[45] In essence, hard amendments in terms of the actual change of the text of the constitution, may not be necessary in given circumstances when there is a ready alternative in the nature of judicial interpretation. It suffices therefore to observe that in the American of 1787 to 1954 it would have been a near impossibility like in South African of Apartheid dispensation or even Nigeria of colonial era' for a constitutional amendment to be effected stating that segregation was unconstitutional, through the instrumentality of judicial interpretation.

6. Nigerian Experience

By virtue of the constitution and statutory laws in Nigeria, the superior courts have inherent judicial powers to interpret all laws in force in the land. However, these powers are subject to the jurisdictional competence of the superior court in question. On the question of whether this interpretative role of the courts extends to amendment, it was asserted that: There are two broad schools of thought in Nigerian jurisprudence on the issue of whether judicial powers to interpret laws is confined only to declaring what the meaning of the provision in dispute is or whether it extends to amending provisions. The one if characterized as the literal approach to interpretation while the others is described as the purposive approach.[46] By adoption of either approach, literal rule or purposive approach in exercise of its constitutional power of interpretation, there is an added judicial capacity possessed by Nigerian courts which flows from such an exercise that brings about an amendment and an enactment of laws in an informal way. Arguing in support of this contention, it was said that: 'Section 1(1) of the Constitution declares its provisions supreme while sub section 3 empowers court with authority to invalidate any laws inconsistent with its provisions, section 6(1) and (2) vest judicial power of the federation and state in the specified superior courts of record thereby empowering them to interpret laws and in the process amend statutes or even enact case laws. To this extent, it can be said that Nigerian courts possess inherent judicial capacity not only to amend but also to enact laws (Emphasis supplied)'[47]. In the foregoing direction, the Nigerian courts have correctly or wrongly interpreted the constitution in such a way as to give it new meaning. It is instructive to note the cases of *Adegbero v. Akintola*[48] where the Supreme Court's adoption of liberal rule of interpretation to impeach the removal of a premier by a governor was later reversed by the Privy Council based on literal construction of the written instrument – the constitution of the Western Nigeria as at then.[49]

To illustrate that this judicial power of interpretation can lead to informal way of amending the constitution under 1999 Constitution, the case of *People Democratic Party (PDP) and Anor v. Independent National Electoral Commission (INEC) & Ors*[50] offers an example. The gravamen of the matter was that *Alhaji Atiku Abubarkar* was

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[39] *Houston, E. & W. Texas Railway Co. v United States 234 US 342 at pp. 351 - 2*
[40] *National Labour Relations Board v. Jones and Laughlin Steel Corporation 301 US 1 at pp. 36 and 36*
[41] *City of Philadelphia v. New Jersey* 437 US 61 798 s. Cct. 2531, 57 L. Ed. 2d 475 (1978)
[42] I & II 347 U.S. 483, 74 S. Ct. 686, 98 L Ed. 873 (1954)
[43] 349 US 294, 75 S. Ct. 753 99L Ed. 1083 (1955)
[44] Coleman (*n. 2)* 97.
[45] Ibid.
[46] A. H. Yadudu, *Amending Process Under Nigerian Law and Constitutions: Trends, Issues, Dilemmas and Process in Nigeria. Issues in the 1999 Constitution,* (n. 8) 303
[47] *Ibid* 303 – 304.
[48] (1962) AO 11 N.L.R., 442.
[49] (1962) 1 AU N.L.R., 6465.
[50] (1999) 7 S. C. N.L.R. 297.

first elected governor of Adamawa State before being elected as the vice president to *Olusegun Obasanjo*, the position he assumed as against the governorship position. The question then was whether his deputy can succeed him under the law. By the provisions of Section 37(1) of the State Government (Basic Constitutional and Transitional Provisions) decree No. 3 of 1999, death of a governor was the only prescription or ground of succession by a deputy to the office of the governor. Based on the political exigency at the material time, the Supreme Court of Nigeria in interpreting the word 'die' gave the widest conceivable meaning of it by placing reliance on Collins English *Theasaru*[51] where the word 'die' was synonymous with words like vanish, wilt, wither, fizzle out and held that: 'The meaning given by these words (as underlined) to the word 'die' is wide enough, in my opinion to embrace what *Alhaji Atiku Abubakar* did in relinquishing his mandate to occupy the office of Governor of Adamawa State, I will therefore give to the word 'die' a wider meaning than had been given to it by the Court of Appeal. Consequently, I hold that by the provision of Section 37 subsection (1) Decree No. 3 of 1999, the 2nd respondent as Deputy Governor elect is entitled to be sworn in as governor of Adamawa State. This accords with the justice of the case'.[52] In *Fawehinmi v. I.G.P.*[53], the Supreme Court held that the immunity conferred on the president, vice president, governor and deputy governor by section 308 of the 1999 constitution does not confer on any of them immunity from police investigation. In *Attorney General Lagos State v Attorney General of the Federation*[54], the Supreme Court held that the word state used under section 20 of the 1999 constitution in relation to protection of the environment refers to Nigeria as a state not the individual states that make up the federation, and in relation to physical and urban planning matters within a particular state of the federation, it is that particular state that has the exclusive legislative powers for the reason that same is a residual matter.

7. Issues and Controversies

There are so many issues and controversies that are involved in constitutional amendments. These issues and controversies in terms of resolved or unresolved constitutional matters which still generate current interest are however diverse in countries of Nigeria and America. It will not be possible for us to exhaust all the potential issues and controversies in constitutional amendments involved in Nigeria and America but a few examined under the heads here under will suffice to drive home some points.

8. Legitimacy of Constitution

The legitimacy of a constitution relates to issues bordering on loyalty, respect, obedience and confidence of the generality of the people to the constitution as the peoples act. *Nwabueze* holds that 'in order that a constitution should have legitimacy in the public eye, the people should be involved in the process of its making. Its form and contents should be subjected to public discussion.'[55] In the light of this, the crucial question is what do we make of the 'we the people…' in the preamble of these respective constitutions. The phrase, 'we the people… do hereby adopt, enact and give ourselves this constitution', was entrenched in the preamble to enforce the Republican Status of the American Constitution. That is to say that the constitution is that of the people which they freely gave to themselves a true social contract. The feature of 'we the people…' in the 1999 Constitution of Nigeria is generally seen as mere incantations as it is very doubtful if its legitimacy is rooted in the people of Nigeria. In an ideal situation, the body charged with drafting a constitutional proposal should consult widely and at the end of the exercise have the drafted copy of the proposal submitted to the people at a plebiscite before final enactment. It is against the foregoing backdrop that it was said that 'the 1999 constitution has no legitimacy rooted in popular consent or a contract between the political communities or states that comprises the country. It is the product of non elected bodies composed of and by a military Junta'.[56] Interestingly, therefore, there has been a call for sovereign national conference that will provide a platform for the Nigerian people to finally give themselves a people's constitution.

The various amendments carried out under the 1999 constitution by the people's representative in some measure watered down the tempo of the feeling that the constitution is not peoples constitution leaving such issues to engage only scholars spilling their inks in such argument. However, we are all witnesses to the setting up of a national conference in the twilight of President Goodluck Ebele Jonathan the past administration by executive fiat to address the issues in Nigeria constitution that called for amendments. The last word may not have been heard on the National conference saga but for our purpose, the idea of the national conference outside the provision or

[51] See Z Form 2nd Colour Edition, p. 32.
[52] *PDP & ANOR v. INEC*, op. cit No. 37 at 327.
[53] (2002) 7 NWLR (pt. 767) 606.
[54] (2003) F.W.L.R (Part 168) 1972.
[55] Nwabueze. (n. 7)
[56] O. Igbuzor and J. Ibrahim, eds., *Citizens' Approach to Making a people's Constitution in Nigeria* (Lagos: Joe-Tolalu & Associates, 2005) 3

procedural requirements of constitution on how amendment will be effected on its own is an issue that was not fully addressed. The controversy is the lack of constitutional power under the 1999 constitution to carry out an amendment of any of the provisions of the constitution through a national conference. It does not matter the lofty goals to be achieved. As well, it does not matter the measure of acceptance of the people of any of the amendment proposals; the fact remains that peoples representatives at the centre and at the state levels in terms of the National Assembly and State Assemblies being in place are constitutionally empowered to stir the ship in that direction not any other body by whatever nomenclature save instances where the people are involved at proposal stage directly for example in matters relating to state and local government creations as well as boundary adjustments by referendum.

9. Difficulty in Amending Process

For operating a written constitution as such a rigid constitution, the first issue and challenge that rear into the fore in constitutional amendment in Nigeria and America is the difficulty in amending process. It has been said with regard to the American Constitution that 'amending the constitution was made difficult but not impossible'[57]. The American constitution was indeed designed in such a way by the framers without the anticipation of regular and detailed amendment. The precise crafting of the terms of the constitution was invariably to allow regular law making in the nature of statutes to respond to economic, political, cultural and moral developments in American society[58]. Clearly, amendment of the constitution calls into operation representative democracy where substantial responsibility for amendment is given to the representatives of the people at the federal as well as the state levels of legislative arms. Being a super majorian arrangements in both America and Nigeria for example 34 senators or 146 representatives or any combination of 13 states legislative chambers in America are sufficient enough to defeat a proposed amendment. In the same wise, 14 states Assemblies can as well defeat a proposed amendment in Nigeria. This is because the required percentage will not be attained in the above situations to effect an amendment. Constitutional amendment therefore is not just a matter of course. It has been estimated that in the constitution of America that has lasted for well over 200 years, there have been more than 10,000 bills introduced in congress to amend the constitution, but only 33 garnered the necessary two thirds vote in both houses and proceeded to state.[59] As well out of the 33 that proceeded to the states, only 27 received the necessary ratifications of three-fourths of the states. Interestingly, the twenty seventh amendments of 1992 which requires that any pay increase for members of congress can go into effect only after elections passed the proposal stage as part of the original bill of rights and was submitted for ratification in 1789 but was concluded in 1992 about 203 years thereafter. It was thus said of the 27th amendment that: 'It had been submitted to state, in 1789 without a time limit for ratification but languished in a political netherworld until 1982 when a university of Texas student, Gregory D. Watson, stumbled upon the proposed amendment while researching a paper. At that time only eight states had ratified the amendment. Watson took up the course prompting renewed interest in the idea. In May 1992, ratification by the Michigan legislature provided the decisive vote, 203 years after congressional approval of the proposed amendment'.[60] Given the fact that by modern practice, USA Congress includes term limits usually seven years in proposed amendments, the longevity or ghost of the 27th Amendment between proposal stage and ratification may have been finally buried. An intriguing but somewhat a typical academic jaw breaking question has been posed by a university of Texas law professor named *Sanford Levinson* in relation to amendment under the American Constitution which 'is a constitutional amendment adopted in accordance with the provisions in Article V really an amendment?[61] This question was considered to be relevant in terms of the current American predicament. As explained: 'In one sense, of course, an amendment approved by two-thirds of each house plus three-fourths of the states does represent change in that it tacks on additional words that modify to some degree the preceding text'. The issue was this, the faith of eighteenth amendment. It is true that when the American Congress and the states approved an amendment prohibiting 'manufacture, sale, or transportation of intoxicating liquors' after the World War I, the result was not only to ban alcoholic beverages but to alter the structure of federal relations.[62] As further observed 'where previously the constitution had allowed congress to regulate interstate commerce only, the eighteenth Amendment allowed it to extend its reach so as to cover at least one aspect of intra state commerce as well'[63]. However, the eighteenth amendment did not change anything. Its ratification following the complicated provisions set forth in Article V only confirmed that rules dating from the late eighteenth century were as binding as ever. So *Lazare*

[57] T. B. Baker & J. S. Williams, *Constitutional Analaysis in a Nutshell*, 2nd ed. (USA: West Publishing co., 2003) 42.
[58] *Ibid* 43 – 44.
[59] *Ibid*., 44.
[60] L. B. Richard, 1789, *Amendment is Ratified but Now the Debate begins*'. New York Times, 8 May, 1992. A1.
[61] See D. Lazare, '*The Velvet Coup in Taking Sides, Clashing Views on Controversial Political Issues'* (13th ed.), G. McKenna & S. Feingold (eds.) (United States of America: McGrew Hill, Dyshkin, 2003) 103.
[62] *Ibid.*
[63] *Ibid.*

reasoned that 'rather than a departure from past practice, prohibition therefore represented a continuation'[64]. It is to be noted that the amendment met its waterloo by subsequent amendment by virtue of 21st Amendment.

10. Presidential Assent

From the text of section 9 of the 1999 Constitution and Article 5V of the American constitution, there is no decipherable or explicit role for the executive provided. In other words, a president need not sign and cannot veto amendment proposal. Amendments from proposal to ratification are clearly the province of the legislative arms of government as against the executive and judicial arms. American courts have refused to play role in the process of considering amendments either substantively or procedurally on the premise that question are left to the political branch. However, judicial role begins once an amendment is ratified and becomes part of the law of the constitution which is the province and responsibility of the judiciary to interpret.[65] The American experience shows that none of her presidents had ever interfered in the amendment process as chief legislator in a manner of giving or withholding assent. It is however within the constitutional right of the president to initiate or participate in the formation of public opinion supporting or opposing a proposal to amend the constitution. In America therefore, presidential assent is a non issue, however in Nigeria, it was at the center of all issues at the time the very first alteration of the 1999 constitution was to be made in 2010. The main issue as we noted earlier was whether the assent of the president is required in constitutional amendment in Nigeria. The issue became a matter for the court to decide while *Olisa Agbakoba* then National Chairman of Nigerian Bar Association approached the Federal High Court Lagos, the Nigerian Bar Association approached the Federal High Court Abuja to decide. Whether within the meaning of section 9 of the constitution of the Federal Republic of Nigeria 1999, a provision of the constitution can be altered in a manner other than by an Act of the National Assembly. Whether having regard to section 1, 2, 3 of the Authentication Act Cap AZ laws of the Federation of Nigeria, an alteration of the provisions of the constitution can become law without the assent of the president.[66] In the suit filed by *Agbakoba*, the court was being asked to in view of section 38(1) of the 1999 constitution, the constitution Amendment Act passed by the National Assembly cannot take effect as law without the assent of the president of Nigeria he argued. He prayed the court on that premise to nullify the constitution (First Amendment) Act 2010[67]. The National Assembly was of the view that Constitutional Amendment bill just as it is the practice in USA does not require presidential assent[68]. The argument was reinforced on the premise that if presidential assent is required, governor's assent will also be required as the act or bill was passed by not just the National Assembly but in conjunction with all the states House of Assembly.[69] This argument was dismissed on the premise that state governor's assent to only 'laws' of State Assembly not 'Acts' which is the province of the National Assembly. *Nwabueze*[70] relies on the Interpretation Act to contend that there is no way law inclusive of law on amendment of the constitution can be properly made without the assent of the president. He argues that Section 9(2) merely creates additional hurdles but does not replace section 58 of the constitution[71] in terms of the form enacted law takes.

However, *Ekweremadu* was insistent on his position and the majority position of National House of Assembly arguing further that: Section 9 of the constitution sets out procedures for the amendment of the constitution, Section 9 is exhaustive in outlining the steps that need to be taken, so if it had wanted presidential assent, it would have made it subject to section 58 or it would have said so explicitly. We borrowed that section from the American Constitution and then in all the amendments spanning over 200 years that were made in the American constitution, there was no time the American president signed the amendment to the constitution.[72] Both sides of the divide in this argument, *Ekweremadu* on one side and *Nwabueze* on the other side had quite persuasive arguments with scholars, politicians, commentators supporting either side. Whichever side of the argument that is correct may not receive a judicial blessing from the Supreme Court. The matter did not go beyond the Federal High Court, the position is presently is that the presidential assent is required to every Act of alteration of the Nigerian constitution

[64] *Ibid*.
[65] See Coleman v Miller, 307 US 437 (1939).
[66] See Daily Independent, Thursday, August 2010 p. 3. Cited in Ogbu (n. 15) 108.
[67] See Guardian, August 3, 2010 p. 1 and 2 & Ogbu *ibid*.
[68] 'It has been settled by practice, which is generally considered, albeit without sufficient reason to have been ratified by judicial decision, that resolutions of congress proposing amendments to the constitution do not have to be submitted to the president' See E.S Corwin's, The Constitution & What it means Today, 14th ed. H W Chase and C.R Ducat – eds. (New Jersey: Princeton University Press, 1978) 38.
[69] I. Ekweremadu, 'Why President Doesn't Need to Sign Constitutional Amendment, Excerpt of an Interview by Ike Ekweremadu, Deputy Senate President, the Guardian Wednesday July 2010, p. 9.
[70] Ogbu (n. 15) 108..
[71] Section 2(1) Interpretation Laws of Federation 2004.
[72] Ekweremadu (n. 69).

as opposed to United States of America. The implication of this challenge to a young democracy like Nigeria is the fact that presidential assent is not a rubber stamp of the National Assembly. It therefore follows that to him whom the power of assent vests is the corollary power to withhold assent or we may call it veto power. Interestingly, if constitutional amendments is the alteration of the charter of the people by the people themselves through their representative, it beats one's imagination that after going through the procedural rigors of alteration, the last act will be left for one man – the president here we are offered a classical example of how difficult and tortuous a journey can be in the arena of constitutional amendment.

11. Structural Imbalance

If the Americans cry that by act of judicial interpretation, the center continuously increases its powers as we saw under commerce clause as well as relying on elastic clauses attached to the enumerated legislative powers of the Federal Government, Nigerians will groan because in the case of Nigeria centrist provision are entrenched in our federal constitution. There has never been a divergence of opinions as to whether Nigeria practices true federalism, the verdict has always been that the country is structured to favour unitary structure in virtually all important aspects of the polity. That is why issues such as state police and fiscal federalism are burning issues in Nigeria today. The only way to address some of these issues is by constitutional amendment aimed at 'stripping the federal government many of its powers and devolving same on the lower tiers of government'[73]. It is no longer news that the federal government has always maintained that the sovereignty of the nation is not negotiable. There are equally popular calls for the 'restructuring of the federation and redefining the terms of association of the various nationalities and geopolitical entities making it up'[74]. The issue is that it is through constitutional amendment that the restructuring will be possible. The questions then is: do we go back to most of the 1963 arrangements when the people produced what may be termed the first autonomous constitution granted the 1960 constitution was styled independent constitution?. How do we address the issue of local government autonomy, revenue sharing formula, secularism and imbalance in the number of states within the geo-political zones and other legitimate demands? These issues are real but greater is the challenge posed by these issues in terms of constitutional amendment. Some of the issues like state creation touch on amendment of the entrenched provisions of the constitution of 1999 which has never been amended up to date. These entrenched provisions include fundamental human rights provisions, state and local government creations, state and local government boundary adjustments.

The imperativeness of this challenge can further be explained if we consider the fact that within the political arrangements called geo-political zones, only the South East have five states as opposed to six or seven in other zones. The fairness of the demand for an additional state within the South East is legitimate and accords with the principles of equity and fairness and thus cannot be impeached. However, other segments of the country have their own legitimate demands in terms of resources control, other forms of fiscal independence and state policing. Based on the foregoing situations, restructuring along those lines by constitutional amendment leaves us with only the option of trade by barter. The South East will be given an additional state, in exchange for a measure of full resource control by the oil producing region over their natural resources and something else the northern part may demand. The terms of compromises may not augur, well for the centre so the centre will readily oppose it. That is why the challenge of restructuring is daunting- along the terms of the current agitations- to wit resource control state creation state police, revenue sharing formula among others. In the same vein in American federation, the principle of Electoral College has been an issue that has not been able to be resolved by constitutional amendment. There are other contentious issues such as same sex marriage and burning of national flag. The American founding fathers settled on democracy based on the will of the people, a democracy where individual vote counts regardless of gender or sexual orientation as well as place of residence. This was achieved in all spheres except in presidential elections where Electoral College mould method still holds sway. An echo restating the popular feelings of most Americans was voiced out when Al Gore said: 'We want a democracy that does not give some states greater clout in presidential elections and other states that are multiracial and urban-less clout merely because something called Electoral College says that this ought to be'.[75] He further remarked that, 'It is effectively impossible to change the Electoral College by amending the constitution'. Some seven hundred proposed amendments have been introduced in Congress over the last two centuries in an effort to reform or abolish this system… yet all failed. Hilary Clinton … was the last to try, and she too failed also'[76]. It gleaned from above the issue of Electoral College where the election of a president of United States of America may end up not being elected by popular vote but outcome of Electoral College is a live constitutional issue. This was the fate of Al-Gore in his presidential contest with Bush, he won by popular votes but Bush was returned as president by the outcome of Electoral College. The same fate of

[73] Yadudu, (n. 46) 312.
[74] *Ibid.*
[75] See Lazare, (n. 61) 102.
[76] *Ibid.*

electorate college victory dislodged Senator Hilary Clinton from riding to the seat of power in Washington on popular votes. In Nigeria it will be unthinkable that a person with close to two million votes ahead in popular mandate will not be allowed. But the greater challenge is why is the Electoral College still on the books all these donkey years till dates? The simple reason is the states that benefit disproportionately from Electoral College never consent to the slightest alteration of the status quo. Even the small states as observed in there greater numbers are inclined not to unsettle the status quo. What a challenge!

12. Concluding Remarks

Perfection may be the aim of every constitution but no constitution has ever assumed a perfect nature. In giving the world its first ever written constitution in modern era, the United States of America announced itself as a beacon of light to the whole world. Nigerians by not just having a written constitution as well but also structuring the nation in similar fashion based on the terms – federalism to American constitution have either seen the light or deliberately want to feel the light. The ultimate experience will be unity in diversity. By making the written constitution the law of the sovereign, it announces itself as the ground norm subject to none but to itself. It is therefore unthinkable that a well thought out constitution will not provide for its amendment given that it is a document for now and the unseen future. In the light of this, the Nigerian and American Constitution spelled out the procedure for their amendments. However, amending the constitution as we have shown is not just looking at the procedure and following it to the letter. Indeed, there are hydra-headed issues that rear into the fore which at times threaten the very existence of a nation if not properly handled in course of constitutional amendment. An attempt to replace federalism with unitary structure by Decree Number 34 under Ironsi is still a history lesson to Nigeria that will not go away as long as Nigeria exists as a country. We are not forgetting the American Civil war between the South and the North. In the history of constitutional making in Nigeria in particular, it has always been one issue or controversy or the other. However, all the issues stemmed from the fact that the years of military rule left the constitution after each epoch made to usher in democratic rule being questioned not only its legitimacy not its legality, but as well as well as its imperfections and distortions of all ideals of the federalism. When constitutions are not truly people oriented, the tendency is that people will distance themselves from such a constitution. The problem with the 1999 constitution despite its acceptance was generally lack of legitimacy. Successive government starting with Obasanjo regime to date tried to thinker with it to give it a semblance of peoples constitution. At the end of the day, the issue and challenges like making room for third-term provision, as against two terms for presidents and governors state creation were overwhelming that nothing crystallized until 2010 when three alterations Act were passed.

It is evident that the issues and challenges relative to constitutional amendments will not go away anywhere in the world including Nigeria and America. As society evolves and further develops, the issues will change. Today the most crushing issue in America may be gun-control tomorrow another will rear its ugly head. In the same way today the issue in Nigeria may be re-structural along the lines of resource control and state police tomorrow it may be greater regional autonomy or fiscal independence of states. In Nigeria of modern era, it is always easy to call for sovereign national conference under whose umbrella all the national questions will be raised and addressed and we will all be happy thereafter. Whatever motivations that propelled the setting up we have not bordered to pause to ask why in over two hundred years of existence of the greatest nation on earth – America, a national convention has never been called or tried in proposing a constitutional amendment. We submit that if such attempt were to be made, the issues or questions will be glaring for all to see. First, the American constitution does not specify the number of delegates who should attend nor the method to be chosen as well as the rules for debating and voting on proposed amendments among others. Invariably, the very idea of national convention evokes confusion of varied proportions of which the major one will be setting limits if any on the business of the convention. We can call to mind the fact that the convention in Philadelphia in 1787 was charged with the responsibility of revising the objectionable provisions of the Article of Confederation of 1776, but it ended up drafting an entirely new charter. The great poser now is assuming a national convention is called to consider a particular amendment; would it be within the bounds of the convention to rewrite the American constitution? The answer exists in our imaginations or in our diverse conclusions, however no one really knows. In the same light no one really knows all the solutions to the issues and challenges in constitutional amendments in America and Nigeria, we can identify them as they presently exist, nothing more nothing less.