

**LEGISLATIVE DRAFTING METHODS FOR ALTERATION OF
CONSTITUTIONS: LESSONS FROM NIGERIA AND THE KINGDOM OF
LESOTHO 1999 TO 2023.**

BY

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BEING

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LAW, LEGISLATIVE DRAFTING (LLM).**

MARCH 2025.

DECLARATION

I, **CHINWEMERI SERAH UZOIGWE**, with Matriculation No: **PG/NLS2215154**, hereby declare that this dissertation is the product of my own research efforts, undertaken under the supervision of Dr. Tonye Clinton Jaja, and has not been presented by anybody previously, either in whole or in part to this Institution or any other institution of higher learning for the award of degrees of any kind or programmes. I declare further and that all sources of data and information have been duly acknowledged by proper references.

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I declare that my research work consists of 48, 475 words, excluding the front and back matter.

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CERTIFICATION

This is to certify that the research work for this dissertation and the subsequent preparation of this dissertation titled: **“LEGISLATIVE DRAFTING METHODS FOR ALTERATION OF CONSTITUTIONS: LESSONS FROM NIGERIA AND THE KINGDOM OF LESOTHO 1999 TO 2023”** is the original work of **CHINWEMERI SERAH UZOIGWE**, with Matriculation No: **PG/NLS2215154**, carried out under the supervision of **Dr. Tonye Clinton Jaja**. It is further certified that the dissertation has not been submitted previously either in part or in whole to this Institution or any other institution of higher learning for an award of a degree or master’s programme, and that all sources have been duly acknowledged by proper reference.

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APPROVAL PAGE

This dissertation entitled “**LEGISLATIVE DRAFTING METHODS FOR ALTERATION OF CONSTITUTIONS: LESSONS FROM NIGERIA AND THE KINGDOM OF LESOTHO 1999 TO 2023**” by **CHINWEMERI SERAH UZOIGWE**, with Matriculation No: **PG/NLS2215154**, has been approved for the award of Master of Law (LLM) in Legislative Drafting, by the University of Benin/National Institute for Legislative and Democratic Studies (UNIBEN/NILDS).

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DEDICATION

To my beautiful mother, Ndidi. Mum, your love is the quiet force that has carried me through life's steepest climbs. The sacrifices you have made for I and my siblings are beyond measure, and if this degree adds even a single step to the foundation you have laid with your prayers, courage, and hard work, then it has been worth the cost. This achievement is as much yours as it is mine.

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Embarking on this research work has been as much a personal odyssey as an academic pursuit. It has taught me a great deal about myself, uncovering not just my intellectual strengths but also my imperfections. The process has been humbling, enlightening, and transformative. Its completion, however, is not a solitary achievement. It is a testament to the support, guidance, and encouragement I received from many remarkable personalities and institutions.

First and foremost, I bow my head in honour of Jehovah, my Repurchaser, the Holy One of Israel, without whose loyal love, guidance, and provision, I would surely not have gotten this far.

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At the heart of this research work stands Dr. Tonye Clinton Jaja, my supervisor, whose influence on this dissertation cannot be overstated. Dr. Jaja's intellectual contributions shaped the entire framework of this research. With tireless dedication, Dr. Jaja reviewed multiple drafts, offering incisive criticisms and constructive feedback that significantly elevated the quality of this work. His keen attention to detail provided the insights I needed to navigate the rigours of this endeavour. Beyond his scholarly acumen, Dr. Jaja was also a source of reassurance, especially during moments of doubt. I remain deeply appreciative of him.

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LIST OF ACRONYMS AND ABBREVIATIONS

Basotho Congress Party	BCP
Basotho National Party	BNP
Constitution Drafting Committee	CDC
Constitutional Debate Co-ordinating Committee	CDCC
Lesotho Law Reform Commission	LLRC
National Institute of Legislative and Democratic Studies	NILDS
National Political Reform Conference	NPRC
National Reforms Authority	NRA
Nigeria Law Reform Commission	NLRC
Presidential Committee on the Review of the Constitution	PCRC
Senior Advocate of Nigeria	SAN

ABSTRACT

The conventional understanding of a Constitution, particularly a written one, is that it should be a relatively rigid document. The high frequency and broad scope of amendments in both Nigeria and Lesotho, but especially in Nigeria, challenge this notion. This observation leads to several crucial inquiries, as set out in the research questions/objectives of this study, such as the primary factors contributing to the accumulation of alterations and structural inconsistencies in the Constitutions of Nigeria and Lesotho, as well as the methodological approach of comparative law can be applied to this study that would allow for a rigorous and insightful analysis of Constitution alteration methods in both Nigeria and the Kingdom of Lesotho.

Given the inherently comparative nature of this research, a crucial preliminary step was determining the most effective approach to ensure the extraction of valuable lessons and identifying potential areas of convergence. This led to adopting the functional theory of comparative law. This unique approach stemmed directly from the insights gained during the comparative legislative drafting course undertaken in the second semester session of Year 1 of this programme, which encouraged a deeper, more practical examination of how legal transplants could help strengthen the shortcomings of a legal system. Nigeria and the Kingdom of Lesotho share a range of historical, legal and institutional similarities, stemming from their common administrative and governance experience under British colonial rule. The period from 1999 to 2023 presented a unique, compelling and rich landscape of constitution alterations in both countries. Thus, based on Jhering, Zweigert and Kotz's functionality theory, this study finds a significant lacuna in the formal alteration procedure stipulated under Section 9 of the 1999 Constitution. This lacuna, which has fueled considerable legal debate and litigation, as detailed in the literature review of this study, justifies examining and potentially adopting the more effective procedure found in Section 85 of the Lesotho Constitution.

It was observed that Lesotho's Constitutional Amendment Acts tend to be more subject specific, addressing specific areas of the Constitution in each Act. This contrasts sharply with the Nigerian approach, where alterations often encompass multiples subjects which are bundled into one single Bill. This dissertation distinguishes itself by being the first within the Institute to apply the functionality test specifically in comparing the legislative drafting methods of Nigeria's and Lesotho's Constitution Alteration Acts in a doctrinal legal research. Not to mention the direct alignment of this research focus with the core mandate of the National Institute for Legislative and Democratic Studies. Accordingly, the Institute will find this study not only relevant but also highly valuable in advancing its mission and contributing to the broader discourse on legislative and democratic development in Nigeria.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1. Background of the Study

The period spanning 1999 to 2023 represents a pivotal era in constitutional development for both the Federal Republic of Nigeria and the Kingdom of Lesotho. This period is marked by a series of constitution alterations, reflecting attempts to address perceived deficiencies within these supreme legal frameworks. Notably, Nigeria, since the promulgation of its 1999 Constitution, has engaged in five (5) distinct alteration exercises. These alterations, driven by diverse factors including demands for greater federalism, electoral reforms, and judicial restructuring, have resulted in substantive modifications to various sections and provisions of the supreme law of the Nation. In contrast, Lesotho's constitutional evolution during the same period was characterized by distinct challenges, primarily concerning the institutional framework for driving reforms and the requisite thresholds for the formal procedure of constitution alterations. Such frequent revisions raise critical questions regarding the stability of the Constitution, which necessitates a thorough examination of the motivations, procedure, drafting method and effects of these alterations.

As is the case with every piece of legislation, the point of origin of the Constitution is the drafting process and as such, deserves far more attention than it typically receives.¹ While several scholars study the historical, legal, political and philosophical value of constitutions,² the intricacies of the drafting of constitutions remains academically underdeveloped. Particularly ignored is the way in which they are drafted. In fact, the absence of focus on the

¹ Arjun Kumar Khadka, 'Interrelation and Distinction between Legislative Drafting and Policy'. *Prashasan*, [2023] 55 (1) (37) 43-51 at 44. <<https://doi.org/10.3126/prashasan.v55i1.56439>> accessed on 3 September 2024.

² Nicolas Olwor, *Constitutional Law: Principles and Practices* (Feb. 19, 2021) 2. <https://ssrn.com/abstract+3789181> > accessed on 2 September 2024; Ben O. Nwabueze, *A Constitutional History of Nigeria* (Longman, 1982); Udo Udoma, *History and the Law of the Constitution in Nigeria* (Malthouse, 1994).

drafting process in Constitution-making and formal procedure for Constitution alterations could be a significant factor contributing to the awkward piling up of successive alterations to Constitutions in several African states.³ Addressing this oversight makes this research topic highly relevant. Apart from a few commentaries here and there,⁴ no one has engaged this research topic directly, making it entirely unexplored. When you have rhetoric and precedent saying one thing, practice going the other way, and a dearth of theory as to why, you have all the ingredients of a topic that needs to be tackled.⁵

1.2.Statement of The Research Problem

Despite their formal recognition as rigid texts, the Nigeria and Lesotho Constitutions have exhibited significant practical flexibility over the years.⁶ The Constitution of the Federal

³Abiodun Odusote, 'Nigeria Needs a New Constitution, Not Piecemeal Adjustments' <<https://theconversation.com/nigeria-needs-a-new-constitution-not-piecemeal-adjustments-178784>> accessed on 3 September, 2024.

⁴ Donald S. Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006); Donald S. Lutz, 'The United States Constitution as an Incomplete Text'. *The Annals of the American Academy of Political and Social Science* [1988] 496, 23–32. JSTOR, <<http://www.jstor.org/stable/1046315>> accessed 4 September 2024; Karim Mahmoud El-Shahed, 'Drafting the Egyptian Constitution: A Comparative Analysis Between the Drafting Committees of the 2012 and 2014 Constitutions'. *A&C - Revista de Direito Administrativo & Constitucional, Belo Horizonte*, [2020] (20) 79, 13–23. <<https://www.revistaacc.com/index.php/revistaacc/article/view/1308>> accessed on 23 September 2024; and Commons Select Committee on Political and Constitutional Reform (Session 2012-13), 'Mapping the Path Towards Codifying - or Not Codifying - the UK Constitution: House of Commons Political and Constitutional Reform Committee, A New Magna Carta?' (A report of the Centre for Political and Constitutional Studies by Dr. Andrew Blick, Senior Research Fellow, in consultation with Professor Robert Blackburn, Director, and others at the Centre, as part of its impartial programme of research for the House of Commons Political and Constitutional Reform Committee into *Mapping the Path towards Codifying – or Not Codifying – the United Kingdom Constitution*, funded by the Joseph Rowntree Charitable Trust and the Nuffield Foundation). <<https://publications.parliament.uk/pa/cm201213/cmselect/cmpolcon/writev/mapping/cde02.htm>> accessed on 23 September, 2024.

⁵ As Professor Amanda Frost wrote of a judicial topic that is often practiced and little discussed— “As a purely practical matter, then, the tension between the rhetoric in favor of party presentation and the actual practice is one that deserves further discussion for the benefit of judges struggling to reconcile their conflicting obligations in specific cases.” See: Amanda Frost, 'The Limits of Advocacy'. *Duke Law Journal* [2009] 59, 447-517. <<https://scholarship.law.duke.edu/dlj/vol59/iss3/2>> accessed on 23 September 2024.

⁶ Note however, that the fact that a Constitution is rigid in outlook should not lead one to conclude that such a Constitution is difficult to alter or amend in practice. It is however a common saying that the main fundamental attribute of a written constitution is rigidity, that is, it cannot be changed, altered or repealed like an ordinary legislation. This view tends to ignore the fact that there could be a written but flexible constitution which allows for easy alteration as the need may arise like a constitution for a colonized community; for example, the Nigerian Constitutions of 1922, 1946 and 1951. They could all not only be amended at will by the colonial power, but also abrogated just like the Military did to the 1963 Republican constitution in January 1966 and the 1979 Constitution in January 1984. The rigidity of the Constitution in practice would therefore depend on a variety of factors as identified by Omotosho and Bawa, such as: (i) whether the Constitution is accepted to the most powerful group in the country; (ii) whether the Constitution is the enactment of a foreign power; and (iii) whether the minorities

Republic of Nigeria, 1999, was an outcome of a Federal Military Government Decree.⁷ However, the current constitutional text is not that similar to the original version, as a huge number of alterations have practically created a brand-new document. Since its promulgation in 1999, Nigeria's National Assembly has embarked on alteration exercises five (5) times in an effort to make changes to the Constitution of the Federal Republic of Nigeria.⁸

The Constitution of Lesotho, on its part, has been altered ten (10) times since its adoption in 1993. The five (5) alterations of the Nigerian constitution as well as the ten (10) alterations to the Constitution of the Kingdom of Lesotho, can imply more than one alteration to a particular section, as one alteration usually involves more than one section. For example, the first alteration to the 1999 Constitution, which was done during the sixth National Assembly (2007-2011), has twenty-nine (29) altered sections in a single Alteration Act. Unlike, the first second and third alterations, the fourth and fifth alterations consists of four (4) and sixteen (16) Alteration Acts, respectively. If the counting of alterations is focused on the number of sections that have been modified, the quantity would be shocking; the Nigerian Constitution has been modified about a hundred and forty-one (141) times.⁹ A handful of sections remain as they were, without any alterations from the original text.

Considering the number of times, the 1999 Constitution has been altered, it is easy to see how the fundamental text is a normative product that easily adapts to the specific goals of the political class. One of the major causes of political and constitutional instability during Africa's first three turbulent decades of independence was the ease with which post-

whose rights are protected under the Constitution would regard a particular amendment as posing dangers to their interests.

See: Aboaba Omotesho and Abdu Bawa, *Issues on Constitutional Law* (Bold Technology and Systems Ltd, 2001) 6.

⁷ The Constitution of the Federal Republic of Nigeria (Promulgation) Decree, 1999.

⁸ Dr. Pius Osunyikanmi, 'A comparative analysis of the Constitution Alteration Procedures in Nigeria and Ghana'. *International Journal of Novel Research and Development* [2024] 9 (7), 749-872 at 754.

⁹ Data was generated through a quantitative analysis of all sections within the 1999 Constitution that were modified by the five Alteration Acts.

independence leaders subverted constitutionalism by regularly altering Constitutions to suit their selfish political agendas.¹⁰ Generally drafted by political coterie, in a hurry, upon a calculation of exigencies, without consultation with major stakeholders, many of these so-called Constitutions are often a mere collection of rules of convenience and administered by each ephemeral regime.¹¹ Since a constitution sets the rules of the ‘political game’, the ruling class may be tempted to change the rules to extend or secure their tenure, marginalize the opposition or minorities, or limit civil and political rights.¹² Aware of the precocity of his own power and the fitting nature of his own regime, each succeeding President or Head of State never bothers to produce a durable Constitution. Consequently, the supreme legal framework of many African states has become a precarious document, thus requiring periodic alterations or amendments. Essentially therefore, the Constitution adopts the shape that the constituent powers want to give it according to the particular circumstances. The ways and frequency in which the Nigerian constitution has been drafted over the last sixty-four (64) years confirms this idea.

The conventional understanding of a Constitution, particularly a written one, is that it should be a relatively rigid document, designed to endure and provide a stable foundation for governance. The high frequency and broad scope of amendments in both Nigeria and Lesotho, but especially in Nigeria, challenge this notion. This raises a critical paradox: if a constitution is so readily and extensively altered, can it truly serve as a bedrock of legal and political stability. This observation leads to several crucial inquiries, as set out in the research questions and objectives of this study.

¹⁰ Charles Manga Fombad, ‘Some Perspectives On Durability and Change Under Modern African Constitutions’. *International Journal of Constitutional Law* [2013] 11 (2) 382–413 at 383.

¹¹ C. Anyangwe, ‘The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy’. *Zambia Law Journal* [1997] 29, 1-32 at 2.

¹² *ibid*

1.3.Aim/Purpose of the Study

The overarching aim and purpose of this study is to address the gaps in literature by shifting the focus from merely analyzing the Constitution as a legal instrument to examining the motivations, procedure, drafting methods, the practical and theoretical implications for the Constitution's alteration or amendment. To meet this aim, this dissertation extracts and analyzes the experiences, both positive and negative, gained from the constitution alteration methods in both countries during the specified period of 1999 to 2023.

1.4. Research Questions

- (i) What are the primary factors contributing to the accumulation of alterations and structural inconsistencies in the Constitutions of Nigeria and Lesotho?
- (ii) What methodological approach of comparative law can be applied to this study that would allow for a rigorous and insightful analysis of Constitution alteration methods in both Nigeria and the Kingdom of Lesotho.
- (iii) How can lessons drawn from the comparative analysis of Nigeria and Lesotho inform broader practices of constitutional drafting and reform in African states?
- (iv) What measures can be adopted to improve the coherence and functionality of constitutional alterations?

1.5. Research Objectives

- (i) To analyze the legislative drafting methods employed for constitutional alterations in Nigeria and the Kingdom of Lesotho between 1999 and 2023.
- (ii) To identify the factors (if any) leading to structural inconsistencies in the Constitutions of Nigeria and Lesotho and propose potential solutions.

(iii) To apply the functional theory of comparative law as an effective approach that would allow for a rigorous and insightful analysis of Constitution alteration methods in both Nigeria and the Kingdom of Lesotho.

(iv) To contribute to the broader discourse on constitutional reform by offering insights into effective legislative drafting practices, particularly in African contexts.

1.6. Scope and Limitations of the Study

This study focuses on the legislative drafting methods for alteration of the Constitutions of Nigeria and the Kingdom of Lesotho between 1999 and 2023. The study is limited to the legislative drafting perspective. Furthermore, the study is geographically confined to Nigeria and Lesotho, which may limit the generalizability of its findings and recommendations to other African or global contexts. However, while examples from other countries may be used to support a point, this does not diminish the primary geographical focus of the study. The insights gained are intended to contribute to a deeper understanding of constitutional reform processes, particularly in African states.

Recognizing the inherent challenges of comparative research, such as data availability, linguistic challenges, and the need to account for unique national contexts, this study employed a multi-pronged approach. This included utilizing a diverse range of data sources, engaging bilingual research assistants (where necessary), and developing a robust comparative framework that considered historical, political, and socio-economic factors.

1.7. Significance of The Study

One interesting aspect of this study is its direct alignment with the core mandate of the National Institute for Legislative and Democratic Studies (NILDS). Being an institute of democratic and legislative studies, this study directly contributes by bridging the fields of

legislative and democratic studies.¹³ Legislative drafting, as the initial and formative stage of any legislative process, is undeniably a critical component of legislative studies. The Nigerian Constitution, is fundamentally a democratic instrument, intended to reflect the will of the populace. Therefore, examining the relationship between both concepts directly addresses a key area of the Institute's expertise and focus.

Furthermore, this study can contribute to a deeper understanding of the opportunities of exploring the functional methodology in a comparative study. This dissertation distinguishes itself by being the first within the Institute to apply the functionality theory of comparative law specifically in comparing Nigeria's and Lesotho's Constitution alteration procedure and drafting methods. This unique approach stemmed directly from the insights gained during Dr. Jaja's lectures in MLL 806 course on Comparative Legislative Drafting, which encouraged a deeper, more practical examination of how legal transplants could help strengthen the shortcomings of a legal system, in this context, in the area of the formal procedure and drafting of constitution alterations.

Consequently, the Institute will find this research not only relevant but also highly valuable in advancing its mission and contributing to the broader discourse on legislative and democratic development in Nigeria. By systematically examining another Country's experience, the study offers actionable insights, enabling the Institute to strategically advance its mission. This approach, focused on identifying beneficial models and mitigating potential pitfalls, will directly contribute to tangible improvements in Nigeria's democratic development.

¹³ <<https://nilds.gov.ng/institute/>> accessed on 12 July 2024.

This study will be valuable for legislators, legislative drafters, legal professionals, and stakeholders involved in constitutional reform, informing best practices and enhancing the quality of future constitution alterations.

1.8. Research Methodology

The point of departure for this study and contribution is the doctrinal legal research methodology, understood as academic legal research that focuses on positive law.¹⁴ The academic embedding of this methodology often takes the form of a summary of the current state of the law in the specific research focus, combining references to primary sources such as legislation and case law, with references to handbooks and recent journal articles.¹⁵ The primary sources of this study are obvious. The Constitution to the Federal Republic of Nigeria, 1999 and all five (5) Alteration Acts were crucial to this study. Similarly, the Constitution of Lesotho, 1993, and all ten (10) Amendment to the Constitution Acts were also examined. Records of Parliamentary Debate provided insights into the discussions and debates that were essential for understanding the changes that occurred. Secondary sources like textbooks, handbooks, recent articles in journals, lecture notes, and commentaries, equally supported this research.

This study is not only doctrinal, it is also historical, comparative and theoretical. Oliver Wendell Holmes, Jr. made some remarks about the importance of history, as follows:

The life of the law has not been logic: it has been experience. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a

¹⁴ Sanne Taekema, "Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice". *Law and Method* (2018) 2. < <https://www.boomportaal.nl/tijdschrift/ReM/lawandmethod-D-17-00010>> accessed on 20 September 2024.

¹⁵ Bethel Uzoma Ihugba. *Introduction to Legal Research Method and Legal Writing*. (Malthouse Press Limited 2020) 36.

book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation.¹⁶

Holmes' famous adage reveals one imperceptible message: experience cannot be appreciated unless we appreciate history. Our experiences continue to be archived in the form of history. Historical research therefore assumes great significance as to understanding the contributions made individually or institutionally to the making and workings of any Constitution.

Given the inherently comparative nature of this study, a crucial preliminary step was determining the most effective methodological approach. This comparative study needed a framework that would allow for a rigorous and insightful analysis of constitutional alteration methods in both Nigeria and the Kingdom of Lesotho. This led to exploring the functional methodology of comparative law. One of the research questions directly addresses this:

- What methodological approach of comparative law can be applied to this study that would allow for a rigorous and insightful analysis of Constitution alteration methods in both Nigeria and the Kingdom of Lesotho.

Based on Jhering, Zweigert and Kotz's functionality theory, the relevant litmus test questions to ask in any comparative study include:

- (1) Are there similarities in both legal systems that provide justification for comparison?
- (2) In the event that question (1) is answered in the affirmative, which of these legal systems is the originator (borrower) and which is the lender respectively? and

¹⁶ Oliver Wendell Holmes, Jr., *The Common Law* (Little, Brown and Company 1881) 1.

(3) Is there a ‘need’ or shortcoming within Nigeria’s legal system that justifies borrowing or legal transplant? And in the event that the legal transplant is legally successful, would the concept be ‘useful’ in Nigeria? That is, would it be functional in Nigeria?¹⁷

Nigeria and the Kingdom of Lesotho share a range of historical, legal and institutional similarities, stemming from their common administrative and governance experience under British colonial rule.

Firstly, they have significant similarities in terms of underlying political commitments. Both countries have grappled with the challenges of consolidating democratic institutions in the face of political instability and, at times, authoritarian tendencies. They have shared periods of military rule and significant political turmoil. Additionally, both countries have faced challenges related to economic inequality and the need for diversifying their economies away from reliance on singular commodities (crude oil in Nigeria, and diamonds and remittances in the Kingdom of Lesotho). They also have common legal and political institutions, such as inherited elements of English common law, as a result of British colonial rule. This influence is evident in certain aspects of their legal systems, including adherence to the

This methodology provided a framework for exploring and assessing foreign constitutional experiences, enabling legislative drafters to devise solutions that are both effective and contextually appropriate for their own jurisdictions.¹⁸ By examining how another jurisdiction addresses similar constitutional challenges, Nigerian constitutional drafters can draw valuable insights and adapt these lessons to suit the specific contexts of Nigeria.¹⁹ The

¹⁷ Tonye Clinton Jaja, *Legislative Drafting and Statutory Interpretation: An Introduction* (Malthouse Law Books, 2017) 26-27.

¹⁸ Francesca Bignami, ‘Methodologies of Comparative Constitutional Law: Functional Approach’. *The Max Planck Encyclopedia of Comparative Constitutional Law (forthcoming)* (George Washington University Law School Faculty Publications and Other Works, 2021) 2. <https://scholarship.law.gwu.edu/faculty_publications/1577> accessed on 12 September 2024.

¹⁹ *ibid*

functional approach, in particular, empowers drafters to identify practical solutions to shared constitutional problems. It emphasizes tailoring these solutions to the unique legal, social, and cultural needs of each jurisdiction.²⁰ Understanding the successes and shortcomings of approaches of other jurisdictions, can help drafters avoid common pitfalls and design more coherent and durable constitutional provisions. This process not only fosters innovation but also reinforces the adaptability and resilience of constitutional frameworks.²¹ When applied thoughtfully, the functional methodology of comparative law can enhance the quality of legislative drafting, ensuring that alterations and reforms are grounded in a well-informed understanding of best practices and lessons learned from other systems.²²

The case study approach also emerges from the comparative methodology. The “case study” method is a research design that consists of an in-depth survey, studying a particular case or multiple cases in order to develop a full rounded understanding of a phenomenon.²³ It asks of “how” and “why” a phenomenon (such as constitutional alterations) occurs. Case studies can be used in both quantitative and qualitative studies, with, however, different objectives. In quantitative studies, they usually constitute precursor or post-research explanation, whereas in qualitative research they constitute the main research.²⁴ This makes case studies very useful in this dissertation, where the aim is to assess the strengths and weaknesses of various drafting techniques, identify common pitfalls, and propose recommendations for improving future constitutional alteration processes in Nigeria and the Kingdom of Lesotho, which would involve determining the number of alterations that have been carried out in the two jurisdictions, the collection and examination of all alteration acts/

²⁰ *ibid*

²¹ *ibid*

²² *ibid*

²³ Bethel Uzoma Ihugba. *Introduction to Legal Research Method and Legal Writing*. (Malthouse Press Limited 2020) 36.

²⁴ *ibid* at 41.

amending statutes, as well as the assessment of the impact of the frequency of constitutional alterations and its long-term consequences on the rule of law, judicial interpretation, and the overall effectiveness of the constitutional framework in both jurisdictions. In effect, the case study of this dissertation are the amending statutes enacted between 1999 to 2023 in Nigeria and the Kingdom of Lesotho.

Case studies are, of course, vulnerable to a number of methodological criticisms, including limited external validity (i.e., the generalizability of its findings may be very low),²⁵ bias, or drawing socially desirable responses (i.e., drawing from what the respondents think the interviewer wants to hear). Acknowledging the limitations inherent in a comparative case study focused on two common law jurisdictions, this research cannot definitively extrapolate its findings to civil law jurisdictions or other legal systems. However, this study serves as a valuable test bed for examining specific assumptions and legislative drafting methods within the context of constitutional alterations. There is also an acute awareness that the shared Westminster model origin of both countries' constitutions, as well as the legislative drafting techniques which are largely similar, may limit the generalizability of this study's findings to other legal systems. Yet, these two countries were chosen, in part because of these shared characteristics. The choice was determined, not only by the "typicality" of the phenomenon (as it would in a quantitative study), but also by the phenomenon's explanatory power. Given the extensive history of constitutional alterations in both Nigeria and the Kingdom of Lesotho, which have significantly shaped their respective constitutional frameworks, these two countries were selected as suitable jurisdictions for this study. This comparative analysis therefore allows for an in-depth exploration of legislative drafting methods employed in the context of

²⁵ *ibid* at 42.

constitutional alterations, while acknowledging the potential limitations arising from the shared historical influences of the Westminster system on both countries' legal systems.

A final word to add here is that this research study tried as much as possible to adhere to all ethical guidelines for research of this nature, including ensuring the validity and reliability of all data.

1.9.Synopsis Of Chapters

This dissertation began by highlighting the understudied area of Constitution alteration from the legislative drafting perspective, emphasizing that the drafting process is the foundation of any constitution and that flaws in drafting can lead to ambiguity, inconsistencies, and a proliferation of amendments just as is evident in Nigeria and the Kingdom of Lesotho. Chapter two of this dissertation concerns the conceptual clarifications, literature review, and theoretical frameworks of legislative drafting methods for constitutional alterations. This chapter begins with a literature review that shows that the need for this research study arises from three key gaps: (i) a limited focus on legislative drafting methods in constitutional amendments, (ii) a lack of comparative studies in African countries, and (iii) insufficient theoretical frameworks linking drafting to constitutional coherence. Addressing these gaps is essential to improving the effectiveness of constitutional reforms in Nigeria and Lesotho, where there is an awkward piling up of successive alterations.

From these expositions emerge several general hypotheses about legislative drafting methods for constitutional alterations. These are tested in Chapter Three through various methods, including historical and comparative analysis. In chapter three, the history, genesis and current legal framework of constitution alteration is discussed. This chapter provides a detailed historical background of Lesotho's development, beginning with the emergence of the Basotho nation under King Moshoeshoe I in the early nineteenth century. It also discusses

Lesotho's colonial history, starting with British annexation in 1868 and its eventual independence in 1966. Key events in Lesotho's constitutional evolution are covered, including the formation of the Basutoland National Council in 1903, the 1959 constitution, and the drafting of the 1966 independence constitution. The chapter also outlines the political turmoil that followed, including military rule, coups, and the eventual democratization process culminating in the 1993 Constitution. Despite challenges and omissions in the initial draft, such as the absence of a preamble, subsequent amendments to the 1993 Constitution have sought to address these gaps. This chapter also sets the stage for understanding the broader political and constitutional framework of Lesotho and Nigeria, laying the foundation for further analysis of its legal and governance systems.

Using the functional methodology as an inspiration, chapter four provides a detailed presentation and analysis of the specific Constitution Alteration Acts that form the core of this study. Interestingly, chapter four achieves the research objective that seeks to apply the functional theory of comparative law as an effective approach that would allow for a rigorous and insightful analysis of Constitution alteration methods in both Nigeria and the Kingdom of Lesotho.

A thorough examination of the Constitution Alteration Acts, coupled with an in-depth analysis of the constitutional history of both Lesotho and Nigeria, yielded key findings. The summary of these findings, are detailed under Chapter Five. In addition, the conclusion, recommendations, suggestion for further studies, as well as the contribution to knowledge is provided under chapter five.

CHAPTER TWO

CONCEPTUAL CLARIFICATIONS, LITERATURE REVIEW AND THEORETICAL FRAMEWORK AND OF THE STUDY

At the outset, it is necessary to explore the meanings of key concepts central to this study. It should be noted that this study does not seek to approach the meaning of the key concepts of this study from a singular perspective, nor are we endorsing a single interpretation. Instead, the goal is to highlight a range of viewpoints and the broadly accepted opinions surrounding these concepts.

2.1. Conceptual Clarifications

2.1.1. Constitution

The word ‘Constitution’ has been variously defined by writers and authors of the subject. Thus, like most concepts the word ‘Constitution’, defies a single definition owing to the different perceptions of it. The truth of how perceptions colour ones understanding of a concept is interestingly offered in the example of how five blind men whose ambition to see an elephant could only be fulfilled by each touching the different parts of the elephant and therefore describing it from their various feelings of the part touched.²⁶ Since each blind man only has a partial understanding, it is difficult for them to reconcile their differing perceptions and arrive at a complete understanding of the elephant.

In the perception of Hood Phillips,²⁷ the word ‘Constitution’ is used in two different senses; the abstract and the concrete sense. In the abstract sense, he opined that, ‘it is the system

²⁶ A. O. Omotesho and Abdu Bawa, ‘An Analysis of the Definitions and Forms of Constitutional Law’ in A. O. Omotesho and Abdu Bawa, *Issues in Constitutional Law* (Bold Technology and Systems Nig. Ltd 2001) 1.

²⁷ O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (6th edn: Sweet & Maxwell 1978) 15.

of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen.’ He proceeded to define the Constitution in a more concrete sense as ‘a document in which the most important laws of the country are authoritatively ordained.’

Hood Phillips’s definition of a constitution in the abstract sense aligns with the prevailing consensus among constitutional law scholars.²⁸ This consensus generally holds that a constitution outlines the structure and functioning of a government’s various organs within a specific community. However, the concrete definition presents an interpretative challenge. If it strictly requires a single, codified document, it excludes many nations, such as the United Kingdom, which lack a single written constitution. In the case of the UK, the definition can be adapted to encompass the collection of important laws and constitutional conventions that collectively govern its political system.²⁹

According to Oluyede,³⁰ it is an expression, whether in documentary form or unwritten, of legal principles, rules, laws and in some cases, conventions or customs in accordance with which a country is governed and by which its citizens are bound. One cannot but agree with the general consensus of writers that a constitution is that supreme law of the land, which defines the structure of the organs of state and the relationship between these organs.

A Constitution with legitimacy plays a much larger role in a society than providing a framework for governance and serving as a yardstick for making legislation, and directing executive action. Explicitly, or by implication, it often contains values that the society believes

²⁸ Corwin, Edward S. ‘The Constitution as Instrument and as Symbol’. *The American Political Science Review* [1963] 30 (6), 1071–1085. < <https://doi.org/10.2307/1948289> > accessed 20 September 2024.

²⁹ Adam Tomkins, argues that the United Kingdom Constitution is actually written but in different documents. By this, he meant the Magna Carta, the Bill of Rights of 1689, the Parliament Act of 1911 and 1949, the European Communities Act of 1972, the Human Rights Act of 1998, etc.

See: EA Young, ‘The Constitution Outside the Constitution’. *Yale Law Journal* [2007] 117, 408-473. <<https://doi.org/10.2307/20455798>> accessed on 2 July 2024.

³⁰ PAO Oluyede, *Constitutional Law in Nigeria* (1st edn; Evans Brothers 1992) 1.

in, or at least strives towards. It may also reflect much of a society's history, especially past struggles, defeats, victories and mistakes. Thus, it is often, symbolically and even poetically referred to as the birth certificate of a nation;³¹ a nation's autobiography;³² the nation's compass;³³ the mirror in which a nation can see itself;³⁴ the alpha and omega of the legal system;³⁵ the supreme law of a nation; and a window into a nation's soul.³⁶

2.1.2. Constitution-making and Alterations

Constitution-making can be defined as a temporally limited process in which a group of political actors engage in the drafting, discussion, and approval of a formal document that intends to regulate the basic structure of the State and the political regime.³⁷ This written text, which is commonly referred to as a "constitution," includes provisions defining the channels

³¹ Address by President Cyril Ramaphosa at the National Conference on 30 Years of Human Rights in South Africa, Birchwood Conference Centre, Ekurhuleni on 18 March, 2024.

See also: Mike Ozehkome, 'Lawful Procedures for Actualizing A People's Constitution For Nigeria'. <<https://lawpavilion.com/blog/lawful-procedures-for-actualizing-a-peoples-constitution-for-nigeria/#:~:text=THE%20NEVER%20DENDING%20CALL%20FOR,a%20truly%20representative%20people's%20Constitution>>> accessed on 24 July 2024;

Hassen Ebrahim, "The South African Constitution: Birth Certificate of a Nation" A paper presented at the Constitutionmaking Forum: A Government of Sudan Consultation 2425 May 2011 Khartoum, Sudan.

<https://unmis.unmissions.org/sites/default/files/2011-05_ebrahim_south_africa.pdf> accessed on 24 July 2024.

³² 'Autobiographies of Nations: a comparative analysis of constitutional reform processes' (Netherlands Institute for Multiparty Democracy; de Ville, J. "The autobiographical constitution." *Law and Humanities* [2023] 18(1): 73-92.

³³ "The nation's compass" Former minister Valli Moosa describes the creation of the constitution and how the country's 'birth certificate' remains the stable centre of governance. <<https://www.timeslive.co.za/sunday-times/opinion-and-analysis/insight/2024-05-05-the-nations-compass/>> accessed on 24 July, 2024. Also: William J. Clinton, President of the United States of America, proclamation of September 17, 1999, as Citizenship Day and September 17 through September 23, 1999, as Constitution Week. <<https://clintonwhitehouse6.archives.gov/1999/09/1999-09-16-proclamation-on-citizenship-day-and-constitution-week.html>> accessed on 24 July, 2024.

³⁴ See *Ugba v Suswam* (2014) All FWLR (Pt. 748) 825 at 863.

Also, *S v. Acheson* (1991) (2) SA 805 (Nm) at 813, paras A-B. (per Mahomed AJ).

³⁵ S. S. Shikyil, *Digests of some issues in the 1999 Constitution Vol. 1*. (PARP, National Assembly 2005) 6.

³⁶ Kibin. (2024). *A constitution is a mirror reflecting the national soul*. <<http://www.kibin.com/essay-examples/a-constitution-is-a-mirror-reflecting-the-national-soul-2I31cSYr>> accessed on 24 July 2024.

See also:

Haris Humayun, 'The Soul of a Nation: Understanding the Constitution'. <<https://www.linkedin.com/pulse/soul-nation-understanding-constitution-haris-humayun/>> accessed on 24 July 2024.

³⁷ Gabriel L. Negretto, "Constitution-making in Comparative Perspective" (2017) *Oxford Research Encyclopedia of Politics* 1-43 at 3. <<https://gabrielnegretto.com/wp-content/uploads/2017/08/PDFARTICLECONSTMAKING.pdf>> accessed on 12 August, 2024.

of access to principal government positions, the allocation of powers among the arms and organs of government, and stipulating fundamental rights and liberties of the citizens.

Most written constitutions also contain rules establishing procedures for altering or amending them and the conditions under which constitutional provisions can be suspended. This definition is somewhat restrictive, though. In a broad sense, constitution-making may include rules adopted via alteration or constitutional adjudication.³⁸ It also may cover the emergence of or changes to unwritten conventions that are part of the Constitution in the sociological sense.³⁹ Such a comprehensive understanding, however, creates obstacles for the comparative analysis of constitution-making as a distinctive form of constitutional transformation.

Similar to the adoption of formal amendments, the production of a new constitutional text can be observed and compared directly and systematically. This analysis is almost impossible if one wants to trace the origins and content of informal conventions and judicial decisions in a relatively large number of cases.⁴⁰ Scholars like Coudert and Levinson, have claimed that certain judicial interpretation of the constitution, for example, the U. S. Constitution, are better viewed as amendments.⁴¹ Indeed, an informal modification of a

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ Boundless, “Informal Methods of Amending the Constitution: Societal Change and Judicial Review.” *Boundless Political Science*. Boundless, 08 Aug. 2016. Available at: <<https://www.boundless.com/political-science/textbooks/boundless-politicalscience-textbook/the-constitution-and-the-founding-of-ameri> Given the varying significance of different amendment approaches in diverse constitutional frameworksca-2/amending-theconstitution 28/informal-methods-of-amending-the-constitution-societal-change-andjudicial-review-168-5169/> accessed on 3 July 2023.

⁴¹ Frederic R. Coudert, ‘Judicial Constitutional Amendment’. *Yale Law Journal* [1904] 13, 331. See also: Sanford Levinson, ‘How Many Times Has the United States Constitution Been Amended?’ (A) <26; (B) 26; (C) 27; (D) >27: ‘Accounting for Constitutional Change’, in Sanford Levinson ed. *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995) 33.

constitutional text may often carry a greater effect than its formal modifications.⁴² Nonetheless, formal constitutional amendments remain an essential means of constitutional change.

At the same time, given their political and symbolic importance, it is also convenient to distinguish new constitutions from mere amendments or revisions to an existing constitutional text. This distinction, however, demands some elaboration. A classical typology attempts to distinguish amendments (or partial reforms) from new constitutions by their content. Amendments are supposed to be minor modifications that do not change the nature of the existing constitutional order. Replacements, by contrast, are said to alter the fundamental structure of the state or the political system.⁴³ Based on this distinction, some constitutions declare that certain principles or provisions are unamendable, and courts occasionally rule that revisions that alter the basic structure of the state are invalid.⁴⁴ The jurisprudence on this issue has been shaped by judicial pronouncements in various jurisdictions.

In Lesotho, the Court of Appeal Case of *Democratic Congress & Ors v. Puseletso & Ors*,⁴⁵ is relevant. In October 2023, the first respondent (as an applicant), sought an order, *inter alia*, that the Ninth Amendment to Section 87 (5) (a) of the Constitution of Lesotho be declared unconstitutional to the extent that it violates the basic structure of the Constitution of Lesotho *per* Section 1 of the Constitution of Lesotho, 1993. The court declined to decide on the prayer that the passing of the vote of no confidence be deferred pending the conclusion of the reforms process in which the Parliament shall promulgate comprehensive provisions to regulate the

⁴² Dieter Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) 4 *NUJS L. Rev.* 27.

⁴³ Levinson, S. (1995). How many times has the United States Constitution been amended? In S. Levinson (Ed.), *Responding to imperfection: The theory and practice of constitutional amendment* (pp. 13–36). Princeton, NJ: Princeton University Press; Murphy, W. (2007). *Constitutional democracy: Creating and maintaining a just political order*. Baltimore: John Hopkins University Press, p. 506; Widner, J., & Contiades, X. (2013). Constitution writing processes. In M. Tushnet, T. Fleiner, & C. Saunders (Eds.), *Routledge handbook of constitutional law* (pp. 57–70). New York: Routledge.

⁴⁴ Jacobsohn, G. F. (2006). An unconstitutional constitution? A comparative perspective. *International Journal of Constitutional Law*, 4 (3), 460–487.

⁴⁵ (C OF A (CIV) NO. 13/2024) [2024] LSCA 1 (14 June 2024)

passing of the vote of no confidence. Upon appeal to the Court of Appeal, one of the issues for determination was whether the court erred in its conclusions of fact and law regarding the import of the Ninth Amendment, specifically that: (a) The amendment revolutionized the original scheme and underlying philosophy to accommodate the electorate's intervention if the Prime Minister advised the King to dissolve parliament; (b) That the amendment misconstrued the Prime Minister as the appointee or the elected of the parliamentarians exclusively and, therefore, removable at their behest exclusively; (c) When gauged against the simple majority requirement, the two-thirds majority requirement for removal proves unrealistic and creates an inherent danger of frequent changes in prime ministers, leading to the destabilization of the country; and (d) The Amendment removed all interventionist mechanisms provided in the original text to ascertain the legitimacy of the move to change a Prime Minister and, by extension, the government.

In the leading judgement, the Court of Appeal observed that Section 85 of the Constitution of Lesotho provides for the amendment procedure, which requires a two-thirds majority vote in both houses of Parliament for most amendments. However, the Constitution does not explicitly mention any “basic structure” or “inviolable principles” exempt from amendment. This absence of explicit provisions regarding unamendable constitutional principles or a basic structure raises significant questions and considerations. However, drawing from the principles established in other Commonwealth jurisdictions, certain fundamental features of Lesotho’s Constitution form part of its basic structure and cannot be abrogated or diminished through the amendment process. Ultimately, the court held that in the absence of explicit constitutional provisions, the recognition and application of the basic structure doctrine in Lesotho will depend on the interpretive approach adopted by the courts.

Whereas a new constitution may reproduce verbatim the content of the previous one, an amendment may alter many fundamental aspects of the existing constitutional structure. For this reason, and perhaps only in extreme cases, it is difficult to determine in an objective way whether a given constitutional change is fundamental. An alternative way of distinguishing between amendments and replacements is based on procedures. From this perspective, it has been argued that a formal constitutional change is an amendment when its adoption is regulated by the constitution in force, and a replacement when it is not.⁴⁶ This distinction rightly takes into account the fact that most constitutions in the world have been adopted extra legally because there was no preexisting constitution, or there was a constitution, but either it did not regulate its own replacement or its replacement procedure was not adhered to. As we will see, however, several constitutions in the world have been enacted following established procedures. A different perspective, also focused on procedures, looks at the approval body. New constitutions are usually adopted by a popularly elected constituent convention, whereas amendments tend to be passed by ordinary Legislatures operating under special procedures. New constitutions, however, can be adopted by an ordinary Legislature, and partial revisions may require the election of a special convention.⁴⁷ This aspect necessitates further investigation, particularly regarding the potential influence of the procedure itself upon the efficacy of subsequent modifications. It is true that whereas alterations preserve the legal continuity of the existing constitution, constitutional replacements imply its abrogation. This legal effect, however, is not primarily based on the content of the reforms or on the procedures by which they are adopted. Rather, it reflects the will and authority of reformers to make their decisions accepted as a new constitutional order at a given historical juncture.

⁴⁶ Elkins, Z., Ginsburg, T., & Melton, J. (2009). *The endurance of national constitutions*. New York: Cambridge University Press. p. 55.

⁴⁷ The Constitution of Uruguay, for instance, allows Congress to pass a total revision of the constitution (with subsequent approval in a popular referendum), and this revision may count as a new constitution. On the other hand, there are constitutions such as the 1853 constitution of Argentina, which require the election of an independent constituent convention to amend even a single article.

Literature on Constitutions at one time made a distinction between major and minor constitutional alterations, calling the former “revisions”, and the latter “amendments”. However, as Albert L. Sturm (1970) pointed out, this distinction proved impractical.⁴⁸ To avoid confusion, the term “alteration” will be used here to refer to the formal procedure established by the Constitutions in question. As earlier stated, alterations to Constitutions can take a variety of forms (as some Constitutions state explicitly):

- (i) repeal of existing provisions (with or without their re-enactment or replacement);⁴⁹
- (ii) modification of existing provisions or addition of new ones;
- (iii) suspension of the operation of existing provisions (or where legally suspended, ending the suspension); and
- (iv) making provisions that are inconsistent with the existing provisions.

2.1.3. Legislative Drafting

Legislative drafting is part of the legislative process, which in turn is part of the policy process.⁵⁰ It is even sometime compared or linked to a child’s game of *Snakes and ladders*⁵¹. According to Onwe (2009),⁵² legislative drafting is the art of writing legislation which includes subsidiary or secondary legislation, administrative orders, notices, rules, warrants, and similar instruments. Crabbe (1993), views legislative drafting as a means of communication.⁵³ He said that legislation expresses legal relationships. It is also a form of communication. It lays down rights and obligations, our powers, our privileges and our duties.

⁴⁸ Albert L. Sturm, *Thirty Years of State Constitution-Making: 1938-1968*. (National Municipal League 1970).

⁴⁹ See: Section 18 of the Tenth Amendment to the Constitution Act, 2022.

⁵⁰ Constantin Stefanou, ‘Legislative Drafting as a form of Communication’ in Luzius Mader and Marta Tavares de Almeida (eds), *Quality of Legislation Principles and Instruments* (Nomos 2011) 308; and also C. Stefanou, ‘Drafters, Drafting and the Policy Process’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 321.

⁵¹ VCRAC Crabbe, *Legislative Drafting* (Cavendish Publishing Limited 1993) v.

⁵² Hillary N. Onwe, *Groundwork of Legislative Drafting* (Snapp Press Ltd 2009) 1.

⁵³ *ibid* at 27.

In that respect, legislation should be drafted in accordance with principles that govern language as a means of communication in that particular jurisdiction. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the law giver.⁵⁴

Typically, the drafter is not the authoritative arbiter or maker of the policies to be embodied in the provisions he drafts. This commonly encountered division between the drafter's function and the ultimate authority in matters of policy has contributed to widespread misunderstanding of the nature of drafting itself. For instance, it has been assumed that the drafting task is primarily a task of English composition.⁵⁵ The drafter is merely a scrivener, it is thought, who is engaged in putting the ideas of others "into legal language."⁵⁶ But, as will become evident later, this is to misjudge badly the contribution made to the development of law by constitutional drafters, and by drafters generally. In reality, only about one-tenth, or even a smaller fraction, of the time is spent on formal composition. Greater portion of drafting endeavours is commonly devoted to research and investigation to clarify and elaborate the intent of the policy maker, and assisting in the determination of the best means of achieving that intent.

The body of general principles which, taken as a whole, constitutes a drafter's basic toolkit, equips competent drafters to demonstrate a variety of virtues, and enables them to avoid a multitude of vices, in relation to language, law and logic. They range from the macro level, dealing with the structure of an instrument as a whole, to the micro level, dealing with individual words, phrases and punctuation marks. But the need to become immersed in the general principles of drafting should never lead drafters to overlook one of the most important

⁵⁴ *ibid*

⁵⁵ Grad and Williams, n. at 32.

⁵⁶ *ibid*

precepts of written communication as a whole, namely the mongoose principle. The *mongoose principle*, therefore, states: *if in difficulty or doubt, rewrite it*.⁵⁷ The principle provides a simple solution to many problems and drafters who are reluctant to apply it are likely to spend an excessive amount of time and energy engaged in unproductive work, before abandoning failed drafts and starting again.

The range of drafting techniques is too broad to be sensibly reduced to a few sentences but some indication can be given. Some issues involve the most appropriate structure for instruments. Others involve the way in which the layout of a page can contribute to good communication. Perhaps the most obvious ones involve the best use of language in order to convey meaning as clearly as possible. Finally, some involve the technical features of legislative and regulatory instruments.

The legislative drafting process is divided by the great Garth Thornton, into five stages:

(1). Understanding the proposal.⁵⁸

(2). Analyzing the proposal.⁵⁹

(3). Designing the law.⁶⁰

(4). Composing and developing the draft.⁶¹

(5). Verifying the draft⁶²

⁵⁷ Ian Mcleod, *Principles of Legislative and Regulatory Drafting* (Hart Publishing 2009).

⁵⁸ Helen Xanthaki, 'Legislative Drafting: A New Sub-Discipline of Law Is Born'. *IALS Student Law Review* [2013] 1 (1) 58. <<https://discovery.ucl.ac.uk/id/eprint/10143060/1/IALS%20SLR%202013%20LD%20The%20birth%20of%20a%20new%20subdiscipline%20of%20law.pdf>> accessed on 12 September, 2024.

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ R. Bergeron, *Rules of Legislative Drafting – Letters to Ukrainian Drafters* (Department of Justice Canada and Ministry of Justice of Ukraine 1999), cited in Xanthaki (n. 78).

⁶² Helen Xanthaki, *Thornton's Legislative Drafting* (5th edn: Bloomsbury 2013) 145-162.

Grad and Williams, opine that the process of drafting constitutional provisions may be divided as follows:

1. General background research or investigation;
2. Study of the specific problem in the light of the law and experience, including the study of related law of the same or inferior order in the jurisdiction concerned;
3. Study of comparative materials: state, national, or foreign;
4. Study of consistency and interrelation of the proposal with higher law;
5. The making of policy choices: criteria for inclusion and exclusion;
6. Review of methods of enforcement: the weighing of sanctions;
7. Consideration of means to achieve flexibility: generality and other devices;
8. Writing the provision: formal aspects of constitution drafting; and
9. Revision of the draft.

On the principles of drafting itself, Bentham's work may be said to be the starting point from which the modern theory of legislative drafting is derived.⁶³ Legislative drafting is a difficult art.⁶⁴ This relates to the expression of others ideas, in concise and clear language and the difficulties inherent in expressing them. A good draft requires the following essential requisites—

- (i) It must be done by a person having the basic legal knowledge;
- (ii) Proper use of English language or the language in which the legislation is drafted;
- (iii) Ability and competence of the legislative drafter combined with imagination and plenty of practice in doing this work.

⁶³ Courtenay Peregrine Ilbert, *The Mechanics of Law Making*. (Clarendon Press, 1914) 94.

⁶⁴ Hirandani, "Legislative Drafting: An Indian View," *The Modern Law Review*, Vol. 27, No. 1, 1-2 (1964).

Legislative drafting requires abundance of knowledge of the language, its Grammar, the technical requirements of the form of legislation and perform the task in a non-partisan manner and keeping totally away from political controversies. In Nigeria, at least, and in many other places in the Commonwealth, we have absorbed from our senior drafting masters, and from our local statute book, not only Coode's seminal analysis, but also the drafting principles of Sir Henry Thring, Sir Courtenay Ilbert and Sir Alison Russell (albeit perhaps unconscious of the origin of these principles).⁶⁵ To a significant extent, modern textbook writers on the subject, led by Elmer Driedger,⁶⁶ and Garth Thornton, have continued this emphasis on the centrality of language to drafting technique. The latter-day proponents of plain English legislative drafting have continued this tradition. If I may sum up the received wisdom, it is that the drafter's expertise is the ability to deploy the English language to write effective legal rules with clarity and force.

Language which reads smoothly does not always represent good drafting. As a member of Congress put it, "like Browning's poetry it may be well said and yet not say anything to the ordinary reader".⁶⁷ The framers of important legislation should have the benefit of the experience of other states and countries in the same field. They should know the legislation of other states and its operation. Mere copying of foreign legislation will not suffice. By studying how other jurisdictions have crafted and implemented laws in the same field, lawmakers can gain valuable insights into both the successes and failures of various approaches. This

⁶⁵ See: George Coode, *On Legislative Expression* (London, 1845); Lord Thring, *Practical Legislation* (London, 1877); Sir Courtenay Ilbert, *Legislative Methods and Forms* (Oxford, 1901); Sir Alison Russell, *Legislative Drafting and Forms* (London, 1938); and EL Piesse and J. Gilchrist Smith, *The Elements of Drafting* (London, 1950).

⁶⁶ EA Driedger, *The Composition of Legislation: Legislative Forms and Precedents* (Department of Justice, Canada, 1957); EA Driedger, *A manual of instructions for legislative and legal writing* (Minister of Supply and Services Canada); EA Driedger, (1949). *Legislative drafting and interpretation*. Ottawa: [Publisher not specified]; EA Driedger, "Legislative Drafting", *Canadian Bar Review* [1949] 27-3, 291, 1949 *CanLIIDocs* 85, <<https://canlii.ca/t/t4lg>> accessed on 8 September 2024.

⁶⁷ Thomas I. Parkinson, "Legislative Drafting." *Proceedings of the Academy of Political Science in the City of New York*, 3 (2) (1913) 142–154 at 150. <<https://doi.org/10.2307/1193363>> Accessed 8 September 2024.

comparative analysis allows for the identification of best practices, pitfalls to avoid, and potential unintended consequences that may arise from certain legislative provisions.

However, it is essential to note that simply copying foreign legislation is not enough. Laws are deeply embedded in the cultural, social, economic, and political contexts of each country, and what works in one place may not necessarily work in another. For example, a law that succeeds in promoting environmental sustainability in one nation might fail in another due to different societal priorities or economic conditions. Therefore, the drafters must adapt foreign models to the unique circumstances of their own country, ensuring that the legislation aligns with local values, needs, and conditions.

In addition to learning from the experiences of other states and countries, the process should involve robust consultation with experts, stakeholders, and the public to create well-rounded, thoughtful, and effective laws. By taking a comparative perspective while remaining grounded in local context, legislators or constitutional drafter can craft legislative instruments that is both informed and truly fit for purpose.

Identifying Potential Readerships

According to McLeod, drafters typically have multiple readerships, often ranging from four to six, with a possible seventh.⁶⁸ The first three readerships are relevant to all legislative instruments, as well as regulatory instruments.

The primary readership in the point of time, is the client. In the case of legislation, the client can be either the instructing authority (the Executive, the Minister, in the case of subsidiary legislation), or Parliament.⁶⁹ While each Bill concerns this readership for only a

⁶⁸ (n. 79 at 5).

⁶⁹ *ibid*

relatively brief period—compared to the lifespan of a typical legislation—securing its approval is of fundamental importance. Regarding the Constitution, the client may be the Constitution drafting committee or the Constituent Assembly established specifically for that purpose. It is also important to note that in some cases, Parliament itself is granted the authority to amend or alter the Constitution.

The second readership is the courts, whose constitutional role is to provide authoritative statements as to the meaning of the Constitution and other legislation and to adjudicate on disputes which are placed before them. Even regulatory provisions which cannot come before a court are likely to be subject to interpretation and application by other tribunals, whose functions may be seen as analogous to, if not identical with, those of the courts. Furthermore, many of those tribunals will, as a matter of practice, tend to give considerable weight to any principles of legislative interpretation which comes to their attention.

The third readership consists of members of the legal profession, whose clients have a legitimate expectation of receiving reasonably accurate advice, whether they are involved in or considering litigation, or when they are organizing their affairs to minimize the risk of litigation (as much as possible). Legal representation may not always be allowed before a particular domestic tribunal, but even in such cases, parties are still free to seek legal advice on how the relevant instruments are likely to be interpreted and applied.⁷⁰

The identities of the fourth, fifth, and sixth readerships will differ depending on the specific context, but they generally include the following:

⁷⁰ *ibid*

The fourth readership includes public officials, such as tax inspectors and planning officers, as well as employees of professional bodies, trade unions, and other interest groups tasked with administering legislative and regulatory frameworks.⁷¹

The fifth readership comprises members of other professions, such as accountants, architects, dentists, doctors, and surveyors, whose interactions with and advice to their clients may be influenced by legislative and regulatory factors.

The sixth readership consists of those members of the public who may wish to understand their legal and regulatory position without recourse to professional, or other specialist, advisers. The remaining possible readership consists of academic lawyers. In the nature of their work, academics will always examine new Constitutional alterations and other legislation in their specialist fields with particular rigour, but drafters may be particularly interested in their reactions to Bills which have come into being as the result of academic criticism of the existing law.

Some may argue that presenting the readerships in this way creates the impression of a hierarchy of importance, which could be misleading because different legislative instruments may have distinct principal readerships. For example, it might be argued that drafters would be the primary readership for a piece of subordinate legislation concerning the technical details of agricultural pesticide use. However, such arguments tend to overlook the fact that, from a constitutional perspective, only the courts can issue authoritative rulings on the interpretation of legislation. Furthermore, any court involved will apply established principles of constitutional or legislative interpretation, which may not be suitable for understanding instruments written less formally and intended for a different readership. On the other hand, when an instrument is drafted with the intention of being interpreted according to formal

⁷¹ *ibid*

principles, experts in the relevant fields will inevitably prepare user-friendly guides based on their interpretation. While these guides may be helpful, they will be unauthoritative, much like the interpretations members of the target readership might form through their own efforts.

2.1.4. Methods for Altering Statute/ Constitution

It is always assumed that drafting of constitutional provisions does not differ appreciably from legislative drafting or drafting of legislation. Although this assumption may be correct in many respects, the drafting of constitutional provisions presents a number of special problems, both substantive and formal, which require the application of some specialized techniques in their solution.

However, the process of amending a constitution does share some similarities with statutory amendment, particularly in the technical specifications. Imhanobe, Crabbe, and a host of other scholars have identified two techniques of drafting amending statutes, namely: textual and non-textual technique.

(1) – textual amendment

(a) this involves the drafting of amendments in a form that effects changes to the actual text of the original (“principal Act”). It is a process of direct integration of new material into the existing statute, enabling a single statute still to contain all the relevant law on the principal topic;

(b) this process facilitates the reading of the statute, in its amended form, as the new and the old constitute a fully integrated text.

(c) it may involve –

(i) adding new parts, sections or subsections, definitions, words or phrases, etc.;

(ii) repealing provisions no longer appropriate;

(iii) repealing inappropriate provisions and replacing them with one that are appropriate.

(d) additional provisions are placed into their logical position in the text and numbered in sequence with those they follow, with the addition in their numbering of an appropriate letter, where necessary, to differentiate them (e.g.; section 55A);

(e) Repealing and replacing can be done in two ways:

- (i) by removing only, the inappropriate words,
- (ii) by replacing the entire section or subsection in which the inappropriate words occur.

The best approach may involve some thought. A provision for the former is notoriously difficult to understand until the changes have actually been incorporated (and can cause problems for legislators). A provision for the latter may allow the whole provision to be discussed in the Legislature rather than the precise changes (and can cause problems for the client). Such a provision does not itself indicate the nature of the change (and this can again cause problems for legislators).

When this method is used, the problem faced by the legislator or user is that the change made to the law is not immediately intelligible. In order to understand the amendment and what it does, it is necessary for the legislator or user to read the text of the amended enactment or rule with the amendment incorporated into it⁷. In some jurisdictions, parliamentary counsel includes in their amending Bills a note showing what a provision will look like when the amendment is incorporated.⁸

The textual amendment device has long been adapted, and is widely used, in many jurisdictions outside the United Kingdom. It has marked advantages -

- (a) It is easier to give effect to the desirable objective that there should be only one, comprehensible, statute on each distinct subject matter;
- (b) It is easier for the user to mark-up amendments on the original;
- (c) It greatly facilitates the consolidation and revision of the statute book;

- (d) The integration of the new and the old is completely effective;
- (e) It results in the user having access to a coherent set of provisions that are inter-related, in the form of a single statute;
- (f) As Thornton suggests, it is easier to draft.

Overall, however, textual amendment greatly facilitates consolidation and the reprinting of statutes, which their amendments included; it is therefore “user friendly”.

Duncan Berry⁹ adds two further advantages. Because textual amendments are relatively easy to incorporate into the relevant principal enactment or statutory rule, the resources involved in keeping the law up-to-date are much reduced. This is because the incorporations can be made by skilled clerical staff, whereas the services of experienced, specialist lawyers are required in order to prepare consolidations of laws that are a mixture of non-textual and textual amendments.¹⁰

Moreover, if a principal statute or statutory rule is amended only by textual amendments, it becomes unnecessary to include provisions such as the following:

This Act and the National Treasury Management Agency Act 1990 shall be construed together as one and may be cited as the National Treasury Management Agency Acts 1990 2000.

(2) – non-textual amendment; amendment by reference

A non-textual amendment does not alter the text of the old law but consists of a discursive statement or narrative of the effect of the amendment on the old law. Because the text of the law that is to be amended remains unaltered, the amendment operates indirectly. With this technique, the amending legislation does not merge with the Act being amended. Nor does it lose its separate identity in the Statute Book.¹¹

- This device was, until recently, to be found as a standard device in the United Kingdom (though not elsewhere). It is now less common in the UK, though, if properly used, it has value for all jurisdictions on occasion.
- it involves the drafting of the law provisions to be read alongside the original, as a distinct but related enactment. The new provisions, in their effect, rather than by changing the original words, modify or alter the operation of the existing provisions, which are thus amended by reference. It may be necessary, therefore, to look at a series of related enactments to see the total effect of amendments. There is no single, integrated text upon which the user can rely.

“In section 35 of the Building Act, 1961, (which relates to conditions to be observed in the management of local authorities’ houses), the reference to contributions under section 12 of the Building Act, 1939, or section 3 of the Building Act, 1947, shall include a reference to contributions under section 4 of this Act.”

- This device gives more information about the effects of an amendment than would the textual amendment –

“in section 35 of the Building Act 1961, after the expression
“section 3 of the Building Act 1947”, add the expression “or
section 4 of the Building Act 1976”.

Whilst both still require access to the new and the old, the non-textual mechanism is thought to serve better the needs of parliament when debating the changes or when amendments are made during the legislative process, as the immediate effects of the change is more obvious.

- The device has its critics, partly because it can fail to make absolutely clear the exact effect of the new on the old, especially when provisions in the old are displaced. The main objection is that the short term interests of the legislator are given greater emphasis than the continuing interests of the user.

- Non-textual amendment remains useful, however, where standard changes have to be made to a large number of statutes (e.g.: on a constitutional or institutional change, or alteration in the currency or weights and measures) and precise listing of the consequential changes would be an immense task.
- Whatever the method of amendment, there are difficulties in conveying to the Legislature the precise nature and effect of the amendment. The terms of the original and of the amendment must be capable of being compared and the extent of the proposed change assessed. This gives rise to important questions as to the editorial support that might usefully accompany textual amendments, so that the legislator can quickly see and understand the effects of the proposed change.

Example:

- Print the original and the original as amended, as well as the amendment;
- Print the original as amended with the amendment highlighted; or
- Provide a detailed explanatory note, in a separate document, at the foot of each amendment, or on the page opposite the amendment.

Using the direct method

Certain responsibilities follow from this method –

- (a) All provisions that are capable of being affected by new legislation must be identified, so that necessary changes can be made of the originals;
- (b) There must be consistency in language and format (including punctuation) between the new and the old – the style and language of the amendment are dictated by the original. Amendments may, therefore, have to reflect the choices of the earlier legislative Counsel;

- (c) Where the principal purpose is to effect amendments to several statutes, some jurisdictions require separate amending statutes for each. In these cases, compatibility between all the Bills, and the resulting Acts, must be maintained;
- (d) Care must be taken to ascertain the need for consequential or incidental changes to other parts of the statute, that follow from the principal amendments;
- (e) Where, in giving effect to proposals, a very large number of amendments will be required to a single statute, consideration should be given to the preparation of a complete bill that replaces the existing legislation. This calls for instructions, as the process may open to debate in the Legislature the old law as well as the new. It will also be often necessary to introduce transitional provisions to cover the transfer from the old Act to the new;
- (f) Alternatively, steps should be taken, where possible, to have produced a consolidated Act, incorporating the extensive provisions (See: Interpretation Act, section 21).

Amendment formulae

Duties of
keepers

7. Section 9 of the Fishery Act 1968, in Act referred to as the
Principal Act, is amended: -

(a) by adding after subsection (1) [the following subsection]

“(1A)”;

(b) in subsection (2) by deleting “fishery” wherever the word
occurs and substituting “fishery and animals”;

(c) in subsection (3) by deleting all the words beginning with
‘after agricultural’ and ending with “enclosed places”;

(d) in subsection (4) by adding, [immediately] after
“treatment”, “to any animal”.

Section 2 amended

8. Section 2 of the principal Act is amended by:

- (a) deleting [the expression] “2. For the purposes” and substituting [the expression] “2. – (1) For the purposes”;
- (b) deleting “captive” in the definition of “animal” and substituting “domesticated”;
- (c) substituting the following definition of “animal” :

“ monkey” means;”;

- (d) adding after the definition of “keeper” the following definition:

“ “trainer” includes;”;

- (e) deleting the definition of “zoo”;
- (f) adding after subsection (1):

“(2) For the avoidance of doubt”.

Addition of section 5A

9. After section 5 of the principal Act, the following section is added;

5A Duties of
keepers

Amendment to Schedule

10. The Schedule to the principal Act is amended by deleting the figures specified in Column 2 of the table set out in the Schedule to this Act in relation to an animal specified in

Column 1 and substituting the figures specified in Column 3 of the table in relation to that animal.

SCHEDULE

	(1)	(2)	(3)
	N\$	N\$	
Catfish	15	20	
Kpanla	20	25	
Titus	10	15	

Addition of Second Schedule

18. The principal Act is amended by adding after the Second Schedule the Schedule set out in the Schedule to this Act.

Consequential amendments

19. The Acts set out in the first column of the Second Schedule are amended to the extent specified in the second column of that schedule.

SECOND SCHEDULE	(section 19)
ACTS AMENDED	
Short title	Extent of amendment
(1)	(2)
Fishery Act (Cap 300)	Addition of section 8A: Duties of owners 8A.
Animal Shelter Act 1990 (No. 21 of 1990)	Addition of 3 (2A) & (2B) (2A) (2B)

ALTERNATIVELY –

Consequential amendments

19. The provisions of the Acts mentioned in the Second Schedule are amended to the extent specified in the third column of that Schedule.

SECOND SCHEDULE

(section 19)

Consequential amendments

Number	Short title	Amendment
Cap. 300	Fishery Act	
<i>Section 12 (1):</i>	delete and substitute -	(1) (1A)
<i>Section 18:</i>	delete - “Any person” substitute – “the owner”	

Points to watch

- There are a number of technical features that need to be checked in the local house-style. As usual, consistency in practice, especially in relation to the formula in current use.
- In addition –
 - (a) Where a number of amendments are made to one major statute, this will usually be designated as “the principal Act” – this expression is usually authorized by “(in this Act referred to as “the principal Act”)” immediately after the reference to the full citation of that Act in the first amending provision.
 - (b) Where textual amendment has been made in the past, it will not be necessary to refer to “the principal Act (as amended)” or to cite the amending Acts (interpretation Act, section 4(1).
 - (c) It is useful to list in a marginal note references to all the amendments to the Act since its last publication.

- (d) It is a common practice, wherever possible, for the amending provision to identify the provision to be amended before the terms of the amendment are set out.
- (e) The provision to be amended must be clearly identified, not by line numbers but by reference to particular words used in the original. These must be enclosed between quotation marks. Where a substantial number of words are to be removed, it is enough to identify the first and the last of the words to be omitted. If the words occur more than once in the provision, those to be amended must be precisely indicated.
- (f) Sections and subsections (but not words) to be added are introduced by a colon/dash and must be enclosed between quotation marks.
- (g) All appropriate punctuation that is needed in the amendment must also be provided. The punctuation of the amending section (i.e., outside the quotation marks) must also be complete.
- (h) It is common to refer to deleting or adding 'words'; but where figures or punctuation are involved, it is preferable better to use 'expression'. But better still, such introductory terms may be omitted and the affected words just shown between quotation marks.
- (i) Where several amendments relate to the same section, these should normally be made in a single amending section, suitably paragraphed.
- (j) Where a new section is added, the amendment should include an appropriate marginal note for that section.
- (k) Practice varies as to the marginal note for the amending section. Often this merely indicates that the relevant section of the principal Act is amended. But in some jurisdictions the marginal note of the amending section repeats the marginal note attached to the original section. There is no advantage in creating yet a third

substantive note, as this will disappear when the amendment is incorporated into original.

- (l) It is not the practice to re-number the whole statute after adding or deleting particular provisions. If additions are made at the end of a section, these can be given the appropriate continuation subsection number. Changes in numbering are not usually made where a numbered provision is deleted.
- (m) Provisions added into the body of an enactment must be given numbers with differentiating letters (e.g.: 9A; 10 (2A); (11) (1) (aa); etc.).
- (n) It can be useful in an appropriate case to insert, by way of information, some parenthetical note after the reference to the provision to be amended, indicating the contents of that provision. This is particularly sensitive in the case of referential amendments.
- (o) Amendments made must be checked to ensure that they fit, both grammatically and in legal effect, with the original provisions.

All these amendments discussed above are examples of *legislation by reference*, because none of them can be understood without referring to the provision which is being amended and they all leave the reader with the task of reconstructing the provision in its amended form. The alternative technique of repealing the original provision and re-enacting it in its amended form makes the law significantly more accessible. One hybrid technique, known in the context of Westminster legislation as a *Keeling schedule* (after EH Keeling, the Member of Parliament who suggested it), is to enact the alterations at the appropriate places in the body of the Act and then reproduce the provisions in their forms in a schedule.⁷² This technique is seldom used because it causes confusion if the earlier Act is subsequently amended, leaving the Keeling schedule included in the later Act as an inaccurate version of the law. However,

⁷² (n. 79 at 93).

using explanatory notes to set out the changes in a form akin to a Keeling schedule can be very useful to anyone who has to grasp their effect.

The technique of repeal and re-enactment, whether or not in the form of a Keeling schedule, may be unduly cumbersome if it is adopted for consequential amendments and repeals, which, as the Renton Report noted, ‘are generally taken pretty well on trust’.⁷³ When only a portion of a provision is amended or repealed textually, it is important to exercise caution to ensure the resulting provision remains fully coherent. When an entire subsection is repealed, along with the need for careful attention to punctuation, a question may also arise regarding the status of any conjunctions that link the repealed text to the remaining text. If these elements are considered essential to the meaning of the paragraph, then they are part of it. However, it is more reasonable to argue that the conjunctions or punctuations are not part of the paragraph itself.⁷⁴

Amending Provisions and Gender-neutral Drafting

Where gender-neutral drafting is a recent development, amendments to older instruments need to be drafted with particular care. More particularly, it may be preferable to continue to use the old style, rather than importing the new one which could bring with it the risk of inadvertently creating scope for argument arising from internal consistency.⁷⁵

Numbering Newly-inserted Provisions

The Drafting Technique Group of the Office of the Parliamentary Counsel recommends the following:

- (i) Provisions inserted between 1 and 2 should be designated 1A, 1B, 1C, etc.

⁷³ Cmnd 6053, para. 13. 22 cited in Mcleod, n.79 at 93.

⁷⁴ (n. 79 at 94).

⁷⁵ *ibid*

(ii) Provisions inserted between 1A and 1B should be designated 1AA, 1AB, 1AC, etc.

(iii) Provisions inserted between 1 and 1A should be designated 1ZA, 1ZB, 1ZC, etc.

(iv) Provisions inserted between 1A and 1AA should be designated 1AZA, 1AZB, 1AZC, etc.

In the rare cases where more than twenty- six (26) new sections are inserted, Z1, Z2, Z3, etc., should be inserted after Z. The same principles should be applied where the insertions are into levels of text which are designated as (a), (b), (c), etc. or (i), (ii), (iii), etc.⁷⁶

2.1.5. General Comparison of the Structure and Form of Constitutions in Africa

Prof. Nwabueze had previously observed a marked difference between the Constitutions of former French and British territories.⁷⁷ Constitutions of ex-French territories were generally characterized by brevity and a straightforward, accessible style. They historically exhibited a more concise style, with a typical range of 39 to 110 articles, often falling between 60 and 80. They have also undergone significant amendments and expansions over time, leading to an increase in their length and complexity in some cases. In contrast, Constitutions of ex-British territories exhibited a marked prolixity, often characterized by extensive detail and complex language. Despite this evolution, Nwabueze's observation that the constitutions of ex- British territories tend to be more voluminous, with extensive detail and complex language, remains largely valid. This is evident in their sheer length, which can

⁷⁶ *ibid*

⁷⁷ BO Nwabueze, *Constitutionalism in the Emergent States* (C. Hurst & Company 1973) 30.

vary significantly, from 192 sections as in Sierra Leone to 264 sections as in Kenya and an impressive 448 articles in India (excluding its extensive schedules).⁷⁸

Why this disparity in length? The first explanation is of course tradition.⁷⁹ The French notion of a code, especially a code of constitutional law, is that it should be as short as possible, marking only the main outlines of the subject and designating only its important objects, and leaving ‘the minor ingredients which compose those objects to be deduced from the nature of the objects themselves.’⁸⁰ Aspects of governmental organization which, though important, are not considered fundamental are left out of the Constitution, but with the express stipulation that they should be regulated by ‘organic laws.’ In the Constitution of the Fifth French Republic, 1958, for example, matters so reserved to organic laws range over such fields as the life of the Legislature, the number of its members, and the organization and operation of the constitutional council. Nearly all the ex-French territories have adopted this device. It has no doubt been an advantage in limiting the constitution to fundamentals, but it may become objectionable as impairing the supremacy of the constitution where it is extended to what might be considered as a fundamental, or where it is used to qualify a general rule enacted in the Constitution.⁸¹ This is because an organic law does not enjoy the same status as the Constitution.

The Legislatures of the ex-French territories are of course mostly unicameral,⁸² and most have no constitutional councils. In the absence of these institutions, the procedure relating to organic laws usually requires that they shall be passed, altered or amended only by an absolute or two-thirds majority of the National Assembly, and may not be promulgated unless

⁷⁸ The Constitution of India initially had 395 articles when it was adopted in 1950, but the number has increased due to numerous amendments over the years.

⁷⁹ (n. 35 at 31).

⁸⁰ See: Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheaton 316 (1819).

⁸¹ Cf. Sir Ivor Jennings, *The Approach to Self-Government*. (Cambridge University Press, 1958) 22.

⁸² Only Madagascar has a bicameral legislature consisting of a National Assembly and a Senate.

the Supreme Court, at the instance of the President Of The Republic, has declared them conformable to the Constitution.⁸³

The British technique of drafting is markedly different. A statute should be as explicit as possible, leaving no loopholes and no ambiguities so far as that can be achieved by drafting ingenuity. As a result, the statute becomes riddled with unnecessary verbiage, technicality and complexity, to the extent that few can read it with understanding, and none with relish. A constitution drafted in the British fashion will therefore remain unreadable and incomprehensible, except by a few lawyers and professional politicians.

A second explanation is the form of executive government which Constitutions establish. The constitutions of the ex-French territories establish without exception a presidential system, while most Commonwealth Constitutions have established a parliamentary executive inherited from Westminster. The Westminster system rests perhaps more upon vague, ill-defined conventions than upon explicit law. A written constitution which adopts it is thus faced with the problem whether to incorporate only the legal rules or to attempt to spell out the conventions in precise, written terms.

There have been three different approaches to the problem. The Constitutions of the older Commonwealth countries incorporate only the strictly legal elements of the system; the conventions are of course taken over also by necessary implication but they do not appear in the Constitution so as to lengthen and encumber it. In the Constitutions of some of the Commonwealth countries, such as those of Ceylon, and Ghana, brevity is achieved by incorporating the conventions, not by mere implication, but by express reference without explicit definition, e.g. by providing that the powers of the Head of State shall be exercised 'as

⁸³ See, e.g., Art. 67, Constitution of the Republic of Senegal, 1963; Art. 33, Chad, 1962; Art. 60, Dahomey, 1964; Art. 56, Togo, 1963.

nearly as may be in accordance with the constitutional conventions applicable to the exercise of similar powers in the United Kingdom by Her Majesty.’ Then there is the method of detailed specification adopted by the constitutions of Nigeria, Lesotho and the countries which became independent after it under the Westminster system. Two distinctions are involved in these three approaches: between law and convention on the one hand, and between two forms of legislation on the other. Under the second and third approaches, the conventions are clothed with the character and force of law, becoming thereby justiciable.

The process of codification provides an opportunity to try to establish these conventions, to make them up where they are uncertain on any point, and to adapt them to suit local conditions and needs. Prolivity and complexity are thus evils made inevitable by the Westminster system. The separation of the head of state from the head of government and the parliamentary character of the executive create complex relationships, which for the sake of precision, require to be explicitly defined. But for this system, there can be no doubt that much of this prolivity and complexity would have been avoided. One needs only refer to the republican, presidential constitutions of Ghana, 1960, and Tanganyika, 1962, to be convinced of this. Both ran to only fifty-five (55) and sixty-nine (69) articles (or sections) respectively, a striking contrast with their previous Westminster-type constitutions. They were without doubt the shortest constitutions in the Commonwealth, and Ghana’s, drafted more in the French style, was the least technical and most readable and most easily understood.

The third reason is that, with the exception of Cameroon, all the ex-French territories have unitary constitutions, whereas many of the Commonwealth constitutions have been federal or at least quasi-federal, such as those of Nigeria, Lesotho, and Rhodesia. Federalism makes it necessary to incorporate additional articles defining the relationship of the various territorial units of government.

Lastly, there was the earlier concern of the British to ensure that on their withdrawal, the tribal or racial minorities were not left with insufficient protection against the tyranny of the majority, since in the plural societies of the emergent states the danger of tyranny of majority rule is markedly greater than in the homogeneous societies of Europe. Thus, in addition to the traditional checks and balances, institutional devices in the form of independent commissions have been established to insulate from political control such sensitive areas of public administration as the delimitation of electoral constituencies, the conduct of elections, the administration and the audit of public accounts; or there may be a special institutional mechanism designed to obstruct the enactment of legislation that discriminates against racial or tribal groups.⁸⁴ Such checks and balances have some value, but it is doubtful whether such value as they have really justifies the encumbrance they impose upon the Constitution.

The inclusion of intricate regulations within the Constitution can lead to rigidity and hinder the government's ability to respond effectively to evolving challenges and changing circumstances. Critics, including Nwabueze (2004),⁸⁵ suggest that this overextension contributes to the document's bulkiness, making it less functional as a supreme legal framework, thereby transforming it into an aspirational document. The structure and organization of the Nigerian Constitution have also been points of contention. Sections and subsections often lack uniform formatting or a logical flow, leading to interpretation challenges. The inclusion of detailed schedules—such as the Exclusive Legislative List and Concurrent Legislative List—complicates navigation, making it challenging to determine whether a particular matter falls under the exclusive jurisdiction of the federal government or the concurrent jurisdiction of both the federal and state governments. The ambiguity inherent

⁸⁴ Stanley Alexander De Smith, *The New Commonwealth and Its Constitutions*, by S.A. De Smith (Stevens and Sons 1964) Ch. 4.

⁸⁵ Ben Nwabueze, *Constitutional Democracy in Africa. I, Structures, Powers and Organizing Principles of Government* (Spectrum Books 2003).

in the Exclusive and Concurrent Legislative Lists has resulted in numerous legal disputes that impede the smooth operation of the Nigerian federal system. In his recent article, Okeke (2023),⁸⁶ draws upon the Supreme Court's decision in *A.-G., Ondo State v. A.-G., Fed.*,⁸⁷ to argue that, by implicitly placing Chapter II (the non-justiciable rights chapter) under the Exclusive Legislative List, the Constitution itself suggests that these provisions are not merely aspirational declarations.⁸⁸ Instead, Okeke (2023) contends that the Executive and the National Assembly have a shared responsibility to translate these provisions into concrete legal enactments through appropriate legislation as circumstances warrant.⁸⁹ Also, state names and other significant state symbols are considered entrenched in the country's Constitution. If a change of state name or state symbol was not duly authorized through the correct legal channels, such as a constitutional alteration and the involvement of the National Assembly or state House of Assembly, it may not hold legal implications.⁹⁰ Finally, the issue of interpreting the scope of executive powers under the Nigerian Constitution, specifically whether an executive order can have the same force as legislation passed by the Legislature has been the subject of judicial scrutiny in recent times.⁹¹

Similar contentions about how the existing distribution of legislative powers has proven insufficient have necessitated the re-categorization of certain matters from the Exclusive Legislative List to the Concurrent Legislative List. For example, by virtue of Alteration Acts

⁸⁶ Odinakachukwu E. Okeke, 'Pro-Justiciability Approach towards enforcing the Provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999'. *NAUJILJ* [2023] 14 (1) at 102. < <https://www.ajol.info/index.php/naujilj/article/view/247001/233631> > accessed on 23 July, 2024.

⁸⁷ [2002] 9 NWLR (Pt. 772) 222.

⁸⁸ (n. 22)

⁸⁹ *ibid* at 105.

⁹⁰ For example, as at 2022, the Osun State House of Assembly is on a collision course with Governor Ademola Adeleke over an Executive order he issued for the name 'State of Osun' to be reversed to Osun State. Adeleke had in his inaugural speech issued an Executive Order, reversing the name of the State from 'State of Osun' to Osun State. He also changed the slogan of 'State of Virtue' to 'State of Living Spring'. But the lawmakers rejected the executive order, saying it was out of place and a nullity. Read more at <<https://pmnewsnigeria.com/2022/11/28/osun-assembly-on-collision-course-with-adeleke-you-cant-rename-state/>> accessed on 23 July, 2024.

⁹¹ *Attorney-General, Abia State and Ors v Attorney-General of The Federation* (2022) LPELR-57010 (SC).

No. 15 and No. 16, “prisons” and “railway services” have been moved from the Exclusive Legislative List to the Concurrent List, meaning that State Governments now have the competence to legislate and regulate on these issues. Furthermore, Section 2 of the Constitution of the Federal Republic of Nigeria, 1999 (Fifth Alteration) No. 17, amends Paragraph 14(b) of Part II of the Second Schedule to the Constitution by expanding the scope of coverage for States in Nigeria, to enable them make laws for their respective states, for the generation, distribution and transmission of electricity without limiting the scope of coverage to areas not covered by the national grid – with the expectation that this will lead to improved electricity generation, distribution and transmission in the country.⁹²

Another prominent criticism of the 1999 Constitution is its overly centralized nature, which undermines the federalist principles it ostensibly upholds. For instance, Sections 162 and 163 on revenue allocation heavily favour the federal government, reducing the fiscal autonomy of states. This imbalance has been identified by scholars such as Suberu (2015) as a significant impediment to effective governance and development at the state and local levels.⁹³ The centralization of policing and resource control further exacerbates tensions between the federal government and subnational entities, contributing to recurring demands for restructuring. Scholars like Ihugba (2023),⁹⁴ identifies a broad consensus on the desirability of a federal structure where states are empowered to govern and provide public goods and the central government focuses on standard-setting, intergovernmental coordination, and international relations. However, achieving this vision requires a clear, actionable roadmap rooted in constitutionalism and widespread public consensus. The problem with these positions

⁹² See however, *LAUTECH v Ogunwobi* (2006) 4 NWLR (Pt 971) 569; *Attorney-General of Ogun State v Attorney-General of the Federation* (1982) 3 NCLR 166, 179 and *Attorney-General of Ogun State v Alhaja Ayinke Aberuagba* (1985) 1 NWLR (Pt 3) 395, 405 and 440, for the doctrine of covering the field.

⁹³ Rotimi Suberu, “Managing Constitutional Change in the Nigerian Federation” (Fall 2015) Vol. 45, No. 4 *Publius*, 552-579 < <https://www.jstor.org/stable/24734693>>> accessed 6 August, 2024.

⁹⁴ Bethel Uzoma Ihugba, ‘Reconciling Constitutional Alteration Themes and Federalism in Nigeria’. *NILDS-JLR* [2022-2023] 5&6, 20-38.

however, is that there is no agreed approach at setting the priority for themes to be dealt with now and those to be left to later. Perhaps this is why some commentators have proposed a holistic alteration or a brand new Constitution and others, while advocating for a decentralized government, also make arguments for a parliamentary system.⁹⁵ This discordance raises the question of the extent there is an understanding of constitution alteration in a federation and what drafting techniques and methods are employed in the constitutional alteration process. While Lesotho is not a federal state, the balance of power between its central government and local authorities reflects issues akin to centralization in federations. The Constitution of Lesotho places significant authority in the hands of the monarchy and central government, overshadowing the autonomy of local councils established under the Local Government Act, 1997.

Lastly, the absence of robust preparatory materials or preambles in the Constitution Alteration Acts complicates judicial interpretation. Legal systems with robust traditions of analyzing legislative debates and drafts, as in other jurisdictions, provide clearer guidance on statutory intent. Scholars like Seidman et al (2011),⁹⁶ and Okon (2015) advocate for the inclusion of explanatory notes and legislative histories in future alterations to enhance interpretative clarity and bridge the gap between judicial interpretation and legislative aspirations.

⁹⁵ Dele Adesina, 'Constitution Review Must Be Holistic and Unfettered'. *Thisday*, (Nigeria, 29 September 2020) <<https://www.thisdaylive.com/index.php/2020/09/29/constitution-review-must-beholistic-and-unfettered/>> accessed 6 September 2024; Malachy Ugwummadu 'A brand new Constitution needed: Stop the amendment charade now!' *The Guardian* (Nigeria, 20 July 2021) <<https://guardian.ng/features/a-brand-new-constitution-needed-stop-the-amendment-charade-now/>> accessed 6 September 2024; Sebastine Hon, 'Agenda for Constitutional Amendment in Nigeria' *The Guardian* (Nigeria, 20 July 2021) <<https://guardian.ng/features/a-brand-new-constitution-needed-stop-the-amendment-charade-now/>> accessed 6 September 2024.

⁹⁶ Ann Seidman et al., *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, 26 (Kluwer Law International 2011).

2.2. Literature Review

After a comprehensive search of domestic and international literature, it was confirmed that limited academic attention has been given to this research focus. It was found that while the procedural realities of constitution alterations are well-documented and debated upon by several scholars, the specific application of legislative drafting methods remains largely unexplored, both domestically and internationally. This gap may stem from the technical complexities of legislative drafting, which are often overshadowed by procedural concerns among non-legal stakeholders who may be directly or indirectly often involved in the Constitution alteration process. This makes them overlook the critical role of legislative drafting in the constitution alteration process. This lack of existing scholarship further emphasizes the importance of this study and its potential to contribute novel insights to the field.

Within the Nigerian context, prevailing scholarship mainly concentrates on the procedural complexities inherent in the constitution alteration process and their ramifications for democratic consolidation.⁹⁷ The ongoing debates surrounding state creation,⁹⁸ revenue

⁹⁷ See: Oserheimen A. Osunbor, 'Constitution Amendment in Nigeria: Concepts and Misconceptions'. (A Paper presented to the Students of the Faculty of Law, Ajayi Crowther University, Oyo, 31 January 2017). <https://acu.edu.ng/wp-content/uploads/simple-file-list/CONSTITUTION_AMENDMENT_IN_NIGERIA_CONCEPTS_MISCONCEPTIONS-Sen_-Prof_-Oserheimen-A_-Osunbor.pdf> accessed on 12 September 2024; Rotimi Suberu, "Managing Constitutional Change in the Nigerian Federation." *Publius*, vol. 45, no. 4, 2015, pp. 552–79. *JSTOR*, <<http://www.jstor.org/stable/24734693>> Accessed on 12 September, 2024. Suberu's work directly addresses the "managing" of constitutional change, which implies a focus on the practical and procedural aspects of how amendments are handled within the Nigerian federal system. It explores the political dynamics and institutional processes involved in altering the constitution, with a strong emphasis on how these changes affect federalism and democratic stability; Julius O. Ihonvbere, "How to Make an Undemocratic Constitution: The Nigerian Example." *Third World Quarterly*, vol. 21, no. 2, 2000, pp. 343–66. *JSTOR*, <<http://www.jstor.org/stable/3993423>> Accessed on 12 September, 2024. While Ihonvbere's paper is more critical and focuses on the underlying undemocratic nature of the constitution itself, it still heavily relies on analyzing the procedural flaws and political manipulations that have shaped the amendment process. It highlights how these procedures have been used to entrench undemocratic practices. His paper uses the procedural flaws as a core part of its argument, and therefore supports the assertion.

⁹⁸ For example, see the article by Chukwuemeka Nwanegbo and Uche Okafor, "The Constitutionality of the Creation of Local Governments by Some States Vis-A-Vis The Powers of the National Assembly in Nigeria". (2005) *AJPAS* <<https://www.ajpasebsu.org.ng/2005/05/the-constitutionality-of-the-creation-of-local>

allocation, and the balance of power between the federal and state governments, highlight the procedural challenges of altering the Constitution to address these issues. Additionally, attempts to alter the 1999 constitution to improve the electoral process and ensure free and fair elections remain a central focus of scholarly attention.⁹⁹ The dynamics between the executive and legislative branches of government,¹⁰⁰ and their influence on the constitution alteration process, are also subjects of ongoing analysis.

In his article, Shamsu (2020),¹⁰¹ examined the changes made to the Constitution of the Federal Republic of Nigeria, since 1999, which provides a valuable point of reference for this present study. Shamsu's work distinguishes itself though, through its detailed examination of specific constitutional provisions that have undergone alteration, coupled with an exploration of the underlying issues that necessitated these alterations. This granular approach offered a comprehensive understanding of the evolving constitutional landscape in Nigeria that was different from what some scholars had previously done. This methodology, while distinct from this study's focus on drafting techniques, provides crucial contextual information regarding the specific provisions that have been amended. This focus on the procedural challenges is prevalent among Nigerian academics. However, this research diverges by emphasizing the critical role of legislative drafting in constitution making, alteration or amendments.

[governments-by-some-states-vis-a-vis-the-powers-of-the-national-assembly-in-nigeria/>](#) accessed on 12 September, 2024.

⁹⁹ For example, see the articles by: Ikenna U. Ibe, Chidimma Stella Nwakoby, Tobechukwu Modestus Ihediuche, "Electoral Laws and Elections in Nigeria: Enthroning A New Legal Framework for The Conduct of Elections in Nigeria", Issue Vol. 1 No. 2 (2024) *Nnamdi Azikiwe University Awka Journal of Private and Property Law*, 85-101; Chibuike Mgbeahuruike, *Reviving Nigeria's Electoral Integrity: Lessons from The Justice Uwais electoral Reform Report* (Centre for Democracy and Development, 2023);

¹⁰⁰ For example, see: Agbo Friday Ojonugwa, Daniel Philemon Saredau and Grace Perpetual Dafiell, "A Comparative Analysis of Immunity Clauses in Nigeria, United State of America, And Australia: Should They Be Retained or Repealed" Vol. 1 No. 2 (2024) *Nnamdi Azikiwe University Awka Journal of Private and Property Law*, 157-166.

¹⁰¹ Yahaya Shamsu, 'Constitutional Alteration and Democratic Consolidation in Nigeria'. <<https://ir.nilds.gov.ng/bitstream/handle/123456789/396/CONSTITUTIONAL%20ALTERATION%20AND.pdf?sequence=1&isAllowed=y>> accessed on 25 September 2024.

In contrast to the dominant discourse on procedural hurdles inherent in the Constitution alteration exercise, my research posits that the efficacy and stability of constitution alterations are fundamentally contingent upon the rigour and foresight employed during the drafting stage. This study argues for a research-driven approach to constitution amendment, wherein proposed alterations are predicated on demonstrable needs and are informed by meticulous anticipation of potential areas of contention arising from the new provisions. This proactive strategy seeks to minimize the frequency of subsequent amendments necessitated by drafting oversights or unforeseen consequences. Therefore, while scholars have illuminated the procedural realities of constitution alteration in Nigeria, this study builds upon the foundation they have laid by exploring the oft-neglected, yet equally crucial, dimension of legislative drafting in the Constitution-making or altering discourse.

One Lesotho professor specifically addressed one of the focus areas of this study, connecting the piecemeal drafting approach to the high frequency of constitution amendments. Prof. Nyane (2021),¹⁰² essentially argued that this method creates an environment where constant revisions become necessary, showing the importance of drafting methods in constitution stability. He criticizes the prevailing amendment approach in Lesotho, labeling it “Constitutional Dismemberment” to highlight its destructive nature.¹⁰³ He advocates for a more structured and theoretically sound approach to constitutional reform, emphasizing the importance of preserving the constitution’s integrity. He also criticizes the dominant role of politicians in the reform process, and points out both procedural and substantive flaws in the 10th Amendment bill.

¹⁰² Hoolo Nyane, “A Note on the Ninth Amendment to the Constitution of Lesotho” *PER / PELJ* 2021 (24) <<http://dx.doi.org/10.17159/1727-3781/2021/v24i0a8624>> accessed on 23 September, 2024.

¹⁰³ Hoolo Nyane, “The State of Lesotho's Constitutional Reforms: Progress or Stagnation?” (2023) <<https://constitutionnet.org/news/state-lesothos-constitutional-reforms-progress-or-stagnation>> accessed on 23 September, 2024.

While not directly incorporated into this work, understanding of amending legislation was significantly shaped by Dr. Amali's lectures in MLL 801: Legislative Drafting and Process. Notably, he emphasized that Nigeria primarily utilizes the direct, or textual, amendment method in legislative drafting. This involves directly integrating new provisions into the existing statute. Dr. Amali also clarified that the crucial task of consolidating these dispersed alterations falls under the purview of the Law Reform Commission, ensuring a cohesive and updated legal framework. This foundational knowledge provided a valuable backdrop for analyzing the alteration techniques discussed.

Very few studies have touched on closely related issues with this study's focus in the international sphere. One of such is Pulido's article titled: "Drafting a Constitution is not Drafting a Statute: An Analysis of the Mexican Constitution and Hyper-Amending Pathologies from the Legislative Drafting Perspective".¹⁰⁴ Pulido's (2020) focus on the Mexican Constitution highlights issues that mirror those in Nigeria and the Kingdom of Lesotho, including frequent amendments stemming from drafting flaws in the Constitution. He highlights the detrimental impact of poorly drafted constitutional amendments on constitutional compliance in Mexico, a problem he terms "*constitutional anomia*." His research found that the frequency of amendments to the Constitution jeopardizes compliance with the provisions of the Constitution which the Mexican people have developed over time due to the series of amendments being made to their constitution. He attributes this phenomenon to the constitution's excessive detail and advocates for simplification of the Constitution and transparency in legislative debates touching on constitutional amendments. Pulido's research is pertinent to this study, as it identifies legislative drafting as a key factor in constitutional instability. This study, however, extends beyond a singular national focus. Recognizing that

¹⁰⁴ Jesús Manuel Orozco Pulido, "Drafting a Constitution is not Drafting a Statute: An Analysis of the Mexican Constitution and Hyper-Amending Pathologies from the Legislative Drafting Perspective" *Mexican Law Review* (2020) 13 (1) 203-217. <<https://doi.org/10.22201/ijj.24485306e.2020.1.14814>> accessed on 12 September, 2024.

these drafting-related challenges are not isolated occurrences, this study embarks on a comparative analysis of Nigeria alongside another African country. This comparative approach aims to demonstrate that the issues this study is addressing—the destabilizing effects of poorly drafted constitutional amendments and the resulting erosion of constitutional compliance, among others—represent a broader, albeit often overlooked, trend particularly in countries with written constitutions.

A crucial dimension of this study which concerns the things to take into account when drafting a constitution or amending a constitution, finds significant support in the work of Grad and Williams (2006).¹⁰⁵ The authors emphasized adequate background research and meticulous approach in drafting as it is difficult to correct an error made in drafting a constitutional amendment or revision after they are adopted. This, the authors opined, would only lead to another amendment process. The practical implications of this argument are starkly illustrated by the Second Alteration Act to the 1999 Constitution of the Federal Republic of Nigeria. Its dual objective, revealed by the long title of the Act, was that not only did the Act seek to alter the 1999 Constitution, it also sought to alter the First Alteration Act to the 1999 Constitution to correct deficiencies in the First Alteration Act. This highlights the potential consequences of imprecise drafting.

The fact that the First Alteration Act itself required alteration highlights the potential for unintended consequences and the inherent complexities associated with constitutional alterations or amendments. It also implies that the drafting process of the First Alteration Act may have been rushed, or that the research that should have backed it was not thorough. This underscores the necessity of a comprehensive and meticulous approach to constitutional

¹⁰⁵ Frank P. Grad, and Robert F. Williams, *State Constitutions: Drafting, Revisions, and Amendments* (State University of New York Press 2006) 31.

drafting, where the potential for future amendments is minimized through careful consideration of all possible ramifications. In the context of this research, the case study of Nigeria and the Kingdom of Lesotho serves as a compelling empirical illustration of the theoretical claims made by Grad and Williams, reinforcing the need for a focused examination of legislative drafting methods in constitutional alteration processes.

Accordingly, the justification and necessity of this research study are outlined under three broad categories, as follows:

- (v) Limited focus on the legislative drafting methods in constitutional alterations.
- (vi) Lack of comparative studies analyzing drafting practices in African countries.
- (vii) Insufficient theoretical frameworks linking legislative drafting to constitutional coherence and functionality.

Addressing these gaps is critical to enhancing the effectiveness of constitutional reforms, particularly in Nigeria and the Kingdom of Lesotho, where frequent Constitution alteration and amended often undermine the stability and coherence of the legal framework.

2.3.Theoretical Framework for The Comparative Study of Nigeria and The Kingdom of Lesotho (1999-2023)

2.3.1. Popular sovereignty and Constitution Alterations

This study is anchored on the doctrine or theory of popular sovereignty, a defining concept of democracy. Jean-Jacques Rousseau is credited with espousing this theory in modern times. However, the concept of popular sovereignty was not unknown earlier as well. In medieval times, Cicero pointed out that the state was ‘people’s affairs’.¹⁰⁶ He opined that the

¹⁰⁶ Cicero is a rarity in history; a philosophically inclined man who held political power. He was born in Arpinum in 106 BC. His political career took place during the twilight of the ailing Roman Republic. He was a self-described constitutionalist, but also a dedicated moderate who wished for peace and harmony above all else.

state was a moral community, a group of persons, and the authority arose from the collective power of the people. Later on, Althusius also said that the people as a corporate body held sovereignty, and this power could not be transferred to any other person or organization.¹⁰⁷ Althusius forcefully argued that the people as a corporate body gave the power of administration to the administrators through a contract for specific purposes, and the power would go back to the people in case they forfeited it for any reason.¹⁰⁸ Althusius also gave the people the right to resist tyranny. Similarly, John Locke also based his civil society on the basis of the consent of the people.¹⁰⁹ According to him, the government existed for the welfare of the people, and there could not be any arbitrary rule. To Locke, government was a trustee constituted through a social contract for the protection of life, liberty, and property of the people. If the government failed in its duty of protecting the life, liberty, and property of the people, it had a right to rebel against it and overthrow it.

But Rousseau is considered the father of the concept of popular sovereignty. According to Rousseau, men by their very nature are free and equal, and the system of government has to be based upon the free will of men.¹¹⁰ This, in turn, can be achieved when the individual enters into a contract with each other, as a result of which they become an indivisible part of a body of sovereign people that has the supreme power of lawmaking. Rousseau also made a clear

Cicero's natural law views persist as influential to this day. Unlike many of his contemporaries, Cicero did not forge a career by means of war but instead through oratory in the law courts of his day. He opposed the tyranny of Caesar and, subsequently, Mark Antony. Eventually, Cicero was assassinated after delivering an intensely scathing condemnation of the tyranny of Mark Antony as part of a series of speeches entitled the *Philippics*.

¹⁰⁷ Considerable interest arose in the thinking of Johannes Althusius outlined in his 1603 work entitled *Politica: Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples*. See also: Malan K "Johannes Althusius' Grand Federalism, the Role of the Ephors and Post-Statist Constitutionalism" *PER / PELJ* 2017 (20) <<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1350>> accessed on 12 September, 2024.

¹⁰⁸ *ibid*

¹⁰⁹ In early modern England, John Locke employed Cicero's phrase "*salus populi suprema lex*," or "let the welfare of the people be the ultimate law," as an epigraph to his most famous work, *The Second Treatise On Government*. Locke even went so far to say that "'*salus populi suprema lex*' is certainly so just and fundamental a rule, that he, who sincerely follows it, cannot dangerously err."

¹¹⁰ Edoh Odum Sunday, "An Appraisal of the Concept of Sovereignty in the Social Contractarian Thoughts of Jean-Jacques Rousseau" *Historical Research Letter* Vol. 45 (2018). ISSN 2224-3178 (Paper) ISSN 2225-0964 (Online)

distinction between the state and the government. To him, the government is merely an agent of the state having limited authority. In fact, it is the people who have delegated the power to rule to the government, and this power can be withdrawn by their will. This will of the people becomes sovereign in Rousseau's state, to which Rousseau gave the name of the General Will. In Rousseau's scheme, the sovereign can only act for the welfare of the people. He writes, "It is impossible for the sovereign body to hurt its members. The sovereign for its part cannot impose upon members any fetters that are useless to the community."¹¹¹

Thus, a Constitution rooted in popular sovereignty is one that necessitates popular constitution making and popular ratification.¹¹² Constitutions should therefore be drafted by popularly elected conventions, and not by the Legislature,¹¹³ and ratification should occur through a process that elicits direct popular consent – ideally, a referendum.¹¹⁴ Furthermore, if a Constitution rested on popular consent, the people retained the inherent right to replace it.

Scholars like John Locke did argue that such replacement was justified only when the government severely endangered the community's well-being. However, Americans went further, institutionalizing the right to change the Constitution whenever deemed necessary. This included both full replacement and formal amendments. The 1776 Pennsylvania Constitution included the first explicit amendment process, bypassing the Legislature and utilizing a convention.¹¹⁵ By 1780, nearly half the American states had established amendment procedures, firmly establishing the principle of popular sovereignty as the authority for altering

¹¹¹ *ibid*

¹¹² Donald S. Lutz, *The Origins of American Constitutionalism* (Louisiana State University Press 1988) Ch. 7.

¹¹³ Willi Paul Adams, *The First American Constitutions* (University of North Carolina Press 1980).

See also: Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton 1988).

¹¹⁴ Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions*. (Louisiana State University Press 1980) 218-225.

¹¹⁵ Donald S. Lutz, "Toward a Theory of Constitutional Amendment" *The American Political Science Review*, Vol. 88 No. 2 (Jun, 1994) 335-370. <https://econweb.umd.edu/~wallis/398W/lutz_amendment_APSR_1994.pdf> accessed on 12 September, 2024.

the organic law. In addition to popular sovereignty, the formal procedure for Constitution alteration in America was built upon three other premises, namely:

- (i) Human Fallibility: Since fallibility is part of human nature, provision had to be made for alteration of constitutions to adapt to changing circumstances and correct unforeseen consequences of existing provisions. This premise was explicated by Vincent Ostrom.¹¹⁶
- (ii) Deliberative Process: A belief in the efficacy of a deliberative process was also part of the general American constitutional perspective. A constitution was viewed as a means not merely to make collective decisions in the most efficient way possible but to make the best possible decisions in pursuit of the common good under a condition of popular sovereignty. The common good is a more difficult standard to approximate than the good of one class or part of the population, and the condition of popular sovereignty, even if operationalized as a system of representation, requires the involvement of many more people than forms of government based on other principles. This in turn requires a slow, deliberative process for any political decision, and the more important the decision, the more deliberative the process should be.
- (iii) Distinction Between Constitutional and Ordinary legislation: Constitutional matters were considered of higher importance, requiring a more rigorous and deliberative process than ordinary legislation. In addition, the alteration procedure needed to strike a balance between ease and rigour. An overly easy procedure could undermine the distinction between constitutional and ordinary legislation, while an excessively

¹¹⁶ Vincent Ostrom, 'Human Fallibility, Political Theory and the Environment'. *Policy Studies Journal* [1973] 1 (4), 2015-2018. Also: Vincent Ostrom, 'Human Fallibility, Political Theory, and the Environment' in S. S. Nagel, ed. *Environmental Politics* (Praeger, 1974).

difficult one could hinder necessary adjustments and impede the effective exercise of popular sovereignty.

The theoretical framework of popular sovereignty holds salience for this study as it provides an analytical lens through which to differentiate between substantive constitutional systems, wherein the constitution functions as a genuine higher law, and those that operate primarily at a symbolic level. The strategic selection of the chosen countries (Nigeria and the Kingdom of Lesotho) for analysis stems from this very distinction. Furthermore, it helps identify theoretical variations by acknowledging that different amendment processes reveal differing assumptions about popular sovereignty, human nature, and the role of the constitution.

2.3.2. Theory of Functionality and Comparative Legislative drafting

It is beyond dispute today that the scholarly pursuit of comparative law has several significant benefits and functions. This emerges from a very simple consideration that no study deserves the name of a science if it limits itself to the phenomena arising within its national boundaries. For a long time, legal scholars were so content to be insular in this sense, and to some extent, they still are. However, such a position is untenable and comparative law offers the only way by which law and its antecedents can become international and a science.

The primary aim of comparative law, as of all science, is knowledge. Comparative law can provide a richer range of model solutions than any study devoted to a single nation. This is because, the different systems of the world can offer a variety of solutions than could be thought up in a lifetime by even the most imaginative jurists who was corralled in his own system. According to Zitelmann, comparative law is an *ecol   de v  rit  * (school of truth)

because it expands the available legal solutions and enriches the understanding of legal concepts.¹¹⁷

Like the lively international or regional exchange with which it gives rise to, comparative law has other functions that can only be mentioned here in the briefest way possible. Firstly, it dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world, and to further the international understanding. It is also extremely useful for law reform in developing countries.

Two particular practical benefits of comparative law calls for closer attention in this study: (i) Comparative Law as an aid to the Legislator; and (ii) Comparative law as a contributor to the systematic unification of the law.

(i) Comparative Law as an aid to the Legislator

Legislators all over the world have found that on many matters, good law cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports specifically prepared on the topic being researched. Many developing nations like Nigeria and Lesotho, are finding that comparative law can be of assistance in framing domestic legislation and even Constitutions.

Of course, one must proceed with intelligence and caution. If comparative analysis suggests the adoption of a particular legal solution or technique to a problem arrived at in another system, one cannot reject the proposal simply because the solution is foreign or *ipso*

¹¹⁷ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd transl. by Tony Weir (Oxford University Press, 1998 [1996]) 32–47, first published as *Einführung in die Rechtsvergleichung* (vol. I, 1971) 27–48, at 15. See also: Christopher A. Whytock, Legal Origins, Functionalism, and the Future of Comparative Law, 2009 BYU L. Rev. 1879 (2009). <https://digitalcommons.law.byu.edu/lawreview/vol2009/iss6/13> > accessed on 12 September, 2024.

facto unacceptable. To those who object the foreignness of importations, Jhering has given the conclusive answer:

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good and better at home, but only a fool will refuse quinine just because it didn't grow in his back garden.¹¹⁸

(ii) Comparative Law as a contributor to the systematic unification of the Law

Another practical function of comparative law is its significant role in the unification of law. Unification cannot be achieved by simply conjuring up an ideal law or practice on any topic and hoping to have it adopted. Rather, one must find what is common among the jurisdictions concerned and incorporate that to make for uniformity. Where there are differences, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution, which is better and more easily applied than the existing ones. Preparatory studies in comparative law are absolutely essential here; without them, one cannot identify the points of convergence and divergence in each legal system, let alone decide which solution is best.

As with all intellectual activity, every investigation in comparative law begins with the posing of a question and the setting of a working hypothesis – in brief, an idea. Often, it is the feeling of dissatisfaction with the solution in one's own legal system which drives one to inquire whether perhaps other legal systems may not have produced something better.

¹¹⁸ Rudolph V. Jhering, *Geist des römischen Rechts* (The Spirit of Roman Law). Part I (9th edn; 1955) 8f. Also cited in Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in C. Stefanou and H. Xanthaki (eds) *Drafting Legislation— A Modern Approach* (Ashgate Publishing Limited 2008) 1-16 at 3. See also: K. Jhering, *Geist des römischen Rechts* (1955, vol. 1) 8-9.

Contra-wise, it may be a pure and disinterested investigation of foreign legal systems which sharpens one's criticisms of one's own law and so produces the idea or working hypothesis.

According to Zweigert and Kötz, the basic methodological principle of comparative law is that of functionality.¹¹⁹ From this basic principle stems all other rules and determines the choice of laws to compare, the scope of undertaking, the creation of a system of comparative law and so on. Incomparables cannot usefully be compared, and in law, the only things that can be compared are those which fulfil the same function. This proposition may seem self-evident, but many of its applications, though familiar to the comparatist, may not be so obvious to the beginner.

To prepare us for his view on the full requirements of this comparative method, Rabel, says:

The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law such as geography, climate and race, developments and events shaping the course of a country's history – war, revolution, colonialization, subjugation, religion and ethics, economic interests and needs, the ambition and creativity of individuals, the interests of groups, parties and classes.¹²⁰

¹¹⁹ (n. 117)

See also: Konrad Zweigert, 'Methodological Problems in Comparative Law' (1972) 7 *Israel LR* 465–74. Earlier versions include Konrad Zweigert, 'Méthodologie du droit comparé', in *Mélanges offerts à Jacques Maury* (vol. I, 1960) 579–96 = 'Zur Methode der Rechtsvergleichung', (1960) 13 *Stadium Generale—Zeitschrift für die Einheit der Wissenschaften im Zusammenhang ihrer Begriffsbildung und Forschungsmethoden*, 193–200; Ernst von Caemmerer and Konrad Zweigert, 'Évolution et état actuel de la méthode du droit comparé en Allemagne', in *Livre du Centenaire de la Société de Législation Comparée* (1969) 267, 282–97. The functional approach to comparative law had been practiced in Germany and elsewhere earlier; see Max Rheinstein, "Comparative Law and Conflict of Laws in Germany" (1934–5) 2 *University of Chicago*.

In discussing functionality in comparative law, one cannot omit to mention Ernst Rabel (1874–1955) who in fact was the first comparatist to clearly state and formulate functionality as a methodological principle in the comparative study of law. It must be borne in mind that Rabel never formulated any systematic functional methodology. Perhaps the lack of theoretical and methodological precision explains why his core ideas about

Rabel's view on the comparative method highlights the necessity of understanding a wide range of factors—legal, historical, social, economic, and cultural—that shape the legal system of different jurisdictions. In relation to the study of legislative drafting methods for constitutional alterations, this approach suggests that a comprehensive understanding of not only the law itself but also the broader context in which it operates is essential.

When it comes to constitutional alterations, the process is influenced by factors such as a country's history (e.g., past wars, revolutions, or colonial experiences), its economic structure, societal values, and even geographic considerations. For instance, a Constitution in a post-colonial state might be shaped by the desire to address historical injustices, while in a country experiencing rapid economic change, the Constitution might need to adapt to new economic realities.

Thus, Rabel's emphasis on a holistic, comparative approach is directly relevant to constitutional drafting because it encourages the drafters to consider not just legal principles but the broader historical, social, and political context in which the constitution operates. A deep understanding of foreign legal systems and constitutional experiences could also inform better decision-making when drafting or altering a nation's Constitution, ensuring that the process is grounded in a broad knowledge of how law evolves within different contexts. Hence, the functionality theory is also very relevant to this study.

This chapter provided a comprehensive review of the recent literature pertinent to the subject matter under investigation, while also examining the theoretical frameworks, albeit limited in scope, that have been explored. The discussion progressed to a critical analysis of the key concepts central to the study, including the meaning, nature, and types of constitutions,

comparative law have later commonly been labelled as functional or functionalist comparative law. The ideas were simply perhaps too vague to be rejected and that is why they not only survived but even flourished.

as well as the distinction between constitution-making and constitutional alterations and amendments. Additionally, the chapter explored the concept of legislative drafting, highlighting several of its core principles and best practices as recognized by leading scholars in the field and widely adopted across various jurisdictions, particularly within Commonwealth nations.

The next chapter will examine how these legislative drafting methods and principles have been applied in previous constitutional alterations in Nigeria and the Kingdom of Lesotho between 1999 and 2023. The selection of the period between 1999- 2023 is purposeful, and only a historical context can elucidate the rationale behind it, as well as the developments in both jurisdictions that make these specific dates pivotal to this study.

CHAPTER THREE
COMPARATIVE ANALYSIS OF LEGISLATIVE DRAFTING METHODS
FOR ALTERATION OF CONSTITUTIONS IN NIGERIA AND THE KINGDOM OF
LESOTHO BETWEEN 1999- 2023

This chapter provides a detailed historical background of Nigeria and Lesotho's development, beginning with the emergence of the Basotho nation under King Moshoeshoe I in the early nineteenth century. It also discusses Nigeria and the Kingdom of Lesotho's colonial history, starting with British annexation in 1868, amalgamation in 1914, and eventual independence in 1960 and 1966 respectively. Key events in Nigeria and the Kingdom of Lesotho's constitutional evolution are covered, including the formation of the Basutoland National Council in 1903, the 1959 constitution, and the drafting of the 1966 independence Constitution. This chapter also outlines the political turmoil that followed, including military rule, coups, and the eventual democratization process culminating in the 1993 and 1999 Constitutions of both jurisdictions, respectively. Despite challenges and omissions in the initial draft, such as the absence of a preamble, subsequent amendments to the 1993 have sought to address these gaps. This chapter also sets the stage for understanding the broader political and constitutional framework of Nigeria and the Kingdom of Lesotho, laying the foundation for further analysis of its legal and governance systems.

3.1. A Brief Historical Background of the Constitution of Lesotho

Currently populated by about 2.33 million people,¹²¹ a lot has been written about Lesotho; its history, and its political economy. Lesotho's existence within South Africa's borders is not a coincidence but a result of historical decisions.¹²²

¹²¹ <datacatalog.worldbank.org> accessed on 23 September 2024.

¹²² Kutloano Pheko, *The Birth and The Existence of Lesotho: A Diplomatic Lesson* (Unpublished Dissertation University of Malta, Msida, 2017).

South Africa surrounds Lesotho Kingdom completely. It is then bordered to The West and North by the Free State, the south by Eastern Cape, and the east by KwaZulu-Natal. The area covered by the Kingdom is about 30,355 square kilometres, where the lowland country which varies in height in the west covers around one quarter.¹²³ The rest of the area is highlands at Thabana-Ntlenyana, in the Maluti Range, which shapes the boundary in the east with KwaZulu-Natal. In fact, scholars like Pheko (2017)¹²⁴ often emphasize that Lesotho does not owe South Africa anything, and *vice versa*, except for the significant portion of land – nearly double Lesotho’s current size – that South Africa annexed and has yet to return.

Predominantly characterized by highland terrain, the Kingdom of Lesotho presents significant challenges to accessibility, with numerous villages reachable solely by equestrian transport, foot, or light aircraft. This geographically isolated nation, often referred to as the “Kingdom in the Sky,” holds the distinction of being the world’s only independent state situated entirely above 1,000 meters (3,281 feet) in elevation, with its lowest point at 1,400 meters (Encyclopaedia Britannica). This unique topography is further exemplified by the Matekane Airstrip, recognized for its formidable landing conditions due to a short runway terminating in steep drops. Indeed, Business Insider characterizes take-offs from this airstrip as a precarious experience akin to a fledgling bird’s initial flight.¹²⁵

Lesotho shares certain cultural and linguistic affinities with South Africa. Notably, Sesotho, the national language of Lesotho, also holds official language status within South Africa’s eleven recognized languages. Interestingly, the number of Sesotho speakers in South Africa surpasses that of Lesotho. The inhabitants of Lesotho are known as Basotho. Prominent

¹²³ *ibid*

¹²⁴ *ibid*

¹²⁵ < [https://africa.businessinsider.com/local/lifestyle/this-african-runway-is-among-the-most-terrifying-in-the-world/j7s4g8m#:~:text=Strip%2C%20Matekane%2C%20Lesotho-Matekane%20Airstrip%2C%20located%20in%20the%20highlands%20of%20Lesotho%2C%20is%20one,\(1%2C600%2Dfoot\)%20cliff](https://africa.businessinsider.com/local/lifestyle/this-african-runway-is-among-the-most-terrifying-in-the-world/j7s4g8m#:~:text=Strip%2C%20Matekane%2C%20Lesotho-Matekane%20Airstrip%2C%20located%20in%20the%20highlands%20of%20Lesotho%2C%20is%20one,(1%2C600%2Dfoot)%20cliff)> accessed on 12 September, 2024.

cultural artifacts associated with the Basotho include their distinctive blankets and the traditional conical hat, the *mokorotlo*. This hat serves as a national symbol, notably featured at the center of the country's flag. Crafted from thick wool, Basotho blankets exhibit intricate and vibrant patterns, each narrating aspects of the Basotho people's history. These blankets are utilized as shawls during significant events and are also exchanged as gifts. So how did the nation come to be?

In 1818, the Basotho people rose as a nation when alliances were formed by King Moshoeshoe I (1786-1870) with chiefdoms and clans of the Sotho people in the South, who at that time lived in region which is presently the Eastern and Northern Free State, and Western Lesotho.¹²⁶ Before the 1800s, the Basotho nation were loose communities set within small chiefdoms with no overall ruler.¹²⁷ King Moshoeshoe I established the Basotho nation with a capital at Buthe-Buthe (which laid the foundations for the eventual Kingdom of Lesotho), shifting in 1824 to Thaba Bosiu (mountain at night), then known as Basutoland.¹²⁸ Thaba Bosiu proved to be an impregnable fortress.¹²⁹ It was successfully defended against an Amangwane army in 1828; against the Batlokoa during Moshoeshoe's absence while he was on a cattle raid in 1829; and against the Ndebele of Mzilikazi in 1831.

¹²⁶ *ibid*

¹²⁷ *ibid*

¹²⁸ Tushar Kanti Saha and Lukman Abdulrauf, 'The Kingdom of Lesotho: Introductory Note' in Institute for International and Comparative Law in Africa (ed), *Oxford Constitutions of the World* (Oxford University Press 2017) 1.

See also: T Thahane, 'Lesotho, an Island Country: The Problems of Being Land-Locked'. *The African Review: A Journal of African Politics, Development and International Affairs* [1074] 4 (2), 279–90. <<http://www.jstor.org/stable/45341329>> accessed on 23 September 2024.

¹²⁹ In the 1830s, as the Boers moved inland from Cape Province to escape British rule, they fought numerous battles with the African tribes inhabiting the interior of the sub-continent. Confronted with the superior weaponry of the Europeans, the Basotho, under the astute leadership of King Moshoeshoe I, retreated from the plains to the mountains, which provided strong natural defenses. From these highlands, the Basotho successfully repelled Boer advances while also seeking the protection of the British Government. In 1868, the British Government accepted Moshoeshoe's appeal and declared Lesotho a British Protectorate. However, despite Moshoeshoe's objections, the ceasefire lines were established as the boundaries of modern-day Lesotho.

For strategic reasons and mainly for protection against the Voortrekkers (today's Afrikaners), the Basotho became allies with the British Cape Colony in 1843.¹³⁰ During the period that followed, many wars and conflicts took place between the Basotho, the Afrikaners, and the British. This occurred against the backdrop of increased colonialization in Africa by Britain and shifts in possession of the Free State region between the Afrikaners and the British. Eventually, the British annexed Basutoland in 1868.¹³¹ Direct British rule of Basutoland was firmly established on 2 February 1884 and continued until the attainment of independence on 4 October 1966. The British Resident Commissioner proposed, as an alternative to the national 'Pitso' (open air assembly), the formation of a National Council which would be composed almost entirely of chiefs and which would advise him and the Paramount Chief on policy matters. The Council was finally accepted and implemented by Paramount Chief Lerotholi (1891-1905) in 1903. The change of title from Paramount Chief to King occurred in 1966 with the independence of the country.

In 1903, Basutoland National Council was established, consisting of a hundred (100) members. Five were nominated by the Resident Commissioner, Mr. Herbert Sloley, who was the President of the Council, and ninety-four (94) were nominated by Motlotlehi Moshoeshoe II, besides himself. The Council was a purely unelected advisory body in a very restricted field, and had no legislative or executive power. Popular demands for election grew progressively more insistent and on 14 September 1959 the first Constitution was introduced, which established a Legislative Council (known as the Basutoland National Council), an Executive Council, and a College of Chiefs. Provision was also made for the introduction of Local Government. The membership of the new Council was restricted to eighty (80), half of whom

¹³⁰ Laurence Juma, 'The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho'. *Pace Int'l L. Rev.* [2011] 23, 92 at 97. <<https://digitalcommons.pace.edu/pilr/vol23/iss1/4>> accessed on 23 July 2024.

¹³¹ (n. 101).

were to be elected. The other half was made up of twenty-two (22) principal ward chiefs *ex officio* and fourteen (14) nominees of Motlotlehi Moshoeshe II. The elected element was to continue to be elected indirectly by the district councils, but a democratic feature was introduced by confining the right to vote to those members who had obtained their seats by election. The germs of a democratization process can be found in this document.

On 19 September 1961, the Basotho National Council passed the following motion (No. 62):

That the High Commissioner be requested to invite Motlotlehi Moshoeshe II to appoint a Constitutional Commission after consultation with the leaders of political parties, which shall, without prejudice to the generality of his powers of appointment, include representatives of the Chieftainship and main political parties to review the working of the 1959 Constitution in the light of the experience gained

...

Thereafter, early in 1962 the Basutoland Constitutional Commission appointed a thirteen-member Constitutional Commission. On 27 August 1962, Professor D.V. Cowen, formerly of the University of Cape Town, was appointed as the Adviser to the Commission and prepared the first draft. The Commission submitted its report on 3 October 1963. It approved a Westminster-style Constitution with a cabinet government headed by a Prime Minister. Parliament would be fashioned with a bicameral legislature consisting of sixty (60) seats in the Lower House elected by universal adult suffrage, while the Senate would consist of the twenty-two (22) principal and ward chiefs as well as eleven (11) members nominated by the Monarch. The King was to enjoy few powers, which included at least one significant residual power to dissolve the Parliament.¹³²

¹³² See: Section 68 (4)(c).

No vacuum was left, because the next subsection provided for simultaneous passage of a resolution of no confidence and naming of the next Prime Minister. However, the possibility of the King exercising real power was retained in an exigency arising out of a vacancy created in the office of the Prime Minister. The Constitution was accepted by Britain, and it enjoyed widespread support. Election for the first government was held in 1965 and the Kingdom of Lesotho declared its independence in 1966.

In the 1970 Lesotho election, the Basotho Congress Party (BCP) won, but Prime Minister Leabua Jonathan of the Basotho National Party (BNP), with South African support, refused to concede, suspended the constitution, and declared a state of emergency. King Moshoeshoe II, was initially under house arrest and later exiled. This strengthened the BNP's dependence on South Africa. The BCP split, with one faction forming the Lesotho Liberation Army and launching attacks from South Africa. Political instability and violence continued, including a South African raid in 1982. The 1985 election was a sham, with the BNP taking all seats unopposed. In 1990, King Moshoeshoe II, advocating for democracy, was deposed by Major General Lekhanya and replaced by his son, Letsie III. Lekhanya himself was ousted in a 1991 coup, replaced by Rameama, who reluctantly oversaw the transition to civilian rule. Elections, initially planned for 1992, were postponed twice due to administrative issues and finally held in 1993, contested primarily by the BCP and BNP.¹³³

3.1.1. The Birth of the Constitution of Lesotho, 1993.

The 1993 Constitution was born out of a democratic initiative in the form of a National Constituent Assembly Order, 1990 (No. 4 of 1990), issued on 14 May 1990, which established a National Constituent Assembly to consider and make recommendations regarding a suitable

¹³³ Monyane, C. (2009). *The Kingdom of Lesotho: An assessment of problems in democratic consolidation* (Doctoral dissertation, Stellenbosch University)

constitution for Lesotho. The Order also repealed and replaced the Lesotho Order of 1990. The Assembly was inaugurated on 28 June 1990 by Queen 'M'amohato, who urged the members to dedicate themselves to promoting peace, justice, freedom, unity, and national reconciliation. She emphasized that this moment, at the dawn of the final decade of the twentieth century, might represent the last opportunity to restore normal political life in Lesotho.

On 12 July 1990, the Assembly resolved to use the Constitution of 1966 as a framework for the new constitution. Eventually, the Assembly prepared a draft constitution that revised the Lesotho Independence Constitution of 1966. The earlier Constitution had an insignificant popular element, although it had been processed through the Basutoland Constitution Commission in 1963, chaired by W.P. Stanford, and it was submitted to the Basutoland Council because it was simply a constitution set out as a Schedule to the Lesotho Independence Order, 1966, under Section 3. It came into force immediately on 4 October, 1966, and had 139 Sections and two Schedules. That Constitution was drafted by Professor D.V. Cowen. It was His Master's Voice.

The National Constituent Assembly had one hundred and ten (110) members of whom, *inter alia*, seventeen (17) were members of the government, twenty (20) were district development councilors, twenty-two (22) were principal chiefs, twenty were recognized politicians, ten were representatives of public interests appointed by the Military Council, eight were from the armed forces, and ten were from urban councils. The President was Dr. J. T. Kolane, who later became the Speaker of the National Assembly after the general election held in 1993. The Assembly had some degree of a representative character, although more than eighty per cent (80%) of its members were nominated and only indirect election for district representatives took place.

The Assembly began its work on 28 June, 1990, and introduced some major changes of far-reaching consequences into the new draft constitution. Eventually, the Assembly recommended the establishment of a National Constitution Commission to seek the views of the people of Lesotho on the draft constitution. The National Constitution Commission, consisting of 22 members, was chaired by Dr. J.T. Kolane. The draft constitution was published in January 1992 (LG 1992). The Assembly prepared the final draft for adoption in 1993 (LG 1993).

The Lesotho Constitution of 1993, notably lacked a preamble, a standard feature in most Constitutions which function is to outline the Constitution's core objectives and guiding principles. This absence is peculiar, leaving the constitution without a clear, concise statement of its overarching goals. Two possible explanations exist for this omission. It could have been simply overlooked during the rushed drafting process, perhaps sacrificed at the altar of expediency. Alternatively, the constitution drafters might have deliberately chosen to forgo a preamble, deeming it unnecessary or redundant. Despite this absence, the Constitution's goals were not entirely obscured. Careful examination of the text itself allowed for the identification and interpretation of the document's intended purposes. However, this deficiency has since been rectified. The Tenth Amendment to the Constitution Act, enacted in 2022, finally introduced a Preamble, providing the Lesotho Constitution with the foundational statement of principles it had previously lacked. This amendment has effectively closed the "open book" nature of the original document.

3.2. A Brief Historical Background of the Constitution of the Federal Republic Of Nigeria

The modern Nigeria is a direct consequence of British imperial actions undertaken between 1861 and 1914.¹³⁴ The unilateral annexation of Lagos in 1861 constituted the foundational act establishing British jurisdiction within the territory that would come to be known as Nigeria.¹³⁵ Subsequently, through a series of engagements culminating in 1903, various indigenous polities were subjected to British imperial sovereignty. The culmination of British policy aimed at territorial consolidation occurred on 1 January, 1914, with the formal amalgamation, under the direction of Sir Donald Fredrick Lugard, of the Northern and Southern Protectorates. This administrative and political unification established the territorial integrity of what has since been legally recognized as Nigeria. The British Crown then exercised sovereign authority over this constructed entity for approximately five decades, until the grant of formal independence to Nigeria on 1 October, 1960.¹³⁶

It all started with the Niger Expedition of 1841 and the formation of the Royal Niger Company (RNC), a trading company that monopolized trade in both the interior and the coastal regions. The British monarchy had granted the company a charter to occupy territory of present-day Nigeria. The RNC therefore served as a medium through which British colonial and mercantile interests were protected until the revocation of the company's charter in 1900, and the subsequent creation of the Protectorate of Northern Nigeria.

¹³⁴ Ojo, Emmanuel Oladipo. "NIGERIA, 1914-2014: From Creation to Cremation?" *Journal of the Historical Society of Nigeria*, vol. 23, (2014) 67–91. *JSTOR*, <http://www.jstor.org/stable/24768942> > accessed 12 September, 2024.

¹³⁵ Nigeria's name and current borders were (mostly) adopted only in 1914, with the amalgamation of territories that the British Empire had acquired by force over the course of the second half of the nineteenth century. But, of course, different peoples have lived in the territory that encompasses contemporary Nigeria for millennia. In pre-colonial Nigeria, ethnic groups like the Yoruba, Hausa, Kanuri, Edo, and Jukun, along with those they influenced or conquered, developed centralized states. A key characteristic of these systems was a single, central ruler who held power and authority, known by titles such as *Sarki*, *Oba*, *Obi*, and *Aku*. These rulers often inherited their positions, and their origins were frequently shrouded in myths and legends, a deliberate tactic used to establish their ancient lineage and social legitimacy. See: Ehiedu E. G. Iweriebor, "State Systems in Pre-Colonial, Colonial and Post-Colonial Nigeria: An Overview." *Africa: Rivista Trimestrale Di Studi e Documentazione Dell'Istituto Italiano per l'Africa e l'Oriente* Vol. 37, no. 4, (1982) 507–13. *JSTOR*, <<http://www.jstor.org/stable/40759619>> accessed on 12 September 2024.

¹³⁶ Matthew M. Heaton, 'History of Nigeria'. *Oxford Research Encyclopedia of African History*. (2024) <<https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore9780190277734-e-1349>> accessed on 23 September 2024.

The Clifford Constitution was enacted in 1922. This was followed by the Richards Constitution of 1946. The Richards Constitution was followed by the Macpherson Constitution of 1951. Three years later, the Federal Constitution of 1954 was enacted. That was the position until 1960 when the Independence Constitution was enacted. As a prelude to the Independence Constitution of 1960, a number of constitutional Conferences were held in London in 1957 and 1958 between representatives of the major political parties, on the one hand, and the British Government, on the other. During the meetings, Nigerian political leaders pressed for a number of issues which bordered on an independent status for the country. After settling the issues at the 1958 resumed constitutional Conference, a date for the country's independence, which was October 1, 1960, was formally named. This was made possible by the British Government's enactment of an Act titled: "*An Act to make provision for, and in connection with the attainment by Nigeria of fully responsible status within the Commonwealth.*" The name and legal status of the country was changed from the "Colony and Protectorate of Nigeria" to Nigeria. By the same token, the dependent status of Nigeria on Britain was formally terminated.

In 1975, the Nigerian military rulers, in power since 1966, decided that the reins of power would be returned to civilians in 1979. While reaffirming faith in and commitment to "a stable system of Government through constitutional law", the military rulers insisted, and rightly too, that this "can best be achieved through the creation of viable political institutions which will ensure maximum participation and consensus and orderly succession to political power".

General Murtala Mohammed, military Head of State from July 1975 to February 1976, addressing the inaugural meeting of the Constitution Drafting Committee (CDC) on the 18th of October, 1975, exhorted the members to draw up a constitution which would reflect past experience and at the same time pay attention to the equally important fact that a good

constitution should be capable of influencing the nature and the orderly development of the politics of a people. Therefore, any constitution devised should seek to:

- (i) eliminate cut-throat political competition based on a system of winner-takes-all. As a corollary, it should discourage electoral malpractices;
- (ii) discourage institutionalized opposition to the government in power and, instead, develop consensus politics and government, based on a community of all interests rather than interests of sections of the country;
- (iii) firmly establish the principle of public accountability for all holders of public office. All public office holders must be seen to account openly for their conduct of affairs;
- (iv) eliminate over centralization of power in a few hands, and as a matter of principle, decentralize power wherever possible, as a means of diffusing tension. The powers and duties of the leading functionaries of Government should be carefully defined; and
- (v) taking the realities of the situation into account, it should evolve a free and fair electoral system which would ensure adequate representation of the peoples at the center.

The military rulers, in drafting the new constitution, considered certain principles, including the need for an Executive Presidency, as fundamental and non-negotiable. They believed a presidential system, with a single, powerful executive, was best suited for the nation during this critical period of transition, prioritizing unity and decisive governance. Consequently, Nigeria abandoned the Westminster parliamentary model and adopted a presidential system, akin to the United States 'Washington Model,' which was enacted in 1978 and implemented the following year.¹³⁷

¹³⁷ SPI Agi, 'The Problem of Incorporating 'The Westminster Model' In A Written Constitution: The Experience of Western Nigeria 1962—64 And Subsequent Reactions'. *The African Review: A Journal of African Politics, Development and International Affairs* (1986) 13 (1), 13–32. <<http://www.jstor.org/stable/45342047>> accessed 12 December 2024.

It did not take long to discover that this hope had been unrealistic. The ‘new’ model was put to test in the most unpropitious circumstances when the Judiciary was called upon to resolve the landmark case of *Awolowo v. Shagari* case. This litigation arose from the interpretation of the Electoral (Amendment) Decree 1979, which implemented the CDC’s recommendations for future presidential elections. Section 34 A (1) of the Decree stipulated that a presidential candidate is deemed elected if they meet certain criteria, including receiving at least one-quarter of the votes cast in each of at least two-thirds of all states. The results of the first election conducted under this system, designed to ensure broad national support for the winning candidate, unexpectedly raised a critical question.

The 1979 Presidential Constitution of Nigeria was established following the transition process initiated by General Olusegun Obasanjo to terminate military rule in Nigeria. An analysis of the influence of the American Constitution on Nigerian constitutional enactments would reveal how the concept of American constitutionalism manifested itself more generally in Nigeria.¹³⁸ Such an approach would be most pertinent when the impact and influence are perceived as extending beyond constitutional drafting to cover the whole realm of political activity in Nigeria. Furthermore, in such a view the paradigm of the American Constitution in Nigeria constitutionalism appears in the ability of the American Constitution to stimulate thought of Nigerians to seek alternate methods of governing themselves. Prof. Benjamin O. Nwabueze, a member of the 1979 Constitutional Drafting Committee, noted thus:

¹³⁸ Library of Congress, Law Library, Staff of 1987, *The American Constitution: Its Global Heritage: Essays by the Staff of the Law Library of the Library of Congress on the Occasion of the Bicentennial of the Constitution of the United States*, June 1987. 33-38. <<https://tile.loc.gov/storage-services/service/ll/lglrdppub/2019668796/2019668796.pdf>> accessed on 23 September, 2024.

The adoption by Nigeria of a presidential system of government on the model of the American is an important milestone in the constitutional history-of the country. It was an act of courage...¹³⁹

Despite the adoption of the general principles of presidentialism as they originate in the American Constitution e.g., the principle of a strong executive of one man in whom the entire executive authority is vested, these principles were modified under the 1979 Constitution to suit local conditions and circumstances of Nigeria. The President's assent was required for legislation. However, a two-third majority vote in each house could override a veto and enact legislation without the president's assent. In case of an impasse over appropriations for government expenditure, the President had authority to order withdrawals of funds from the Consolidated Fund, after the commencement of the fiscal year. The 1979 Constitution also contained an "Exclusive Legislative List," enumerating subjects only within the legislative competence of the federal Legislature. The Constitution also laid down conditions of operating political parties. It also established and constituted an independent Judiciary comprising the Supreme Court, the Federal Court of Appeal, the Federal High Court, a High Court for each state, Customary Court of Appeal of a state and Sharia Court of Appeal of a state, particularly in states of the North.

3.2.1. The Birth of the 1999 Constitution

While the making of the Nigerian Constitution followed a similar pattern from 1960 – 1995, the making of the 1999 Constitution was different in the sense that it did not involve an elaborate process of election persons to a constitution-making body.

¹³⁹ Nwabueze, B. O. *The presidential constitution of Nigeria*. (C. Hurst and Co., and Nwamife Publishers 1982) at v.

On 11th November, 1998, the Federal Military Government under General Alhaji Abubakar inaugurated the Constitutional Debate Co-ordinating Committee (CDCC) charged with the responsibility to, among other things, pilot the debate on the 1999 Constitution. The CDCC was headed by Hon. Justice Niki Tobi, Justice of the Court of Appeal (JCA), as he then was. The Committee had the responsibility to co-ordinate and collate views and recommendations canvassed by individuals and groups for a new Constitution for our dear country, Nigeria.

As expected, large volumes of memoranda from Nigerians at home and abroad and oral presentations at the public hearings at the debate centres throughout the length and breadth of Nigeria were received. The conclusions reached or arrived thereat and at various seminars, workshops and conferences organized, everybody and especially the CDCC became convinced that the general consensus of Nigerians is the desire to retain the provisions of the 1979 Constitution of the Federal Republic of Nigeria, with some alterations.

At this stage, it should be pointed out that Nigeria did not move from the 1979 to 1999 Constitutions overnight. There was a draft Constitution in 1995, but for a number of reasons Nigerians preferred to adopt most of the provisions of the 1979 Constitution in preference of those in the 1989 or 1995 Constitutions. While the 1989 Constitution did not become operational, the observation was near unanimous that the 1979 Constitution had been tried and tested and, therefore, provides a better point of departure in the quest for constitutionalism in Nigeria. In particular, the view was canvassed that the 1979 Constitution had received judicial pronouncements from the highest courts of the land and enjoys, thereby, its own established jurisprudence.¹⁴⁰

¹⁴⁰ (n. 52 at 566).

After due consideration of the recommendations of the CDCC, most of which was accepted by the government, the Federal Military Government of Nigeria promulgated the 1999 Constitution of the Federal Republic of Nigeria (Promulgation) Decree (No. 24) 1999 on 5 May, 1999, which took effect from 29 May, 1999, the day when the civilian President of the Federal Republic of Nigeria, was sworn into office.

Critics who claim that the 1999 Constitution was imposed by the Military may be overstating the case. This objection is clearly rooted in the fact that the Federal Military Government gave the Constitution its formal legal status. However, it overlooks the events leading up to the formal signing of the Constitution, as well as the origins of its substantive provisions. A closer examination of these aspects reveals that there was input that can be traced directly to the people.

3.3.The Genesis of the Formal Procedure for Constitutional Alterations

While many of our political and legal initiatives trace their origins to the British and occasionally continental concepts, the process of constitutional alteration is distinctly American.¹⁴¹ The idea of a written constitution emerged relatively late in Western civilization, and the United States of America, not England, pioneered this concept.¹⁴²

The earliest written charters or Constitutions to include provisions for their alteration were those of the Colony of Pennsylvania, the only colony to incorporate such measures.¹⁴³

¹⁴¹ Lester Bernhardt Orfield. *The Amending of the Federal Constitution*. (University of Michigan Press, 1942) 1. See also: Voegler, "Amending the Constitution by the Article V Convention Method", (1979) 55 *N.D.L. REV.* 355, 359 (quoting L. Orfield, *The Amending of the Federal Constitution*, 1942). The doctrine of popular sovereignty, particularly influential in the American colonies during the late eighteenth century, implies not only the power to create a Constitution but also the authority to revise and amend it.

¹⁴² *ibid*

¹⁴³ Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, 2nd ed. (1878) 1518, 1527, 1531, 1536, in Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore the United States of America* (GPO, 1909)

Following this precedent, eight state Constitutions drafted between the Declaration of Independence and the Constitutional Convention of 1787, also included clauses for alteration or amendment.¹⁴⁴ Indeed, soon after the Declaration of Independence in the United States of America, six (6) of the first thirteen (13) Constitutions included amendment provisions.¹⁴⁵ Notably, even the flawed Articles of Confederation allowed for their alteration. Consequently, it was nearly inevitable that when the Constitutional Convention convened, proposals for a structured plan of constitutional alteration would emerge.

During the Constitutional Convention, the necessity of an alteration procedure was debated extensively. Initial proposals, such as Randolph's resolution and Charles Pinckney's draft, laid foundational ideas for revision mechanisms, including conventions and legislative approvals. Article sixteen (16) of his draft specified that if the legislatures of two-thirds of the states requested a convention to amend the constitution, the national legislature would be obligated to convene one.¹⁴⁶ Alternatively, Congress itself could propose amendments through a two-thirds vote in each house, which would then require adoption by two-thirds of the state legislatures. Both proposals were subsequently referred to the committee of the whole.¹⁴⁷

By June 1787, delegates expressed varied opinions about the necessity, practicality, and scope of an amendment clause, with concerns about congressional overreach and state rights shaping discussions. The 'Virginia Plan', introduced by Edmund Randolph, contained a provision allowing for amendments 'whenever it shall seem necessary'.¹⁴⁸ The most detailed deliberations occurred in September 1787.¹⁴⁹ When doubts were raised as for the need to

¹⁴⁴ For a detailed analysis of these laws, refer to Martig, "*Amending the Constitution*," (1937) 35 Mich. L. Rev. 1251-1255.

¹⁴⁵ *ibid*

¹⁴⁶ *ibid*

¹⁴⁷ *ibid*

¹⁴⁸ Elliot, *Debates On the Adoption of the Federal Constitution*, 2d ed. (1937 facsimile of 1836 ed.) 127-128. Vol. 5 is a revised edition of Madison's Diary of the Debates.

¹⁴⁹ Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 280-281.

include an amendment provision, George Mason replied that ‘amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and constitutional way than to trust to chance and violence’. An amendment formula was thus considered as a “healing principle” that would allow the Constitution to stand the test of time.¹⁵⁰ Such a mechanism was required especially in light of the Articles of Confederation’s almost impossible amendment process— the requirement of states unanimity. The chosen mechanism for amendments in Article V of the Constitution, as James Madison described in the Federalist No. 43, ‘guards equally against the extreme difficulty which might perpetuate its discovered faults’.¹⁵¹ Article V was thus described as ‘the keystone of the Arch’,¹⁵² the constitutions *vis medicatrix*.¹⁵³ Moreover, it was claimed that the idea of including within a constitution a special provision for its amendment is ‘one of America’s principal contributions to political science’. This compromise balanced state and federal interests, ensuring adaptability while safeguarding foundational principles. The final version included provisions protecting states’ equal suffrage in the Senate, reflecting the concerns of smaller states. Article Five was unanimously agreed upon and incorporated into the Constitution.

The First ten (10) amendments were proposed in 1789 and adopted just eight hundred and ten (810) days later, within a span of two (2) years. The Eleventh Amendment was proposed in 1794 and adopted in three hundred and thirty-nine (339) days, while the Twelfth Amendment was proposed in 1803 and adopted in two hundred and twenty-nine (229) days. The Thirteenth Amendment, proposed in 1865, was adopted in three hundred and nine (309) days. The Fourteenth Amendment, proposed in 1866, took seven hundred and sixty-eight (768)

¹⁵⁰ Gordon S. Wood, *The Creation of the American Republic 1776-1787* (University of North Carolina Press, 1997 [1998]) 613,

¹⁵¹ James Madison, ‘The Federalist No. XLIII’, *Federalist on the New Constitution* (Alexander Hamilton, et al, 1817) 239.

¹⁵² Martig, n. 143 at 1284.

¹⁵³ John C. Calhoun, *A Disquisition on Government and a Discourse on the Constitution and the Government of the United States* (A. S. Johnston, 1851) 295.

days to be adopted. The Fifteenth Amendment, proposed in 1869, was adopted in three hundred and fifty-six (356) days, and the Sixteenth Amendment, proposed in 1909, was adopted in 1278 days. Today, the U.S. Constitution has been amended twenty-seven (27) times.¹⁵⁴

This is now a universally recognized method of constitutional change. In most jurisdictions, the constitution amendment process is different and more difficult than ordinary law-making, and usually involves either (or a combination of) a qualified majority of the Legislature, numerous decisions, time delays, etc. Entities other than the Legislature are often involved. For instance, some Constitutions require ratification by popular referendum or by states.¹⁵⁵ Others require an extra ordinary constituent assembly to be established for the purpose of constitution making or alterations. Also, in some constitutions, there are diverse procedures within the Constitution for different subject matters.

The Genesis of Constitution Alterations In Nigeria

Before Nigeria gained independence in 1960, Nigeria was governed by a series of colonial Constitutions imposed by the British. These Constitutions were designed primarily to serve colonial interests, and the process of altering them was controlled by the British authorities, with little or no input from Nigerians. Consider the remarks of the Attorney-General, Sir Reginald Manningham-Buller, during the sitting of the House of Commons on 2 August, 1956,¹⁵⁶ which shed light on the constitutional framework governing Nigeria at the time:

May I start by referring to the Nigeria (Constitution) Order in Council, 1954. In

Section 1 (4) of that Order in Council power is reserved to Her Majesty, with the advice

¹⁵⁴ <[15.3 Info Brief Periods of Constitutional Change and the 27 Amendments .pdf](#)> accessed on 24 September, 2024.

¹⁵⁵ See for example, Section 128 of the Australian Constitution Act, 1900.

¹⁵⁶ (HC Deb 02 August 1956, vol. 557 cc1770-7),

of Her Privy Council, to amend or revoke this Order. That power has, I think, been exercised on two occasions. It is not proposed to exercise that power tomorrow. Subsection (5) of the Nigeria (Constitution) Order in Council says: Nothing in this Order shall affect the power of Her Majesty in Council to make laws for the peace, order and good government of Nigeria or any part thereof.

So it is clear that this Order in no way restricts or limits the power of Her Majesty in Council to make laws for the peace, order and good government of Nigeria or any part thereof. It has always been the case that that power relating to the laws for the peace, order and good government, can be lawfully exercised by Order in Council. The proposed Order in Council to be submitted to Her Majesty tomorrow is an exercise of the power which Her Majesty in Council has, and which is not affected by the Constitution Order. It is not an exercise of the power under subsection (4) to amend or revoke that Order. The Order in Council submitted to Her Majesty tomorrow will not touch the Nigeria (Constitution) Order in Council of 1954, or the amendments made to that Order. I hope that I have made that clear.¹⁵⁷

[underlining supplied for emphasis]

The above statement exemplifies how pre-independence Nigeria's constitutional arrangements were subject to the prerogatives of the British Crown, exercised through Orders in Council. The sovereignty of the British government over the colony, embodied in the power to make laws for Nigeria's peace, order, and good government, was a defining feature of the legal and political landscape of pre-independence Nigeria. In retrospect, this system of constitutional amendment in colonial Nigeria reflects the broader colonial governance

¹⁵⁷ See: <https://api.parliament.uk/historic-hansard/commons/1956/aug/02/nigeria-administration-1>> accessed on 25 September, 2024.

structure, wherein the constitutional frameworks were established and modified through imperial decision-making, rather than through processes rooted in local self-governance or the popular will of the Nigerian people. Consequently, such alterations, like the one discussed in the 1956 debate, were often designed to accommodate administrative needs or respond to shifting colonial policies, rather than reflecting a deeper evolution of Nigerian constitutionalism.

The formal procedure for altering the Constitution was introduced into the Constitution of the Federal Republic of Nigeria through the Independence Constitution of 1960, which provided the framework for the country's independence on 1 October, 1960.

Section 4 of the 1960 Constitution of the Federation of Nigeria provided thus:

4.— (1) Parliament may alter any of the provisions of this Constitution: Provided that, in so far as it alters any of the provisions of this section, sections 1, 2, 5, 6, 18 to 36, 38, 41, 42, 43, 50, 51, 52, 62, 67 to 94, 104 to 113, 115, 117, 119, 120, 122 to 125, 127, 129, 130, 133 to 147, 150, 152, 154 to — 161, 166 and the Schedule to this Constitution. or (in so far as they apply to any of those provisions) sections 66 and 165 of this Constitution, an Act of Parliament shall not come into operation unless each legislative. house of at least three Regions has' passed a resolution signifying consent to its having effect.

(2) A bill for an Act of Parliament under this section, not being an Act to which subsection (3) of this section applies, shall not be passed in either House of Parliament unless it has been supported on second and third readings by the votes of not less than two-thirds of all the members of that House,

(3) Alterations to section 3 of this Constitution for the purpose of establishing new Regions out of other territories shall be effected only in accordance with the following procedure— (a) a proposal for the alteration shall be submitted to each House of Parliament and, if that proposal is approved by a resolution of each of those Houses supported by the votes of at least two-thirds of all the members of that House, the proposal shall then be submitted to the legislative houses of all the Regions; and (6) if the proposal is approved— (i) by a resolution of each legislative house of a majority of all the Regions; or (ii) by a resolution of each legislative house of at least two Regions, «including any

Region comprising any part of Nigeria that would be transferred to the new Region under the proposal, Parliament may provide for the alteration.

(4) Alterations to section 3 of this Constitution for the purpose of altering the boundaries of territories by the transfer of any part of one territory to another territory shall be effected only in accordance with the following procedure—

(a) a proposal for the alteration shall be submitted to each House of Parliament and, if that proposal is approved by a resolution of each of those Houses supported by the votes of at least two-thirds of all the members of that House, the proposal shall then be submitted to the legislative houses of all the Regions; and (b) if the proposal is approved—

- (i) by a resolution of each legislative house of a majority of all the Regions, including any Region to which any part of Nigeria comprised in another territory would be transferred under the proposal; or
- (ii) by a resolution of each legislative house of each Region comprising any part of Nigeria that would be transferred either to or from that Region under the proposal, Parliament may provide for the alteration:

Provided that the procedure described in paragraphs (a) and (b) of this subsection need not be followed if the alteration is for the purpose of transferring an area of not more than one thousand square miles inhabited by not more than one hundred thousand persons from one Region to another Region or Regions.

(5) An Act of Parliament passed for the purposes of subsection (3) of this section or an Act of Parliament passed for the purposes of subsection (4) of this section, being an Act to effect an alteration in respect of which the procedure described in paragraphs (a) and (b) thereof is required to be followed, shall not come into operation unless— (a) a resolution has been passed by each legislative house of at least two Regions signifying consent to its having effect ; and (b) a referendum upon the question whether the Act should have effect has been held in pursuance of provision made in that behalf by Parliament in every part of Nigeria that would be comprised in a new Region or 10 15 20 25 ___ 30 35 45 transferred from one territory to another, as the case may be, at which the persons entitled to vote were the persons who at the date of the referendum were entitled to vote in any constituency in that part of Nigeria established under section 51 of this Constitution and at which at least three-fifths of all the persons who were entitled to vote at the referendum voted in favour of the Act.

(6) An Act of Parliament passed for the purposes of subsection (4) of this section, being an Act to effect an alteration in respect of which the procedure described in paragraphs (a) and (b) thereof is not required to be followed, 10 15 20 25 30 35 45 shall not come into operation unless a resolution has been passed

by each legislative house of each Region whose boundaries are affected by the Act signifying consent to its having effect.

(7) An Act of Parliament altering section 42 of this Constitution in relation to any Region in such a manner that that Region would be represented in the Senate by less than the appropriate proportion of Senators shall not come into operation unless a resolution has been passed by each legislative house of that Region signifying consent to its having effect.

(8) An Act of Parliament altering section 43, 51 or 52 of this Constitution in relation to any Region in such a manner that the number of members of the House of Representatives to be elected in that Region would be less than the appropriate proportion for that Region shall not come into operation unless a resolution has been passed by each legislative house of that Region signifying consent to its having effect.

(9) An Act of Parliament altering section 43, 51 or 52 of this Constitution in relation to the Federal territory in such a manner that the number of _ members of the House of Representatives to be elected in that territory would be less than the appropriate proportion for that territory shall not come into operation unless a resolution supported by a majority of the members of that House who represent that territory has been passed by each House of Parliament signifying consent to its having effect.

(10) The provisions of this Constitution shall not be altered except in accordance with the provision of this section.

(11) For the purposes of subsection (7) of this section, the expression “the appropriate proportion” means the number obtained by dividing the total number of Senators representing the Regions by the total number of Regions; and for the purposes of subsections (8) and (9) of this section that expression means, in relation to a territory, such proportion of the total number of members of the House of Representatives as corresponds most nearly to the proportion borne by the number of inhabitants of that territory to the total number of inhabitants of Nigeria.

(12) For the purposes of this section the number of inhabitants of Nigeria or a territory shall be ascertained by reference to the latest census of the population of Nigeria held in pursuance of an Act of Parliament.

Section 4 of the 1963 Constitution of the Federation of Nigeria maintained similar provision. A number of pronouncements were equally made by the Courts in their decisions

on this issue of constitutional alteration. In the Supreme Court case of *Att.-Gen. Eastern Nigeria v. Att.-Gen. Federation*,¹⁵⁸ one of the issues before the Court was based on monetary grants.¹⁵⁹

Under the 1979 Constitution, constitutional alteration was effected by the National Assembly by a two-third majority of all members in each House approved by a resolution of the House in at least two-thirds of all Nigerian states.¹⁶⁰ Furthermore, the Constitution was alterable only by a four-fifths majority of all members of each federal house and approved by the Legislatures of at least two-thirds of the states of the Federation.¹⁶¹

Upon coming into force, the Federal Military Government enacted Decree No. 1 of 1984, with Section 1, stating the following:

1.— (1) The provisions of the Constitution of the Federal Republic of Nigeria 1979 mentioned in Schedule 1 to this Decree are hereby suspended.

(2) Subject to this and any other Decree, the provisions of the said Constitution which are not suspended by subsection (1) above shall have effect subject to the modifications specified in Schedule 2 to this Decree.

It is obvious from the above quoted provision of Decree No. 1 of 1984, especially Section 1 (2), that the Military Government which came into force early in 1984 did not want to rule without a Constitution of the Federation. The result is that the 1989 Constitution as established with the coming into force of Decree No. 1 of 1984 assumed a completely different character from the 1979 Constitution, and the method of alteration took on a completely new

¹⁵⁸ S.C. 231 and 232/1964.

¹⁵⁹ Lionel Brett, "Digest of Decisions on the Nigerian Constitution." *Journal of African Law* 8 (3) (1964): 185–94. <<http://www.jstor.org/stable/745138>> accessed on 22 September, 2024.

¹⁶⁰ See: Section 9 of the 1979 Constitution of the Federal Republic of Nigeria.

¹⁶¹ *ibid*

shape. The dimension in respect of the alteration of the 1989 Constitution were to be found in the provisions of Decree No. 1 of 1984 and subsequent decrees.¹⁶² The Court of Appeal of the former Western Nigeria, in the case of *Lakanmi v. Attorney-General, Western Nigeria*,¹⁶³ which shall be fully discussed shortly, held that ‘once a decree is made... nothing, not even the provisions of the Constitution, can derogate therefrom. In other words, if the provisions of the Decree are expressly enacted for the purpose of altering the Constitution, they will invariably suspend, amend, replace, repeal, or modify the existing provisions of the Constitution. These are extraordinary provisions, and the look given by the Military regime to the 1989 Constitution was a complete departure not only from the 1979 Constitution of the Federal Republic of Nigeria, but also from most written federal Constitutions.’¹⁶⁴

The near total domination of the Nigerian polity by the Military since independence introduced new trends in Constitution-making in the country. Whenever they felt firmly in control after a take-over and it suited them, the Military would declare their intention to quit the political scene within a specified period. This would be followed by the establishment of committees, comprising lawyers, technocrats, high profile politicians, traditional rulers etc., to draw up a draft constitution. It is interesting to note that, apart from the significant departure by the Constitution Drafting Committee (CDC) in 1997 which preferred the Presidential to the Parliamentary System, the “drafting” exercises have all resulted in not-too-radical amendments being proposed for the existing constitution in which some lacunae were detected. The draft would next be subjected to the deliberation of constituent assemblies which comprised elected and nominated representatives. At the end of the exercises, the supreme governing body of the Military would sit in judgement over the draft already deliberated upon and adopted, though not without acrimony even recurring contentious issues which often stalled their work. They

¹⁶² See: Sections 2, 3 and 15 of Decree No. 1 of 1984.

¹⁶³ The Western State Court of Appeal judgment is reference (1968) C.A.W./35/68 (unreported).

¹⁶⁴ (*supra* n. 49 at 121).

almost always made additions, deletions and as Chief Rotimi Williams would put it, “mutilating” the product of the Constituent Assemblies. At the end of the day, politics would be played and the nation would then be governed according to the gospel as handed down by these military governing bodies.

Under the Military rule in terms of Decree No. 1 of 1966¹⁶⁵ and 1984,¹⁶⁶ by which the military established their legal authority and control of the country and government, sections of the Constitution which dealt with special procedures for altering the Constitution were repealed. In 1967 the creation of twelve (12) states was effected by Decrees which did not follow any special or formal procedures. Under military administration, the law provided for only one general mode of exercising legislative powers. For the Federal Military Government, it was provided that the power to make laws would be exercised by means of Decrees signed by the Head of the Federal Military Government. Since this method was the only one provided for in the Decree, all laws, including the Constitution, were placed on the same level for the purposes of amendment and repeal. As in flexible constitutions, the rigid Constitution of 1979 could therefore be altered like any other ordinary law by the military rulers.

The observable trends from the foregoing synoptic description are many:

- (i) First, neither the traditional rulers nor religious leaders, who actively participated in the processes did so claiming or being granted sovereign rights nor did the elected and selected representatives have any pretensions as to the limit of their authority.
- (ii) Secondly, for whatever reasons, referendum, a universal means which signifies the imprimatur of popular legitimacy on the fundamental law, was never entertained as a viable or necessary option.

¹⁶⁵ The Constitution Decree No. 1 of 1966.

¹⁶⁶ Schedule 1, Section 1 (1), Constitution Decree No. 1 of 1984.

- (iii) Thirdly, the basis of representation at all the conferences was by election (be it direct or indirect) or nomination of delegates on behalf of a territorial constituency and ex-officio participation. Ethnicity and tribal affiliation was never a factor.
- (iv) It would appear, fourthly, that the movement for constitutional reform was rarely grassroots-based. The vocal, regrettably even in those early days, the partisan and regionally-based press, populist politicians and colonial benevolence provided the impetus.
- (v) Fifthly, Military intervention in Nigerian polity and constitution making processes has, for good or worse, left its indelible mark on all post-independence constitutions.
- (vi) Sixth, Partisan politicians and other stakeholders often exhibit impatience when confronted with complex constitutional issues. Instead of patiently allowing the political process to evolve and address challenges, or deferring to the Judiciary for authoritative interpretations, they frequently seek immediate solutions. This impatience is particularly evident in the actions of past military regimes.
- (vii) Seventh, the alteration processes and exercises have tended to be haphazard with no long-term view, being largely dictated on the spur of the moment and influenced by the incumbency factor.
- (viii) Perhaps owing to the recurrence of military intervention, a distinct constitutional jurisprudence, crafted through judicial ingenuity and deft political engineering, has not quite emerged as has happened in India, for instance.
- (ix) Lastly, it is arguable that the same elbow room or leeway left by the British which enabled parliamentarians in 1963 to alter the Constitution to found a Republic also is available even within the purview of all the constitutions mid-wifed by the Military. Whether the political will exists to accomplish a similar or even greater feat by the contemporary political class remains to be seen.

Genesis of Amendments to The Constitution Of Lesotho

As for the Kingdom of Lesotho, the genesis of amending their Constitution is not so different from Nigeria, seeing as both countries were colonized by the British. Before independence, Lesotho was governed by the British through a system of indirect rule, where the British Crown had the ultimate authority over laws and governance. The constitutional framework for Lesotho during this period was heavily influenced by British colonial law, with legislative authority resting in the hands of the Crown. The Constitution that governed Basutoland before independence was the Basutoland Order in Council,¹⁶⁷ which was passed by the British government. The Order in Council, like other colonial Constitutions, reserved for Her Majesty power with the advice of Her Privy Council, to amend, add to or revoke the Order as Her Majesty shall see fit. That is, without the consent of the Basotho people.¹⁶⁸ This type of constitutional framework was characteristic of British colonial governance, where ultimate power rested with the Crown and changes to the Constitution could be made through an Order in Council or by the Parliament.

Upon gaining independence in 1966, Lesotho adopted a new independent Constitution, which was a direct reflection of the political realities of the time. The Constitution established Lesotho as a constitutional monarchy with a parliamentary democracy. The king of Lesotho was made the Head of State, while a Prime Minister, chosen from the elected National Assembly, was the Head of Government.

The 1966 Constitution, like other post-independence constitutions in African countries, allowed for certain provisions to be amended. Section 85 of the 1966 Constitution set out the

¹⁶⁷ Basutoland, Bechuanaland Protectorate, and Swaziland (Office of High Commissioner) Order in Council, 1959. This Order-in Council is commonly referred to as “1959 Constitution of Lesotho”. It was introduced on the 14th September, 1959, and became fully operational on 5th March, 1960.

¹⁶⁸ Section 16 (2) of the Basutoland, Bechuanaland Protectorate, and Swaziland (Office of High Commissioner) Order in Council, 1959.

procedure for amendment of the Constitution. This clause indicated that any changes to the constitution could be made by the National Assembly, with the approval of at least two-thirds of the members, and the king's consent was also required. This mechanism reflected a system of checks and balances, although the king's power remained significant in both ceremonial and constitutional terms.

Under the civilian government, the Constitution was the supreme law. Section 2 of the Constitution, provided that the Constitution was the supreme law of Lesotho and if any other law was inconsistent with the Constitution, that other law would, to the extent of the inconsistency, be void.¹⁶⁹ This supremacy of the Constitution was reversed after the 1970 *coup d'etat*. Section 3 of the Lesotho Order No. 1 of 1970, provided that the existing laws would be construed with such modifications, adaptations, qualifications as would be necessary to bring them into conformity with the provisions of the order. Therefore, supremacy shifted from the Constitution to the law-maker, the Council of Ministers which had suspended the entire Constitution.¹⁷⁰ In the same way, in Nigeria, section 1 of 1979 Constitution, provided that the Constitution was supreme, that its provisions had binding force on all authorities and persons throughout the country and that any other law inconsistent with its provisions would be void to the extent of the inconsistency. In other words, the Constitution prevailed over any other legislation. The supremacy of the Constitution was reversed by the military rulers. Among the provisions of the 1979 Constitution modified by the Military Rulers was the supremacy provision.

¹⁶⁹ Mkwentla, N.K. (2001). *The Legal Effect of a Coup d'État on Traditional Constitutional Concepts* (LL.M. thesis, Rhodes University), 53.

¹⁷⁰ Order no. 2 of 1970.

Chapter VII of the Constitution of Lesotho, 1993, equally provides for the “alteration” of the Constitution. In one long and detailed provision, section 85, stipulates the procedure to be followed.

Section 85 (2) states:

“A bill for an Act of Parliament under this section shall not be passed by Parliament unless it is supported at the final voting in the National Assembly by the votes of the majority of all the members of the Assembly and, having been sent to the Senate, has become a bill that, apart from this Section, may be presented to the King for his assent under subsection 80 (1) or (3) as the case may be, of this Constitution.”

Section 85 (3) then proceeds to say that a bill to alter certain provisions (stated in 3 (a) and (b)) shall not be submitted to the King for his assent unless the Bill, between two and six months after its passage by Parliament, is approved by the majority in what seems to be referendum (“the vote of the electors qualified to vote in the election of the members of the National Assembly”). If the bill does not alter any of the provisions in 3 (a) and is supported by a two-thirds majority of each house of Parliament, a referendum is not necessary.

Procedurally, the main predicament has been deciding whether to form a multi-stakeholder body to drive the constitution amendment programme forward, or to lead the reforms itself. After the catastrophic decision to dissolve the National Reforms Authority (NRA), a 35-member multi-stakeholder body including representation of political parties and civil society organisations, the government took over the reforms a few months before the scheduled 2022 elections. Although the NRA had produced some important drafts, the body had not yet completed its work when its time lapsed, and it unsuccessfully challenged its

disbandment in the courts of law. Due to the time pressure and international impatience with the country's failure to complete the reforms, the government hurriedly and clumsily put together the drafts from the NRA into the Tenth Amendment to the Constitution Bill, colloquially known as the “Omnibus Bill”. Since the drafts from the NRA were not yet complete, the government, without much consultation and proper draftsmanship, completed the drafts to present to parliament for enactment. The government ran the Bill through both chambers of parliament without regard for the constitutional voting thresholds required for altering different clauses of the Constitution. However, when parliament was dissolved at midnight on 13 July, 2022, after the completion of its five-year term, it had not yet finished enacting the Tenth Amendment to the Constitution Bill. The much-anticipated reforms bill was then aborted. The Prime Minister, perhaps out of embarrassment, labelled the failure ‘a state of emergency’ so that parliament could be recalled from dissolution to pass the Bill. Parliament was indeed recalled from dissolution under the flawed constitutional pretext that the failure to pass the reforms bill was an emergency. The recalled parliament purportedly passed the Tenth Amendment to the Constitution Bill and other laws such as the National Assembly Electoral (Amendment) Bill 2022. The recall of parliament was successfully challenged in the High Court, which noted that the failure of the tenth parliament to pass the two bills was not a public emergency ‘that threatens the life of the nation’, as provided for in the Constitution. The Court of Appeal confirmed the judgment of the High Court, with the net effect being that the 2022 elections were held under the old dispensation.

3.4.A Comparison of The Current Legal Framework For Constitution Alteration In Nigeria And The Kingdom Of Lesotho

A. Nigeria

As regards the Constitution of the Federal Republic of Nigeria, 1999, which is currently in force in Nigeria, Section 9 provides for its own alteration.¹⁷¹ The section identifies two main participants in the alteration process; two components of Constitutional alteration; the provisions to be altered; and the number of votes required from each of the participants to alter such specified provisions. It provides as follows:

- (1) *The National Assembly may, subject to the provisions of this Section, alter any of the provisions of this Constitution.*
- (2) *An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.*
- (3) *An Act of the National Assembly for the purpose of altering the provisions of this Section, Section 8,¹⁷² or Chapter IV,¹⁷³ 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 of Assembly of not less than two-thirds of all States.¹⁷⁴*

¹⁷¹ Hereinafter [“1999 Constitution”].

¹⁷² Section 8 of the 1999 Constitution relates to State creation or creation of new states and boundary adjustment.

¹⁷³ Chapter IV of the 1999 Constitution bothers on Fundamental Rights.

¹⁷⁴ That is, 24 out of 36 States.

(4) *For the purposes 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 Sections 48¹⁷⁵ and 49¹⁷⁶ of this Constitution.*

From the foregoing, the National Assembly has the power to alter the constitution. No other arm of government is given such power under the Constitution. There is also no unamendable provision within the meaning of Section 9. This, any and all of the provisions of the Constitution can be amended by the National Assembly.

Now, in carrying out the alteration, areas of alteration must be identified in order to determine the number of votes required. In the case of the alteration of the provisions Constitution other than the provisions of sections 8 and 9 and Chapter IV of the Constitution, the proposal (bill) for the alteration can only be passed by two-thirds majority of all the members of each chambers and approved by the resolution of at least two-thirds of the State Houses of Assembly.¹⁷⁷ However, where the alteration concerns the provision of sections 8 and 9 and Chapter IV of the Constitution, four-fifths majority of all the members of each chambers of the National Assembly,¹⁷⁸ is required to pass the proposal and approved by the resolution of at least two-thirds of the State Houses of Assembly.¹⁷⁹

¹⁷⁵ Section 48 of the 1999 Constitution provides that: “The State shall consist of three Senators from each State and one from the Federal Capital Territory, Abuja”.

¹⁷⁶ Section 49 provides that: “Subject to the provisions of this Constitution, the House of Representatives shall consist of three hundred and sixty members representing constituencies of nearly equal population as far as possible, provided that no constituency shall fall within more than one State”.

¹⁷⁷ That is, 24 out of 36 States.

¹⁷⁸ That is, 72 Senators out of 309 and 240 out of 360 Members.

¹⁷⁹ Going by its features of a Federal structure of government, Presidential system of government and a rigorous alteration process respectively, the 1999 Constitution of Federal Republic of Nigeria appears to have been inspired by the United States model. Article V of the United States Constitution clearly states the procedure for amending the US Constitution as well as its ratification. It requires a two-third vote of members of the Senate and House of Representatives proposing such an alteration followed by a ratification of three-fourths of the various State Legislatures. Alternatively, two-thirds of the State Legislatures can call a constitutional Convention for such

The recent discourse surrounding state creation in Nigeria serves as a pertinent illustration of the complexities involved. Public reports indicated that the House of Representative received 31 requests for State creation, yet none of the requests met the Constitutional requirements for state creation.¹⁸⁰ However, none of these proposals reportedly satisfied the multifaceted constitutional prerequisites stipulated for such an undertaking.[1] Beyond the stipulations outlined in Section 9(3) of the 1999 Constitution of the Federal Republic of Nigeria (as altered), the Creation of States and Boundary Adjustments (Procedure) Act, 1982, Cap C23, LFN 2004, provides a detailed procedural framework.

Section 1 of this Act explicitly mandates requests for state creation or boundary adjustment must be submitted in writing to the National Assembly. Section 1 (2) of the Act specifies that such requests needs to be supported by at least a two-thirds majority of members representing the area demanding the creation of new states, in the National Assembly (Senate and House of Representatives), the relevant State House of Assembly, and the local government councils, with their signatures or right-hand thumb impressions directly affixed opposite their names as verification. The request must include the proposed state's name, a clear geographical description, and the names of supporting elected officials.

The Act further delineates the subsequent steps in the process. Should the National Assembly, upon careful review, determine that an initial request has indeed fulfilled the constitutional prerequisites for state creation, it is then obligated to direct the Independent National Electoral Commission (INEC) through a formal resolution to conduct a referendum within the specific geographical area from which the demand for the new state originated. INEC is vested with the comprehensive responsibility for the organization, supervision, and

purpose which could be followed by a ratification of proposed alterations from the Convention by three-fourths of the State Legislatures.

¹⁸⁰ <https://www.channelstv.com/2025/02/21/house-of-reps-committee-rejects-31-states-creation-proposal/>> accessed on 22 Feb, 2025 (corrected version)

execution of this crucial referendum. This must be accomplished within a stipulated timeframe of three months following the receipt of the National Assembly's directive. INEC is also tasked with the crucial responsibilities of determining the date and time for the referendum, ensuring that at least one month's public notice is provided, and formulating all necessary regulations to govern the conduct of the referendum. The substantive question presented to eligible voters in the referendum will be a straightforward binary choice: an affirmation or rejection of the proposal to create the new state, utilizing the existing and valid register of voters. Following the conclusion of the referendum and the collation of results, the Chairman of INEC is legally mandated to promptly issue an official certificate detailing the outcome of the referendum and transmit this certificate to the Clerk of the National Assembly. Furthermore, INEC is also required to publicly disseminate the referendum results through official channels, including the Federal Government Gazette and other widely accessible news media. Significantly, the Act also grants the State High Court original jurisdiction to adjudicate any legal questions or disputes that may arise from or be connected to the organization, conduct, or outcome of the referendum.

Moreover, the Act outlines the subsequent legislative process contingent upon a successful referendum. If the certified results of the referendum demonstrate that the proposal for the creation of the new state has garnered the support of at least a two-thirds majority of the individuals within the affected area who actually cast their votes, the President of the Senate is then obligated to transmit a certified copy of the referendum result certificate, as issued by INEC, to the Speaker of every State House of Assembly within the Federation. Each State Speaker is then responsible for presenting this certificate before their respective legislative chamber for deliberation and a vote on a motion for its approval, requiring a simple majority. Following this vote, the Clerk of each State House of Assembly is mandated to issue a certificate documenting the outcome of their respective House's vote on the motion and

promptly forward this certificate to the Clerk of the National Assembly, who, in turn, submits these to the President of the Senate and the Speaker of the House of Representatives. Should the certificates from the State Houses of Assembly collectively indicate that the motion for approval has been supported by a simple majority of all the States within the Federation, and this support is further reinforced by a simple majority of the members within each of those approving State Houses of Assembly, then a resolution may be introduced by any member in both the Senate and the House of Representatives of the National Assembly, formally calling upon their respective chambers to grant final approval to the proposal for the creation of the new state. Finally, if this resolution successfully garners a two-thirds majority vote in both the Senate and the House of Representatives of the National Assembly, the legislative process culminates in the National Assembly proceeding to enact a law that formally creates the new state. It is crucial to note that this Creation of States and Boundary Adjustments (Procedure) Act remains a valid and subsisting Act of the National Assembly, having not been repealed or amended since its enactment, and thus continues to apply with its full legal force and effect to any contemporary proposals for state creation or boundary adjustments in Nigeria.

THE LEGISLATIVE PROCESS FOR CONSTITUTION ALTERATION

In its proceedings, the National Assembly, as well as the State Houses of Assembly are guided by the provisions of the 1999 Constitution and the Standing Orders of the National Assembly (brought pursuant to sections 60 and 101 of the 1999 Constitution), which empowers the each of the Houses to regulate its proceedings. The Standing Orders is an addition to the provisions of Sections 52-59 of the 1999 Constitution, which already prescribes certain procedure for the National Assembly, and thus cannot be inconsistent with the provisions of the Constitution. The Standing Orders of each House of the National Assembly requires that every Bill to be passed must receive three readings. These stages shall now be considered:

(1) Initiation Stage

At the initiation stage, the drafter has a major role to play.¹⁸¹ A Bill needs to be drafted and this requires a drafter. The drafter must therefore be familiar with the mechanisms for constitution alteration in their jurisdiction. This knowledge is crucial for three key reasons:

- 1) To ascertain which provisions are protected against easy alteration and which provisions require special procedures for its alteration;
- 2) To check whether there is any requirement that an amending statute must state that purpose if it is to have constitutional validity (for example, if the amending statute would require a long title or a purpose clause or, if appropriate, by express words altering the text of the Constitution); and
- 3) To determine if there is any requirement that special enacting words must be used.¹⁸²

A legislative drafter needs to ascertain which constitutional provisions are protected against easy alteration and which require special procedures for alteration. Special amendment

¹⁸¹ A good legislative drafter must be abreast with the drafting process. The drafting process is divided by the great Garth Thornton into five stages: (1) Understanding the proposal. (2) Analyzing the proposal. (3) Designing the law. (4) Composing and developing the draft. (5) Verifying the draft.

Upon receipt of the Instruction to draft a Bill, the first thing must be to examine the instruction. The drafter must be sure that he or she is clear on the instruction, in order that he or she may not misunderstand what the legislation is intended to achieve. If there is doubt as to the nature of the instruction, the drafter must take steps to clarify. After reading and digesting the instruction and the Instruction has become clarified, the drafter is to set the ball in motion by analyzing the Instruction.

Apart from a careful analysis of the Constitutional provision (s) he intends to alter or modify,¹⁸¹ a good legislative drafter must also research on existing statutes with closely related subject matter. He or she must also look out for possible danger areas and practicality of the proposed alteration i.e. whether the proposed alteration is in fact necessary and whether the desired ends may be capable of achievement.

As the Constitution is designed to promote the Rule of Law, the draftsman must ensure that the proposed amendment does not foist arbitrariness, or vest unchecked powers, nor does it oust the power or jurisdiction of the courts or the right of persons to seek redress for alleged violation of rights. He or she must also bear in mind that the role of the Legislature is the enacting of laws for the peace, order and good governance of the Federation.¹⁸¹ The drafter must also ensure that the proposal does not undermine International Law or International obligations to which Nigeria is a signatory. The drafter must also take into account the cost or benefit of the Bill. The next stage is the legislative design and composition stage. At this stage it is assumed that the drafter has dealt with all the substantive issues. The structure of the bill must be designed taking into account precedents, the drafting style of his jurisdiction, etc. This is the process known as “the legislative plan”. Finally, the drafter shall scrutinize the draft. Here, the drafter seeks excellence and perfection by calling on an independent colleague to scrutinize the draft and verify that it good. After all this is completed, the drafter may then hand over the Bill to his Instructor.

¹⁸² Dr. Priti Rana and Dr. Sarvesh, *Legislative Drafting: Cases Selected and Edited* (A Lecture Note prepared for LL. B, IV Term, LB-4034 of students of the Faculty of Law, University of Delhi, 2023) 298.

procedures are designed to prevent frequent or impulsive changes to the constitution, ensuring stability and predictability in the legal system. Drafters must adhere to these procedures to maintain this stability. Additionally, Constitutions often contain provisions that safeguard fundamental rights, democratic principles, or the structure of government. These provisions are frequently entrenched, meaning they require more stringent amendment processes. Drafters must respect these entrenchments to prevent the erosion of core constitutional values. Furthermore, when drafting an altering statute, it is important to bear in mind the technique to be adopted in drafting the Bill. As stated earlier, there are two amendment techniques, textual and non-textual because those are the two forms of drafting an amending statute. Also, such drafter must also be abreast with the existing drafting style in his or her jurisdiction. If there is an in-house style, then such person needs to adopt the in-house style.

(2) Introduction and First Reading Stage

Upon receipt of the Bill, the Instructor may forward same to the President of the Senate in accordance with the provisions of the Standing Orders.¹⁸³ The Bill will then be scheduled for first reading by the Rules and Business Committee.

At the first reading stage, the long title of the Bill is read aloud for first reading marking the beginning of the legislative journey of the bill.¹⁸⁴ The purpose of the first reading is simply to introduce and inform the legislators about the bill. There are no discussions or debates at this stage. At the conclusion of the first reading, a day to be named by the Rules and Business committee shall be appointed for the second stage.¹⁸⁵

(3) Second Reading

¹⁸³ See: Order 78 Rule (1) -(5) of the Senate Standing Orders 2015 (as amended).

¹⁸⁴ See: Order 78 Rule (6) of the Senate Standing Orders, 2015 (as amended).

¹⁸⁵ See: Order 79 Rule (2) of the Senate Standing Orders, 2015 (as amended).

The process begins with the member sponsoring the Bill moves a motion for the Bill to be read the second time, and seconded by another member of the House. Where the Bill is not seconded, it cannot proceed further and thus dies a natural death at that level. The motion will highlight the object of the Bill, its general principle and benefits. Furthermore, a debate may arise on the general merits and principles of the Bill. Amendments to the Bill may also be proposed, which would require an adjournment of the session.

After this, the Bill shall be sent to the Committee in whose jurisdiction, the subject matter of the Bill touches on. Where the Bill touches on the jurisdiction of two or more Committees of the Senate, the Bill shall be referred to the Committee having dominant jurisdiction. The other committees affected shall be constituted into sub-committees for the purpose of considering and reporting to the main Committee on aspects of the bill affecting their Committees.¹⁸⁶ For the purpose of Constitutional alteration, the Bill shall be referred to the Committee on the Review of the Constitution in the Senate or House of Representatives.¹⁸⁷

(4) The Committee Stage

The Committee will critically review the Bill and in so doing, may organize a public hearing and other consultations on the Bill. The Committee may identify relevant stakeholders of the public and invite them to make written submissions of their view through a Memorandum to propose further amendments where necessary to the bill.¹⁸⁸

¹⁸⁶ See: Order 81 Rule (1), (2), and (3) of the Senate Standing Orders, 2015 (as amended).

¹⁸⁷ In the National Assembly, the Ad Hoc Committees on the Review of the Constitution is usually led by the Deputy Senate President and Deputy Speaker of the House as Chair in the respective chambers. Membership of the Committee typically includes the Principal Officers of each chamber and in the House, the convention is that one member from each State of the Federation and the Federal Capital Territory (FCT), Abuja are nominated to the committee. To facilitate the committee's work, external Technical Experts on constitutional and legal matters are usually commissioned to assist it with developing its work plan, reviewing memoranda and making technical inputs to the bill.

¹⁸⁸ Involvement of the public in Constitutional alteration process in Nigeria is a requirement in the process. The hearing gives the public opportunity to make input in the bill on important issues that relate to substance of the bill and the modalities for the implementations in the past, the Legislature has embarked on zonal hearings on Constitution review in the six geopolitical zones to ensure public enlightenment and receive input on proposals. Citizens/Interest groups may also be called upon to give feedback in public hearings after a Constitution alteration

The Committee is at liberty to develop new amendment proposals based on received submissions and outside of those committed to it. The amendment proposals are presented as one Constitution Amendment Bill or as several Bills touching on different subject matters in a report to plenary.

(5) Third Reading

At this stage, every proposed clause of the bill is read and every member of the House votes either in support or against each specific item in the Bill. Here, the proposals to the Constitution are often presented in the form of a clause. A two third majority of all the members of each House is needed for each clause to be deemed as passed except where the proposal borders on the provisions of sections 8 and 9 and Chapter IV of the Constitution. In such cases, a four-fifth majority is needed.

(6) Methods of voting¹⁸⁹

A member of the House shall vote according to:

- a. Voice (usually by saying Ayes or Noes);¹⁹⁰
- b. Signing of register in a division; or
- c. Through electronic voting installed in the House.

The electronic voting is usually adopted at plenary sessions for easy documentation and recording. Voice vote is not suited because of the specific constitutional requirements. The reason for this is twofold. Firstly, it is to ensure that the total number of Senators or House of Representatives members in attendance are not below the minimum number required to pass a proposed clause.

proposal passes second reading. In the now defunct 7th Assembly, the House of Representatives circulated a 43-item questionnaire to constituents that was used to develop its amendment proposals.

¹⁸⁹ See: Order 71 of the Senate Standing Orders 2015 (as amended); Order 11 Rule 2 (8) of the Standing Orders of the House of Representatives.

¹⁹⁰ A peculiar feature of the voting procedure in respect of the constitution amendment process is that electronic voting is usually adopted at plenary for easy documentation and recording. Voice vote is not suited because of the specific constitutional requirements. See, Odusote, (n. 4).

Secondly, this is to ensure that any proposal that is passed meets the stipulated requirement of an approval by the majority required under the Constitution.

(7) Harmonization Committee

This will become necessary where each of the Houses passes the Bill with difference or with amendments, a joint Conference Committee of the two Houses will be set up to harmonize the difference. This is because the two chambers are required to pass every bill in an identical format. Where both Houses are unable to harmonize their positions, the bill will be returned to the respective chambers of the National Assembly for fresh voting and passage (on the same constitutional requirement).

Where the bill is however adopted or passed in identical format by the two chambers without amendments or difference, there would be no need for a conference or harmonization. It is only when the two chambers of the National Assembly pass a bill in identical format that it can be said that the bill is duly passed by the National Assembly.

(8) Approval by The State Houses of Assembly

After the Bill has been duly passed by the National Assembly; it is then transmitted to the Clerk of the State Assemblies for the approval of each State House of Assembly. A simple majority vote of members in twenty-four (24) States will be required for each amendment to be approved. This is usually in the form of a “YES” or “NO” vote. In practice, State Assemblies usually “step down” or “defer” a bill they are unable to decide on instead of voting “No.” However, the use of the words “step down” or “defer” instead of “No” does not translate to a “Yes” vote.

(9) Presidential Assent

Since the First Alteration Act of 2010, there has been controversy regarding the propriety of Presidential Assent for Constitutional Alterations. This protracted controversy motivated a foremost Senior Advocate of Nigeria, Olisa Agbakoba (SAN), who being dissatisfied with the decision of the defunct National Assembly to dispel with Presidential assent for Constitution alterations, demonstrated uncommon courage by instituting an action before the Federal High Court, against the National Assembly, for the determination of the Courts which shall settle the matter once and for all time.

There are two schools of thought on this subject. One school of thought argues that since Section 9 does not prescribe any role for the President, as such, Presidential assent is unnecessary. The other school of thought is that Constitutional Alteration is inchoate without Presidential Assent, adding that the requirement of Presidential assent is a way of reinforcing checks and balances between the two arms of government. The former school of thought advanced arguments that since the alteration procedure under the 1999 Constitution is analogous to Article V of the United States Constitution, which does not require presidential assent for its amendment, the 1999 Constitution, logically, will not also require presidential assent before its amendment can take effect.¹⁹¹ A strong reliance has also been placed the American case of *Hollingsworth v Virginia*.¹⁹² The Federal High Court, presided by Hon. Justice Okechukwu Okeke, held that constitutional alteration is inchoate until assented to by the President.¹⁹³

Another interesting analysis of this issue in support of the latter school of thought was given by Shittu (2012).¹⁹⁴ According to Shittu, there is a divergence of constitutional terminology

¹⁹¹ <<https://www.vanguardngr.com/2010/11/constitution-amendment-controversy/>> accessed on 3 July, 2024. See also:

<<https://www.thisdaylive.com/index.php/2023/04/09/senior-lawyers-ask-nassemblies-to-override-buharis-refusal-of-assent-to-constitution-alteration-bills>> accessed on 5 July 2024.

¹⁹² 3. U. S. (3 Dall) 378 (1798).

¹⁹³ See: *Agbakoba v Attorney-General, Federation and Anor* [incomplete citation].

¹⁹⁴ Mohammed A. Shittu, 'Amendment of the Constitution of the Federal Republic of Nigeria: Do we need assent of the President?' (2012) *National Judicial Institute Staff Seminar Series* 225-239.

between “An Act of” and “A Bill for an Act”. The former was used in Sections 8 (1) and (2); 9 (2) and (3) of the 1999 Constitution, while the latter was used in Section 8 (3) and (4), 12 (3) of the 1999 Constitution. While the 1999 Constitution defines an “Act” as any law made by the National Assembly,¹⁹⁵ the Constitution is silent on the meaning of the word “Bill”. However, the Constitution itself provides a way out of the dilemma by stating in Section 318 (4) that the Interpretation Act shall apply for the purpose of interpreting the provisions of the Constitution. However, neither the word “Act” or “Bill” enjoy a definition under the Interpretation Act. However, Section 2 of the Interpretation Act categorically states that: “An Act is passed when the President assents to the Bill for the Act, whether or not the Act then comes into force”. This provision in turn enjoys the highest degree of Constitutional blessing by virtue of Section 58 (1) of the 1999 Constitution. In addition, Shittu contends that the use of the word ‘proposal’ under Section 9 (2) indicates that the drafters intended that any such Constitution Alteration must receive Presidential Assent as with other Acts of the National Assembly. Not to mention Section 1 (1) and (2); 3, 5 (1) and (2) of the Act Authentication Act which provides a clearly laid out procedure for the passage of an Act of the National Assembly.

In construing the Constitution, the Courts have always stressed that it is impermissible to construe sections in isolation but in the context of the Constitution as a whole.¹⁹⁶ It must be noted that Section 9 of the Constitution cannot be read in isolation, but must be read together with sections 58 and 59 of the Constitution. Therein, lies the primary authority for the exercising legislative power by the National Assembly, even before advancing to the Standing Orders. Section 58 (1) expressly provides that all Bills passed by the National Assembly must be assented to by the President, unless he withholds assent under subsection (5). This power cannot be whittled down by any legislative overzealousness. Thus, as a general rule the Bill becomes an Act where

¹⁹⁵ See: Section 318 of the 1999 Constitution.

¹⁹⁶ See: *Attorney-General, Ondo State v Attorney-General, Federation* [2002] 9 NWLR (Pt 772) 222; and *Action Congress v INEC* [2007] 12 NWLR (Pt 1048) 220.

assented to, and it remains a Bill, where assent is withheld by the President. Where assent is withheld by the President, the Bill will be sent back to the National Assembly which would have the opportunity to override the President's withholding of his assent, under Section 58 (5) of the 1999 Constitution to pass the Bill into Law.¹⁹⁷ This is the only exception to the general rule.

In addition, in the case of *Ogboru v Uduaghan*,¹⁹⁸ it held thus:

By virtue of section 58 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and section 2 of the Interpretation Act, any bill passed by the National Assembly must be assented to by Mr. President before it becomes an Act of the National Assembly or comes alive and be enforceable. It is also very clear that the date Mr. President signs or assents to the bill is very crucial in determining when the bill becomes an Act, except otherwise stated.

Furthermore, in the case of *Hope Democratic Party v Obi*,¹⁹⁹ the apex Court, per Onnoghen JSC (as he then was) put it succinctly thus:

From section 58 (1) of the Constitution of the Federal Republic of Nigeria, 1999 original and as amended and section 2 of the Interpretation Act, Capt. 123, Laws of the Federation of Nigeria, 2004, it is clear and I hereby hold that the provisions of the Constitution of the Federal Republic of Nigeria, 1999 as amended came into force, effect on 10th January, 2011, when Mr. President of the Federal Republic of Nigeria signed same and not on any other date, whether stated on the body of the document or elsewhere as there is no evidence that the President withheld his assent to the bill as envisaged in subsection (5) of the

¹⁹⁷ See: *National Assembly v Accord* (2021) 18 NWLR (pt. 1808) 193.

¹⁹⁸ (2012) ALL FWLR (pt. 610) 1206.

¹⁹⁹ [2011] 18 NWLR (pt. 1278) 80 at 101-102, paras H-B.

said section 58 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

Hollingsworth v Virginia (supra), was a case in which the United States Supreme Court ruled early in America's history, that the President of the United States has no formal role in the process of amending the United States Constitution and that the Eleventh Amendment was binding on cases already pending prior to its ratification. A learned writer argued that the American case based on its facts in relation to time limit is limited to its facts and not necessarily an authority to dismiss the requirement for Presidential assent to a Constitutional alteration in a democratic dispensation.

In 1999, Chief Gani Fawehinmi had made some proposals. Fawehinmi would not approve of any role for the President in the alteration process. He would rather have the Senate President, in consultation with the Speaker of the House of Representatives, form a Committee, with the approval of each state House of Assembly, to, in his words, “work out modalities for convening a Constitutional Conference or Sovereign National Conference” to alter the Constitution.²⁰⁰ He further wanted a special, non-party election to be organized to elect representatives, on the basis of the existing LGCs, to form the Sovereign National Conference. He also proposed the special interest groups to be represented by nomination. By his prescription, the draft Constitution produced by the conference should be subjected to a referendum for the consideration of the Nigerian people.

(10) Post-Assent Stage

By this procedure, the Bill will as it is passed, be listed in a schedule which, when approved, is to be signed by His Excellency, the President, and then sealed. The Bills will

²⁰⁰ Interview with Chief Gani Fawehinmi, Vol. 2 *Weekly Trust* (Kaduna, August 20, 1999) 9.

thereafter be published as Acts, and if endorsed as published by authority shall have effect as if the assent in President's name duly appeared on the face of the Act.

Some Problems with the Procedure Under Section 9

On its face, Section 9 only provides minimal guidance as to how the alteration process is to be accomplished; the question of how Constitutional alterations are initiated and how votes are taken may be unclear from a sole reliance on the Section. In addition, the absence of an express or explicit role for the Executive arm of government as well as the Judiciary, particularly the Presidential Assent which is a condition precedent to the enactment of any Act of the National Assembly, has drawn into question the propriety of the assent or veto of the President of the Federal Republic of Nigeria, for the passing of Constitutional alteration bills.²⁰¹

Seeing that the procedure for alteration of the Constitution is set out in the Constitution, it follows that any claimed alteration ought to be able to be tested in a court of law, via judicial review. However, there is no explicit role given to the Judiciary under Section 9 of the 1999 Constitution. The courts typically become involved only *after* an alteration bill has been enacted, and even then, usually only when the changes spark disputes or controversy. In the Nigerian case of *Attorney-General of Bendel State v. Attorney-General of Federation and*

²⁰¹ This has been a subject of legal debate that nearly truncated the entire Electoral transition Programme, not because of disagreement on the subject matters of alteration, but because of the decision of the now defunct 7th National Assembly to oust the requirement of Presidential assent for Constitutional alterations in Nigeria. The argument was reinforced on the premise that if Presidential assent is required, the Governor's assent will also be required, as the Alteration Act or bill was passed by not just the National Assembly, but in conjunction with all the states Houses of Assembly. Olisa Agbakoba (SAN), being dissatisfied with the decision of the defunct National Assembly to remove the powers of the President of giving assent under Constitution alteration, instituted a case against the National Assembly in a case titled *Olisa Agbakoba v. National Assembly*. The reactions that followed the decision of the Federal High Court, presided by Hon. Justice Okechukwu Okeke, that the constitutional alteration is inchoate until assented to by the President, have also shown that the matter may not yet be finally settled. See: *Agbakoba v. Attorney-General, Federation and Anor* (2021) LPELR-55906 (CA).

For more detailed discussion, see: Chinwuba Chukwura, "Constitutional Alterations in Nigeria and the United States of America; Issues and Challenges" (2019) 3 *International Review of Law and Jurisprudence*, 108. Available at: <<https://www.nigerianjournalonline.com/index.php/IRLJ/article/download/291/284>> accessed on July 5, 2023; I. Ekweremadu, "Why President Doesn't Need to Sign Constitutional Alteration", Excerpt of an Interview by Ike Ekweremadu, Deputy Senate President, the Guardian Newspaper, Wednesday July, 2010, p. 9.

Others,²⁰² the Supreme Court of Nigeria struck down the Allocation of Revenue (Federation Account etc.) Act 1981, on the ground that there was procedural (irregularity) and inconsistency in the legislative process required by the provisions of the Constitution and the one adopted by the National Assembly in conjunction with the President on the passing of the Act.²⁰³

Where an alteration is required to pass two Houses of the National Assembly, its approval can be too difficult as compared to ordinary legislation which can be enacted by a House, in some jurisdictions. In effect, stiff alteration requirements that were not initially envisaged by framers of a constitution would inevitably cause the dilemma between pursuance of the formal alteration procedure or looking for other mechanisms.

Also, where the process is defeated at any stage, it will end any further step such alteration will have to begin afresh. In the same vein, the tenure of the legislative Houses breaks the cycle of the alteration process. Some jurisdictions even have unalterable Constitutional provisions or expressly prohibits Constitutional alteration during certain periods.²⁰⁴

There are several examples of Constitution alterations or amendments that did not follow formal procedures laid down in Constitutions in other jurisdictions. For example, the United States of America and Australia have written requirements for constitutional alteration that are unusually onerous. Given the fact that almost every constitution worldwide imposes some form of super-majority requirement for successful constitutional alteration, this has negative bearings on the chance of successful textual constitutional change.

²⁰² (1982) 3 NCLR 1.

²⁰³ See also: *Attorney-General, Abia State and 35 others v. Attorney-General, Federation*, *supra*.

²⁰⁴ For example, the prohibition of enactment of constitutional alterations during periods of emergency. The Constitution of Brazil may not be amended during a state or federal intervention, defense, or siege. (CF Art. 60, Section 1). It is popularly viewed as a mechanism of self-preservation in a country with a history of authoritarian interventions in the Constitution.

In the United States, the difficulty to adhere to the alteration procedure outlined in Article V of the US Constitution has rerouted the pursuance of constitutional from formal to informal alteration means. The difficulty of formally altering the Constitution has accordingly forced political actors to update the Constitution informally through non- Article V methods, leaving the actual constitutional text unchanged. Some argue that the alteration procedures under Article V are too cumbersome and erratic to serve as the sole vehicle for constitutional development in a complex and rapidly changing society.

As earlier stated, there are several other more flexible modes of constitutional alteration which do not rely on the cumbersome procedures of Section 9 in order to keep the constitutional regime current and reflective of new social and political equilibria. Such informal constitutional alteration mechanisms have drawn growing attention within governments and among scholars as they are ubiquitous and inevitable. Therefore, informal constitutional alteration procedures may play a role in reconstituting constitutional meaning in response to cumbersome Constitutional alteration requirements. Finally, there is need to codify public participation in the Constitutional Alteration process.²⁰⁵

3.4. Use of Ordinary Legislature Versus Extraordinary Constituent Assembly

A crucial, yet often overlooked, aspect of the constitution alteration process within academic literature is the nature of the legislative body involved. While much of the existing scholarship tends to focus on the shortcomings of the amendment procedures themselves, it is essential to critically examine whether the most suitable body for undertaking such a significant

²⁰⁵ For example, Thailand's 1997 Constitution was made following public uprising against the military dominated government. Article 211 of the existing 1991 Constitution originally set out a process by which the House of Representatives could amend the constitution. In response to calls for a new, democratic constitution, the government amended this provision in 1996 to provide for the creation of an indirectly elected Constitution Drafting Assembly, to debate and approve a new constitution, before it was formally adopted by the parliament. It is not always necessary to amend the constitution to provide for such procedures. Depending on the context they may instead be set out in legislation, included in a peace agreement, or conducted under the auspices of those charged with constitutional review.

task is the existing, ordinary Legislature, or whether an extraordinary, specifically convened body or entity might be more appropriate.

The question of whether to employ the existing Legislature or an extra ordinary constituent assembly can be contentious with conflicting positions generally centering on which option will serve whose interests. In Uganda, disagreement over what type of body would drive the constitution-making process was part of the broader struggle over the ruling National Resistance Movement's control of the process.²⁰⁶ In Lesotho, the issue of who should drive the constitution-making process has been contentious, particularly following periods of political instability and military intervention. After the 1998 political crisis, which involved disputes over election results and led to an intervention by the South African Development Community (SADC), there was a significant push for constitutional reforms to stabilize the political environment. In the early 2000s, the constitutional reforms in Lesotho were highly debated, particularly regarding whether the existing Parliament should take the lead in drafting a new constitution or whether a more independent body should be created to oversee the process. The outcome was the formation of a Constitutional Parliamentary Committee (CPC), composed of MPs, which reflected a compromise between political interests. However, there were ongoing concerns that the process could be influenced by the ruling party, undermining the legitimacy of the reforms. Civil society organizations, opposition parties, and some stakeholders called for the establishment of a more independent body that would ensure impartiality in the drafting process. However, political leaders and some factions argued that using the existing legislature would be more efficient and democratic. Nigeria has also established several Constitutional Review Commissions to review the constitution and propose

²⁰⁶ Benjamin B. Odoki, "The Challenges of Constitution-Making and Implementation in Uganda" in J. Oloka-Onyango (ed.), *Constitutionalism in Africa: Creating Opportunities, Facing Challenges*, (Kampala: Fountain Publishers, 2001) 263-286.

amendments.²⁰⁷ These commissions were often criticized for not being independent enough and for failing to involve enough civil society participation, further deepening suspicions about the integrity of the constitution-making process.

The choice between using the existing legislature or convening a dedicated constituent assembly for constitutional amendment presents distinct advantages and disadvantages. The use of a constituent assembly can have several advantages over the parliamentary approach. A constituent assembly may have greater popular legitimacy as a Constitution maker because its members are elected specifically to develop and adopt the new national charter. In addition, a constituent assembly, unless double hatted as a Parliament like South Africa, can devote itself to full time constitution making without any distractions of day-to-day parliamentary business. As a consequence, it may be better able to focus on the broader questions of constitutional vision. A key consequence of the parliamentary approach to constitution making is that, being members elected to represent state and local interests, they tend to operate with a short term perspective. Also, because the regular Parliament is responsible for drafting and deliberations, the process may be repeatedly interrupted and delayed by parliamentary elections and various political crises that absorbed delegates' attention. These events end up lengthening the constitution making or amendment processes.

They may also use the constitution-making or altering process to improve ethnic relations or reinforce ethnic divide. Moreover, it is a clear conflict of interest for the National Assembly to be solely involved, at any stretch with constitution making or alteration. Overall, these issues suggest that using an ordinary Legislature for constitution making or alterations can be problematic, especially when giving the Legislature a central role would likely

²⁰⁷ A. Eresia-Eke, 'The contradictions of constitution-making in Nigeria'. *An International Multidisciplinary Journal, Ethiopia*, [2012] 6 (4), 76-92 at 86 <<https://doi.org/10.4314/afrev.v6i4.6>> accessed on 23 September 2024.

undermine the legitimacy of the process (including when members have a vested interest in avoiding reforms); or where there may be reasons to suspect that the legislative representatives are not those who would likely be chosen for a constitution drafting job. Certain cases also suggest that under particular circumstances, using an ordinary or convertible Legislature can be regarded as fully legitimate, as in Poland and South Africa, or at least harmless, as in Namibia.²⁰⁸

In choosing between the parliamentary and constituent assembly options, sensitivity to the history and constitutional tradition of the country in question may be required, as these may be crucial to the popular legitimacy of the process. Factors such as resources, time to elect both the ordinary Legislature and the constituent assembly and, where still respected, a country's constitution making traditions, must be considered in determining a suitable procedure.

B. The Kingdom Of Lesotho

Section 85 of the Constitution of Lesotho, 1993, provides as follows:

- (1) Subject to the provisions of this section, Parliament may alter this Constitution.
- (2) A bill for an Act of Parliament under this section shall not be passed by Parliament unless it is supported at the Final Voting in the National Assembly by the votes of the majority of all the members of the Assembly and having been sent to the Senate, has become a bill that, apart from this Section, may be presented to the King for his assent under subsection 80 (1) or (3) as the case may be, of this Constitution.

²⁰⁸ LE Miller, (2012) "Designing Constitution-Making Processes Lessons from the Past, Questions for the Future"

(3) A bill to alter any of the following provisions of this Constitution, that is to say—

(a) this section, sections (1) and 2, Chapter II except sections 18 (4) and 24 (3), sections 44 to 48 inclusive, 50 (1) to (3), 52, 86, 91 (1) to (4), 92, 95, 103, 104, 107, 108, 118 (1) and (2), 119 (1) to (3), 120 (1), (2), (4) and (5), 121, 123 (1), (3), 125, 128, 129, 132, 133, and sections 154 and 155 in their application to any of the provisions mentioned in this paragraph; and

(b) sections 37, 38, 54 to 60 inclusive; sections 66, 67, 68, 69 (1) and (6), 70, 74, 75 (1), (2), (3) and (4), 80 (1), (2), and (3), 82 (1), 83 and 84; sections 134 to 142 inclusive, 150 and 151 and sections 154 and 155 in their application to any of the provisions mentioned in this paragraph,

shall not be submitted to the King for his assent unless the bill, not less than two or more than six months after its passage by or under an Act of Parliament, been submitted to the vote of the electors qualified to vote in the election of the members of the National Assembly, and the majority of the electors voting have approved the bill:

Provided that if the bill does not alter any of the provisions mentioned in (a) and is supported at the final voting in each House of Parliament by the votes of no less than two-thirds of all the members of that House it shall not be necessary to submit the Bill to the vote of the electors.

(4) Nothing in section 80 of this Constitution affects the operation of subsection (3).

(5) In this section—

- (a) references to this Constitution to any particular provision thereof includes references to any other law in so far as the law alters the Constitution or, as the case may be, that provision; and
- (b) references to altering this Constitution or any particular provision thereof include references to repealing it, with it without re-enactment thereof or the making of different provision in lieu thereof, to modifying it and to suspending its operation for any period.

The legislative procedure for altering a constitution based on Section 85 above involves several key steps and requirements. In Lesotho, Parliament holds the power to alter the Constitution, but this is subject to the provisions outlined in the section. A bill for an Act of Parliament must be introduced to Parliament to alter the Constitution. The bill must first be passed by the National Assembly. For the bill to be passed, it needs to be supported by the majority of all members of the National Assembly during the final vote. After passing the National Assembly, the bill must be sent to the Senate. The bill, once approved by both Houses, can be presented to the King for royal assent as per the provisions of the Constitution.

Certain provisions of the Constitution are more difficult to alter, and these sections are listed under subsection (3). These include Chapter II, which safeguards fundamental human rights and freedoms; sections 44 to 48, which cover the office of the King, the Regent, proceedings in the High Court and Court of Appeal, as well as the civil list and remuneration of the King and Regent; sections 50 (1) to 50 (3), which protects the King and certain persons in respect of legal proceedings; section 52 on the abdication of the King; section 86 on whom the executive authority of Lesotho is vested, and several others. These protected provisions cannot be submitted to the King for assent unless additional steps are taken.

If the bill alters certain protected provisions (like those mentioned in subsection 3), it must be:

- (a) Submitted to a vote by the electors (i.e., the general population qualified to vote in National Assembly elections).
- (b) This vote must take place between two and six months after the bill passes Parliament.
- (c) The bill must be approved by a majority of the electors voting for the alteration to proceed.

If the bill does not alter the provisions mentioned in the first category of protected sections (section 3a), it can be passed if:

- (a) It has two-thirds support in each House of Parliament.
- (b) In this case, there is no need to submit the bill to a public referendum.

It is also important to highlight the definition of “altering the Constitution” as provided under Section 85 (5) (b), which encompasses:

- (a) Repealing a provision with or without re-enactment;
- (b) Making a different provision in lieu of the provision;
- (c) Modifying a provision; and
- (d) Suspending the operation of a provision for a period.

However, it is important to acknowledge that, pursuant to the Tenth Amendment to the Constitution Act, 2022, Section 85 has been amended. Therefore, it is crucial to examine the revised section to identify any additions or deletions made to the original provision.

Amendment of Section 85: Alteration of Constitution

18. The Constitution is amended in section 85—

(a) by deleting subsection (1) and substituting the following subsection:

“(1) Subject to the provisions of this section, Parliament may amend or repeal the Constitution by introducing a Bill expressly providing that the Constitution may be amended or repealed.”;

(b) by inserting the following subsections after subsection (1):

“(1A) A Bill to repeal this Constitution shall only be introduced at a joint sitting of the Senate and National Assembly summoned specifically for the repeal of the Constitution.

(1B) A Bill under subsection (1A) shall not be introduced, unless the Bill has been published in the Gazette not less than thirty days before the introduction at the joint sitting of Senate and National Assembly.

(1C) After the Bill has been introduced at the joint sitting of Senate and National Assembly, no further proceedings shall be taken on the Bill in Parliament until the period prescribed in subsection (1B) has lapsed.

(1D) After the period of thirty days has lapsed, at the joint sitting of Senate and National Assembly shall pass the Bill.

(1E) A Bill passed by joint sitting of Senate and National Assembly under subsection (1D) shall be subjected to a referendum by the Parliament.

(1F) If after a prescribed period, the Bill is passed at a referendum with the requisite majority, the Bill shall be submitted to the King for Royal Assent.”.

The amendment to Section 85 of the Constitution, as outlined in the Tenth Amendment to the Constitution Act, 2022, introduces significant changes to the procedure for amending or repealing the Constitution.

The original subsection (1), which lacked clear instructions for Parliament on how to amend the Constitution, has been replaced with a more specific provision. The new text specifies that Parliament may ‘amend’ or ‘repeal’ the Constitution by introducing a Bill that expressly provides for such amendments or repeal, thereby formally allowing Parliament to initiate constitutional changes through clearly defined legislative processes. Previously, any Bill could be introduced to amend the Lesotho Constitution; however, under the new provision, only a Bill specifically designed for this purpose is allowed.

Several new subsections (1A through (1F)) are added, detailing the specific procedural steps for introducing, passing, and ratifying a Bill aimed at repealing or amending the Constitution. These provisions are crucial in ensuring a rigorous process for constitutional amendments or repeal.

- (a) Subsection (1A): A Bill seeking to repeal the Constitution must be introduced at a joint sitting of the Senate and National Assembly specifically convened for this purpose. This ensures that such a monumental decision requires the attention of both legislative bodies together, rather than through standard parliamentary procedures.
- (b) Subsection (1B): The Bill must be published in the Gazette at least thirty days before it is introduced at the joint sitting. This provision ensures public transparency and gives time for public awareness and potential lobbying or discourse before the Bill is considered.
- (c) Subsection (1C): After the Bill is introduced at the joint sitting, no further action can be taken on it until the 30-day period (as specified in subsection (1B)) has passed. This

delay ensures that members of Parliament and the public have adequate time to review and consider the implications of the proposed repeal.

(d) Subsection (1D): Once the 30-day waiting period has expired, the Bill is put to a vote at the joint sitting of the Senate and National Assembly. The Bill must be passed by both Houses in this sitting before proceeding to the next stages.

(e) Subsection (1E): After the Bill is passed by the joint sitting, it must undergo a referendum, where the general public votes on the proposal. This step reflects the need for public involvement in the decision-making process, especially in matters as significant as repealing the Constitution.

(f) Subsection (1F): If the Bill receives the required majority in the referendum, it is then submitted to the King for Royal Assent, finalizing the constitutional amendment or repeal. This step is similar to the procedure in the earlier provisions, where royal assent is required for a constitutional change to be fully enacted.

3.5. Repeal, Its Technique and Effect

The expression “repeal” generally refers to the legislative action of causing some existing provision no longer to have effect as part of the written law.²⁰⁹ The expression ‘amend’, in relation to a statute, generally refers to formally enacting alterations to that statute – these may include the addition, the replacement or the variation or modification of provisions in the statute. Technically, the deletion of provisions too must be treated as an amendment since it produces an alteration to an instrument that continues in existence. Since only some of the provisions are repealed, it must follow that the effect is that of amendment.

In practice, therefore, “repeal” tends to be used when the life of a complete statute is brought to an end, whereas “amend” tends to be used in cases where particular provisions are

²⁰⁹ Section 3 of the Interpretation Act, 1977, defines ‘repeal’ to include: revoke, rescind or cancel.

being deleted or are being deleted to be replaced by others, as well as where additions or alterations are being made.

A drafter will always endeavour to isolate and repeal expressly any provision which, by reason of the introduction of a new enactment, is no longer required. It is submitted that there is no rule that a statute is impliedly repealed by age, non-user, irrelevance, obsolescence, etc.

A statute may be repealed by express provision or by implication. But it cannot cease to have effect merely as a result of disuse or the passage of time (unless the latter has been expressly provided for, e.g.: by a “sunset clause”).

The drafter should endeavour to deal with repeals by express terms that identify all the relevant provisions explicitly. It is, therefore, undesirable to repeal by –

- (a) generalized provision: e.g.: “any provision of any written law that is inconsistent or in conflict with this Act is repealed”; and
- (b) implication, that is, leaving it to be the courts to infer that the later legislation has displaced earlier provisions.

Neither technique gives the degree of precision that is called for. It follows, therefore, that the drafter must identify in the repeal provisions all the provisions of the existing law that must be repealed because they can no longer continue alongside the new statute.

Legal effects of repeals

These, in the main, are usually governed by the Interpretation Act which lays down standard rules (sections 18 to 21). These should always be kept in mind, so that provision in this respect can be made, if difficulties or additional legal consequences are required to follow upon the repeals. The interpretation Act does not cover all obvious cases which may need

attention on repeal. The limits of the Act must also be borne in mind. The Interpretation Act of Lesotho mainly deals with these effects as follows:

18. Effects of repeal generally

Where an Act repeals in whole or in part another Act, the repeal shall not—

- (a) revive anything not in force or existing at the time at which the repeal takes effect;
- (b) affect the previous operation of the Act so repealed or anything duly done or suffered under the Act so repealed;
- (c) affect any right, privilege obligation or liability acquired, accrued or incurred under the Act so repealed;
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the Act so repealed;
- (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment referred to in paragraphs (c) and (d); and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

19. Repealed Act not revived

Where an Act repealing in whole or in part a former Act is itself repealed, such last repeal shall not revive the Act or provision previously repealed, unless words be added reviving the same.

20. Repeal and substitution

Where an Act repeals in whole or in part another Act and substitutes other provisions therefore, the repealed Act shall remain in force until the substituted provisions come into operation.

21. Repeal of amended Act to include amendments

Where an Act which has been amended by another Act is repealed, such repeal shall include the repeal of all those provisions of that other Act by which the first-mentioned Act was amended.

The Ninth Amendment likely served as a catalyst for the amendment to Section 85. The Ninth Amendment changed the balance of power between the Prime Minister and the King. It removed the Prime Minister's ability to unilaterally dissolve Parliament after a no-confidence vote. The amendment required the Prime Minister to resign after a no-confidence vote, unless supported by a two-thirds majority of the National Assembly. The amendment removed the King's discretionary role in the dissolution process. The PM could no longer advise the King to dissolve Parliament after losing the confidence of the National Assembly. It gave the PM two options: either resign within three days or advise the King to dissolve Parliament.²¹⁰

The Court of Appeal ruled that the amendment violated the Constitution's basic structure and diminished the Prime Minister's discretion. Consequently, the Ninth Amendment to the Constitution of Lesotho was invalidated by the Court of Appeal of Lesotho in November 2024. In the recent case of *Basotho Patriotic Party & 3 Others v. Lejone Puseletso & 6*

²¹⁰ After the 2017 snap elections, Thabane formed a new coalition government comprising the ABC, Alliance of Democrats (AD), BNP and Reformed Congress of Lesotho (RCL). After a while, his party, the ABC, lost confidence in him due to infighting. Some among the opposition exploited the weaknesses of the ABC and pushed for Thabane's ouster. When Thabane was threatened with a vote of no confidence, he suspended Parliament from 19 March to 19 June, 2020, in terms of Section 83 of the Constitution. This section empowers the King to suspend Parliament on the advice of the PM. Read more at: <<https://www.accord.org.za/conflict-trends/the-abuse-of-a-motion-of-no-confidence-in-lesotho-triggers-and-impact/>> accessed on 29 November, 2024.

others,²¹¹ the Court of Appeal, by majority, dismissed the appeal challenging the invalidation of the ninth Amendment to the Constitution of Lesotho. The Court affirmed that the Amendment violated the basic structure of the Constitution by diminishing the Prime Minister's discretion and altering the role of the King in dissolution of Parliament. The Court invoked the doctrine of objective invalidity, with the invalidation operating prospectively. The appellants sought a suspension of invalidity to allow for legislative correction, but the Court found no justification for such a suspension, especially as the eleventh Amendment Bill was not before the Court at the time of its decision. The appellants' grounds for review, including allegations of hardship, uncertainty in Parliament, and misapplication of local precedent, were rejected. The Court emphasized that the judiciary's role in reviewing legislation for constitutional compliance does not infringe upon Parliament's legislative function. The application for review was dismissed, and the appellants were ordered to bear costs, including the costs of two counsel for the first respondent and one counsel for the fifth respondent.

These newly inserted provisions therefore aim to provide legal certainty and stability when laws are repealed or amended. They ensure that past legal actions and acquired rights are not automatically nullified, and that there is a clear and orderly process for transitioning between different regimes.

3.6. Suspension of Provision(s) of the Constitution

By virtue of the Tenth Alteration, the 1993 Constitution of Lesotho empowers the Parliament to suspend provision(s) of the Constitution. However, any such suspension must strictly adhere to the procedure outlined under Section 85 of the Constitution (as amended). This means that a valid constitutional suspension in Lesotho can only occur through Parliamentary action and by following the specific procedures established within the

²¹¹ (C of A (CIV) No 13/2024) [2024] LSCA 17 (1 November 2024)

Constitution itself. In other words, Section 85 of the Constitution grants Parliament not only the authority to alter the fundamental law of the land but also the extraordinary power to temporarily suspend its provisions. This represents a significant and potentially controversial authority. The following sections will delve deeper into the nature, scope, and potential implications of this power.

- (i) Beyond Military Rule: What can give rise to Suspension of the Constitution especially in a democratic dispensation?

It is a sobering thought; under what extreme circumstances might a democratically elected government feel compelled to suspend parts or the whole of its own Constitution? While military interventions immediately come to mind, it is worth exploring whether truly exceptional civilian-led situations could warrant such a drastic measure.

History offers some potential scenarios, though highly controversial. Imagine a nation gripped by violent, uncontrollable riots, where basic law and order have collapsed. A government could argue that temporarily suspending certain rights, like freedom of assembly, is necessary to restore order and protect lives. For example, in 2005, during the period of intense political instability and unrest under President Robert Mugabe, the Zimbabwean government limited the constitutionally guaranteed rights and freedoms of its citizens through legislation.²¹²

²¹² Under President Robert Mugabe's rule, Zimbabwe witnessed a significant erosion of personal freedoms. To consolidate his power, Mugabe systematically curtailed civil and political rights, including freedom of expression, assembly, and association. These restrictions were enshrined in the Access to Information and Protection of Privacy Act (AIPPA) of 2002 and the Public Order and Security Act (POSA) of 2002, despite being protected by the Zimbabwean Constitution and international human rights covenants. This suppression of fundamental rights created a climate of fear and stifled dissent, hindering the development of a vibrant and democratic society. Even though there wasn't a direct suspension of the provisions of the Constitution, those legislation, had the effect of suspending the operation and enforcement of those Constitutional Rights. See: Jamal Jafari, "Attacks from Within: Zimbabwe's Assault on Basic Freedoms through Legislation" (2003) 10 (3) *Human Rights Brief* 6-10. <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1416&context=hrbrief> > accessed on 23 September, 2024.

Furthermore, the former Prime Minister of the Kingdom of Lesotho, Thomas Thabane, faced great pressure to resign due to the allegation of his involvement in the murder of his estranged wife in 2017.²¹³ In an attempt to remain in power, Thabane took several actions that raised concerns about the suspension of the Constitution. One notable incident occurred in March 2020 when Thabane suspended Parliament for three (3) months after the lower House passed a bill stopping him from calling fresh elections if he lost a vote of no-confidence.²¹⁴ This move was later overturned by the Constitutional Court, highlighting the judiciary's role in upholding the Constitution.

A catastrophic earthquake or pandemic could overwhelm a nation's infrastructure and resources. In such a crisis, the government could justify temporarily suspending certain regulations or procedures to expedite emergency aid and ensure the survival of the population. Facing an imminent invasion or a devastating act of terrorism, a government might claim that extraordinary powers are needed to safeguard National Security. This could involve measures like surveillance expansion or restrictions on certain fundamental liberties and freedoms. In response to the 9/11 terrorist attacks, the U.S. government enacted sweeping national security measures, including the Patriot Act, 2001), which expanded surveillance powers, allowed for the indefinite detention of non-citizens, and gave authorities increased powers for wiretapping and monitoring communications. Similarly, during the early stages of the COVID-19 pandemic, China implemented extreme measures, including lockdowns of entire cities (such as Wuhan), mass surveillance through digital tracking, and stringent quarantine procedures. The government also limited the movement of people and heavily censored information about the virus. Another troubling event occurred in Lesotho in April 2020, when Thabane deployed

²¹³ Thomas Thabane Resigns as Prime Minister of Lesotho Amid Corruption Charges, *The New York Times* (May 18, 2020). <<https://www.nytimes.com/2020/05/18/world/africa/lesotho-thomas-thabane-resigns.html>> accessed on 23 September, 2024.

²¹⁴ The Abuse of a Motion of No Confidence in Lesotho: Triggers and Impact, *ACCORD* (2020). <<https://www.accord.org.za/conflict-trends/the-abuse-of-a-motion-of-no-confidence-in-lesotho-triggers-and-impact/>> accessed on 23 September, 2024.

troops onto the streets of the capital, Maseru, to “restore order,” citing unnamed threats to national security. This action raised fears of a potential military coup and a further erosion of constitutional principles. While the Constitution of Lesotho, 1993, itself has not been formally suspended, these actions by the Prime Minister demonstrate a disregard for the Rule of Law and a willingness to undermine democratic institutions. Thus, where the operation of a provision of the Constitution may entail irreparable consequences to the Federation, the Parliament of Lesotho can suspend the operation of such provision of the Constitution until such provision is altered or amended. Recent events in Lesotho exemplifies this.

2) Meaning and Effect of Suspension of Constitutional Provision

According to the Black’s Law Dictionary,²¹⁵ in the context of a legal provision, suspension means “a term that is applied to the temporary stoppage in the operation of a regulation or law.” In the Nigerian case of *A.-G., Anambra State v. A.-G., Fed.*,²¹⁶ the Supreme Court observed that:

If a section of any law is suspended, the rights and privileges under that section can no longer be invoked until the section suspended is restored by a subsequent legislation. Until it is restored, it has the same effect as if repealed completely. That suspension obliterates that section for the duration of the suspension. The rights, obligations and liabilities under the suspended section are extinguished. So long as the suspension is in force, that Section is deemed not to have been passed by the Legislature. Suspension of a right in a Law and enforcement of that right cannot co-exist.

²¹⁵ Black’s Law Dictionary 2nd Edition, published 1910.

²¹⁶ [1993] 6 NWLR (Pt 302) 692, 738, paras. E-F.

[underlining supplied for emphasis]

It is crucial to acknowledge that suspending the Constitution, even partly, creates a constitutional vacuum. However, categorically rejecting this mechanism solely out of fear of its potential negative consequences risks undermining its potential benefits.

Consider the realities of the legislative process: amending or repealing a disputed constitutional provision can be a lengthy and arduous process, often spanning months or even years. In such cases, temporarily suspending a disputed provision might be the only viable course of action to prevent immediate and irreparable harm to citizens and the nation. This allows Parliament sufficient time for a thorough and objective consideration of the provision in question. Therefore, the drafting committee must carefully weigh the opposing interests and carefully assess the potential risks associated with both suspending a provision and refusing to include a suspension mechanism within the Nigerian Constitution.

The preceding section has described the formal alteration procedure in Nigeria, focusing on the two principal actors: the legislative and judicial arms of government, as dictated by constitutional and statutory law, as well as judicial precedent. However, these branches do not function in isolation. To fully understand the alteration process, it is important to consider the forces that drive the initiation of discussions about which aspects of the law or Constitution should be amended, and the subsequent steps that lead to the actual alteration.

2.5. The Public Participation Question

Despite the existence of mechanisms for public participation, such as petitioning and public hearings, the extent and effectiveness of public engagement in the legislative process in Lesotho remain limited. Reported instances of public consultations were identified as being

limited in scope.²¹⁷ In addition, the public faces challenges in obtaining timely and comprehensive information on the progress of bills and the parliamentary schedule, hindering their ability to effectively participate in the legislative process.

The relevant questions therefore are:

- (i) What are the permissible limits of public participation in the legislative process in Lesotho?
- (ii) Can individual members of the public directly participate, or must participation be channeled through designated representatives?

The constitutional provisions that are relevant here are sections 20 (1) (a), 78 and 80.

They provide in relevant parts, thus:

Right to participate in government

20(1) Every citizen of Lesotho shall enjoy the right –

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

Mode of exercise of legislative power

78(1) The Power of Parliament to make laws shall be exercisable by bills passed by both Houses of Parliament (or, in the cases mentioned in section 80 of this Constitution, by the National Assembly) and assented to by the King.

(2)

(3) When a bill has been passed by the National Assembly it shall be sent to the Senate and –

(a) when it has been passed by the Senate and agreement has been reached between the two Houses on any amendments made to it by the Senate; or

²¹⁷ Lesotho Final Report, “Commonwealth Parliamentary Association Recommended Benchmark for Democratic Legislatures” (Commonwealth Parliamentary Association 2024).

(b) when it is required to be presented under section 80 of this Constitution, it shall be presented to the King for assent.

Limitation of powers of Senate

80 (1)

(2)

(3) When a bill, other than a bill that is certified by the Speaker as an Appropriation bill, is passed by the National Assembly and, having been sent to the Senate at least thirty days before the end of the session, is not passed by the Senate within thirty days after it is so sent or is passed by the Senate with amendments to which the National Assembly does not agree within thirty days after the bill was sent to the Senate, the bill, with such amendments, if any, as may have been agreed to by both Houses, shall, unless the National Assembly otherwise resolves, be presented to the King for assent.”

Regulation of procedure in Parliament etc.

81(1) Subject to the provisions of this Constitution, each House of Parliament may regulate its own procedure and may in particular make rules for the orderly conduct of its own proceedings.”

National Assembly Standing Orders

The following Standing Orders, relevant to the case, provide in relevant parts:

“64. Procedure on Senate Messages Concerning Bills

(1)

(2)

(3)

(4)

(5)

(6)

(7) If the Senate

(a) has not signified its agreement to a bill, or to all amendments made by the House to Senate amendments to a bill at the expiry of the period stated in paragraphs (1) or (3) of section 80 of the Constitution, whichever may be appropriate; or

(b) has signified by message its disagreement to the second or third reading of a bill before the expiry of such period, the Clerk shall, unless the House resolves otherwise, forthwith present the bill to His Majesty as provided in paragraph (4) of section 80 of the Constitution

54. Procedure on Bills in Portfolio Committee

(1)

(1)

(2) The Committee shall consider whether the Bill warrants public hearings as contemplated in Standing Order No.75 (facilitation of public participation) and if it is resolved, the Committee shall conduct public hearings.

76. Facilitation of Public Participation

The National Assembly and its Committees shall facilitate public participation in its legislative and other processes through implementing the following:

(a) Conducting public hearings as when necessary;”

Senate Standing Orders

The relevant Senate’s Standing Orders provide that:

“51 Bills Received from National Assembly

(1)

(2)

(3) The Bill shall then stand, referred to the Legislation Committee for consideration thereof for a period not exceeding thirty (30) working days.”

52 Procedure On Bills in Legislation Committee

(1)

(2)

(3) When the Committee recommends that the bill be passed with amendments, the Committee shall submit the text with all the proposed amendments and a text of the bill in which the amendments are inserted.

It has been argued in many quarters that Section 20 (1) (a) of the Constitution of Lesotho, 1993, guarantees an opportunity for political participation by citizens and requires Government to be accountable to the electorate. A configuration of this model of democratic participation is explained in by Ely (1980),²¹⁸ to be:

Representative democracy is perhaps most obviously a system of government suited to situations in which it is for one reason or another impractical for the citizenry actually to show up and personally participate in the legislative process. But the concept of representation, as understood by our forebears, was richer than this. Prerevolutionary rhetoric posited a continuing conflict between the interests of “the rulers” on the one hand, and those of “the ruled” (or “the people”) on the other. A solution was sought by building into the concept of representation the idea of an association of the interests of the two groups. Thus the representatives in the new government were visualized as “citizens”, persons of unusual ability and character to be sure, but nonetheless “of” the

²¹⁸ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 77-78 (Harvard University Press 1980).

people. Upon conclusion of their service, the vision continued, they would return to the body of the people and thus to the body of the ruled. In addition, even while in office, the idea was that they would live under the regime of the laws they passed and not exempt themselves from their operation: this obligation to include themselves among the ruled would ensure a community of interest and guard against oppressive legislation. The framers realized that even visions need enforcement mechanisms: “some force to oppose the insidious tendency of power to separate...the rulers from the ruled” was required. The principal force envisioned was the ballot: the people in their self-interest would choose representatives whose interests intertwined with theirs and by the critical reelection decision ensure that they stayed that way, in particular that the representatives did not shield themselves from the rigors of the laws they passed.

Crucial is the extent to which legal and constitutional frameworks enable public participation. And in this regard, section 20 (1) (a) should be interpreted consistently with the jurisprudence of the UN Human Rights Committee because of Lesotho’s treaty obligations. There is also a legal controversy surrounding the role of Standing Orders 54 and 76 of the National Assembly in ensuring public participation in legislative processes. A previous court ruling in *Development For Peace And Another v. Speaker of National Assembly And Others*,²¹⁹ rejected the proposition that these Standing Orders establish a mandatory procedural requirement for public participation. The court’s decision appears to be based on the rejection of the argument that internal parliamentary rules, derived from Section 81 (1) of the Lesotho Constitution, possesses constitutional force.

²¹⁹ Constitutional Case 1/0.5/2016.

The most direct solution would be to amend Section 20(1)(a) of the Lesotho Constitution to explicitly guarantee public participation and define its scope within the legislative process. Alternatively, a clarifying interpretation of the existing section by the Constitutional Court could achieve a similar result. Even without a constitutional amendment, the legislature could revise the Standing Orders (54 and 76) to clearly establish mandatory procedures for public participation. This would require a shift in the legislature's approach and a recognition of the importance of public input. The revised Standing Orders should specify how public participation will be facilitated (e.g., public hearings, written submissions, online consultations). While less likely, the courts could revisit the Development for Peace decision. A strong argument could be made that while internal rules may not have the *same* force as constitutional law, they are still legally binding and should be interpreted in a way that promotes the constitutional principles of public participation. The court could emphasize that Section 81(1) should not be interpreted to undermine other constitutional rights, like the right to participate in government.

Training for legislators and Legislative staff on the importance of public participation and effective methods for engaging the public would also be beneficial. Similarly, educating the public about their rights and how to effectively participate in the legislative process is also important. Examining how other countries in the region or those with similar legal systems ensure public participation in legislative processes could equally offer valuable insights and best practices. However, the success of any of these solutions depends heavily on the political will of the government of Lesotho and the Legislature.

CHAPTER FOUR

A PRESENTATION AND ANALYSIS OF THE ALTERATIONS ACTS OF NIGERIA AND THE KINGDOM OF LESOTHO BETWEEN 1999-2023.

Having established the theoretical and historical base for Constitution this study will now turn attention to the practical application by examining the legislative drafting methods adopted in altering the Constitution in these countries. This chapter, therefore provides a detailed presentation and analysis of the specific Constitution Alteration Acts that form the core of this study. These Acts will be examined in turn, exploring the context surrounding its enactment; the specific changes it introduced; and the legislative drafting methods and techniques applied in its content and structure. This practical examination will help to bridge the gap between theory and reality, assessing how well the established drafting techniques and methods were followed and the actual effects of these alterations on the legal and political landscape.

4.2. Data Presentation

4.2.1. Constitution of The Federal Republic of Nigeria (First Alteration) Act, 2010.

Initially, fifty (50) sections of the 1999 Constitution were proposed for alteration.²²⁰ However, only twenty –nine (29) sections were passed by both Houses of the National Assembly and got the nod of the state Houses of Assembly. The specific sections were: Sections 66 (1) (h); 69 (a); 75; 76 (1) and (2); 81, 84, 107 (1) (h); 116 (1) and (2); 132 (1) and (2); 135 (2); 137; 145; 146 (a); 160 (1); 178 (1); 180 (2); 182 (1); 190; 200 (a) and (b); 229; 233; 239 (a), (b), and (c); 246 (1) (b) and (3); 251 (4); 272 (3); 285 (1), (2), (3), (4) and (5). In addition, the Second, Third and Sixth Schedules to the 1999 Constitution were altered.²²¹

²²⁰ Shittu, (n. 194 at 228).

²²¹ *ibid*

The above listed sections all fall within the province of constitutional provisions that can be amended by the procedure stated under Section 9 (2) of the 1999 Constitution. To understand their drafting, this study shall now examine specific examples under the First Alteration Act.

- i. Section 145: One of the central issues in Nigeria’s constitutional framework was the absence of a clear process for transferring presidential power during instances of the President’s incapacitation. When President Umaru Musa Yar’Adua fell ill, the lack of a constitutional mechanism to transfer power to the Vice-President created political uncertainty.²²² Section 145 thus had to be amended to allow the National Assembly to authorize the Vice-President to assume presidential duties in the event of the President’s incapacity, even if the President failed to formally notify the National Assembly within the prescribed time. It was altered as follows:

Section 145 of the Principal Act is substituted for a new section
“145”—

145. —(1) Whenever the President is proceeding on vacation or is otherwise unable to discharge the functions of his office, he shall transmit a written declaration to the President of the Senate and the Speaker of the House of Representatives to that effect, and President until he transmits to them a written declaration to the contrary, the Vice-President shall perform the functions of the President as Acting President.

(2) In the event that the President is unable or fails to transmit the written declaration mentioned in subsection (1) of this

²²² Francis Paschal Nwosu, ‘The Death of President Umaru Musa Yar’adua and the Doctrine of Necessity in Nigeria, 2007-2010’. *Nnamdi Azikiwe Journal of Philosophy* (2022) 13 (1), 80-97 at 83.

section within 21 days, the National Assembly shall, by a resolution made by a simple majority of the vote of each House of the National Assembly, mandate the Vice-President to perform the functions of the office of the President as Acting President until the President transmits a letter to the President of the Senate and Speaker of the House of Representatives that he is now available to resume his functions as President.

Throughout this Act, the textual amendment technique was employed. One of the styles of the textual amendment is substituting a completely new section or subsection for the existing section or subsection as it will read after the necessary amendments have been made. Section 145 exemplifies this technique. This is a common and effective way to alter a provision of law when the changes are substantial, as it provides a clear and consolidated view of the law as altered or amended. The former Section 145, provided as follows:

145. – Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary, such functions shall be discharged by the Vice-President as Acting President.

The original Section 145 was a single, long sentence. The new Section 145 breaks it down into two shorter, more manageable sentences. This improves readability and potentially reduces ambiguity.

- ii. Section 190: Alterations or amendments are also made to ensure consistency with other parts of the principal Act. Therefore, other sections referencing the President's absence are expected to be updated, as an effort towards maintaining coherence throughout the

1999 Constitution. However, while Section 146 remained untouched, a comparable provision relating to the Governor of a state, Section 190, was altered. This suggests a deliberate effort to harmonize the legal treatment of Executive absence, even if the specific sections directly referencing the President were not immediately altered. This selective alteration demonstrates a focus on systemic consistency, even if it wasn't universally applied across all potentially related sections.

iii. The Sixth Schedule

The Sixth Schedule to the Constitution is altered—

(a) by deleting, the word “Assembly” and inserting immediately after the word “National” the words “and State Houses of Assembly Election Tribunals” in Heading “A” ;

(b) in paragraph 1(1), line 1, by deleting immediately after the word “National” the word “Assembly”, and inserting the words, “and State Houses of Assembly Election Tribunals”;

(c) in subparagraph (2), line 1, by substituting for the word “four”, the word “two”; and

(d) by deleting—

(/) Heading “B”, and

(ii) paragraph 2 (1), (2) and (3).

The use of direct amendment (deleting, inserting, substituting) is a straightforward and generally accepted method for modifying legal texts. It avoids the need for complex cross-referencing or implied changes.

The Sixth Schedule to the 1999 Constitution was drawn up as a result of Section 285 of the 1999 Constitution which establishes for the Federation and each state, one or more

election tribunals to be known as the National Assembly Election Tribunal and the Governorship and Legislative Houses Election Tribunals, respectively. These tribunals shall, to the exclusion of any other court, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected as Member of the National Assembly, the office of Governor or of Deputy Governor, or as a Member of any legislative House.

Following established drafting conventions, the Constitution's structure separates matters of principle from technical or administrative details. While the main body of the Section 285 of the 1999 Constitution, establishes the Election Tribunals, subsection (3) directs that the operational details, that is, the composition of these tribunals be contained under the Sixth Schedule to the Constitution. While using schedules is good practice, it also introduces a level of cross-referencing that can make the text more difficult to navigate for those unfamiliar with the structure of the Constitution. Clear signposting and explanatory notes within the main body of the Constitution and the schedule itself can help mitigate this issue.

The alteration to the Sixth Schedule are made with a high degree of specificity. Instead of rewriting entire sections, the drafters target precise words and phrases for deletion or insertion. This minimizes the risk of unintended consequences and makes the changes relatively easy to track.

A potential weakness in the alteration to the Sixth Schedule lies in the referencing technique. Legislative drafting experts, like Crabbe, have advocated that a reference to another Part, division, section, subsection, paragraph or subparagraph within an Act should be identified by its number or letter and *not* by such terms as *preceding*, *following* or *herein provided*.²²³ Therefore, the use of “*immediately after the word*” under paragraphs (a) and (b) can lead to interpretation issues if the text being modified is itself complex or subject to change

²²³ Crabbe (n. 76 at 139).

in the future. Expressions like *preceding section, hereinafter provided, immediately after*, should be avoided. Identification should be unmistakable and indicated by reference to the number of the section, subsection, paragraph or subparagraph. It is unnecessary to overdo such a reference by extra words where there is a general statutory presumption that these extra words are read into the reference.²²⁴ There are other statutory presumptions arising from the Interpretation Act of each jurisdiction that permit more brevity in legislative expression.

More precise methods of referencing specific locations within the text (e.g., by paragraph and line number, even if those might need updating later) might be preferable. It is better drafting to identify a provision in an Act by reference to it as a section, subsection, paragraph or subparagraph as given in the Act and not by vague words which through the passing of time can become misleading.

4.2.2. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (SECOND ALTERATION ACT) 2010.

The long title of the Second Alteration Act “*An Act to Alter the Provisions of the Constitution of the Federal Republic of Nigeria, 1999 And The Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010; And for Related Matters*”, raises an intriguing point. It is not only altering the Constitution itself but also the First Alteration Act. This begs the question: is it legally sound for a subsequent alteration act to directly modify a previous one? While seemingly unusual, it is indeed possible and legally valid. Legislatures routinely alter existing legislation, and this principle extends to Constitutional Alteration Acts as well. The Second Alteration Act, in modifying the First, is essentially updating the legislative record to reflect the current state of the Constitution. It is not a matter of one act “killing” another, but rather a process of legislative refinement and revision. This approach ensures that the

²²⁴ See: Section 5 (1) of the Interpretation Act, 1964.

Constitution remains coherent and up-to-date, reflecting the most recent alterations. It avoids the need to consult multiple, potentially conflicting, Alteration Acts, consolidating the changes into a single, authoritative text.

The alterations under this Act primarily focus on the conduct and timelines of elections and the jurisdiction of the courts in relation to election matters. Some of the key alterations include:

- i. **Election Timelines:** The timelines for elections at various levels, including the National Assembly, House of Assembly, and for Presidential and Governorship elections, have been revised. The required time frame for elections is now one hundred and fifty (150) days but not later than 30 days before the election, as opposed to one hundred and twenty (120) days in the previous version.
- ii. **Appellate Jurisdiction:** The Act also revises the provisions related to the jurisdiction of the Supreme Court and the Court of Appeal. The Supreme Court now has exclusive jurisdiction to hear appeals from the Court of Appeal on specific issues, such as election validity, constitutional interpretations, and human rights matters.
- iii. **Original Jurisdiction:** The Court of Appeal is granted original jurisdiction to hear cases regarding the validity of the election of the President, Vice-President, Governor, and Deputy Governor, as well as issues relating to vacancies in these offices.
- iv. **Election Tribunals:** The Act establishes clear guidelines for the composition and jurisdiction of election tribunals at the National and State levels, including the National and State Houses of Assembly Election Tribunals and the Governorship Election Tribunals. The tribunals have exclusive jurisdiction to determine election-related

petitions. The Act also outlines the timeframes within which election petitions must be filed and adjudicated.

- v. Composition of Election Tribunals: The Act revises the composition of election tribunals, ensuring that the Chairman is a High Court judge, with the remaining members drawn from judges of various courts within the judiciary. The President of the Court of Appeal appoints the tribunal members in consultation with other relevant judicial authorities.
- vi. Miscellaneous Alterations: The Act also includes provisions for the establishment of new tribunals and the streamlining of procedures for resolving election disputes. It ensures quicker resolution of cases, particularly those involving election results and political officeholders.

One of the most notable changes is the revision of election timelines, which ensures that elections are held within a more predictable and timely manner, addressing previous concerns about delays in the electoral process. The decision to grant the Court of Appeal exclusive jurisdiction over election-related disputes is also a positive move, ensuring that such cases are handled at a higher level of judicial authority and avoiding the fragmentation of cases across different courts.

Additionally, the establishment of specialized election tribunals with clear guidelines for their composition and functioning is an important step in ensuring that election disputes are resolved in a transparent and efficient manner. The provision for quick adjudication of election petitions, with fixed timeframes for appeals, helps in mitigating prolonged election-related litigation that could destabilize the political process.

The repetitive drafting style within this Alteration Act, however, may cause redundancy. For example, the substitution of similar phrases across multiple sections could have been consolidated into a single overarching amendment. Imhanobe (2014) has recommended that when if there are several provisions that are repealed, it should be written like this, “The following sections of Act/Constitution are hereby repealed.”²²⁵ Consider also the example given by Crabbe (1993) of where both a textual and non-textual amendment style was adopted, as follows:

In subsections (1)(a), (1)(b), (3)(a) and (3)(b), for the words “the whole or part” (wherever occurring) there shall be substituted the words “the whole or a substantial part”.²²⁶

The Act also effectively cross-references relevant sections of the 1999 Constitution and the First Alteration Act, improving coherence and reducing ambiguity.

4.2.3. Constitution of The Federal Republic of Nigeria (Third Alteration) Act, 2010.

This Act alters the 1999 Constitution, by altering sections 6, 84, 240, 243, 287, 289, 292, 294, 295, 316, and 318. It also inserts new sections 254A to 254F and alters the Third and Seventh Schedules to the 1999 Constitution.

The primary objective of this Act was to establish the National Industrial Court within the constitutional framework. This was achieved by altering key sections of the Constitution for the following purposes:

- (i) To recognize the National Industrial Court as a court established by the Constitution under Section 6. Hence the reason why Section 6 was altered.

²²⁵ Imhanobe (n. at 426).

²²⁶ Crabbe (n. 76 at 137-138).

- (ii) To empower the President of the Federal Republic of Nigeria to appoint the President and Judges of the National Industrial Court under Section 84 (4).
- (iii) To grant the National Industrial Court jurisdiction to adjudicate on industrial disputes under Section 240, encompassing civil and criminal disputes under Sections 254E (2), 254F (2).
- (iv) To establish the appellate jurisdiction of the Court of Appeal over decisions of the National Industrial Court under Section 243.

A cursory look at the Act reveals some shortcomings. The Act assumes the readership knows the existing structure of the Principal Act. This is unrealistic, especially considering the diverse readership of legislation.

As McLeod points out,²²⁷ the primary readership is the client, which, in the context of constitutional alterations, could be the Constitution Drafting Committee, the Constituent Assembly, or even Parliament itself. While their engagement with the legislation might be brief, their approval is paramount. Following the client, the courts form the second key readership, tasked with interpreting the Constitution and adjudicating disputes. The legal profession constitutes the third readership, responsible for providing accurate advice to clients navigating potential litigation or structuring their affairs to minimize legal risks. Beyond these core readerships, the Act must also be intelligible to a broader group. This includes public officials (tax inspectors, planning officers, etc.), professionals from other fields (accountants, architects, doctors, etc.) whose work is affected by legislation, and finally, members of the public seeking to understand their legal standing without professional assistance. While

²²⁷ McLeod, n. 79.

academics, as legal scholars, will undoubtedly scrutinize constitutional changes, their perspective is secondary to the needs of these primary and secondary readerships.

Although legal professionals familiar with the Principal Act may readily grasp these alterations, best drafting practice dictates explicit articulation of all changes to ensure clarity and avoid potential misinterpretations, even among experts. For example, instead of just saying “inserting immediately after the existing section 243,” it would be clearer to say “inserting the following new subsections after subsection (1) of section 243.”²²⁸ This avoids ambiguity if section 243 already has multiple subsections.

4.2.4. Constitution of the Federal Republic of Nigeria (Fourth Alteration) Act, 2017

The fourth alteration exercise to the 1999 Constitution was characterized by a piecemeal legislative approach, wherein alterations were enacted through separate bills rather than being encompassed within a single omnibus bill. According to Osunyikanmi (2024),²²⁹ the seventh National Assembly (2011-2015) conducted a long-winding Constitution review process, but despite significant expenditure, the process ultimately failed after the proposed alterations, which were submitted as a single bill, were vetoed by the then President of the Federal Republic of Nigeria. Taking a cue from its predecessors and wary of a potential presidential veto, the eight National Assembly (2015-2019) adopted a piecemeal approach to the Constitution review process by setting up two separate Committees; one for the House of Representatives and one for the House of Senate with the hope that the multiple bills proposing different alterations would have more chances of being passed into law than a single bill.²³⁰ This

²²⁸ See: Section 3 of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

²²⁹ Dr. Pius Osunyikanmi, “A Comparative Analysis of the Constitution Alteration Procedures in Nigeria and Ghana” (2024) Vol. 9 (7) *IJNL* 749-872 at 754.

²³⁰ *ibid*

approach proved fruitful, resulting in the successful passage of five distinct alteration Bills within the Fourth Alteration to the 1999 Constitution.

The five (5) variants of the Fourth Alteration to the 1999 Constitution that were successfully passed were:

- (i) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No.4) Act, 2017.
- (ii) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No.9) Act, 2017.
- (iii) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 16) Act, 2017.
- (iv) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 21) Act, 2017.
- (v) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 27) Act, 2017.

- (i) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration) (No. 4) Act, 2017.

This alteration was to provide for the funding of the Houses of Assembly of States directly from the consolidated revenue fund of the State by substituting for subsection (3) of Section 121 of the 1999 Constitution which formerly read: “Any amount standing to the credit of the Judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the heads of the courts concerned” a new subsection (3) which now reads “Any amount standing to the credit of the –

- (a) House of Assembly of the State; and (b) Judiciary;

in the Consolidated Revenue Fund of the State shall be paid directly to the said bodies respectively; in the case of the judiciary, such amount shall be paid directly to the heads of the courts concerned.”

- (ii) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No.9) Act, 2017

This version of the fourth alteration focuses on providing INEC with sufficient time to conduct bye-elections where no clear winner has emerged in an election by substituting for the word, “seven” days, in line 2 of subsection 4 and 5 of Sections 134 and 179 of the Principal Act, the words “twenty-one” days.

The alteration further made provision for grounds for de-registration of political parties by inserting after section 225 of the principal Act, a new section 225A which empowers INEC to de-register a political party for any of the reasons contained thereunder.

- (iii) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 16) Act, 2017.

This specific alteration aims to prevent individuals who assumed the presidency or governorship to complete the term of an elected predecessor from serving more than one term in that office. This was achieved by introducing a new subsection (3) to Sections 137 and 182 of the 1999 Constitution.

- (iv) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 21) Act, 2017 ACT No. 8

This particular fourth alteration provides for the time frame for the determination of pre-election matters by substituting for the marginal note of Section 285 of the Principal Act, a new marginal note “Time for determination of pre-election matters, establishment of Election Tribunals and time for determination of election petitions” and substituting for its subsection (8), a new subsection (8) which empowers a tribunal or court to suspend its ruling on a preliminary objection or any other interlocutory issue touching on its jurisdiction to the final judgment stage. This fourth alteration further altered section 285 of the 1999 Constitution by

inserting new subsections (9) – (14) to the effect that every pre-election matter shall be filed not later than fourteen (14) days from the date of the occurrence of the event and judgment in writing is to be given within one hundred and eighty (180) days; appeal from a decision in such pre-election matter is to be filed within fourteen (14) days from the date of delivery of the judgment and same shall be heard and disposed of within sixty (60) days from the date of filing of the appeal. The section, as amended, also explains what constitutes a “pre-election” matter and precludes an election tribunal or court from declaring any person a winner at an election in which such a person has not fully participated in all stages of the election.

- (v) Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 27) Act, 2017.

This alteration focuses essentially on the reduction of the qualifying age for the office of the president, membership of the House of Representatives and the State House of Assembly by substituting the word, “thirty-five” and “thirty” in Sections 65 (1) (b) and 106 (b) of the Principal Act respectively, with “twenty-five”; and substituting the word, “forty” in Section 131 (b) of the 1999 Constitution with the words, “thirty-five”.

It is worthy of note that Fourth Alteration, No. 4, 9, 16 and 21 has 7th day of June, 2018, as their assent date while Fourth Alteration, No. 27 has 31st Day of May, 2018, as its commencement date. The differing assent dates for the Fourth Alterations to the 1999 Constitution are likely due to a combination of legislative, procedural, and potentially political factors. Each Alteration Act, while part of a larger set, was treated as an individual bill with its own timeline and requirements. In other words, even though they are all part of the “Fourth Alteration,” they were not necessarily considered or finalized simultaneously.

- 4.2.5. The Constitution of the Federal Republic of Nigeria (Fifth Alteration) Act, 2022.

The Fifth Alterations to the 1999 Constitution were met with considerable fanfare. News outlets across Nigeria prominently reported President Muhammadu Buhari's assent to sixteen (16) Constitution Alteration Bills, marking a significant moment in the ongoing evolution of Nigeria's foundational legal document. This section will focus on a selection of these Alteration Acts, chosen for their accessibility and availability through library resources and online databases. These particular alterations offer a valuable insight into the scope and nature of the Fifth Alteration package.

- (i) Constitution of the Federal Republic of Nigeria, 1999 (Fifth Alteration) (No. 1) Act, 2023.

The purpose of this Act is clearly outlined under the long title as: “*An Act to alter the Constitution of the Federal Republic of Nigeria, 1999 to change the names of Afikpo North and Afikpo South Local Government Areas; and for related matters.*” This clear and direct statement makes it easy to understand the goal of the Act. This approach follows the best practice of drafting legal provisions with clear intent, allowing for unambiguous interpretation of the document.

- (ii) The Constitution of the Federal Republic of Nigeria, 1999 (Fifth Alteration) (No. 2) Act, 2023

The purpose of this Act is clearly stated from the long title: “*An Act to alter the Constitution of the Federal Republic of Nigeria, 1999 to change the name of Kunchi Local Government Area; and for related matters.*” This statement sets the context and purpose of the alteration without ambiguity, ensuring that the intent is clear for legislators, legal practitioners, judges, and the public. This Act aimed to alter a specific part of the Constitution, namely Part I of the First Schedule, which lists local government areas in Nigeria. This is a

common method for making precise changes to the Constitution without altering the broader legal framework.

A pertinent question that arises here is whether renaming a local government is equivalent to the creation of a new local government. According to Section 8 of the 1999 Constitution, the Legislature has the authority to create new States or Local Government Areas and adjust their boundaries. At the federal level, this can be done through an Act of the National Assembly, following the procedures outlined in Subsections (1) and (2). At the state level, State Houses of Assembly can make such changes through a Law passed in accordance with Subsections (3) and (4) of the same section. Section 8, however, does not address the renaming of states or local government areas. Since the names of states and local governments in Nigeria are enshrined in the Constitution, any change, modification, addition, or removal from this list would necessitate a constitutional alteration to that effect. Therefore, the question arises whether the same process for creation would apply in the case of renaming a state or local government. This study concludes that this is not the case. Accordingly, it is crucial for the drafter to determine which procedure should be followed: the one outlined in Section 9(2) or the one in Section 9(3)?

- (iii) Constitution of the Federal Republic of Nigeria, 1999 (Fifth Alteration) (No. 8) Act, 2023.

This Act was to alter the Constitution of the Federal Republic of Nigeria, 1999, to regulate the first session and inauguration of members-elect of the National and State Houses of Assembly; and for related matters.

The first session and inauguration of the National and State Houses of Assembly (“NSHA”) members-elect in Nigeria represents a pivotal moment in the nation’s democratic history. Essentially, the election of the principal officers of the NSHA is conducted at the first

session and inauguration of the members-elect. Prior to the Fifth Alteration Act No. 8, there had been situations where the principal officers of the Houses were elected by a handful of members-elect using unlawfully amended Standing orders of the House (s). There are also instances where a handful of members-elect were inaugurated. This, to a large extent, can be attributed to the way and manner the then relevant provision of the Constitution was worded.⁴

The wording of the Constitution to a large extent characterized the manner in which the first session and inauguration of members-elect of the NSHA were carried out over the years, especially with respect to the election of Principal Officers of the NSHA. This is seen in cases where only a few members-elect were inaugurated and where the principal officers of the NSHA were elected by a handful of members-elect.²³¹ Furthermore, in most of the first sessions and inauguration of the members-elect especially with respect to the election of principal officers which is governed by Standing Orders of the various Houses of Assembly, there had been situations where the process was facilitated by new Standing Orders which was surreptitiously produced by some persons and used for the inauguration of the Assembly without approval and adoption by members. This pandemonium in the NSHA resulted in the Fifth Alteration, which is currently being examined.²³²

The fifth Alteration Act (No. 8) specifically altered sections 54, 96, and 311 of the Constitution to provide for and regulate the quorum and the Standing Orders for the first session

²³¹ For example, on 9th June 2015, the Senate President and Deputy President of the 8th National Assembly were elected by Fifty-Seven (57) members-elect present and voting, even in the absence of Fifty-One (51) other members-elect. Similarly, in 2019, the Speaker of the Bauchi State House of Assembly was elected by Eleven (11) members-elect out of the Thirty-One (31) members-elect while the rest of the members-elect conducted another first session and inauguration wherein they elected their own Speaker (the second Speaker) of the Bauchi State House of Assembly. Also, in 2019, the Speaker of the Edo State House of Assembly was elected by 9 members-elect out of the 24 members-elect. Essentially, only nine (9) members-elect out of the fifteen (15) members-elect were inaugurated due to the political disputes the other fifteen (15) members-elect had with the Governor of the State. This kind of situation has led to the enmeshment of the various Houses of Assembly in controversy all over the Country for so many years.

²³² “Constitutional Amendment on the First Session and Inauguration of Members-Elect of the National and State House of Assembly”, *Mondaq* (2024) <<https://www.mondaq.com/nigeria/constitutional-administrative-law/1468540/constitutional-amendment-on-the-first-session-and-inauguration-of-members-elect-of-the-national-and-state-house-of-assembly>> accessed on 23 September, 2024.

and the inauguration of members-elect of the NSHA. To this effect, Section 54 (1A) was inserted into Section 54 of the 1999 Constitution and states that:

(1) The quorum of the Senate or of the House of Representatives shall be one-third of all the members of the Legislative House concerned.

(1A) For the purpose of the inaugural and first sitting of the Senate or the House of Representatives, the quorum shall be at least two-thirds of all the members-elect of either the Senate or the House of Representatives.

A similar provision was also inserted into section 96 of the Constitution for the State House of Assembly's inaugural and first sitting. By virtue of the foregoing, the fifth alteration Act (No. 8) created a clear distinction between the inaugural and first sitting and subsequent sittings of the NSHA. While the inaugural and first sitting of the NSHA cannot be held without at least two-thirds of all the members-elect of the various Houses of Assembly, the fifth alteration retained the one-thirds provision for subsequent sittings. To this end, the controversies experienced in the past as to a handful of the members-elect electing principal officers and getting inaugurated seem to have been minimized if not put to an end by the Fifth Alteration Act (No. 8).

Section 311 of the Constitution was also altered, to the effect that Standing Orders made prior to the dissolution of the various legislative house shall be applied in respect of the proceedings of the first session and inauguration of members-elect of that legislative house. This is to ensure the continuity of established procedures during the initial proceedings. The alteration empowers the Legislative Houses to subsequently modify these Standing Orders to reflect the needs of the newly elected members within a reasonable timeframe.

- (iv) Constitution of the Federal Republic of Nigeria, 1999 (Fifth Alteration) (No. 34) Act, 2023.

The alteration Act is explicitly designed to address the right to food and food security in Nigeria. The long title clearly states the intent: *“An Act to Alter the Constitution of the Federal Republic of Nigeria, 1999 to require the Government to direct its policy towards ensuring the right to food and food security in Nigeria; and for related matters.”* This clear purpose aids in guiding the reader through the proposed changes.

In Section 16 (2)(d), the words “suitable and adequate food” are substituted with the phrase “right to food and food security.” This change signifies a shift from a general, aspirational term (“suitable and adequate food”) to a more explicit legal right (“right to food”), which is aligned with modern human rights frameworks and emphasizes the state’s duty to ensure food security.²³³ The addition of a new Section 16A is an important drafting technique that enhances the specificity of the constitutional framework. Rather than attempting to alter existing provisions in a way that could cause confusion, the new section is inserted as a separate provision, gives it prominence and clarity. Section 16A outlines the state’s responsibility in ensuring food security, specifying how policies related to food security should be designed, implemented, and maintained. Section 16A (1) gives concrete directives to the State to direct its policy towards strategies that guarantee food security of the nation regarding availability, accessibility, and affordability of food to the citizens. This method of drafting goes beyond general principles and prescribes actionable policy steps, ensuring that food security is an ongoing priority.

4.3. Constitution Alterations in Lesotho (1999-2023)

Before examining the Amendment Acts from the relevant periods, it is important to clarify a point previously mentioned; amendments to the 1993 Constitution of Lesotho did not

²³³ Pedi Obani, “Reflections on the Right to Food under the Constitution of the Federal Republic of Nigeria 1999 (2020) *Nigerian Current Law Review* 2019/2020. <<https://ssrn.com/abstract=4269469>> accessed on 23 September, 2024.

originate in 1999. The formal amendment process of the 1993 Constitution began in 1996 with the First Amendment to the Constitution Act of 1996. This Amendment repealed and replaced articles of the Constitution regarding the Defence Force, Courts-martial Appeal Court, Police Force, and Prison Service.

Section 145 of the Constitution of Lesotho, 1993, established the Defence Commission. The history shows that at all times there was some control exercised over the Police Force and that, under the new Constitution, that control passed to a newly created body i.e. the Defence Commission. This transfer of authority was subject to judicial scrutiny in the case of *Mokapela v Minister of Home Affairs and Others*,²³⁴ where the constitutionality of Legal Notice No. 72 of 1994, which outlined regulations for disciplining members of the Police Force, was challenged. The appellant, a police officer, appeared before a disciplinary board charged with contravening Reg. 5 of LN 72 of 1994, in that he had ordered certain troopers to neglect their duties and, furthermore, had unlawfully transferred sixteen troopers from the capital to the outlying districts contrary to the aforesaid regulation. He was found guilty by the disciplinary board and demoted to the rank of trooper. He applied to the High Court to have the decision of the board reviewed and set aside on the ground inter alia that the regulations published as LN 72 of 1994 were null and void and had no legal effect.

The appellant argued that the Defence Commission overstepped its authority by issuing regulations that infringed upon the Commissioner of Police's command and control over the Police Force. The appellant alleged that the respondent had no power to make the said regulations styled Legal Notice No. 72 of 1994. Therefore, the Legal Notice, purportedly made by the 3rd Respondent "purporting to act" under Section 145 (4) of the Constitution of Lesotho, was *ultra vires*. The further point made by the appellant was that in terms of the Law of

²³⁴ *Mokapela v Minister of Home Affairs and Others* (C of A CIV 16 of 95) [1996] LSCA 77 (30 June 1996).

Lesotho, every Subordinate Law (of which Legal Notice No.72 of 1994 is one) must be laid before the Senate within fifteen (15) sitting days of its publication in the Gazette. On the 8th July, 1994, the Senate went into recess at which stage the said Law had not yet been tabled before it and was laid before the Senate only on the 28th September, 1994. It was claimed that as Legal Notice No. 72 of 1994, was not laid before the Senate within fifteen (15) sitting days of its publication. It ceased to have any effect.

The respondents submitted that the proceedings were legally valid for the following reasons: (1) Legal Notice No. 72 of 1994 was laid before the Senate within seven sitting days of its publication. (2) Section 147 of the Constitution establishes a Police Force for Lesotho that is to be responsible for the maintenance of Law and Order in Lesotho and which is to have such other functions as may be prescribed by an Act of Parliament. It further vests responsibility for the administration and discipline of the Police in the Commissioner of Police. Section 5 (3) of the Police Order of 1971, is essentially an embodiment of certain provisions of Section 147 of the Constitution; and (3) Section 6 of the Police Order of 1971 must be read with Section 147(1) of the Constitution. Section 6 authorizes delegation by the Commissioner of his powers.

The court emphasized a “purposive interpretation” of the 1993 Constitution in upholding the constitutionality of Legal Notice No. 72 of 1994. Cases such as *Mokapela* likely contributed to the subsequent repeal and replacement of Section 145 under the First Amendment to the Constitution Act of 1996, reflecting the evolving understanding and interpretation of the constitutional framework governing the Police Force in Lesotho.

This study highlights the noteworthy and striking nature of the language employed under the 1996 Act:

Section 145 of the Constitution of Lesotho, hereinafter referred to as the “Constitution” is repealed and the following section substituted -

From the foregoing, it is apparent that the alteration to Section 145 of the Constitution of Lesotho followed a specific order: the original section was first repealed and then replaced with the new provisions. In Chapter two of this study, it was stated that repeal provisions serve a crucial supporting role within an amending statute.²³⁵ Their purpose is to introduce new changes to existing law made by the consequential amendments enacted by the statute. This approach contrasts with the method employed by the drafters of the Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010, where certain sections were directly substituted without a preceding repeal.

4.3.1. The Fourth Amendment to The Constitution Act, 2001.

Given the review period of 1999-2023, the appropriate starting point for this analysis of Lesotho’s constitutional amendments is the Fourth Amendment Act to the 1993 Constitution. The Fourth Amendment to the Constitution Act, 2001, was primarily focused on electoral reforms, enhancing the independence of the Independent Electoral Commission (IEC), and adjusting operational procedures within the National Assembly. Below is a critical examination of the legislative drafting methods used in amending these sections, emphasizing clarity, coherence, and alignment with drafting principles. The specific Amendment Acts related to this study have been reproduced under Appendix A for reference.

The general purpose of the Act is explicitly stated in its long title: “An Act to amend the Constitution to establish a mixed member proportional electoral system for the election of members to the National Assembly; to provide for greater independence for the Independent

²³⁵ *supra* pages 59-60.

Electoral Commission; and to provide for special provisions for the conduct of general elections.” This clear articulation aids in understanding the legislative intent and ensures coherence across the amendments. Given the existence of multiple purposes, they are appropriately separated by semi-colons, aligning with best drafting practice.²³⁶

The language used in the amendments is generally formal and precise, reflecting standard legislative drafting practices. The provisions avoid overly technical jargon, making them accessible to legal professionals and policymakers. Terms like “high moral character” and “proven integrity” set clear qualitative standards for IEC members.

The Act employs both substitution and insertion methods to amend existing provisions, which is standard in legislative drafting. Clear demarcation of deletions and substitutions ensures the amendments are precise and unambiguous. The substitution of sections, such as the complete replacement of Section 56, effectively integrates new provisions while eliminating redundancy. Amendments involving numerical changes (e.g., “deleting ‘twenty-one’ and substituting ‘eighteen’”) could provide context or justification for these changes in an accompanying explanatory memorandum.

4.3.2. Fifth Amendment to the Constitution Act, 2004.

Under this Act, Section 137 of the 1993 Constitution was amended to establish the Public Service Commission which is vested with powers to appoint persons to hold or act in offices in the public service and the power to terminate appointment of such persons.

A notable distinction of this Act compared to the earlier Amendment Act of 2001 is that the Act does not include a detailed long title or purpose statement beyond the short title.

²³⁶ Imhanobe, (n. at 243)

This approach may limit the ability to understand the broader intent of the amendments without referring to external explanatory documents.

4.3.3. Sixth Amendment to the Constitution Act, 2011.

Firstly, the Act introduces a new section (31A) emphasizing the need for policies supporting victims of crime. This includes provisions for compensation and assistance for vulnerable groups. The Act also amends section 69 to clarify the process of determining parliamentary membership disputes. Notably, it removes subsection (6) of section 69, suggesting a change in the procedure for resolving such disputes. The Act introduces a new section (84B) allowing the King, upon the Prime Minister's advice, to order a referendum on matters of national interest and grants Parliament the power to legislate on referendum procedures. The Act also amends section 90 to clarify the procedures for exercising the Prime Minister's functions during absence or illness.

Furthermore, the sixth amendment Act replaces "Assistant Minister" with "Deputy Minister" throughout the Constitution and clarifies the roles and responsibilities of Deputy Ministers, particularly in the absence of the relevant Minister. Adds a new subsection (5) to section 98 requiring the Attorney-General to take and subscribe to an oath of office.

Establishment of the Human Rights Commission:

- (i) Introduces a new Chapter XIA establishing an independent Human Rights Commission.
- (ii) Outlines the Commission's composition, appointment process, qualifications, tenure, removal from office, functions, and reporting requirements.

This Act focuses on various aspects of governance in Lesotho, including:

- (i) Strengthening human rights protections: By establishing an independent Human Rights Commission.
- (ii) Improving democratic processes: By introducing provisions for referendums and clarifying parliamentary procedures.
- (iii) Enhancing government efficiency: By clarifying the roles and responsibilities of government officials, including Deputy Ministers and the National Advisory Planning Board; and
- (iv) Improving accountability: By requiring the Attorney-General to take an oath of office and by establishing reporting mechanisms for the Human Rights Commission.

4.3.4. The Eighth Amendment to the Constitution Act, 2018.

Repeals and replaces Section 40:

Now, both men and women who marry Lesotho citizens must fulfill the same requirements for acquiring citizenship as follows:

- Five years of cohabitation in Lesotho.
- Five years of continuous and lawful stay in Lesotho with a Lesotho citizen.

Previously the constitution of Lesotho did not allow dual citizenship. But, in 2018, that Clause was successfully amended. This means that applicants do not have to renounce their original citizen to acquire Lesotho citizenship.

Dual Citizenship:

Repeals and replaces Section 41:

- (i) Explicitly allows Lesotho citizens to hold citizenship of other countries.
- (i) Introduces limitations for naturalized or registered citizens:
 - Eligibility for social benefits (e.g., education sponsorships, social grants) is limited to 10 years after naturalization/registration.
 - Prohibits holding certain positions specified by an Act of Parliament.

Restoration of Lesotho Citizenship:

Introduces a new Section 41A:

- i. Provides for the restoration of Lesotho citizenship for:
- ii. Citizens who renounced their citizenship due to marriage to a foreign national requiring such renunciation.
- iii. Citizens born in Lesotho who renounced their citizenship and wish to regain it.
- iv. Specifies that restored citizens may have limitations on certain rights and privileges, particularly those that contradict the provisions on dual citizenship.

Clearly, when the eight amendment was promulgated, giving Parliament a leeway to enact laws regulating citizenship matters, it was in recognition of the need for revisiting laws governing such matters. The Constitution was alive to the dangers insufficiently regulated citizenship laws may pose to Lesotho in their current state. These fears are not unique to Lesotho; they can be traced as far back as the formation of the United States of America after gaining her independence from Great Britain. A member of the American Constitution drafting body, one George Mason, is recorded to have commented, as demonstrated herein below, when the issue on the table was the participation of foreigners in the Legislative and Executive arms of government. In stating concerns regarding the citizenship of congressional officeholders, and the required length of such citizenship, George Mason argued that although he “was for

opening a wide door for immigrants; ... [h]e did not chose (sic) to let foreigners and adventurers make laws for us”; nor would he want “a rich foreign Nation, for example Great Britain, [to] send over her tools who might bribe their way” into federal office for “invidious purposes”.²³⁷

The fears of opening doors for foreigners to make laws for citizens have long been a concern. The fear is real and not unfounded. The fear is that the foreigners will use the public office for invidious purposes. The Eighth Amendment therefore, acknowledged the need for limitations on the rights and privileges of naturalized or registered citizens, particularly concerning social benefits and certain government positions.

4.3.5. The Tenth Amendment to The Constitution Act, 2022

A significant innovation of this Amendment Act is the inclusion of a preamble to the Lesotho Constitution. The 1993 Constitution, notably, lacked a preamble, a deficiency that has had far-reaching consequences. This omission has arguably contributed to a lack of clear national identity and purpose, hindering the development of a shared vision for the nation. A preamble serves as a foundational statement of the nation’s aspirations, values, and guiding principles, providing a framework for interpreting and applying constitutional provisions. Its absence created ambiguity and uncertainty regarding the fundamental purposes of the Lesotho Constitution and the principles that should govern its interpretation and implementation.

Preamble

We, the Basotho nation:

Acknowledging the supremacy of God, the Almighty;

Inspired by the legacy of Morena Moshoeshoe I, the Founder of the Basotho Nation, which is based on the values of good governance, prosperity, peaceful co-existence, reconciliation, and unity;

²³⁷ Max Farrand, *The Records of the Federal Convention of 1787*, Vol. II at 85 (Yale University Press, 1911).

Mindful of the challenges of political instability, conflict, and under-development in our recent history;

Conscious of the need to manage our natural resources sustainably and efficiently for the equitable benefit of the present and future generations;

Determined to build a better future based on a stable democracy, strong economy, peace, equality of opportunity, prosperity, and sustainable development;

Affirming our resolve to uphold, commit and embrace, as pillars of our national cohesion and governance the following foundational values:

- (a) se-Moshoeshoe, nation-building, peace, and unity;
- (b) respect for human rights and freedoms, equality, human dignity, and gender equity;
- (c) supremacy of the Constitution, rule of law, justice, separation of powers and the independence of the judiciary; and
- (d) democracy, accountability, responsiveness, and openness,

now therefore, adopt this Constitution as the Supreme Law of the Kingdom of Lesotho.

Section 2 of the Amendment Act amends the Constitution by inserting the words “or she” wherever the word “he” appears, “or her” wherever the word “his” appears and “her” wherever the word “he” appears, except in respect of the King. This amendment acknowledges the evolving understanding of gender and seeks to ensure that the legal framework is inclusive of all gender identities.

The amendment also significantly enhances the role of the Ombudsman, likely expanding their powers and functions to better serve the public interest. Furthermore, the

introduction of a new chapter dedicated to the Human Rights Commission and the Lesotho Anti-Corruption and Ethics Commission underscores a commitment to upholding human rights and combating corruption. Moreover, the amendments to sections related to the Public Service Commission suggest an intent to improve the efficiency, accountability, and integrity of the public service. Importantly, the inclusion of a new chapter on the media indicates a recognition of the importance of a free and independent press in a democratic society. Additionally, the amendments to sections concerning the High Court and Court of Appeal likely aim to strengthen the Judiciary and improve the administration of justice. Finally, the introduction of a provision on international law and agreements signifies an intention to align Lesotho's domestic legal framework with international standards and obligations.

The Amendment Act significantly revises Section 85 of the Constitution, altering the established process for amending the nation's fundamental law. The amendment introduces a mandatory referendum, a significant departure from Nigeria's current process.

4.4. Challenges and Solutions in the Drafting of Alterations of Constitutions: A Functional Comparative Perspective On Nigeria and Lesotho.

4.5. Trust and Distrust in Constitutional Institutions

As Dixon (2015) highlighted in his analysis of constitution-making, trust in constitutional institutions is critical for the legitimacy and effectiveness of constitutional amendments. Both Nigeria and Lesotho have faced challenges of trust in their constitutional institutions, particularly the Judiciary and The Legislative Arms of Governments. In Nigeria, for example, there has been a history of judicial interference in political matters, leading to public distrust in the judiciary's ability to interpret constitutional amendments impartially. Similarly, in Lesotho, distrust between the political parties and the monarchy has undermined the effectiveness of constitutional amendments aimed at strengthening democratic institutions.

To overcome the challenge of distrust in constitutional institutions, both Nigeria and Lesotho should focus on strengthening the independence and impartiality of key institutions such as the Judiciary, Legislature, and Electoral bodies. This could involve constitutional provisions that ensure the protection of these institutions from political interference and enhance their accountability to the public. In particular, reforms aimed at ensuring judicial independence and impartiality would help restore public trust in the judiciary's role in interpreting constitutional amendments.

4.6. Lack of Public Participation and Legitimacy

Another significant challenge in both countries is the limited public participation in the drafting of constitutional amendments. In Nigeria, constitutional alterations are typically initiated by the National Assembly, with limited involvement from the general public. Similarly, in Lesotho, amendments are often pushed through by the ruling political elite without broad-based consultations. This lack of public involvement undermines the legitimacy of the amendments, as citizens may feel disconnected from the process and the resulting changes.

CHAPTER FIVE

SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1. Summary of Findings

A thorough examination of the Constitution Alteration Acts, coupled with an in-depth analysis of the constitutional history of both Lesotho and Nigeria, has yielded the following key findings:

5.1.1. Historical Legacies of Nigeria and the Kingdom of Lesotho shaped their Constitution-making and alteration processes.

Stemming from their shared colonial history under British rule, both Nigeria and the Kingdom of Lesotho inherited constitutional frameworks where ultimate authority initially rested with the British Crown, evidenced by the ability to amend constitutions through Orders in Council without local consent.

Post-independence, both nations adopted constitutions with amendment procedures, often requiring supermajorities in the Legislature and some form of assent from the Executive Arm of Government. More so, both countries also experienced periods of constitutional disruption due to military coups, where the supremacy of the Constitution was challenged and power shifted to ruling councils or military regimes. This shared experience of colonial influence and subsequent constitutional instability is a key finding, highlighting how historical legacies can shape contemporary constitutional processes.

An analysis of Nigerian constitutional alterations processes revealed several recurring patterns. First, participating traditional and religious leaders did not claim sovereign rights, and elected representatives acknowledged the limits of their authority. Second, referendums, a key

tool for popular legitimacy, were consistently absent. Third, representation at constitutional conferences was based on territorial constituencies (electoral or nominative) rather than ethnicity or tribal affiliation. Fourth, constitutional reform was primarily driven by elites (the press, politicians, and colonial influence) rather than grassroots movements. Fifth, military interventions have profoundly shaped all post-independence constitutions. Sixth, political actors, especially during military regimes, often exhibited impatience with complex constitutional issues, preferring immediate solutions over gradual political or judicial processes. Seventh, constitutional alterations have been largely ad-hoc and reactive, lacking long-term vision and influenced by the “incumbency factor.” Eighth, frequent military interventions have hindered the development of a distinct Nigerian constitutional jurisprudence. Finally, the constitutional framework, even those created under military rule, arguably contains sufficient leeway for alterations, similar to the 1963 shift to a Republic, but how the current political classes will to utilize this leeway remains uncertain.

5.1.2. Similarity in the Structure and Form of the Constitutions of Nigeria and Lesotho:

Another finding is that the structure and form of constitutions in formerly British colonies (like Nigeria and Lesotho) differ significantly from those of formerly French colonies. British-influenced constitutions tend to be longer, more detailed, and more complex in their language, while French-influenced constitutions are generally shorter, more concise, and more straightforward. The British, concerned about minority rights in newly independent, plural societies, often included detailed provisions for minority protection in their constitutions, adding to their length and complexity. British-style constitutions often include details that could be left to ordinary legislation, contributing to their length and making them more difficult to amend. The Nigerian Constitution is cited as a prime example of this, with its inclusion of

administrative details, revenue allocation formulas, and other matters that could be handled through ordinary laws. This level of detail makes the constitution rigid and difficult to adapt to changing circumstances.

5.1.3. Textual Amendment as the Primary Method for Altering the Lesotho and Nigerian Constitutions:

The dominant drafting technique employed in the First Alteration Act is textual amendment, specifically substitution. This involves replacing existing text with new text, providing a clear and consolidated view of the law as amended. The Constitution Alteration Acts of Nigeria and Lesotho serves as a prime example of this method. This method of alteration aligns with the principles emphasized in the works of Grad and Williams (2006) on constitutional drafting. In their book, the authors highlight the importance of making careful, deliberate alterations to constitutional texts while considering the broader context and implications of each change. In the case of Nigeria and Lesotho, textual amendments were used to bring about specific changes in line with evolving political realities or emerging needs, such as the need for electoral reforms or addressing political instability. However, while textual amendment ensures clarity and directness, it also has significant risks, especially when amendments are not carefully coordinated with other parts of the constitutional text. The importance of consistency across constitutional provisions, emphasized by Grad and Williams, is therefore crucial to prevent the unintended consequences of piecemeal amendments.

The textual amendment method also connects with Dixon's (2015) analysis of constitutional design in contexts of distrust. In Nigeria and Lesotho, where political instability and historical challenges have eroded trust in the system, the drafting of constitutional amendments through textual substitution can be seen as a way to remedy perceived flaws. However, this approach may not fully address underlying systemic issues, as it fails to ensure

the institutional and procedural changes necessary to build long-term trust and prevent the recurrence of political crises.

5.1.4. Piecemeal Approach to Amendments:

While the amendments aimed to improve consistency across the Constitutions, the approach appears somewhat piecemeal. For example, under the First Alteration Act, 2010, the alteration of Section 190 while Section 146 remained untouched suggests an inconsistent application of the principle of harmonization. This raises concerns about potential ambiguities and the need for a more comprehensive review of related sections. A more comprehensive review, encompassing all related sections, would have been a more effective approach to ensure clarity and avoid future interpretive difficulties. This piecemeal approach can lead to unintended consequences and undermine the overall coherence of the Constitution.

This issue is especially pertinent in Lesotho, as highlighted in Nyane's (2021) work on the Ninth Amendment, where the haste in constitutional amendments led to suboptimal results. Nyane critiques the Ninth Amendment for being a quick fix rather than a carefully considered overhaul of the system. The piecemeal approach, while perhaps expedient in the short term, risks creating long-term complications, as it fails to address the root causes of political instability. This resonates with Dixon's (2015) theory that constitution drafters must take a careful, methodical approach to constitutional change, particularly in contexts where trust in the system is low. The piecemeal amendments in Lesotho and Nigeria might reflect a pragmatic response to the constraints of political realities, but they ultimately contribute to the fragility of the constitutional order.

Moreover, the argument of Shamsu (2019) regarding Nigeria's constitutional alterations further illustrates the consequences of piecemeal amendments. In his paper, Shamsu advocates for more comprehensive constitutional change, which would involve a more holistic review and wider consultation, rather than adopting isolated amendments that fail to address

broader structural problems. His proposal for a referendum-based validation of constitutional changes after passing through the National Assembly echoes the need for a more thorough, inclusive process that would avoid the fragmented, piecemeal approach.

Such selective alterations or amendments can create ambiguities that necessitate judicial interpretation, potentially leading to protracted legal battles and further complicating the constitutional framework. A more holistic approach, considering the broader context and interrelationships between different sections, would have been a more prudent and effective way to achieve the desired consistency. This highlights the ongoing challenges in the Nigerian constitutional alteration process, where a lack of comprehensive drafting plan can undermine the intended improvements and create new avenues for legal contestation.

5.1.5. Limited Public Participation in Alteration Process:

The limited public participation in the constitution alteration process in both Nigeria and the Kingdom of Lesotho, it is found, may be as a result of the pre-independence colonial system where Constitutional alterations were entirely controlled by the British Crown through Orders in Council. Citizens of Lesotho and Nigeria had virtually no input, and changes served British colonial interests, not the will of the people. The cited parliamentary debate in chapter three clearly illustrates this complete lack of agency in the process. This historical legacy of exclusion may have contributed to a sense of disengagement or apathy among citizens regarding constitutional matters, potentially hindering their participation in post-independence amendment processes. Furthermore, the centralized nature of colonial governance, where power resided in the hands of British officials, may have also fostered a culture of limited civic engagement, impacting how citizens perceive their role in influencing constitutional change even after independence. This historical context is crucial for understanding the ongoing

challenges in promoting public participation in contemporary constitutional reform efforts in both nations.

5.1.6. Suspension as a mode of alteration of the 1999 Constitution

The Lesotho Constitution, specifically under Section 85, grants Parliament the power to temporarily suspend provisions of the Constitution. This is a significant and potentially controversial power, requiring strict adherence to established procedures. While the power exists, its use raises complex questions about justification, implementation, and the potential for abuse, as illustrated by examples of other countries and even events within Lesotho itself.

This highlights the tension between the need for such a mechanism in extreme circumstances and the inherent risks to constitutional principles. While the 1999 Constitution of Nigeria does not explicitly provide for the suspension of the entire Constitution, it does contain provisions for situations that might necessitate limitations on certain rights or deviations from normal constitutional procedures. These are primarily found within the context of emergency powers. For example, Section 305 of the 1999 Constitution provides as follows:

305. (1) Subject to the provisions of this Constitution, the President may by instrument published in the Official-Gazette of the Government of the Federation issue a Proclamation of a state of emergency in the Federation or any part thereof.

(2) The President shall immediately after the publication, transmit copies of the Official-Gazette of the Government of the Federation containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting of the House of which he is President or Speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the Proclamation.

(3) The President shall have power to issue a Proclamation of a state of emergency only when—

(a) the Federation is at war;

(b) the Federation is in imminent danger of invasion or involvement in a state of war;

(c) there is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security;

(d) there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger;

(e) there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation;

(f) there is any other public danger which clearly constitutes a threat to the existence of the Federation; or

(g) the President receives a request to do so in accordance with the provisions of subsection (4) of this section.

(4) The Governor of a State may, with the sanction of a resolution supported by two-thirds majority of the House of Assembly, request the President to issue a Proclamation of a state of emergency in the State when there is in existence within the State any of the situations specified in subsection (3) (c), (d) and (e) of this section and such situation does not extend beyond the boundaries of the State.

(5) The President shall not issue a Proclamation of a state of emergency in any case to which the provisions of subsection (4) of this section apply unless the Governor of the State fails within a reasonable time to make a request to the President to issue such Proclamation.

(6) A Proclamation issued by the President under this section shall cease to have effect—

(a) if it is revoked by the President by instrument published in the Official Gazette of the Government of the Federation;

(b) if it affects the Federation or any part thereof and within two days when the National Assembly is in session, or within ten days when the National Assembly is not in session, after its publication, there is no resolution supported by two-thirds majority of all the members of each House of the National Assembly approving the Proclamation;

(c) after a period of six months has elapsed since it has been in force;

Provided that the National Assembly may, before the expiration of the period of six months aforesaid, extend the period for the Proclamation of the state of emergency to remain in force from time to time for a further period of six months by resolution passed in like manner; or

(d) at any time after the approval referred to in paragraph (b) or the extension referred to in paragraph (c) of this subsection, when each House of the National Assembly revokes the Proclamation by a simple majority of all the members of each House.

From the above, it can be deduced that in Nigeria, the power to take actions that may effectively suspend certain constitutional provisions or necessitate limitations on rights and deviations from normal procedures, rests with the Executive arm of government, specifically,

the President of the Federal Republic of Nigeria as stated under Section 305, rather than the Parliament as is the case under the Lesotho Constitution.

5.1.7. Subject- specific vs Omnibus Constitutional Alterations:

It is also observed that Lesotho's Constitutional Amendment Acts tend to be more subject specific, addressing specific areas of the Constitution in each Act. This contrasts sharply with the Nigerian approach, where alterations often encompass multiples subjects which are bundled into one single legislative Bill. However, a slight variation is observed under the recent Fifth Alteration Acts to the 1999 Constitution where each bill was subject-specific and altered the specific sections related to each subject-matter.

5.2. Lessons Learned

5.2.1. Structure and Form are significant

The format and level of detail in a Constitution have real-world consequences. It may be argued that choosing the structure of the Constitution may not be the prerogative of the drafter; the drafter is expected to draft legislation that fits into the statute book and follow the existing methodology and conventions prevalent in the jurisdiction in relation to the structure. However, law is a communication and it is not effective if there is no communication and a structure which has been the practice over a period of time but does not achieve its purpose of communication is not effective and falls short of legislative quality. Overly detailed Constitutions, like the Nigerian Constitution or the Constitution of the Kingdom of Lesotho, can become rigid, difficult to amend, and prone to legal challenges. This can be contrasted with the more concise French-influenced Constitutions. According to Thornton, a primary role of the drafter is to design a structure that facilitates communication of the content at the same time

as it achieves the object of the instruction.²³⁸ Research in the United States has shown that organization and layout is as important as the length of the sentence and the difficulty of specific words.

5.2.2. Amendment Approaches Need to be Holistic

Piecemeal amendments, while seemingly efficient, can create new inconsistencies and ambiguities. Piecemeal amendments to the constitution falls far short of what the Nigeria and the Kingdom of Lesotho needs in terms of the legitimacy and efficacy of its constitution. Persistence in this approach will be proved wrong eventually in the long term. Beyond altering parts of the Constitution, agitation and controversy on some significant national issues including for example and among others, resource control, restructuring (however defined), the most suitable or preferable form of federalism, in Nigeria for example, shows that a serious national dialogue is required on the pathways to pursuing suitable constitutional arrangements with a wide perception of legitimacy and more likely to lead to a political order perceived as legitimate. In addition to the above, there is also insufficient time enough time for proper deliberation and public consultation. While the general rule is that a new assembly must restart the entire process for constitutional amendments, there is a recent rule, under Order XIII, Rule 1 (11) of the Standing Orders of the House of Representatives that suggests otherwise. This new rule allows a New Assembly to continue working on constitution alterations started by the previous Assembly. However, this new rule hasn't been tested in court, meaning its validity and application are uncertain. Even if the new rule is valid, the bills still need to be reintroduced and go through all the legislative stages.

²³⁸ Xanthaki n. at 157.

A comprehensive review of related constitutional provisions is crucial for effective reform. Nigeria and Lesotho's experiences with constitutional amendments clearly illustrate the dangers of piecemeal changes. Almost every Alteration Act in both countries has generated controversy or originated as a result of controversy, ultimately leading to legal proceedings, even causing friction between different branches of government, despite their supposed involvement in the alteration process.

5.2.3. Drafting Techniques Matter:

The choice of drafting techniques, such as textual amendment (substitution) or non-textual amendment, has implications for clarity and accessibility. Given the clarity that this the textual amendment provides, this is the usual practice for making amendments in modern times. While this method can be effective, it must be applied consistently and within a broader framework of constitutional coherence. The textual amendment method, while a useful tool, is not a magic bullet. Even with clear substitutions, amendments can still create contradictions or inconsistencies if they are not carefully considered in relation to the entire document. Nigeria and Lesotho's experiences show that simply substituting text doesn't guarantee a coherent constitution if the amendments are not strategically planned and evaluated for their impact on the overall constitutional framework. For example, an amendment might clearly replace a clause, but the consequences of that replacement for other parts of the constitution might not be fully considered, leading to unintended problems.

When using textual amendment, inconsistencies in its application can arise. For example, different sections of the constitution might be amended using slightly different wording or approaches for similar issues. This lack of uniformity can create ambiguities and make it difficult to interpret the constitution as a whole. It can lead to legal challenges and differing interpretations, undermining the very clarity that the textual amendment method is

supposed to provide. This has been observed in both Nigeria and the Kingdom of Lesotho where amendments, while using the direct method, might introduce new clauses or modify existing ones in ways that are not entirely consistent with the overall structure and principles of the Constitution.

A good example in this context would be the Ninth Amendment to the Constitution of the Kingdom of Leostho. The animating principle of the formation of government in terms of the Constitution of Lesotho is that government must, at all material times, enjoy the confidence of the National Assembly.²³⁹ Equally, the Constitution gives Parliament the power to withdraw confidence from the government of the day. Under the Constitution, a motion of no confidence in the government, unlike a motion to remove the Speaker, requires only a simple majority. The sole procedural requirement is that the motion must include a proposed replacement for the Prime Minister. Despite its importance in government formation, this process is largely unregulated, allowing such a motion to be raised at any time.²⁴⁰ While other Westminster systems prioritize swift resolution of confidence votes, Lesotho doesn't necessarily follow suit. Previously, if a no-confidence vote passed, the Prime Minister had three (3) days to either resign or advise the King to dissolve parliament (a process that had been altered by the Ninth Amendment).

While the Ninth Amendment in Lesotho may have reduced the frequency of elections and saved taxpayer money, its impact on overall parliamentary stability is questionable. The core issue – the vote of no confidence – remains largely unregulated. Substantively, no reasons

²³⁹ Section 87(2) of the 1993 Constitution embodies this principle.

²⁴⁰ While motions of no confidence were rare in Lesotho's early constitutional history after 1993, they became a significant and destabilizing force after 2012 with the rise of coalition politics. Several governments were removed through no-confidence votes, leading to early elections in both 2015 and 2017. To address this instability, the Ninth Amendment was passed, removing automatic dissolution as a consequence of a lost no-confidence vote. Now, the Prime Minister's primary option is resignation, and they can only advise dissolution with the support of a two-thirds majority in the National Assembly.

are required for such a motion to pass, making it dependent on political will. Unlike other countries with impeachment processes, Lesotho lacks a formal mechanism for addressing governmental misconduct, leaving such matters to be handled politically through no-confidence votes. Procedurally, these motions can still be raised at any time, meaning that even without the threat of dissolution, they can still create significant governmental instability.

Furthermore, the Ninth Amendment in Lesotho created confusion regarding parliamentary dissolution. While the Constitution grants the King the power to dissolve parliament on the Prime Minister's advice, and establishes a five-year term for Parliament, the frequent early dissolutions after 2012 (averaging every two years) have created a practical contradiction. This highlights the tension between the constitutional framework and the political realities that led to the repeated early elections. This was clear mischief that needed to be addressed. In an attempt to remedy this mischief, the Ninth Amendment deleted all the three provisos to section 83(4) and replaced them with new provisos; without necessarily redrafting the whole of section 83(4).

5.2.4. A special constituent Assembly for Constitution-making and Alterations

Both Lesotho and Nigeria grant their legislatures the exclusive power to alter or amend their Constitutions. This raises the question: has this arrangement proven effective over time? Using the regular Legislature for Constitution alterations has proven problematic in both jurisdictions looking at the history and constitutional tradition of both jurisdictions. Taking the preparation/drafting of the Constitution as well as its Alteration out of the hands of the regular Legislature and entrusting it into a special commission or committee will do so much to remove one important cause of discontent which has been made the basis for the proposal of popular call for the total enactment of a New Constitution, which is the concern about the constitution's origins. A more inclusive process, involving wider public participation in the drafting and

amendment stages, can foster a sense of ownership over the constitution. This can lead to greater public support and a willingness to uphold the supreme legal framework.

5.2.5. Need for Preparatory Materials

The absence of robust preparatory materials and legislative history can complicate judicial interpretation of constitutional alterations. Including such materials can enhance clarity and bridge the gap between legislative intent and judicial understanding.

6. Independent Review: Independent review mechanisms, such as judicial review, can play a crucial role in ensuring the constitutionality and effectiveness of alterations to the Constitution.

5.3.Recommendations:

5.3.1. Amendment to section 9 of the 1999 Constitution of The Federal Republic Of Nigeria

The formal procedure for amending the Constitution under Section 9 requires critical revisions to enhance clarity and address existing ambiguities. Specifically, subsections (2) and (3) of Section 9 currently employ the phrase “An Act of the National Assembly for the alteration of this Constitution...” This wording introduces significant uncertainty regarding the necessary legislative instrument. It remains unclear whether the drafters intended that a pre-existing Act of the National Assembly is a prerequisite for initiating constitutional alterations, or if the provision refers to a Bill that is yet to undergo the legislative process.

To resolve this ambiguity and ensure a more transparent procedure, it is recommended that if the intention is to utilize a Bill, the relevant provisions should be revised to explicitly state “A Bill for an Act of the National Assembly for the alteration of this Constitution.” This

amendment would clearly indicate that the constitution alteration process commences with the proposal and passage of a specific Bill dedicated to altering the Constitution.

Furthermore, to promote efficiency and prevent undue delays, it is imperative to incorporate explicit timelines for the various stages involved in passing these Constitution Alteration Bills. Specifying deadlines for committee reviews, legislative debates, and final approvals by the National Assembly and State Houses of Assembly would streamline the process and reduce the potential for protracted political maneuvering.

Beyond procedural clarity, the Constitution should also include a precise definition of what constitutes an “alteration to the Constitution.” Currently, the focus is primarily on the legislative procedure and the required majority for amendments. However, a clear articulation of the scope of “alteration” is essential. This definition should delineate the types of changes that fall under the alteration process, distinguishing them from other forms of constitutional adjustments or interpretations. Laying bare the meaning of “alteration” would provide a consistent framework for understanding and applying the alteration provisions.

Finally, to foster greater inclusivity and accountability in the constitution alteration process, the specific roles and responsibilities of the three arms of government and the citizens should be explicitly defined. The current provisions lack clarity regarding the precise involvement of the President, the Judiciary, and the citizens in the alteration process. Clearly outlining their respective roles – whether it involves assent, judicial review, or mechanisms for public participation and input – would mitigate ongoing controversies and ensure a more transparent and legitimate amendment process. Explicitly defining these roles would equally contribute significantly to a more robust and widely accepted framework for constitutional change.

5.3.2. An Independent Institutional Mechanism to Handle Constitution Making and Reform

To ensure the successful implementation of any constitutional alteration exercise, the development and adoption of a realistic and widely accepted plan of action is paramount. This plan must meticulously outline the strategies and steps necessary for the effective execution of the entire process. Crucially, the plan must garner the acceptance of all relevant stakeholders. Imposing a plan without their input risks alienating key participants and undermining the legitimacy and widespread acceptance of the eventual constitutional amendments.

Historically, Nigeria has employed a two-stage methodology for both drafting new Constitutions and undertaking alteration exercises. The initial phase typically involves the establishment of a committee composed of legal experts and other relevant professionals. This committee's primary responsibility is to gather diverse perspectives from the populace and synthesize these views into concrete proposals and a preliminary draft of the constitutional amendments. The subsequent stage involves the convening of an elected constituent assembly. This body is tasked with the critical role of deliberating on the draft proposals and ultimately adopting the revised Constitution.

Drawing upon the insights presented earlier in Chapter three of this dissertation,²⁴¹ particularly concerning the mandate of the Lesotho Law Reform Commission (LLRC), a similar institutional framework could be advantageously adopted in Nigeria. Specifically, the responsibility for initiating and managing the constitution alteration task could be formally assigned to the Nigeria Law Reform Commission (NLRC). This would leverage the NLRC's existing expertise in legal reform and provide a dedicated body to oversee the complex process of constitutional amendment, potentially enhancing its efficiency, technical soundness, and public trust. By entrusting this crucial task to an independent law reform body, Nigeria could establish a more consistent and less politically charged mechanism for constitutional evolution.

²⁴¹ See: pp 112-114 above.

Alternatively, a Constitution Alteration Act can be enacted to provide for the institution that would be wielded with the responsibility to carry out such exercise in Nigeria.

However, if the decision remains to vest the responsibility for altering the provisions of the Constitution in the National Assembly, a thorough justification for this allocation of power becomes essential. This necessitates a comprehensive study to determine the suitability and rationale behind entrusting this significant function to the legislative branch. Such an inquiry should delve into the following aspects:

- **Comparative Analysis:** Examining the constitutional amendment processes in other established democracies to understand the various models employed and the justifications for assigning this role to their respective Legislatures or other specialized bodies.
- **Functional Suitability:** Evaluating the inherent strengths and potential limitations of the Legislature in undertaking a task that often requires a degree of detachment, specialized expertise, and broad societal consensus-building beyond the typical legislative process.
- **Potential for Bias and Political Influence:** Analyzing the potential for partisan politics and vested interests within the National Assembly to unduly influence the constitutional amendment process, and exploring safeguards to mitigate such risks.

Furthermore, a historical study into the origins and evolution of the National Assembly' role in constitution alteration would provide valuable context. Understanding why and how this function was initially assigned to the Legislature could shed light on the underlying assumptions and whether those rationales remain valid in the present-day socio-political landscape. This historical perspective could inform the debate on the most appropriate body to handle constitution alterations moving forward.

5.3.3. Strengthen The Role of Expert Legislative Drafters

The drafting of constitutional amendments requires specialized knowledge and expertise. Both Nigeria and Lesotho should invest in training legislative drafters and constitutional experts who are skilled in drafting clear, precise, and consistent legal language. This would help avoid ambiguities and inconsistencies in the constitutional text and ensure that alterations are properly drafted to achieve their intended outcomes. Additionally, the involvement of international experts and comparative constitutional law scholars could provide valuable insights into best practices for constitutional reform. The government can equally take up the duty to engage with international organizations and independent experts to provide technical assistance in legislative drafting, legal analysis, and capacity building for parliamentarians and government officials.

5.3.4. A Comprehensive and Inclusive Approach To Amendments

Rather than relying on piecemeal amendments, both Nigeria and Lesotho should adopt a more comprehensive approach to constitutional reform. This would involve conducting a thorough review of the entire constitutional framework, identifying inconsistencies and gaps, and making coordinated amendments to address these issues. For example, the harmonization of related constitutional provisions, such as the electoral process and the structure of government, could help ensure consistency and clarity.

5.3.5. Revision of The Standing Orders of the Legislative Houses Of The National Assembly

The revised standing orders should specify how public participation will be facilitated. That is, whether through public hearings, written submissions or consultations.

5.3. Conclusion

The conclusion seems inevitable that every law-making body ought to be supplied with a force of carefully-trained lawyers whose duty it shall be to give attention to these problems before a statute is cast in its final form.

In all legal systems, regardless of whether they follow common or civil law traditions, legislative drafting is fundamentally a governmental function. Governments initiate and direct the drafting of all legislation, controlling both the legislative agenda and the drafting process itself. This includes ensuring the availability of skilled drafters, appointing legislative counsel, and overseeing their training and development. Building capacity among legislative counsel is therefore crucial for any government seeking to achieve its development goals. In contemporary democracies, where law plays a central role in governance, this need is even more pronounced. Legislation is a key instrument for policy implementation, further emphasizing the government's vested interest in managing the development and drafting of laws. As exemplified by the Commonwealth Secretariat's capacity-building efforts for African drafters, governments often collaborate and leverage external support to enhance their drafting capabilities. Ultimately, however, the choice of drafting system rests with each individual government, a pattern observed throughout Commonwealth Africa. This is evident in the collective agreement among Commonwealth nations to utilize colonial expertise in assisting developing countries with training their government drafters, with the Commonwealth often providing funding for staff and students involved in these programs.

Both Nigeria and Lesotho offer valuable lessons in legislative drafting and constitutional amendments. While Nigeria's approach is more inclusive, it suffers from inefficiencies, and Lesotho's model, while faster, can be overly influenced by traditional power structures. The two countries could benefit from adopting elements from each other's systems,

ultimately creating a more balanced, transparent, and efficient constitutional amendment process that fosters greater public participation and political stability.

5.4. Contribution to Knowledge

This dissertation distinguishes itself by being the first within the Institute to apply the functionality test specifically in comparing the legislative drafting methods of Nigeria's and Lesotho's Constitution Alteration Acts in a doctrinal legal research.

5.5. Suggestion for Further Studies

5.5.1. Further research is needed to determine the optimal institutional framework for constitution alteration in Nigeria and potentially other African nations. This investigation should compare the efficacy and suitability of the current National Assembly-led process with alternative mechanisms such as a dedicated Constituent Assembly or a specialized Constitutional Review Commission.

5.5.2. The conclusions arrived at in this study were drawn only from a comparative analysis of the legislative drafting methods for the alterations of the Constitutions of Nigeria and the Kingdom of Lesotho. Thus, it is believed that a comparison of the constitutional drafting experiences of Nigeria and Lesotho with other African countries, or even countries in different regions (e.g., Southeast Asia, Latin America) that have undergone similar constitutional transitions, may help broaden the scope of the research topic.

5.5.3. Researchers can also explore the possibility of using quantitative methods to analyze constitutional texts and identify patterns in drafting styles and techniques. This could involve using computational linguistics or other text analysis tools.

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APPENDICES

(iii) The Fourth Amendment to the Constitution Act, 2001.



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4 Fourth Amendment to the Constitution Act²⁰⁰¹179

FOURTH AMENDMENT TO THE CONSTITUTION ACT, 2001

Act No. 4 of 2001

An Act to amend the Constitution to establish a mixed member proportional electoral system for the election of members to the National Assembly; to provide for greater independence for the Independent Electoral Commission; and to provide for special provisions for the conduct of general elections.

ENACTED BY THE PARLIAMENT OF LESOTHO.

Short title and commencement

1 (I) This Act may be cited as the Fourth Amendment to the Constitution Act, 2001 .

(2) This Act shall come into operation on such date as the Minister responsible for Law and Constitutional Affairs may, by notice published in the Gazette, appoint.

Composition of National Assembly

2. Section 56 of the Constitution is deleted and substituted with the following section -

“56. The National Assembly shall consist of one hundred and twenty members elected in accordance with the provisions of this Constitution.”

Elections to National Assembly

3. Section 57 of the Constitution is amended by deleting subsection (1) and substituting the following subsection -

(1) The members of the National Assembly shall be elected in terms of a mixed member proportional electoral system that

(a) is prescribed by legislation;

(b) is based on a national common voters roll; and

(c) provides for the constitution of the National Assembly as follows -

(i) eighty members to be elected in respect of each of the constituencies contemplated by section 67(1); and

(ii) forty members to be elected to forty seats in accordance with the principle of proportional representation applied in respect of the National Assembly as a whole. ”.

Independent Electoral Commission

4 Section 66 of the Constitution is amended-

(a) by deleting subsections (1), (2) and (3) and substituting the following subsections -

“(1) There shall continue to be an Independent Electoral Commission consisting of a chairman and two who shall be appointed by the King acting in accordance with the advice of the Council of State.

(2) A person to be appointed as a member shall be of a high moral character and proven integrity and should either qualify to hold a high judicial

office or should possess considerable experience and demonstrated competence in the administration of public affairs.

(3) In its advice to the King under subsection (1), the Council of State shall submit to him the names of three persons selected from a list of not less than five names.

(4) For the purpose of enabling the Council of State to select the names of persons to be submitted to the King under subsection (3), the Council shall request all registered political parties in accordance with a procedure agreed by them to jointly propose to the Council, within a period of thirty days from the date specified by the Council, a list of not less than five names. "; and

- (b) in subsection (7) by deleting the word "six" wherever it appears and substituting the word "three".

Powers, duties and functions of the Electoral Commission

5. Section 66A is amended –

- (a) by deleting subsection (2) and substituting the following –

“(2) In order to discharge the duties and functions referred to in subsection (1), the Electoral Commission may–

(a) employ staff on terms and conditions of employment determined by it after consultation with the Public Service Commission;

(b) take into employment public officers seconded to it in terms of subsection (3). ,

(b)by inserting the following new subsection (3) alter subsection (2)

“(3) The Minister responsible for the Public Service shall, when requested by the Electoral Commission, make available to the Commission any public officer of any authority of the Government for the purpose of the discharge of its functions, and the appointment, exercise of disciplinary control or removal of any public officer in relation to the performance of his electoral functions shall be vested in the Commission,”.

Delimitation of Constituencies

6. Section 67 of the Constitution is amended–

- (a) by deleting subsection (1) and substituting the following –

“(1) For the purpose of elections to the National Assembly Lesotho shall, in accordance with the provisions of this section, be divided into eighty constituencies by an order made by the Electoral Commission. and

- (b) in subsections (2), (5) and (6) by deleting “twenty-one” and substituting “eighteen”.

Quorum in the House of Parliament

7. Section 74 of the Constitution is amended by deleting subsection (2) and substituting the following

“(2) If objection is taken by any member of the National Assembly who is present, that there are present in the National Assembly (besides the person presiding) fewer than thirty members of the National Assembly and, after such interval as may be prescribed in the rules of procedure of the National Assembly, the person presiding ascertains that there are still fewer than thirty members of the National Assembly present, he shall thereupon adjourn the National Assembly.”.

(Figure 1: Extract of the Fourth Amendment to the Constitution Act, 2001)

b. Fifth Amendment to the Constitution Act, 2004



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ACT NO. 8 OF 2004

FIFTH AMENDMENT TO THE CONSTITUTION ACT 2004

An Act to amend the Constitution of Lesotho ¹.

ENACTED BY THE PARLIAMENT OF LESOTHO

Short title and commencement

1. This Act may be cited as the Fifth Amendment to the Constitution Act, 2004 and shall come into operation on the date of publication in the Gazette.

Appointment, etc. of public officers

2. Section 137 of the Constitution of Lesotho (hereinafter referred to as “the Constitution”) is amended by deleting subsection (1) and substituting the following—

“(1) Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), and the power to terminate appointments of such persons, save the power to discipline and terminate the appointment of such persons for disciplinary reasons, is vested in the Public Service Commission.”.

Independent Electoral Commission

3. Section 66 of the Constitution is amended by deleting subsection (7) and substituting the following —

(7) A member of the Electoral Commission shall hold office for such term, being not more than five years, as is specified in his instrument of appointment, and may be reappointed for only one further term not exceeding five years.”.

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Amendment of section 149

4. Section 149 of the Constitution, is amended by-

(a) deleting “Prison Service” wherever it appears and substituting “Lesotho Correctional Service”; and

(b) deleting “Director of Prisons” wherever it appears and substituting “Commissioner of Correctional Service”.

NOTE

1. Constitution of Lesotho 1993
2. As amended by Act No. 7 of 1997 and Act No. 4 of 2001
3. As amended by Act No. 1 of 1996

(Figure 2: Extract of Fifth Amendment to the Constitution Act, 2004)

c. Constitution Amendments in 2011.



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ACT NO. 13 OF 2011

Sixth Amendment to the Constitution Act, 2011

An Act to amend the Constitution of Lesotho.

ENACTED by the Parliament of Lesotho.

Short title and commencement

1. This Act may be cited as the Sixth Amendment to the Constitution Act, 2011 and shall come into operation on the date of its publication in the Gazette.

Protection of victims of crime

2. The Constitution is amended by inserting the following new section after section 31 -
“Protection of victims of crime

31A. Lesotho shall adopt policies designed to make provision for victims of crime support services including mechanisms to ensure compensation for victims of crime, and assist vulnerable groups of victims.”

Decision of questions as to membership of Parliament

3. Section 69 of the Constitution is amended -

(a) in subsection (3), by inserting the words “or by a political party which participated in the election” immediately before the words “or by the Attorney-General”;

(b) in subsection (4), by inserting the words “or by a political party which participated in the elections” immediately before the words “or by the Attorney-General”;

(c) by deleting subsection (6).

Referendum

4. The Constitution is amended by inserting the following new section after section 84A -

“Referendum

84B (1) The King may, on the advice of the Prime Minister order that a referendum be conducted to obtain the opinion of the electors on any matter he considers to be of national interest.

(2) Parliament may make provision for the conduct of a referendum.”

Exercise of Prime Minister's functions during absence or illness

5. Section 90 of the Constitution is amended by inserting the following -

(a) a comma immediately after the word “Lesotho” wherever it appears;

(b) “is on leave” after the word “Lesotho,” wherever it appears; and

(c) a comma immediately after the word “absence” appearing in the proviso to the section;

(d) “being on leave” after the word “absence,” appearing in the proviso to the section.

Deputy Ministers

6. The Constitution is amended —

- (a) by deleting the word “Assistant” wherever it appears before the words “Minister” or “Ministers” and substituting the word “Deputy”; and
- (b) in section 93(1) -
 - (i) in subsection (1) by deleting the words “to assist” and substituting the words “to deputize”; and
 - (ii) by inserting the following new subsections after subsection (2) -
 - “(3) Whenever a Minister is absent from Lesotho, is on leave or is by reason of illness unable to exercise the functions conferred on him or her by this Constitution, those functions shall be exercised by the Deputy Minister.
 - (4) If the Minister does not have a Deputy Minister or the Deputy Minister is absent from Lesotho, is on leave or is by reason of illness unable to exercise the functions of the office of Minister, the assignment of responsibility to any Minister under section 89 shall apply.”

Attorney-General

7. Section 98 of the Constitution is amended by adding after subsection (4) the following new subsection -

- “(5) The Attorney-General shall take and subscribe such oath of office for the due execution of his functions as may be prescribed by Parliament.”.

National Advisory Planning Board

8. Section 105 of the Constitution is amended -

- (a) by inserting the word “Advisory” between the words “National” and “Planning” wherever they appear;
- (b) in subsection (2) by deleting paragraphs (a) to (e) and substituting the following -
 - “(a) to advise the Minister responsible for development planning on -

-
- (i) issues relating to the planning and budgeting systems;
- (ii) the alignment of the medium-term expenditure framework approach with strategic planning documents;
- (iii) the integration of district planning activities in the national planning system; and
- (iv) the preparation of guidelines for planning activities;
- (b) to review progress -
- (i) towards achievement of targets, goals and objectives of the national vision and provide advice on the procedures to be followed in the periodic updating of the national vision; and
- (ii) on the inclusion of poverty reduction priorities in the planning and budgetary system."; and
- (c) by adding the following new subsections after subsection (3) -
- “(4) The National Advisory Planning Board shall -
- (a) prior to each financial year, submit an annual work-plan and budget to the Minister responsible for development planning; and
- (b) at the end of each financial year, submit an annual report on the activities of the Board to the Minister responsible for development planning.
- (5) The Minister responsible for finance and development planning shall table the report
- before Cabinet and Parliament.”

Remuneration of certain offices

Section 115 of the Constitution is amended by deleting subsection (5) and substituting the following-

"(5)

This section applies to the offices of the President of the

Senate, the Speaker of the National Assembly, a judge of the High Court, a member of the Independent Electoral Commission, a member of the Public Service Commission, an appointed member of the Judicial Service

Commission, the Attorney General, the Director of Public Prosecutions, the Auditor General, the Ombudsman and such other similar offices as may be established by or under this Constitution.”

Insertion of new Chapter

10. The Constitution is amended by inserting the following new chapter after Chapter XI:

“CHAPTER XIA HUMAN RIGHTS COMMISSION

Establishment of the Human Rights Commission

133A. There is established a Human Rights Commission (in this Chapter referred to as "the Commission") which shall be independent and free from interference and subject only to this Constitution and any other law.

Composition

133B. The Commission shall consist of the chairman and two other members who shall be appointed by the King acting in accordance with the advice of the Prime Minister.

Qualification for appointment

133C. A person shall not be qualified to be appointed a member of the Commission if he is a public officer, and the Prime Minister shall not advise the King to appoint a person as a member unless he or she is satisfied that the person -

- (a) has extensive experience in human rights and related disciplines;
- (b) is of high moral character and integrity and possesses such qualities of mind as to enable him to discharge his duties impartially, fairly and free from bias or prejudice; and
- (c) does not take an active part in, or has retired from, the party politics or political party activity.

Tenure of office

1331). Subject to the provisions of this section, the office of a member of the Commission shall become vacant -

- (a) at the expiration of seven years, in the case of the chairman and five years in the case of other commissioners, from the date of his appointment; or
- (b) if he becomes a public officer; or

- (c) if he becomes a member of either House of Parliament, a local authority, a candidate for election to Parliament or a local authority, or an officer of a political party.

Removal from office

133E. (1) A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) incompetence in the performance of the functions of his office or misbehaviour (including failure to discharge his duties in a fair manner free from prejudice) and shall not be removed except in accordance with this section.

(2) A member of the Commission shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (3) and the tribunal has recommended to the King that he ought to be removed from office for inability, incompetence or misbehaviour.

(3) If the Judicial Service Commission, in the case of either the Chairman of the Commission or any other member, represents to the King that the question of removing a member of the Commission under this section ought to be investigated, then -

(a) the King shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Prime Minister from among persons who hold or have held high judicial office; and

(b) the tribunal shall enquire into the matter and report on the facts of the enquiry to the King and recommend to him whether the member ought to be removed under this section.

(4) If the question of removing a member of the Commission has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Prime Minister, may suspend that member from the exercise of the functions of his office and any such suspension may, at any time, be revoked by the King, acting in accordance with such advice as Prime Minister and shall in any case cease to have effect in the tribunal recommends to the King that the member should not be removed.

Functions of the Commission

133F. The Commission shall perform the following functions -

(a) monitor the state of human rights throughout Lesotho; (b) monitor the human rights situation of detainees;

(c) investigate violations of human rights and, if necessary, be responsible for instituting proceedings against such violation in the courts of law;

-
-
- | | | |
|-----|--|-----|
| (d) | sensitize the public on its work, the nature and meaning of human rights; | |
| (e) | develop and deliver education and training programmes as necessary to the general public; | |
| (f) | submit opinions, recommendations, propositions and reports public institutions on human rights issues, using the media and other means; | to |
| (g) | advocate for ratification, and recommend the domestication international and regional human rights instruments; | of |
| (h) | promote and monitor the harmonization of national laws and practices with international and regional human rights instruments ratified by Lesotho; | |
| (i) | develop and maintain working relations with organizations and representatives of civil society in Lesotho; | |
| G) | work in cooperation with the United Nations, regional mechanisms, national human rights institutions of other countries, in the areas of promotion and protection of human rights, and | the |
| (k) | undertake any other activities or responsibilities that are consistent with spirit of the promotion and protection of human rights. | the |

Assistance to the Commission

133G. The Government shall accord such assistance as the Commission may require to enable it to protect its independence, dignity and effectiveness, subject to this Constitution and any other law.

Annual report of the Commission

133H. (1) The Commission shall prepare, submit and present an annual report of its activities to Parliament.

(2) If it considers it necessary, in case of an urgent and specific issue, Commission may submit a special report to Parliament at any time, which be treated by Parliament in the same manner as an annual report.”.

NOTE



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ACT NO. 15 OF 2011

Seventh Amendment to the Constitution Act, 2011
An act to amend the Constitution of Lesotho.

Enacted by the Parliament of Lesotho.

Short title and commencement

1. This Act may be cited as the Seventh Amendment to the Constitution Act, 2011 and shall come into operation on the date of its publication in the Gazette.

Design of question as to membership of Parliament

2. Section 69 of the Constitution is amended (a)

in subsection (1) by -

(i) deleting the full stop at the end of paragraph (c) and substituting a semi-colon (";"),

(ii) inserting the following new paragraph after paragraph (c):

"(d) proportional representation seats have been properly allocated.";

- (b) inserting the following new subsection after subsection

"(4A) An application to the High Court for the determination of any question under subsection (1)(d) may be made by a member of the National Assembly or by any person registered as an elector in the elections to the National Assembly or by a political party which participated in the elections or the Independent electoral Commission or the Attorney-General, and if it is made by a person other than the Attorney-General, the Attorney

359. General may intervene and may then appear or be represented in the proceedings."

NOTE

1. Constitution of Lesotho 1993



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ACT NO. 8 OF 2018

Eighth Amendment to the Constitution Act, 2018

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement
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ACT NO. 8 OF 2018

Eighth Amendment to the Constitution Act, 2018

An Act to amend the Constitution of Lesotho, 1993¹.

Enacted by the Parliament of Lesotho.

Short title and commencement

1. This Act shall be cited as the Eighth amendment to the Constitution Act, 2018 and shall come into operation on the date of its publication in the Gazette.

Amendment of section 40

2. Section 40 of the Constitution is repealed and the following is substituted:

"40. (1) A person who marries a citizen of Lesotho shall, upon making application and taking oath of allegiance be registered as a Lesotho citizen after five years of (a) cohabitation in Lesotho; and

(b) continuous and lawful stay in Lesotho with a citizen of Lesotho.

(2) A person who marries a citizen of Lesotho who, but for his death would have continued to be a citizen of Lesotho under section 37 of the constitution is entitled to be registered as a citizen of Lesotho after five years of continuous and lawful stay in Lesotho.

Amendment of section 41

3. (1) Section 41 of the Constitution is repealed and the following section is substituted:

"41. (1) A citizen of Lesotho may hold citizenship of any other country in addition to his citizenship of Lesotho.

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(2) Notwithstanding the provisions of sections 18, 28 and 29 of the Constitution a person who is a citizen of any country who acquires a citizenship of Lesotho by naturalisation or registration -

(a) is only eligible for social benefits after ten years of being naturalised or registered as a citizen of Lesotho; and

(b) shall not hold a position which will be specified by an Act of Parliament governing citizenship matters.

(2) After section 41 of the Constitution the following section is inserted:

"Restoration of Lesotho citizenship

41A (1) A citizen of Lesotho who marries a citizen of another country which requires him to renounce his Lesotho citizenship, shall, upon dissolution of marriage, have his citizenship restored if he wishes to become a citizen of Lesotho.

(2) A person who was born a citizen of Lesotho and renounced his citizenship through acquisition of another citizenship, his citizenship shall be restored immediately on the coming into operation of this amendment to the Constitution and his rights and privileges, except those that contradict section 41 (3) shall continue to prevail as if he never lost Lesotho citizenship.

(3) A citizen of Lesotho who acquires citizenship in another country shall not hold a position which will be specified by the provisions of the Constitution and any Act of Parliament governing citizenship matters in Lesotho.

(4) For purposes of this section "social benefits" means educational sponsorships, social grants, old age pension or any other benefit which the Minister responsible for citizen matters may determine."

GOVERNMENT NOTICE NO. 49 OF 2018

The Parliament of Lesotho

Statement of Objects and Reasons of the
Eighth Amendment to the Constitution Act, 2018

(Circulated by authority of the Honourable Minister of Home Affairs Tsukutlane
Au)

The object of this Bill is to amend the Constitution of Lesotho 1993 in order to provide for marriage to a Lesotho citizen and dual citizenship, and to also provide for the restoration of Lesotho citizenship.

The Bill uplifts the discriminatory provisions which were favouring foreign women married to Lesotho citizens over foreign men who marry Basotho women by providing for similar requirements for the acquisition of Lesotho citizenship.

The Bill further removes the Constitutional prohibition on dual citizenship and restoration of Lesotho citizenship with the aim of facilitating the return and reintegration of Lesotho Citizens by birth or ancestry who lost their citizenship. It will also allow naturalized or registered Lesotho citizens to regain or retain their birth nationality.

Moreover, the Bill provides for limitations for citizens of other countries who acquire citizenship of Lesotho through naturalization and registration to be eligible for social benefits after ten years of being naturalised or registered as a citizen of Lesotho. Furthermore, the Bill provides that a naturalised or registered Lesotho citizen shall not hold specified positions as provided for by an Act of Parliament.