

Zimbabwe Law

Review

THE LAW



Volume 10

1997

THE ZIMBABWE LAW REVIEW

1997 VOLUME 14

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ALTERATION OF THE CONSTITUTION

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INTRODUCTION

According to Section 52 (1) of the Constitution:

Parliament may amend, add to or repeal any of the provisions of [the] Constitution.

The proviso to subsection (1) states that generally;

. . . no law shall be deemed to amend, add to or repeal any provision of [the] Constitution unless it does so in express terms.

The only permissible exception to this requirement is where an Act of Parliament has authorised the publication of a revision of the Constitution.¹ Here:

renumbering the provisions of [the] Constitution so as to reflect amendments that have been made² is permitted. Similarly amendments that are necessary as a consequence of any renumbering may also be effected in non express terms.³

Constitutional Bills⁴ must be published in the Government Gazette not less than thirty days prior to being introduced into Parliament.⁵ This is a mandatory requirement and unless and until it has been complied with, a Constitutional Bill cannot be lawfully introduced into Parliament. The purpose of this requirement is to give members of the public an opportunity to study the provisions of the Bill so that they can make representations to members of Parliament, should they choose to do so.

The original Lancaster House Independence Constitution divided constitutional amendment procedure into two distinct categories.⁶ In terms of the first of these, Constitutional Bills effecting alterations to certain specified provisions required the affirmative votes of all one hundred members of the then House of Assembly. The specified provisions were themselves divided into two groups. One group, set out in section 52 (4), was essentially comprised of certain sections in the Declaration of Rights. Amending, adding to or repealing these sections, otherwise than by a unanimous vote of the entire membership of the House of Assembly, was prohibited for a period of not less than 10 years after the coming into force of the Constitution. The second group, set out in section 52 (5), encompassed provisions relating to the structure of the House of Assembly and the Senate, as well as the qualifications for enrolment on the white voters roll. These provisions could not be altered otherwise than by a unanimous vote of all of the members of the House of Assembly for a period of not less than seven years after the coming into force of the Constitution.

The second category of amendment procedure embraced all constitutional provisions not referred to in section 52 (4) or (5). These could be altered if not less than seventy members

1 Section 52 (1) and (6) as read with section 53 (2) of the Constitution.

2 Section 52 (6) (a) of the Constitution.

3 Section 52 (6) (b) of the Constitution.

4 i.e. a Bill whose purpose is to alter the Constitution in some way.

5 Section 52 (2) of the Constitution.

6 Section 52 (3) (b) of the original Lancaster House Independence Constitution.

of the House of Assembly voted in favour of such an alteration. Constitutional Bills passed by the House of Assembly in terms of either procedure thereafter had to receive the affirmative votes of not less than two-thirds of the total membership of the Senate (i.e. at least 27 votes).⁷ However, if the Senate declined to pass such a Bill within a period of one hundred and eighty days after its introduction into the Senate, the House of Assembly had the right to forward it directly to the President for his assent, provided only that at least seventy members voted in favour of a resolution to that effect.⁸

THE NEW APPROACH

Following the expiry of the 10 year period provided for in section 52 (4) of the original Lancaster House Constitution, section 52 was itself radically altered. The position now is that, in order to pass, Constitutional Bills must receive the support of at least two thirds of the total membership of Parliament (i.e. at least one hundred votes).⁹ There are no longer any special procedures to be followed in respect of altering certain provisions. All alterations are now effected through the same procedure. The Speaker must certify that the Bill was passed by the required majority, and the Bill cannot be sent to the President for his assent unless accompanied by a Speaker's certificate to that effect.¹⁰ Constitutional Bills are not subject to examination by the Parliamentary Legal Committee.¹¹ To date, fifteen Constitutional Amendment Acts have been passed.

Are the courts entitled to question whether Parliament has followed the correct procedures laid down in the Constitution for amending the Constitution? In *Nkomo and Another v Attorney-General and Others*¹² Muchechetere JA, in a dissenting judgement¹³ held that the Supreme Court:

... is not competent to enquire into the internal proceedings [of Parliament] relating to the ... [constitutional] amendment.¹⁴

He added that:

... once the Speaker has certified ... in terms of section 52 (5) of the Constitution that the Bill has received the requisite majority on the final vote thereon in Parliament this court is precluded from inquiring into and pronouncing upon the validity of parliamentary proceedings.¹⁵

With respect, the learned judge of appeal was mistaken. Had he been an English judge sitting in an English court, considering the relationship between Parliament and the judiciary in the context of English constitutional law, his conclusion would probably have been correct. However, Zimbabwe is a constitutional democracy, not a parliamentary democracy like the United Kingdom. In Zimbabwe, the Constitution is sovereign, not Parliament.¹⁶

7 Section 52 (3) (a) of the original Lancaster House Independence Constitution.

8 Section 52 (6) of the original Lancaster House Independence Constitution.

9 Section 52 (2a) of the Constitution.

10 Section 52 (5) of the Constitution.⁸

11 Section 40 B (i) (a) of the Constitution. Because a Constitutional Bill seeks to alter the Constitution, it will, by its very nature, be contrary to the provisions of the existing Constitution. There is therefore no point in its being examined by the Parliamentary Legal Committee.

12 1993 (2) ZLR 422 (S).

13 The majority decided the case on other grounds and therefore did not address the issue of whether the Supreme Court had the power to question the validity of Parliament's legislative procedures.

14 *Ibid.*, at 440.

15 *Ibid.*, at 442.

16 See *Chairman of the Public Service Commission and Others v Zimbabwe Teachers Association and Others*, 1996 (9) BCLR 1189 (ZS) at 1198.

In *Smith v Mutasa NO and Another*¹⁷ Dumbutshena CJ said:

The Constitution of Zimbabwe is the supreme law of the land. It is true that Parliament is supreme in the legislative field assigned to it by the Constitution, but even then Parliament cannot step outside the bounds of the authority prescribed to it by the Constitution.¹⁸

The learned Chief Justice added that:

the difference between the powers of the House of Commons and our House of Assembly¹⁹ is that the Constitution of the United Kingdom does not permit the judicature to strike out laws enacted by Parliament. Parliament in the field of legislation is sovereign and supreme. That is not the position in Zimbabwe, where the supremacy of the Constitution is protected by the authority of an independent judiciary, which acts as the interpreter of the Constitution and all legislation. In Zimbabwe the judiciary is the guardian of the Constitution and the rights of the citizens.²⁰

In the *Smith* case Dumbutshena CJ also made it clear that the jurisdiction of the courts was not ousted simply by the production of a Speaker's certificate. If this were the case, said the learned Chief Justice,

... Parliament could disregard with impunity the provisions of its own statutes and the Constitution. It could proceed with its illegal activities without regard to fundamental rights, much to the detriment of the citizens.²¹

For this reason the courts have the power to examine such certificates to determine whether they have been lawfully issued.²² It is submitted that relevant objective facts must exist justifying the issue and contents of a Speaker's certificate, and that the judiciary is not precluded from enquiring into the existence of such facts.

Provided that Parliament follows the procedures prescribed by section 52, does it have the right to alter the Constitution in any way it likes? This issue was considered by Chief Justice Gubbay in a speech delivered at the opening of the 1991 legal year in Harare on 14 January 1991. He said that

a Constitution stands on certain fundamental principles which are its structural pillars. If these pillars are demolished or even damaged the constitutional edifice will fall.²³

He added that:

there is an implied limitation on the power given under section 52 (1) which precludes Parliament from abrogating or changing the identity of the Constitution or any of its

17 1989 (3) ZLR 183 (SC).

18 *Ibid.*, at 192.

19 This case was decided before the abolition of Zimbabwe's bicameral legislative system.

20 At page 192. At 193 he approved of the approach adopted by the Supreme Court of India in Special Reference No. 1 of 1964 [1965] 1 SCR 413, where Gajendragadkar CJ said at 446: "When a statute is challenged on the ground that it has been passed by a legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not."

21 Per Dumbutshena CJ, at 211.

22 *Ibid.*, at 214.

23 The relevant extracts from the speech are published in Greg Linington, "Is Parliament's Right to Amend the Constitution Limited?" *Legal Forum*, 1996, Vol. 8, No. 3, page 23. The full text, entitled 'Speech Delivered at the Opening of the 1991 Legal Year Harare, on 14 January 1991,' was published in the *Legal Forum*, 1991, Vol. 3, No. 1, p. 5.

basic features. Consequently, any law which has that effect would be pronounced invalid by the judiciary.²⁴

Here the Chief Justice was making reference to what is known as the "essential" or "basic" features doctrine,²⁵ according to which it is not permissible to change a constitution in a way that effectively destroys its intrinsic nature. In other words, changes will only be valid where they are consistent with the essential or basic purposes of the Constitution.²⁶ If the Constitution of Zimbabwe does indeed contain certain essential features which cannot be changed or removed, how are these to be recognised and distinguished from non-essential features that may be changed or abolished, provided only that the correct procedures are followed in doing so? Attempting to answer this question in the course of his speech, the Chief Justice drew attention to the need to consider:

the place of the particular feature in the scheme of the Constitution, its object and purpose, and the consequence of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance.²⁷

If the Constitution were to be purportedly changed so as to establish a life presidency and a non-elected Parliament made up entirely of appointed members, would this be contrary to the essential features doctrine and therefore invalid? The answer would appear to be yes. To begin with, it is important, when interpreting section 52 (1), to have regard to section 50 of the Constitution. The latter is the introductory provision of chapter five part 5 of the Constitution which deals with the powers and procedures of Parliament. Section 50 is itself concerned with establishing the parameters of Parliament's legislative powers. As such it is the "key or umbrella provision"²⁸ in chapter five part 5 from which all of Parliament's law making powers are derived.

Section 50 states that:

subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Zimbabwe.

The clear purpose of the section is to restrict the law making powers of Parliament. Thus Parliament is not permitted to legislate in a way that is contrary to "peace, order and good

24 *Ibid.*, at page 24. The learned Chief Justice's remarks were motivated by a constitutional amendment which authorised the enactment of laws excluding the judiciary from ruling on the fairness of any compensation paid for land acquired by the state.

25 On the essential features doctrine see D. Morgan, 'The Indian Essential Features Cases', *ICLQ* 1981, Vol. 30, p. 307; J. Hatchard, 'Individual Freedoms and State Security in the African Context: The Case of Zimbabwe', Harare, Baobab, 1993, at pages 162-163; A. Butler, 'The 1996 [South African] Constitutional Bill, Its Amending Power, and the Constitutional Principles', Occasional Paper, Konrad Adenauer Stiftung, 1996; P. Nherere, 'How Can A Bill of Rights Best Be Protected Against Undesirable Erosion And Amendment'? *Legal Forum*, 1995, Vol. 7, No. 2, p. 40.

26 A. Butler (*op. cit.*) says at page 12: "An essential features doctrine provides that certain constitutional principles are so fundamental that they may not be legitimately be departed from, absent a constitutional revolution".

27 Gubbay CJ, "Speech Delivered at the Opening of the 1991 Legal Year, Harare, on 14 January 1991", *op. cit.*, at page 8.

28 To borrow an expression used by Gubbay CJ in *In Re Munhumeso and Others*, 1995 (1) SA 551 (ZSC) at 556, in describing the status (at that time) of section 11 of the Declaration of Rights (the Declaration's introductory provision). The learned Chief Justice was himself borrowing language used by Amisshah JP in the Botswana case of *Dow v Attorney-General* 1994 (6) BCLR 1.

government." In *S v Gatzi, S v Rufaro Hotel (Pvt) Ltd*²⁹ Smith J said, in a dissenting High Court judgement³⁰ that section 50:

confers on Parliament power to make such laws as it considers to be necessary for the peace, order and good government of Zimbabwe³¹ (my emphasis).

With respect, the learned judge's understanding of the section is mistaken. The aim of section 50 is to impose an *objective* restraint on Parliament's legislative powers, *not* to give Parliament the discretionary right to decide for itself what constitutes "peace, order and good government".³²

What exactly do the words "peace, order and good government" mean? Determining the limits of such broad and all embracing language is not an easy task. That is not to say, however, that the words are without meaning. On occasion, Parliament may purport to pass legislation which is so blatantly contrary to "peace, order and good government" that no reasonable person could argue that it fell within the parameters of those words. Of course, invalidating legislation, including purported constitutional amendments, on the ground that section 50 has been contravened, is something that no court ought to do lightly. However, in exceptional circumstances, the judiciary will be entitled to do so.

Looking specifically at the words "good government", it is submitted that they mean "democratic government." This is due in part, to the emergence, arguably, of a new rule of customary international law establishing an entitlement to democracy.³³ In addition Zimbabwe is a party to the International Covenant on Civil and Political Rights, article 25 of which states that every citizen has the right:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

Paragraph 7 of the Bangalore Principles enables national courts:

... to have regard to international obligations which a country undertakes whether or not they have been incorporated into domestic law for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

For this reason it is permissible to interpret the words "good government" as they appear in section 50 in a way that accords with article 25 of the Covenant and customary international law. This leads inescapably to the conclusion that democracy is an essential attribute of "good government." This must mean therefore that Zimbabwe's Parliament does not have the right to change the Constitution in a way that would remove its democratic features. From this it can be inferred that democracy is one of the essential or basic features of the Constitution.

29 1994 (1) ZLR 7 (H).

30 On this occasion — a criminal review — the High Court sat with 3 presiding judges.

31 *Ibid.*, at 25.

32 The *Gatzi* case was not concerned with the essential features doctrine. The majority did not address the issue of whether section 50 imposes an objective limitation on Parliament's law making powers.

33 See Thomas Frank, 'The Emerging Right to Democratic Governance,' *AJIL*, 1992, Vol. 86:46, page 46 and James Crawford, 'Democracy and International Law,' *BYIL*, 1994, page 113. Customary international law is generally part of Zimbabwe's municipal law: see *Barker McCormac (Pvt) Ltd v Government of Kenya*, 1983 (4) SA 817 (ZSC).

Having said that it is now necessary to turn to section 52 (1) and consider the meaning of the words "amend," "add to," and "repeal" as they appear in that provision. The Constitution does not itself define these words. According to the Interpretation Act "amend" "includes vary, alter, modify, add to, delete or adapt",³⁴ while "repeal" "includes rescind, revoke and cancel".³⁵ Unfortunately these definitions do not provide much assistance when trying to determine the ambit and scope of the language used in section 52 (1). However, some help may be derived from the Indian case of *Kesavananda v State of Kerala*,³⁶ where Khanna J observed that:

the word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subject to alterations.³⁷

The word "amend" is therefore not a synonym for "abrogate." Thus a distinction must be drawn between amending the Constitution, which is one thing, and abrogating it, which is something else altogether. Like "amend", the words "add to" and "repeal" must similarly be interpreted restrictively.

The word "any", as it appears in section 52 (1), is also subject to a restrictive interpretation. Thus "any" does not necessarily mean "every". For example, although section 52 (1) states that "any" provision in the Constitution may be repealed, this is subject to the restriction imposed on Parliament's law making powers by section 50. Indeed, section 50 is a provision which can never be repealed, because such a "repeal" would facilitate the creation of legislation that is not "for the peace, order and good Government of Zimbabwe", the very thing prohibited by that section! In other words, repealing section 50, or even changing it in a way that diluted its essential content or purpose, would itself be contrary to section 50 and therefore invalid. This is significant because one example of a provision that cannot be repealed or radically altered, suffices to destroy the notion that "any" is synonymous with "every". Moreover, restrictions on change exist even with respect to those provisions that can be amended. Thus there is a distinction between the power to alter any provision, which is one thing, and the power to change any provision in any way, which is another thing altogether.

Basically, changes to the Constitution will be permissible to the extent that the changes in question accord with the *purposes* of the Constitution's essential features, such as democracy. An amendment may be validly enacted where its objective is to change the *form* through which these purposes are attained. However, where the purported change seeks to frustrate, subvert or nullify the *substance* of the purpose in question, it will be invalid. Thus the essential features of the Constitution are really its *substantive* purposes, which are meant to endure, while the non-essential features are the *form* through which these purposes are expressed. For example, the provisions establishing a bicameral legislative system were repealed and a unicameral legislature was set up instead. However, the essential feature of democracy was not adversely affected by this constitutional amendment (at least, in any unduly serious way). This is because the *substance* of the essential feature in question, democracy, is able to function in both bicameral and unicameral systems. All that has changed is the *form* through which democracy operates. The important point is that

34 Section 3 (3) of the Interpretation Act.

35 *Ibid.*

36 AIR 1973 SC 1461.

37 *Ibid.*

democracy itself continues and endures. The creation of a life presidency and a Parliament made up entirely of appointed members, on the other hand, would go beyond merely altering the form of Zimbabwean democracy. Such a change would actually eliminate democracy altogether, and would therefore constitute an abrogation of important constitutional provisions, rather than their mere amendment.

A number of possible objections to the essential features doctrine may now be considered. In the first place, can it be argued that the doctrine is not applicable in the Zimbabwean context because the Constitution was never intended to be a permanent and enduring document? In the opinion of the present author, such a view is unduly simplistic and therefore untenable. Of course, some parts of the Constitution granted at independence were always intended to be transitional: for example, the twenty seats in the House of Assembly reserved for white members elected by voters registered on the special white voters roll. These seats could only be removed by a Constitutional Bill that received the support of all one hundred members of the House of Assembly *for the first seven years of the Constitution's life*. The seven year period is significant. It points to the fact that the white seats were not intended to remain beyond that period. They were never meant to remain a permanent feature of the Constitution. It is therefore important to distinguish between provisions which, by their very nature, are obviously supposed to have only a limited lifespan, and those that are designed to endure virtually forever.

Another objection is that put forward by Pearson Nherere.³⁸ He has argued that:

the essential features doctrine is no more than the theory of natural law applied to constitutions in the latter half of the twentieth century. The ideas of natural justice are regulated by no fixed standard. The ablest and purest of men have differed upon the subject. Where are they to be found?

He believes that if there is nothing in the Constitution (such as a preamble) which expressly states what the essential features are, identifying them:

becomes a matter for the judge in the exercise of his value judgement. What is or is not an essential feature . . . would then depend on the particular judge concerned.

Certainly it must be admitted that ascertaining what a constitution's essential features are will not always be an easy exercise. Nevertheless, it is submitted that in most cases it will not be necessary for judges to make value judgements when dealing with this issue. This is because the essential features doctrine does not advocate appealing to something outside the text of a constitution, such as the concept of natural justice, when trying to determine whether a constitution has certain fundamental and unalterable provisions. It is simply a question of seeking an answer through the application of modern purposive statutory interpretation.

To date the essential features doctrine has not been invoked in any Zimbabwean constitutional litigation.³⁹ However, if this occurs, and if the courts uphold arguments based

38 Pearson Nherere, "How Can a Bill of Rights be Protected Against Undesirable Erosion and Amendment"? *op. cit.*

39 But the doctrine has been successfully invoked in a number of Indian cases. The *Kesavananda* case has already been referred to. In another Indian case, *Indira Gandhi v Raj Narain* (1975) ASC 1590, the Prime Minister of India, Mrs Gandhi, had been found guilty of corrupt electoral practices by the High Court of India, which quashed her election to Parliament. She appealed against this decision to the Supreme Court. While her appeal was pending, Parliament — dominated by her supporters — purported to amend the Constitution (a feat achieved in a mere four days). The 'amendment' provided

on the doctrine, they may find themselves being accused of preventing Parliament from exercising its law making functions. Such accusations would be misplaced. The judiciary would simply be making the point that Parliament's legislative powers are limited. It is the duty of the judiciary to uphold and respect the Constitution, and this includes ensuring that Parliament does not legislate beyond the powers ascribed to it by the Constitution.

that her election was valid "notwithstanding any order made by the court". Clearly this was contrary to the holding of free and fair elections, an essential feature of the Indian Constitution. For this reason, the Indian Supreme Court declared the purported 'amendment' to be invalid. See also *State of Rajasthan v Union of India*, AIR 1977 SC 1361; and *Gupta v Union of India*, AIR 1982 SC 149. In *Minerva Mills v Union of India*, AIR 1980 SC 1789, a constitutional 'amendment' purported to give Parliament the right to amend all constitutional provisions and eliminated judicial review of constitutional amendments. The Supreme Court of India invalidated the 'amendment' on the ground that it was contrary to the essential features of the Constitution. See also the Bangladesh case of *Anwar Hossain Chowdury v Bangladesh*, 41 DLR (AD) 1989 165.



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