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**THE ESSENTIAL FEATURES DOCTRINE: A CRITICAL ANALYSIS OF
THE CONSTITUTIONAL AMENDMENT ACT (No.2) 2021**

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The undersigned certify that they have read, signed and recommended to the Midlands State University for acceptance, a research project entitled: **THE ESSENTIAL FEATURES DOCTRINE: A CRITICAL ANALYSIS OF THE CONSTITUTIONAL AMENDMENT ACT (No.2) 2021**. The project was submitted by **LLOYD SHINGAI TOENDEPI**, Student Registration Number **R165474E**, in partial fulfillment of the requirements of a Bachelor of Laws (Honors) Degree in the Faculty of Law at **Midlands State University**.

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DECLARATION

I, **LLOYD SHINGAI TOENDEPI (R165474E)** do hereby declare that this dissertation entitled **THE ESSENTIAL FEATURES DOCTRINE: A CRITICAL ANALYSIS OF THE CONSTITUTIONAL AMENDMENT ACT (No. 2) 2021**, is my own work and a result of my own investigation and research, save to the extent indicated in the references included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree or examination at any other University.

.....
Student's Signature

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Date

DEDICATION

This work is dedicated to my dear mother who never stopped believing in my destiny. Also Justice Y Omerjee for placing me within reach of my dreams and instilling in me the discipline and work ethic necessary to navigate the legal field.

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My heartfelt appreciation goes foremost to the Lord Almighty for the guidance and answering my prayers. To my boss Mr Walter Chikwanha for availing the opportunity for me to pursue law. I am forever grateful. To my sisters Cathy Toendepi, Ruvimbo Toendepi Yemurai Toendepi and Simba for your love and unwavering support during trying times.

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ABSTRACT

Judicial review of constitutional amendments has always been a contentious issue in constitutional democracies and Zimbabwe is no exception. Thus, this study advocated for the adoption and application of the Essential Features Doctrine by the judiciary in reviewing constitutional amendments. In this context the study made a critical analysis of the provisions of the Constitutional Amendment Act (No. 2) 2021 regarding the independence of the Judiciary and the Prosecutor General including the removal of parliamentary oversight. The main objective being to give the judiciary leeway to review constitutional amendments not only on the basis of procedural compliance but also on substance so as to protect the basic structure of the constitution.

This was done primarily through a desktop research utilizing academic writings, journals and case law authorities. A comparative analysis was also employed in this study using the Indian jurisdiction as the focal point. In the study it was established that the provisions in the Act undermine judicial and prosecutorial independence and violate the system of checks and balances by removing the oversight role of parliament. Basically the amendments violate the basic structure of the constitution and essentially consolidate executive power. Therefore, it recommended the adoption and application of the Essential Features Doctrine by Zimbabwe's judiciary in constitutional review of amendments which mutilate the basis structure of the constitution. This would restrain the executive from using a pliant legislature from destroying fundamental constitutional values embedded in the constitution.

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CHAPTER ONE

The problem and its setting

1.1 Introduction

This study is premised on the call for the application of the essential features doctrine by the judiciary in considering the Constitutional Amendment Act No 2.¹ It probes whether parliament has carte blanche powers to make amendments to the constitution which alter its core values. Crucially it exposes dangers of unrestrained parliamentary power. It explores the background and identifies legal issues arising from the non-application of the essential features doctrine by the judiciary including a comparative analysis with India.

1.2 Background

This study is impelled by the gazetting of the Constitutional Amendment Act and the general amendment culture imbedded in Zimbabwe's constitutional history. The old constitution was amended 19 times whilst the current was amended in only its third year of infancy. Following suit is this Constitutional Amendment Act (No.2) which erodes progressive provisions regarding the appointment of judges, the prosecutor general and removes parliamentary oversight in respect of agreements between government and foreign entities.

The appointment of judges and the attorney general prior 2013 was exclusively the presidents and there was parliamentary oversight. Current law reversed that upon the enactment of the new constitution. This Act now reverts to an opaque system arming the Executive by removing checks and balances, transparency and accountability. On

¹ Constitutional Amendment Act No 2 of 2021 gazetted on the 7th May 2021

this background this study critically analyses its validity within the context of the essential features doctrine and recommends its application by the judiciary.

1.3 Problem Statement

Ideally the constitution should have a clear provision allowing judicial review of constitutional amendments based on the essential features doctrine. Any misgivings about judicial usurpation would be countered. Currently once there is procedural compliance with section 328 the amendment is prima facie effective regardless of its substance.² Thus parliaments powers are unlimited. Question is whether there is implied limitation? The absence of a clear provision ties the courts hands and the adoption of the doctrine would empower the judiciary in plugging this constitutional loophole.

1.4 Research Objectives

The chief objective of this study is to implore the judiciary to adopt and apply the Essential Features Doctrine in determining the constitutionality of Constitutional Amendment Act No.2

Sub Objectives

- I) To analyze the philosophical concept of the Essential Features Doctrine
- ii) To analyze the applicability of the doctrine within the Zimbabwean legal framework
- iii) to make a comparative analysis between Zimbabwe and India in their interpretive approach regarding constitutional amendments
- v) to provide conclusions and recommendations

² Constitution of Zimbabwe Amendment (No 20) Act 2013, section 328

1.6 Research Methodology

This research is a qualitative study of legal material and it is primarily a desk research which employs primary and secondary sources such as constitutions, statutes, case law authorities and books, academic writings including law reviews, legal journals and electronic resources respectively. A comparative analysis with the Indian approach was made owing to the extensive application of the essential features doctrine by its judiciary.

1.7 Delimitations

This study is focused on the adoption and application of the essential features doctrine by the judiciary in considering the validity of the Constitutional Amendment Act. This entails the probing of the interpretation to be accorded to section 328 of the constitution in light of the essential features doctrine. It focuses on aspects of the Act only in relation to the appointment of judges, attorney general and the removal of parliamentary oversight in respect to international agreements. Other aspects of the Act will not be delved into.

1.8 Limitations

Comprehensive research for this study was hampered by the advent of the Covid 19 pandemic. Due to the contagious nature of the virus there was restriction of movement which meant there could not be any interaction with lecturer's or research within an ideal environment such as the Law Faculty. As such access to affordable internet usually afforded by the faculty was inaccessible including library resources which would have been readily available under normal circumstances was affected by the restrictions.

1.9 Chapter Synopsis

Chapter One

The introduction, background, problem statement, aims, research method, delimitations, limitations and brief synopsis of chapters.

Chapter Two

This Chapter critically analyses the philosophical foundation of the Essential Features Doctrine.

Chapter Three

This chapter analyses the doctrine within the Zimbabwean legal framework focusing on the provisions of the Constitutional Amendment Act regarding the independence of the Judiciary, Prosecutor General and parliamentary oversight

Chapter Four This Chapter makes a comparative analysis between Zimbabwe and India in their interpretive approach regarding constitutional amendments

Chapter Five

This Chapter provides the conclusion and recommendations

CHAPTER TWO

Essential Features Doctrine

2.1 Introduction

The previous chapter was introductory and it set out the purpose of the study and its objectives including the historical background which impelled the study. This chapter will now look at the philosophical basis of the essential features doctrine. It will explore its origins and its roots within the theory of implicit limitations. Scholarly views on the doctrine including its jurisdictional development will also be examined in this chapter. The relationship between the doctrine and constitutional supremacy will also be analysed including its limitations.

2.2 Origins of the Essential Features Doctrine

The Essential features doctrine or Basic structure doctrine gained prominence in India in the of case *Kesavananda vs State of Kerala*.³ However its ideology is attributable to Germany whose Basic law under article 79(3) prohibits alterations to provisions regarding its federal structure and basic principles.⁴ This German influence also came through professor Dietrich Conrad whose paper on implied limitations had an impact on MK Nambyar a constitutional lawyer, who drew argument from it in *Golakhnath v. State*

³ ALR 1973 SC 1461

⁴ Goerlich, Helmut, 'Concept of Special Protection For Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany', 1 *N.U.J.S. L. Rev* (2008), 397

of Punjab.⁵ Although it was unsuccessful the Supreme Court embraced it later in the *Kesavananda* case and it was eventually cemented into the Basic structure doctrine in its present form.⁶

2.2.1 The Theory of Implicit Limitations

There is a theory known as The Theory of Implicit Limitations which basically asserts that there are implied limitations to the amendment powers of the legislature.⁷ This theory is associated with the notion that amendment power is not absolute.⁸ The heart of the theory can be deduced from Schmitt's view that there are certain substantive principles of the constitution which are unamendable and cannot be removed by the legislature but by constituent power.⁹ It is these principles which are at the heart of the constitution without which it loses its identity.¹⁰

Some scholars refer to these limitations as *supra constitutional* limitations on the amendment powers.¹¹ Otto Bach takes a jurisprudential argument that natural law is above positive law as such constitutional legislation expressed in positive text can be limited.¹² Basically even though explicit limitations exist and the constitutional text is clear and positive the courts can invalidate the amendment as unconstitutional if it violates the substantive principles or its basic structure.¹³ In this context one cannot separate the essential features doctrine and the implicit limitations for the philosophy of restraining parliaments amendment power is derived from the latter.

⁵ Y Roznai "Unconstituional Constitutional amendments:A Study of the nature and limits of Constitutional amendment powers" Unpublished PhD Thesis, Department of Law London School of Economics,(2014)55

⁶ S Gupta 'Vicitudes and Limitations of the Basic Structure Doctrine' *ILI Law Review* (2016) 112

⁷ Roznai (n3 above)109

⁸ G Dietze 'Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany' (1956) 42 *VaLRev*

⁹ M Polzin "The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting" *Indian Law Review* (2021)3

¹⁰ Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power' (2016) 14 *Int'l J. Const. L.* 411, 421–433

¹¹ Y Roznai "The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments" (2013) Vol 62 *International The International and Comparative Law Quarterly* 558

¹² Y Roznai(n 6 above)565

¹³ Y Roznai(n 6 above) 558

2.3 Philosophy and essence of the Doctrine

The essential features doctrine seeks to identify the philosophical basis of a constitution.¹⁴ The theoretical foundation of the doctrine stems from the concept that parliaments amendment power is derived from the people.¹⁵ It is aligned with the views of liberal theorist like John Locke who asserted that there has to be a social contract between those governed and those governing.¹⁶ Consent is critical. John Locke states that legislative authority should be exercised in trust and the constituent power has the mandate to rectify any acts done in contravention of that trust.¹⁷ This also resonates with Kelsen who bases his views on the doctrine of effectiveness. If they are changes to the basic law its legitimacy is dependent upon its acceptance and recognition.¹⁸

H.L.A. Hart in *The Concept of Law*, described the “rule of recognition” as the ultimate method of validating or legitimizing any law.¹⁹ Agreeing with Kelsen, he argued that “the validity of legal prescriptions depends on their provenance, on whether they are made by an authorized law-maker in an authorized way”.²⁰ In this context any alterations to the basic features of the constitution should be derived from a legitimate source and such the legislatures powers are restrained.

Importantly the powers is delegated and as such it is implicitly limited. Chandrachud CJ in *Minerva Mills Ltd and Ors v Union of India and Ors* aptly sets out the essence of the basic structure doctrine when he stated the following

‘Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a

¹⁴ Y Roznai (n 6 above)

¹⁵ Y Roznai(n6 above)

¹⁶ J Locke *Two Treatises of Government* [1821) 317

¹⁷ Locke (note 14 above)317

¹⁸ H Kelsen *General Theory of Law and State* (2006) 120.

¹⁹ H.L.A. Hart *The Concept of Law* (1961)97-104

²⁰ Kelsen(note 16 above)

precious heritage; therefore, you cannot destroy its identity.²¹

It is the identity of the constitution which must be preserved even after amendment. The doctrine is related to natural law and natural rights ideology.²² Thus at its core it is a tool for barricading the constitution against self-serving parliamentary majority bent on mutilating constitutional values.²³

2.4 Scholarly views and literature on the doctrine

There has been numerous scholarly views and literature on the basic structure doctrine. The general viewpoint being that it serves as a last line of defense in preventing the destruction of fundamental principles of the constitution²⁴. Katz and other scholars pessimistic about the doctrine also acknowledge that it is useful in the sustenance of constitutionalism and democracy.²⁵

Those who reject the notion of implicit limitations, even admit that the Indian basic structure doctrine was created as an answer to the abuse of amendment power, and accept that a limited amendment power may avoid the grabbing of power and consequently preserve democracy.²⁶ Although it may have flaws the restriction of amending power including its enforcement by the courts has been viewed as imperative in a constitutional democracy.²⁷ Kathleen Sullivan asserts that tinkering with

²¹ AIR 1980 SC 1789

²² N Samanta and S Basu 'Test of Basic Structure: An Analysis' (2008) *NUJSL Rev* 499,516

²³ Guha, Shouvik Kumar and Tundawala, Moiz 'Constitution: Amended it Stands?' (2008) Vol 1 *NUJS L. Rev*) 537

²⁴ S Vijayashri 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)' (1998) Vol 14(2) *Am. U. Int'L L. Rev.* 480

²⁵ Katz, Elai, 'On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment' (1995-1996) Vol 29 *Colum. J. L. & Soc. Probs* 251

²⁶ Roznai (n3 above)224

²⁷ Garlicki, Lech and Garlicka, Zofia A., 'External Review of Constitutional Amendments? International Law As a Norm of Reference', (2011) *Isr. L. Rev* Vol 44, 185

the constitution should not be frequent and easy as doing so preserves public confidence in the stability of the basic constitutional structure.²⁸

However, the fact that the ideological boundaries of the doctrine are not clear gives the judiciary unwarranted power leading to value judgements. Other scholars according to Beshara view the doctrine as a remedy for odious constitutional amendments.²⁹ He even argues that it has evolved from substantial limitation on amendment power to a general method of restricting anti-democratic behavior and may be resorted to for judicial review.³⁰ Roznai concurs with this view also and asserts that it is now prevalent in changing democracies to limitations on the power to amend to insulate against politicians wavering adherence to the rule of law.³¹

2.5 Jurisdictional development of the doctrine

The jurisdictional development of the essential features doctrine has been generally positive and some scholars have argued that it has evolved into a doctrine of constitutional judicial review.³² In India the doctrine has already gained roots ever since Kesavananda whilst in neighbouring states such as Bangladesh, Pakistan even Belize have also followed suit.³³

The recent emphatic acceptance of the doctrine in Kenya in the BBI case is a positive given the complexities in African politics.³⁴ Furthermore, it reflects the positive or extent of the jurisdictional impact of the basic features doctrine. However, some countries such

²⁸ KM Sullivan *Constitutional Amendmentitis* Am. Prospect (2001) 20

²⁹ C Beshara "Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India" (2015) *Law and Politics in Africa, Asia and Latin America* Vol. 48, No.2.100

³⁰ Beshara(n14 above) 101

³¹ Y Roznai "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea" (2013) *American Journal of Comparative Law* Vol 61 , 657.

³² H Ridwanul *Judicial Activism in Bangladesh: A Golden Mean Approach* (2011) Cambridge Scholars Publishing

³³ Roznai (n3 above)59-64

³⁴ David Ndii and Others vs Attorney General and Others Petition E282/2020(Consolidated) See also *Njoya & Others v. Attorney General & Others*, [2004] LLR 4788 (HCK),

as South Africa have chosen a cautious approach and have left the question open as to whether or not parliament is at large to make amendments which affect the basic structure of the constitution.³⁵

2.6 Constitutional supremacy and the Essential features doctrine

Constitutional supremacy is rooted in the American legal system. The seminal case of *Marbury vs Madison* affirmed the supremacy of the constitution.³⁶ In the context of judicial review, the case held that the constitution is not inferior or subject to any other law, it is above ordinary laws.³⁷ As such any legislation against it is void ab initio. It was asserted that the aim of the supreme law was to instill governance with demarcated and restrained law making powers.³⁸ Thus judicial recognition of ultra vires legislation defeats the underlying intention of the constitution.³⁹

This reasoning is applicable to judicial review of constitutional amendments since amendment power is limited.⁴⁰ Essentially judicial scrutiny of constitutional amendments achieves the goal of constitutionalism.⁴¹

Thus one may not separate the principles of constitutional supremacy and the Essential Features Doctrine for in its application the judiciary will be basically protecting constitutional values. In this context the constitution provides for judicial review of amendments stemming from the principle of constitutional supremacy which requires courts to ensure that the legislature does not abuse its delegated power within constitutional limits.⁴² In that way, judicial review of constitutional amendments accomplishes the supremacy of the constitution.⁴³ The essential features doctrine is

³⁵ Roznai(n3 above)65-67

³⁶ *Marbury vs Madison* (1803)

³⁷ Roznai (n3 above)176

³⁸ Roznai(n3 above) 176

³⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-178 (1803).

⁴⁰ Roznai(n3 above) 177

⁴¹ Roznai(n3 above)177

⁴² Roznai(n3above) 177

⁴³ B Upendra“*The Constitutional Quicksands of Kesavanada Bharati and the Twenty-Fifth Amendment*” (1978) Vol 1 S.C.C. J. 123.

relative in guarding against the shredding of the constitution thus also ensuring that the system of checks and balances is kept intact without violating the constitutional principles of separation of powers.⁴⁴

2.7 Limitations of the doctrine

The essential features doctrine has over the years faced criticism over its applicability especially in India itself.⁴⁵ Furthermore, it is argued that it is vague and essentially depends on judicial discretion.⁴⁶ Van horn argued that the doctrine is limited because the constitution itself was never intended to be a lasting enduring document.⁴⁷ Another limitation is that it is not applicable to ordinary legislation as affirmed in *Kuldip Nayar v. Union of India* it is rather restricted to constitutional amendments.⁴⁸ Perhaps the limitation which has been over looked by most scholars is that the doctrine is dependent on a well-functioning independent judicial system. That explains the slow pace of its impact and adoption in African jurisdictions whose systems are complex and riddled with endless violations of the rule of law and general breaches of constitutionalism.

2.8 Conclusion

As reflected in this chapter the essence of the essential features doctrine stems from constitutionalism. It is hinged on constitutional supremacy and in its application the judiciary acts as a vanguard against the mutilation of the constitution by an all too powerful legislature. Even though there has been divergent scholarly views and judicial interpretations of the doctrine its impact cannot be ignored given its jurisdictional

⁴⁴ R Kaur 'The Basic Features Doctrine and the Elected President Act' (1994) Vol 15 *Sing. L. Rev* 266

⁴⁵ Beshara (n14 above) 109

⁴⁶ AIR 1975 SC 2299

⁴⁷ Linington (n9 above) 361

⁴⁸ (2006) 7 SCC 1

development over the years since *Kesavananda*. The subsequent chapter will analyse the application of the doctrine within the Zimbabwean legal framework.

CHAPTER THREE

Zimbabwean Legal framework

3.1 Introduction

The previous chapter focused on the philosophical basis of the essential features doctrine. It explored its theoretical foundation and its jurisdictional development including its evolution from being primarily a doctrine of implied limitation of amendment powers to its current status as a judicial tool for constitutional review.

This chapter will now focus on the applicability of the doctrine within the Zimbabwean legal framework and this will be done in parts. Firstly, on the Independence of the Judiciary and then, the independence of the Prosecutor General and concluding with the removal of parliamentary oversight. All these aspects will be explored within the context of the essential features doctrine and its applicability in Zimbabwe's legal framework.

3.2 The Basic structure of the Zimbabwean Constitution

The Zimbabwean constitution has core features which if removed it would lose its identity. These are the foundational values which are constitutionally entrenched under Section 3 as follows;

- (i) The doctrine of **supremacy of the Constitution**;*
- (ii) **The rule of law and the doctrine of legitimacy**;*
- (iii) The principle of **separation of powers**;*
- (iv) The principle of **good governance** defined to include **transparency, accountability**, free, fair, regular elections and the transfer of power; and...⁴⁹*

All the other provisions are couched within the parameters of these basic features of the constitution. As will be analysed in this chapter provisions of the Act violate section

⁴⁹ Constitution of Zimbabwe Amendment (No 20) Act ,2013 section 3

117(2)(b) which mandates the legislature to make laws for the peace, order and importantly good governance.⁵⁰ They decimate the doctrine of separation of powers and the independence of the judiciary consequently stripping the constitution of its identity.

Furthermore, if section 328 which provides for the amendment of the constitution is read with section 117 the unconstitutionality of the Act become inescapable. In this context parliament is provided with the procedural mechanism to amend the constitution however this power is limited. Implicitly and substantially under Section 328 and explicitly under Section 117 which obligates that legislation should be based on good governance.

Thus the judiciary is now bestowed with constitutional review powers to inquire into whether parliaments legislation is consistent with good governance including the constitutionality of certain executive acts under section 167(2)(d). This was not permitted under Section 31K of the old constitution.⁵¹

Therefore, the Act violates the essential features of the constitution by tempering with the separation of powers, judicial and prosecutorial independence and removing parliamentary oversight as will be explored herein under.

3.3 Essential features doctrine and independence of the judiciary

The independence of the judiciary, separation of powers and judicial review have been held to be amongst the basic features propping the Constitution. Any amendments which unswervingly or circuitously purport to remove them from the constitutional scheme can be annulled by the Court.⁵² It is trite that judicial freedom is a logical consequence of the principle of separation of powers⁵³. Therefore the fast tracking of the amendments to extend the tenure of judges and also changing of the appointment process all have an impact on the independence of the judiciary.

The removal of checks and balances in the whole process and the consequent consolidation of executive influence over judges impedes on their judicial independence.

⁵⁰ Constitution of Zimbabwe Amendment (No 20) Act ,2013 Section 117(2)(b)

⁵¹ Constitution of Zimbabwe Amendment (No 19) Act ,1979 Section 31K

⁵² G Austin Working a Democratic Constitution: A History of the Indian Experience (1999) 69-98

⁵³ Madhuku (note 2 above)232

Admittedly this affects the separation of powers. The retrogressive Act violates the constitutionally entrenched principle of good governance and transparency thus altering the basic structure of the constitution. Once it is clear that the alterations have a negative effect on judicial independence then this compels judicial review though the application of the essential features doctrine.

3.4 THE JUDICIARY

3.4.1 Overview of independence of the judiciary

The judiciary is a vital organ of the state that is why its independence is constitutionally entrenched.⁵⁴ Judicial independence from the other branches of government forms the theoretical foundation of separation of powers.⁵⁵ However a brief historical background regarding the status of judicial independence in Zimbabwe to the present generally reflects that it has always been contentious.

The independence of the judiciary under the Smith regime was under scrutiny during the time of Unilateral Declaration of Independence.⁵⁶ Especially when they devised the doctrine of necessity to legalize the unconstitutional regime during *the Madzimbamuto v Lardner-Burke case*⁵⁷ This led to criticism that had become an accessory of the regime.⁵⁸

After independence cases are rife where judicial independence was constantly undermined and there was no rule of law.⁵⁹ The advent of the 2013 liberal constitution ushered in hope. However, the attack on judicial independence has already manifested itself through the act which undermines the independence of the judiciary by altering the appointment process and extending the tenure of judges and effectively concentrating those powers to the executive. Thus the judiciary is placed in an invidious position of being beholden to the executive for appointment and tenure extension thereby compromising its independence.

⁵⁴ Constitution of Zimbabwe Amendment (No 20) Act ,2013 Section 164

⁵⁵ L Madhuku *Introduction to Law* (2000) 47

⁵⁶ Unilateral Declaration of Independence 1965

⁵⁷ 1968 (2) SA 284 (RAD)

⁵⁸(note 3 above)

⁵⁹ G Linington *Constitutional law of Zimbabwe* (2000) 450

3.4.2 Section 186 and judicial independence

The new section 186 of the constitution allows the President acting on the recommendation of the JSC to appoint sitting judges to vacancies in the higher courts, without subjecting them to the public interview procedure.⁶⁰ This is a return to the old system under Lancaster house constitution which was less transparent which gave the executive monopoly over judicial appointments.⁶¹ The question is what is the intention or mischief which the legislature sought to remedy? The reasonable inference is that the consolidation of executive power on this aspect is calculated to impede on judicial independence.

Changes to the way judges are promoted to superior courts removes checks and balances on the president's powers and reverts to a cloudy process which was sought to be remedied by the 2013 constitution.

3.4.3 Appointment process

The process of appointment of judges is a key factor in guaranteeing the independence of the judiciary.⁶² Where the nomination process is wholly in the hands of political figures, the probability is high that the bench will be selected on the basis of partisan loyalty consequently making a judiciary which is pliant to the executive.⁶³ However given the representative nature of our legislative system politicians cannot be excluded from the appointment process.⁶⁴ The inquiry in each case essentially becomes one of the scope to which the selection procedure has adequate checks and balances countering exclusive prejudiced selection of judges.⁶⁵

This is what the 2013 constitution sought to remedy through the inclusion of public interview process with the active participation of the judicial service commission to

⁶⁰ Constitutional Amendment Act No 2, 2021 Section 13

⁶¹ Constitution of Zimbabwe (1980) Section 4(1)

⁶² L. Madhuku Constitutional Protection of the Independence of the Judiciary: A Survey of the position in Southern Africa (2002) Vol 46 *Journal of African Law* 232

⁶³ Madhuku (note 2 above) 91

⁶⁴ Madhuku (note above) 92

⁶⁵ Madhuku (note 2) above)92

enhance checks and balances.⁶⁶ Furthermore, it sought to avoid purely political appointments as exposed in *Zibani v Judicial Services Commission* ⁶⁷

However, the Act now reverts to the old system whereby the executive had the sole discretion in the appointment of judges.⁶⁸ Not only that but also the removal of public interviews clouds the whole process and effectively exposes judges to political influence.

3.4.4 Tenure extension

The new section 186 provides that Judges of the Constitutional Court and Supreme Court may prolong their tenure beyond 70 years annually up to 5 years and it is dependent on a positive health record. ⁶⁹

This was an amendment to the old Section 186 of the constitution which obligated a judge to depart office upon attaining 70 years.⁷⁰ However, the alteration effectually seeks to lengthen the occupancy of the judges on the bench and arguably it has an adverse effect on judicial freedom. This is so given the fact that it is subject to executive discretion as stated recently by the High Court in *Musa Kika vs Minister of Justice, Legal and Parliamentary affairs* that:

“The intended extension of the length of time that the persons in office as judges of the constitutional court and the supreme court, does have the effect of compromising of the independence of the judiciary and the rule of law”⁷¹

⁶⁶ Constitution of Zimbabwe Amendment No 20, 2013 (Section 180)

⁶⁷ HH-797-16

⁶⁸ Constitution of Zimbabwe Amendment No 19, 1979 (Section 84)

⁶⁹ Constitutional Amendment Act No 2, 2021, Section 13

⁷⁰ Constitution of Zimbabwe Amendment No 20 (2013) Section 13

⁷¹ HH264/21

Extension of tenure should not be subject to executive discretion it should be compulsory and this would keep political appointments beyond reach of the executive which would ultimately undermine judicial independence.⁷²

The new section 186 fundamentally departs from the original section 186 of the 2013 Constitution. It emasculates the old system thus resurrecting executive supremacy contrary to the democratic ethos of constitutionalism. Furthermore, it unconstitutionally extends tenure without the people's approval through a referendum in blatant violation of section 328 (9) of the constitution.

The majority judgement in *The President of the Senate and 2 ors vs Innocent Gonese and 3 ors* exposes this general disregard of constitutionalism by critical arms of the state.⁷³ This impunity has triggered a flurry of court challenges whose import basically underscores the importance of judicial tenure within the matrix of judicial independence.

3.5 THE PROSECUTOR GENERAL

3.5.1 Background and independence

The office of the Prosecutor General is established in terms section 258 of the constitution.⁷⁴ Prior to the 2013 constitution the Attorney General prosecuted on behalf of the state.⁷⁵ Although he had this role he was essentially a political appointee and he sat in the cabinet and it was always contentious since his membership arguably limited his independence. Therefore, the new constitution ushered in a progressive provision by separating the roles of the Attorney General and the Prosecutor General⁷⁶ given the critical role played by the state prosecutor in the wider context of separation of powers.

The 2013 constitution separated of the roles of the Attorney General and the Prosecutor General with the creation of an independent National Prosecuting Authority. One has to

⁷² Madhuku (note 2 above)²⁴³ In Malawi, Ghana, Uganda, Lesotho, Botswana and Kenya compulsory retirement regime does not allow the executive discretionary power to extend the term of office of a judge and this is conducive to judicial independence

⁷³ CCZ1/21

⁷⁴ Constitution of Zimbabwe Amendment No 20, 2013 Section 16

⁷⁵ Constitution of Zimbabwe ,1980 Section 76(4)

⁷⁶ Constitution of Zimbabwe Amendment No 20, 2013 Section 114 and 258

interrogate the purpose of this division of roles in light of its impact on the autonomy of the Prosecutor General. This split was clearly meant to enhance his independence and it was progressive especially when viewed in light of the spirit of transparency and accountability.

Importantly the removal of the dual role of being the main legal adviser of government sitting in cabinet and being the state prosecutor enhanced his autonomy. However executive interference still looms in the form of the retrogressive changes to the appointment process in the Act thus rendering the separation redundant.

3.6 Relevance of the doctrine to the independence of Prosecutor General

The threat to prosecutorial independence brought about by the amendment compels the application of the basic structure doctrine by the courts since it violates constitutional values. By reverting to the old system of the appointment process of the Prosecutor General, the new section negatively affects his independence. If the Prosecutor General is under executive influence it has adverse impact on the rule of law and generally on the separation of power since it will be evidence of one organ having excessive power and influence over such an essential public officer.

Furthermore, it violates the principle of good governance set out under section 117 thus affecting the basic structure of the constitution. Viewed in light of constitutionalism it will be contrary to the fundamental values upon which the constitution stands as such it tears the basic fabric of the constitution.

It is arguable that the purpose of the Act is to vest the executive with excessive power. Once the foundational pillars of the constitution are destroyed it compels the application of the essential features doctrine to nip presidential power in the bud in the spirit of constitutionalism.

3.7 Section 259 and the independence of the Prosecutor General

Section 259 of the Act now provides for the appointment of the Prosecutor-General by the President on the recommendation of the Judicial Services Commission, without the

public interview procedure⁷⁷ This position reverts to the old process wherein the prosecution head was selected by the president without being subjected to an open interview method.⁷⁸

The removal of the participatory process and the return of exclusive discretion of the executive in the appointment of the Prosecutor General makes him a political appointee. This has an adverse impact on his independence because it places him again within the shadow of executive influence.

The appointment process of the prosecutor general is a critical factor within a constitutional democracy due to the role he plays in the justice delivery system. The old Section 259(3) provided for the appointment of the Prosecutor General in terms of which he is was subjected to public interviews. Importantly his appointment was similar to that of judges which evidently underscores the importance of his office.⁷⁹

Consequently, any changes to the appointment process of judges directly affects the Prosecutor General. However, the new Act is contrary to the spirit of transparency and good governance as set out in section 9(1) of the constitution which states that appointment to public office should be based on merit. The new act now makes the appointment of the Prosecutor General the absolute choice of the president. That is why the public interview process was important for it guarded against appointment of incompetent individuals. The removal checks and balances affects transparency thus it is a compromised process.

⁷⁷ Constitutional Amendment Act No 2, 2021 Section 259(3)

⁷⁸ Constitution of Zimbabwe 1980 Section 76(2)

⁷⁹ Constitution of Zimbabwe Amendment No 20, 2013 Section 258(3)

3.8 PARLIAMENTARY OVERSIGHT

3.8.1 Overview of role of parliament

The primary role of parliament has always been legislative and it is provided for in the constitution.⁸⁰ However, the functions of parliament apart from being representative also include exercising oversight. This basically ensures that there is accountability and transparency within government especially in regard to agreements made by the state concerning the fiscus.⁸¹ This is crucial and it is constitutionally provided for given that it is an integral part of the system of checks and balances between the Legislature and the Executive.⁸²

3.9 Relevance of the doctrine to the removal of parliamentary oversight

Generally, the amendment goes beyond the removal of the words foreign entities. It strikes at the core of the system of checks and balances provided for constitutionally. It borders on absolutism. This is so given the fact that it dents the basic principles of the Constitution such as transparency, accountability and separation of powers by eroding parliamentary review of agreements done by government.

Parliament is a representative organ and its powers are delegated and derived from the people.⁸³ Therefore, by seeking to bar parliament scrutinizing international agreements which may have an impact on the fiscus the executive violates the constitutional values of transparency. It is contrary to good governance and democratic values as enshrined in the constitution. In this context the doctrine may be applied in reviewing such amendments which seek to erode the oversight powers of parliament by consolidating presidential power thus shredding the basic structure of the constitution.

3.9.1 Section 327 and oversight role of parliament

Section 21 of the Act amends the old section 327 of the constitution which relates to the implementation of international conventions, treaties and agreements by removing the

⁸⁰ Constitution of Zimbabwe Amendment No 20, 2013 section 119

⁸¹ Constitution of Zimbabwe amendment No 20 2013 section 327 3(2)(b)

⁸² Frederick M. Kaiser, Congressional Oversight, Order Code 97-936 GOV

⁸³ See (note 23 above)

terms “foreign organisations or entities” and substituting it with “international organisations”.⁸⁴ The latter is defined whilst the former is not.⁸⁵ It is vital to note that these agreements are not binding unless ratified by the legislature.⁸⁶ The aim was to make sure that parliament is not kept in the dark on matters related to loan agreements between Zimbabwe and external parties.

The term “foreign organizations or entities” was not defined in the constitution so that it would include any financial agreement it was purposefully broad in scope because it related to financial matters. Its replacement by the narrowly defined term “international organization’ means that parliamentary scrutiny will only be limited to agreements within the defined parameters only. Effectively decreasing the role of parliament by aiming to bind the nation to fiscal responsibilities with foreign bodies without legislative examination. This again is evidence of the character of the amendments which seek to empower the executive by removing checks and balances.

3.9.2 Conclusion

This chapter analyzed the nature of the new Act and its effect on the basic structure of the constitution. It exposed how the independence of the judiciary and the prosecutor general have been compromised including the removal of parliamentary oversight by the consolidation of executive power in breach of values of good governance and ultimately the separation of powers. The subsequent chapter will focus on the application of the essential features doctrine within the international legal framework with a comparative analysis with India.

⁸⁴ Constitutional Amendment Bill No2, 2021 section 21

⁸⁵ Constitution of Zimbabwe amendment No 20 2013 section 327 (1)

⁸⁶ See (note 24 above)

CHAPTER FOUR

Comparative Jurisprudence

4.1 Introduction

The previous chapter focused on the Zimbabwean legal framework regarding the applicability of the basic structure doctrine. It analysed and established how the Constitutional Amendment Act has the effect of altering the basic structure of the constitution through interference with judicial and prosecutorial independence and the removal over parliamentary oversight. This chapter will make a comparative analysis between with India and Zimbabwe focusing on the constitutional legal framework within which the doctrine is applicable respectively.

4.2 Overview and Justification of India as comparator

The application of the Indian jurisdiction for comparative analysis is pertinent given its rich history of constitutional jurisprudence especially in its extensive use of the essential features doctrine. The application of the basic structure doctrine whose essence is the protection of the identity of the constitution has contributed in creating a constitutional balance between critical organs of government.⁸⁷ The purposeful interpretative approach in India in the application of the doctrine maybe adopted in Zimbabwe which has been using a narrow approach in constitutional review of legislation. Focus should be on both procedural and substantive compliance not only on the former as is the current state in Zimbabwe.

The doctrine has essentially cemented the supremacy of the constitution.⁸⁸ Furthermore, judicial review of unconstitutional amendments has been fully embraced in India ever

⁸⁷ D C Chauhan 'Parliamentary Sovereignty vs Judicial Supremacy in India'(2013) Vol 74 *The Indian Journal of Political Science* 99

⁸⁸ S Mukhajejee 'The unconventional dimensions of the Basic Structure Doctrine' (2011) Vol 1 *Nirma University Law Journal* 48

since the Golaknath case and especially the Kesavananda judgement.⁸⁹ Importantly the parliaments amendment power is no longer infinite as such any amendments with the effect violating sacred constitutional pillars are subjected to judicial scrutiny and may be invalidated.⁹⁰

Although this power of review seemingly empowers the judiciary,⁹¹ sight must not be lost to the fact that the constitution is supreme⁹² and all organs are bound by its dictates including the judiciary.⁹³ The doctrine simply posits that parliament cannot use its delegated power to change the constitution.⁹⁴

Fundamental constitutional values such as the independence of the judiciary, separation of powers and judicial review cannot be left at the mercy of the government of the day using its legislative majority. This has been the problem within the Zimbabwean system for parliamentary majority essentially guarantees absolute authority to temper with the constitution. Without the safeguard of the application of the doctrine as done in India the constitutional rights are subject to the will of the present government.

As such this doctrine maybe applied within Zimbabwe's context in light of the recent Constitutional Amendment Act with the judiciary acting as the guardians of the constitution for the preservation of our constitutional democracy.

4.3 Legal framework of amendment under Article 368 Indian Constitution

The power of the legislature to amend the constitution of India is provided for under Section 368 (1) of the Indian constitution as follows;

⁸⁹Golaknath v. State of Punjab, AIR 1967 SC 1643 triggered a string of judgments which cemented the judiciaries powers of reviewing constitutional amendments. See also (1973) 4 SCC

⁹⁰ D C Chauhan (n1 above)99

⁹¹ Y Roznai "*Unconstitutional Constitutional amendments: A Study of the nature and limits of Constitutional amendment powers*" Unpublished PhD Thesis, Department of Law London School of Economics (2014)231

⁹² Constitution of Zimbabwe Amendment No 20 Section 2(2)

⁹³ See (n6 above)

⁹⁴ Y Roznai (n 5 above) 237

(1) Notwithstanding anything in this Constitution, parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this constitution in accordance with the procedure laid down in this article⁹⁵

This section allows parliament to amend the constitution in the exercise of its constituent power.⁹⁶ As interpreted in Kesavanada the powers under 368 cannot be used to alter the basic structure of the constitution.⁹⁷ It was interpreted purposefully so as to restrict the amending powers of the legislature regardless of the fact the provision does not cap parliaments powers directly. The limitation is implicit.⁹⁸ This was aptly pronounced by Justice Shelat as follows

The meaning of the “words amendment of this constitution” as used in article 368 must be as such which accords with the of the intention of the constitution makers as ascertainable from the historical background, the preamble, the entire scheme of the constitution, its structure and framework and intrinsic the evidence in various articles including article 368. It is neither possible to give a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the constitution.⁹⁹

The procedural mechanism of amendment is also set out.¹⁰⁰ The importance of this provision comes from the fact that it doesn't give parliament carte blanche powers of amendment . It essentially curtails amendment power on the basis that it is borrowed

⁹⁵ Article 368(1) constitution of India

⁹⁶ (n 9 above)

⁹⁷ (1973) 4 SCC

⁹⁸ S Mukhjee (n 2 above) 46

⁹⁹ (n 11 above) 235

¹⁰⁰ Section368(2) Indian constitution

and not constituent.¹⁰¹ In this context only the summoning of a new "constituent assembly." can cloth the alteration of fundamental rights with constitutional legality¹⁰² Thus it allows judicial review on a substantive basis hence the application of the essential features doctrine by the Indian judiciary.

4.4 Application of the Essential Features Doctrine by the Indian Judiciary

The essential features doctrine has been applied in Indian jurisprudence in several cases and it has evolved into a powerful judicial instrument for the preservation of the equilibrium of power including the requisite checks and balances critical in a constitutional state. ¹⁰³The British system heavily influenced the Indian legal framework which originally precluded the concept of implicit restrictions .¹⁰⁴ Nevertheless, governments extensive endeavors to change the supreme law, ultimately facilitated the emergence and expansion of 'the basic structure doctrine' through a flurry of judicial pronouncements as will be summed up below.¹⁰⁵

The roots of judicial acceptance of the doctrine may be traced back to In *Golaknath v. State of Punjab* where the court decided that the legislature could not apply its lawmaking authority to alter fundamental rights. This was perceived as an attack by the executive on parliament's sovereignty and responded by enacting the 24th amendment. Which empowered parliament to amend any provision including those protecting fundamental rights.

As a consequence, the amendments were tested in *Kesavananda vs State of Kerala* it held that no provision is immune from amendment but Parliaments power to do so does not include the power to alter the basic structure, or framework of the constitution so as to change its identity, thus birthing the 'basic structure doctrine'.¹⁰⁶

¹⁰¹ S Raman *Amending Power under the Constitution of India: A Politico-legal Study* (1990) 35

¹⁰² *Golaknath v. State of Punjab*, AIR 1967 SC 1643, 1718

¹⁰³ S Gupta 'Vicitudes and Limitations of the Basic Structure Doctrine' (2016) *ILI Law Review* 110

¹⁰⁴ Y Roznai (n 5 above) 54

¹⁰⁵ Y Roznai (n 5 above) 54

¹⁰⁶ *Kesavananda Bharati v. State of Kerala*, 1973 (4) SCC 225

In *Indira Nehru Gandhi v. Raj Narain* the court affirmed the basic structure doctrine in overturning amendments which ousted the court's jurisdiction.¹⁰⁷ It held that exclusion of judicial review breached fundamental constitutional pillars and it was thus unconstitutional. In *Minerva Mills v. Union of India* the court invalidated the amendments ousting jurisdiction on the same grounds and confirmed that parliaments powers are not absolute.¹⁰⁸ Several other cases have since followed suit whereby the court has applied the doctrine thereby cementing its establishment within the constitutional system of India.¹⁰⁹

4.5. Amendment powers and procedure under Section 328 of the Zimbabwean Constitution

Parliament is given power to amend the constitution under Section 328¹¹⁰ although it is not expressly stated as was the position under section 52 of the old constitution.¹¹¹ The relevant section is couched as follows;

Amendment of Constitution

(5) A Constitutional Bill must be passed, at its last reading in the National Assembly and the Senate, by the affirmative votes of two-thirds of the membership of each House.

(6) Where a Constitutional Bill seeks to amend any provision of Chapter 4 or Chapter 16—

(a) within three months after it has been passed by the National Assembly and the Senate in accordance with subsection (5), it must be submitted to a national referendum; and

¹⁰⁷ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299

¹⁰⁸ *Minerva Mills Ltd. v. Union of India* AIR 1980 SC 1789

¹⁰⁹ *Waman Rao v. Union of India*, (1981) 2 SCC 362; *S.R. Bommai v. Union of India*, (1994) 3 SCC1; *M. Nagaraj v. Union of India*, AIR 2007, *S.P. Gupta v. Union of India*, *P. Sambamurthy v. State of Andhra Pradesh*

¹¹⁰ Constitution of Zimbabwe Amendment (No 20) Act, 2013 section 328

¹¹¹ Constitution of Zimbabwe Amendment (No 19) Act, 1980 section 52(1)

*(b) if it is approved by a majority of the voters voting at the referendum, the Speaker of the National Assembly must cause it to be submitted without delay to the President, who must assent to and sign it forthwith.*¹¹²

It also provides the procedural mechanism of amendment.¹¹³ Just like the corresponding section in the Indian constitution no provision is unamendable provided that there is adherence with the procedure set out. However, provisions under chapter 4 and 16 are procedurally protected because it mandates the approval of the majority of voters through a referendum.¹¹⁴ This also includes any amendment to section 328 itself with the effect of extending tenure of public office.¹¹⁵

To a large extent it is procedural provision however it should not be interpreted to mean that once there is procedural compliance then the amendment is automatically constitutional. Rather there should be room for it to be tested based on its constitutional substance. That is the question which the judiciary must heed by applying a purposeful interpretation and adopting the essential features doctrine as is the case in the Indian jurisdiction.¹¹⁶

4.6 A Comparison: Campbell (Pvt) Ltd & Anor Vs Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor and Keshavananda v State of Kerala

A stark comparison and analysis can be made between the Zimbabwean case *Campbell (Pvt) Ltd & Anor V Minister Of National Security Responsible For Land, Land Reform & Resettlement & Anor*¹¹⁷ and the *Keshavananda* judgement especially on the interpretive approach adopted by the respective courts.¹¹⁸ Both cases involved the

¹¹² Constitution of Zimbabwe Amendment (No 20) Act, 2013 section 328(5) and (6)

¹¹³ Constitution of Zimbabwe Amendment (No 20) Act, 2013 section 328(3,4,5,6 and 10)

¹¹⁴ Constitution of Zimbabwe Amendment (No 20) Act, 2013 section 328(6)(b)

¹¹⁵ Constitution of Zimbabwe Amendment (No 20) Act, 2013 section 328(7)

¹¹⁶ See CCZ14/21

¹¹⁷ 2008 (1) ZLR 17(S))

¹¹⁸ (1973) 4 SCC

constitutionality of a constitutional amendment, property rights, the amendment power of parliament and critically the application of the basic structure doctrine.

In *Campbell* the applicants challenged an amendment which ousted the court's jurisdiction regarding land acquired by the state.¹¹⁹ This removal of judicial authority was challenged as an attack on the essential features of the Constitution, just as had been argued in the *Kesavananda* case in India, where similarly, courts' jurisdiction over property-related disputes had been taken away.

The Zimbabwean court dismissed the application by adopting a restrictive interpretation of the constitution and held that the basic features doctrine was just an interpretive aid.¹²⁰ It held that if the intention of the legislature is clear and unambiguous on the text and if there was procedural compliance in the passing of the amendment then the courts have no authority to annul.¹²¹ It essentially fell short of declaring parliamentary superiority in a constitutional democracy founded on the principle of separation of powers.¹²²

This narrow approach was avoided by the Indian bench which basically limited the amendment power of parliament.¹²³ It accepted as in Zimbabwe, that the legislature has the constitutional authority to amend any provision however it is subject to the non-violation of the basic structure of the constitution.¹²⁴ In other words, the identity of the supreme document should remain intact after amendment.¹²⁵

A close scrutiny of these cases leads to one inevitable conclusion that the time is nigh for the Zimbabwean bench to abandon archaic constitutional interpretations to that which gives life and meaning to the constitution. This is especially so given the new constitutional dispensation which binds all organs of government to constitutional supremacy.¹²⁶ Thus the adoption of the basic features doctrine as applied in Indian

¹¹⁹ (n31 above)

¹²⁰ (n31 above)

¹²¹ (n31 above)

¹²² (n 31 above)

¹²³ (n 32 above)

¹²⁴ (n 32 above)1461

¹²⁵ (n 32 above)1461

¹²⁶ Constitution of Zimbabwe Amendment (No 20) Act, 2013 section 3

jurisprudence the judiciary would not only be reflecting fidelity to the constitution but also safeguarding critical values of the constitution such as the independence of the judiciary and separation of powers which are under siege by the Constitutional Amendment Act No 2.¹²⁷

4.4.2. Role of the Judiciary in enforcing limitations on amendment powers

The role of the judiciary is always under the microscope when it strikes down constitutional amendments in the exercise of its review powers. This may be viewed within the purview of counter majoritarianism as argued by Alexander Bickel.¹²⁸ Some scholars have described the judicial role in reviewing constitutional amendments as a political question best left to the executive.¹²⁹ In India the court in *Kesavanada Bharati* effectively confirmed the limitations on parliament's amendment powers thus preserving judicial review.¹³⁰ This has consequently caused a rift between the judiciary and legislature in terms of supremacy.¹³¹ However, it is the constitution which is supreme and the role of the judiciary in this context is to safeguard the constitution especially against the tyranny of the majority.¹³² The danger of barring the courts from judicial scrutiny was vividly captured by Justice P.N. Bhagwati in the *Minerva Mills* case as follows,

"If by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire

¹²⁷ Constitutional Amendment Bill No 2, 2019

¹²⁸ Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962).

¹²⁹ J H. Choper "The Political Question Doctrine: Suggested Criteria" (2005) 54 *Duke Law Journal*). See also

Coleman v. Miller (1938)

¹³⁰ (n32 above)

¹³¹ (n1 above)99

¹³² Cox, Paul N 'John Hart Ely, Democracy and Distrust: A Theory of Judicial Review' (1981) 15 *Val. U. L. Rev* 637

*Constitution including its basic structure and even to put an end to it by totally changing its identity.”*¹³³

Therefore, the courts role is vital in the enforcement of limitations on the amendment powers of parliament for the efficient functioning of a constitutional democracy. A constitutional amendment can be tainted with constitutional breaches and if the judiciary turns a blind eye to such it will be tantamount to abdicating of its constitutional role thus exposing the minority to the vagaries of rogue parliamentary majorities.¹³⁴

4.5 Conclusion

From this comparative analysis it is clear that Zimbabwean courts can benefit immensely from Indian constitutional jurisprudence. In this chapter it was established that the role of the judiciary encompasses more than just interpretation but also includes the critical role of safeguarding fundamental rights in its role as the guardian of the constitution. Critically the Zimbabwean judiciary may harness the principle from *Kesavananda Bharati* encouraging scrutiny of legislation not only on procedural but also on a substantive basis through application of Basic Features Doctrine.¹³⁵ The next chapter will focus on recommendations and conclusions in a bid to remedy the loopholes exposed within the Zimbabwean legal framework.

¹³³ (n22 above)

¹³⁴ D Rosalind "Transnational Constitutionalism and Unconstitutional Constitutional Amendments"(2011) No. 349 Public Law and Legal Theory Paper, *Law School of the University of Chicago* I

¹³⁵ M Moin Uddin and R Nabi 'Judicial review of constitutional amendments in light of the " Political Question"Doctrine: A comparative study of the jurisprudence of Supreme courts of Bangladesh, India and the United States:' (2016) Vol. 58 *Journal of the Indian Law Institute* 325

CHAPTER FIVE

Recommendations and conclusion

5.1. Introduction

The previous chapter was a comparative analysis between Zimbabwe and the Indian jurisdiction regarding the application of the essential features doctrine. The analysis exposed the legal deficiencies in the Zimbabwean system which may be remedied mainly through a purposive interpretative approach based on the doctrine as applied in the Indian jurisdiction order to safeguard the values of the constitution.

The final chapter now provides recommendations deduced from a scrutiny and analysis of the application of the essential features doctrine in the erstwhile chapters. The net effect of the above chapters is a legal conclusion that is germane to the current constitutional issues and also constructive to the general Zimbabwean constitutional jurisprudence.

5.2. Chapter Overview

Chapter one was introductory and it laid out the legal problem and explored the historical background of this research.

Chapter two outlined the philosophical basis of the essential features doctrine and traversed its origins and its roots within the theory of implicit limitation. It also included scholarly views and its jurisdictional development.

Chapter three focused on the applicability of the doctrine within the Zimbabwean legal framework in light of the provisions of the Constitutional Amendment Act. Essentially it

revealed the constitutional grey areas inherent in the non-applicability of the basic features doctrine by Zimbabwean judiciary in reviewing constitutional amendments.

Chapter four made a comparative analysis of Zimbabwe's interpretive approach and that of the Indian judiciary regarding judicial review of constitutional amendments on the basis of the Basic Features Doctrine

5.3 Findings from study

The writer noted:

The independence of the judiciary and the Prosecutor General is under threat by the provisions of the Constitutional Amendment Act. That parliamentary oversight role is under siege by the provisions of the Act. That judicial review of constitutional amendments is primarily based on procedural grounds rather than also on the substantive. The provisions of the Act clearly violate the basic structure of the constitution and are consequently unconstitutional.

5.4 Recommendations

5.4.1 Adoption of the Essential Features Doctrine

The Zimbabwean judiciary must adopt and apply the essential features doctrine as a judicial tool especially when reviewing the constitutionality of legislation. This should be done in its capacity as the interpreter and guardian of the constitution. This would ensure that any amendments with the effect of altering the identity of the constitution are nullified on that basis thus preserving integral values of the constitution such as the separation of power and the independence of the judiciary including the protection of parliament itself.

5.4.2 Inclusion of a substantive Constitutional Review Clause in Section 328

As previously analysed in Chapter four, Section 328 to a large extent is a procedural provision.¹³⁶ It does not explicitly provide for the substantive review of constitutional amendments as such the power of the judiciary in this context is implicit. This also applies to the scope of parliaments amendment power. Therefore, the inclusion of legislation which clearly empowers the judiciary to review constitutional amendments based on substance thus explicitly limiting parliaments powers would address this anomaly. Admittedly many constitutions avoid and are silent of this aspect which has led to tussles between judicial activism and parliamentary supremacy which is regrettable especially in constitutional democracies.

5.4.3 Nullification of Constitutional Amendment Act

Given the inclination of the provisions of the Act to consolidate executive supremacy it is recommended that it be nullified as unconstitutional. The pending constitutional court challenge in *Matinenga and 4 others vs Luke Malaba No and 2 others* gives credence to this point.¹³⁷ The Act allows the president unfettered discretion in relation to the appointment of the judiciary and the Prosecutor General thus holding their independence at ransom. The flagrant removal of parliamentary oversight also adds weight to the grounds for nullification. Essentially the Act reconstructs the constitution and embodies the disfigurement of its core infrastructure and ideals of constitutionalism.

5.4.4 Entrenching the founding values and principles of the constitution

In theory Zimbabwe has a rigid constitution given that there is a distinction between the procedure of amending ordinary legislation and the constitution. However, in practice it is flexible and can easily be amended as argued by Madhuku that the grouping of a constitution as inflexible is reliant upon governmental practice more than the legal steps

¹³⁶ Constitution of Zimbabwe Amendment (No 20) Act, 2013 section 328

¹³⁷ CCZ 14/21

mandated for that amendment route¹³⁸. This is true because despite the so called rigidity of the constitution it has been amended numerous times.¹³⁹

Therefore, to plug this loophole it is recommended that certain provisions be entrenched such as all those in Section 3 constituting the founding values and principles.¹⁴⁰ Doing so would make it difficult for any government to temper with the constitution at will thus preserving our constitutional democracy.

5.5 Conclusion

In summation it is critical for all organs of government to function in harmony for Zimbabwe's constitutional democracy to thrive. This entails the respect for constitutionalism especially the concept of the separation of power. The enactment of constitutional amendments with the effect of undermining judicial and prosecutorial independence including the removal of parliamentary oversight essentially mutilates the constitution as evidenced by the Constitutional Amendment Act.

Parliament should exercise its powers of amendment within the confines of the law for its powers are delegated. They are derived from the people. It is up to the judiciary to be the watchman of the constitution in case such power is exercised ultra vires and in violation of fundamental values.¹⁴¹ Thus the adoption of the Essential Features Doctrine by the Zimbabwean judiciary in its constitutional jurisprudence would enhance the protection and identity of the constitution.

¹³⁸ L Madhuku 'A survey of constitutional amendment history in post-independence Zimbabwe' (1996) Vol 16 *Zimbabwe Law Review* 82

¹³⁹ Madhuku (n3 above)

¹⁴⁰ Constitution of Zimbabwe Amendment (No 20) Act, 2013 section 3

¹⁴¹ CCZ1/13

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