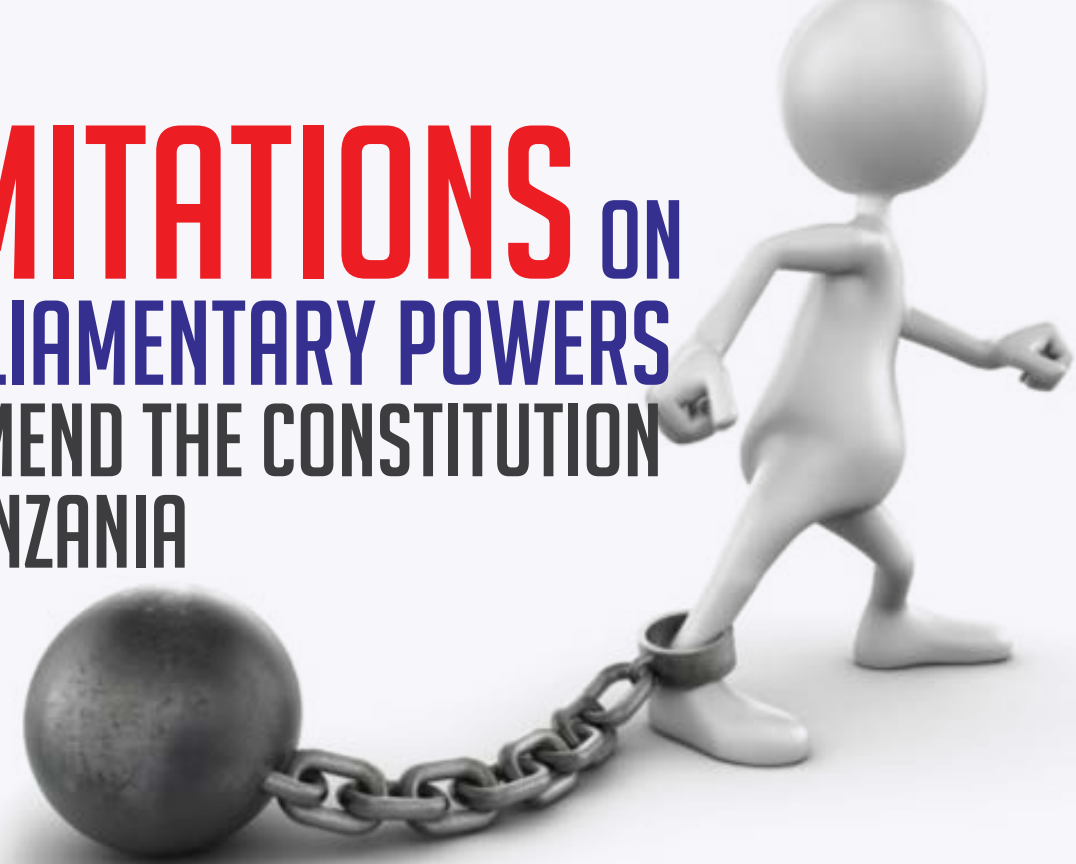


LIMITATIONS ON PARLIAMENTARY POWERS TO AMEND THE CONSTITUTION IN TANZANIA



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Abstract

*The Court of Appeal of Tanzania in *A.G v. Rev. Christopher Mtikila*³ held that the parliament has no substantive limitations whatsoever to amend the constitution in Tanzania. This decision brought confusion on sanctity and solemnity of the constitution and hence a need for critical consideration of the powers and limits of parliament to amend the constitution. Against the backdrop of article 98 of the Constitution of Tanzania, this article examines the powers and limits of parliament to amend the constitution. The article argues that the amending power of parliament is limited by the principles of constitutionalism, constitutional supremacy, the basic structure tenets, sovereignty of the people and a third majority approval.*

Key words: Constitutional Amendment, Limitations, Parliament

1.0 Introduction

Constitution is a supreme law of the land. It is a mother law and foundation of any given legal system of a country. The Court of Appeal of Tanzania in *A.G v. W.K Butambala*⁴ observed that the constitution is a serious and solemn document. Its sanctity and solemnity is rooted from popular authorship. Being the basic law, the constitution arises from the people. It is made after long deliberation forming national consensus on its letter and spirit. The latter signifies the notion of constitutional legitimacy. In spite of its sacredness the constitution can be amended. In the Constitution of the United Republic of Tanzania amending powers are provided under article 98. The Court of Appeal of Tanzania in *A.G v. Rev. Christopher Mtikila*⁵

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³ *civ. Appeal No. 45 of 2009*

⁴ (1993)TLR 46

⁵ *civ. Appeal No. 45 of 2009*

held that the parliament can amend any article of the constitution and the constitution has no basic structures. According to this decision the parliament in its constituent capacity and after observing procedural requirements is competent in law to repeal any provision of the constitution in any manner it wants. This may include repealing and replacing the whole constitution. This interpretation implies that the parliament in Tanzania has powers not only to amend, but also to destroy or emasculate the fundamental law of the land. It may therefore lead to absurdity to construe that the Parliament can legally repeal and replace any article of the constitution.

The nature and scope of powers of parliament under article 98 of the Constitution raises a legal problem relating to the exact meaning and implication of the words “altering any provision of the constitution” as used in the provision of the above mentioned article. Is it that the parliament is conferred powers to do anything including changing the basic structure or features of the constitution when exercising its amending powers? The main concern here is whether the parliament has unlimited powers to amend the union constitution. The purpose of this article is to critically examine the amending powers of the parliament under the constitution of the United Republic of Tanzania. In so doing, the article explores the scope of the amending powers in the constitution.

2.0 Concept of Constitution

The constitution is the basic and fundamental law, which deals with the structure and powers of the organs of a state.¹ Its scope also includes the rights and duties of citizens. The definition of the constitution is not out of dispute. There are different theories in relation to its meaning which can be conveniently grouped into a broad abstract definition and narrower concrete definition.² The constitution according to a wider (broad) definition is the collection of laws, customs, and conventions that describe the composition and powers of **organs of the state**, and regulates the relations

1 Ingovon M., “The Concept of Constitution” in Mtaki, C.K. and Okema, M. Eds *Constitutional Reforms and Democratic Governance in Tanzania*, Friedrich Nauman Foundation, DSM., (1994) pp. 13-14
2 Ibid.

of various state organs among themselves and with ordinary persons. In its broadest sense the constitution consists of collection of laws, institutions, fixed principles and customs that compose the whole system under which the state is administered.³ In a broader perspective, the constitution is not confined to a written or codified document.⁴

In its narrower (concrete) meaning, a constitution means a document having supreme character establishing the structure and principles of a government including its manner of operation.⁵ While the former (abstract) definition does not necessarily call for documents in order to have a constitution, in the latter, presence of a document is a necessity. Significantly, both written and unwritten constitutions aspire to provide and regulate the allocation of powers, functions, and duties among different organs and departments of government and do determine their relationship with the citizens.

2.1 Classification of Constitutions

Constitutions may be classified into different categories depending on a number of factors: these may include whether or not the constitution is written, flexibility in amending the constitution and the nature of government created under the constitution. There are three categories of constitutions which are Written and Unwritten constitutions, Rigid and Flexible Constitutions and Federal and Unitary constitutions.

2.2 Sanctity of a Constitution

The importance of the constitution is axiomatic. Where the constitution is written and codified, that text is a supreme document. It provides the structure, functions, powers, and duties of the organs of the state. Rights and duties of the citizens are on average part of the constitution. The constitution covers both intra state and interstate relations. It is a foundation of the legal system, politics, all rights and duties in the state. Being

3 *Constitutional meaning and definition*, <http://thinkexist.com/dictionary/meaning/constitution>, accessed on 19th January, 2018 at 11:45 AM
4 Ingovon M., (1994), *Infra*.
5 N Philip, *The constitution influx*, oxford: Basil Blackwell (1984) P. 3

a precious heritage⁶, it is not a luxury to have a constitution rather, a necessity. Both legitimate and illegitimate governments must have a constitution. The contrary is anarchy and chaos. Emphasize is not only to have a legitimate constitution but also pay full respect to it. Ruling regimes are obliged to honor constitutions. Where the constitution is not respected, is reduced into an empty shell. The constitution is more than a social contract between the governors and the governed. It is a consensus among the citizens (or civic society) on how to carry on their individuals and collective lives; how to interact with each other and with state authorities; and the way national building will be launched. The constitution is identity of the nation. It is a roadmap pointing to the desired ends by members of the state. It reflects collective wishes, wants, and aspirations by the people to be achieved in the course of time.

3.0 Constitutional Making

There is no a hard and fast rule on procedures for constitution making. What is important is the fact that a constitution should arise from popular authorship.⁷ By and large, Procedures and methods for constitution making reflect its sanctity and have much to do with its legitimacy and reliability.⁸ People who are the principal stakeholders have to be made aware of their roles in constitution making. Constitution making is not exclusive duty of politicians, elite and non-government factions, but also the public at large.⁹

There is no uniform procedure for constitution-making process. The parliament, the executive and individual aspirants may ignite the exercise.¹⁰ Although citizens have paramount role in advancing their wishes and aspirations as to the nature of the intended constitution, the executive and parliament are among the

6 *Minerva Mills Ltd. V. Union of India* (1980) AIR 1789.
7 *Does the constitutional process matter?* Works.bepress.com/cgi/viewcontent.cgi?article=1007context accessed on 20th January, 2018 at 8:03 A.M
8 Robert F. W., *State Constitution law process* 24 w m.& Mary L. Rev 169 (1983), at <http://www.scholarship.law> accessed on 20th January, 2018 at 8:02 A.M
9 *Zimbabwe*, at <http://www.newzimbabwe.com/pages/senate18.13087.html>; accessed on 20th January, 2018 at 8:03 A.M
10 *Constitution Convention*, www.shmoop.com/constitution-convention, accessed on 20th January, 2018 at 8:16 A.M

key players in the course.¹¹ Formulation of constitutional commission, drafting of the white paper, organizing a national referendum, designation of a constituent assembly and call for constitutional convention are done with close control, supervision, direction, or influence by the executive authorities.

As a result, making a constitution is becoming the subject of maneuver by the ruling powers to maintain control of government and politics.¹² A legitimate constitution is a result of national consensus. The constitution has to accommodate marginal voices, majority articulations, minority aspirations, and adequate stockholder’s interests.¹³ Constitution making is part of national building. The constitution has to reconcile between mainstream and conflicting forces and achieve consensus among interests.

3.0 Methods for Constitution Making

Methods to be adopted in drafting a constitution depend on number of factors.¹⁴ These include growth of democracy in a state, political climate, level of tension among the contending forces, nature of state to be formed whether federal, unitary or monarchy and social political history of the state. The choice of the particular mechanism may implicate a need for popular participation in the process, consensus among conflicting and cross-cutting interests and government dominance in the process.¹⁵

Approaches in constitution making may also differ between cases where there is existing constitution to be reformed and where there is no constitution at all. In the former case, changes and mechanism for re-formation

11 Shivji I G., *constitutional making in Tanzania: historical and contemporary processes*, A paper presented at Tanganyika Law Society Annual General Meeting (AGM) at Arusha, February 19th -20th, 2011.
12 *Fallacy of Constitution –making process*, allafrica.com/stories/201105020703.html accessed on 20th January, 2018 at 8:17 A.M
13 Bhaltara P. H., *Inclusive and participatory constitution making*, at <http://www.nesac.org> accessed on 20th January, 2018 at 8:18 A.M
14 *Proceedings workshop on constitution Buildings process*, A joint project of the Bobst centre for peace and Justice, Princeton university –inter peace international IDEA may, 2007 at www.princeton.edu; accessed on 20th January, 2018 at 8:18 A.M
15 *Participatory Constitution Making Centre for Constitutional Dialogue* (CCD) at <http://ccd.org.np>; accessed on 20th January, 2018 at 8:19 A.M

may be sanctioned by existing constitution.¹ Where there is no prior constitution, or if the existing constitution is silent on how to go about making a new constitution, any of the several mechanisms for constitution making may be adopted.

The commonest method of constitutional making is through a constituent assembly (C.A). This assembly is a body of people chosen to run the exercise of constitution making. Although its principal duty is to make the constitution, additional mandate may extend to supervise transition process, governing the state, appointing leaders and to work as a legislative body.² C.A is designed to ensure the final draft of constitution is arising from the people and reflect their wishes.³ Where people fully participate in constitution making the resulting constitution will be their property, uniting them and bring close ties of people and their government.⁴

Roundtable is another forum for constitution making especially where no understanding on how to go about making a constitution.⁵ Here pressure groups, politicians, academicians and other social actors meet to compromise their ideas and stand in order to have consensus in the process.⁶ This option is very important in the absence of existing constitutional guidance. Consensus is reached on how to go ahead. This initial bargain 're – legalise opposition', set forth a framework for subsequent negotiations, specify the rules that govern elections for constituent assemblies or some other method for delegate selection; and identify the law that will govern in the interim.⁷ Roundtable is a fit mechanism that provides a way for developing initial text and the processes that will lead to adoption of the final draft.

A National Constitution Conference is another mechanism for constitution making. The conference is composed of stakeholders from all spheres of life in the state such as lawyers, public administration specialists, technical expertise, economists, business community, civic organization and trade unionists.⁸ The conference may appoint a constitution commission to design initial draft (text). Sometimes consensus during a constitution conference may cover some basic features or immutable principles which must form part of the final draft. The latter move is intended to avoid politicians from hijacking the mission.⁹ Constitution making is different from ordinary law making, while politicians dominate the latter, their roles must be controlled in the former for the sake of national accord¹⁰

Other models for constitution making are Legislature Model; Executive directed process and Hybrid approaches.¹¹ Constitution making may be achieved by an ordinary parliament. This is the case for Britain, New Zealand, and Israel.¹² The British constitution is partly written, substantially unwritten, and whole un-codified. English statutes such as Acts of Settlement, Acts of union, Judicature Acts of 1873 and parliamentary Acts of 1911 and 1949 are considered to form part of the British constitution although were made by ordinary British parliament. Vesting the parliament with the role to make a constitution is very risky since the political whims and emotions of the majorities in the house might subvert the principles to suit their interests.¹³ Indeed this was the case where the majority labour party in the British parliament in 1911 and 1949 while desiring to silence the conservative and headstrong Lords, successfully changed the composition and procedure of the parliament.

The executive directed process is another

- 8 Shivji G. I., *Infra*.
- 9 *Proceedings workshop on constitution Buildings process*, *Infra*
- 10 Ssempewa, *stake holders and constitution making, the role of the Law Society*; A paper presented at Tanganyika Law Society Annual General Meeting (AGM) at Arusha on 19th – 20th Feb. 2011
- 11 Dicey A. V, *Infra*
- 12 *Ibid*.
- 13 Ssempewa, (2011), *Infra*

less democratic mechanism of constitution making.¹⁴ Under this mechanism the executive initiate, direct, and govern constitution making. This practice is not new in Latin America where an emergency decree is issued by the president to formulate rules governing election of the assembly. The presidential decree may also be accompanied with draft text to be adapted.¹⁵ Executive directed processes characterized formulation of France and Russian constitution in 1958 and 1993 respectively. The constitution of France was drafted by the team of experts appointed by President De Gaulle. This team of expert was headed by the prime minister. After the text draft was ready it was sent to the people who approved it in a referendum. The similar trend was reflected in Russia where upon instructions and directions by Boris Yeltsin, the constitution of Russia was drafted and adopted by the people in a referendum that was held on December 12, 1993. Despite the weak points in their making the French and Russia constitutions have become popular and model in different countries.

4.0 Theoretical Basis of Constitutional Amendment

The constitution is designed to serve the society and not vice versa. The society however is subjected to the constitution for orderly, peace, and development. It is the prerequisite for the existence of the constitution. There is no constitution in the absence of the society. Between the pillars of continuity and flexibility the constitution gains normative power in different ages.¹⁶ Unless it is regularly updated, the constitution may be obsolescing with time. States with too rigid or immutable constitutions despite the need for changes may be victimized by extra-legal, violence and revolutionary mechanisms of change. The inflexible constitutions upon lose aspiration of the people may be subjected to opportunistic changes of which in most cases are hasty and arbitrary.¹⁷ Constitutional

- 14 *Proceedings workshop on constitution Buildings process*, *Infra*
- 15 *Ibid*.
- 16 *Choice of constitutional Reform: Constitution Making, Constitutional Amendment and Constitutional change*, at <http://www.idea.int>

17 Fombad C. M *Challenges to Constitutionalism and Constitutional Rights in Africa and the enabling Role of political parties; lessons*

changes through amendment reflect its character as a living document which serves different generations clockwise with the changing circumstances. Constitutional changes through amendment are inevitable. Thomas Jefferson the former president of USA (between 1801 -1809) emphasized on the need to amend the constitution. He states:

*'No work of man is perfect. It is inevitable that in the course of time, imperfections of a written constitution will become apparent. Moreover the passage of time will bring changes in society which a constitution must accommodate if it is to remain suitable for the nation. It was imperative, therefore, that a practicable means of amending the constitution be provided.'*¹⁸

It therefore follows that a constitution should not be viewed as too sacred to be touched. Constitutional amendment is, sometimes, a necessity. Although a constitution has a special significance and sanctity which must be accorded full respect, it is not immutable.¹⁹ Its formulation cannot be equated with infallible and immutable holy book whose letters have eternal application. It should therefore be subjected to amendment according to society needs.

4.1 Constitutional Amendment and Entrenchment

Amendment is a minor improvement²⁰ or a small change made on a law or a document.²¹ The process of changing a law or document may also be termed as amendment provided the changes are not so radical. Furthermore, amendments may be described as changes, which are effected, on legislation for the purpose of adding to, modifying or correcting its operation.²² The rationale behind amendment

and perspectives from south Africa, (2007) at www.saifac.org.za accessed on 20th January, 2018 at 12:40 PM

- 18 *The Malawi Law Commission, Constitutional Review Program*; Discussion Paper No. 7 Amendments to the constitution and preservation of its Sanctity, June, 2006 at www.lawcom.mw accessed on 20th January, 2018 at 8:55 A.M
- 19 *Amendment to the Constitution and Preservation of its sanctity*; *loc.cit*.
- 20 *Concise Oxford Dictionary – 10th Edition*
- 21 *Oxford Advanced learners Dictionary 6th edition* Oxford University Press, 2000. p.34
- 22 *Oxford Dictionary of Law 5th edition*, Oxford University Press,

- 1 Ghai Y., *Constitutional making Process*; A Paper presented at Tanganyika law society Annual General Meeting (AGM) held at Arusha from 19th -20th Feb.2011.
- 2 *Participatory Constitution Making Centre for Constitutional Dialogue (CCD)* at <http://ccd.org.np>; accessed on 20th January, 2018 at 8:55 A.M
- 3 *ibid*
- 4 Ghai Y., (2011), *Infra*.
- 5 *Proceedings workshop on constitution Buildings process*, A joint project of the Bobst centre for peace and Justice, Princeton university – interpeace international IDEA may, 2007. www.princeton.edu; accessed on 20th January, 2018 at 8:55 A.M
- 6 *ibid*
- 7 Ghai Y.,(2011), *Infra*.
- 8 *Proceedings workshop on constitution Buildings process. Infra*.

is rectification of some mistakes or omissions or improving the legislation. From the foregoing, constitution amendment may be defined as a minor improvement or changes effected on the constitution. Amending powers does not include fundamental changes or making a new constitution.¹ Upon amendment the constitution survives without losing its identity.² Amendments have implications that the constitution is a living document that accommodates the changing hopes, aspirations, and desires of the society.³

The manner and methods for amending the constitution are very important in preservation its sanctity. Amending powers are within the domain of people or the constituent assembly acting on their behalf.⁴ Usually amending powers are shared among the people, legislature, executive, and the judiciary or between a federation and its components.

The nature and extent of amendments on the constitution depends largely on the wording of amendment clause. Framers of constitutions are well-versed on the importance of the constitution. Being informed on the twin dangers of one generation to bind its successors through rigid constitutions and the usual tendency of politicians to twist constitutions to suit their ill desires, they try to harmonise the two evils by employing various tacks.⁵ These tacks include, entrenchment of some provisions that make the amendment impossible and secondly, by introducing special procedure to amend the constitutions.⁶

The mechanism of constitutional entrenchment makes some provisions the subject of immutable principles. The entrenched provisions cannot be amended.⁷ A dozen of states have adopted this approach. The *Basic law of the Federal Republic of Germany* provides under Art. 79(3) that;

affecting the division of the federation into Lander, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited.'

The same is the course for the *Constitution of the Republic of Azerbaijan*. Under Art. 158 it provides that

'There cannot be proposed the introduction of additions to the constitution of Azerbaijan Republic with respect to provisions envisaged in chapter 1 of the present constitution'

The French constitution under Art. 89 is of the same upshot. It provides that *'The republican form of government shall not be the object of any amendment'*. The same fortitude is reflected in the constitution of the Italian Republic. Art. 139 provide that *'the form of Republic shall not be a matter for constitutional amendment.'* The framers of the constitutions in the four cases listed above prohibit amendments on matters considered vital. Unless and until new constitution is adopted it is very difficult to change matters entrenched as provided above.

The second mechanism is through special procedure for amending the constitution. Several mechanisms of amending the constitution indicate the specialty of the document. The constitutions of the Republics of: *Latvia*,⁸ *Lithuania*,⁹ *Serbia*,¹⁰ *Spain*,¹¹ and *Estonia*¹² require certain amendments to be effected by referendum. Other constitutions require amendments to be effected by special majorities in the parliament. This is the case for countries such as *Tanzania*,¹³ *South Africa*,¹⁴ and *Australia*.¹⁵ It is the intendment of the

framers that the constitution as a fundamental law should not be the subject of twist and subversion attributed from the whims and emotions of the day.

Another method designed in many of the constitutions to prevent unpopular amendments is prohibiting amendment during natural calamities, states of emergence and wars. It is provided under Art. 196 of the constitution of *Belgian* that *'no constitutional revision may be undertaken or pursued during times of war or when the Houses are prevented from meeting freely on federal territory'*. The constitution of *Georgia* is of the same spirit as provided under Art. 103 that *'the announcement of a state of emergency or marshal law shall lead to the suspension of the revision of the constitution until the cancellation of the state of emergency or martial law'*. The Basic law of *Israel* presents another good example. Under Art 41, it is provided that *'Notwithstanding the provisions of any law, emergency regulations cannot change this Basic law, temporarily suspend it, or make it subject to conditions'*. The last example is given from the Republic of *Moldova*. The constitution of *Moldova* under Art. 142 prohibit its revision under state of national emergency, martial law or war. Unlike the above cited examples, the Constitution of *Tanzania* is silent on the matter.

Further, constitutional protection is by means of limited time frame to make amendment. The constitution of *Greece* under Art. 110 prohibit revision of the constitution before the lapse of five years from the completion of a previous revision. This requirement is aimed at protecting the constitution from being tampered with under political expediency. Sufficient time is providing rethinking and discussing the appropriateness of the intended amendment.

The less well thought method of constitution amendment is through the judiciary. The constitutions normally do not expressly provide amendment through the judiciary. However, the judiciary does amend the constitution through judicial constitutional interpretation. The *Malawi Law Commission*

rightly observed that *'As ultimate arbiter of how the constitution is interpreted, the judiciary wields more actual power than the constitution alludes to.'*¹⁶ Judiciary interpretation of the constitution fills hollows and pits in the constitution when trying to effect the intention of the framers.

5.0 Constitutional Amendment in Tanzania

The current Constitution of Tanzania was made in 1977. This constitution was preceded by four Constitutions which are the Independence Constitution of 1961, The Republican Constitution of 1962, The Constitution of the United Republic of Tanganyika and Zanzibar of 1964 and The Interim Constitution of Tanzania of 1965. The constitution of Tanzania consists of ten chapters, divided in several parts comprising of 152 Articles and two schedules. The preamble forms the preface of the constitution. It articulates the principles upon which the democratic society of Tanzania is to be nurtured. The society envisaged in the preamble is one based on freedom, justice, fraternity and concord. Furthermore, the preamble aims at building a society with a responsible government and an independent judiciary.

Chapter one of union constitution addresses on the United Republic of Tanzania; her people and political parties; and the popular policy of socialism and self reliance. It covers the nature of the state, separation of powers, Bill of rights and essential Objectives and Directive Principles of State Policy. Matters pertaining to the governments and legislatures of both the United Republic of Tanzania and Zanzibar are covered in Chapters Two, Three and Four. Chapter Five addresses the Superior Courts and matters concerning administration of justice in Tanzania. Chapter Six is providing on Commission for Human Rights and Good Governance and the Public Leaders Ethics Secretariat. Finance of the United Republic of Tanzania is covered in Chapter Seven. Chapter eight is for public authorities in particular local Governments. Armed forces of Tanzania are covered in

Amendments to this Basic law

2002 p. 25

- 1 Gatmaytan B. D, *Can Constitutionalism Constrain Constitutional Change?* University of the Philippines, College of law, at www.cics.northwestern.edu accessed on 20th January, 2018 at 11:09 A.M
- 2 Andhyarujina, *Infra*
- 3 Fombad C.M., *Supra* p.8.
- 4 Ssempewa, *Infra*
- 5 Posner A. E and Vermeule A., *Legislative Entrenchment*; *Infra*
- 6 *Ibid.*
- 7 Art. 79(3) of the Basic law of the Federal Republic of Germany

- 8 Under Art 77
- 9 Art. 148
- 10 Art. 203
- 11 Art 168
- 12 Art 162
- 13 Art 98 Two thirds of all members of parliament must assent to the Bill to amend the constitution.
- 14 Art. 74: 5 Percent of members of National Assembly and the National Council of provinces with a supporting vote of at least six provinces,
- 15 Art. 35: Apart from the majority of votes required to amend the constitution, the majority of representative from at least four Laender has to approve the amendment.

¹⁶ Fombad *Supra*. p.8

chapter nine. Chapter ten that is the last in the series deals with miscellaneous provisions.

The union constitution has two Schedules. The first Schedule contains the list of union matters. The second one has two types of lists. List one provides the laws the amendments of which require support by at least two thirds of all members of parliament. List two on the other hand, covers matters the amendments of which must be supported by a double two thirds of all members of parliament: one from mainland Tanzania and another from Zanzibar.

5.1 Amendments made to the 1977 constitution

The current constitution of Tanzania has been subjected to numerous amendments. These include 14 amendments the subject of discussion below. It is interesting that as early as two years after its adoption, the first amendment came in place.¹ The first amendment addressed fundamental matters in the court system of Tanzania including introduction of the court of Appeal of Tanzania. A year later the 2nd amendment was made.² That amendment aimed at accommodating Zanzibar Constitution of 1979. It removed possible disparities between the union constitution and the constitution of Zanzibar. On the same year, the Third amendment was made.³ The third amendment intended to create the balance between number of members of parliament and the constituencies. In 1982 The Fourth amendment was made and aimed at introducing new procedure for appointing Regional Commissioners. The much celebrated and most cited is the Fifth Constitutional Amendment of 1984. It recorded a turning point in the history of the country.⁴ The Fifth Amendment is much admired for introducing the Bill of Rights for the first time in the history of Tanzania. The Sixth amendment covered several matters including the new system of electoral commission and election complaints.⁵ The seventh amendment dealt with election of the

president of Zanzibar⁶

A notable development in the legal and political system of Tanzania was brought by the Eighth Constitutional amendment. Through Eighth amendment the system of multiparty replaced a single party culture that survived for almost twenty seven-years in Tanzania. The Ninth amendment introduced the new procedure for election of the president, his powers and matters incident thereto.⁷ Vesting the Election Commission with powers to supervise and monitor Councillor elections was the subject of Tenth Amendment.⁸

The Eleventh amendment covered several matters including regulating holding the posts of president and vice president and, enlargement of the composition of parliament.⁹ Important to note is the fact that Eleventh amendment buried the struggle for independent candidate in Tanzania. It statutory overruled the classical judgment of *Rev. Christopher Mtikila v. A. G.*¹⁰ Rugakingira J in the latter case had declared lawful for independent candidate to contest elections clockwise with candidates sponsored by political parties. Responsibilities and accountability by the principal leaders of the state and provisions on the public leader's ethics were among matters covered by the Twelfth constitutional amendment.

Thirteenth constitution amendment is another important event in political and legal system of Tanzania.¹¹ Firstly it made possible the president to win presidential election by simple majority vote. Secondly it provided for reservation of special seats for woman in the National Assembly. Thirdly it boosted administration of justice in Tanzania. The judiciary was empowered to have a final say on matters of determining rights and duties and on dispensation of justice. Lastly, it established Commission for Human Rights and Good Governance.

Fourteenth amendment¹² is the last in the series.

6 Made on 24th September, 1990
7 Act. No 20 of 1992.
8 Act No. 7 of 1993.
9 Act. No. 34 of 1994
10 (1995) TLR 31
11 Act. No. 3 of 2000
12 Act no 1 of 2005

It dealt with many issues. Firstly it covered Human Rights such as freedom of religion and association and rights to information and property. Secondly the amendment excluded the Speaker of National Assembly and Chief Justice from exercising presidential functions when the president is mentally or physically incapacitated. In the absence of the President, the Vice – President or Prime Minister are empowered to discharge his functions according to the order of seniority. Thirdly, women folks hailed that amendment. They were fairly covered. It provided for 30% of members of parliament to be women. Fourthly, it touched the Judiciary. It provided qualifications for a person to be appointed a judge of High Court and expressly guaranteed independence of Judiciary. Other matters covered by this amendment are creation of the offices of Deputy Attorney General and Director of Public Prosecution, and, qualification for the person to be appointed Chairperson of the Electoral Commission.

5.2 Parliamentary Powers to Amend the Constitution

The source of parliamentary powers to amend the constitution is found under Art. 98(1) of the constitution of Tanzania. The relevant provision states that;

Parliament may enact law for altering any provision of this Constitution in accordance with the following principles:

- a) *a Bill for an Act to alter any provisions of this Constitution (other than those relating to paragraph (b) of this sub article) or any provisions of any law specified in List One of the Second Schedule to this constitution shall be supported by the votes of not less than two thirds of all the Members of parliament: and*
- b) *a Bill for an Act to alter any provisions of this Constitution or any law relating to any of the matters specified in List Two of the Second Schedule to this*

constitution shall be passed only if it is supported by the votes of not less than two- thirds of all member of Parliament from Mainland and not less than two- thirds of all Members of Parliament from Tanzania Zanzibar.

In that respect any provision of the constitution may be altered provided the conditions set out in paragraphs (a) and (b) of Art. 98(1) of the constitution is met. The principal procedural requirement is the supporting votes of not less than two thirds of all members of parliament. The latter is the requirement for altering the provisions and laws the subject of Art. 98(1) (a) For the provisions and matters the subject of Art. 98(1) (b) The supporting votes is double two-thirds of members of parliament namely from Mainland and Zanzibar. The meaning of altering is amplified in sub-article two of Article 98. It is extended to modification or correction of those provisions or repeal and replacement of those provisions or the re- enactment or modification of the application of those provisions.

6.0 Judicial interpretation of Article 98 of the Constitution of Tanzania

The judiciary is vested with exclusive duty of administration of justice. The constitution of United Republic of Tanzania categorically provides under Art. 107A that the judiciary shall be the final authority in dispensation of justice. In discharging that duty the court interprets laws. Indeed, in different occasions the court is invited to offer the correct meaning during adjudication of rights and interests. Both the High Court and Court of Appeal of Tanzania got opportunity to offer the supposed meaning of Art. 98 of the union constitution in the popular *Reverend Mtikila's* cases.

6.1 The First Mtikila's Case

For the first time in history of Tanzania, the High Court of Tanzania was invited to decide on the powers of parliament to amend the constitution in 1995. This was in a popular case of *Rev. Christopher Mtikila v. Attorney General*.¹³ The petitioner in this case prayed

¹³ (1995) TLR 31

1 Act. No. 14 of 1979
2 Act. No. 1 of 1980
3 Act. No. 28 of 1980
4 Act. No 15 of 1984
5 Act. No 14 of 1990

before the High Court among other things to review and consider the validity of certain amendments to the constitution. He faulted the said amendments, as they appeared to infringe the right to participate in national public affairs and freedom of association both of which are guaranteed by the constitution. It was at this juncture that the High Court for the first time analysed the implication of Art. 98 in relation to the powers of parliament to amend the constitution in Tanzania. Lugakingira, J., (as he then was) gave a classical judgment on the matter. At first, he admitted enormous powers of parliament to amend the constitution. In his own words, Lugakingira J. (as he then was) stated;

These powers are evidently wide. It has to be accepted, in the first place, that parliament has power to amend even those provisions providing for basic human rights. Secondly, that power is not confined to a small sphere. It extends to modification of those provisions suspension or repeal and replacement of the same, re-enactment or modification in the application thereof

Despite enormousness of those powers the judge proceeded to state that;

Drastic as some of these terms may sound, I still do not believe that they authorise abrogation from the constitution of these rights. The provisions of Art. 98 should be read in the light of the claw back clauses in Art.30 (2) and 31.

The provision of Art. 30(2) qualifies principles of rights, freedom and duties as provided in part three of the Union Constitution. In Article 30 (2), it is provided that those principles will not affect the validity of any law or act which is fostering public good or interests, protection of rights and freedom of others, enforcing court's judgment or order and regulating formation and operation of private societies and organizations in the country. Art. 31 on the other hand empowers the parliament to legislate during the state of

emergence for the purpose of maintaining national security.

The judge viewed that powers of parliament to amend provisions of chapter one part three of the constitution are limited by the provisions of Art. 30 (2) and Art. 31. Where the parliament is empowered to suspend, repeal or replace any provision of the constitution, the same ought to be done within limits as formulated above.

6.2 The Second Mtikila's Case

The High Court of Tanzania was chanced for the second time to consider powers of Parliament to amend the constitution in Tanzania. This was in the case of *Christopher Mtikila v. The Attorney General*¹ which is referred herein as *the Second Mtikila's case*. The petitioner in this case among other things sought a court's declaration that constitutional amendments on Articles 39 and 67 of the constitution of the United Republic of Tanzania as introduced by amendments contained in Act no. 34 of 1994 was unconstitutional. It must be noted that what the petitioner challenged was the eleventh constitutional amendment, which in principal maintained the status quo on the law prior to the High Court decision in the first Mtikila's case. That amendment statutorily overruled the decision of the High Court in the latter case which had flashed a green light for independent candidates to participate in Presidential, Parliamentary and Local Council Elections.

For the second time the High Court got opportunity to consider amending powers of parliament in view of Art. 98 of the constitution. In its judgment delivered on 5th May 2006 the court squarely adopted the findings and observations by Lugakingira J., in the first Mtikila's case.

The court observed that complying with procedural requirements under Art. 98 do not necessarily validate constitutional amendment. It held that despite existence of Art. 98, amending powers of parliament are limited. The court made a further step ahead the first Mtikila's case by adopting

¹ Misc. civil cause No. 10 of 2005 (unreported)

the doctrine of the basic structures or features of the constitution. It was held that while exercising its amending powers, the parliament cannot alter essential features of the constitution. For the first time in the constitutional history of Tanzania the doctrine of the basic features was recognized as inbuilt in the union Constitution.

The High Court in the second Mtikila's case held unconstitutional the 11th Amendment to the constitution. It was held that the parliament had exceeded its amending powers under Art. 98.

6.3 The Court of Appeal's Restraint

The Attorney General who lost his case before the High Court in the second Mtikila's case appealed to the Court of Appeal of Tanzania. The Court of Appeal was invited to interpret Art. 98 of the Union constitution under which the scope of powers of parliament to amend the constitution became an issue.

The court discarded the High Court decisions on limitations on parliamentary powers to amend constitution as it stated;

Let us now examine our constitution of 1977. We have already seen that Art. 98 (1) provides for the alteration of any provision of the constitution, that is there is no article which cannot be amended. In short there are no basic structures.

The court rejected existence of substantive limitations on parliamentary amending powers. The only limitation recognised by the court is procedural. According to the court, failure to obtain the requisite number of votes as provided under Art. 98 (1) (a) may call for nullification of the amendment as being unconstitutional. Apart from procedural constraints, the parliament was afforded a leeway by the CAT to tamper with the constitution in any manner whatsoever. The doctrine of essential features of the constitution was dismissed by the CAT. The court recognized nothing as fundamental feature in the constitution that should be immune from parliamentary emasculation or

twist through amendment.

Critically examining the decision of the CAT, one may ask; does it mean that amending powers of the parliament are substantively unlimited as held by the CAT?; and if that is the case, can the parliament repeal and replace the whole constitution through amendment? Can the parliament through amendment surrender the sovereignty of the state to a foreign state? Or abolish the state of Tanzania? Is it within the powers of parliament to abolish its office and all courts and vest permanently the powers to make laws and adjudication in the office of the president or in the foreign investment company? Can the parliament through amendment introduce slavery and resurrect colonialism in Tanzania?

Arguably, in view of the precedent and observation by the CAT, the parliament in Tanzania can do all the above constitutional evils without facing legal constraints, provided it is exercising amending powers under Art.98 of the constitution. To hold that the parliament may legally commit the above constitutional evils leads to absurdity. The absurdity is basically rooted in the CAT decision in *the Attorney General v. Rev. Christopher Mtikila* of which it may be said its decision was given *per incurium*.

7.0 Limitations on Parliamentary Powers to Amend the Constitution

It may fairly be submitted that powers of Parliament to amend the Constitution are subjected to five limitations. These are the doctrines of Constitutionalism, Supremacy of the Constitution and the Basic Structure of the Constitution. Other limitations are the Sovereignty of the People and the Third Majority Principle. According to the latter principle, amendment to the constitution must be supported by not less than a two – third of all members of the Parliament.

7.1 The Doctrine of Constitutionalism

The doctrine of constitutionalism entails essential principles and rules, which are implied in the constitution of a democratic state. The doctrine expands the meaning of the constitution into a broader perspective.

It goes beyond the letter of the text. It is not necessary to have a written constitution for constitutionalism to exist. What is needed is a culture of restraint by the government to exceed its power. The central theme of constitutionalism is a limited government. The very idea of a constitution is to provide powers to the government, procedure to exercise those powers and laying foundations for limitations over those powers. In this premise, the limitations on the powers of government include the limitation of the parliamentary powers to amend the constitution.

Fombad cements on the importance of limiting constitution amendment. In his views, the value of a constitution will be lost as the supreme law of the land rooted on the will of the people if it can be altered easily, casually, carelessly by artifice or by implication under the influence of a group of people with ill desires.¹ He maintains that control over amendments on the constitution is one among the core elements of constitutionalism. Amendments that undermine constitutionalism, Professor Gatmytan submits, pose the same threats as those caused by a coup.² In Jackson's opinion, the goal of constitution making is not to have a written constitution in place, rather to promote constitutionalism.³ In light of his argument, the principal purpose of constitutionalism is not only to establish a legitimate constitution but also to maintain it.⁴

Fombad again links constitutionalism with control of constitutional amendment. In his view, constitutionalism is backed by the need to formulate constitutions that are not simply programmatic, shams, or ornamental documents as objects for politician's

manipulation.⁵ His emphasis is based on the need to have control over constitution amendment.

The doctrine of constitutionalism stands between the need for power and control of those powers. It has a practical utility to enforce both powers and limitations to the same. It answers the question "how can we exist from disorder without falling into tyranny."⁶ It prevents suspension, circumvention or disregarding of the constitution by any authority in the state. Therefore constitutionalism subscribes to control amendments on the constitution as one of its core elements.⁷

7.2 Supremacy of the Constitution

Tanzania does not adhere to the popular English doctrine of parliamentary supremacy. According to that doctrine every Act of parliament is supreme and cannot be questioned on any ground whatsoever. The position is different in Tanzania. With a written constitution the doctrine of parliamentary supremacy does not stand. The governing principle is constitutional supremacy. The constitution in Tanzania is a supreme document. It is the source and weighing scale of power. Acts of parliament are subordinate to the constitution. Laws made by the Parliament should be consistent with the constitution. Otherwise, such acts shall be null and void. Constitution supremacy is explicit under Art. 64(5) of the Union Constitution. Art. 98 of the Constitution as a matter of necessity should be read with substantive limitations on amending powers.

7.3 The Basic Structure Tenets

There are some attributes of the constitution forming its identity. These are fundamental values also known as basic features. The latter remains and survives constitutional amendments. In Tanzania these may include existence of the United Republic of Tanzania and the bill of rights. The parliament through

constitutional amendment is powerless to scan them out. The concept of unlimited amending powers of parliament as held by the CAT is not consonant with principles of basic structures of the constitution. Although the doctrine was rejected by CAT, it is still a proper and efficient safeguard against parliamentary usurpation of amending powers. Samatta J (supra) raises a genuine question on the matter when he states that; "in any case why should the features of the constitution which are incontestably paramount not be so regarded?" He further states that "..... The Court of Appeal sadly has given parliament a blank cheque to mutilate the constitution at the altar of political expediency."

The union constitution has its own identity. There are some fundamental values and attributes without which our constitution will be something else. These values and attributes were envisioned by original architect of the constitution. They form core values to the constitution. They are undeniably basic and fundamental.

In India, the Supreme Court held against unlimited parliamentary amending powers. *In Minerva Mills Ltd. & Ors. v. Union of India & Ors*⁸ the Supreme Court stated;

Parliament too is a creature of the constitution and it can only have such powers as are given to it under the constitution. It has no inherent power of amendment of the constitution and being an authority created by the constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the constitution as to alter its basic structure or to change its identity. Now, 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 constitution including its basic structure and even to put an end to it by totally changing its identity. It will therefore be seen that the limited amending power of parliament is itself an essential feature of the constitution.

The powers to amend the supreme document are now under control in India. Her constitution has survived political upheavals and emotions. The seasonal majorities in parliament come and pass without substantially twist the constitution. Using the basic structure doctrine the court has preserved the heritage of India.

By learning examples from India it is the task of the court in Tanzania to identify, clarify and protect constitutional values in the constitutional set up of Tanzania. Absence of a litmus test on the doctrine of basic structure, is burdening the court in Tanzania to formulate one for the purpose of determining essential values of the constitution. This in turn will offer protection and shield the fundamental values of union constitution against emasculation by the parliament exercising amending power. Application of the doctrine of basic structure in Tanzania is a necessity.⁹ Some values of the constitution of the United Republic of Tanzania are incontestably paramount.¹⁰ These include:

- a) Fundamental rights under part III of the Union Constitution
- b) Supremacy of the constitution art.64 (5) of the constitution.
- c) Sovereignty of the people. Art. 8(1) (a) of the constitution.
- d) The United Republic of Tanzania Art.28 of the constitution.

1 . Fombad M C, *Limits on the power to amend constitution: Recent Trends in Africa and their potential impact on their constitutionalism*; A paper presented at the world congress of constitutional Law, Athens Greece, 11-15 June 2007.

2 Gatmytan B. D, *Can Constitutionalism constrain constitution change?* paper presented at the IALS conference on constitutional law, American university Washington college of on law and Georgetown university law centre, Washington DC, United States of American, September 11th -12th, 2009

3 Jackson C. V, what's in a name? Reflections Timing, Naming and constitution making, (2008) at <http://scholarship.law.wm.edu> accessed on 20th January, 2018 at 12:40 PM

4 Jackson; Ibid

5 M. Fombad Charles, *Challenges to Constitutionalism and Constitutional Rights in Africa and the enabling Role of political parties; lessons and perspectives from south Africa*, (2007) at www.saifac.org.za accessed on 20th January, 2018 at 12:40 PM

Jackson; Infra

6 Gatmytan B. D. Infra

7 Fombad M. C. Infra

8 (1980) AIR 1789

9 Chief Justice (rtd) Barnabas Albert Samatta, *Judicial Protection of Democratic Values: The judgment of the Court of Appeal on Independent candidates*. A Public Lecture delivered at Ruaha University College, Iringa, on 25th November, 2010 at p 9

10 Shivji, I.G. "Constitutional limits on parliamentary powers;" in *the Tanzania Lawyer Special Edition*, Central Printing Works Ltd, Dar es Salaam p.39-4 also Shivji I.G. (1990), *The Legal Foundations of the Union*, Dar es Salaam. Dar Es Salaam University press ss. 18-29.

- e) Independence of judiciary
- f) Judicial constitutional review
- g) Separation of powers
- h) Democratic character of the State
- i) Rule of law
- j) Limits on parliamentary amending powers.
- k) Secular character of the constitution.
- l) The principle of free and fair elections.

These are some of the incontestably fundamental values.¹ They form part of the basic structure of the union constitution. It is stressed here that, the basic structure doctrine does not make any provision of the constitution un-amendable.² Any provision can be amended. However, amendment should aim to improve but not to destroy. Whereas amendment can be made on any provision of the constitution and in any manner the parliament deems fit, such amendment should not damage, twist or mutilate the basic structure of the constitution.

7.4 Sovereignty of the People

Sovereignty is simply referred to as supreme power or authority.³ It may further be referred to as the quality of supremacy or authority over and above others in certain matter such as making the law. People are the primary source of powers in the state. The basic law is made by the people and for the people. In Tanzania sovereignty of the people is provided under Art. 8 (1) of the Union Constitution which states that:

The United Republic of Tanzania is a state which adheres to the principles of democracy and social justice and accordingly; Sovereignty resides in the people and it is from the people that the Government through this constitution shall derive all its powers and authority...

The concept of unlimited powers of parliament to amend the constitution is not consonant with sovereignty of the people. With unlimited amending powers, the parliament, may repeal and replace the whole constitution. Replacing the whole constitution means making a new constitution. The latter is within the mandate of the people and not the parliament. Similarly, amending or changing identity of the constitution is within the domain of the people. The people of Tanzania never surrendered their sovereignty to the parliament. Sovereignty of the people is inherent. Under no circumstance sovereignty of the people can be violated.

7.5 Procedural Constraint: The Third Majority Principle

Another limitation on parliamentary amending powers is procedural. Art. 98 of the Union Constitution provides a third majority principle as a condition to amend any provision of the constitution. Whereas some provisions and laws specified in the constitution may be altered by a support of not less than two- third of all the members of parliament,⁴ others requires a double two- third vote of support from members of parliament; one from Mainland Tanzania, and another from Tanzania Zanzibar.⁵ It is common ground that courts take procedural requirements seriously. Amendment to the constitution is invalid, if procedural conditions are disregarded. The purported amendment will be unconstitutional. This fact was endorsed by the CAT in *Attorney General v. Rev. Christopher Mtikila's* (Supra) when it is stated:

However situations can arise where the High Court and this court can nullify a constitutional provision on the ground that it is unconstitutional in the sense that it was not enacted as provided by Art. 98. An example is where a constitutional amendment is challenged on the ground that it did not obtain the prerequisite number of votes according to Art. 98 (1) (a). We already pointed out earlier

that generally a constitutional amendment requires the support of a two- thirds majority and under Art 98 (1) (b) the support of two thirds majority of all the members of parliament from Zanzibar and all members of parliament, from the Mainland. If such a challenge is sustained then the court might have to find that the article has not been enacted in accordance with the constitutional provision, and is, therefore, unconstitutional.

The third- majorities' principle therefore is regulating amending powers of parliament. Disregard of the principle will invalidate any purported amendment on the union constitution. To the extent of complying with procedural safeguard provided under Art.98 of the constitution, amending powers of parliament are limited.

8.0 Conclusion

The constitution is a solemn and serious document that forms heritage of the nation. Fundamental values and identity of the state are reflected in the constitution. As the society envisaged by the constitution is not static, the constitution inevitably becomes obsolete with time. A need arises to regularly update the constitution in light of changing

needs and circumstances of the society. The changes on the constitution however, may be ill- motivated. The constitution can be altered for political gains. Fundamental values and attributes of the society embodied in the constitution can be distorted at the sake of political expedience. As a result there should be limitations on parliamentary amending powers. The holding by the Court of Appeal of Tanzania (CAT) that parliamentary amending powers are substantively limitless is creating confusion in the field of constitutional law. It is against the fact that there are both substantive and procedural limitations on parliamentary powers to amend the constitution, which includes the principles of constitutionalism, supremacy of the constitution, the doctrine of basic structures, sovereignty of people and approval by the third majority. Because the decision of CAT is, arguably, a bad precedent, in theory and practice it is recommended firstly for CAT to get it reversed. Secondly, necessary steps must be taken through constitutional re-forms involving the electorate to clarify substantive limitations of powers of parliament to amend the constitution. Thirdly, there should be entrenchment of core constitutional values. And fourthly, until the necessary reforms are adopted the parliament should not exploit existing leeway to the detriment of constitutional fundamental values and identity.

¹ Samatta Infra
² It only protect constitutional core values from distortion
³ *Concise Oxford Dictionary*; Tenth Edition, London Oxford University Press 2001on C.D.ROM.2001version

⁴ Art. 98 (1) (a)
⁵ Art. 98(1)(b)