Theory of Constitutional Unamendability; The Legality of Sec.23(4) of the Zanzibar Constitution, 1984

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DOI: https://dx.doi.org/10.47772/IJRISS.2024.809074

Received: 29 August 2024; Accepted: 04 September 2024; Published: 02 October 2024

ABSTRACT

Many constitutions across the world contains un-amendable provisions, in order, inter alia, to protect the basic characteristics of the constitutional principles seeming as to be at risk of repealed by the parliaments. From the same aspect, this article meant to examine un-amendable provisions stipulated in the Constitution of Zanzibar, 1984. In doing so, the article reviews the origins, formation and substance of un-amendable provisions. To some extent, un-amendable provisions drawn in the 1984 Constitution, executes certain functions and imitate the significant values of the constitutional principles. In spite of these limitations being used as a protector of genetic codes, but the constitutional drafters were keen enough to find a way not to diminish the power of the people to modify their way of life through un-amendable provisions.

Keywords: un-amendability, infinity articles, constitutional identity, constitutional design.

INTRODUCTION

In many democratic constitutions the drafters balance stability and flexibility by creating different amendment processes in every provision. This process is known as a method for reconciling the tension between stability and flexibility. Considering what Edmund Burke wrote 'A state without the means of some change has no means of its conservation"[1]. The constitutional makers separate the constitutional matters to those requires a simple amendment procedure, and those which enjoy a special protection[2]. Those protected provisions are in some perspectives are considered to be un-amendable provisions, either no amendment is allowed to those provisions. However, courts have given different opinions on this mystery.

This paper focuses in conceptualizing and explaining the character of "un-amendable provisions" through the Constitution of Zanzibar, 1984 and to some extent the article touches the Constitution of the United Republic of Tanzania, 1977. This move has both advantages and disadvantages. Apart from sticking to one side of the republic, the article explores them equally regardless of their level of authority and effectiveness. As was confirmed by different authors, the constitutional text itself matters for both practical and symbolic reasons[3] . In this article, both comparative and theoretical were applied to examine various constitutional provisions which limiting amendments in both constitutions in order to point to a comprehensive pattern of a constitutional behavior. On the other hand, theoretical approach aims to identify the existing character constitutions and offer an explanation.

This approach is very important for this study since the inclusion of un-amendable provisions in many democratic constitutions has become an essential element of modern constitutional design globally, and moreover, in recent decades un-amendable provisions have expanded in terms of their detail which leads to a careful attention. This article is both comparative and theoretical. It is comparative in examining different provisions substantively limiting amendments (contra to procedural limitations) in order to see in a wide-range

[1] EDMUND BURKE, Reflections on the Revolution in France, Kessinger Publishing, 16 (2004)
[2] RICHARD ALBERT, Amending Constitutional Amendment Rules, Int'l J. Const. L. 11-12. (forthcoming 2015).
[3] 7 BEAU BRESLIN, From Words to Worlds – Exploring Constitutional Functionality, John Hopkins University Press, 3, 9 (2009)

what is called a "constitutional behavior". On other hand, the article employed theoretical method to draw an explanatory theory from the comparative practice[4]. It should be noted that, this article is not intending to argue whether un-amendable provisions are essentially good or bad, or argued on their effectiveness or enforceability, but rather to study explicit limitations on the amendment power drawn in the constitution of Zanzibar, 1984.

METHODOLOGY

The analysis of case laws and the collection of data from primary sources and the survey of secondary sources become necessary in this article as required in any doctrinal research to answer the research questions. With this move, a careful review of literature helped to answer the research questions precisely. A survey of experienced people and unstructured interactions with them helped the researcher to portray the facts in more aspect.

The Nature of Amendment Powers

For the purpose of this Article, we must first discuss the nature of that power and it is healthier to instigate by enlightening the hypothetical distinction between constituent power and constituted power. The amendment power considered as an exclusive power found in a between those two powers, in other words can be regarded as sui generis.

Constituent power in one hand is regarded as the authoritative principle of modern constitutional requirements to create the constitutional order of a state. The idea of constituent power discovers its first expressions in English political considerations in mid-seventeenth century, and again in eighteenth century the theory has been more fully expressed in the French and North-America uprisings. According to Emmanuel Sieyès[5], a constitution is not the work of a constituted power but a constituent power. It is the direct expression of the people and thus its representative. On other hand, the Constituted powers are legal powers given by the constitution itself and the same limits it. In a simple word, the constituted power derived its existence from the constituent power and depend on it. Therefore, the constituent power is greater than constituted power.

Based on those theories, the amending power is multi-faced. It moves dual structures of both constituent and constituted powers; hence the question of its nature becomes complicated.

Un-amendable Provisions

Un-amendable constitutional provisions arose with the appearance of the first constitutions in the USA and Norway, but did not become widespread.[6] Un-amended provisions again were included in the Constitution of France in 1885, continued this tradition. After the Second World War, countries began to protect their territories by incorporating un-amendable provisions to their constitutions. Today, the tendency of unamendability is a global constitutionalism[7]. The term u*namendability* includes explicit or implicit conflict of constitutional matters to their amendment[8]. When we look on constitutions which were passed between 1989 and 2013, we'll find that almost 53% of those constitutions have unamendable provisions[9]. Unamendability cannot be seemed as simply declarative. In various countries, such as India, Turkey and Tanzania *especially to the union heart provisions*, any alterations which violates those unamendable articles may be taken as unconstitutional and nullified by the Judiciaries. If the amendments were done according to the drawn procedures can be declared unconstitutional when the new content is puzzling the total intention of the whole constitution, after all, the amendments is not meant to change the constitution[10]

[4] MAURICE ADAMS/ JACCO BOMHOFF (eds), Practice and Theory in Comparative Law, CUP, 1, 7-8 (2012)
[5] E.-J. Sieyès, Political Writings, Indianapolis, Hackett Publishing Company, 2003, p. 136
[6]
[7] H. Abdu (2024),
[8] R. Albert, "Counterconstitutionalism", *Dalhousie LJ* 1, 31, 2008, p. 37-44
[9] Y. Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers*, Oxford, OUP, 2017, p. 20-21
[10] U.K. Preuss, "The Implications of 'Eternity Clauses': The German Experience", *Isr. L. Rev.*, 44(3), 2011

The Scope of Amendment Powers

From what illuminated in previous parts of this article, this part provides the intellectual ground that elucidates various open and hidden limitations on the amendment power. Basically, constitutions do have rules to its amendments. However, no specific form as to the application of amendments. Some countries are more persuaded to alter the text of their Constitutions. The German Basic Law of 1949 was amended on more than 50 times, the Constitution of Ireland, 1937 had been altered on 29 occasions and the Zanzibar Constitution,1984 had only 11 times.

The Legitimacy of Unamendable Provisions

Constitutional amendment is one of the debated topics in the literature[11]. But, unamendability takes the topic to the next level, it is therefore defined as "absolute"[12]. Some scholars argue that there is no law which cannot be changed[13].

Observed from the viewpoint of the formal theory, explicit unamendability imitates the impression that any exercise of the amendment power must stand by the rules and exclusions stipulated in the constitution, including fundamental limits. In that regard, Schmitt[14] observed that, unamendable provisions are an example of the fact that the amendment power may be restricted with regard to the themes of certain amendments, and can amend the constitution merely under the assumption that the distinctiveness and stability of the constitution as a totally is preserved. It should be noted that, the substantive theory can simply elucidate those unamendable provisions that intent to prevent essential alterations in an effort to safeguard the constitution's integrity and the stability of its constitutive values. Normally, the secondary constituent power, (a delegated power), acts as a trustee of the primary constituent power. It is limited based to the conditions specified in the constitution, including various functional limits.

Looking to the delegation theory connecting to the legal position of the Constitution of Zanzibar, 1984, after the tenth amendment, the House of Representatives had a power to amend Article 24(3)[15] that were preserved as unamendable provisions since the said amendment did not remove the constitution's integrity and the stability of its constitutive values.

In most cases, anxiety appears when the amended provision confined itself in unamendable tomb like Art. 1 and Art 9(3) that carry a special integrity of the constitutional tenth amendment as well as art. 23(4) that eliminates the wing of Court of Appeal on fundamental rights cases, again French inserted un-amendable provision in 1875 that created republican form of government Constitution. The provision invited a huge scholarly debate[16].

The Constitution of United Republic of Tanzania, 1977 which is regarded as an apex law of the republic, lose its validity when faces a conflicting norm formulated by the Zanzibar's authority over non-union matters since the primary constituent power can limit the secondary constituent power.

For that reason, cutting down the jurisdiction of the court of appeal which is the union court over fundamental rights cases in Zanzibar did not destroy the constitution by upsetting the basic principles, it is absolute clear that delegated power acquired by the House of Representatives were not ultra vires. The House which is so called the house of the people have been vested the power to amend any provision of the constitution on behalf of the people under Art.80 of the constitution. It is absolute right to argue that the Tenth amendment of the Constitution of Zanzibar, 1984 were not designed for modifying the fundamental principles of the Union

[11] E.A. Youni, "The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda", *U. Pa. J. Const. L.*, 10, 2007-2008
[12] R. Albert, (2010) "Constitutional Handcuffs", *Arizona State LJ*, 42(3)
[13] F. Regelsberger, (1893) *Pandekten: Systematisches Handbuch der Deutschen Rechtswissenschaft*, I Abt Bd 1, 7 Teil s. 109
[14] C. Schmitt, Constitutional Theory, op. cit
[15] The Constitution of Zanzibar, 1984
[16] W. Bennett Munro, The Governments of Europe, (3rd edn.), New York, The Macmillan company, 1938

constitution nor changing the constitution's ingredient or Schedule II of the Constitution of Republic of Tanzania, since such amendment drove from the people's primary constituent power, not the delegated organs.

CONCLUSION

From what we observed in this article, unamendability despite being a powerful instrument which need to be used cautiously, it is attuned with the nature of amendment authority. Quoting the words of Charles Howard[17] that a constituted power is one that is defined, and there can be no definition which does not of necessity imply a restriction. The amendment power is not a normal created power, but a sui generis one.

The Zanzibar transformation from vertical to horizontal form of fundamental rights enforcement employed under the tenth constitutional amendments in 2010 brought numerous benefits to Zanzibaris, this ample transformation, which conveyed about a new constitution principle, suffered legitimacy arguments and clashes of identification under the Union perspectives. By the same token, the Union Constitution has been under change since 1977 through a series of constitutional amendments without swallowed any legitimacy claim. It's obvious that, when amendment provisions are used for creating new constitutional principles of one side of the union, not only legitimacy issues are raised, but it also raises trouble in clearly breaking with the union constitution.

This article proves that what was taken as unconstitutional constitutional amendment does not involve an ambiguity, but merely a misuse of assumptions. In this case Art. 24(3) of the Constitution of Zanzibar, 1984 is purely legitimate and was under the mandates of the House of Representatives of Zanzibar.

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