

# Pacifying the Crises of (Un)Constitutional Amendments: The Case of Zimbabwe's Amendment (No.1) and (No.2) Acts

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## Abstract

*Zimbabwe enacted a new constitution in 2013 amid high hopes for a turn towards a new era of democratisation, constitutionalism, and adherence to the rule of law. However, subsequent to 2013, Zimbabwe entered an era of regression on the democratic values espoused by the new constitution. The apogee of the regression is the amendments of the Constitution, neutralising some of its most progressive elements. This paper analyses two recent constitutional amendments: amendments no. 1 and no.2, in the Zimbabwean context pertaining to judicial appointments and terms of office. It also evaluates the potential of judicial review of substantive validity of constitutional amendments through the lens of the doctrine of 'unconstitutional constitutional amendments'. This is in defence of core constitutional values such as equal protection of the law, rule of law, separation of powers, and democratic participation. The central argument of this paper is that the amendments, which contravene the values espoused by the Constitution, are substantively unconstitutional because they precipitate a multi-pronged crisis of constitutionalism. These crises are embodied in the indirect control of the judiciary by the executive, and in 'rule by law' replacing 'rule of law'. This article proposes that these crises can be remedied by exploring the doctrine of unconstitutional constitutional amendments.*

**Keywords:** *Constitutionalism, Rule of Law, Democracy, Constitutional Amendment, Judicial Review, Judicial Independence, Basic Structure*

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## Table of Contents

<b>I.</b>	<b>Introduction .....</b>	<b>77</b>
i.	Background: Zimbabwe's constitutional revolution .....	77
ii.	The crises.....	79
<b>II.</b>	<b>The Doctrine of Unconstitutional Constitutional Amendments</b>	<b>81</b>
i.	Zimbabwe's post-2013 constitutional regression .....	81
ii.	The doctrine of unconstitutional constitutional amendments ..	84
<b>III.</b>	<b>Towards Constitutional Amendment Restraints in Zimbabwe ...</b>	<b>90</b>
i.	Constitutional Amendment (No.1).....	90
ii.	Constitutional Amendment (No.2).....	91
iii.	A Zimbabwean view of unconstitutional constitutional amendments .....	93
<b>IV.</b>	<b>Judicial Review: The Role of Judges in Constitutional Safeguards</b>	<b>95</b>
<b>V.</b>	<b>Conclusion .....</b>	<b>98</b>

## I. Introduction

### i. *Background: Zimbabwe's constitutional revolution*

In 2013, Zimbabwe adopted a new Constitution amid hopes that it would usher in an era of democratisation, constitutionalism and the rule of law.<sup>1</sup> The Constitution of 2013 (hereafter 'the new Constitution') replaced the Lancaster House Constitution of 1980 (hereafter 'the 1980 Constitution' or 'the repealed Constitution'), which had been adopted at Zimbabwe's independence from the settler-colonial rule.<sup>2</sup>

The process of adoption of the new Constitution differed from the 1980 Constitution because, for the first time, the new Constitution is a home-grown document drawing from wide public consultations by the Constitutional Parliamentary Select Committee (COPAC) after the rejection of other draft constitutions that did not meet the expectations of public participation.<sup>3</sup> It is a values-based constitution which enumerates among its founding values supremacy of the Constitution, respect for the rule of law, protection of fundamental rights and freedoms, and good governance, to name a few.<sup>4</sup> These have been construed to be foundational pillars against which the interpretation of the rest of the Constitution is to be undertaken.<sup>5</sup> Thus, a reasonable assumption can be made that all provisions of the Constitution must be in harmony with these foundational values. If the values specify that the rule of law is foundational, then the rest of the provisions of the Constitution must also embody the rule of law, and not ignore it.<sup>6</sup>

Like the 1980 Constitution, the new Constitution was also born out of political contestation and conflict.<sup>7</sup> The new Constitution sought to address

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<sup>1</sup> Buchanan-Clarke S and Mashingaidze S 'Rebuilding constitutionalism and rule of law in Zimbabwe' Good Governance Africa, August 2021 - <<https://www.africaportal.org/publications/rebuilding-constitutionalism-and-rule-law-zimbabwe/>> on 16 June 2022.

<sup>2</sup> ConstitutionNet 'Constitutional history of Zimbabwe' 2016 - < <https://constitutionnet.org/country/zimbabwe>> on 12 June 2022.

<sup>3</sup> Konrad Adenauer Stiftung 'Progressive reforms in the new Constitution of Zimbabwe: A balance between the preservative and transformative constitution-making process', February 2015, 2.

<sup>4</sup> Article 3, Constitution of Zimbabwe (2013).

<sup>5</sup> Veritas 'Founding principles of a Constitution', 18 May 2016 - < <https://www.veritaszim.net/node/2068>> on 16 June 2022.

<sup>6</sup> Veritas 'Founding principles of a Constitution', 18 May 2016 - < <https://www.veritaszim.net/node/2068>> on 16 June 2022.

<sup>7</sup> While the 1980 Constitution was a negotiated settlement to end the war of liberation from white settler rule, the 2013 Constitution was a core agreement of the parties to the Global Political Agreement of 2009, which was meant to end a political impasse after a discredited election marred by electoral violence. See further ConstitutionNet 'Constitutional history of Zimbabwe' 2016 - < <https://constitutionnet.org/country/zimbabwe>> on 12 June 2022.

multiple challenges that resulted from the several amendments to the repealed Constitution by the Parliament of Zimbabwe. Many of the amendments to the repealed Constitution were made to stifle the effect of judgments of the Zimbabwean courts.<sup>8</sup> The new Constitution omitted many of the qualifications on rights that were introduced in the 1980 Constitution through the amendment process. Some of these amendments increased the powers of the executive president, who exerted control on the levers of the State, including the judiciary, the prosecution, and the nominally independent commissions through the power of appointment which was not devolved in any meaningful way.<sup>9</sup>

The 2013 Constitution introduced several reforms that were coloured by the founding values provision<sup>10</sup> and shaped by the past experiences and deficiencies of the state, including clauses that limited the power of the executive and insulated the levers of the state from political interference. For instance, and of importance to this research, the independence of the judiciary was bolstered by the introduction of several safeguards. Firstly, the judicial appointment process was devolved, giving a more prominent role to the general public, including ordinary citizens and civic society organisations, and the Judicial Services Commission in the appointment process.<sup>11</sup> Public nominations and interviews were introduced for all judges of the superior courts, namely the High Court, the Supreme Court of Appeals and the Constitutional Court.<sup>12</sup>

Furthermore, the administrative heads of the courts, namely the Chief Justice, Deputy Chief Justice, and the Judge President of the High Court, as with any other judge, were also subject to public interviews as part of their appointment process.<sup>13</sup> Thus, the obscure nomination and appointment process characterised by concentrated executive power under the 1980 Constitution was replaced with a more transparent process, including more role-players, putting a greater emphasis on merit while reducing opportunities for patronage characteristic of

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<sup>8</sup> Hofisi S and Masunungure E 'Rule by law or rule of law' Good Governance Africa, 1 July 2020 – <<https://gga.org/rule-by-law-or-rule-of-law/>> on 12 January 2022. See also Madhuku L'A survey of constitutional amendments in post-independence Zimbabwe (1980-1999)' 16 *Zimbabwe Law Review* 1999, 82-107; and The Editors 'Summary of amendments to the 1980 Constitution of Zimbabwe (Lancaster House Constitution)' 1 *UZ Student Journal*, 2014.

<sup>9</sup> See, for example, the Lancaster House Constitution of 1980 (As amended) on the appointment process for judges (Article 84), the appointment process for the Attorney-General (Article 76), appointment of Commissioners to the Judicial Services Commission (Article 90), and the appointment of the Members of the Zimbabwe Electoral Commission (Article) by the president with varying levels of discretion trending in favour of the executive.

<sup>10</sup> Article 3, Constitution of Zimbabwe (2013).

<sup>11</sup> Article 180, Constitution of Zimbabwe (2013), before it was amended.

<sup>12</sup> Article 180, Constitution of Zimbabwe (2013), before it was amended.

<sup>13</sup> Article 180, Constitution of Zimbabwe (2013), before it was amended.

the previous appointment regime. The aptitude of candidate judges, their judicial temperament, their performance record, and previous experiences could also be put to the test and interrogated in public interviews, unlike in the previous process.

The last of these highlighted important guarantees of judicial independence the new Constitution introduced a definitive retirement age of seventy years for all judges.<sup>14</sup> This was a departure from the presidential discretion to extend tenure of judges for a further five years after the age of seventy under the repealed Constitution.<sup>15</sup> This change, to an extent, strengthened the security of tenure of judges because it removed executive discretion on the extension of tenure for a further five years. It meant that the hope of extended tenure could no longer be dangled by the executive as an incentive in exchange for loyalty from the bench.

Notwithstanding, the recent amendments appear to resurrect the repealed Constitution and negate the above progressive structures and values of the new Constitution.

## *ii. The crises*

This paper, therefore, characterises a three-pronged crisis of constitutionality resulting from the amendments that rest to be resolved by the courts through the judicial review process. First, the amendments promote the indirect control of the judiciary by the executive through the appointment power and control over judicial tenure. This potentially insulates the executive from an important check on its power and disadvantages anyone who might challenge the actions of the executive branch of government in the courts.

Secondly, the amendments continue a precedent of rule by law that threatens to undermine the core values enunciated in Article 3 of the Constitution.<sup>16</sup> Rule by law refers to the instrumental use of law as a tool of political power, which subjects the individual to control by the state while diminishing control of the state within the confines of the law.<sup>17</sup> Rule by law undermines the constitutional tenet of separation of powers into the independent executive, legislative and judicial branches counterbalanced by a system of checks and balances, directly contrary to the aims of the Constitution. In such a case, the Constitution, therefore,

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<sup>14</sup> Article 186, Constitution of Zimbabwe (2013), before it was amended.

<sup>15</sup> Article 86(1) Constitution of Zimbabwe (1980).

<sup>16</sup> Article 3, Constitution of Zimbabwe (2013).

<sup>17</sup> Waldron J, 'The rule of law' *The Stanford Encyclopaedia of Philosophy* 2020 – <<https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/>> on 12 January 2022.

is at risk of failing in one of its central functions, namely the organisation of the government into three co-equal arms under the principle of separation of powers, as its provisions are rendered nugatory.

Lastly, as a consequence of the amendments, judges are placed in the invidious position whereby they are the potential personal beneficiaries of the amendments but at the possible cost of weakened independence on the one hand. On the other hand, the judiciary has the power of judicial review to strike down the amendments for inconsistency with the rest of the Constitution, yet the amendments tend to confer a benefit upon them. This raises both a problem of conflict of interest, but also scope for an innovative guard against regressive amendments in weak democracies. The doctrine of unconstitutional constitutional amendments might therefore provide a way out of such a crisis of constitutionalism.

The central hypothesis of this paper, therefore, is that if one were to apply the doctrine of unconstitutional constitutional amendments in the Zimbabwean context, Constitutional Amendments No.1 and No. 2 would be unconstitutional because the amendments tend to negate the progressive pillars of the Constitution. The amendments also spur on, with urgency, the opportunity to develop strategies to buttress constitutionalism through the application of constitutional law principles supporting the recognition of substantive limits to the amendment power, particularly by resorting to the judicial review process.<sup>18</sup>

This research aims to offer both a caution and a solution to constitutional defenders located in the practical application of the doctrine of unconstitutional constitutional amendments. To achieve these aims, Part I of this paper is the introduction and it highlights the problem. Part II uses the doctrine of unconstitutional constitutional amendments to explain how the amendments are substantively unconstitutional, namely that they negate the core values of the Constitution, and thereby destroy its essential features. In Part III the paper envisions the application of the doctrine of unconstitutional constitutional amendments in Zimbabwe using the example of Amendment No.1 and Amendment No.2 to the Zimbabwean Constitution of 2013. In Part IV, the author locates the forum and the remedy available to constitutional defenders in the judicial (constitutional) review process in order to offer a route for the protection of the core features of the Constitution and puts forward recommendations. Part V concludes the paper.

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<sup>18</sup> Roznai Y, *Unconstitutional constitutional amendments – the limits of amendment powers*.

## II. The Doctrine of Unconstitutional Constitutional Amendments

### i. Zimbabwe's post-2013 constitutional regression

On 6 April 2021, the majority of Zimbabwe's Senate voted to adopt Constitutional Amendment No. 1 Bill of 2017. It is important to note that this was nearly four years from the conception of the Bill. The vote in the Senate was pursuant to a suspended judgment of the Constitutional Court pending the cure of a defective procedure.<sup>19</sup> The initial vote in the Senate did not meet the two-thirds majority threshold to validly adopt the Bill.<sup>20</sup> Other series of issues are grossly irregular and cast doubts on the validity of the amendment.<sup>21</sup>

Apart from its procedural irregularity, Amendment (No.1)'s substance is also constitutionally unsound. Amendment (No.1) Bill proposed to remove the public interview process for the appointment of the Chief Justice, Deputy Chief Justice, and the Judge President of the High Court.<sup>22</sup> It merely obliges the president to consult the JSC, whose recommendations the president is not ultimately bound to follow.<sup>23</sup> The Bill is regressive because it reduces transparency in the appointment of senior judges, and it potentially subjects the appointment of the administrative heads of Zimbabwe's courts overwhelmingly to political considerations. Furthermore, it dilutes the role of the JSC.

<sup>19</sup> Senate Hansard Report, 6 April 2021; See also *Gonese & Another v Parliament of Zimbabwe & 4 Others* (2020), Constitutional Court of Zimbabwe.

<sup>20</sup> *Gonese & Another v Parliament of Zimbabwe & 4 Others* (2020), Constitutional Court of Zimbabwe.

<sup>21</sup> This Bill has not been assented to by Zimbabwean President Emmerson Mnangagwa as required by the procedure of Article 328 of the Constitution. However, it appears that this is because it had been assented to by the former President Robert Mugabe in 2017 before it was struck down by the Constitutional Court. The Bill also appears to straddle two sessions of Parliament, which suggests that the Bill lapsed before the second vote by the Senate in 2021. The fact that it has not been assented to by the president after the secondary vote in the Senate, and the fact that the Bill seems to have lapsed altogether, has only served to bring into question the status and validity of the constitutional amendment. As the procedure followed was highly irregular, it is not certain if the amendment is validly part of the law of Zimbabwe, and likewise if the appointments made on the strength of the amendment, are valid appointments. Zimbabwe held harmonised elections on 30 July 2018, and therefore the Eighth parliament was dissolved by operation of law at midnight on the 29 July 2018. The Ninth Parliament commenced on the first sitting of Parliament. See, in this regard the clarification note by the Clerk of Parliament, last edited 8 June 2020 - <<https://parlzim.gov.zw/08-jun-dissolution-of-the-eighth-parliament-and-commencement-of-the-ninth-parliament/>> on 15 June 2022. See also Article 147, Constitution of Zimbabwe (2013); and 'Constitution Watch 2/2021 -Constitution Amendment No. 2 Act Published' Veritas, 8 May 2021 – <<https://www.veritaszim.net/node/4963>> on 10 January 2022.

<sup>22</sup> Clause 6 Constitutional Amendment (No.1) Bill (2017).

<sup>23</sup> Clause 6, Constitutional Amendment (No.1) Bill (2017) substituting Article 180(2) and (3).

Sharon Hofisi and Eldered Masungure point to Amendment No.1 Bill as a regression to the repealed Constitution, strengthening the executive's hand in the appointment of senior judges.<sup>24</sup> Alex Magaisa notes the interference by the executive with judicial independence as unconstitutional and a phenomenon that must be resisted.<sup>25</sup> However, the crisis goes deeper than this. The contention by Magaisa captures the necessity of the investigation into the diminution of 'rule of law' and its replacement with 'rule by law', bordering on an illegitimate 'constitutional replacement' effected by a dominant political class regardless of the will of the governed.<sup>26</sup> It then questions the role of the courts in adjudicating the substantive constitutionality of 'amendments' that tend towards illegitimate constitutional replacement.

Subsequently, on 7 May 2021, the Zimbabwean president, Emmerson Mnangagwa, signed Constitutional Amendment No. 2 Bill of 2019 into law.<sup>27</sup> What is now Constitutional Amendment No.2 Act, among a litany of clauses, introduces two notably regressive changes regarding the judiciary. The first of these is that it restores the influence that the president had on judicial appointments under the 1980 Constitution, namely that the President has the authority to promote sitting judges to the next higher court acting on a recommendation of the Judicial Services Commission (JSC).<sup>28</sup> This amendment dispenses with the requirement of a public interview for appointees to the next higher court, as long as they were already sitting judges. This is justified on the basis that sitting judges have already been interviewed when they were first appointed to the bench and should not be required to subject themselves to another interview for promotion. However, this means that the merit of the promotion is not scrutinised in a transparent manner as under the original provision.

There are two major problems stemming from this change. Firstly, it grants more power of appointment to the superior courts in the executive, thereby

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<sup>24</sup> Hofisi S and Masungure E 'Rule by law or rule of law' Good Governance Africa, 1 July 2020 – <<https://gga.org/rule-by-law-or-rule-of-law/>> on 12 January 2022.

<sup>25</sup> Magaisa A 'Big Saturday Read: Understanding judicial capture in Zimbabwe', Big Saturday Read, 14 November 2020 - <<https://bigsr.africa/bsr-understanding-judicial-capture-in-zimbabwe/>> on 10 June 2022.

<sup>26</sup> 'Constitutional replacement' is differentiated from mere constitutional amendment in that the former seeks to radically change the system that was put in place by the original constitution, while the latter is aimed at only modifying the Constitution, perhaps in view of certain developments that necessitate an amendment. See further Bernal C 'Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine' 11 *International Journal of Constitutional Law* 2013, 340.

<sup>27</sup> 'Constitution Watch 2/2021 -Constitution Amendment No. 2 Act Published' Veritas, 8 May 2021 – <<https://www.veritaszim.net/node/4963>> on 10 January 2022.

<sup>28</sup> Article 180(4a), *Constitution of Zimbabwe* (2013) as amended.



potentially introducing partisan political considerations to the promotion of judges. Promotion to higher courts is rendered a carrot in the hands of the executive to be dangled before judges to potentially render partisan judgments in favour of the executive. Secondly, it serves to reduce the transparency of the process of promotion of judges by removing the progressive element of public interviews by the Judicial Services Commission. Public interviews give a glimpse of the suitability of the candidate for the superior courts.

While the Constitution does not mention public participation as the rationale for the public interview process, it can be inferred from Article 162 of the new Constitution, which states that judicial authority derives from the people of Zimbabwe.<sup>29</sup> A process of appointment of judges that side-lines the input and scrutiny of the public in favour of the executive, therefore, does not accord with the Constitution. By removing the requirement for public interviews, the basis of the recommendation of the Judicial Services Commission is shielded from the public. This way, it weakens public participation and transparency in the process of promotion of judges. It further diminishes confidence in the independence of judges, at least in the perception of the public as they are considered solely executive appointments.<sup>30</sup>

Furthermore, the latter amendment challenges the principle of security of tenure of judges by removing the definitive mandatory retirement age of seventy years.<sup>31</sup> Instead, it returns to the position under the 1980 Constitution, subjecting the continued tenure of judges for a further five years after attaining the age of seventy years to the approval of the president.<sup>32</sup> This further potentially weakens the independence of judges, and significantly already undermines their independence in the eyes of the public they serve.<sup>33</sup> This is because it creates

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<sup>29</sup> Article 162, Constitution of Zimbabwe (2013).

<sup>30</sup> Majome J 'Rule of law, respect for the Constitution and other laws' 1 *REDE Konrad Adenauer Stiftung*, 2010, 3.

<sup>31</sup> Article 186, Constitution of Zimbabwe (2013) as amended.

<sup>32</sup> This is despite the contention of Patel J. in *Mupfema v Minister of Justice and Others* (2021), Constitutional Court of Zimbabwe. In this case, he opined that it is a medical certificate, and not the election to continue that the president must accept. This, in the author's considered view does not save the provision since accepting the medical certificate is a condition for the extension of the term of office. That acceptance is still discretionary on the part of the president. In this respect, compare Article 86 of the Lancaster House Constitution, 1980, to the new Article 186 of the Constitution of Zimbabwe, 2013 as amended.

<sup>33</sup> It is too early to be able to say that the amendments have caused judicial capture. The amendments, however, open the judicial appointment and promotion process, and extension of tenure up to abuse by the executive. If control over these processes is not devolved, and if it is overwhelmingly controlled by the executive, then the impartiality of judicial office is compromised. This has potential adverse effects as trust in the judiciary is eroded and extra-legal means are sought to resolve differences and assert rights.

the moral hazard that judges may be beholden to the president for accepting the election to continue in the office of a judge. It can also be argued that even before the election is exercised, a judge's intent on serving beyond seventy years may be beholden to the president who ultimately must accept or reject the judge's election to continue serving. The danger here lies in that public confidence in the judiciary is important because it reinforces the rule of law and resorts to the courts for protection of the law, as well as for the vindication of rights. Conversely, if the judges do not enjoy the confidence of the public, this will eventually precipitate resort to other, potentially extra-legal means of asserting rights. This has the general effect of weakening the rule of law in Zimbabwe.

*ii. The doctrine of unconstitutional constitutional amendments*

There must have been an intentional realisation of what changes the new Constitution had put in place and their gravity in protecting the new set of values that it enshrined. The framers must have seen the need to protect these new provisions, and by extension, this new set of values. This is because the Constitution embodies certain 'self-defence' mechanisms vis-à-vis the exercise of the amendment power.

The process for amendment of the Constitution is provided in Article 328 of the Constitution. Among the procedural requirements for amendment are that the Constitution can only be amended through an Act of Parliament in express terms,<sup>34</sup> and that must come before both houses of Parliament in the form of a Bill proposing to amend the Constitution, in its precise terms, after a cooling off period of 90 days,<sup>35</sup> during which the Bill must be subjected to public comment through public meetings and written submissions.<sup>36</sup> When the Constitutional Bill is presented for its final reading in Parliament, it is subjected to a vote by both houses of Parliament in which it must attain a majority of two-thirds.<sup>37</sup> Only after it has reached this threshold must it obtain presidential assent.<sup>38</sup>

Additionally, certain constitutional amendments require extra steps and are subjected to other limitations. These are Bills amending the Declaration of Rights

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<sup>34</sup> Article 328(2) Constitution of Zimbabwe (2013).

<sup>35</sup> Article 328(3) Constitution of Zimbabwe (2013).

<sup>36</sup> Article 328(4) Constitution of Zimbabwe (2013).

<sup>37</sup> Article 328(5) Constitution of Zimbabwe (2013).

<sup>38</sup> Article 328(10) requires the Speaker of the House of Assembly and the President of the Senate to certify that the Bill received the necessary votes to pass their respective Houses. There is no provision for an ex post facto vote by Parliament after the President has already assented. It is submitted that this would be unprocedural.

and the Chapter of the Constitution concerning agricultural land, which have to be subjected to a national referendum before they are put to a parliamentary vote.<sup>39</sup> Term limit provisions may also be amended, but it is provided that they are to be put to a national referendum, that they are not to benefit any person who held the public office concerned, nor are such amendments to be done concurrently with amendments to the Declaration of Rights and to the Chapter concerning agricultural land.<sup>40</sup> In view of the above, Parliament has the power to amend the Constitution of Zimbabwe. However, this power must necessarily be further distinguished from the power to change the Constitution altogether. This is further discussed below under the rubric of further unwritten limits, called implied limits to the amendment power.<sup>41</sup>

The doctrine of unconstitutional constitutional amendments is one that has been given prominence in contemporary scholarship by Yaniv Roznai.<sup>42</sup> Its basic premise is that constitutions may impose certain limits on the power to amend them, the transgression of which renders them unconstitutional.<sup>43</sup> Some amendments may be adjudged to be unconstitutional because they do not meet the strict procedural requirements to validly effect them, but others may also be unconstitutional in their very substance, because they do not conform with the core features of the Constitution.<sup>44</sup> The focus of this paper is on whether the substance of an amendment, though procedurally passed, is sufficient for its invalidation for unconstitutionality, particularly on the basis that it conflicts with some 'unamendable' provisions or a principles of fundamental importance. Roznai contends that:

Substantively, a constitutional change may be deemed revolutionary, even if accepted according to the prescribed constitutional procedures, if it conflicts with unamendable constitutional provisions or collapses the existing order and its basic principles and replaces them with new ones, thereby changing its identity'.<sup>45</sup>

The word 'revolutionary' is used here to denote a radical constitutional change that is more drastic than an amendment.<sup>46</sup> What makes a constitutional

<sup>39</sup> Article 328(7) Constitution of Zimbabwe (2013).

<sup>40</sup> Article 328(8) Constitution of Zimbabwe (2013).

<sup>41</sup> Roznai Y *Unconstitutional constitutional amendments – the limits of the amendment power* 1<sup>st</sup> ed, Oxford University Press, Oxford, 2017.

<sup>42</sup> Roznai Y, *Unconstitutional constitutional amendments – the limits of amendment powers*.

<sup>43</sup> See generally Roznai Y, *Unconstitutional constitutional amendments – the limits of amendment powers*.

<sup>44</sup> For example, the essential features argument famously developed by the Indian Supreme Court in *Indira Gandhi v Shri Raj Narain and Another* (1975) Indian Supreme Court.

<sup>45</sup> Roznai Y, *Unconstitutional constitutional amendments – the limits of amendment powers*, 8.

<sup>46</sup> Roznai uses this formulation in questioning when an amendment becomes a constitutional revolution or a legal coup d'état.

amendment revolutionary is relative to the degree of ‘amendability’. The degree of amendability is a result of limits imposed by constraints explicitly or implicitly drawn from the constitution itself. For example, a constitution may entirely prohibit the amendment of a specific provision, or certain provisions may be the teleological point towards which all other provisions of the constitution are directed. Roznai has termed this as explicit and implicit unamendability respectively.<sup>47</sup>

Unamendability is a feature of constitutions whose justification lies in the fact that a body with the competence to amend the constitution does so only within the framework of the constitution. Among the reasons a constitution could restrict amendment is the basic reason that the general popular will should not be hastily or whimsically frustrated.<sup>48</sup> Conversely, other constitutions may impose a degree of unamendability so that minorities might not be deprived of its protection through the caprices of a temporary majority. Others yet might do so to entrench a particular system of governance or structure of the state.<sup>49</sup>

Oran Doyle makes an erudite critique of the limits imposed by the doctrine of unconstitutional constitutional amendments from the perspective that it tends to elide the justifications for its existence at the expense of the contemporary majority’s right to change a constitution to respond to changing imperatives.<sup>50</sup> Doyle also raises an equally justified concern that proponents of the doctrine also tend to neglect how far it empowers the judiciary, which is usually unelected.<sup>51</sup> However, this critique makes some misplaced assumptions: firstly, that the contemporary majority’s representatives in parliament always act in the interests of their electors. For example, partisan politics may fuel certain actions and changes. Secondly, that the electoral process is always carried out fairly and results in a parliament with legitimate authority to effect amendments. In weaker democracies, these prerequisite democratic assumptions are not always the case.

Constitutional Amendment (No. 2) is an example of an amendment that was adopted in a hasty process for which public consultations were held

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<sup>47</sup> Roznai Y, *Unconstitutional constitutional amendments – The limits of amendment powers*, 11-12.

<sup>48</sup> Fombad CM ‘Limits on the power to amend constitutions: Recent trends in Africa and their potential impact on constitutionalism’ 1 *University of Botswana Law Journal* 2007, 28.

<sup>49</sup> For example, The Constitution of Algeria Title VI, Article 234 prohibits a number of amendments, including the amendment of ‘the Republican character of the State’.

<sup>50</sup> Doyle O, ‘Constraints on constitutional amendment powers’ in Albert R, Contiades X and Fotiadou A (eds) *The Foundations and Traditions of Constitutional Amendment*, Hart Publishing, Portland, 2017, 74-80.

<sup>51</sup> Doyle O, ‘Constraints on constitutional amendment powers’, 77.

under the strictures of a COVID-19 pandemic-induced national lockdown, where movement of persons and their association was severely curtailed.<sup>52</sup> The greater Zimbabwean public was therefore side-lined in this process that cumulatively weakened democracy in favour of strengthening the hand of the executive. Notwithstanding these circumstances, parliamentarians voted to adopt the amendments. One may infer from these circumstances that the present amendments are not an expression of any majoritarian will, but the self-serving will of a political elite.

Conscious of Doyle's critique, however, this author seeks to show that what Doyle assigns as conceptual justification for the justiciability of unconstitutional constitutional amendments can be combined with moral justifications on the basis of 'who' effects the amendments. This elision is intentional. In so doing, it is recognised that the power to change a constitution in a particular way can be intentionally limited according to the extent and the content of the change envisioned. Certain amendments would be appropriately made by a legislative body such as parliament to ensure the proper functioning of the constitution, while in other cases where the change envisioned constitutes a constitutional revolution, something more than the mere delegated power of parliament is required.

In this respect, the distinction by Roznai between the constituent power and a constituted power is particularly useful. Constituent power refers to the power to establish the constitutional order of a nation and is reposed in the political will of the people as the constitutional authority.<sup>53</sup> This power can be described as original, as the constituent power can make, and unmake a constitution by replacing it with a new one. In Zimbabwean context, this is the power that was exercised by the citizens of the country in the Constitutional referendum of 2013, where ninety-four and-a-half per cent of the eligible votes cast were in favour of the 2013 Constitution.<sup>54</sup>

Conversely, constituted power is created by the constitution itself, and is therefore limited to operating within the powers reposed in it by the constitution.<sup>55</sup> The competence is therefore derivative, rather than original. As such, the competence to amend does not amount to the same thing as changing a constitution entirely, as that is a sovereign power reposed in the public, rather than

<sup>52</sup> 'Zimbabwe to change its constitution under cover of COVID-19' Institute for Security Studies, 9 July 2020 – < <https://issafrica.org/iss-today/zimbabwe-to-change-its-constitution-under-cover-of-covid-19> > on 12 January 2022.

<sup>53</sup> Roznai, *Unconstitutional constitutional amendments – The limits of amendment powers*, 106.

<sup>54</sup> Vollan K. 'The Constitutional History and the 2013 Referendum of Zimbabwe' Norwegian Centre for Human Rights, 2013, 51.

<sup>55</sup> Roznai, *Unconstitutional constitutional amendments – The limits of amendment powers*, 106.

in the legislature that exercises agency in favour of the public.<sup>56</sup> The Zimbabwean Constitution locates this delegated power in the Parliament of Zimbabwe.<sup>57</sup> Article 328 prescribes the procedures by which the Constitution may be amended, and provides some explicit restrictions on the amendment power. Some of these restrictions are achieved by making the mooted amendment subject to a national referendum.<sup>58</sup> Generally, all other amendments to the Constitution require the two houses of Parliament to follow a strict procedure, and to attain the relevant two-thirds majority approval before the amendment can be passed.<sup>59</sup>

However, another school of thought exists holding that mere conformity with procedure is not sufficient for valid amendment of a constitution. By virtue of the amendment power being a delegated power, some influential theorists, notably Carl Schmitt, have argued that there are also implied limits to this power that stem from the distinction between the original power to make or abrogate a constitution, which resides in the people, and the delegated power of amendment residing in the parliament.<sup>60</sup> Therefore, changes to a constitution that pass over the threshold between mere amendment and constitutional replacement overstep the distinction between the original power of constitution-making and the delegated power of constitutional amendment. Such purported amendments are invalid.

This approach gives effect to the claim of constitutional supremacy in contradistinction to parliamentary sovereignty, and so militates against the detournement of the Constitution through the amendment power. Since it is the Constitution that is supreme, and not the Parliament in terms of Zimbabwe's Constitution, the Parliament bears only a delegated power and must exercise its powers in line with the Constitution, including the delegated power to amend the Constitution.<sup>61</sup>

<sup>56</sup> Roznai argues that the amendment power may be *sui generis* in that it straddles in substance and effect both original and derivative powers. However, it is still a power that is derived from the constitution and limited by what the constitution allows and is therefore strictly still a constituted rather than constituent power. See Roznai, *Unconstitutional constitutional amendments – The limits of amendment power*, 110-113.

<sup>57</sup> Article 328, *Constitution of Zimbabwe* (2013).

<sup>58</sup> For example, amendments to the Declaration of Rights (Chapter 4), amendments to provisions relating to agricultural land (Chapter 16), as well as amendments to provisions affecting term limit provisions for holders of a public office “the effect of which is to extend the length of time that a person who held or occupied that office, or an equivalent office, at any time before the amendment” (Article 328(7)).

<sup>59</sup> Article 328, *Constitution of Zimbabwe* (2013).

<sup>60</sup> Schmitt C (Seitzer D Trans.) *Constitutional Theory* 2008 Duke University Press, Durham and London, 75-76; See further 78 for the distinction between a constitution as a ‘political decision’ by the constituent power and ‘constitutional laws’ that can be changed by a constituted power.

<sup>61</sup> Article 2 read with Article 117, *Constitution of Zimbabwe* (2013).

Peter Gerangelos has contended that the modern system of responsible government means that the legislative branch and the executive branch are not separated to the same extent that they are from the judiciary.<sup>62</sup> Due to the fact that the office of a judge is not usually an elected office, its cooperation cannot be secured through the commonly used means of electoral manipulation in weak democracies. Therefore, more sophisticated means are required to bring this nonetheless important branch of government under the influence of the executive or the legislature, in order to trend towards absolutism and rule by law.

The constitutional amendment process has been deployed to serve this function in Zimbabwe by further concentrating power in the executive branch of government. At face value, this appears to be repugnant to Zimbabwe's constitutional values. In such circumstances, constraints on the amendment power may be justified in the interests of protecting democracy particularly in weaker democracies, where there is often a deficit in trust from people towards their elected representatives to prosecute the popular interest instead of private interests.<sup>63</sup>

The idea of substantive limits to the amendment power is not new to Zimbabwean judicial thought. Former Zimbabwean Chief Justice Anthony Gubbay has previously voiced the view that certain features of a constitution are immutable under whatever circumstance, and that if the 'structural pillars of the Constitution are destroyed, the whole constitutional edifice will crumble'.<sup>64</sup> However, the principle of implied unamendability has never been adjudicated in Zimbabwe. The present circumstances of Constitutional Amendments (No.1) and (No.2) suggest the ripeness of the doctrine of unconstitutional constitutional amendments with respect to implied unamendability in the Zimbabwean context, and indeed elsewhere in Africa where there has been a tendency to whimsically amend the constitution.<sup>65</sup> The amendments raise the prospect of encroachment by the executive on the operations of the judiciary.

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<sup>62</sup> P Gerangelos *The separation of powers and legislative interference in judicial process*, 1<sup>st</sup> ed, Hart Publishing, Portland, 2009,35.

<sup>63</sup> Doyle O, 'Constraints on constitutional amendment powers', 93. See also MM Uddin 'Judicial review of constitutional amendments in light of the 'political question' doctrine: A comparative study of the jurisprudence of the supreme courts of Bangladesh, India and the United States' 58 *Journal of the Indian Law Institute* 331.

<sup>64</sup> Gubbay AR, 'The Role of the Courts in Zimbabwe in Implementing Human Rights, with Special Reference to the Application of International Human Rights Norms' in 8 *Developing Human Rights Jurisprudence* (Interights/ Commonwealth Secretariat 2001).

<sup>65</sup> CM Fombad 'Limits on the power to amend constitutions: Recent trends in Africa and their potential impact on constitutionalism' 1 *University of Botswana Law Journal* 2007, 28-29.



The context under which Constitutional Amendment (No.1) and Constitutional Amendment (No. 2) must be judged is, therefore, whether or not they are amendments that exceed the implicit substantive limits placed on the executive branch of government and the Parliament of Zimbabwe by the Constitution.

### **III. Towards Constitutional Amendment Restraints in Zimbabwe**

This section envisions the development of a doctrine of unconstitutional constitutional amendments for the Zimbabwean context through the prism of the two constitutional amendments discussed below. First, a discussion of the salient features and effects of the amendments is laid out. Then a case is made for the application of a doctrine of unconstitutional constitutional amendments to counteract the abuse of the constitutional amendment procedure.

#### *i. Constitutional Amendment (No.1)*

Prior to this amendment, Article 180 of the Constitution permitted for broad participation by the public, the Executive, and the Judicial Services Commission, which spearheaded the process, and allowed for greater transparency in the appointment of all judges, including senior judges at all levels of the superior courts.<sup>66</sup>

This amendment reverses this progressive process of judicial appointment. It places the power of appointing the three most senior judges almost squarely with the President. The new Article 180, though permitting the Judicial Services Commission to recommend a candidate to fill a vacancy in a senior judge's office, does not bind the President to that recommendation. Instead, if the President opts to appoint any other person, the President is only merely obliged to inform the Senate of that appointment 'as soon as is practicable'.<sup>67</sup> Therefore, the President has full discretion regarding the appointment of the Chief Justice, Deputy Chief Justice, and Judge President of the High Court.

As there is no longer a requirement for a public interview process, the appointment to those offices is now opaquer and more exposed to political considerations. The President is no longer mandated to make an appointment based on merit, as determined by interviews administered by an independent

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<sup>66</sup> Article 180(2) and (3), Constitution of Zimbabwe (2013).

<sup>67</sup> Article 180(3), Constitution of Zimbabwe (2013) as amended. Compare with wording of Article 84(2), Constitution of Zimbabwe (1980) as amended.



Commission, but should the inclination to disregard the recommendation of that Commission arise, there is nothing to deter the President from doing so without any reason having to be given for dispensing with the recommendation of the Commission.

The dangers are evident as the senior judges are the administrative heads of the court. If subjected to mere executive appointees, they are in a position to undermine the independence of judges in their divisions through directives. Previously, Chief Justice Luke Malaba has been criticised for issuing directives that undermined the independence of judges by requiring them to submit their judgments to their division heads to be 'seen and approved' before they were handed down.<sup>68</sup> This directive was roundly criticised both within Zimbabwe and without, by, among others, the Law Society of Zimbabwe and the African Judges and Jurists Forum.<sup>69</sup>

The protests of the Law Society of Zimbabwe and the African Judges and Jurists Forum in the wake of the directive as highlighted above speak to the substantive ill of Constitutional Amendment (No.1), since it provides an exemplum that by potentially controlling the administrative heads of the courts, the executive may gain an ability to influence the issuing of directives and the selection of judges to preside over particular cases that undermine judicial independence. The executive, therefore, gains through this amendment, a back door through which to interfere with the right to a fair trial and the fair administration of justice.

This potential is directly in conflict with the founding values of respect for fundamental rights and the respect for the rule of law, as it diminishes these protections and makes them less effective. The amendment, therefore, collapses at least a couple of the foundational pillars of the Constitution, which amounts to a prohibited amendment.

## *ii. Constitutional Amendment (No.2)*

Constitutional Amendment (No.2) is an amendment of incredible range. It represents a wide regression of checks on the powers of the executive. It introduced a great number of amendments, some of which were cosmetic, and

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<sup>68</sup> Memorandum from Chief Justice Luke Malaba, 'Directive on handing down and distribution of judgments and orders', 16 July 2020. See also Amended memorandum from Chief Justice Luke Malaba, 21 July 2020.

<sup>69</sup> Letter from Law Society of Zimbabwe, 20 July 2020. See also African Judges and Jurists Forum Statement, 22 July 2020.

some of which were of great significance. The remit of this article only extends to those amendments affecting judicial appointments and tenure.

The amendment to Article 180(4) allows the President to promote a sitting judge of the Supreme Court, High Court, Labour Court or Administrative Court to the next higher court. This amendment provides that the President has the decisive power over which judges are promoted to the next higher court, thereby circumventing the need for public interviews, and creating diminished conditions of transparency in judicial appointments and promotions in the superior courts that handle crucial appeals. Other candidates who are not sitting judges may be considered, but the public interview process still applies to them. It is unclear if, when appointing judges, there is an obligation to interview candidates who are not sitting judges before promoting sitting judges to the next higher court. The provision, therefore, creates confusion and uncertainty—a cardinal sin that every law ought to avoid.<sup>70</sup>

The High Court declined to make a pronouncement on this issue in the matter between *Chingwe v Judicial Services Commission and others*<sup>71</sup> where it said that the Court was not empowered by the Constitution to prescribe to the appointing authority how it must carry out its processes of recommendation for the appointment of Supreme Court and Constitutional Court judges. This creates room for political considerations to factor into judicial appointments and promotions and incentivises pliant adjudication in the hopes of being promoted to the next higher court, or at the very least, creates the perception of this being the case.

Another perverse aspect of Constitutional Amendment (No.2) is the subjection of judicial tenure to control of the executive by creating the possibility of a conditional extension of tenure beyond the age of seventy years.<sup>72</sup> The amended provision states that a judge who wishes to serve beyond attaining the age of seventy years has to submit to a medical test that the president may consider. If the certificate is accepted, then such a judge can serve until he or she attains the age of seventy-five years.

Ostensibly, this amendment preserves experience on the bench but requires proof of physical health by the judge to extend tenure. In practice, however, the executive may gain an interest in prolonging the tenure of certain judges, or an inclination not to extend the tenure of others on arbitrary or political

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<sup>70</sup> Article 186, Constitution of Zimbabwe (2013) as amended.

<sup>71</sup> *Chingwe v Judicial Services Commission and Others* (2021) High Court of Zimbabwe.

<sup>72</sup> Article 186, Constitution of Zimbabwe (2013) as amended.

grounds. This is so because the authority of the president to grant the extension of tenure is discretionary, although disguised on medical grounds. The president is empowered to accept or refuse the medical certificate required by the amended provision.<sup>73</sup> At any rate, there is little justification for requiring a judge to submit to a medical test before the extension of tenure, just as other public officers are not required to submit to medical tests as a condition of their tenure.

The hazard of the amended Article 186 was captured in an obiter dictum by Zhou J in the case of *Kika v Minister of Justice and Others* where the learned judge opined that the amendments impugned 'have the effect of compromising on the independence of the judiciary and the rule of law,' because:

'the election to continue in office...is not an automatic guarantee that the judge concerned will continue in office. It is subject to acceptance by the President... This has the effect of subjecting the term of office (or the extension thereof) to the control of the Executive'.<sup>74</sup>

In the above case, the extension of the tenure of Chief Justice Luke Malaba was challenged on the grounds that the amendment to Article 186 could not apply with respect to his term in office as a serving judge because of the operation of Article 328 of the Constitution, which prohibits incumbents from benefiting from the amendment of term limit provisions.<sup>75</sup>

While the amendment remains part of the Zimbabwean Constitution and applies to benefit non-incumbent judges, a judge, before attaining seventy years, may be tempted to prove worthy of being permitted to continue as a judge in the eyes of the President. After attaining seventy years and after the President has allowed such a judge to continue for a further five years, a perception of bias is created as the judge has accepted a gift from the President for which that judge is now beholden to the President. The amendment, therefore, seems to have a potentially negative effect on actual and perceived impartiality before and after the attainment of seventy years of age.

### *iii. A Zimbabwean view of unconstitutional constitutional amendments*

Both Constitutional Amendments (No.1) and (No.2) significantly undermine judicial independence and are potentially unconstitutional.

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<sup>73</sup> Article 186, Constitution of Zimbabwe (2013) as amended.

<sup>74</sup> *Kika v Minister of Justice and Others* (2021) High Court of Zimbabwe.

<sup>75</sup> It is worth noting that Article 328, which was not amended by either Constitutional Amendment (No.1) or Constitutional Amendment (No.2), is specially protected with a measure of unamendability, requiring that its amendment should be subjected to a national referendum.

Their net effect is the diminishing of the rule of law and lack of protection of the fundamental right to a fair trial by undermining judges' independence. For similar reasons, these amendments would collapse the basic features of the Constitution as expressed in Article 3 thereof. This is the basis that sets up the justification for the adoption of a doctrine of unconstitutional constitutional amendments for Zimbabwe.

As the basic premise of such a doctrine is that amendments can fall foul of the Constitution and therefore be unconstitutional, this means that a hierarchy of norms internal to the Constitution has to be established, and secondly there must be a possibility of annulling constitutional amendments that do fall foul of higher constitutional norms. It has been argued that Article 3 of the 2013 Constitution introduced founding values to the constitutional order of Zimbabwe and therefore underlies the technical provisions of the Constitution. A legal thinktank, Veritas, has described the founding values of a constitution as 'those values that citizens commit themselves to their adherence' and which 'reflect the manner in which the people desire to be governed'.<sup>76</sup> This being the case, the internal coherence of the Constitution depends on its provisions living up to those foundational values.

A doctrine of unconstitutional constitutional amendments in Zimbabwe, therefore, accepts the founding values contained in Article 3 of the Zimbabwean Constitution as higher order values which should not be contradicted in the rest of the Constitution, not least through the amendment power. It is improbable, though not impossible, that the framers of the Constitution could make original constitutional provisions that contradict the founding values in the same constitutional text. This presents a conundrum that is beyond the remit of this paper, namely whether original constitutional provisions can be unconstitutional. However, what is more likely is the detournement of the power to amend the Constitution by a body so empowered, leading to the introduction of contradictory provisions that run counter to the values espoused by the rest of the constitution. The consequences of such a change would threaten the constitutional order as a whole, and so the power to change the constitution is construed to be limited so as to preserve the internal coherence of the Constitution.

Safeguards against the abuse of the amendment power include procedural safeguards, but these are not sufficient on their own. A majoritarian party may abuse such an advantage to destroy the constitutional order while meeting all the procedural requirements for constitutional amendment. This is dangerous in

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<sup>76</sup> Veritas 'Founding principles of a Constitution' 18 May 2016 - < <https://www.veritaszim.net/node/2068> > on 9 July 2022.

cases where electoral manipulation and loyalty to the political party supersedes the popular will. Protecting the substance of how the people wish to be governed through implementing a doctrine limiting the substantive amendment power is therefore justified on these grounds.

Such a doctrine requires adjudication of the conduct of the amending power. This power is already reposed in the judiciary as one of the co-equal branches of government tasked with safeguarding the Constitution through its review powers. The nature of judicial review and its application to the doctrine of unconstitutional constitutional amendments is further discussed below.

#### IV. Judicial Review: The Role of Judges in Constitutional Safeguards

Judicial review is a practice which is commonly traced to the decision of *Marbury v Madison* where the United States Supreme Court first declared an Act of Congress illegal.<sup>77</sup> Judicial review is, according to Tom Ginsburg, the ideological underpinning of the related concept of constitutional review, whereby a court or other body with judicial authority makes a determination on whether administrative or legislative conduct or rules statutes or other decrees made by an institution empowered to make them, accords with the provisions of the constitution.<sup>78</sup> Without the possibility of judicial review, it would be up to the executive and the legislature to constrain themselves, and this would create moral hazard for arbitrariness. Judicial review is therefore a key cog in the principle of separation of powers. The latter principle ensures that the branches of government, traditionally the executive, legislature, and judiciary act within the limits of their powers in a system of checks and balances. In Zimbabwe, the power of judicial review of the validity of legislation or conduct of the executive and legislature is constitutionally enshrined.<sup>79</sup>

What is less readily apparent is how constitutional defenders can resort to the judiciary in an effort to prevent or reverse amendments that run contrary

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<sup>77</sup> *Marbury v Madison* (1803) Supreme Court of the United States.

<sup>78</sup> T Ginsburg 'The global spread of constitutional review' in KE Whittington, RD Kelemen and GA Caldeira 'The Oxford handbooks of political science'. See also D Robertson, *The judge as a political theorist: Contemporary constitutional review*, 2010, Princeton University Press, Princeton 5.

<sup>79</sup> Article 167(3) of the Constitution of Zimbabwe (2013) provides that the Constitutional Court makes the final decision on whether an Act of Parliament or conduct of the President or Parliament is constitutional, and that the Constitutional Court must confirm any order of invalidity made by another court before that order can have any force. Article 171(1)(c) of the Constitution provides that the High Court may decide on constitutional matters except for those that only the Constitutional Court may hear. This provision is subject to Article 167(3).

to those constitutional values. Comparative evidence exists that the idea of a role for the judiciary in protecting against unconstitutional amendments based on implied limits is already effective elsewhere. Roznai has argued that judicial review of constitutional amendments ‘is no longer a mere theoretical hypothesis; instead, judicial review... is an existing practice in various jurisdictions’.<sup>80</sup> On the other hand, authors such as Doyle have warned against the impact of empowering judges on the majoritarian right to self-govern.<sup>81</sup>

As this paper seeks to provide an outlet for constitutional defenders, the normative question of whether judges should be so empowered is left open for development in other future research works. Suffice to outline the position of the courts in the context of the 2013 Constitution and the values that it enshrines, namely that the courts are empowered to watch over the exercise of public power in accordance with the dictates of the Constitution.<sup>82</sup> While the Constitution delineates the powers of each respective branch of government, it sets up the courts as the referees who decide whether the other branches of government play by the rules it sets or not. This ensures that the other branches of government, namely the executive and the legislature, as well as all other persons who exercise public power, are bound to operate within the limits of those powers and are held accountable by the courts.

Cases challenging the constitutionality of a constitutional amendment on substantive grounds rarely see the light of day in Zimbabwe. The courts have, in the past, tended to strictly apply the doctrine of separation of powers, and so public officials could avoid scrutiny by relying on a strict interpretation of this doctrine.<sup>83</sup> However, this should not be mistaken to mean that the courts are powerless in the face of flagrant disregard of constitutional principles of which they are the ultimate guardian.<sup>84</sup> The Constitutional Court expressed as much in the case of *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited and Another*, where Chief Justice Malaba asserted that the Court is ‘the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force’, and that ‘[i]t uses constitutional

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<sup>80</sup> Roznai, *Unconstitutional constitutional amendments – The limits of amendment powers*, 179.

<sup>81</sup> Doyle O, ‘Constraints on constitutional amendment powers’, 77. As this paper seeks to provide an outlet for constitutional defenders, the normative question of whether judges should be so empowered is left open for development in other future research works.

<sup>82</sup> *Mliswa v Parliament of Zimbabwe* (2021) Constitutional Court of Zimbabwe.

<sup>83</sup> See dictum of Hlatshwayo JCC in *Chironga and Another v Minister of Justice* (2020) Constitutional Court of Zimbabwe.

<sup>84</sup> *President of the Senate and Others v Innocent Gonese and Others* (2021) Constitutional Court of Zimbabwe.

review predominantly, albeit not exclusively, in the exercise of its jurisdiction'.<sup>85</sup> The executive and the legislature, being political offices, are more likely to test the boundaries of separation of powers, and it is in this grey area that democratic erosion takes place. Scrutiny by the judiciary through judicial review is therefore one of the most critical checks and balances required by the constitution to keep itself viable. The Constitutional Court asserted this position in *Mliswa v Parliament of Zimbabwe* where it held that:

‘the constitutional order has evolved from one where the conduct of those wielding public power was predominantly immune to judicial review, insulated and shielded under strict application of the doctrine of separation of powers, to one where all public affairs must measure up to constitutional imperatives under the watchful eye of the judiciary, which in turn is also obliged to venerate the Constitution’.<sup>86</sup>

However, courts do not review arguments that are not placed before them. It is up to constitutional defenders to boldly make cases that, for better or for worse, will settle the question of substantive review of constitutional amendments in the Zimbabwean courts. To start, the Constitution imposes duties on the President and Parliament to act in a particular manner and refrain from particular conduct. Article 90 (1) of the Constitution imposes a duty on the President to uphold, defend, obey and respect the Constitution, while Article 90 (2)(c) places a duty on the President to ensure the protection of fundamental rights and freedoms and the rule of law. Under Article 119 (1), Parliament has a duty to ‘protect [the] Constitution and promote democratic governance in Zimbabwe’, whereas Article 119(2) requires Parliament to ‘ensure that the provisions of the Constitution are upheld and that the State and all institutions and agencies of government... act constitutionally and in the national interest’.

The duties in common enjoin conduct that is consistent with the Constitution as a whole, such that any conduct that is inconsistent with the constitution stands to be invalidated. This is in keeping with Article 2 of the Constitution which provides for the supremacy of the Constitution. Reflecting on the founding principles enumerated in the Constitution in Article 3, Patel J held in the case of *Judicial Services Commission v Zibani and Others* that those principles ‘bind everyone, including the appellant which, as an executive institution, is expressly bound to comply with the substantive and procedural requirements of the Constitution’.<sup>87</sup> Properly understood, this dictum reveals a judicial philosophy that the Article 3

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<sup>85</sup> *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited and Another* (2018) Constitutional Court of Zimbabwe.

<sup>86</sup> *Mliswa v Parliament of Zimbabwe* (2021) Constitutional Court of Zimbabwe.

<sup>87</sup> *Judicial Services Commission v Zibani and Others* (2017) Supreme Court of Zimbabwe.



founding values underlying the rest of the constitutional provisions are the lens through which the Constitution as a whole is read. Actions by any person or organ of the state that is inconsistent with those values are potentially unconstitutional by virtue of that incongruency. A reviewing judge would therefore be inclined to protect the Constitution by striking down or invalidating that conduct which breaches the values of the Constitution.

The author submits that the legal-political realities of Zimbabwe are closer to comparable jurisdictions such as India, where there is a greater acceptance of a role for the judiciary in reviewing the juristic acts of the other branches of government. Judicial officers should also approach the matters of adjudicating the substantive constitutionality of constitutional amendments with an open mind. The courts, when presented with arguments concerning substantive limits to constitutional amendments, should be more inclined to take inspiration from those jurisdictions whose political standpoint is similar to that of Zimbabwe, namely taking a realistic view of the state of democracy in Zimbabwe and threats thereto, especially through the lens of the Constitution's core values.<sup>88</sup> Doing so would result in a weighted preference to pronounce themselves in favour of reading in implied limits to the constitutional amendment power that contradict the values espoused by the Constitution. Furthermore, by upholding the rule of law in this way, judges guarantee their own independence and give fulfilment to the protections afforded to them of their independence by the Constitution. Hence, it extricates them from the whims of the other arms—the main motive for such amendments in question.

Doing the contrary would only perpetuate the dissimulation of a democratic system, reduce the Constitution of Zimbabwe to a mere suggestive document and question its claim of supremacy.

## V. Conclusion

This paper's central hypothesis was that Constitutional Amendment No.1 and Constitutional Amendment No.2 to the Zimbabwean Constitution are unconstitutional by reason of the legislature overstepping its amendment powers. The ways in which the legislature has done so potentiate several crises elucidated herein. The thrust has been to elucidate particular problems of constitutional

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<sup>88</sup> Zimbabwe's Constitutional Court has not previously shied away from drawing inspiration from foreign case law in the interpretation of constitutional provisions. See in this regard Sloth-Nielsen J and Hove K 'Mudzuru and Another v The Minister of Justice, Legal and Parliamentary Affairs and 2 Others: A review' 16 *African Human Rights Law Journal* 2016.



amendment and whether the amendment power can be subjected to substantive limits.

Through an analysis of the case of Zimbabwe's recent constitutional amendments and the application of the doctrine of unconstitutional constitutional amendments, this author shows that there is a real possibility that amendments can be substantively unconstitutional. In a situation where they are upheld, constitutional crises are bound to occur in the form of rule by law replacing rule of law as in the instances of introducing direct or indirect control of the judiciary by the executive, and the manufacturing of a conflicted position of judges in remedying the effects of the amendments.

There is a paucity of jurisprudence covering substantive limits to the amendment power, and although some authors and precedents have shown challenges of this nature to be a possibility, it is regrettable that the discourse has not gone beyond a few cases and is non-existent in Zimbabwean jurisprudence to date. However, the expansion of the doctrine seems inevitable as democracies face up to the growing threats posed by democratic erosion, particularly through abuse of the amendment power by illiberal and authoritarian governments.

Constitutions still tend to have inbuilt protections, particularly implied and express limitations on amendability. This author seeks to place the locus of review of breaches of the substantive limits of the amendment power with the judiciary. With the threat of authoritarianism in the guise of rule by law growing in Zimbabwe, the judiciary should have the possibility of insulating its own independence and, in turn, vindicating the rule of law by relying on a purposive interpretation of the Constitution based on the values it enshrines. This opens the possibility of challenging constitutional amendments on substantive grounds, thereby averting constitutional crises.