IN THE CONSTITUTIONAL COURT OF ZAMBIA 2019/CCZ/0013
AT THE CONSTITUTIONAL COURT REGISTRY 2019/CCZ/0014
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)

BETWEEN:

LAW ASSOCIATION OF ZAMBIA 1ST PETITIONER
CHAPTER ONE FOUNDATION LIMITED 2ND PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

CORAM: Chibomba, PC, Sitali, Mulenga, Mulembe, Mulonda, Munalula and Musaluke, JJC.on 29th November, 2019 and on 3rd July 2020

For the 1st Petitioner: Mr. J. Chimankata and Mr. L. Mwamba both of Simeza Sangwa and Associates.

For the 2nd Petitioner: Ms. L. C. Kasonde and Mr. J. Kalala both of L. C. K. Chambers.

For the Respondent: Mr. L. Kalaluka, S.C., Attorney General,
Mr. A. Mwansa, S.C., Solicitor General,
Mr. F. K. Mwale, Principal State Advocate,
Mr. S. Mujuda, Principal State Advocate,
Ms. J. Mazulanyika, Assistant Senior State Advocate,
Mr. J. Sianyabo, State Advocate,
Ms. N. K. Chongo, State Advocate.

JUDGMENT

Chibomba, PC, delivered the Judgment of the Court.

Cases cited:

1. Nkumbula v Attorney General (1972) Z.R. 265
2. Hem Chandra Sengupta & Others v The Speaker of the Legislative Assembly of West Bangal & Others. AIR 1956 Cal 378
3. In Re Nalumino Mundia (1971) ZR 70
4. Speaker of National Assembly v Attorney General and 3 others (2013) eKLR
5. Mohamed Abdi Mahamud v Abdullahi Mohamed & 3 Others (2019) eKLR
6. Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others (2016) Z.L.R 226
7. Milford Maambo and Others v The People Selected Judgment 31 of 2017

8. Godfrey Malembeka (suing as Executive Director of Prisons Care & Counseling Association) v The Attorney General & The Electoral Commission of Zambia CCZ Selected Judgments No. 34 of 2017)
9. Webby Mulubisha v The Attorney General Selected Judgment 13 of 2019
10. Jammeh v Attorney General (2002) AHRLR 72 (GaSC 2001)
11. Godfrey Miyanda v Attorney General (2016) CC 006
12. Premier of Kwazulu-Natal v President of the Republic of South Africa (1996) SA 769 (CC)
13. Chishimba Kambwili v Attorney General (2019) CCZ 009
14. Bradlaugh v Gossett (1884) 12 QBD 271
15. Zambia Democratic Congress v Attorney General (2000) Z.L.R 6

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Constitution of South Africa 1996
3. The Constitution of Zimbabwe as Amended by Act No. 20 of 2013
4. The Constitution of the Kingdom of Thailand
5. The Constitution of Chile

A. INTRODUCTION

[1] The genesis of this case lies in the initiation, signing, publication and tabling of the Constitution of Zambia (Amendment) Bill No. 10 of 2019 (hereinafter referred to as Bill No. 10) before the National Assembly, by the Respondent. The Petitioners question whether the process leading to the introduction of Bill No. 10 before the National Assembly complies with the constitutional requirements for amending the Constitution and whether the decisions of the President, Attorney General and National Assembly to initiate, sign and table Bill No. 10 contravened constitutional provisions. The key issue before us is whether or not this Court has jurisdiction to intervene when questions are raised on the constitutionality of proposed legislation.

B. 1ST PETITIONER'S PETITION

[2] By Petition filed on 12th August, 2019 under Cause No. 2019/CCZ/0013, the 1st Petitioner, the Law Association of Zambia (LAZ), prays for the following reliefs from this Court against the Respondent, the Attorney General of the Republic of Zambia:-

(a) **a declaration that the Respondent's decision to the extent to which it seeks to amend the Constitution in the manner set out in the Constitution of Zambia (Amendment) Bill No. 10 of 2019, is illegal because it contravenes Articles 1(2), 8, 9, 61, 90, 91, 92 and 79 of the Constitution;**

(b) **an order (of *Certiorari*) that this Petition be allowed and that the Constitution of Zambia (Amendment) Bill No. 10 of 2019, which evidences the Respondent decision to amend the Constitution in the manner provided therein be removed forthwith into the Constitutional Court for purposes of quashing:**

(c) **Any other remedy the Court may consider just in order to defend the Constitution and resist or prevent its overthrow, suspension or illegal abrogation; and**

(d) **The costs of and occasioned by the Petition be borne by the Respondent.**

[3] The Petition was filed pursuant to Articles 128 (3),1(2), 8, 9, 61,90, 91, 92 (2) (1), 177 (5) (b) and 79 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and Section 8 (3) of the Constitutional Court Act and Order 4 (1) of the Constitutional Court Rules, 2016. The

Petition was filed together with an Affidavit Verifying the Petition and skeleton arguments and a witness statement.

C. RESPONDENT'S ANSWER TO THE 1ST PETITIONER'S PETITION

[4] In opposing the 1st Petitioner's Petition, the Respondent, on 8th October, 2019 filed an Answer and Affidavit in Opposition and skeleton arguments.

D. 2ND PETITIONER'S PETITION

[5] On 4th September, 2019 the 2nd Petitioner, Chapter One Foundation Limited, filed an amended Petition under Cause No. 2019/CCZ/0014 in which it is claiming the following reliefs against the Respondent:-

1. **The Court makes a declaration that all institutions that are involved in the process of enacting legislation including the National Assembly and Parliament are bound by the Constitution to apply the national values and principles in the enactment process;**

2. **The Court makes a declaration that Parliament cannot enact legislation that contravenes Article 61 of the Constitution or Articles 8 and 9 of the Constitution and therefore can only enact legislation that protects the Constitution and promotes democratic governance in Zambia;**

3. **The decisions, omissions and the actions by the Government of the Republic of Zambia in drafting and tabling the Constitution of Zambia (Amendment) Bill No. 10 of 2019 which weakens the Constitution and does not promote democratic governance in Zambia be declared unconstitutional and contrary to the provisions of Article 61 of the Zambian Constitution and therefore illegal;**

4. That the Court make a declaration that the President, Minister of Justice and Attorney General acted illegally by initiating legislation that did not comply with the national values and principles as provided in the Constitution of Zambia;
5. That the Court order that the Minister of Justice to withdraw the Constitution of Zambia (Amendment) Bill No. 10 of 2019 from the National Assembly as the process of its enactment and the proposals contained within it do not comply with the national values and principles and the provisions of the Constitution of Zambia;

6. That the Court make a declaratory order that the Government of Zambia cannot propose or enact legislation including propose the enactment or amend the Constitution of Zambia in a manner that contravenes the national values and principles as set out in the Constitution of Zambia;

7. That the Court make a declaratory order that the National Assembly of Zambia cannot exercise legislative authority in a manner that does not protect the Constitution or promote democratic governance in the Republic of Zambia;

8. The Court make a declaration that Article 79(1) of the Constitution must be interpreted in a manner that is consistent with the entire Constitution;

9. The Court make a declaratory order that the Government of Zambia cannot fundamentally alter the nature of the Constitution contrary to the will expressed by the people of Zambia without duly consulting the people of Zambia; and

10. An Order that costs of and occasioned by the Petition be borne by the parties.

[6] The Petition was filed pursuant to Articles 128 (1) (b), 128 (3) (b), 1(3), 8 (c), and (e), 9, 61, 79 and 287 of the Constitution together with the Affidavit Verifying Facts and skeleton arguments.

E. RESPONDENT'S ANSWER TO THE 2ND PETITIONER'S PETITION

[7] The Respondent, on 17th October, 2019 filed an Answer and Affidavit in Opposition and skeleton arguments.

F. CONSENT ORDER CONSOLIDATING PETITIONS

[8] On 4th October, 2019 the parties filed a consent order consolidating the two Petitions so that they could be heard at the same time. The Law Association of Zambia became the 1st Petitioner while Chapter One Foundation Limited became the 2ndPetitioner.

G. ANALYSIS

[9] As we stated in the abridged Judgement, the historical background of this matter, which was common cause to the parties in the Petition, is that following the amendment of the Constitution of Zambia by the Constitution of Zambia (Amendment) Act No. 2 of 2016 which came into force on 5th January, 2016, it was observed that the Constitution had some lacunae which required to be addressed. The Ministry of Justice invited members of the public, associations and institutions to make submissions by identifying provisions that required refinement. Among those who responded to this invitation was the 1st Petitioner, the Law Association of Zambia. The Ministry collated the submissions received from the public and other institutions and these were considered by the

Secretaries General of political parties who met in Siavonga and came up with the Siavonga resolutions of 12th June, 2018.

[10] On 9th November, 2019 the National Dialogue (Constitution, Electoral Process, Public Order and Political Parties) Act, 2019 (the Act), was enacted. The preamble to the Act reads: -

> **"An Act to facilitate the implementation of the Siavonga resolutions of political parties relating to constitutional and institutional reforms, separation of powers and judicial independence, tolerance, freedom of assembly and civility in politics and electoral reforms; provide for a national dialogue process to facilitate the Constitution refinement process and regulation of political parties, public order and electoral process reforms; establish the National Dialogue Forum and provide for its functions; and provide for matters connected with, or incidental to, the foregoing."**

[11] Section 4 (1) and (3) of the Act provided for the establishment and the functions and powers of the National Dialogue Forum (NDF) as follows: -

> **"4 (1): There is established the National Dialogue Forum which, subject to the Constitution, is a forum for the implementation and enhancement of the Siavonga resolutions for proposals to –**
>
> **(a) alter the Constitution, based on the draft amendments proposed to the Constitution based on submissions from the stakeholders specified in the Schedule, following the enactment of the Constitution of Zambia (Amendment) Act, 2016, and additional submissions from the church; and**
>
> **(b) reform the law on the electoral process, public order and regulation of political parties based on submissions from various stakeholders.**
>
> **"(3) The Forum shall, in the performance of the functions or exercise of the powers conferred by this Act –**
>
> **(a) be accountable to the people of Zambia;**

(b) recognise the importance of confidence building, engendering trust and developing a national consensus for the review process;

(c) ensure, through the observance of the principles referred to in section 3, that the review process –

(i) provides the members with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution, the Electoral Process Act, 2016 and the Public Order Act and provide for the enactment of the Political Parties Bill, 2019, as contained in their submissions and appropriate technical or expert reports considered by the Forum;

(ii) is, subject to this Act, conducted in an open manner; and

(iii) is guided by the respect for the universal principles of human rights, gender equality and democracy; and

(d) ensure that the final outcome of the review process faithfully reflects the wishes of the people of Zambia."

[12] Section 5 of the Act lists the composition of the Forum, while the Schedule to the Act pursuant to section 4 (1) lists individuals, institutions and organizations that made submissions to the Constitution refinement process, Public Order Act and Political Parties Bill. The draft Constitution (Amendment) Bill was initiated by the Republican President and signed by the Attorney General, the Respondent in this matter. Bill No. 10 was published in the Government Gazette and then tabled for first reading in the National Assembly. Bill No. 10 was thereafter referred to a Select Committee of the National Assembly for consideration. The Select Committee invited the public and certain organisations and associations including the 1st Petitioner, to make their submissions on the Bill for

consideration. The 1st Petitioner however did not attend before the Select Committee on the ground that on the same day that it received the invitation, it had filed its Petition before this Court.

[13] On 29th November, 2019 we delivered our abridged Judgment, in which we dismissed the two Petitions on the ground that this Court does not have the jurisdiction under Article 128 of the Constitution to delve into the contents of a bill, which is proposed legislation. We also indicated that we would give a full judgement later which we now do.

[14] In our abridged Judgement, we comprehensively dealt with the major question raised by the parties which was, whether the Constitution (Amendment) Bill Number 10 should be moved into this Court for the purpose of quashing it on grounds that the Republican President's, the Attorney General's and the National Assembly's decisions respectively to initiate, sign and table the Bill in the National Assembly contravened Articles 1(2), 8, 9, 61, 79, 90, 91, and 92 of the Constitution as the process through which it was birthed did not take into account the national values and principles; was not consultative or inclusive and touched the basic structure of the Constitution.

[15] In determining this question, we stated that the 1st and 2nd Petitioners have sought declarations based on the provisions of the Constitution, in particular, Articles 8, 9 and 61 on national values and

not yet been enacted into law, the same cannot be challenged. The second argument in support of this position was that Parliament enjoys exclusive cognizance over its internal proceedings. Hence, the Courts cannot interfere with the conduct of the internal affairs of Parliament when it is exercising its constitutional mandate to legislate. As authority, the following cases were cited for our consideration:

1. **Nkumbula v Attorney General**[1] where the Court of Appeal had occasion to pronounce itself on the propriety of challenging proposed amendments to the Constitution.
2. **Hem Chandra Sengupta & Others v The Speaker of the Legislative Assembly of West Bangal & Others**[2] in which some parties sought to restrain the Chief Minister from pursuing a resolution approving the union of two States as well as to restrain the Union of India from bringing or initiating any bill or legislation in Parliament for purposes of uniting the two States; and
3. **In Re Nalumino Mundia**[3] where the High Court was moved to quash the decision of the Chairman of the Standing Orders Committee to suspend a Member of Parliament from the National Assembly. It was held that the court did not have the power to interfere with the exclusive jurisdiction of the National Assembly in the conduct of its internal proceedings.

[18] The Respondent's further argument was that the actions of initiating the Bill by the Republican President, the signing of the Bill by

the Respondent and the publishing of the Bill and tabling it for consideration by the National Assembly were not 'decisions' as alleged by the Petitioners but were steps which were provided for in the Constitution as mandatory and constitutional obligations. Further, that it had not been shown how the steps or actions taken by the respective officers or institutions in accordance with their constitutional mandate amounted to contravention of the Constitution. That Parliament has the mandate to amend the Constitution and so long as there was compliance with Article 79, there is no basis for any person to challenge the mandate.

[19] In response, the learned Counsel for the 1st Petitioner argued that what their Petition challenges is that the decisions of initiating the Bill by the Republican President, signing the Bill by the Respondent and publishing it in the Government Gazette and tabling it for consideration by the National Assembly, contravened Articles 1 (2), 8, 9, 61, 79, 90, 91, and 92 of the Constitution as they did not take into account the national values and principles; which according to Counsel are democracy; constitutionalism; social justice; rule of law; dignity; leadership and integrity. And hence those decisions were not made for the Zambian people's well-being and benefit, and do not uphold and safeguard the Constitution. Further, that what the 1st Petitioner is

challenging is not the contents of Bill No. 10 but the decisions taken by the Respondent as outlined above. Hence, this Court has jurisdiction under Article 128 (3) of the Constitution.

[20] The 2nd Petitioner's response was that the national values and principles under Article 8 of the Constitution were not applied in the manner envisaged by Article 9 of the Constitution in coming up with Bill No. 10. And that the initiation, approval, signing and considering of Bill No. 10 contravened Article 61 of the Constitution which provides for the principles of legislative authority and states that the legislative authority of the Republic derives from the people of Zambia and shall be exercised in a manner that protects the Constitution and promotes the democratic governance of the Republic. Further, that the Court can determine whether the decision to pass Bill No. 10 complied with Article 1 of the Constitution which provides for the supremacy of the Constitution. And whether non-compliance with national values and principles invalidates any decision, action or measure taken in the legislative process. As authority, the Kenyan case of **Speaker of National Assembly v Attorney General and 3 Others**[4] was cited.

[21] In response to the decision in the **Nkumbula**[1] case, relied upon by the Respondent, Counsel for the 2nd Petitioner contended that the above cited case does not apply in this case because under the constitutional

regime currently in place, national values and principles have been enshrined while when that case was decided, no national values and principles had been embedded in the then Constitution. Therefore, that this Court in interpreting the Constitution,is now enjoined to apply the national values and principles which did not exist at the time of the **Nkumbula**[1] decision.

[22] We have considered the above submissions. The starting point is Article 128 which sets out the jurisdiction of this Court. Article 128 provides as follows:

> **"128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—**
>
> **(a) a matter relating to the interpretation of this Constitution;**
>
> **(b) a matter relating to a violation or contravention of this Constitution;**
>
> **(c) a matter relating to the President, Vice-President or an election of a President;**
>
> **(d) appeals relating to election of Members of Parliament and councillors; and**
>
> **(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.**
>
> **(2) Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.**
>
> **(3) Subject to Article 28, a person who alleges that—**
>
> **(a) an Act of Parliament or statutory instrument;**
>
> **(b) an action, measure or decision taken under law; or**

(c) an act, omission, measure or decision by a person or an authority; contravenes this Constitution, may petition the Constitutional Court for redress.

(4) A decision of the Constitutional Court is not appealable to the Supreme Court."

[23] It is clear from the provision of Article 128 (3) (b) that the Constitutional Court has jurisdiction to hear a matter concerning an allegation that an action, measure or decision taken under the law contravenes the Constitution. However, the question is, does the Court have jurisdiction to hear a matter that alleges that a bill contravenes the Constitution as alleged in this case by the 2nd Petitioner?

[24] Ms. Kasonde's position in this regard was that where the allegation is that a bill touches on the basic structure of the Constitution or violates the national values and principles set out therein, the Court has jurisdiction to grant the remedies sought.

[25] As can be seen from the provisions of Article 128, the Constitutional Court has very wide jurisdiction subject to Article 28. However, although this jurisdiction is extensive, it is still limited by the Constitution itself in Article 128. Therefore, as a creature of the Constitution, the Constitutional Court can only exercise the jurisdiction and power given to it by the Constitution. In this respect we refer to the case of **Mohamed Abdi Mahamud v Abdullahi Mohamed & 3 Others**[5]

in which the Supreme Court of Kenya, observed on jurisdiction as follows;

> **"It is now settled that a Court cannot arrogate to itself jurisdiction through the craft of interpretation. The Court's jurisdiction is donated (sic) by either the Constitution or Statute or both. And, a Court's jurisdiction is not a matter of procedural technicality but one that goes to the root of the Courts' adjudication process. If a Court lacks jurisdiction to entertain a matter, it downs its tools".**

[26] We agree with these observations as they are apt in this case and provide clarity on the issue of jurisdiction raised by the parties in this matter. Therefore, the question that follows is whether the Constitutional Court has jurisdiction to hear and determine an allegation that a bill proposed to amend the Constitution contravenes any provision of the Constitution as has been argued by Ms. Kasonde. This has required us to holistically look at the entire provision of Article 128 of the Constitution vis-a-viz the jurisdiction of the Court.

[27] We have pronounced ourselves in several of our decisions on the canons of interpretation of the Constitution. In the case of **Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and 63 Others**[6], we stated that Article 267 (1) enjoins us to interpret the Constitution in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles. This entails that this Court must have in mind the broad

objects and values that underlie any particular subject matter. We explained in that case that this was premised on the principle that words or provisions in the Constitution or statute must not be read in isolation. And that the purposive approach entails adopting a construction or interpretation that promotes the general legislative purpose which requires the Court to ascertain the meaning and purpose of the provision having regard to the context and historical origins, where necessary. Also in **Milford Maambo and Others v The People**[7] we stated that all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to give effect to the objective of the Constitution. After holistically considering Article 128, our finding is that none of the provisions in Article 128 mention a bill.

[28] Ms. Kasonde has also argued that under Article 1, this Court is the last in the line of defence of the Constitution. As much as we agree with this position, there is nothing in Article 128 or any other provision in the Constitution that gives this Court jurisdiction to question the contents of the bill or to declare it unconstitutional. Our position is further buttressed by the fact that the question of giving the Constitutional Court jurisdiction to hear a matter that alleges that a bill contravenes the Constitution was considered by the Technical Committee on drafting the Zambian Constitution but was rejected. In this respect, we refer to Article 131 at

page 361 of the Draft Final Report of the Technical Committee dated 30th December, 2013 which reads as follows:-

> **"Article 131: Challenge of Bill and Reference to Constitutional Court Recommendations in the first Draft Constitution.**
>
> **[29]** The following provisions were recommended in the First Draft Constitution:
>
> **131 (1): Thirty or more Members of Parliament or any person, with leave of the Constitutional Court, may challenge a bill, for its constitutionality, within three days after the final reading of the Bill in the National Assembly.**
>
> **(2) Where the Constitutional Court considers that a challenge of a Bill, under this Article, is frivolous or vexatious, the Constitutional Court shall not decide further on the question as to whether the Bill is, or will be, inconsistent with this Constitution but shall dismiss the action.**
>
> **(3) Where the Constitutional Court determines that any provision of a Bill is, or will be, inconsistent with any provision of this Constitution, the Constitutional Court shall declare the provision unconstitutional and inform the Speaker and the President.**
>
> **(4) Clauses (1), (2), and (3) shall not apply to a Money Bill or a Bill containing only proposals for amending this Constitution or the Constitution of Zambia Act.**(Underlining is for our emphasis)
>
> **(5) The Standing Orders of the National Assembly shall provide for the procedure to be followed by Members of Parliament who intend to challenge a Bill."**

Deliberation of the Technical Committee on Article 131

The Committee considered the resolutions of the District Consultative Fora, Provincial, Sector Groups and National conventions.

The Committee observed that since a 'Bill' was not yet law, there was no need to provide for it to be challenged. The Committee, therefore, agreed to delete the Article."

[30] It will be observed from the provisions of Article 131 (1), (2), (3) and (4) of the first draft Constitution which we have set out above, that the framers of the Constitution specifically considered giving jurisdiction to the Constitutional Court to hear a matter challenging the constitutionality of a bill and to declare as unconstitutional any provision of a bill which was or would be inconsistent with any provision of the Constitution. It is significant to note that the framers of the first draft Constitution specifically provided in Article 131 (4) that clauses (1), (2) and (3), would not apply *inter alia* to a bill containing only proposals for amending the Constitution or the Constitution of Zambia Act. In other words, a bill containing proposals for amending the Constitution or the Constitution of Zambia Act would not be open to challenge for its constitutionality before the Constitutional Court even if Article 131 of the draft Constitution had been adopted.

[31] This position mirrors Article 27(2), (3) and (8) of the Constitution which provide as follows:

(2) A request for a report on a bill or statutory instrument may be made by not less than thirty members of the National Assembly by notice in writing delivered –

(a) in the case of a bill, to the Speaker within three days after the final reading of the bill in the Assembly;

(b) in the case of a statutory instrument, to the authority having power to make the instrument within fourteen days of the publication of the instrument in the Gazette.

(3) Where a tribunal is appointed under this Article for the purpose of reporting on a bill or a statutory instrument, the tribunal shall, within the prescribed period, submit a report to the President and to the Speaker of the National Assembly stating –

(a) in the case of a bill, whether or not in the opinion of the tribunal any, and if so which, provisions of the bill are inconsistent with this Constitution;

(b) in the case of a statutory instrument, whether or not in the opinion of the tribunal any, and if so which, provisions of the instrument are inconsistent with this Constitution;

and, if the tribunal reports that any provision would be or is inconsistent with this Constitution, the grounds upon which the tribunal has reached that conclusion:

Provided that if the tribunal considers that the request for a report on a bill or statutory instrument is merely frivolous or vexatious, it may so report to the President without entering further upon the question whether the bill or statutory instrument would be or is inconsistent with this Constitution.

(8) Nothing in clause (1), (2) or (3) shall apply to a bill for the appropriation of the general revenues of the Republic or a bill containing only proposals for expressly altering this Constitution or the Constitution of Zambia Act.

[32] Based on this, we note that our Constitution is not completely devoid of a mechanism to scrutinise whether or not proposed legislation is consistent with the Constitution. Of particular note, however, is that Article 27(8) prohibits the application of the outlined procedure to a bill containing only proposals for expressly altering the Constitution or the Constitution of Zambia Act. In our considered view, therefore, the current

constitutional framework allows for scrutinising the constitutional consistence of a bill by a tribunal appointed by the Chief Justice according to the mechanism set out in Article 27, save for a bill for altering the Constitution which is expressly exempted from the said procedure.

[33] However, in the case of the Constitutional Court, the Technical Committee on drafting the Constitution specifically decided to delete the proposed Article 131 of the first draft Constitution and not confer jurisdiction on the Constitutional Court to hear a matter relating to the challenge of a bill for its constitutionality. The Technical Committee's decision was premised on the ground that a bill is not yet law and therefore there was no need to provide for it to be challenged.

[34] In our view, the foregoing observations explain why Article 128 (3) of the Constitution does not confer jurisdiction on this Court to hear and determine a matter seeking to challenge a bill for its constitutionality. We also wish to add and make it clear that when Article 128 (3) (b) is read together with Article 1 (5) of the Constitution which provides that a matter relating to this Constitution shall be heard by the Constitutional Court, we find no support that this includes proposed legislation in a bill when clearly, in conferring the Constitutional Court with jurisdiction, no provision for challenging a bill or proposed legislation was expressly made in Article 128 or elsewhere.

[35] We also take note that with respect to an Act of Parliament or Statutory Instrument, specific provision was made by the Legislature to give the Constitutional Court jurisdiction to hear and determine a matter where the allegation is that the Act of Parliament or Statutory Instrument contravenes the Constitution. To this effect, this Court has in fact declared certain sections of Acts of Parliament unconstitutional. (See **Godfrey Malembeka (suing as Executive Director of Prisons Care & Counseling Association) v The Attorney General & The Electoral Commission of Zambia**[8] and **Webby Mulubisha v The Attorney General**[9].

[36] In the current case, the Petitioners have also argued that when the Respondent undertook the decisions being challenged, the Respondent breached Articles 61, 62 and 63 of the Constitution. We have carefully examined these provisions. Article 61 provides that the legislative authority of the Republic derives from the people of Zambia and shall be exercised in a manner that protects this Constitution and promotes the democratic governance of the Republic.

[37] Article 62 (1) establishes the Parliament of Zambia and states that it consists of the President and National Assembly. Article 62(2) vests the legislative authority of the Republic in Parliament, while Article 62(3) proscribes any person or body, other than Parliament, to have power to

enact legislation, except as conferred by the Constitution. Article 63(1) provides that Parliament shall enact legislation through bills passed by the National Assembly and assented to by the President.

[38] The above provisions clearly vest legislative authority which is derived from the People of Zambia in Parliament which consists of the President and the National Assembly. Sub Article 3 of Article 62 makes it clear, that no person or body other than Parliament has the power to enact laws.

[39] Further, Article 79 (1) states that subject to the provisions of this Article, Parliament may alter this Constitution or the Constitution of Zambia Act. It is trite that Article 79 is the primary provision for alteration or amendment of our Constitution. It is couched in these terms:

> **(1) Subject to the provisions of this Article, Parliament may alter this Constitution or the Constitution of Zambia Act.**
>
> **(2) Subject to clause (3) a bill for the alteration of this Constitution or the Constitution of Zambia Act shall not be passed unless –**
>
> > **(a) not less than thirty days before the first reading of the bill in the National Assembly the text of the bill is published in the Gazette; and**
> >
> > **(b) the bill is supported on second and third readings by the votes of not less than two thirds of all members of the Assembly.**
>
> **(3) A bill for the alteration of Part III of this Constitution or of this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to National referendum with or without amendment by not less than fifty per cent of persons entitled to be registered as voters for the purposes of Presidential and parliamentary elections.**

[40] Thus, Article 79 provides the formal procedure for amending the provisions of the Constitution and not any other procedure. Article 79 is, together with Part III of the Constitution, an entrenched provision. This, we posit, is due to its special nature as encapsulating the procedure for alteration of the Constitution. To borrow the words of **Jallow JSC in Jammeh v Attorney General**[10]**:**

> **The special nature of such a procedure is justified by the fact that the Constitution is not akin to any ordinary law. It Is the supreme law and the source of validity of all other laws and the authority for all public actions.**

[41] In **Godfrey Miyanda v The Attorney General**[11], a case which involved a challenge of constitutional provisions post amendment, this Court had occasion to pronounce itself on alteration of the Constitution pursuant to Article 79 of the Constitution. In that case, we held the view that under our present constitutional framework, this Court would be on firm ground to look into the constitutionality of an amendment to the Constitution if, prima facie, there were questions about compliance with Article 79. We echoed, as we do now, the sentiments of the Constitutional Court of South Africa in the case of **Premier of Kwazulu-Natal v President of the Republic of South Africa**[12] to the effect that where there is a procedure which is prescribed for amendment to the Constitution, this procedure has to be followed.

[42] Thus, as we noted in the **Godfrey Miyanda**[11] case, the Constitution itself provides a guide in Article 79 to which alterations or amendments to the Constitution of the Republic of Zambia must conform. And to demonstrate that this Court would frown upon amendments that breach the procedural imperatives dictated by Article 79, in the **Godfrey Miyanda**[11] case, we held that:

> **....maintaining the definition of "discrimination" as given in Article 266 has the effect of amending Article 23(3) which, being part of Part III of the Constitution, cannot be altered minus referral to a referendum as required in Article 79(3). In view of the conflict that the definition causes with the definition given in Article 23(3), we urge the Legislature to redress the conflict by removing the definition from Article 266.**

[43] Our finding in the **Godfrey Miyanda**[11] case on that particular aspect demonstrates that this Court is not completely devoid of jurisdiction to intervene, as appropriate, when alterations to the Constitution offend the formal procedure set out for constitutional amendments. In such an eventuality it would be incumbent upon this Court to ensure that Parliament does not fall outside the dictates of the amendment process when exercising its power of amending the Constitution as Parliament's amendment power is limited in scope explicitly by Article 79. In this regard, and though only of persuasive value to this Court, we share the sentiments of the Supreme Court of

The Gambia in **Jammeh v Attorney General**[10] where it ruled that failure to comply with the conditions set out in their constitutional provision prescribing the procedure for amending the constitution of that country rendered a purported amendment of the Constitution and assent thereto invalid, null and void and of no effect.

[44] Thus, we re-assert our holding in the **Godfrey Miyanda**[11] case that this Court would be on firm ground to declare unconstitutional, proposed amendments or amendments to the Constitution where there has been an infraction of Article 79 which prescribes the amendment process to be followed by Parliament.

[45] Having said that, we are alive to the fact that, unlike in **Godfrey Miyanda**[11] where the petitioner challenged the constitutionality of some amendments effected to the Republican Constitution by Act No. 2 of 2016, in the instant case the Petitioners' central concern is the constitutionality of Bill No. 10, which is proposed legislation, and that the actions taken in initiating, signing and tabling of Bill No. 10 contravened the Constitution. Our considered view is that the Petitioners have not, in their evidence and submissions to this Court, shown how the process defined in Article 79 has been hitherto breached as at the current stage of the process.

[46] We therefore agree with the reasoning of the Court of Appeal in the **Nkumbula**[1] case that it is absurd to suggest that the Legislature intended the courts to be vested with the power to pronounce in advance that if the government pursued an expressed intention, legislation on the lines of that expressed intention would be *ultra vires* the Constitution. We are of the firm view that had it been so, the framers of the Constitution as amended would have made the position clear. In our abridged Judgment, we noted that a recommendation had been made to the Technical Committee to give the Constitutional Court power to decide on the constitutionality of a bill. For this purpose, we referred to, and quoted, Article 131 of the First Draft Constitution and noted that the Technical Committee rejected the proposal.

[47] By way of comparison, we note that in other jurisdictions where the courts play a role in scrutinising a bill, the constitutions of those countries make clear provision for when the court can, be engaged to decide on the constitutionality of a bill under stipulated conditions. For instance, within the region, the Constitution of the Republic of South Africa Act 108 of 1996 provides in section 167(4)(b) that the Constitutional Court may decide on the constitutionality of a parliamentary or provincial bill upon referral by the president or provincial premier pursuant to sections 79 and 121 respectively. In Zimbabwe, Article 131(8)(b) and (9) of the Constitution as amended by

Act No. 20 of 2013 provides that where the President has reservations about a bill, he or she can refer the bill to the Constitutional Court for advice on its constitutionality.

[48] Further afield, section 148 of the Constitution of the Kingdom of Thailand creates a procedure for referral of a bill to the Constitutional Court for a decision where the Prime Minister or members of the Senate or House of Representatives are of the view that the provisions of a bill are contrary to or inconsistent with the Constitution. In Chile, Article 93(3) of that country's Constitution empowers its Constitutional Court, *inter alia*, "to resolve questions of constitutionality that appear during the processing of bills law (sic) or of constitutional reform projects...."

[49] We are mindful, in citing the above examples, of the fact that the socio-legal and socio-political circumstances are different for each country and may be factors in the framing of a country's constitution, including the shape and nature of its institutions of governance. However, our point of emphasis, for purposes of this Judgment, is that if the framers of our Constitution had intended for this Court to have the power to review or inquire into the constitutionality of a bill or its provisions, the intention would have been clearly expressed as was done for an Act of Parliament or statutory instrument under Article 128(3)(a) of the Constitution.

[50] With all that in mind, we have considered the prayers of the 2nd Petitioner. The 3rd, 4th, 5th and 6th prayers would require us to delve into the contents of Bill No. 10 which we cannot do because we do not have jurisdiction as already stated. We also find that the 1st and 2nd prayers are already provided for in the Constitution in Articles 8, 9 and 61. Similarly, Articles 9 and 61 respond to the 2nd Petitioner's 7th prayer, while with respect to the 8th prayer, the power to amend the Constitution is given to the Legislature in accordance with Article 79(1) of the Constitution. In the 9th prayer, the 2nd Petitioner prays for a declaratory order that the Government of Zambia cannot fundamentally alter the Constitution without consulting the people of Zambia.

[51] Coming to the 1st Petitioner's case, its first prayer is for a declaration that the President's, Respondent's and National Assembly's decision to the extent that it seeks to amend the Constitution in the manner set out in Bill No. 10, is illegal on grounds that it contravenes Articles 1 (2), 8, 9, 61, 79, 90, 91 and 92 of the Constitution. The 1st Petitioner in its oral submissions argued that the decisions by the President, the Attorney General and the National Assembly to amend the Constitution, are evidenced by Bill No. 10.

[52] From the above, it is clear that what the 1st Petitioner is asking us to do is to delve into Bill No. 10. We have already stated that Article 128

(3) (b) gives this Court jurisdiction to inquire into an action, measure or decision taken under law where it is alleged that such action, measure or decision contravenes the Constitution. However, this jurisdiction does not extend to questioning the contents of a bill. The 1st Petitioner's submission that what they are challenging is not the contents of the Bill but the decisions, is at variance with their own pleadings and evidence which requires this Court to delve into the contents of the Bill itself. While contending that the 1st Petitioner does not intend to challenge the contents of Bill No. 10 of 2019, Counsel for the 1st Petitioner did not proffer any explanation as to how this Court could interrogate the impugned decisions contained in Bill No. 10 of 2019 without examining the contents of the Bill. Further, we do not see how we can grant a declaration that the Respondent's decision to the extent to which it seeks to amend the Constitution in the manner set out in the Constitution of Zambia (Amendment) Bill No. 10 of 2019, is illegal because it contravenes Articles 1 (2), 8, 9, 61, 90, 91, 92 and 79 of the Constitution or an order of *certiorari* that this Petition be allowed and Bill No. 10 of 2019 which evidences the Respondent's decision to amend the Constitution in the manner provided therein be removed into Court for quashing of the Bill as prayed by the 1st Petitioner, without examining its contents.

[53] We have considered the prayers of the 1st Petitioner and we are unable to grant them without our delving into the Bill and its contents. It is a roundabout way of asking us to delve into the Bill which we cannot do because we do not have jurisdiction. The prayer is therefore declined.

[54] The second issue that the Learned Attorney General argued on jurisdiction is the defence of exclusive cognisance enjoyed by the National Assembly. He submitted that Parliament enjoys exclusive cognisance over its internal proceedings and that in the current case, the National Assembly was exercising its constitutional mandate to legislate. As authority, the learned Attorney General cited the case of **In Re Nalumino Mundia**[3] where the High Court held that it did not have power to interfere with the exclusive jurisdiction of the National Assembly in the conduct of its internal procedures.

[55] We have considered the above submission. We had occasion to pronounce ourselves on the defence or principle of exclusive cognisance in the case of **Chishimba Kambwili v Attorney General**[13] wherein we stated that:

> **"The doctrine of exclusive cognisance connotes the privileges and immunities enjoyed by the legislative branch of Government in the discharge of its functions or in the regulation of its affairs to the exclusion of other branches of government."**

[56] We observed that in the context of our Constitution, the freedom of Parliament to regulate its own affairs has its genesis or origin in Article 77(1) of the Constitution and that the wording of Article 77(1) is clear and grants the National Assembly power to regulate its own procedure and to make standing orders for the conduct of its business. The regulation of its procedure and the making of standing orders are internal matters in the functioning of the National Assembly while the powers and privileges accorded to the National Assembly are a necessary adjunct to the legislative and deliberative functions conferred by the Constitution on the National Assembly. To illustrate the point, we cited the observations of Lord Coleridge in the case of **Bradlaugh v Gossett**[14] wherein he said that:

> ***"What is said or done within the walls of parliament cannot be inquired into in a Court of law.... The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive".***

[57] However we observed that although the Constitution gives the National Assembly powers to regulate its own procedure and to make standing orders for the conduct of its business, that power is not absolute as Zambian Courts have the constitutional mandate to scrutinise the acts of the Legislature where it is alleged that the

Legislature in the exercise of its mandate has breached or exceeded its power as conferred by the Constitution.

[58] As we stated in the **Kambwili**[13] case, the defence of exclusive cognisance is only available when the National Assembly or the Speaker is dealing with a procedural or internal matter. In this case where the allegation that various provisions of the Constitution have been breached, as pleaded and argued by the Petitioners, does not touch on the procedural or internal affairs of Parliament, the defence of exclusive cognisance is not available to the Respondent.

[59] In the abridged Judgment, we did not fully address the hereunder stated issues which we now wish to address;

> **(i) whether or not the process leading to Bill No. 10 was consultative and inclusive;**
>
> **(ii) whether or not the process leading to Bill No. 10 took into account the national values and principles; and**
>
> **(iii) whether Bill No. 10 goes beyond refinement as it touches on the basic structure of the Constitution.**

[60] With regard to the first issue, the 1st and 2nd Petitioners' position was that the National Dialogue Forum (NDF) process was not consultative or inclusive. In support of this allegation, the 1st Petitioner relied on the evidence of PW1, Mr. Eddie Mwitwa, the President of LAZ. The sum total of his evidence in this respect was that the NDF process was not consultative as the participants were pre-determined and were

as listed under Section 5 of theNational Dialogue (Constitution, Electoral Process, Public Order and Political Parties) Act No. 1 of 2019. And that as a result of restricting the process to those individuals and organisations listed in the Act, the NDF process was not consultative because the members of the public at large were not consulted before coming up with the Bill in question. In illustrating his position, PW1 referred us to the pre- 2016 constitutional amendment process. He testified that the consultation was wide as the Technical Committee on drafting the Constitution had gone to the provinces and districts before they came up with the draft Constitution. It was his testimony that this process did not take place before the NDF came up with Bill No. 10.

[61] Secondly, that the invitation by the Minister of Justice to the members of the public and organisations only called for submissions on the refinement of the Constitution. However, the proposed amendments contained in Bill No. 10 went beyond mere refinement to making major constitutional amendments that touch on the basic structure of the Constitution. In this respect, PW1 again referred us to the pre- 2016 constitutional amendments where, according to him, the Technical Committee went and obtained views from each district and province before coming up with the draft bill that led to the 2016 constitutional

amendments. Hence, according to PW1, the process leading to Bill No. 10 cannot be said to have been inclusive or consultative.

[62] The 2nd Petitioner relied on the evidence of PW2, Dr. O'Brien Kaaba, a lecturer at the University of Zambia, and that of PW3, Ms. Sarah Longwe, a board member of Chapter One Foundation Limited, the 2nd Petitioner in this matter who at the time of the request by the Minister of Justice for submissions was the Chairperson of the Non-governmental Organisations Co-ordinating Council (NGOCC), and was at the time of giving her testimony a member of the OASIS Forum and many other non-governmental organisations (NGOs).

[63] The sum total of PW2's evidence was that he was nominated to represent the University of Zambia at the NDF and that he attended the first four days of the NDF process during which accreditation of delegates was done, the materials to be used during the deliberations were distributed and the official opening by the Republican President was done. And that after he went through the materials, he was not comfortable with the NDF process because it went beyond refinement of the Constitution. According to PW2, it was for this reason that he resigned from the NDF before the deliberations begun. He also testified that there was no explanation as to how membership to the NDF, as provided in the Act, was determined.

[64] As regards PW3, the sum total of her evidence was that the NDF process was neither inclusive nor consultative. She also compared the NDF process with the pre-2016 constitutional amendment process in which, according to her, the Technical Committee on drafting the Constitution undertook wide consultative processes which culminated into the amendment of the Constitution in 2016. It was also her evidence that some of the proposed amendments in Bill No. 10 touched on the basic structure of the Constitution. She identified some of these as the re-introduction of Deputy Ministers, the introduction of a coalition government, the abolition of various commissions including the Gender Equality and Equity Commission and the limiting of the Bank of Zambia's oversight function over financial matters of the Republic.

[65] To further support the 1st Petitioner's position that the NDF process was not consultative or inclusive, Counsel for the 1st Petitioner, Mr. Chimankata, argued that in deciding to amend the Constitution, the people's wellbeing must be taken into account. And that the testimonies of the 1st and 2nd Petitioners' witnesses all confirm that by taking away the people's rights or benefits that were vested in them by or in the Constitution (Amendment) Act No. 2 of 2016, it cannot by any stretch of imagination be categorised as a decision to amend the Constitution for the benefit of the people as evidenced by the contents of Bill No. 10.

[66] On the part of the 2nd Petitioner, the sum total of Ms. Kasonde's written and oral submissions was that a constitution reform process must have the citizen and the citizen interest at the centre of the process. And that without citizen engagement, the Constitution lacks the legitimacy and acceptance which it deserves. Counsel took the position that the process of developing Bill No. 10 expressly excluded citizens from participation.

[67] Counsel further argued that Bill No. 10 was a product of the NDF. She referred the Court to section 5 of the National Dialogue (Constitution, Electoral Process, Public Order and Political Parties) Act No. 1 of 2019 (NDF Act of 2019) which provides for the composition of the NDF. Ms. Kasonde submitted that participation in the NDF was limited to the institutions provided for in that Act. It was Counsel's submission that such limitation was unconstitutional as the value and principle of democracy dictates that participation should be central to the implementation process. It was Ms. Kasonde's submission that the implementation of the NDF Act of 2019 was thus unconstitutional to the extent that it excluded Zambians from participating in the development of the Constitution. Learned Counsel further submitted that since a constitution is a public document, its content and drafting should not be secretive and hidden away from the public. Its content should speak to

unconstitutional and that the consensus at the NDF was limited as it lacked citizenry engagement.

[70] Ms. Kasonde then submitted that this Court is the last line of defence as Zambia has a long and checked history of constitution making and constitutional amendments from the Chona Constitution Review Commission all the way to the Mung'omba Commission and that successive governments have tried and so far have been successful in wrestling the power of the people of Zambia away from them.

[71] Counsel went on to argue that the legislative authority of Parliament is not unlimited because the people of Zambia are sovereign and that legislative power is derived from the people of Zambia pursuant to Articles 5 and 61 of the Constitutionand should be exercised in a manner that protects the Constitution and promotes democratic governance of the Republic. Counsel further argued that the Government does not have absolute or indeed ultimate power to decide to make fundamental changes to the Constitution without adequately consulting and seeking the permission of the Zambian people. In this respect, Counsel referred us to the preamble of the Constitution and submitted that read with Article 5 of the Constitution, the preamble imperatively positions the people of Zambia as the ultimate determinants of how they should be governed. Therefore, that any extensive changes

to the Constitution as proposed by Bill No. 10 which have the effect of radically changing the character of the current Constitution mandatorily requires that the people of Zambia adopt the contents of such a bill before any such changes are made. Counsel argued that Article 79 of the Constitution does not give the government *'carte blanche'* powers to amend the Constitution.

[72] Ms Kasonde argued further that as testified by PW3, the decisions and processes that led to the introduction of Bill No. 10 actually have the effect of reversing the decision of the people of Zambia as contained in the Report of the Technical Committee on drafting the 2016 Constitution. Consequently, that it was incumbent on the government, both the Executive and the National Assembly to allow the people of Zambia to decide how to govern themselves. Counsel, spiritedly, argued that this can only be done through a consultative process and as testified by the Petitioners' witnesses, that the NDF which is a precursor to Bill No. 10 did not meet that standard.

[73] Learned Counsel wound up her submissions by reiterating the point that the most adequate, legitimate and democratic means of consulting the people of Zambia is through holding a national referendum which the government has failed or neglected to do before deciding to table the Bill in issue before the National Assembly. Counsel,

finally, argued that the decision to initiate Bill No. 10 fell foul of the basic structure principle because it breaches the trust of the Zambian people placed in the elected officials in the Executive and Legislature.

[74] In response, the Respondent took the position that participation in the NDF process was open to all individuals, institutions and organizations that had made submissions to the Constitution refinement process following an invitation to the public and all stakeholders by the Minister of Justice. And that the 1st Petitioner made submissions as shown in the schedule to the Act as to what they desired to be amended in Act No. 2 of 2016. Further, that through its witness, PW1, the 1st Petitioner acknowledged that it was invited by the National Assembly to appear before the Parliamentary Select Committee to make submissions on Bill No. 10 when the Bill was being considered by the Select Committee. However, that the 1st Petitioner lost the opportunity by staying away and neglecting to appear.

[75] As regards the 2nd Petitioner, the Respondent submitted that it also lost its opportunity to make submissions on Bill No. 10 as the evidence of its witness, PW3, was that appearing before the Parliamentary Select Committee was not compulsory but voluntary.

[76] In reply, Mr. Mwamba, argued that contrary to the learned Solicitor General's submission that the 1st Petitioner was given an opportunity to

participate in the constitutional amendment process and chose not to, the decision that was taken by the Respondent in the manner they initiated Bill No. 10 was illegal. It was Counsel's submission that the 1st Petitioner did not want to participate in an illegality as that would have been illogical and extremely absurd.

[77] In supplementing Mr. Mwamba's submissions, Mr. Chimankata contended that it is clear that the President of the Republic of Zambia initiated Bill No. 10 and that this decision contravened the safeguards that have been put in place to protect the Zambian people. Counsel further submitted that the enactment of the law is a process and that at every stage of that process, the exercise of power must be checked against the constitutional provisions.

[78] Counsel, in winding up his submission, argued that any amendment or enactment must be for the wellbeing of the people of Zambia. Conversely, that the decision to alter the Constitution which is meant to take away the benefits that the people of Zambia are already enjoying is not in any way intended to benefit the people of Zambia and that Bill No. 10 falls short of the safeguards and threshold that have to be met before amending the Constitution.

[79] In her reply, Ms Kasonde, on behalf of the 2nd Petitioner, insisted that the NDF was not consultative enough due to the fact that the

decision to initiate Bill No. 10 would lead to the reversal of the will of the people of Zambia. And that the people of Zambia are sovereign and legislative power is derived from them.

[80] We have considered the evidence from the 1st and 2nd Petitioners and the submissions by the learned Counsel for the respective Parties. As we see it, the question is whether this Court has jurisdiction under Article 128 (3) (b) to hear and determine a matter that alleges that the Republican President, by initiating the bill, the Attorney General by signing the bill and the National Assembly, by causing the bill to be published in the government gazette and tabling it for first reading in the National Assembly and referring it for consideration to a Select Committee breached the Constitution. The Petitioners have argued first, that the process was not inclusive or consultative and secondly, that there was no evidence to prove or show that in coming up with the said decisions, they took into account the national values and principles as mandated by Article 9 of the Constitution. It was their contention that the contents of Bill No. 10 itself show that they did not do so. In other words, has Article 128 (3) (b) clothed this Court with the power to grant an order of *certiorari* that Bill No. 10 can be brought into the Constitutional Court for the purpose of quashing it on the ground that the process leading to it was not consultative or inclusive and thus breached the Constitution.

[81] We have examined the provisions of Article 128 (3) (b) of the Constitution pursuant to which the two Petitions were brought. Article 128(3)(b) empowers any person who alleges that an action, measure or decision taken under law contravenes the Constitution to petition the Constitutional Court for redress. We agree that this Court has the power under Article 128(3)(b) to hear and determine a matter where it is alleged that an action, measure or decision taken by a person or an authority under the law contravenes the Constitution.

[82] We are alive to the fact that the Petitioners did not only challenge Bill No. 10 as being unconstitutional, they also challenged the process which birthed Bill No. 10.

[83] The Petitioners in the current case have also argued that the decision in the **Nkumbula**[1] case has no application in the current case as no national values and principles had been enshrined in the constitutional regime that was applicable when that decision was made. We do not agree with that proposition for the reason that the issue that was dealt with in that case, is similar to the current case in the sense that, both cases sought to challenge the constitutionality of a bill which is proposed legislation. The Court of Appeal in the **Nkumbula**[1] case put it as follows:

> **The existence of section 28(5) makes it clear that if the only step taken by the executive is the introduction of the bill in question subsection (1) cannot be invoked; this view is reinforced by the existence of section 27 which specifically provides the machinery for the testing of legislation prior to it becoming law. This test is by a tribunal appointed by the Chief Justice and not by the Courts..... One of the reasons for the existence of section 28 (5) is that between the time of the publication of a bill and its third reading there is ample opportunity for amendment and the deletion of provisions repugnant to Chapter III; it would be premature to come to Court before the bill had been given its third reading. And this is why it is provided in section 27 (2) that a request for a report on a bill or a statutory instrument can, in the case of a bill, be made only after the final reading and, in the case of a statutory instrument, only after its publication in the Gazette. In the case of expressions of intention by the Government, however authoritative and however apparently final the terms, obviously there is even more opportunity and room for amendment than in the case of a bill. It is in my view absurd to suggest that the Legislature intended the Courts to be vested with the power to pronounce in advance that if the Government pursued an expressed intention, legislation on the lines of that expressed intention would be *ultra vires* the Constitution.**

[84] As stated in the **Nkumbula**[1] case, the issue of the timing for bringing such challenges in Court is crucial. We further note that the Constitution does not provide for the process by which proposed constitutional amendments should be arrived at, save to provide for the procedure for presentation of a bill containing the proposed amendments to the Constitution in Parliament under Article 79.

[85] In the current case, the 2nd Petitioner's argument was that the implementation of the NDF Act of 2019, which became effective on 9th April, 2019, was unconstitutional to the extent that it excluded Zambians from participating in the development of the Constitution. The Petitioners complained that the NDF process was not consultative or inclusive but restrictive as the NDF Act of 2019 limited participants to only those

stipulated in the Act and listed only those organisations and individuals who had made submissions to the Minister of Justice.

[86] As per evidence of PW2, the NDF deliberations begun on 23rd April, 2019 whilst PW1's evidence was that the 1st Petitioner became aware and had concerns over the NDF process almost from the very beginning of that process. The Petitioners did not however challenge that process at the time. They instead waited for a period of more than three months before filing their respective Petitions alleging that the NDF process was not consultative or inclusive. By that time, the NDF process had come to end as the NDF Act of 2019 was self repealing. Since the NDF process was under an Act of Parliament, the process stipulated in that Act was challengeable under Article 128 (3) (a). This provision empowers any person to petition the Constitutional Court where it is alleged that an Act of Parliament contravenes the Constitution. We reiterate that the 1st and 2nd Petitioners had the opportunity to challenge the NDF Act of 2019 for allegedly not being consultative and inclusive thereby contravening Articles 8 and 9 of the Constitution as that process was amenable to scrutiny under Article 128 (3) (a) by this Court. They lost that opportunity because of tardiness on their part.

[87] That notwithstanding, apart from arguing that for the process to have been consultative, it should have mirrored the process undertaken

by the Technical Committee on drafting the Constitution which held district, provincial and national consultations, the Petitioners did not cite any constitutional provision or any other law as the basis for this argument.

[88] As regards issues numbers (ii) and (iii) above on whether or not the process leading to Bill No. 10 took into account national values and principles and whether or not Bill No. 10 goes beyond refinement of the Constitution as the proposed amendments therein touch the basic structure of the Constitution, our firm view as stated in our abridged Judgment is that the questions ask us to delve into the contents of Bill No. 10 which is proposed legislation. We also note that in the case of **Zambia Democratic Congress (ZADECO) v Attorney General**[15] decided in the year 2000, in which Mr. Sangwa argued the appeal as Counsel for the Appellant, the Appellants in that case had challenged the decision of the then Republican President and his Cabinet to amend the Constitutionin the manner suggested in the Constitution (Amendment) Bill No. 17 of 1996. We observe that, Mr. Sangwa, in that case had argued that Bill No. 17 should be quashed on the ground that the Bill was seeking to alter or destroy the basic structure or framework of the Constitution. In dismissing the appeal, the Supreme Court observed *inter alia*, as follows:

> **The powers, jurisdiction, and competence of Parliament to alter the Constitution of Zambia are extensive provided that it adheres to the provisions of Article 79 of the Constitution. Article 79 limits the powers of Parliament only in relation to Article 79 itself and to Chapter III of the Constitution relating to fundamental rights and freedoms of the individual...**

[89] Although the above decision of the Supreme Court is not binding on the Constitutional Court, we totally agree with the position taken as the reasons given aptly cover the argument by the Petitioners that Bill No. 10 of 2019 should be quashed on the ground that it contains proposals that touch on the basic structure of the Constitution. We also note that the Supreme Court in the **ZADECO**[15] case cited with approval, the Court of Appeal's decision in the case of **Nkumbula v Attorney General**[1]. The two cited cases clearly illustrate that Courts in Zambia have historically declined to make pronouncements on allegations that proposed amendments touch the basic structure of the Constitution for the same reason that we have given and this is that these are proposed legislation.

[90] As already noted, unless it is shown that the process leading to the tabling of Bill No. 10 offends the mandatory formalities prescribed in Article 79, this Court cannot intervene on the basis of Article 128(3)(b) of the Constitution.

H. ORDERS OF THE COURT

[91] We reiterate our position in the abridged Judgment and issue the following Orders:

(i) The two Petitions have no merit and they stand dismissed.

(ii) The parties shall bear their own respective costs.

.....

H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

.....

A. M. Sitali
CONSTITUTIONAL COURT JUDGE

.....

M. S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....

E. Mulembe
CONSTITUTIONAL COURT JUDGE

.....

P. Mulonda
CONSTITUTIONAL COURT JUDGE

.....

M. Musaluke
CONSTITUTIONAL COURT JUDGE

Munalula JC dissenting:

Cases referred to:

1. Zambia Democratic Congress v Attorney General 2000 Z.R. 6
2. Nkumbula v Attorney General (1972) Z.R. 265
3. United Democratic Movement v The President of the Republic of South Africa Case CCT 23/02 2002
4. Miyanda v Attorney General 2016/CC/006
5. Law society of South Africa and Others v President of The Republic of South Africa and Others SALR 01 Case CCT 67/18
6. Law Society of Kenya v Attorney General and Another, Constitutional Petition No. 3 of 2016 [2016] eKLR
7. Male H. Mabirizi K. Kiwanuka v The Attorney General consolidated with Constitutional Appeal No. 03 Of 2018 between Karuhanga Kafureeka Gerald And Others v The Attorney General and with Uganda Law Society v The Attorney General, Constitutional Appeals No. 2, 3 and 4 of 2018

Legislation referred to:

Constitution of Zambia, Chapter 1 of the Laws of Zambia (as amended in 2016)

Works referred to:

Commonwealth (Latimer House) Principles on the Three Branches of Government, 2003

Baas, Katherine Slenn and Sijit Chondry "Constitutional Review in Democracies" Centre for Constitutional Transitions NYU *https://www.law.nyu.edu*

Sweet, Alec Stone (2013) "Constitutional Courts" in Michel Rosenfeld and Andras Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, pp.816-830

Jacobsohn, Gary Jeffrey (2013) "Constitutional values and principles" in Michel Rosenfeld and Andras Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, pp.777-791

Klein, Claude and Andras Sajo (2013) "Constitution-making: Process and Substance" in Michel Rosenfeld and Andras Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, pp.419-441

The Petitioners brought before this Court, a very important question. They alleged that the on-going process of amending the Constitution of Zambia had not complied with the constitutional requirements. It was a "heavy" question because in answering it the

Court would determine the parameters of its jurisdiction in matters involving amendment of the Constitution. These were my thoughts as I perused the pleadings, evidence and arguments of the Petitioners. Having read the Decision handed down however, I am unable to reconcile myself to the limits set by the Court. So by this Opinion, I choose a different path from that taken by my sisters and brothers.

My Opinion is anchored on the sense that the Constitution of Zambia as amended in 2016 instituted a new constitutional order quite different from what prevailed in the past. The new order is the result of repeated efforts at constitution reform over the past 50 years. With the new order came a constitutional court to enforce it and inculcate a new legal culture. In my considered view, the Court has not gone far enough in executing this mandate in this case. Understandably, the Court is constrained by the combination in the Constitution of both the old and the new, as courtesy of the failed 2016 referendum, the amendment process provided for in Article 79 was retained. In interpreting the Constitution therefore it is my firm belief that there is need to take into account the values embraced by the new order so as to minimize the impact of the impugned constitutional culture of the pre-2016 Constitution amendment era.

I wish to support my position point by point.

The first point that I want to make relates to the question brought before this Court. I hold the view that the Petitioners set out to challenge the process leading up to the introduction of Bill No. 10 to the National Assembly rather than Bill No. 10 *per se*. That the Petitioners so framed and so argued their Petitions.

The Petitioners argued repeatedly that they were not challenging the merits of Bill No. 10, but the process leading up to its presentation before Parliament. They averred that the process that resulted in Bill No. 10 ought to be examined by this Court because it had fallen short of constitutional expectations. That mandatory values and principles which must inform every stage of the Constitution amendment process were not taken into account in the process which was undertaken. Further that there was inadequate public participation in the process, such that Bill No. 10 of 2019 was not The People's document that it should be. That the process being in contravention of the Constitution, could not yield a viable document.

It was evident to me that although there were some reliefs prayed for, that seek the quashing /withdrawal of Bill No. 10, this in itself is insufficient to render the Petitions a ruse to challenge the said Bill. I say so because while the Petitioners inclusion of the impugned reliefs may have opened the door to the issue of jurisdiction, such reference was not

fatal. This is because the impugned reliefs are consequential in the event that the Court came to a finding that the impugned decisions and/ or actions/ measures contravene the Constitution. The Petitioners wanted the impugned decisions and/or or actions/measures which are complete in themselves and could stand apart from Bill No. 10 so as to warrant their separate consideration to be found wanting, regardless of the effect such determination would have on Parliament's subsequent consideration of the Bill itself.

It is my opinion that the impugned decisions, actions and measures, leading to the initiation, signing, publication, and tabling of Bill No. 10 before the National Assembly were complete in themselves as separate parts of the process. As such they could be raised in this Court at any time as there is no time or other limit on when they can be brought before this Court. In the circumstances, the allegations did not have to be about the National Dialogue Forum Act (henceforth the NDF Act). More so as it is apparent from the pleadings and the evidence led in Court, that the Petitioners were questioning the entire initiating process that preceded the tabling of Bill No.10 before the National Assembly. The NDF Act was one of the steps taken on that road. In saying so, I am fortified by the learned authors of **"Constitution-**

making: Process and Substance" Claude Klein and **Andras Sajo** at page 425 that:

> **Producing a Constitution starts with an initial decision (known as the 'initiative'): Who decides the initiative and what does it mean...The process goes on with a decision on how to position the process *vis a vis* the existing structure ...followed by the choice... for the deliberating body or the draft constitution-preparing body. The process includes also the working technique of that body...Lastly, the question of the final decision or approval appears; approval by the body itself or by a referendum...**

The second point that I want to make relates to Article 79 and the decision in **Zambia Democratic Congress v Attorney General**[1]. In that case, it was held that Parliament has extensive powers to amend the Constitution subject only to Article 79 and Part III of the Constitution. The Constitution as amended in 2016 includes Articles 8 and 9 which in my view has substantially changed matters.

The Petitioners rode on Articles 8 and 9 to demonstrate that the values and principles stipulated therein are now a part of the constitutional requirements for amending the Constitution and therefore ought to be adhered to. That the Court is the stronger for the inclusion of these mandatory national values and principles which make it easier to identify contraventions of the Constitution even where such contraventions purport to be within the law. According to the learned author **Gary Jeffrey Jacobsohn** in "**Constitutional Values and**

Principles," values (which are culturally determined and steeped in long-standing traditions) and principles (which are more universal in scope and are a requirement for justice or fairness) are the very cornerstones of constitutionalism. It is only because their meaning and content is so contested that they are often spelt out in the Constitution, as is the case with Articles 8 and 9. The People thus stipulated the applicable values and principles so that the Court would have the means to protect the Constitution particularly during an amendment process when the Constitution is at its most vulnerable.

I agree with the Petitioners Article 61 binds Parliament to protect the Constitution as it exercises its legislative authority. This underscores the fact that the authority to amend the Constitution derives from the People and it is to be exercised in a manner that protects their preferred values. Further, protection of the Constitution during the process of amendment being paramount for both Parliament and this Court, once the allegation of procedural impropriety was raised, then as opposed to proceeding with its own consideration of Bill No. 10, Parliament should for the sake of good order, have suspended consideration of Bill No.10 until the question of alleged procedural impropriety surrounding its initiation had been resolved by the Court. The allegations raised by the Petitioners about the substantive nature of the proposed amendments, that the amendments went so far as to change the basic structure of the

Constitution when consultations were inadequate, made for exceptional circumstances putting both Parliament and this Court on notice that this was a suitable case in which to review the initiating process for adequate compliance with the constitutional requirements and the need for public participation.

On its own, Article 79 is quite rudimentary. It cannot adequately protect the amendment process. Hence the need to supplement it with the mandatory Constitutional values and principles. In practice, conventions such as the appointment of constitution review commissions are also undertaken in order to ensure not just the legality but also the legitimacy of amendments to the Constitution. I am therefore of the view that compliance with Article 79 is not the sole mandatory consideration in the process of amending the Constitution. That the constitutional values and principles have to be taken into account as well.

The third point I want to make is in relation to the jurisdiction of this Court. Again because of the continued legal presence of the old order, a holistic reading of **Nkumbula v Attorney General**[2] with Article 27 of the Constitution of Zambia 1991 and Article 128 of the Constitution of Zambia as amended in 2016 shows that it is not possible to question the substantive provisions of a bill intended to amend the Constitution either in this Court or before a Tribunal. I will not take issue with this position

because the Constitutional amendments are assumed to be the wishes of the People. That assumption however is dependent on the process of amendment which is stipulated by the Law or the Constitution being followed diligently. Thus it is the process which must be protected by all parties including this Court in order to preserve the integrity of the end product. This is why the prohibition against challenging a Bill intended to amend the Constitution does not extend to challenging the constitutionality of the process by which a bill to amend the Constitution is initiated and processed for enactment. Checking that the process of amendment protects and validates the contents of the Constitution and is necessary for purposes of not just the legality but also the legitimacy of constitutional amendments. Hence in **United Democratic Movement v The President of the Republic of South Africa**[3] the South African Constitutional Court in a majority judgment held that:

> **Amendments to the Constitution passed in accordance with the requirements of section 74 of the Constitution become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities**.*(emphasis added)*

Indeed, in this Court's seminal decision of **Miyanda v Attorney General**[4] it was held that:

> **An act purporting to amend the Constitution that breaches Article 79 would be illegal and the offspring thereof a nullity. The natural role of the Court in a modern democracy is to protect the Constitution and to prevent bodies that were created by the Constitution from abrogating its provisions. In this instance the Court's role would be to verify whether the conditions for alteration provided for in the Constitution have been fulfilled. An alteration to the Constitution is valid only if it was enacted in conformity with the conditions of form and procedure provided for in the Constitution**. *(emphasis added)*

Rather than interpret this holding to mean that only compliance with Article 79 is required in order to make valid amendments to the Constitution, I see it as an opportunity to broaden the requirements to include at the very least, the national values and principles. I say so because I am of the firm view that this Court because of its nature must keep its jurisdiction as wide and open as possible.

My position is premised on the fact that a constitutional court as a specialised court, is set up to protect the Constitution which is the supreme law of the land. It acts as sole or final arbiter in matters to do with the constitution and resolves constitutional questions which are too important to be left without an answer or a remedy. When there is an important constitutional question before it, a constitutional court cannot take refuge in precedent or technicalities nor shy away from making hard

decisions that hold anyone and everyone including the court itself constitutionally accountable. **Katherine Slenn Baas** and **Sijit Chondry,** point out in "**Constitutional Review in Democracies**" that:

> **A constitutional court should have jurisdiction over all matters that involve a constitutional question. While granting a constitutional court broad jurisdiction allows the court to exert substantial influence over a country's politics, restricting the court's jurisdiction in a way that declares any area of constitutional law "off-limits" is incompatible with the court's role as final arbiter of the law.**

Further, the learned author **Alec Stone Sweet** in "**Constitutional Courts,**" at page 825 opines that:

> **CCs [constitutional courts] do not preside over litigation, which remains the purview of the ordinary courts. Instead specifically designated authorities or individuals ask questions of CCs challenging the constitutionality of specific legal acts; constitutional judges are then required to answer these questions, and to justify their answers with reasons.**

I adopt the learned authors' views as my own in relation to this Court. And I want to go further to say that a constitutional court should when a constitutional question is raised before it, be prepared to push the boundaries to the outer limits of its constitutional mandate. The many doors in the Constitution should be left open to deal with any unforeseen harm to the Constitution albeit with circumspection. In the South African case of **Law society of South Africa and Others v President of the**

Republic of South Africa and Others[5] Chief Justice Mogoeng said and I agree:

> **[25] Only under exceptional circumstances, is it permissible for courts to intervene and grant relief in relation to a process that is yet to be finalised.***(emphasis added)*

In my considered view, an 'exceptional circumstance' would include allegations of impropriety during the process of amending the Constitution.

Further, constitutional courts have powers of both abstract and concrete review. According to **Sweet,** 'abstract review' is also called 'preventive review' as its purpose is to filter out unconstitutional laws before they can harm anyone. Since constitutional courts are the gatekeepers of constitutionalism, they are constantly on guard to both prevent and mitigate harm to the constitution because such harm may not only be irreversible but also dangerous to the legal, political and social fabric of the nation.

I am of the firm view that the Constitutional Court of Zambia is different from the ordinary common law courts with their emphasis on procedure and precedent. That it follows the mould of other constitutional courts. So while it has its unique features, it is identifiable as a constitutional court precisely because it shares a similar jurisdiction to that enjoyed by other constitutional courts. That in setting it up, the People of Zambia made a fundamental break with Zambia's

constitutional past in which the separation of powers favoured the Executive and Legislative branches of Government. The Court was created to nurture and protect a new order which would deepen constitutionalism. It was thus given wide original and final jurisdiction over all matters to do with the Constitution subject only to Article 28 which caters for Bill of Rights claims.

In my considered view, limiting the possibility of reviewing the process while a Bill is in motion and confining the span of the validity test to Article 79 will constrain the Court's ability to intervene when necessary. I say so alive to the warning by **Klein and Sajo** in **Constitution-making Process and Substance** that an amending process may be done in accordance with the prescribed amending procedure but so alter the Constitution's essence that the end result is a different political regime.

The fourth point that I want to make relates to the timing of the Petitions. I see no provision in the Constitution that says that this Court cannot consider at the bill stage, an allegation of a violation relating to the manner in which a bill to amend the Constitution has come about. In the current constitutional set up, protecting the Constitution is all that this Court is set up to do. It would therefore be self-defeating for the framers of the Constitution to then deny the Court the power to effectively protect it. In my considered view the People as the framers of the Constitution

have given the Court ample powers to intervene in the name of the Constitution.

The Constitution in Article 128(3), which was invoked by the Petitioners, simply requires that there be an allegation that an action measure or decision taken under law or otherwise contravenes the Constitution in order to trigger the jurisdiction of the Court. Article 128 gives this Court jurisdiction to review a decision, action or measure for compliance with the constitutional requirements without any limitation as to what type of process is involved.

The fifth and final point that I want to make is about the separation of powers. Under the separation of powers doctrine each arm of Government including the Judiciary (this Court in particular) enjoys the freedom to do their work in accordance with the People's aspirations as expressed in the Constitution. This Court is the guardian of the Constitution. Parliament cannot plead exclusive cognizance and separation of powers to avoid the scrutiny of the courts as that would hinder this Court's ability to exercise its powers of review and protect the Constitution.

Admittedly, the Court must "tip toe" into and around the territory of Parliament and the law making process and it does so not to undermine the separation of powers and Parliament's legislative independence but

to carry out its duty to ensure Parliament's compliance with its constitutional obligations. This Court cannot defer to Parliament if doing so undermines its own duty to protect the Constitution. The Court's intervention in fact strengthens the comity that the three Organs of Government share by interpreting and clarifying the Constitution where a question arises. In framing the independence of Parliamentarians, the Commonwealth (Latimer House) Principles state that Parliamentarians must be able to carry out their legislative and constitutional duties in accordance with the Constitution free from unlawful interference. This Court's intervention is not unlawful. The Court is mandated to ensure Parliamentarians are acting in accordance with the Constitution as they legislate.

Intervention is necessary not only in order for the other Organs to function effectively within the constitutional limits but also for the Court to be effective in fulfilling its constitutional mandate. I fully agree with **Sweet** who puts it thus at page 818:

> **Constitutional review can be said to be effective to the extent that the important constitutional disputes arising in the polity are brought to the CC [constitutional court] on a regular basis, that the judges who resolve these disputes give reasons for their rulings, and that those who are governed by the constitutional law accept that the court's ruling have some precedential effect.** *(sic)*

Article 91 which vests executive authority in the President shows that the language used to vest powers in the two Organs is similar. Since the vesting of executive authority does not oust this Court's jurisdiction to inquire into allegations of contraventions by the Executive it follows that the vesting of legislative authority also does not oust the Court's powers to consider allegations of procedural impropriety surrounding the law making process.

The regional jurisprudence, further shows that a constitutional court is duty bound to act on alleged violations of the Constitution by Parliament when there are allegations of the same brought to the attention of the court. Whilst this jurisprudence is not binding and the Zambian Constitution has its own peculiarities, such decisions are nevertheless helpful in the search for a new more democratic order. In support of this point I wish to quote two of the cases:

Firstly, in **Law Society of Kenya v Attorney General and Another**[6] the Court was unequivocal about its role, saying:

> **190. ... this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, as this petition alleges a violation of the Constitution by the Respondents, it is our**

finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court.

191. We hold that this Court has the power to enquire into the constitutionality of the actions of Parliament notwithstanding the privilege of *inter alia*, debate accorded to its members and its proceedings. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and Parliament must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.

192. In our view the doctrine of separation of powers must be read in the context of our constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles the doctrine must bow to the dictates of the spirit and the letter of the Constitution.

Secondly, in the Ugandan case of **Male H. Mabirizi K. Kiwanuka v The Attorney General consolidated with Constitutional Appeal No. 03 of 2018 between Karuhanga Kafureeka Gerald and Others v The Attorney General and with Uganda Law Society v The Attorney General**[7] Chief Justice Bart M Katurebee at page 51 had this to say:

In line with the doctrine of separation of powers, the courts are and should be wary of interfering with the internal workings of Parliament. As long as Parliament has acted within the provisions of the Constitution and the set rules of procedure, the court cannot and should

> **not dictate how the Speaker and the House run its business; <u>of course, with the exception of where there is abuse of power and/or where Parliament does not act within the confines of the law.</u>** *(emphasis added)*

As I understand the regional jurisprudence, courts, should not normally interfere in the performance of the functions of Parliament but they may do so where necessary. As long as a contravention has not been brought to the attention of the Court, the law making process may proceed unimpeded. However once a complaint of some procedural impropriety is filed in court then the dynamics change. An alleged contravention of the Constitution compels the courts to investigate and establish whether indeed the alleged transgressor has failed to comply with the Constitution.

This is like any other review process. Parliament and the constitutional court act in accordance with established civility and decorum towards each other. Parliament defers the relevant bill until the court has determined the matter. And the court acts timely and does its job not in a manner that usurps the powers of the lawmakers, but that protects the Constitution by ensuring that the law makers are acting appropriately. Given that constitution amendment processes are not a regular affair, there is minimal disruption to the law-makers performance of their responsibilities.

As I conclude I want to reiterate what I said at the beginning. The Constitution is hopeful and it is incumbent on this Court which holds the mandate to interpret and protect it to use all means constitutionally available to it to sustain that hope.

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Prof Justice M M Munalula (JSD)

Constitutional Court Judge