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JUDICIAL REVIEW OF THE CONSTITUTION MAKING PROCESS IN  
ZAMBIA: A CRITIQUE OF *MUNIR ZULU AND CELESTINE MUKANDILA V*  
*ATTORNEY GENERAL*

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## I. INTRODUCTION

Do courts have judicial review powers over the constitution amendment process? Should courts have power to stop a constitutional amendment process even before a Bill is drafted? Those are the questions the Constitutional Court had to grapple with in the case of *Munir Zulu and Celestine Mukandila v Attorney General 2025/CCZ/009*. It was not the first time the Zambian judiciary was asked to intervene in the constitution amendment or constitution making process. While the Courts have in all past similar cases declined the invitation, in the current case the Court gladly took the opportunity to assert its role in the constitution reform process.

The petitioners in this case challenged the constitutionality of the constitution amendment process that was embarked on by the government, premised on announcements by the President and the Minister of Justice, that it lacked a wide public consultative process. The petitioners also sought from the Court to overturn its position in the earlier case of *Law Association of Zambia and Chapter One Foundation Limited v Attorney General 2019/CCZ/0013/0014* in which the petitioners sought the intervention of the Constitutional Court to halt the Constitution of Zambia (Amendment) Bill No 10 of 2019 (Bill 10).

The Constitutional Court held that the initiating process for the constitutional amendment process was defective as it had no public input. It distinguished the current case from the previous case of *Law Association (LAZ)* case for two reasons. First, that in the *LAZ* case the challenge revolved around the constitutionality of a Bill, that is, Bill 10. Second that the petitioners in this case challenged the constitutionality of the process leading to the tabling of Bill 10. According to the Constitutional Court, the Bill 10 judgment is acceptable because the constitution making process then was chaperoned by an Act of Parliament, the National Dialogue Forum Act. The distinction was, therefore, that there was no guiding legislation and that the challenge raised related to the pre-Bill stage of framing the constitutional amendment. For these reasons, the Court dismissed the claim that the *LAZ* case was *per incuriam*.

In halting the process, the Constitutional Court relied heavily on articles 2 and 128 of the Constitution. Article 2 states:

Every person has the right and duty to—

(a) defend this Constitution; and

(b) resist or prevent a person from overthrowing, suspending or illegally abrogating this Constitution.

Court reasoned that the import of article 2 is that it is cardinal in protecting the constitution as it clothes ordinary people with locus standi in protecting the constitution and empowers them to defend the constitution. Riding on this provision, the Court considered it had jurisdiction to intervene in the constitution amendment process.

The Court read this provision together with article 128(3)(c) to hold that it had jurisdiction to determine the constitutionality of conduct at pre-Bill stage in the constitutional amendment process. Article 128(3)(c) states: “Subject to Article 28, a person who alleges that— (c) an act, omission, measure or decision by a person or an authority.”

The court reasoned that the initial pre-Bill stages of the process are subject to challenge under this provision as it gives liberty to any person to challenge the process as soon as it is launched. Based on articles 2 and 128, the Court resolved that it had jurisdiction to determine what happens at the pre-Bill stage in the constitution amendment process. However, to determine that the amendment process was defective, the Court summoned the ‘constituent power’ doctrine, that is, that the people as a collective are the ultimate source of the constitution and that state institutions only exercise delegated or agent power donated to them under the constitution by the people. The Court thus regarded article 79, the amendment clause in the constitution, as merely formalistic, and since there was no engagement with the people, article 79 did not apply:

We are therefore of the firm view that the power to amend the Constitution as elucidated in Article 79 is formalistic. Article 79 attends to the passing of the amendments and is not the first step in the constitution amendment process. The first step is framing the amendments by the people. So, what does this mean when it comes to the current constitution amendment process? In our considered view, it means that this Court has the power and the duty to check whether the initial acts which informed the amendment process are in compliance with the relevant provisions of the constitution.<sup>2</sup>

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<sup>2</sup> Munir Zulu and Celestine Mukandila v Attorney General 2025/CCZ/009, para 40

This case raises matters of significant national interest and impacts jurisprudence governing constitution amendments in the country and beyond. I argue in this paper that the position taken by the Court is legally unsound and lacking in analytical rigour.

The paper is organised thematically around the following issues:

- 1) The difference between amendment and constitution making;
- 2) The scope of the amendment power in the Constitution;
- 3) Judicial power to intervene in the constitution amendment process prior to enactment;
- 4) Initiation of the constitution amendment process and the power and role of the executive in the amendment process; and
- 5) Applicability of the Basic Structure Doctrine in Zambia.

I elaborate on each of these further below.

## **II. DISTINCTION BETWEEN AMENDMENT AND REVISION OR CONSTITUTION MAKING**

The constitution sets the framework of government of a country to which it applies. It is usually intended to be durable and survive vicissitudes of political expediencies. To be of long-term use, constitutions are usually drafted in broad terms in order to accommodate future developments that may not have been foreseen at the time of articulation. They must adapt to the changing economic, political, social, and cultural value systems. This entails that there is always an inherent contest in each constitutional system for stability and change. Every constitution needs to strike an appropriate balance between the need for stability and change.

To preserve a constitution or keep it relevant and responsive to changing times, each constitution contains an amendment clause. An amendment clause is like a safety valve that enables the constitution to release pressure without damaging the entire constitutional framework. It is a necessary device in every constitution that allows the constitution to respond to pressing needs without the destruction of the whole constitutional order.<sup>3</sup>

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<sup>3</sup> Adem Kassie Abebe, "Substantive Validity of Constitutional Amendments in South Africa," (2014) 131 The South Africa Law Journal, 657

Professor Charles Manga Fombad aptly captured the essence of the amendment clause in the constitution when he stated:

It can be said that the need to amend a constitution inheres in the very nature of a constitution itself. Far from being a “lifeless museum piece,” or a document that contains “time-worn adages or hollow shibboleths,” a constitution must be regarded as a living document which is designed to serve present and future generations, as well as embody and reflect their fears, hopes, aspirations, and desires. Hardly any political system, whether dictatorial or democratic, will survive for long without striving to reflect the political realities of the day in its constitution. As Donald Lutz rightly points out, every political system needs to be modified over time as a result of some combination of any of the following: changes in the environment within which the political system operates (including economics, technology, foreign relations, demographics, etc.); changes in the value system distributed across the population; unwanted or unexpected institutional effects; and the cumulative effect of decisions made by the legislative, executive, and judiciary. In fact, Thomas Jefferson, in arguing that constitutions should be rewritten every generation, declared that the “dead should not govern the living.” He probably went too far in suggesting that constitutions should have an expiration date of 19 years, but he was certainly right in deriding those who “look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched.”<sup>4</sup>

Inevitably, this means there is a difference between the power to create a new constitution and the amendment power. The two should not be confused. Unfortunately, the Constitutional Court conflated and confused the two distinct concepts in the case of ***Munir Zulu and Celestine Mukandila v Attorney General 2025/CCZ/009*** when it held to the effect that any amendment of the constitution required the exercise of constituent power. I return to this point later below. For now, it is sufficient to point out that the power of amendment is constituted power, as enshrined in the amendment clause in a constitution. The power to revise, review or establish a new constitution is constituent power. Constituent power is the power to establish the constitutional order of a nation. It is original and unmediated, at least in terms of logical grounding. It exists outside the constitution, sovereign and towers above the constitution as it is raw public power, not answerable to the constitution but above the constitution. As Professor Yaniv Roznai has

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<sup>4</sup> Charles Manga Fombad, “Some Perspectives on Durability and Change Under Modern African Constitutions,” (2013) 11 International Constitutional Law Journal, 386

observed, constituent power is original power that is “exercised in a legal vacuum, whether in the establishment of the first constitution of a new State or in the repeal of the existing constitutional order, for instance with regime change. It acts outside the forms, procedures, and limits established by the constitution.”<sup>5</sup> Once the constitution is established, constituent power retreats and becomes dormant as its task is established, and all public power is henceforth exercised under the constitution. The people are a “sleeping sovereign” so to speak, until there is a new round of constitution making, when the people awaken. As the Ugandan Supreme Court held, once the people establish the constitution, they also agree to be bound by the constitution:

Article 1(3) emphasizes the Constitution as the source of “all power and authority of Government and its organs”. At the same time, the clause emphasizes that the Constitution itself derives its authority from the people. It is important to note that, even here, the emphasis is that by this Constitution, the people consent to be governed in accordance with the Constitution.<sup>6</sup>

On the other hand, the power exercised under the constitution is constituted power and includes power to amend the constitution. Constituted power is legal power derived from or delegated under the constitution. Based on this distinction, only an exercise of constituent power should result in change of the constitution or a substantial part of it. All reforms or alterations that go to the substance of the constitution should be reserved to the people as the constituent power. However, amendment power is delegated and is properly exercised by those upon whom it is conferred without any need to invoke or stir constituent power. The exercise of constituted power (amendment power), however is not intended to change the substance of the constitution but merely the text. As Professor Richard Albert notes,

The procedures of constitutional amendment give lawmakers and the people a way to rid their constitution from an observed fault or to update it without having to write an altogether new constitution.<sup>7</sup>

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<sup>5</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Power* (Oxford: Oxford University Press, 2017), 106

<sup>6</sup> *Male H Mbirizi K Kiwanuka v Attorney General Constitutional Appeal No 02 of 2018*, per Katureebe CJ

<sup>7</sup> Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press, 2019), 39

The power of amendment is, therefore, preservative and not destructive of the constitution. It is intended to maintain its existence, while adjusting it to the needs of the time without changing its core or substance. Prof Roznai aptly summarises the nature of this power:

The amendment process is designed for the textual change of constitutional provisions, but not of fundamental political decisions that form the substance of the constitution: The authority to amend the constitution ... means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved ... The authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to change the particular basis of this jurisdiction for constitutional revisions.<sup>8</sup>

Professor Richard Albert equally makes the distinction between constitution amendment and constitution making as follows:

Both amendment and revision are species of constitutional change. The latter refers to fundamental changes to the constitution typically requiring more exacting procedures than the former, which generally requires a lower amendment threshold and is used for narrow, non-transformative adjustments. Whereas an amendment alters the constitution harmoniously with its spirit and structure, a revision departs from its presuppositions and is inconsistent with its framework, thereby disrupting the continuity of the legal order. The distinction between amendment and revision is largely theoretical, though it is sometimes entrenched in constitutional texts that expressly impose higher thresholds for revision than they do for amendment.<sup>9</sup>

The distinction is not just academic but well established in jurisprudence. The Ugandan Supreme Court in the case of ***Male H Mbirizi K Kiwanuka v Attorney General Constitutional Appeal No 02 of 2018*** took this approach. Katureebe CJ, noted:

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<sup>8</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Power* (Oxford: Oxford University Press, 2017), 117

<sup>9</sup> Richard Albert, "Amending Constitutional Amendment Rules," (2015) *International Journal of Constitutional Law*, 12

It can be discerned from the above provision that there are instances when the people expect to exercise their sovereignty directly and at other times through their elected representatives.

The Kenyan case of *Njoya v. Attorney General Civil Application No 82 of 2004*, is also a good illustration of the distinction between constitution amendment and constitution making. In this case, the Court rejected the claim that the amendment power under the constitution includes the power to make those changes that amount to the replacement of the Constitution. It indicated that the amendment “plainly means that Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution,” and that “alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered.”

The same, or even perhaps more strict approach was taken by the South African Constitutional Court when it contrasted amendment power from constitution making power, noting:

The reliance upon the “spirit” of the Constitution is, in my view, misconceived. There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an “amendment” at all.<sup>10</sup>

### **III. SCOPE OF THE AMENDMENT CLAUSE (ARTICLE 79)**

Having clarified the distinction between amendment and constitution making, here I seek to elaborate the scope of the amendment clause in the Zambian constitution, which is Article 79 of the Constitution. Both constitution making and constitution amendment carry inherent risks of regressive constitutional reform. This is because, as David Landau pointed out, this may provide regimes not committed to constitutionalism a further

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<sup>10</sup> Premier of Kwa Zulu Natal and Others v The President of South Africa and Others Case No CCT 36/95

opportunity to “wipe away existing institutional order and consolidate power in a particularly rapid and durable way.”<sup>11</sup>

Associated with this is the danger that proposed amendments may be extensive so as to blur the difference between amendment and constitutional revision or constitution making. Extensive amendments may have far-reaching consequences and could redesign the constitution. Of this, Professor Richard Albert noted:

Some constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations. They dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old. These constitutional changes entail substantial consequences for the whole of law and society.<sup>12</sup>

While there is no easy solution to this perennial problem, each Constitution determines, through its amendment clause, what limitations should be placed on the power of amendment. Through the amendment clause in the constitution, constitutional crafters determine in advance what amendments would be allowable and what safeguards should be placed in the constitution to limit the possibility of the abuse of the constitution amendment process.

For countries that inherited the British system of constitutional government, the constitution usually contains an amendment clause that has at least three safeguards. That is, a parliamentary raised majority beyond the one used for ordinary legislation, the need to publish the proposed constitutional amendment bill for a specified period to provide for cooling off and avoid surprise constitutional amendments, and usually entrenchment of some provisions and a requirement that such entrenched provisions cannot be amended without the ratification of the people in a referendum. Professors John Hatchard, Muna Ndulo and Peter Slinn observed:

The Westminster export model provided for a specially enhanced parliamentary majority (SEPM) (normally a two-thirds majority of all members of Parliament) coupled with a requirement to publish the Bill in the *Government Gazette* not less than thirty days before the final parliamentary vote. This was seemingly based on the view that Parliament was

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<sup>11</sup> D Landau “Populist Constitutions” (2018) 85 *The University of Chicago Law Review* 523

<sup>12</sup> Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press, 2019), 63

the 'guardian of the constitution' and thus best suited to take responsibility for approving constitutional amendments.<sup>13</sup>

For countries that take this approach, such as Zambia, once the safeguards under the constitutional amendment clause have been met, the amendment is unassailable, regardless of its moral merits or demerits. Let me illustrate using comparative judicial precedents.

In the Tanzanian case of *Attorney General v Christopher Mtikila Civil Appeal no 45 of 2009*, the petitioners challenged the constitutionality of certain constitutional amendments on the ground that the amendments offended the basic structure of the constitution. In dismissing the case, the Tanzanian Supreme Court held that as long as the amendment complied with safeguards under the amendment clause, it was valid. It noted that under the Tanzanian constitution, "...the Parliament can alter "any provision" of the Constitution. We wish to emphasize "any provision" of the Constitution." The Court noted further that the only time it could intervene is when the amendment was not effected in line with the amendment clause or violated the safeguards in the amendment clause. It stated:

However, situations can arise where the High Court and this Court can nullify a constitutional provision on the ground that it is unconstitutional in the sense that it was not enacted as provided for by Art. 98. An example is where a constitutional amendment is challenged on the grounds that it did not obtain the prerequisite number of votes according to Art. 98(l)(a). We already pointed out earlier that generally a constitutional amendment requires the support of a two-thirds majority and under Art 98(l)(b) the support of two-thirds majority of all the Members of Parliament from Zanzibar and all Members of Parliament from the Mainland. If such a challenge is sustained then the court might have to find that the article has not been enacted in accordance with the constitutional provisions and is, therefore, unconstitutional.

The same approach was taken in the Ugandan case of *Male H Mbirizi K Kiwanuka v Attorney General Constitutional Appeal No 02 of 2018*, which challenged the constitutionality of the amendment that lifted the age limit of 75 years for presidential

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<sup>13</sup> John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, 2004), 45. See also Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change," (1995) 64 *Fordham Law Review*, 535- 586

candidates. In holding that what mattered was compliance with the amendment clause, Katureebe CJ stated:

Clearly, what this means is that the Constitution is amendable; one, by the representatives of the people (Parliament) as per article 258 thereof; two, by representatives together with the population in a referendum as per article 259 thereof; three, by representatives together with district councils as per article 260 thereof; and four, by referenda on any question as demanded either by any person or by Government as per article 255 thereof. It is important to note that article 255 (4) makes it crystal clear that the only matter that cannot be subjected to a referendum is the issue of fundamental and other rights and freedoms as guaranteed under chapter 4 of the Constitution and the power of the courts to question the validity of the referendum.

The Kenyan Supreme Court, in the case of *Attorney General and Others v David Ndii and Others Petition No 12 of 2021*, in rejecting the basic structure doctrine, took the view that amendments needed to comply with the amendment clause and the safeguards therein and not extra-constitutional doctrines of basic structure. It held that the amendment clause in the Kenyan constitution had enshrined sufficient safeguards from the arbitrary constitutional changes.

Finally, I would like to draw attention to the South African Constitutional Court decision in the case of *United Democratic Movement v The President of the Republic of South Africa and Others Case CCT 23/02*. The court first observed that the issue is not about the merits or demerits of proposed changes but one of compliance with the requirements of the amendment clause:

This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.

The Court then proceeded to hold:

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.

This approach is consistent with the Zambian Constitution and Zambian jurisprudence. Article 79, the amendment clause, provides:

(1) Subject to the provisions of this Article, Parliament may alter this Constitution or the Constitution of Zambia Act, 1991.

(2) Subject to clause (3) a bill for the alteration of this Constitution or the Constitution of Zambia Act, 1991 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 the 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 a 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.

There are four things to observe about this provision. First, Article 79(1), by use of the words “subject to the provisions of this article...” confirms that Article 79 itself is not subject to any other provisions in the constitution, except itself. It overrides all other clauses that may seem to contradict it. In the *Munir Zulu* case (supra), The Court asserted that constituent power resides in the people and that the people as a constituent power are the direct source of the constitution and therefore, it is only the people that can frame constitutional amendments through as an exercise of their sovereign power. Hence the need to always have a wide consultative process whenever amending the Constitution. Because of this, the Court thought that article 79, the amendment clause in the Constitution, was merely formalistic. To fulfil its view, the Court held that “The only way to properly protect the constitution is to take every amendment process through a wide consultative process with the people, at inception.” This was based on the Court’s combined interpretation of articles 2 and 128 (3)(c) to the effect that it has jurisdiction

to superintend the constitutionality of the conduct of the executive at the pre-Bill stage. Considering that Article 79 was not amended by the Constitution of Zambia (Amendment) Act No 2 of 2016, the holding of the majority in the *Munir Zulu* case is defective, as it would imply an indirect amendment of Article 79, a provision which is entrenched.

The Constitutional Court itself has laid sound jurisprudence on how to treat constitutional provisions that seem irreconcilable with entrenched constitutional provisions that survived the amendment process. It has been unequivocal that a new amendment provision cannot purport to amend an entrenched provision that was not amended. This was the approach the Constitutional Court took in the case of *Godfrey Miyanda v Attorney General 2016/CC/0006*. In this case, the Constitutional Court grappled with the inconsistency between the definition of “discrimination” found under article 23 in the Bill of Rights and that under article 266 introduced in 2016 via Constitution of Zambia (Amendment) Act No 2 of 2016. The Court reviewed the two definitions and found them irreconcilable and considering that the 2016 amendment could not affect the Bill of rights which is entrenched, the Constitutional Court urged Parliament to remove the definition under article 266 for being contrary to the definition under article 23. The Court stated:

It is obvious that, though the two provisions substantively refer to the same principle of prohibition of discrimination, they are worded differently. We further note that, in addition, the new definition in article 266 expands the prohibited grounds for discrimination and adds grounds that are not mentioned in article 23(3), these being birth, age, disability, religion, conscience, belief, culture, language, pregnancy, health, or ethnic, social or economic status. We also note that, unlike article 23(3), article 266 does not mention “political” opinion and “creed” among prohibited grounds of discrimination.

Clearly the two provisions are different. We find merit in the Petitioner’s contention and hold 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.

The significance of this is , that, the new Article 2 and 128 cannot be interpreted to have any impact on Article 79. Article 79 overrides them. So, when it comes to constitutional amendment, Article 79 must be implemented as it has been implemented prior to the 2016 Constitutional amendment. On this note, the Supreme Court of Zambia, in the case of **Zambia Democratic Congress v Attorney General SCZ Judgment No 37 of 1999** noted:

Apart from the difference in the numbering in different Constitutions, the contents of Article 79 of the Constitution of Zambia have been in existence and used from the Independence Constitution.

Article 79, therefore, has a towering stature and cannot be elbowed into oblivion by recent amendments. It is Article 79 that should inform the supervening amendments and not vice versa. It was, therefore, incorrect to hold, as did the Constitutional Court in **Munir Zulu**, that Article 79 was merely formalistic, in preference to newer provisions in the Constitution . Article 79 is what anchors constitutional amendments.

The second point to note is that Article 79(2)(a) requires that before the Bill is brought for the first reading, it must be published for at least 30 days in the *Gazette*. The importance of this is to provide a cooling off period to allow for political debate and to avoid surprise constitutional amendments. As noted by Professors John Hatchard, Muna Ndulo and Peter Slinn,

... a ‘cooling-off’ period at least provides a check on over-hasty constitutional amendments. In particular, it is a potentially useful means of stimulating public awareness, for allowing human rights commissions to comment on the Bill and for civil society to engage in dialogue with the government.<sup>14</sup>

The third is that Article 79(2)(b) requires a heightened majority of two-thirds of all members of parliament in order to pass. The conventional thinking was that the Members of Parliament, as representatives of the people, stood in a better position to protect the interests of the people in the constitution amendment process. <sup>15</sup>

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<sup>14</sup> John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, 2004), 53

<sup>15</sup> *Ibid*

By placing this responsibility on Members of Parliament, Article 79(2)(b) entails that the Courts are not the only guardians of constitutional order. The representatives of the people equally have a fundamental role to play and may even be in a better place to debate, negotiate, compromise and make trade offs in the constitution amendment process than the Courts. As leaders answerable to the electorate, the Members of Parliament (MPs) ought to effectively represent their people in all governance spheres, including in constitution making. As such, they should consult their people and the people should be free to make representations to their MPs on how they expect to be represented on matters of national significance such as on constitution amendment issues. The Ugandan Supreme Court in the case of *Male H Mabirizi K Kiwanuka v Attorney General Constitutional Appeal No 02 of 2018* aptly observed that:

So when the Constitution gives Parliament the power to make law or to amend the Constitution, that power is being given to the representatives of the people. To me therefore, the primary responsibility to consult the people of Uganda on any proposed legislation, and more particularly on a Constitutional amendment, must fall squarely first and foremost on the elected representatives of the people. There is nobody in Uganda who does not belong to a Constituency, including the Special Constituencies, so as to be able to access a Member of Parliament to give them their views.

In the Zambian context, the legislature has at least on two occasions risen to the challenge to block what were generally considered illiberal proposed constitutional amendments. In 2020, the Constitution of Zambia (Amendment) Bill No 10 of 2019 collapsed in parliament having failed to receive the requisite two-thirds of the parliamentary votes. The legislature did the same in 2010 when it failed to vote in favour of the Constitution of Zambia (Amendment) Bill of 2010.

Fourth, and final observation on Article 79 is that Article 79(3) places the power in the people, in relation to the amendment of the entrenched provisions (Article 79 itself and part III of the Constitution), to ratify or reject proposed amendments through a referendum. Again, this shows that in relation to amendments relating to this clause, responsibility has been placed directly on the people to decide the fate of the country. If the crafters of the constitution wanted, they could easily have subjected all amendments to public participation as a mandatory requirement. As Article 79 currently stands, only amendments relating to the Bill of Rights and the entrenchment clause itself require the

public imprimatur through a referendum in order to pass. Article 79(3) has been invoked twice in the history of Zambia: in 1969, in a referendum to end all referenda, where the people voted to remove the referendum clause in the constitution, and in 2016, when the people rejected the Bill intended to expand the Bill of Rights.

Both the Zambian Supreme Court and the Constitutional Court have well-articulated jurisprudence, to the effect that Article 79 is self-contained when it comes to constitutional amendments. Once its safeguards are met, then an amendment is valid. It cannot be questioned on nebulous grounds of public participation or the basic structure doctrine.

In the Supreme Court case of *Zambia Democratic Congress v Attorney General SCZ Judgment No 37 of 1999* it was held:

It follows that politics and morality aside, the portion of the judgment the subject of the attack is in legal theory substantially correct. The submissions by Mr Sangwa overlook the history and the reality of the constitutional enactments in Zambia. Apart from the difference in the numbering in different Constitutions, the contents of Article 79 of the Constitution of Zambia have been in existence and used from the Independence Constitution. Thus in reality, Constitutions in Zambia have been written and promulgated by Parliament using the powers under Article 79 after a Constitution Commission has made its findings.

The Constitutional Court followed suit in the case of *Godfrey Miyanda v Attorney General 2016/CC/0006* and held:

It is clear that under the Constitution, there are no substantive limits for constitutional amendments under Article 79. In other words, all provisions of the constitution are amenable to amendment although the constitution distinguishes between what one may venture to term 'ordinary provisions' on the one hand and 'entrenched provisions' on the other. Article 79 is unequivocal. First, Parliament has the mandate to alter the constitution. Second, for 'ordinary provisions', the procedure is clearly stipulated in Article 79(2). Third, the entrenched provisions, that is part III and Article 79 itself, are amenable to amendment in accordance with Article 79(3), requiring the approval of the people through an affirmative referendum vote. Thus, faced with the question as to whether a constitutional amendment is constitutional, we are of the firm view that the constitution itself provides a guide in Article 79 to which alterations or amendments to the constitution of the Republic of Zambia must conform. As long as the prescribed

procedure is followed, the constitutionality of a constitutional amendment cannot be called into question.

For some reason, the Constitutional Court did not engage with this earlier decision in settling the *Munir Zulu* case.

Having said the above about Article 79, I would like to engage with the position of the majority in the *Munir Zulu* case, namely that the country's constitutional history shows that every constitutional amendment went through public participation at the initiation or pre-Bill stage. According to the Constitutional Court, this has been either through the appointment of a commission of inquiry or a technical committee. This holding of the Court is deeply troubling as it is not factual and is historically incorrect. The history of constitutional amendments in Zambia, by contrast, shows that the empaneling of a commission or technical committee is the exception rather than the norm and is entirely discretionary. While, for example, there have only been about six (6) constitutional commissions of inquiry or constitutional technical committees, there have been more than 20 constitutional amendments that were not premised on any commission of inquiry or public process beyond what is stipulated under Article 79.

To illustrate this point, below are several constitutional amendments the country has had since independence, which were not preceded by a commission of inquiry or a public process of sorts:

- 1) Constitution (Amendment) Act No 30 of 1966: Clarified the role of the minister in granting citizenship to persons entitled to be registered as citizens.
- 2) Constitution (Amendment) Act No 2 of 1966: introduced clauses restricting floor crossing.
- 3) Constitution (Amendment) Act No 33 of 1967: Adjusted the government financial year.
- 4) Constitution (Amendment) Act No 3 of 1967 (Act No 3 of 1968): increased the size of the National Assembly from 75 to 105 members.
- 5) Constitution (Amendment) Act No 1 of 1968: Amended definition of "junior minister."
- 6) Constitution (Amendment) Act No 1 of 1969: Introduced the position of Secretary General to government.

- 7) Constitution (Amendment) Act No 2 of 1969: Clarified that reference to a minister includes reference to the vice president.
- 8) Constitution (Amendment) Act No 3 of 1969: Deleted the referendum clause under then section 72(3) (people did not take part in framing the issue but in referendum)
- 9) Constitution (Amendment) Act No 4 of 1969: Added the word “hold” to section 62 of the constitution.
- 10) Constitution (Amendment) Act No 5 of 1969: Abolished the Barotseland Agreement.
- 11) Constitution (Amendment) Act No 44 of 1970: amended the property clause; renamed Barotseland as Western province.
- 12) Constitution (Amendment) Act No 58 of 1970: amended the property clause to allow forfeiture or confiscation of property of a person who has left Zambia, inter alia.
- 13) Constitution (Amendment) Act No 12 of 1970: amended clauses relating to public finance.
- 14) Constitution (Amendment) Act No 1 of 1972: Amended some clauses relating to the appointment of judges.
- 15) Constitution (Amendment) Act No 17 of 1972: introduced a clause empowering the National Assembly to ratify or confirm expenditure up to a set threshold.
- 16) Constitution (Amendment) Act No 27 of 1972: raised the retirement age for judges from 62 to 65 years.
- 17) Constitution (Amendment) Act No 28 of 1972: made amendments to the public finance provisions.
- 18) Constitution of Zambia (Amendment) Act No 18 of 1974: empowered the president to retire non- citizens in public service to appoint Zambian citizens; prohibited courts from ordering damages or compensation against a restriction or detention order issued by the president; provided for the appointment of High Court commissioners and appointment of acting judges.
- 19) Constitution of Zambia (Amendment) Act No 22 of 1975: clarified the relationship between the national constitution and the party (UNIP) constitution under the one-party system; the powers of the leadership committee; the role of the central committee, functions of cabinet.

- 20) Constitution of Zambia (Amendment) Act No 23 of 1977: introduced the requirement that each province should have a minimum of 10 constituencies.
- 21) Constitution of Zambia (Amendment) Act No 10 of 1980: Introduced amendments, inter alia, to clarify the role of the prime minister.
- 22) Constitution of Zambia (Amendment) Act No 1 of 1983: restricted from appointment as nominated Members of Parliament a person who either applied to be adopted or contested a parliamentary election.
- 23) Constitution of Zambia (Amendment) Act No 3 of 1986: amended provisions, inter alia, relating to citizenship and the defence forces.
- 24) Constitution (Amendment) Act No 2 of 1988: amended rules relating to the qualifications and disqualifications of members of parliament.
- 25) Constitution (Amendment) Act No 20 of 2009: Aligned the government financial year to the calendar year.

Looking at this constitutional amendment history, it is, therefore, wrong to hold, as did the Court in *Munir Zulu* case, that the history of constitution amendment in Zambia suggests only one thing, that is, all amendments went through a popular participatory process through either a commission of inquiry or technical committee. That is simply not true.

The amendment of the Constitution without a mandatory requirement for pre-Bill public participation is not unique to Zambia. By 2012, for example, the South African Constitution of 1996 had been amended 17 times as follows:

- 1) Constitution First Amendment Act of 1997
- 2) Constitution Second Amendment Act of 1998
- 3) Constitution Third Amendment Act of 1998
- 4) Constitution Fourth Amendment Act of 1999
- 5) Constitution Fifth Amendment Act of 1999
- 6) Constitution Sixth Amendment Act of 2001
- 7) Constitution Seventh Amendment Act of 2001
- 8) Constitution Eighth Amendment Act of 2002
- 9) Constitution Ninth Amendment Act of 2002
- 10) Constitution Tenth Amendment Act of 2003
- 11) Constitution Eleventh Amendment Act of 2003

- 12) Constitution Twelfth Amendment Act of 2005
- 13) Constitution Thirteenth Amendment Act of 2007
- 14) Constitution Fourteenth Amendment Act of 2008
- 15) Constitution Fifteen Amendment Act of 2008
- 16) Constitution Sixteenth Amendment Act of 2009
- 17) Constitution Seventeenth Amendment Act of 2012

None of these amendments went through a popular process such as a commission of inquiry, a technical committee or even a constituent assembly since the South African Constitution was elaborated and adopted through a Constituent Assembly. All the amendments were accomplished through the invocation of the amendment clause in the constitution. Dr Adem Abebe, in observing how the South African constitutional amendment process works, noted:

Moreover, the Constitution does not anticipate any possibility that proposals for constitutional amendments must be subjected to popular referendum. The people do not have any formal involvement either in the tabling or approval of constitutional amendments.<sup>16</sup>

What matters is that the amendment has met the requirements of the amendment clause and not that the people participated in the initiation process. In South Africa, as the South African Constitutional Court decided in the case of *Doctors for Life*, it is sufficient for public participation to publicise the proposed amendment for a given period and inviting the public to make comments on a Bill.

In passing, may I also indicate that even in the context of constitution making, it is a sweeping claim to hold that the people must be involved in the framing of the issues for articulation in the constitution. Public participation is nuanced and is a matter of constitutional design. There have been various ways of designing constitution making processes, many leading to credible constitutions, without necessarily starting with the people at conceptualisation or framing of constitutional issues. In developing the Kenya 2010 Constitution, for example, the people were not involved in broad consultations prior to the drafting the process. The process had two stages at which people had a key

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<sup>16</sup> Adem Kassie Abebe, "Substantive Validity of Constitutional Amendments in South Africa," (2014) 131 The South Africa Law Journal, 678

role to play: commenting on the first draft established by the Committee of Experts and ratifying the document in a referendum. In the 1989 Namibian Constitution, the vehicle was an elected Constituent Assembly, and not direct consultations with the people; In the 1993 South African Constitution, it was the Kempton Park Multiparty Conference and in the 1996 South African Constitution it was an elected Constituent Assembly. The conceptualisation of public participation and initiation in the *Munir Zulu* case is, therefore, a gross oversimplification of something more complex.

#### **IV. SHOULD COURTS INTERVENE IN LEGISLATIVE PROCESS BEFORE ENACTMENT**

It is doubtful if the Court should interfere with the legislative process prior to enactment of legislation. Anglophone judiciaries generally give two reasons for hesitancy or restraint from intervening in the pre-legislation disputes. The first is where judiciaries, in respect of the doctrine of separation of powers, let other branches perform their role without interference and wait to see if the requisite safeguards within the legislative process will hold. All countries with written constitutions have the doctrine of separation of powers, either explicitly stated or implied from the demarcation of the three branches of government. From this angle, it is argued that, although the courts have a role to enforce constitutional norms, this does not amount to directing the other branches how they should perform their functions, just the way the other two branches should not intervene with the judiciary and dictate how judges should make judicial decisions. The role of the judiciary is to *check* and not to *supervise* the other branches of government.

The separation of powers doctrine divides governmental authority into three distinct branches, that is, Legislative (making laws), Executive (enforces laws) and the Judiciary (interprets laws), preventing power concentration and tyranny as championed by thinkers like Montesquieu and implemented by many democratic constitutions including ours. The legislature is responsible for making laws and the judiciary responsible for interpreting them. The constitutional Court's role is to act as a check on the other branches, not to interfere in the legislative process which is governed by internal parliamentary regulations. The independence of parliament is guaranteed by the Constitution. This limits the judiciary's involvement in the political process and ensures that the Court only rules on actual legal disputes that have been brought before it. The doctrine is aimed at preventing any one branch from taking over another's duties. Each

branch has separate powers and is generally not allowed to exercise the powers of the other branches.

For example, in the South African case of *Doctors for Life International v The Speaker of the National Assembly and Others CCT12/05 [2006] ZACC11*, the Constitutional Court had to determine if it had power to nullify a Bill which had not yet become law and also, assuming the Court had no such power, if it could provide declaratory relief where the legislature disregarded constitutional obligations in drafting a Bill, although not yet law. The Court held that it is more appropriate to review an Act of Parliament and not a Bill in order to respect the principle of separation of powers and to avoid prescribing to Parliament how it should perform its role. The Court further formulated the test to be used when to intervene or not intervene. It stated that intervention by the Court in the legislative process:

would only be appropriate if an applicant can show that there would be no effective remedy available...once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible.

The same approach was taken by the Kenyan Supreme Court in the case of *Commission for Implementation of the Constitution v National Assembly of Kenya and 2 Others (2013) eKLR*, when Lenaola JSC held:

Although this Court can stop Parliament on its tracks at this stage of the legislative process, there is one question that has lingered in my mind; since the Bill is incomplete and its language is yet to be settled, what then am I being asked to strike down? Had the petitioner waited until the same is passed and within thirty days before Presidential assent, this Court would have had something tangible to work with. I am reluctant to pass a judgment on the hypothetical issues...I say so because the Bill may not receive the two-thirds majority required for it to pass and even if it does, there is time before it is assented to, for the petitioner or any Kenyan to seek that it should not be allowed to go beyond parliament, if it is obvious its content will ultimately be destructive of the structures of the Constitution. As it is, the Petition is premature...

Equally, the Tanzanian Supreme Court took this approach when it stated: “Otherwise, Tanzanian courts exercise calculated restraint to avoid meddling in constituencies of the other two pillars of the State.”<sup>17</sup>

The second approach is where the courts consider that if a Bill has not been passed, it is premature to intervene as there is no binding decision or action that alters the rights of citizens. This approach relies on the concept of ripeness of a dispute. A dispute is not ripe as the supposed injury is only hypothetical and not yet crystallised. At this stage, therefore, the court does not have jurisdiction to determine the constitutionality of a Bill (including pre-Bill conduct) prior to its passing because any potential dispute regarding the constitutionality of the Bill would not be “ripe” for adjudication. A Bill is not “ripe” until the Bill has been enacted and signed into law. This is what in the United States of America (USA) is called the “**ripeness doctrine**”. The ripeness doctrine is part of the standing requirements for USA plaintiff’s, and obligates a plaintiff to have suffered an “actual injury” before the plaintiff can seek legal redress; since an unenacted law necessarily has not yet harmed a plaintiff, the plaintiff must wait until the law has been enacted and there is some degree of certainty that the plaintiff will be injured or the plaintiff must actually be injured before a plaintiff can sue. In a USA case, *Democratic Party v. Abbott (461 F. Supp. 3d 406; 2020 U.S. Distr.)*, the Court observed that subject matter jurisdiction goes to the heart of the court’s power to hear a case. In a Bill that is before the legislature, the court would be dealing with a proposed statute that has yet to be enacted and may never be enacted. “Ripeness” is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated or indeed may not occur at all.

In the 2022 case of *Texas Democratic Party v Scott Civil Action no SA-20-CA-438-FB (2022)*, the defendants' motion to dismiss was granted in part because the plaintiffs were alleging injuries based on laws that had not yet been enacted. In dismissing the matter, the Court held:

This Court declines to analyse policies and laws that have not been enacted or evaluate the pandemic in light of in-person voting in future elections, and plaintiffs have not

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<sup>17</sup> Attorney General v Christopher Mtikila Civil Appeal no 45 of 2009

identified any concrete harm based on future contingent events. Accordingly, these claims are unripe.

This point is buttressed further by the well know old case of *Marbury v. Madison* 5 US 137 (1803) which emphasizes the point that the US Supreme Court cannot review a Bill before congress passes the Bill into law, as they can only have the power of judicial review over enacted laws and executive actions, meaning they can strike down existing laws as unconstitutional, not prevent Bills from being passed.

Courts in a democracy are empowered to review the constitutionality of a statute. The grounds on which legislation can be declared unconstitutional are generally agreed to be the following: (a) the legislature may not have had the power to enact the impugned statute; (b) the statute might be found to breach one or more fundamental rights embodied in the constitution; (c) the statute may contravene any other justiciable provision of the constitution; and (d) the statute may be invalidated for having delegated an essential legislative function to the executive or another authority. None of these five grounds exist in relation to the constitutionality of a pre-Bill process that has not crystallised or regarding a Bill and can only exist with regard to an Act of parliament.

The comparative law position elaborated here appears consistent with the earlier decision of the Constitutional Court in the case of *Law Association of Zambia and Chapter One Foundation Limited v Attorney General* 2019/CCZ/0013/0014 in which the Constitutional Court, in interpreting its mandate under article 128 of the Constitution, held that it had no jurisdiction to review a Bill. Considering this position, the decision in *Munir Zulu*, in which the Court intervened in the pre-Bill stage creates anomalous jurisprudence, whereby the Court seems to have jurisdiction in pre-Bill political debate but once that debate or speech crystallises concretely into a Bill, then that jurisdiction vanishes. To avoid this anomaly, the Court may wish in future to take the cautious approach, elaborated above, which the other jurisdictions have taken, which respect the doctrine of separation of power and wait for action to be ripe for judicial intervention. The position is not that the court would not have a role in protecting the constitution but that this role is better performed once there is concrete action as the court would know exactly what it is enforcing or at least deciding against, as opposed to hypothetical matters that may or may not be moved forward. As the South African Constitutional Court stated in *Doctors for Life*, “The rights of the public are therefore delayed while the

political process is underway. They are not taken away.” This ensures that courts interpret laws and therefore require a real controversy (a lawsuit) after a law has been enacted and someone is harmed (or potentially harmed) by it, therefore acting as a check on other branches after the fact. It is a reactive process and not a proactive veto before a Bill becomes law.

## **V. INITIATION OF THE AMENDMENT PROCESS AND THE ROLE OF THE EXECUTIVE IN THE INITIATION PROCESS**

The conventional Anglophone approach is that, where the constitution does not expressly indicate who may initiate the constitution-making process, the Executive's routine practice of leading the development of Bills for presentation to the legislature is assumed. Professor Charles Manga Fombad correctly observed that:

In looking at the issue of who should initiate constitutional amendments, the assumption where there is silence is that the normal procedure for amending legislation applies.<sup>18</sup>

In the case of Zambia, this responsibility is expressly given to the President. Article 92(2)(i) of the Zambian Constitution assigns the President the function to “initiate Bills for submission to, and consideration by, the National Assembly.” There are no set standards the President is required to meet in the initiation process of a Bill before it is tendered in the National Assembly. The President, therefore, has discretion in how he approaches this task. S/he may or may not seek the services of a commission or technical committee to help him frame matters to be proposed for amendment.

This discretion is readily manifest in how section 2(1) of the Inquiries Act Chapter 41 of the Laws of Zambia is couched. It states:

The President may issue a commission appointing one or more commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be for the public welfare.

It goes without saying that the decision to appoint a commission is discretionary as it is “in the opinion of the President.” As the law stands, whether to appoint a commission of inquiry or not is a decision the President has to make in his own discretion. He cannot be

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<sup>18</sup> Charles Manga Fombad, “Some Perspectives on Durability and Change Under Modern African Constitutions,” (2013) 11 International Constitutional Law Journal, 402

forced. Similarly, as the law stands, even where there has been a commission of inquiry on constitution reform or amendment, what happens with the proposals received from the commission once submitted to the President is at the discretion of the President. As the Supreme Court noted in ***Derrick Chitala v Attorney General SCZ Judgment No 14 of 1995***: “The Act does not say what the President must do once a commission renders its report on a matter.” The President, therefore, has discretion to appoint or not appoint a commission. Once the commission renders a report, the President has discretion to determine how to address the findings and recommendations. There is no legal basis to compel the President either way, provided he has acted within the discretion allocated to him. The President, therefore, cannot be forced to perform a discretionary duty. It must be a deliberate action by the President.

In any case, most of the previous constitution making processes were based on the Inquiries Act, a colonial legacy of constitution making designed by the British Constitutional lawyer and academic, William Ivor Jennings. He pioneered most post-colonial constitution making in Asia and Africa. The statute predated independence and was applied to the territory of Northern Rhodesia before 1964. The model enables the politicians, as it did the colonial governor, to choose and determine what recommendations to accept or reject in the making of a constitution. To date, its use has failed to produce a durable constitution in countries that still rely on that model. The countries that have settled their constitutional orders, such as Namibia, Kenya and South Africa, had to depart from the use of that model. The preference by the Constitutional Court in the ***Munir Zulu case***, to use the model of the Inquiries Act, unknowingly undermines the process of articulating a constitution that would be more democratic and durable and actually adds nothing of value to the constitutionalism discourse in Africa.

The Zambian legal context should be contrasted with jurisdictions which have constitutional clauses which outline exactly how the people can on their own initiate a constitution amendment process. Article 257 of the Kenyan Constitution (2010), for example, lays out an elaborate process for popular initiation of constitution making process and outlines what should happen stage by stage. It provides:

- (1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256 (4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255 (1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255 (2) applies, with any necessary modifications, to a referendum under clause (10).

It is in this context and from this angle that the *David Ndii* case in which the Supreme Court considered that the President had no power to initiate the constitution making process using the popular strand in the Kenyan context because that power has been given to the people in an elaborate manner. It should also be noted that Kenya has four strands through which the constitution could be amended and the amendment through public initiation is just one of them.

Zambia does not have a similar constitutional framework on public initiation of constitutional Bills. But even where the amendment process went through a public process like a commission of inquiry, there is no standard measure of when public participation would be adequate or inadequate. There is no prescribed threshold for the number required to move the process forward.

For example, the Mvunga Commission, which led to the 1991 Constitution, only received 586 oral submissions and only 401 written submissions.<sup>19</sup> For a country of about 20 million people, the views of less than 1,000 people cannot be considered to have legitimised the process. The danger of conflating participation in a commission of inquiry with legitimate exercise of constituent power is impossible to resolve using the approach taken by the Constitutional Court in *Munir Zulu*. Without a guiding legal framework like that in Kenya, attempts to enforce a nebulous view of public participation, as Ugandan retired Supreme Court Judge, Professor George Kanyeihamba JSC observed, “transports the judge from the heights of legality and impartiality to the deep valleys of personal inclinations and political judgment.”<sup>20</sup>

Without a legal framework anchored in the constitution for public participation at the pre-Bill stage, there is no basis for Court intervention without the risk of the Court being seen to be imposing its own political views or attempting to usurp legislative power and rewrite the constitution.

It must also be noted that the power used by the President in appointing a commission of inquiry under the Inquiries Act is executive power. The Inquiries Act has no life of its own except as can be traced from the constitution. It is the constitution, directly or indirectly, that validates all legislation. Any exercise of executive power under the Inquiries Act must be traceable to the Constitution. Article 92 of the Constitution vests the President with executive power. It is under this power that the President appointed the current Technical Committee (TC) that has been tasked with responsibility to consult the people and draft constitutional amendments. The President appointed the TC under articles 92(1), 92(2)(f) and 92(2)(j) of the Constitution. Article 92(1) simply requires the President to perform “with dignity, leadership and integrity, the acts that are necessary

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<sup>19</sup> Mvunga Commission Constitution Report, October 1990, 3

<sup>20</sup> Ibid, dissenting opinion of Kanyeihamba, JSC, p.304. see also Twinomugisha “The Role of the Judiciary in Promotion of Democracy in Uganda” 1-22

and expedient for, or reasonably incidental to, the exercise of the executive authority.” Article 92(2)(f) entitles the President to “appoint persons as are required to perform special duties for the Executive,” while article 92(2)(j) entitles the President to appoint persons “perform other functions specified by this Constitution or as prescribed.” Both articles 92(2)(f) and 92(2)(j) are ‘conferment’ clauses. They confer power in the President to make appointments for stated purposes. This is at the heart of constitutional democracy. An individual or entity can only exercise power conferred by law and for the purposes for which that power is established. Where power derives from the constitution, its exercise must be rationally related to the purpose for which power was given. For anyone to argue that the TC is illegal, one must demonstrate that the appointment of the TC is rationally inconsistent with the purpose for which the power under which it was appointed.

Empaneling a TC for purposes of collecting the views of the people on any subject and advising the President of such public views is patently within articles 92(2)(f) and 92(2)(j). This is because, the TC can only collect views and make proposals or recommendations. It would be a different thing if the TC was empowered to usurp any of the powers allocated to the three branches of government, especially of the legislature, and enact into law its own views. As it is, the TC is simply advisory to the Executive. It has no powers beyond making recommendations to the executive branch of government.

It is not the first time that a TC has been appointed directly under executive powers of the President. When President Sata appointed the Annel Silungwe constitutional Technical Committee, the appointment was not under the Inquiries Act but under the clauses conferring the President with executive powers under the constitution. The Silungwe TC was appointed under the now repealed articles 33 and 44 of the Constitution, which are the equivalent of the current article 92 of the Constitution.

## **VI. APPLICABILITY OF BASIC STRUCTURE DOCTRINE IN ZAMBIA**

Although the Constitutional Court in *Munir Zulu* did not refer to the basic structure doctrine, it is implicit in its decision as the Court, by its decision, tried to preserve what it considered the essence of the Constitution by blocking what it considered inordinate in proposed reforms by set out by the minister of justice. In the common law jurisdictions, the doctrine was first articulated and given currency by the Indian Supreme Court. One

of the earliest articulations of the doctrine was in the case of *Kesavanda Bharati Sripadagalvaru v State of Kerala AIR 1973 SC 1461* where the Supreme Court held that the power of amendment in the constitution was not unlimited. The Court observed:

According to the doctrine, the amendment power of Parliament is not unlimited; it does not include the power to abrogate or change the identity of the constitution or its basic features.

The doctrine is judicially made. It holds that even if the amendment clause does not place limits on amendment of some clauses in the constitution, some clauses are not amenable to the amendment power of the constitution as they are essential to the character of that constitution. Therefore, the constitution is said to have a basic structure which should be beyond the amendment powers of parliament.

On face value, the doctrine appears alluring but in reality, it adds nothing or little to constitutionalism and may actually, in the long term, be counterproductive. In an Amicus brief filed by Professor Charles Manga Fombad in the case of *Independent Electoral and Boundaries Commission v David Ndi and 81 Others*,<sup>21</sup> he argued against the adoption of the basic structure doctrine in Africa (and his position was adopted ultimately by the Supreme Court).<sup>22</sup> He advanced four reasons against the adoption of the basic structure doctrine.

First, Fombad Fombad argues that the historical and socio-political context in which the Indian courts adopted the basic structure doctrine does not exist in Africa, so there is no need to adopt the doctrine out of context and out of sync with African constitutional practice.<sup>23</sup> Second, Fombad argues that the text of the amendment clauses in Africa is different from the Indian one as the contemporary African texts give clear scope of what or what may not be amended by the legislature, together with safeguards to be observed by the legislature.<sup>24</sup> One of the reasons the basic structure doctrine emerged in India is that the Indian Constitution does not expressly provide for stringent requirements for

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<sup>21</sup> *Independent Electoral Boundaries Commission v David Ndi and 81 Others* Civil Appeal No E291 of 2021

<sup>22</sup> Professor Charles Manga Fombad, Amicus Curiae Brief: The Basic Structure Doctrine: A Judicial Panacea or a Judicial Conundrum in Checkin Arbitrary Amendment of African Constitutions? Submitted in *Independent Electoral Boundaries Commission v David Ndi and 81 Others* Civil Appeal No E291 of 2021

<sup>23</sup> *Ibid*

<sup>24</sup> *Ibid*

the amendment of the Indian constitution as the constitution could be amended by a simple majority, like any ordinary legislation. However, there was no agreement even among judges as to what amounted to the basic structure of the Indian constitution. As Okwengu J.A correctly observed in *Electoral and Boundaries Commission & 4 others v. Da Ndi & 82 others; Kenya Human Rights Commission & 4 others (amicus Curiae) (2012 eKLR 66)*:

Although the judges were agreed that the Indian constitution has a basic structure, they were not agreed on what exactly the basic structure is. Each judge identified a different aspect. While all constitutions can be said to have a basic structure, it is best for such structure to be expressly provided.

Third, Fombad argues that there are theoretical challenges associated with the doctrine. If constituent power means the people should determine their constitutional destiny, then basic structure militates against that approach as it entails that a past generation is given power to determine the future of generations to come and taking away the power from those generations to change the constitution governing them.

Fourth and finally, Fombad argues that since basic structure is judge made, it is not based on any express authority given to the judiciary in the constitution. It, therefore, gives “unelected judges such sweeping ill-defined powers and ties the hands of both the executive and legislative branches.”<sup>25</sup> Judges, then, ironically assume the same dictatorial powers they ideally would condemn if assumed by the other branches of government. This defeats the essence of the idea of constitutional governance as in a constitutional system, arms of government can only assume powers granted unto them by the constitution.

The result of assuming the basic structure doctrine is that it creates potential for instability as the only way change can be accomplished is through unconstitutional means of overthrowing the constitution. Thus, the doctrine might actually be counterproductive in the long term.

A careful review of jurisprudence from English speaking countries in Africa shows that they have all been unanimous in rejecting the applicability of the basic structure doctrine in their countries. For example, after entertaining the thought of the basic structure

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<sup>25</sup> Ibid

doctrine and churning out some obiter dicta in several cases, the Kenyan Supreme Court had to decide head on the applicability of the doctrine under the Kenyan constitution. In a detailed exploration of the doctrine in the case of ***Attorney General and Others v David Ndi and Others Petition No 12 of 2021***, the Supreme Court ultimately rejected the application of the basic structure doctrine to Kenya as the 2010 Kenyan constitution had enshrined sufficient safeguards from arbitrary constitutional changes. The same approach was taken by the South African Constitutional Court in the case of ***United Democratic Movement v The President of the Republic of South Africa Case CCT 23/02***.

The Ugandan Supreme Court equally dismissed the idea of unamendability of their constitution in the basic structure sense and noted:

Clearly, what this means is that the Constitution is amendable; one, by 15 the representatives of the people (Parliament) as per article 258 thereof; two, by representatives together with the population in a referendum as per article 259 thereof; three, by representatives together with district councils as per article 260 thereof; and four, by referenda on any question as demanded either by any person or by Government as per 20 article 255 thereof. It is important to note that article 255 (4) makes it crystal clear that the only matter that cannot be subjected to a referendum is the issue of fundamental and other rights and freedoms as guaranteed under chapter 4 of the Constitution and the power of the courts to question the validity of the referendum.<sup>26</sup>

Equally, the Tanzanian Supreme Court held that:

It is our considered opinion that the basic structures doctrine does not apply to Tanzania and we cannot apply those Indian authorities, which are in any case persuasive, when considering our Constitution.<sup>27</sup>

The Zambian judiciary has not been insulated from considering the basic structure doctrine. Both the Supreme Court and the Constitutional Court had occasion to deal with the issue and both rejected the applicability of the basic structure doctrine.

In the case of ***Zambia Democratic Congress v Attorney general SCZ Judgment No 37 of 1999***, the Supreme Court held:

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<sup>26</sup> Male H Mbirizi K Kiwanuka v Attorney General Constitutional Appeal No 02 of 2018

<sup>27</sup> Attorney General v Christopher Mtikila Civil Appeal no 45 of 2009

The learned trial judge was on firm ground when he held that 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. The observation that Article 79 limits the powers of Parliament only in relation to Article 79 itself and to Chapter III of the Constitution of Zambia was also correct. Indeed, the constitutional history of Zambia has shown that the alteration of the Constitution has depended on who controls the majority in Parliament and in the population of eligible voters for the referendum. This means that the entrenched provisions can be altered.

Hence, for the time being the theory of basic structure or framework of the Constitution can only be said to exist in theory.

In the case of *Godfrey Miyanda v Attorney General 2016/CC/0006*, the Constitutional Court held:

It is clear that under the Constitution, there are no substantive limits for constitutional amendments under Article 79. In other words, all provisions of the constitution are amenable to amendment although the constitution distinguishes between what one may venture to term 'ordinary provisions' on the one hand and 'entrenched provisions' on the other. Article 79 is unequivocal. First, Parliament has the mandate to alter the constitution. Second, for 'ordinary provisions', the procedure is clearly stipulated in Article 79(2). Third, the entrenched provisions, that is part III and Article 79 itself, are amenable to amendment in accordance with Article 79(3), requiring the approval of the people through an affirmative referendum vote. Thus, faced with the question as to whether a constitutional amendment is constitutional, we are of the firm view that the constitution itself provides a guide in Article 79 to which alterations or amendments to the constitution of the Republic of Zambia must conform. As long as the prescribed procedure is followed, the constitutionality of a constitutional amendment cannot be called into question.

## **VII. CONCLUSION**

This paper has argued that the decision of the majority on Munir Zulu is incorrect. It demonstrates that:

1. There is a difference between the power of amendment and constitution revision or constitution making;

2. The scope of what is amendable in each constitution is dependent on what is allowable by the amendment clause of each constitution, which is article 79 in the Zambian Constitution;
3. The courts should be hesitant to intervene in the pre-enactment legislative process as that is a sphere in which the other two branches of government have designated roles (separation of powers), and often matters are not ripe as several times proposals change or may not crystallise. If the Court jumps at every pre-legislative dispute, it risks being lopped into deciding endless hypothetical disputes, and interfering with political debate. The Court may, therefore, wish to develop its own jurisprudence on ripeness of matters for constitutional adjudication;
4. That the executive has an assigned or at least an assumed role in the initiation of the amendment process to the constitution; and
5. That the Basic Structure doctrine has been universally rejected in Anglophone Africa, including in Zambia, and there is no benefit for adopting it in Zambia.