



United Party for National Development
Office of the President

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21st August 2019

The Speaker,
National Assembly of Zambia,
Parliament Buildings,
P.O. Box 31299,
Lusaka, 10101
Zambia.



Dear Sir,

RE: The Law Association of Zambia V The Presidency of the Republic of Zambia, The Attorney General and the National Assembly: Petition Challenging the Constitutionality of the Constitution of Zambia Amendment Bill No. 10 of 2019

1. I refer to the above and to the letter written by the Clerk of the National Assembly dated 16th August 2019 addressed to Messrs Simeza Sangwa & Associates and widely circulated in the media. The said letter states that the Clerk was communicating information directed by yourself and was therefore writing in your name. Although the letter was directed to Messrs Simeza Sangwa & Associates, and since it is in the public domain, I am compelled to reply to it on account of my right and obligation as a citizen of Zambia to defend the Constitution of Zambia and promote its ideals and objectives. For the reasons that I tabulate below, I believe that the arguments you have advanced in the stated letter are based on complete misunderstanding and are in disregard of constitutional provisions and principles.
2. The letter from the Clerk raises two main points on which you based your refusal to suspend the legislative process in the National Assembly pending the determination of the matter in the Constitutional Court.

3. The two grounds stated in the letter are the doctrine of exclusive cognizance and selective application of the *sub judice* rule to proceedings of the National Assembly. In that letter, you argued that 'the House (National Assembly) enjoys exclusive and unfettered jurisdiction in the conduct of its internal proceedings.'
4. Related to this, your second argument asserts that the 'application of the *sub judice* rule to the business of the House is not absolute. It has to be decided by the Speaker on the Merits of each case.' You did not cite any constitutional provisions to support the above claims, save for a narrative of the process followed when enacting legislation. As you have not cited any constitutional provisions that support your arguments, I have taken the liberty to search the Constitution of Zambia to assess the validity of your propositions. Your interpretation and purported application of the above principles is flawed on two grounds.
5. Firstly, the doctrine of exclusive cognizance is not constitutional, but merely affords Parliament privileges and immunity relating to its internal rules and operations, provided that these are exercised within the parameters of the Constitution. It is a principle that applies to the United Kingdom where, because the country does not have a written constitution, Parliament is supreme. In Zambia, however, the situation is completely different. All institutions including Parliament are creatures of the Constitution and are amenable to it.
6. The law-making function of Parliament is a constitutional and public function, which cannot possibly fall within your narrow construction of what you term 'internal proceedings' of the House.
7. Secondly and related to this, your claim that the *sub judice* rule is not absolute and depends on your discretion based on the merits of each case is grossly flawed as that would amount to your usurping a constitutional power, namely, judicial authority, which is lawfully allocated to the Judiciary and in this case the Constitutional Court.
8. Any other interpretation would be contrary to the Constitution and its values and principles expressed in the following Articles of the Constitution of Zambia:
 - i) Zambia is a constitutional democracy with a written and supreme Constitution that binds all persons, state organs and state institutions as stated in Article 1(3), which states that the Constitution binds 'all persons in Zambia, State Organs and State Institutions.' The Legislature is a state organ according to Article 266 of the Constitution.
 - ii) Zambia being a constitutional democracy with a supreme written Constitution, Parliament does not enjoy unfettered jurisdiction in its exercise of constitutional functions. This is expressly stated in Article 267(4) which provides that:

‘a provision of this Constitution to the effect that a person, an authority or institution is not subject to the direction or control of a person or authority in the performance of a function, **does not preclude a court from exercising jurisdiction in relation to a question whether that person, authority or institution has performed the function in accordance with this Constitution or other laws.**’

This provision clearly shows that the National Assembly, a state organ, is bound by the Constitution and subject to the jurisdiction of the court, which has the authority to question whether the House is performing its functions in accordance with the Constitution. The principle of exclusive cognizance is therefore subordinate to this express constitutional provision.

- iii) The Constitutional Court has exclusive jurisdiction to hear and determine matters relating to and in respect of the Constitution as provided by articles 1(5) and 119(2) (b) and matter relating to the interpretation, violation or contravention of the Constitution as stated by Article 128(a) and (b).
- iv) The Constitutional Court in the exercising of this constitutional function also retains implied power to stop proceedings of the House through the application of the *sub judice* rule to enable the court to enforce its judicial authority as provided by Article 271 of the Constitution of Zambia, which states that ‘in this Constitution, a power given to a person or an authority to do or enforce the doing of an act, included the necessary and ancillary powers to enable that person or authority to do or enforce the doing of the act.’
- v) The Speaker of the National Assembly therefore has no authority to decide on the applicability of the *sub judice* principle on the merits of the case. The authority to interpret the Constitution or to determine whether the National Assembly is exercising its power in accordance with the Constitution, which the petition in question seeks to determine, vests exclusively with the Constitutional Court as per Articles 128 as read together with Articles 119(2)(b) and 271 of the Constitution of Zambia.

9. Given the foregoing, I entreat you to rescind your position and allow the courts to determine the constitutionality of the published Bill before the House discusses the issue any further.

10. I noted that the Clerk of the National Assembly, in the reply to Messrs Simeza Sangwa & Associates, curiously went out of her way to outline the well-known steps of law-making, including from first reading to presidential assent. As a citizen, I found it surprising that the Clerk responded to questions that no one asked, as far as I am aware, since the originating letter from Messrs Simeza Sangwa & Associates, which is also available in the public domain, never sought

such detailed information from any one. There are two considerations that came to mind when I read the Clerk's curious response in this regard.

11. The first consideration was that the Clerk may have been trying to influence the outcome of the *Law Association of Zambia V The President of the Republic of Zambia, The Attorney General and the National Assembly* case which is currently before the Constitutional Court.
12. In essence, it was being suggested that no person or authority can challenge Parliament's right to make laws and that those who seek to do so should wait until after a proposed law has been signed by the President – in short until after the entire process of law-making has been completed.
13. Let me demonstrate the absurdity of this thinking with an illustration. The Constitution places an obligation on me, a citizen, to defend and uphold it. If I notice that Parliament is in the process of illegally abrogating the Constitution, I have the duty to petition the courts to seek the termination of such a proposed constitutional amendment law even if it is simply a Bill.
14. If the argument is that a person should wait until the said Bill has been passed by Parliament before challenging it, then a corollary question arises: what would stop the President from immediately signing the same proposed law before anyone has the opportunity to challenge its constitutionality in court?
15. What would also stop someone from arguing that such a law that awaits presidential assent cannot be challenged in court since it is incomplete? Or that once the President has signed the proposed Constitutional Amendment Bill, no one can challenge the unconstitutionality of what would then be the Constitution itself? Are you seeing the absurdity of thinking that simply because a proposed law is at the stage of a Bill, then it would be premature to challenge it as the Constitutional Court can only pronounce itself on the interpretation of the already existing constitutional provisions?
16. Sir, a proposed law can be challenged at any stage of its development. Even if the president signs the Constitutional Amendment Bill and the new law comes into being, it could still be challenged under the substantial certainty doctrine, in line with the *Law Association of Zambia V The President of the Republic of Zambia, The Attorney General and the National Assembly* petition.
17. Being a lawyer, I am sure you are familiar with the instructive case of *Indira Nehru Ghandi v Shri Raj Narain & Anr (1975)* in which she had bullied Parliament into amending the Constitution to divest courts of jurisdiction while her election was being challenged (the High Court had already nullified her

election and she had subsequently appealed). The Supreme Court of India nullified the Constitutional Amendment that she signed into law, demonstrating that the power of Parliament is not limitless, that it must at all times be exercised within the bounds of the Constitution, that it is possible for one or two new Articles of the Constitution to be unconstitutional and void.

18. The second consideration that came to mind when reading the letter from the Clerk is that it raises serious questions about why you have not tabled before Parliament the motion that seeks to impeach Mr. Edgar Lungu, one that was moved by MPs a few months ago, over a number of constitutional breaches. I believe you do not need any reminder or context on this matter.
19. May I please seek an explanation from you on why you have not tabled the impeachment motion to date if the ongoing court processes do not bind Parliament over the same matter? If the argument is that even for matters that are before court, the Speaker has the right to decide which among such cases can be discussed in Parliament and which ones cannot be discussed, may I request you to cite the legal basis of your position?
20. I would be grateful to receive a response from your office within seven working days, starting from the date of this letter.

Yours in the service and defence of the Constitution of Zambia.



Hakainde Hichilema,
Citizen of Zambia
President, United Party for National Development

CC: Mr. John Sangwa, Simeza Sangwa and Associates
President, Law Association of Zambia
UPND Chief Whip
Leader of the opposition in Parliament