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ALLIANCE FOR COMMUNITY ACTION (ACA) PRESENTATION TO THE PARLIAMENTARY SELECT COMMITTEE SET UP TO SCRUTINISE THE CONSTITUTIONAL AMENDMENT BILL 10 OF 2019

1. Introduction

Mr Chairman, Honourable Members of the Parliamentary Select Committee here present, we wish to thank you for the opportunity to make our submission on the Constitution (Amendment) Bill number 10, of 2019.

The Alliance for Community Action (ACA) is a non-governmental organisation (NGO) whose objective is to strengthen the supply and demand of public resource accountability in Zambia, with special emphasis of instituting that demand in the general public. The ACA devotes all its efforts towards that goal.

The ACA's understanding of public resources is not limited to national finances but extends to other assets, both tangible and intangible. In our understanding therefore, Zambia's constitution and constitutionalism is a critical public resource for which there must be accountability. Specifically, any changes to our constitution must be for and only for the shared good of the nation.

Mr. Chairman, our reason for appearing before you is because it is our considered view that the Constitutional Amendment Bill 10, of 2019, is detrimental to Zambia's common good and would, if passed, harm both our democracy and nationhood fundamentally. In trying to reach a conclusion as to the extent to which each of the proposed amendments to the constitution would advance the national good, the ACA applied this test:

1. Why is this change being proposed? (It is our considered view that the reasoning behind any change to the constitution must be good for citizens and the nation and be understood to be so by a consensus of citizens that apply their collective minds).
2. What ill or mischief is this provision trying to remedy? (It is our understanding that constitutions should only be changed to remedy an ill or to strengthen their ability to protect the national good.)
3. Would remedying this mischief cause a larger ill? (The “first do no harm” principle must apply to changes to a constitution. If in remedying a perceived ill, a larger harm is caused, then the status quo must be retained.
4. How is this provision good for Zambia? (This test sums up all of the above.)

We now wish to submit as follows:

2. Our Substantive Submission

I. The Amendment Process

The ACA, together with other CSOs, has been part of the conversation that led to the proposed amendment of the constitution. It is our recollection that after the 2016 amendments to the 1991 constitution were passed, the nation welcomed the passing of the amendments but was concerned with the contradictions, loopholes and lack of clarity in some of the provisions. These led to varying interpretations of the same clauses causing great controversy. For example, in the 2016 elections it could not be decided if the President needed to cede his power to the Speaker during the presidential election petition among other issues. It is our submission that it was those drafting weaknesses that Zambians asked to be addressed. It is also our submission that at no time was there a call from the nation to fundamentally change the constitution in the way Constitutional Amendment Bill 10 proposes. Our question therefore is who gave powerholders the mandate to make constitutional changes as monumental as those proposed in the Bill under discussion? Further, we ask, when the decision was made, to amend the constitution in the most fundamental manner done since independence, why did government not go to the people in another constitutional review process that would receive the views of citizens?

With the foregoing in mind submit to you, Chairperson, that the ACA is against the passing of Bill 10 because:

- a) Government had no mandate from the people to change their constitution to the extent being proposed in the Bill under discussion.

- b) When government unilaterally decided to change the constitution, it used the controversial process of the National Dialogue Forum (NDF) that left out a large part of the country. We submit that a constitutional review that results in fundamental changes, such as set out in Bill 10, must seek consensus from the wider public. It is reckless for government to push forward constitutional amendments via a process being rejected by whole sections of the country as the NDF was, because a constitution must hold a nation together and not divide it.
- c) After government decided to go with the NDF, it should at least have kept its word and abided by the provisions of the National Dialogue Act that provided that any changes not agreed at the NDF would not find themselves in Bills. That Bill 10 includes provisions that were not agreed at the NDF, as announced to the public by Forum chairperson, Patrick Chisanga, means that government has betrayed the trust of the people.

II. Analysis of the provisions

Below we set out the substantive provisions that the ACA submits fail the test set out above. We would like to state that we have not tried to be exhaustive due to time limits, but have picked clauses that advance our overall argument against this Constitutional Amendment Bill 10 as follows:

1. *Clause 15 which repeals Article 68 of the current constitution, which Article sets out the maximum number of elected and nominated Members of Parliament at 156 and no more than 8 respectively, stating that this will be prescribed.* Subject to the test we set out above, the ACA is of the view that this change does not remedy any understood ill or mischief in the current constitution. Instead, it seeks to create a larger harm by allowing Parliament to create itself. As Parliament is a creature of the constitution, the constitution cannot allow it to change its essential being via a simple vote. The ACA is of the view that the largest harm that this would create is that a President and ruling party could increase their representation in parliament thus creating a majority, even a 2/3 majority, which would allow them to change the very constitution that creates parliament. This provision, in our view, makes general elections academic as a ruling party could give itself a parliamentary majority by creating seats in its strongholds or increasing nominated numbers without limit. We are of the view that this destroys our democracy and should not be passed.

The biggest harm to democracy of this proposal will be the weakening of the separation of powers as parliament will be as pliable as dough, in the hands of the Executive.

2. *We are opposed to Clause 30, that amends Articles 101, 102 and 103 of the current constitution. This amendment allows for a presidential candidate that does not receive more than fifty percent of the valid votes cast, but achieves the highest number of votes, to negotiate and form a coalition government with a presidential candidate that participated in the initial ballot as long as the combined vote meets the more than 50 percent threshold.* In response to the test above, we have followed supporters of Bill 10 argue that this is meant to save the country from an expensive re-run of the presidential election. We are of the view that the Constitution Amendment Bill, as a whole, proposes very expensive changes such as the return of Deputy Ministers who would come with perks much more expensive than a re-run. This makes this argument invalid. Further, the possibility of a president as powerful as the Constitutional Amendment Bill proposes, being allowed to negotiate their way into office would threaten peace and stability. In a presidential democracy, a President must not only be elected by the people but be seen and accepted to be so. A candidate who might negotiate with the most unpopular loser to enter State House would not be acceptable to the people. We submit that the country has paid too high a price for presidencies whose ultimate win is under constant discussion as seen in the Levy Mwanawasa first term and Edgar Lungu two terms. We state, therefore, that this change would cause a larger harm than it is trying to remedy.
3. *Clause 13 of the Amendment Bill takes away the power of Parliament to oversee debt contraction.* As stated above, the ACA works in the area of public resource management and is therefore very aware of the extent to which Zambia has overborrowed and strangled itself with debt to the extent that nearly 70% of the recent supplementary budget presented in parliament, will go to debt repayment. We ask, according to the test above, what is this change trying to remedy? Why weaken debt contraction at a time when one would expect we would be strengthening parliamentary oversight of debt? The ACA is of the view that removing parliamentary oversight on debt will harm a nation already struggling with a debt burden that

could have been avoided if the current power of Parliament to supervise debt had been respected.

4. *Clause 26 removes the power of parliament to accede to and ratify international agreements.* This again weakens parliament and the ACA does not know what ill is being remedied. We are of the view that strengthening the Executive at the expense of Parliament weakens our overall democracy.
5. *Clause 37 allows for parliament to stay in office until the next election.* It is the ACA's view that this will harm our democracy as Ministers will be able to campaign using public resources, thus inordinately advantaging the party in office. We are unaware of the harm that has been done to the country since Independence, when the National Assembly has been dissolved ahead of the elections. And so, we ask, why has this change been made? How will having Ministers staying in office benefit Zambia? How does rewriting a constitution against a current court ruling declaring the stay in office of Ministers ahead of the 2016 election illegal, a ruling that ordered repayment of remuneration, an order that has not been obeyed, advance the rule of law or constitutionality?
6. *Clause 38 seeks to reintroduce Deputy Ministers.* The straightforward questions are – why has this been proposed against the expressed will of Zambian people as seen in constitutional review commissions? What ill is being remedied as government has operated smoothly without Deputy Ministers? Why is the inordinate cost to the treasury this would entail being ignored?
7. *Clause 31 seeks to prevent parliament from investigating the mental and physical capacity of a President to perform executive functions as provided in the current Article 107.* The ACA is perplexed at this proposed change. How does it benefit a country for it to be unable to investigate the President's physical and mental ability to hold office? What then happens when a president has a mental or physical breakdown that makes his or her stay in office harmful to the nation? We ask why this change? How does it benefit our common good? Most importantly, what ill or mischief is it trying to remedy. How will Zambia failing to decide their president is incapable of running the nation be good for her?

8. *Clause 71 takes away the power of the Bank of Zambia to issue currency placing it, we would expect, in the Cabinet. Why this change? Why weaken the Bank of Zambia? How has the Bank of Zambia issuing currency hurt the nation? How will cabinet being able to print money without oversight be good for the country?*
9. *Clause 51 gives the President the power to create provinces and districts without parliamentary oversight. This strengthens an already very powerful president. It also can allow for expensive creation of districts and provinces without parliamentary agreement. Again, we would want to know why this change is being proposed and how it will help Zambia's democracy advance as we have failed identify a single benefit to it or the mischief it tries to remedy.*
10. *The Constitutional Amendment bill creates a fluid judiciary with no upper limit. This again allows for too powerful a President. We ask why we would want to strengthen the Executive over the Judiciary. How does it benefit the nation?*

3. Democracy means Consensus Not Unanimity

We are fully aware that, in a democracy, it is very difficult to achieve unanimous positions all the time. In fact, that rarely happens. What is more common is that citizens in a democratic state make compromises. In the spirit of give and take, people come to positions of agreement based on trade-offs where each group sacrifices some of its strongly held positions. It is called consensus. However, such a situation is only possible in a climate of mutual respect and agreement on the most fundamental aspects of nationhood.

There can be no consensus when the doctrine of common good or even common sense is abrogated.

We, in conclusion, state that if so many provisions in the Constitution Amendment Bill 10 fail the simple principle of "do no harm" if they can only benefit the Executive, when democratic principle suggests that Executive powers in a democracy must be to be limited and subjected to oversight by the two other arms of government, then the Constitutional Amendment Bill is harmful.

In supporting the Constitutional Amendment Bill, proponents have pointed to some areas of the Bill which have wide public support and are indeed progressive. The danger with this position, however, is that it ignores or does not address the fact that, passing this Bill into law, the good clauses

notwithstanding, also legitimizes the destructive portions we have addressed and listed above.

Most importantly, those portions of the Bill which are widely regarded as flawed or retrogressive, are also extremely injurious to our democracy. Passing into law a Bill that legitimizes a self-creating parliament, weak central Bank, all powerful president and executive, among other undemocratic features, is very dangerous and risks destroying our democratic gains in ways we cannot imagine.

We at the ACA would like to state that one does not take a poisoned drink just because it happens to have the progressive aspect that is sweet.

The ACA therefore would like to call for the total withdrawal of Bill 10 so that a constitutional review process supported by the people, that seeks to remedy agreed ills and advance the common good, is carried out. Most importantly, this process must be mandated by the people. We thank you!