

THE JURISDICTION OF THE CONSTITUTIONAL COURT OF ZAMBIA ON THE BILL OF RIGHTS

(Conference ID: CFP/323/2017)

Annie Musonda Kawandami
roseannie101@gmail.com
Student in school of Law
University of Zambia(UNZA)

ABSTRACT

Since its establishment on 5th January, 2016, the Constitutional Court of Zambia was given extensive jurisdiction to hear matters arising from the Zambian Constitution. Wide though its powers, it is excluded from hearing matters under the Bill of Rights which forms a fundamental part of the Zambian Constitution. This is because Zambia has had an entrenched Bill of Rights since 1991 which can only be amended using a referendum. According to Article 28 (1) and (2) of the said Constitution all matters arising under the Bill of Rights are a preserve of the High Court of Zambia with appellate jurisdiction vested with the Supreme Court of Zambia. Using a qualitative approach, this paper argues that it is an anomaly for the Constitutional Court to be excluded from exercising its jurisdiction over the Bill of Rights. The paper seeks to demonstrate that one of the reasons behind the establishment of the Constitutional Court as a separate court within the judicial framework of Zambia was for the adequate hearing of matters relating to the violation of human rights. Thus, the Constitutional Court will have complete jurisdiction over the Zambian Constitution only if the necessary constitutional amendments are made to allow the court to hear matters arising from the Bill of Rights. Based on this premise, the paper will argue as to why the Constitution of Zambia should be amended in order to allow the Constitutional Court its rightful jurisdiction, which is; to hear matters arising from the Bill of Rights at appellate level.

1.0 Introduction and Background

The origins of a constitutional court (hereinafter ‘ConCourt’) can be traced to the writings of the legal theorist Hans Kelsen. When the Austrian Republic was formed in 1918, a young scholar then, Kelsen designed the Austrian constitution and provided in it the establishment of the C. Court of Austria.¹ The Kelsenian model establishes constitutional justice as a part of the judicial power.²³ This particular justice is exercised by judges in a centralised court and it is specialised on constitutional questions. This paper’s argument is derived from Kelsen’s theories which argue that only a constitutional court endowed with the generalised and centralised power authoritatively to repeal constitutionally defective acts of legislation, as well as other unconstitutional acts taken by organs of government in immediate execution of the constitution will be fully a safeguard of constitutional legality.⁴ Kelsen argues that the protection of human rights demands a court especially concerned with human rights issues.⁵

In systems that use the Kelsenian model in their constitutional courts, it is very much a norm that only the constitutional court has the power to rule on any issues arising from the constitution.⁶ The constitutional court therefore has the unique position to hear matters arising from various constitutional questions including issues from the Bill of Rights where a constitution contains the Bill of rights.⁷

In Zambia, the creation of a ConCourt was first proposed by President Kenneth Kaunda on 24th September, 1990 at an address to the Twenty-Fifth National Council of the United National Independence Party (UNIP), the policy making body of the party.⁸ In Kaunda’s view, the ConCourt would have the responsibility of ensuring that the provisions of the constitution were strictly adhered to and that neither the President nor Parliament should abuse their powers. In doing so, the constitutional principle of separation of powers which entails that the three

¹Thilo Tetzlaff, “Kelsen and Constitutional Review Accord in Europe and Asia.” *National Taiwan University Law Review* volume 1:2, (2006), 89.

² Gabriele Kuscko-Stadhomeyer, Constitutional Review in Austria: Traditions and New Developments, International Conference dedicated to the 20th Anniversary of the Constitutional Court of Romania, accessed on 7th December, 2016, available at <http://193.226.121.81/events/conferiata/kuckesco>, p.2.

³ Kuscko-Stadhomeyer, “Constitutional Review in Austria” p.2.

⁴ Lars Vinx, pp.157-161.

⁵Thilo Tetzlaff. “Kelsen and Constitutional Review Accord in Europe and Asia”, p.80.

⁶ Kim L. Scheppelle, ‘Guardians of the Constitution, Guardians of The Constitution: Constitutional Court Presidents and The Struggle for the Rule of Law in Post-Soviet Europe’ *Pennsylvania Law Review*, 154 (2006): p.1758.

⁷ Scheppelle, “Guardians of the Constitution” p.1759.

⁸ J.P. Sangwa, “Brief to the President of the Republic of Zambia on the Qualifications of the Six Nominees to the Constitutional Court” (March 2016), p.2.

branches of government (executive, legislative, and judicial) are kept separate to prevent abuse of power would be enhanced.⁹

The ConCourt was to be a court where any person would go to for redress, if they felt that their rights had been or were being or were likely to be abused.¹⁰ When seen from this point of view, it is clear that the establishment of a ConCourt was to be an important step in the protection of human rights in Zambia.

A few days after the National Council, on 8th October 1990, President Kaunda appointed the Mvunga Constitution Review Commission (hereinafter ‘Commission’).¹¹ The Commission’s terms of reference included the making of appropriate arrangements which would protect human rights, the rule of law and good governance.¹² Deriving from these terms of reference, the Commission recommended the creation of a ConCourt, to exercise jurisdiction over any alleged violation or threatened violation of any right guaranteed by the Constitution and any matter relating to the interpretation of the Constitution.¹³

Twenty-seven years later, the recommendation to create a ConCourt was given effect when the Constitutional (Amendment) Act No. 2 of 2016 (hereinafter “C. Amendment Act”) was assented to on 5th January, 2016. The ConCourt is viewed as a monumental creation as it is the final and authoritative interpreter of the Zambian Constitution in all matters.

Despite this wide jurisdiction, the ConCourt does not have jurisdiction to adjudicate over the Bill of Rights. In accordance with Article 128 (1) of the Constitution (Amendment) Act No. 2 of 2016, the ConCourt has, subject to Article 28, original and final jurisdiction to hear various constitutional matters. Article 28 (2) provides that matters relating to the Bill of Rights are to be heard by the High Court.

This paper will explore whether the present lack of jurisdiction of the ConCourt over the Bill of Rights is appropriate. This will be done in view of the background given above that one of the purposes of a constitutional court is to adjudicate on issues of human rights.

⁹ Available at https://www.law.cornell.edu/wex/separation_of_powers. Accessed on 20th June, 2017.

¹⁰ Sangwa, Brief to the President of the Republic of Zambia, p. 3.

¹¹ The Commission was appointed pursuant to the Inquiries Act, Volume 4, and Chapter 41 of the Laws of Zambia.

¹² Muna B. Ndulo and Robert B. Kent. “The Constitutions of Zambia.” *Zambia Law Journal* 30, (1998): 1-28 at 22.

¹³ Ndulo & Kent, 22.

1.2 Methodology

This paper employs a qualitative non- doctrinal approach technique in order to provide detailed descriptions and prose. Both secondary and primary data was collected.¹⁴ In order to ensure accuracy of research methods, research techniques and findings, the paper used the concept of triangulation.¹⁵ Triangulation is rooted in the view that employing two or more ways or perspectives of examining or analysing a problem is better than using only one.¹⁶ One of the means of triangulation is to use two or more data bases. Thus, based on this concept, the paper used different bases of data collection including analysis of documents and interviews. Secondary sources of data from the libraries of the UNZA, Supreme Court and National Assembly were consulted to provide a starting point. Articles of peer reviewed journals, text books, conference proceedings, reports and internet materials were all consulted. These provided support for primary sources, ground for comparison, gauging and defining the topic which was located in a novel area of constitutional law in Zambia.

Since doctrinal research is based on authority and hierarchy¹⁷, primary data was collected from legislation and case law. It was also collected using semi-structured interviews, informal discussions and direct observations with key respondents, who included Judges, Constitutional Law experts and a Civil Procedure expert. The selection of the key informants was driven by the need to collect rich data from those directly involved in constitutional law in Zambia. Consent was obtained from the respondents before being interviewed and they were urged to be forthcoming and free. The primary data was secured by means of tape recording with a micro-cassette recorder and later transcribed and coded. This was done to allow for smooth flow of the interviews and accurate reporting of the results. For interviews, an interview schedule was prepared to guide the discussions and this assisted in data coding and in determining the main responses of the participants.

The respondents were selected using purposive sampling so as to be efficient. In this method, the researcher purposively targeted a group of people believed to have common characteristics and possessing special insights into the issues under study.¹⁸ Thus, only key respondents relevant to the paper were selected as they were expected to have special knowledge on the subject under consideration.

Thematic and content analysis was used. The related themes were categorised and a coding system was developed, after which the coded materials were placed under the major themes. The

¹⁴ Sophie Kasonde-Ng'andu, *Writing A Research Proposal In Educational Research*, p. 45.

¹⁵ Andrew Chiponde Mushingeh, *Basic Steps in Conducting Qualitative Research: A Manual for Students & Researchers*. (Ndola: Mission Press, 2007), p. 65.

¹⁶Mushingeh, *Basic Steps*, p. 65.

¹⁷ Mc Conville and Chui, p.23.

¹⁸Kasonde-Ng'andu, *Writing A Research Proposal In Educational Research*, p. 41.

frequency with which the theme description appeared was used to interpret the importance or attention attached to it and to determine the main themes of the paper.

1.3 Results

The paper found that it would be desirable for the adjudication of the Bill of Rights to fall under the jurisdiction of the ConCourt at appellate level. The paper also found that the ConCourt being a specialised court would be well suited to hear matters relating to the Bill of Rights. The study therefore recommends that Zambia should pursue efforts to amend part III of its Constitution in order to enable the ConCourt to have jurisdiction over the Bill of Rights.

1.4 Discussion

Human rights are the basic rights to which every human being is entitled. They are universal and inalienable; indivisible; interdependent and interrelated.¹⁹ They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background.²⁰ They are inalienable because people's rights cannot be taken away.²¹ Indivisible and interdependent because all rights political, civil, social, cultural and economic, are equal in importance and none can be fully enjoyed without the others.²²

The protection and enforcement of human rights has been guaranteed by the establishment of the United Nations (UN) in 1945 and thereafter with the adoption of a resolution on the Universal Declaration of Human Rights (UDHR) in December, 1948.²³ The UDHR applies to Zambia by virtue of its being a member state of the UN.²⁴ Although being a resolution, the UDHR does not impose legal obligations upon the member states, rather it sets a common standard of achievement for all people and all nations so that they strive to promote respect for human rights and fundamental freedoms by teaching and educating and by adopting progressive measures in this regard.²⁵ The enforcement of human rights is the responsibility of the Nation State, and it is the primary responsibility of the State to make human rights a reality.²⁶ This is typically done through a Bill of rights. A Bill of rights is a written declaration, charter or instrument which sets out the standards upon which the state or institutions, whether political or judicial, undertake to protect and promote individual or group rights and freedoms.²⁷

¹⁹ Available at <http://www.unfpa.org/resources/human-rights-principles#sthash.eGQLJnMt.dpuf>, Accessed on 18th June, 2017.

²⁰ Available at <http://www.unfpa.org/resources/human-rights-principles#sthash.eGQLJnMt.dpuf>, Accessed on 18th June, 2017.

²¹ Available at <http://www.unfpa.org/resources/human-rights-principles#sthash.eGQLJnMt.dpuf>, Accessed on 18th June, 2017.

²² Available at <http://www.unfpa.org/resources/human-rights-principles#sthash.eGQLJnMt.dpuf>, Accessed on 18th June, 2017.

²³ S://V.Y Dhupdale, "Enforcement of Human Rights at International and National Level. Available at <https://www.researchgate.net>.

²⁴ Zambia joined the United Nations on **1st December 1964** after gaining its independence on 24th October the same year.

²⁵ S://V.Y Dhupdale, "Enforcement of Human Rights at International and National Level. Available at <https://www.researchgate.net>.

²⁶ S://V.Y Dhupdale, "Enforcement of Human Rights at International and National Level. Available at <https://www.researchgate.net>.

²⁷ Julius Bikiloni Sakala, "The Role of the Judiciary in the Enforcement of Human Rights in Zambia" (2013), Image Publishers Ltd., Lusaka, p. 56.

The Bill of Rights is a powerful tool that can be used to protect individuals in a state against possible abuse of human rights by all powerful and intolerant governments, which even the judiciary, might have no courage to control.²⁸

In Zambia, the Bill of Rights is contained in Part III of the Constitution of Zambia. It has remained in Part III since independence.²⁹ It is titled 'Protection of Fundamental Rights and Freedoms of the Individual. The rights run from Article 11 to 26 inclusive.³⁰ The Zambian Bill of Rights has been in existence since 1963 when it was incorporated into the Constitution of Northern Rhodesia which became Zambia a year later.³¹ Protective Sections 1 to 13 inclusive, in the Northern Rhodesia Constitution of 1963 were reproduced verbatim in the subsequent Constitutions of Zambia as Articles 11 to 23 inclusive.³²

In 1960, Zambia was still being colonised by Britain and such; the British government had appointed the Monkton Advisory Commission to review the constitution of the Federation of Rhodesia and Nyasaland to which the indigenous Africans in all the three territories abhorred.³³ The Advisory Commission reported that most of the witnesses who appeared before it expressed concern over the lack of more effective safeguards with respect to fundamental human rights.³⁴ Africans had grave doubts about a legislature which was dominated by whites.³⁵ Likewise, the colonisers too, had expressed grave doubts about the effectiveness of existing human rights safeguards in future legislatures which were likely to be dominated by African freedom fighters upon obtaining independence.³⁶ The Commission concluded that all races were gripped by the fear that their rights could be infringed or prejudiced by either the Federal or the Territorial Legislatures.³⁷ So, the inclusion of the Bill of Rights in Territorial Legislatures was inevitable.³⁸ The Commission accordingly recommended the incorporation of fundamental human rights in the Federal and Territorial Constitutions of the then Federation of Rhodesia and Nyasaland.³⁹ This saw the birth of the incorporation of human rights in Zambia's legal order.

Later, when the discussions of the establishment of a ConCourt arose, advocates of the creation of the ConCourt argued that that this particular court, would among other things, improve the protection of human rights.⁴⁰ In order for this to happen, it was necessary to amend Article 28 (1)

²⁸ Sakala, "The role of the Judiciary." P.56.

²⁹ Sakala, "The Role of the Judiciary." P.57.

³⁰ Constitution of Zambia Act as amended by Act No. 18 of 1996.

³¹ Sakala, "The Role of the Judiciary". P. 57.

³² Sakala, "The Role of the Judiciary." P. 57.

³³ Sakala, "The Role of the Judiciary." P. 57.

³⁴ Sakala, "The Role of the Judiciary." P. 57.

³⁵ Sakala, "The Role of the Judiciary." P. 57.

³⁶ Sakala, "The Role of the Judiciary." P. 57.

³⁷ Sakala, "The Role of the Judiciary." P. 57.

³⁸ Sakala, "The Role of the Judiciary." P. 57.

³⁹ Sakala, "The Role of the Judiciary." P. 57.

⁴⁰ See Mung'omba Constitutional Review Report.

of the Constitution of Zambia requiring that the enforcement of the Bill of Rights be a matter for the High Court. Provision was therefore made in the proposed Bill of Rights of 2016 that where there has been a contravention of the Bill of Rights; a person may apply for redress in the ConCourt of Zambia or any other court which the person has access to.⁴¹ Since the Bill of Rights is an entrenched part of the Constitution and it can only be amended by a referendum.⁴² The proposed Bill of Rights was put to a referendum vote on 11th August, 2016. The vote failed and the jurisdiction of the Bill of Rights therefore remains unchanged. The effect is that the adjudication of the Bill of Rights falls under the High Court and on appeal, the Supreme Court.

As already stated in this paper, the procedure for the enforcement of the Bill of Rights is contained under Article 28 (1) and (2) of the Constitution of Zambia.⁴³ It provides in part as follows:

28. (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-

- (a) hear and determine any such application;
 - (b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);
- (2) Any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court.

From the above provisions, it is clear that the enforcement of the Bill of Rights in Zambia lies with the High Court of Zambia as a court of first instance and on appeal with the Supreme Court of Zambia. This position is supported by Article 128 (1) of the Constitution (Amendment) Act No. 2 of Zambia, which subjugates Article 128 (1) to Article 28 of the Constitution. Article 128 (1) provides that the ConCourt has original and final jurisdiction to hear matters relating to the constitution.⁴⁴ The provision has been interpreted by the ConCourt of Zambia as follows: -

It is our firm view that matters under the Bill of Rights lie with the High Court. Article 267 of the constitution provides that constitutional provisions must be interpreted in accordance, not only with the Bill of Rights, but also in a manner that promotes the values

⁴¹ Clause 57 (1) of The Constitution of Zambia (Amendment) Bill, 2016.

⁴² See Article 79 (3) of Constitution of Zambia Act as amended by Act No. 18 of 1996.

⁴³ Constitution of Zambia Act as amended by Act No. 18 of 1996.

⁴⁴ See Article 128 (1) of the Constitution (Amendment) Act No. 2 of 2016.

and purposes of the constitution.⁴⁵

According to Justice Mumba Malila, in the manner that the current Constitution is structured, the intention was that the ConCourt would have among its functions, the role of adjudicating on the Bill of Rights.⁴⁶ The rationale of this arrangement was that, human rights are better protected if they are in the constitution. In some other jurisdictions, added Malila, “the Bill of Rights is not in the constitution”. He also pointed out that in Zambia; however, it is an advantage that the Bill of Rights is in the Constitution.⁴⁷ He noted that the ConCourt was the appropriate forum to deal with issues of the Bill of Rights, because the court was a specialised court with men and women specifically qualified to deal with human rights issues.⁴⁸ He added that the promise to have the ConCourt deal with the Bill of Rights was well intended as it was based on the premise that the court would have exceptional men and women dealing with the Bill of Rights. On this issue, Mr. Silwamba (SC) also stated that it would be preferable if matters of human rights were dealt with by the ConCourt, since they are so entrenched in the Constitution.⁴⁹

Malila stated further that Article 28 (1) of the Constitution is a procedural provision rather than a substantive jurisdictional provision.⁵⁰ He added that on this basis, the ConCourt could in fact use Article 128 (1) of the Constitution to interpret a matter of the Bill of Rights.⁵¹ This view is corroborated by Kulusika, who is of the view that in the process of interpreting constitutional issues, the court would determine whether the High Court has proceeded correctly or incorrectly regarding issues to deal with the Bill of Rights and then give directions to the High Court.⁵² This paper takes the view that rather than have recourse to its interpretative powers in order to exercise its jurisdiction over the Bill of Rights, the ConCourt will better fulfill its role as the defender of the Zambian Constitution if it is vested with substantive jurisdiction over the Bill of Rights.

Kulusika, further, contends that human rights issues should remain the preserve of the High Court and that they should not be heard by the ConCourt as a court of first instance. In his view, human rights issues are not *per se*, constitutional issues; they are only enshrined in the constitution for convenience.⁵³ He argues that various technical issues would arise in the determination of a human rights violation which could be better handled by a single judge of the High Court and then determined by the Supreme Court on Appeal.⁵⁴ Thereafter, any matter of interpretation which hinges on the Constitution would be handled by the ConCourt. He further argues that such a

⁴⁵ Hakainde Hichilema & Geoffrey Bwalya Mwamba v. Edgar Chagwa Lungu, Inonge Wina, E.C.Z and the Attorney General 2016/CC/0031.

⁴⁶ Interview with Mumba Malila, Supreme Court Chambers dated 21st December, 2016.

⁴⁷ Interview with Malila.

⁴⁸ Interview with Malila.

⁴⁹ Interview with Malila.

⁵⁰ Interview with Malila.

⁵¹ Interview with Malila.

⁵² Phone Interview with Dr. Simon, Kulusika (Lusaka, 21st December, 2016).

⁵³ Phone Interview, Kulusika.

⁵⁴ Phone Interview, Kulusika.

system would preserve a parties' right of appeal.⁵⁵ This paper agrees with this position in part and adds that there would be value in having a constitutional division at the high court level to handle constitutional and human rights issues whose appeals would lie to the ConCourt.

On the issue of the ConCourt dealing with human rights issues as a court of first instance, it is further argued that the ConCourt ought not to deal with human rights issues as a court of first instance because of the nature of a court of first instance. The nature of the ConCourt sitting at the apex, puts it in a bad state to deal with matters routinely as a court of first instance, since when fully operational, the court would have 13 judges; to have matters involving the collection of evidence by a minimum of 3 persons and a maximum of 13 is a difficult task which may result in procedural difficulties. This paper argues that it would be an untidy venture if the ConCourt sitting as a full court was involved in the collection of evidence to determine the violation of human rights as a court of first instance. Accordingly, the paper suggests that the high court should hear issues arising from the Bill of Rights as a court of first instance and the ConCourt as an appellate court.

With the foregoing in mind, this paper takes the view that the jurisdiction of the ConCourt in its current form is not very appropriate, because it does not include the adjudication of matters arising from the Bill of Rights. The very point for the establishment of a ConCourt was to have a specialised court, better equipped to defend the constitution; incidentally, the Bill of Rights is a central part of the constitution. It therefore follows that issues of the Bill of Rights must be dealt with by the ConCourt. Furthermore, the background leading up to the establishment of the ConCourt shows that the need for a specialised court to deal with human rights issues was a key consideration.

This study argues that the ConCourt being a specialised court is the right forum to handle issues arising from the Bill of Rights. This is more so that judges of the ConCourt are required to have experience or specialist training in constitutional law or human rights law. In this way the jurisprudence of human rights law in Zambia will be greatly enriched. Furthermore, in order to preserve an individual's right of appeal which is a procedural right to a fair trial; it is proposed by the paper that the High Court be a court of first instance hearing matters relating to the Bill of Rights. In this regard, the Kenyan model of a constitutional division at High Court level could be adopted. The ConCourt would then have the final say as an appellate court. This arrangement would better enhance the Court's jurisdiction, as it would have the benefit of drawing from the various view points of the Judges in the lower court. Furthermore, the procedural difficulties which would arise from the ConCourt having to hear evidence at first instance would be eliminated.

⁵⁵ Interview with Justice Malila.

1.5. Conclusion

The very purpose of having a constitutional court is to enhance the protection of a nation's constitution since such a court is typically endowed with extensive jurisdiction to hear matters from every part of the constitution. Although presently this is not case in Zambia, it is hoped that one day if not soon, it will become a reality, one in which the ConCourt will finally have the jurisdiction to interpret and defend the Bill of Rights under the Zambian Constitution. In conclusion, this paper has argued that the situation obtaining presently whereby the adjudication of the Bill of Rights is matter for the High Court of Zambia is undesirable. As such, the paper takes the position that the ConCourt of Zambia ought to be the right forum to handle issues emanating from the Bill of Rights, at least at appellate level.

1.6 Acknowledgement

I wish to thank the organisers of the First ever International Multi-Disciplinary Conference for granting me the opportunity to participate in this exciting venture.

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