
THE ROLE OF THE JUDICIARY IN THE PROMOTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ZAMBIA

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ABSTRACT

This research evaluates the role of the Zambian courts in the recognition, promotion and enforcement of economic, social and cultural rights in Zambia. It has discussed the Zambian legal system in form of governance, human rights and the sources of law. It has also reviewed the literature review through the legal doctrinal approach as methodology. The findings of the research have been provided followed by a discussion of the findings. Lastly, the conclusion and recommendations are adduced and references are provided for further reading and research.

Keywords: Legal system, Sources of Law, Governance, Rule of Law, Separation of Powers, Human Rights.

INTRODUCTION

Zambia has a constitutional form of democracy.¹ As a unitary State and constitutional democracy, Zambia acknowledges the supremacy of the Constitution. It has a written constitution which is supreme law and sovereign authority.² The sources of law include the Constitution itself, statutes, statutory instruments, Zambian customary law which is consistent with the constitution and lastly, other laws as prescribed.³ The Constitution establishes the Judicature⁴, the Legislature⁵ and the Executive⁶. The function of the judiciary is to interpret the law while the legislature is to make the law. The executive enforces the law.

The High Court, in *Mumba and others v Electoral Commission of Zambia and others*⁷, took judicial notice that Zambia had enacted the *Constitution of Zambia Act No. 1 of 2016* and the *Constitution of Zambia (Amendment) Act No. 2 of 2016* on 5th January, 2016. The Zambian Constitution was further amended in 2025 through the Constitution of Zambia Amendment Act No. 13 of 2025.

The national values for the Republic of Zambia include good governance, constitutionalism, social justice, human dignity, non-discrimination, equality and democracy which apply to the interpretation of the Constitution, the enactment and the interpretation of the law. It equally applies to the development and implementation of state policy. Thus, the interpretation of the Constitution should take into account the Bill of Rights in a manner that promotes good governance.⁸

The Zambian Judiciary is established pursuant to the Zambian Constitution⁹. It is vested with the judicial function to hear civil and criminal matters as well as matters relating to the Constitution. The judiciary derives its authority from the people of Zambia. The authority is expected to be exercised in a just manner so as to promote accountability.

The superior courts in Zambia include the Supreme Court, the Constitutional Court, the Court

¹ Zambian Constitution, Amendment Act No. 2 of 2016, Article 4

² Zambian Constitution, Amendment Act No. 2 of 2016, Article 5

³ Zambian Constitution, Amendment Act No. 2 of 2016, Article 7

⁴ Zambian Constitution, Amendment Act No. 2 of 2016, Article 188

⁵ Zambian Constitution, Amendment Act No. 2 of 2016, Article 61

⁶ Zambian Constitution, Amendment Act No. 2 of 2016, Article 90

⁷ 2015/HP/0967

⁸ Zambian Constitution, Amendment Act No. 2 of 2016, Article 8

⁹ Zambian Constitution, Amendment Act No. 2 of 2016, Article 118

of Appeal and the High Court. The other courts include the Subordinate Court, Small Claims Court, Local Courts and other courts as prescribed.¹⁰ Despite the Supreme Court and the Constitutional Court ranking equivalently¹¹, the former is bound by its own decisions except in the interest of justice and in furtherance of jurisprudence.¹²

A person is qualified to be appointed as a Judge based on proven integrity and if that person has been a legal practitioner for at least fifteen years in the case of the Supreme Court and the Constitutional Court. With regards to the Court of Appeal and the High Court, a person must have been a legal practitioner for at least twelve and ten years respectively. A judge can be removed from office based on, among others, incompetence and gross misconduct.¹³

The Courts in Zambia are constitutionally obliged to follow the principles of exercising judicial authority. The court should ensure that justice is administered to everyone without discrimination as well as it not been delayed and/or denied. Further, the court should ensure that it awards adequate compensation where payable. The court should administer justice without undue regard to procedural technicalities. It should administer justice to everyone without discrimination. Moreover, the Judiciary should promote traditional dispute resolution and other alternative forms of dispute resolution. Lastly but not the least, the court should promote and protect the values and principles of the *Zambian Constitution*.

Human rights are inherent and that human beings enjoy human rights by virtue of being human.¹⁴ It is also trite that most countries have enacted laws to recognize, enforce and protect human rights. The *Zambian constitutional order* has undergone myriad reviews in a bid to promote recognition and enforcement of human rights. However, the *Zambian Bill of Rights* has remained static for some time owing to the rigid constitutional requirement to hold a referendum to amend it. Consequently, the *Zambian Constitution* does not incorporate social and economic rights. The latest attempt to amend the *Zambian Bill of Rights* was in 2016 which resulted in the 2016 constitutional amendments. The referendum failed thus part three of the *Zambian Constitution* was not amended to include the proposed economic, social and cultural rights.

¹⁰ *Zambian Constitution, Amendment Act No. 2 of 2016, Article 120*

¹¹ *Zambian Constitution, Amendment Act No. 2 of 2016, Article 121*

¹² *Zambian Constitution, Amendment Act No. 2 of 2016, Article 125*

¹³ *Zambian Constitution, Amendment Act No. 2 of 2016, Article 140*

¹⁴ *United Nations Human Rights, Handbook for Parliamentarians (Inter-Parliamentary Union, 2016)*

Justiciability was defined in the case of *George Peter Mwanza & Another v Attorney General*,¹⁵ as the ability to have matter heard where there has been a breach of rights. In situations where a matter has not been impliedly or expressly stated to be justiciable, the Courts therefore has nothing to resolve. Matters that are non-justiciable includes; the prerogatives of the President as well as national security and it was in the latter case the was the main ground on which the Minister of Home Affairs cited in rejecting the appeal from Dr Sondashi whose licence to trade in firearms was denied.

LITERATURE REVIEW

Maru Bazezew¹⁶ observed that having a constitution alone does not secure or bring about constitutionalism. Constitutionalism embraces limitation of power (limited government), separation of powers (checks and balances), responsible and accountable government, popular sovereignty, rule of law, limited government, separation of powers (checks and balances), civilian control of the military, police governed by law and judicial control, independent judiciary, respect for individual rights and the right to self-determination as essential features (characteristics) of constitutionalism. Granted the foregoing, it is imperative for this study to determine the enforceability of economic, social and cultural rights in Zambia based on all the principles of constitutionalism other than focusing on one aspect of justiciability or judicial activism as most studies have done.

Linda Kasonde¹⁷ discusses the justiciability of the ESCRs Bill of Rights. The author recognises that most socio-economic rights must be achieved progressively within the available resources of the state. Zambia is one of the poorest nations in the world and there is no denying the fact that the Zambian government is severely resource-constrained. This, however, does not mean that Zambians cannot afford socio-economic rights. The implementation of socio-economic rights forces government to optimise its resources and be held accountable for failing to do so. It is argued that although the legislature has promulgated some laws concerning socio-economic rights it has not provided for the full spectrum of rights. The fact that the executive virtually controls the legislature means that the checks and balances on the executive are somewhat restricted. Zambia has had socio-economic rights in its Constitution as directive

¹⁵ [2019] [33]

¹⁶ Maru Bazezew., 'Constitutionalism' (2009) 3 MIZAN Law Review St Mary's University

¹⁷ Linda Kasonde., 'The need for Social-Economic Right in the Bill of Rights in the Zambian Constitution.' (Thesis submitted in fulfillment for the Award of LLM, University of Cape Town 2008)

principles of state policy for the last ten years and there is no jurisprudence to show for it despite the overwhelming deprivation in the country.

Phillip Musonda¹⁸ looks at the concept of a written constitution and the management performance of the three organs of a government, that is, executive, legislative and national assembly. The scholar argues that enshrinement of human rights in the constitution is not enough protection of the rights due to clawback clauses or derogations. The scholar argues that deletion of the clawback clauses can enhance protection of the human rights enshrined in a constitution. It is argued that formal constitutionalism means having a constitution in place while substantive constitutionalism means the spirit of the constitution. A constitution provides a blueprint for governance of a country but may not be committed to principles of constitutionalism. It is argued that the nine elements of constitutionalism are government according to a constitution, separation of powers, sovereignty of the people and democratic government, judicial review, independent judiciary, limited government according to a Bill of individual Rights, controlling the police, civilian control of the military and state power, and lastly, circumscribed state power to suspend the operation of a constitution. The failure of constitutionalism in Africa is attributed to weak institutions and oversight institutions captured by a powerful presidency. The concept of constitutionalism is also negated by non-democratic constitution making process which results in a constitution which reflects the will of the leaders and not the people.

O'Brien Kaaba¹⁹ postulates that the Zambian Constitution does not expressly recognise socio-economic rights but only recognises civil and political rights which include the right to life, personal liberty, freedom from torture, cruel or inhuman punishment or treatment, privacy, freedom of association and assembly, freedom of speech, religious freedom, and right to a fair trial. The scholar postulates that 2016 referendum was intended to incorporate ESCRs in Zambia which was not successful due to the failure to garner the requisite votes in favour of the proposed Bill of Rights on ESCRs. The scholar argues that non-inclusion socio-economic rights in Zambia does not make it non-justiciable as the Zambian Supreme Court has held that the ESCRs can still be enforced based on the nexus with the existing civil and political rights.

¹⁸ Phillip Musonda., 'Constitutionalism in the Third Republic' (Thesis submitted in fulfillment of the Award of the Doctorate of Philosophy, The University of Zambia 2010)

¹⁹ O'Brien Kaaba., 'Deliberate Disregard: Socio-Economic, Constitutionalism and Covid-19 Pandemic in Zambia' in Alfred Mavedzenge (ed), *Covid-19 Pandemic and Socio-Economic Rights in Selected East and Southern African Countries* (Juta and Company 2020)

The scholar argues that the ESCRs are indirectly recognised in Zambia by case law. The study also looks at selected ESCRs in international and regional instruments such as the right to education. The scholar defined constitutionalism to entail governance which is confined within the constitutional limits and in furtherance of collective national values. The scholar recommends that governments should respect the concept of indivisibility of human rights as a basis to recognise and enforce ESCRs and the need to hold government accountable for its failure to realise ESCRs.

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Ndulo and Beyani²¹ discusses Zambia's constitutional history which reveals a struggle to have a legitimate constitution since independence. There has been a number of constitutional review commissions or commission of inquiries ranging from the Chona Commission 1972, the Mvunga Commission 1991, the Mwanakatwe Commission 1994, the Mungomba Commission 2003 and the Technical Committee on drafting the Zambian Constitution which have all suffered from the same pitfall of imposing a top-to-down imposition of a constitution pursuant to the Inquiries Act. The scholars further stated that Rebuilding Zambian political system entails a complete orientation to recognise the constitution as supreme law of the land and the need to respect people's wishes and needs.

Ndulo²² advocates for reform for judicial activism to make it more effective, accountable and independent in order to deliver justice effectively. It advocates for judicial reforms

²⁰ Maru Bazezew., 'Constitutionalism' (2009) 3 MIZAN Law Review St Mary's University

²¹ Ndulo and Beyani., 'As Tedious as a Twice-told Tale: The Struggle for a Legitimate Constitution and Democratic Constitution in Zambia' Southern African Journal of Policy and Development, 1

²² Muna Ndulo., 'Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System.' (2011) 2 *Zambia Social Science Journal*, 3-4

meant to enhance constitutionalism and rule of law. Governance is the way people are ruled. It is about whether the people are ruled with or without their consent. There are two ways in which governance issues can be looked at. Either the country is ruled in accordance with democratic or dictatorship principal. Good governance involves the management of a county's affairs in a manner that is transparent, accountable and equitable. The scholar advocates for an independent and accountable judiciary if the fundamental human rights are to be protected and enforced in Zambia.

METHODOLOGY

This paper adopts legal doctrinal method by reviewing the black letter law in form of primary and secondary sources of law and/or data.

RESULTS

From the above scholarly review, it is evident that the scholars further recommend rebuilding of Zambian political system which entails a complete orientation to recognise the constitution as supreme law of the land and the need to respect people's wishes and needs. It is also established that constitutionalism has characteristics which include limitation of power (limited government), separation of powers (checks and balances), responsible and accountable government, popular sovereignty, rule of law, limited government, separation of powers (checks and balances), civilian control of the military, police governed by law and judicial control, independent judiciary, respect for individual rights and the right to self-determination. Zambia has had socio-economic rights in its Constitution as directive principles of state policy for the last ten years and there is no jurisprudence to show for it despite the overwhelming deprivation in the country. The failure of constitutionalism in Africa is attributed to weak institutions and oversight institutions captured by a powerful presidency. The concept of constitutionalism is also negated by non-democratic constitution making process which results in a constitution which reflects the will of the leaders and not the people.

DISCUSSION OF FINDINGS

From a conspectus of a host of authorities cited herein, it is evident that the Zambian legal system does not expressly recognise social, economic and cultural rights under the bill of rights. It is also evident that despite this non-recognition of the said rights, the Zambian courts have

actively endeavoured to broadly interpret the civil and political rights in the Constitution using the concept of characteristics of human rights such as human rights are inter-dependent, universal, inherent and equal. The role of the court is critical and may be attributed to the concept of judicial activism as opposed to judicial conservatism. This approach is commendable in a democratic and constitutional form of governance as it aids the recognition, promotion and enforcement of human rights.

CONCLUSION AND RECOMMENDATIONS

It can be concluded that the role of the judiciary in the recognition, promotion and enforcement of human rights is dependent on good governance principles and the legal system of a country. It is recommended that Zambia should enshrine the economic, social and cultural rights in the Constitution to enhance the enforcement of the human rights.

REFERENCES

STATUTES

Zambian Constitution, Amendment Act No. 2 of 2016 and Act No. 13 of 2025

CASE LAW

George Peter Mwanza & Another v Attorney General 2019

Mumba and others v Electoral Commission of Zambia and others 2015/HP/0967

JOURNAL ARTICLES AND ONLINE SOURCES

Linda Kasonde., 'The need for Social-Economic Right in the Bill of Rights in the Zambian Constitution.' (Thesis submitted in fulfillment for the Award of LLM, University of Cape Town 2008)

Maru Bazezew., 'Constitutionalism' (2009) 3 MIZAN Law Review St Mary's University

Maru Bazezew., 'Constitutionalism' (2009) 3 MIZAN Law Review St Mary's University

Muna Ndulo., 'Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System.' (2011) 2 *Zambia Social Science Journal*, 3-4

Ndulo and Beyani., 'As Tedious as a Twice-told Tale: The Struggle for a Legitimate Constitution and Democratic Constitution in Zambia' *Southern African Journal of Policy and Development*, 1

O'Brien Kaaba., 'Deliberate Disregard: Socio-Economic, Constitutionalism and Covid-19 Pandemic in Zambia' in Alfred Mavedzenge (ed), *Covid-19 Pandemic and Socio-Economic Rights in Selected East and Southern African Countries* (Juta and Company 2020)

Phillip Musonda., 'Constitutionalism in the Third Republic' (Thesis submitted in fulfillment of the Award of the Doctorate of Philosophy, The University of Zambia 2010)

United Nations Human Rights, *Handbook for Parliamentarians* (Inter-Parliamentary Union, 2016)