
THE CONCEPT OF NON-BAILABLE OFFENCES: A LEGAL ANALYSIS OF THE CRIMINAL PROCEDURE CODE AMENDMENT ACT NO. 4 OF 2026

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ABSTRACT

This paper discusses the concept of non-bailable offences with special focus on sexual offences in Zambia. The sexual offences in Zambia include rape, attempted rape, indecent assaults on females, indecently insulting females, defilement of girls under sixteen, defilement of idiots or imbeciles, procuring defilement of women by threats or fraud or administering drugs, unnatural offences, attempt to commit unnatural offences, indecent assault of boys under fourteen, indecent practices between males, incest by males, incest by females, among others. It has discussed the concept of non-bailable offences and the implication of non-bailable offences on the rights of accused person(s). It has also reviewed the literature review through the legal doctrinal methodological approach from the international, regional and national perspectives. 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: Sexual Offences, Rape, Defilement, Indecent Assault, Bail, Human Rights

1.0 INTRODUCTION

Zambia has an adversarial legal system as opposed to inquisitorial legal system. In an adversarial system, there is a presumption of innocence of accused person(s). This means that an accused person is considered to be innocent until proven guilty by a court of competent jurisdiction. The opposite is equally true for inquisitorial system. An accused person is presumed guilty until proven innocent by a court of competent jurisdiction.¹

The sources of law in Zambia include the Constitution itself, statutes, statutory instruments, Zambian customary law which is consistent with the constitution and lastly, other laws as prescribed.² The Penal Code³ is a penal statute in Zambia which provides for offences such as rape, defilement, incest, unnatural offences, indecent assault, living on the proceeds of prostitution, among others. The Criminal Procedure Code⁴ provides for bailable and non-bailable offences in Zambia. It also provides for different types of bail such as bail pending trial, bail pending appeal, among others.

The High Court, in *Mumba and others v Electoral Commission of Zambia and others*⁵, 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 Constitution provides, among others, for presumption of innocence, right to liberty and other human rights for citizens.

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.⁶

Human rights are rights that everyone must enjoy, by the mere fact that they are human beings. These rights are inalienable, which means that it cannot be taken away from you except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law and is sentenced to serve time

¹ Margaret Munalula. *Legal Process in Zambia: Cases and Materials* (UNZA Press, Lusaka, 2004)

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

³ Penal Code Chapter 87 of the laws of Zambia

⁴ Criminal Procedure Code Chapter 88 of the laws of Zambia

⁵ 2015/HP/0967

⁶ Zambian Constitution, Amendment Act No. 2 of 2016, Article 8

in jail. Human rights are also interdependent and indivisible. The one right affects the other, and no one human right is more or less important than another human right. These rights also come with certain obligations, for example the obligation to respect the human rights of others.⁷ It is postulated that no one should be deprived of physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.⁸

Most legal orders foresee a right to bail, that is, to be set free against a financial security while waiting for the court proceedings to start. When provided for in the laws of a state, the right to bail must not be denied and not implemented in an arbitrary way, although the judge usually has discretionary powers in making his decision.⁹ The Universal declaration of human rights provides that everyone has the right to life, liberty and the security of person.¹⁰

Article 13 of the *Constitution of Zambia* provides:

Any person who is arrested or detained— for the purpose of bringing him before a court in execution of an order of a court; or upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia; and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial. (Emphasis mine)

The above Article provide for constitutional bail as illustrated in the Supreme Court of Zambia judgment in *Chetankumar Shantkal Parekh v The People*¹¹ in which it was held that:

Where any trial is unreasonably delayed through no fault or strategem of the accused,

⁷ Parliament of the Republic of South Africa.

https://www.parliament.gov.za/storage/app/media/EducationPubs/human_rights_email_eng.pdf

⁸ American Convention signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969

⁹ Understanding Human Rights Manual On Human Rights Education. Edited By Wolfgang Benedek European Training and Research Centre for Human Rights and Democracy (ETC). https://www.etc-graz.eu/wp-content/uploads/2020/08/Manual_2012_Eng_FINAL.pdf

¹⁰ Universal Declaration of Human Rights

¹¹ *Chetankumar Shantkal Parekh v The People* (1995) S.J. (S.C.)

the arrested person must be released on what one might call "constitutional bail". Such bail is available and clearly overrides any prohibitions in the lesser laws so that Article 13(3) would apply to any unreasonably delayed case, whatever the charge and whatever s.43 of the Act., or s.123 of the C.P.C. or any other similar law may say. (Emphasis mine)

Based on the foregoing, this paper will discuss the notion of sexual offences in Zambia and the concept of non-bailable offences. It will discuss the concept of constitutional rights of accused persons in relation to non-bailable offences such as sexual offences in Zambia.

2.0 LITERATURE REVIEW

2.1 THE CONCEPT OF NON-BAILABLE OFFENCES: REGIONAL AND INTERNATIONAL PERSPECTIVE

Choudhury and Sinha define bail as the process of obtaining a person's release from prison while awaiting trial or an appeal by depositing a bond to secure his timely surrender to legal authority. They refer to bail as a post-arrest remedy that allows the arrested person to be released until his trial date. It upholds the customary right to liberty before guilt is established. The scholars submit that the purpose of bail is to protect innocent people from being imprisoned, which would otherwise result in a pre-trial penalty, and to allow an accused person to prepare a defense to the charges levelled against him, which is based on the common law premise of presumption of innocence.

The scholars submits that bail is an important part of the criminal justice system, and the right to bail is governed by statute. It is submitted that though bail can be granted in both categories of offences (bailable and non-bailable offences), it is awarded on a discretionary basis in non-bailable cases, whereas bail is granted as a right to the accused in bailable cases.¹²

The examples of petty crimes that are usually classified as bailable is petty theft, public nuisance and defamation. The court may refuse bail to a suspect/accused in case of a grievous assault and feels that the accused might tamper with the investigations. The purpose is to allow an accused person to be treated fairly and that society is protected. The scholar submits that

¹² Dr. Pankaj Choudhury and Ms. Nimisha Sinha. Concept Of Bailable and Non-Bailable Offences Under The Criminal Procedure Code, 1973. *Ilkogretim Online - Elementary Education Online*, 2021; Vol 20 (Issue 1): pp. 4084-4091 <http://ilkogretim-online.org> doi: 10.17051/ilkonline.2021.01.451, Page 1

bail affects the freedom of the person who is accused, and it also affects how society is kept safe.

Upadhyay submits that the Indian criminal law provides that some crimes are bailable and some are not, and this is what helps the police and the courts make their decisions about bail. The scholar argues that the distinction between bailable and non-bailable offences is the foundation of the jurisprudence of bail in India itself, and it is the representation of the greater aim of balancing the freedom of an individual with the safety of society. It is essentially regarded as an absolute right in bailable offences, which supports the notion that detention is not to be a punitive provision before conviction.

The scholar further submits that non-bailable offences gives discretionary authority to the judiciary, and the court must be keen to examine certain issues, including the seriousness of the crime, the probability of absconding, and the possibility of pathology in the course of the delivery of justice. Upadhyay argues that although the discretion needs to be made to serve the greater good of the people, it has to be used wisely and in line with the constitutional guarantees. Conclusively, the scholar argues that bail has to be viewed not only as a formality of the procedure but as a crucial right to the right to life and personal freedom.¹³

It is vital to note that bail eligibility differs between states. All state constitutions grant the right to bail and typically have rules against excessive bail. The scholar submits that there is variation among states in specifying exceptions to the right to bail, also known as “pre-trial detention eligibility” or “non-bailable offenses.” While some states limit their definition of non-bailable offenses to capital offenses, others provide a specific list of serious and violent crimes. Non-bailable offenses are any crimes that state law deems eligible for pre-trial detention. Generally, these types of crimes are severe and have substantial maximum sentences. Capital offenses are the most common type of non-bailable offense, but other serious crimes like kidnapping or terrorism may also be considered bailable offenses.¹⁴

It is further submitted that a state’s provisions for non-bailable offenses can fall within one of three categories: **(1) traditional bail denial (2) expanded bail denial or (3) no bail denial**

¹³ Sanskriti Upadhyay, *Bailable And Non-Bailable Offences: A Comparative Legal Analysis*, *Indian Journal Of Legal Review (Ijlr)*, 6 (1) Of 2026, Pg. 449-455, Apis – 3920 – 0001 & Issn - 2583-2344.

¹⁴ *Balancing Personal Rights and Public Safety: How do states define non-bailable offenses?* CSG SOUTH Question of the Month | June 2025 | Page 1

allowances. (emphasis mine)

The scholar submits that only capital offenses are considered non-bailable in states with traditional bail denial provisions. States with expanded bail denial have broadened the list of non-bailable offenses. This amended list could be as simple as including crimes with maximum life imprisonment sentences or as detailed as naming specific violent crimes. Constitutions with expanded bail denial could also allow a judge to use discretion to determine if the accused threatens public safety or is unlikely to appear for trial.

The scholar highlights different views regarding the non-bailable offences. The proponents of amending state definitions of non-bailable offense believe doing so is acting in the public interest by ensuring a potentially dangerous defendant remains in custody before trial. The opponents see this as stripping the accused of their rights and essentially determining guilt before a fair trial. Thus, states often include clauses in their constitutions that require substantial evidence of the accused's guilt before being denied bail and held in pretrial detention. It is recommended that if a state wish to expand its definition of non-bailable offenses, the language of the state's constitution would dictate that process. If a state constitution allows for statutory amendments, a full constitutional amendment is not necessary.

2.2 THE CONCEPT OF NON-BAILABLE OFFENCES: NATIONAL PERSPECTIVE

The Criminal Procedure Code provides for bailable and non-bailable offences in Zambia. For non-bailable offences, an accused person can apply for constitutional bail pursuant to Article 13 of the Constitution of Zambia. Some of the examples of non-bailable offences in Zambia include murder, treason, rape, incest, defilement, among others.¹⁵

For bailable offences, there a number of principles that the courts follow before granting bail. The High Court of Zambia in *Watson Banda and another vs the People*¹⁶ considered an application for bail pending appeal made pursuant to Section 332 (1) of the *Criminal Procedure Code*¹⁷. The court stated that it is not in dispute that the applicants were entitled to apply for bail pending appeal, indeed as per Section 332 (1) of the Criminal Procedure Code, as it was their right to apply for bail.

¹⁵ Criminal Procedure Code Chapter 88 of the laws of Zambia as amended in 2026

¹⁶ *Watson Banda and another vs the People* HPBA/35/2025

¹⁷ *Criminal Procedure Code* Chapter 88 of the laws of Zambia

However, the court stated that the grant of bail pending appeal is treated with much circumspection as was demonstrated in *Titus Zulu, Mike Musanya Sambundu vs The People* in which Justice Matibini stated that:

"Unlike bail pending trial, bail pending appeal is granted with the reserve because the applicant is a convicted person and the conviction is good unless and until the appellate Court quashes the conviction. It is for this reason that different considerations apply in applications for bail pending appeal." It was further held that Our Courts have held that in determining a bail application there are five considerations to be taken into account, as was outlined in the case of *Oliver John Irwin vs The People* & Justice Bwalya, as he was then, stated in that case as follows: "I

It was further stated that in deciding a bail application, five considerations to be taken into account are clearly spelt out in *Archibold, 36th ed* and amplified in the case of the *State v Gopolong Makcenzie* which read as follows:

the nature of the accusation against the applicant and the severity of the punishment which may be imposed; (ii) the nature of the evidence in support of the charge; (iii) the independence of sureties if bail were to be granted; (iv) the prejudice to applicant (accused) if he is not admitted to bail; (14 the prejudice to the State if bail is granted."

The court further ruled that in the *Irwin case*, that the foregoing conditions do not bar an applicant from raising any other special circumstances peculiar to that particular applicant. Special or exceptional circumstance has been aptly described in the cases of *Stoddard* and *Krishnan*. Further the court cited the case of *The People vs Yousuf Pandor and Bengula Beyani* in which Justice Matibini in that case held:

"The exceptional or unusual circumstance include: where an appeal has raised an important or difficult point of law; where there is real doubt about the correctness of a conviction on a point of law; where a sentence is manifestly contestable as to whether or not it is a sentence known to law; where the appellant is likely to serve the entire or substantial part of the sentence before the appeal is heard and where generally there is likelihood of success."

The court was satisfied that the convicts were entitled to bail and provided for the following

bail conditions:

- a) The applicants to pay K10,000.00 each in their own recognizance;
- b) The applicants to produce two working sureties working in the public service and of a fixed abode within Lusaka to be bond in the sum of K5,000.00 each;
- c) Each applicant to surrender their passports to the Senior Clerk of Court;
- d) Each applicant to report to the Senior Clerk of Court every last Friday of the month until the hearing of the appeal is concluded.

The recent Court of Appeal of Zambia judgment in *Chirwa vs the People*¹⁸ echoed the above principles and added a realistic chance of winning the appeal is essential. If the appeal clearly has no prospect of success, the fact that the applicant may serve most of the sentence before the appeal is decided cannot, on its own, justify granting bail.

3.0 METHODOLOGY

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

4.0 FINDINGS

From the above scholarly review, it is evident that:

- a) Zambia has an adversarial legal system as opposed to inquisitorial legal system;
- b) state's provisions for non-bailable offenses can fall within one of three categories: (1) traditional bail denial (2) expanded bail denial or (3) no bail denial allowances;
- c) Capital offenses are the most common type of non-bailable offense, but other serious crimes like kidnapping or terrorism may also be considered bailable offenses;
- d) There is variation among states in specifying exceptions to the right to bail, also known

¹⁸ *Chirwa vs the People* CAZ/09/90/2025

as ‘pre-trial detention eligibility’ or ‘non-bailable offences;

- e) The proponents of amending state definitions of non-bailable offense believe doing so is acting in the public interest by ensuring a potentially dangerous defendant remains in custody before trial;
- f) The opponents see this as stripping the accused of their rights and essentially determining guilt before a fair trial;
- g) Bail for bailable offences in Zambia is not automatic as accused needs to apply and advance grounds to justify the grant of bail;
- h) The Criminal Procedure Code in Zambia has expanded the list of non-bailable offences to include, among others, rape, defilement and incest;
- i) The other sexual offences still remain as bailable offences; and
- j) Constitutional bail is one of the mechanisms available to accused persons charged with non-bailable offences in Zambia.

5.0 CONCLUSION AND RECOMMENDATIONS

It can be concluded that the concept of non-bailable offences is not a novel concept as it is a common practice in most jurisdictions and civilized nations. It is also evident that the application of the concept varies among jurisdictions and scholars have classified different jurisdictions based on the classification of bailable and non-bailable offences. It is recommended that Zambia should balance the rights of the accused person and the safety of the public. While the concept of non-bailable offences is not novel, a good legal system should be flexible and change with time granted the prevailing circumstances in Zambia. There is also need to improve operational efficiency and administrative procedures to ensure that accused persons are granted constitutional bail if matters delay so as to decongest the prisons. Considering that that right to personal liberty is not absolute in Zambia, it cannot suffice to argue that non-bailable offences are unconstitutional in Zambia.

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