

**THE PROPOSED CONSTITUTIONAL COURT IN ZAMBIA: A COMPARATIVE
ANALYSIS OF THE COURT'S JURISDICTION IN ZAMBIA AND SOUTH AFRICA**

BY

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**A DISSERTATION SUBMITTED TO THE UNIVERSITY OF ZAMBIA FOR
PARTIAL FULFILLMENT OF THE REQUIREMENTS OF BACHELOR OF LAWS**

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DEDICATION

For Milton and Maria, my lovely parents, I know you are smiling down on me from heaven.

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ABSTRACT

This research undertakes a comparative analysis of the jurisdiction accorded to the proposed Constitutional Court as provided for in Article 157 of the 2014 Final Draft Constitution of Zambia and the Constitutional Court of South Africa. The main objectives of this research include: to examine the general nature and purpose of a Constitutional Court, to critically analyse the jurisdiction given to the proposed Constitutional Court and the South African Constitutional Court and to analyse whether or not the proposed Constitutional Court of Zambia should be vested with original and final jurisdiction on all constitutional matters, instead of appellate jurisdiction on all constitutional matters. This research considers various arguments that have been advanced for and against the proposed Constitutional Court being vested with original and final jurisdiction. It also examines the rationale behind the appellate jurisdiction that the South African Constitutional Court has been accorded.

This research was undertaken by making reference to different sources of law including local and foreign legislation, judicial decisions, books, journals, newspaper articles and other relevant publications. It is therefore qualitative and focuses on analysing the different sources of law.

This research establishes that conferring appellate jurisdiction on the proposed Constitutional Court would better achieve the purposes that Constitutional Courts seek to fulfil. Further that original and final jurisdiction of the Court should be reserved for the most fundamental constitutional matters. Such a jurisdiction is narrower and thus more efficient. It does not take away the benefits of coherence, uniformity and accountability that a system of appeals produces. This research further establishes that the wide jurisdiction of the proposed Constitutional Court may result in a violation of Article 147(2) of the Final Draft Constitution which provides that justice shall not be delayed. Further, Article 157 of the 2014 Final Draft Constitution, by eliminating a right of appeal, effectively violates Article 147(1) which provides that justice “*shall be exercised in a manner that promotes accountability.*” The right of appeal accords an opportunity to review decisions made by lower Courts thus creating accountability.

This research thus recommends that the proposed Constitutional Court should mainly operate as a Court of appeal. It is recommended that original jurisdiction of constitutional matters that are not exclusively reserved for the Constitutional Court, must continue to be presided over by the High Court. This will help to get a full development of the facts and legal arguments in cases such as those concerning the violation of human rights before the cases reach the Constitutional Court. This research also recommends that the Constitutional Court should only have original and final jurisdiction in the following matters: to determine a Presidential election petition challenging the election of a President-elect; to determine disputes between State organs or State institutions and to determine whether or not a matter falls within the jurisdiction of the Court. Additionally, this research also recommends that the proposed Constitutional Court should devise rules that will help ensure that there is prompt disposition of cases that are brought before it. The prompt disposition of cases will uphold the principle provided for in Article 147 (2) (b) of the Final Draft Constitution that justice shall not be delayed.

TABLE OF STATUTES

The Constitution of Austria

The Constitution of Germany

The Constitution of India

The Constitution of Indonesia

The Constitution of Italy

The Constitution of the Republic of South Africa.

The Constitution of the Republic of Uganda.

The Constitution of Zambia, Chapter One of the Laws of Zambia.

The Final Draft Constitution of Zambia

The Rules of the Constitutional Court of South Africa

TABLE OF CASES

Christian Education of South Africa v. The Ministry of Justice 1999 (2) SA 83 (CC)

Christine Mulundika and Others v. The People [1996] 2 LRC 175

Dudley v. City of Cape Town and Another (CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC)

Mkangeli and Others v. Joubert and Others 2001 (2) SA 1191 (CC)

Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Re Nalumino Mundia (1971) Z.R. 70 (H.C.)

The Attorney General v. The Local Government Election Commission (1990--1992) Z.R. 182 (H.C.)

TABLE OF CONTENTS

Title	i
Copyright Declaration.....	ii
Approval Page.....	iii
Dedication	iv
Acknowledgments.....	v
Abstract.....	vi
Table Of Statutes.....	vii
Table Of Cases.....	viii

Chapter One: Introduction

1.1 Introduction.....	1
1.2 Background	1
1.3 Statement of the Problem.....	4
1.4 Objectives of the Study	6
1.5 Research Questions.....	6
1.6 Significance of the Study	6
1.7 Literature Review.....	7
1.8 Methodology	11
1.9 Outline of Chapters	11
1.10 Conclusion	12

Chapter Two: The Nature and Purpose of a Constitutional Court

2.1 Introduction.....	13
2.2 Nature of a Constitutional Court.....	13
2.3 The Purpose and Importance of Constitutional Courts.....	14
2.4 General Jurisdiction of Constitutional Courts.....	17
2.4.1 Interpretative Powers	18
2.4.2 Judicial Review of Legislative and Executive Actions.....	19
2.4.3 Distribution of Powers among Public Authorities	20
2.4.4 Elections and Political Parties.....	21
2.4.5 Human Rights and Civil Liberties	21
2.5 Conclusion	23

Chapter Three: The Jurisdiction of the Proposed Constitutional Court in Zambia as provided for under the Final Draft Constitution

3.1 Introduction.....	24
3.2 Article 157 of the 2014 Final Draft Constitution.....	24
3.3 Arguments for and against original and final jurisdiction	26
3.4 Conclusion	31

Chapter Four: The Jurisdiction of the Constitutional Court of South Africa

4.1 Introduction.....	33
4.2 Nature and Development of the Constitutional Court of South Africa.....	33
4.3 What is a Constitutional Matter?	35
4.4 Non Appellate Jurisdiction.....	36
4.4.1 Exclusive Jurisdiction	36
4.4.2 Confirmation Jurisdiction	37
4.4.3 Direct Access to the Court	37
4.5 Conclusion	42

Chapter Five: Conclusions and Recommendations

5.1 Introduction.....	43
5.2 Conclusions.....	43
5.3 Recommendations.....	46
Bibliography	48

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

The purpose of this research is to undertake a comparative analysis of the jurisdiction accorded to the proposed Constitutional Court as provided for in Article 157 of the 2014 Final Draft Constitution of Zambia (hereinafter ‘the Final Draft Constitution’) and the Constitutional Court of South Africa. This research will examine the nature and importance of a Constitutional Court. It will also assess the strengths and weaknesses of the jurisdiction given to the proposed Constitutional Court in Zambia and that of South Africa. This will be done in order to determine how best the jurisdiction of the proposed Constitutional Court is provided for under the Final Draft Constitution. This is further intended to help ensure that the provisions of the Constitution are upheld.

1.2 BACKGROUND

Article 91 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia (as amended by Act No. 18 of 1996) (hereinafter referred to as ‘the Zambian Constitution’) lists the Courts that consist the Judicature, accordingly these include the Supreme Court of Zambia; the High Court of Zambia; the Industrial Relations Court; the Subordinate Courts; the Local Courts; and such other Courts as may be prescribed by an Act of Parliament. The list does not include a Constitutional Court. Notwithstanding the absence of a specialised Court that hears constitutional matters, the High Court and the Supreme Court have jurisdiction over constitutional matters.¹

Article 94 of the Zambian Constitution gives the High Court original and unlimited jurisdiction to hear and determine any civil and criminal proceedings under any law. The

¹ Article 94 and Article 41 of the Constitution of Zambia, Chapter One of the Laws of Zambia.

‘law’ referred to in this Article includes the law as provided for by the constitution. This effectively means that the High Court has original jurisdiction to hear and determine matters arising under the constitution. As per Article 41 of the Zambian Constitution, questions relating to presidential elections are the preserve of the full bench of the Supreme Court. Therefore, constitutional matters in Zambia are mainly heard by the High Court as the current constitution does not make provision for a Court that specialises in constitutional matters.

The idea of a Constitutional Court was first recommended by the Mvunga Constitution Review Commission in 1991.² Notwithstanding the recommendation, the resultant 1991 Constitution of Zambia did not make provision for a Constitutional Court.³ Thereafter, in 1996 the Mwanakatwe Constitution Review Commission also recommended the inclusion of a Constitutional Court to the Judicature.⁴ However, the constitutional amendments that followed did not alter the list of Courts that make up the Judicature.⁵ The establishment of a Constitutional Court was one the recommendations of the Mung’omba Constitution Review Commission that was adopted by the National Constitutional Conference (NCC) in 2005.⁶ Regardless of the continuous recommendations, the Zambian Constitution has still not been amended to provide for the establishment of a Constitutional Court.

More recently, the Technical Committee on drafting the Zambian Constitution has since released the 2014 Final Draft Constitution.⁷ Article 1 (5) of the Final Draft Constitution provides that, the Constitutional Court shall have jurisdiction in any matter arising under the Constitution.

² A. W. Chanda, *Zambian Constitutional Law: Cases and Materials* (Lusaka: Unza Press, 2012) 471.

³ A. W. Chanda, *Zambian Constitutional Law: Cases and Materials*, (Lusaka: Unza Press, 2012) 471.

⁴ A. W. Chanda, *Zambian Constitutional Law: Cases and Materials*, (Lusaka: Unza Press, 2012) 472.

⁵ A. W. Chanda, *Zambian Constitutional Law: Cases and Materials*, (Lusaka: Unza Press, 2012) 472.

⁶ Republic Of Zambia. *Initial Report of the National Constitutional Conference* (Lusaka: Government Printers, 2010) 606.

⁷ “The Technical Committee on Drafting the Zambian Constitution.” Zambian Constitution. Last modified October 31, 2014. <http://www.zambianconstitution.org/about-us.html>

Article 156 of the Final Draft Constitution provides for the establishment and composition of a Constitutional Court. Particularly, Article 157, which is the focus of this research, provides for the jurisdiction of the Constitutional Court. The provision provides that, the Constitutional Court has original and final jurisdiction to hear and decide on any cases relating to the constitution. These matters include those relating to the interpretation of this Constitution; a violation or contravention of the Constitution; to the President, Vice- President or an election of a President; and whether or not a matter falls within the jurisdiction of the Constitutional Court; among other matters.

Article 157 (4) further provides that the decisions of the Constitutional Court are not appealable to the Supreme Court. This implies that petitioners of constitutional matters will not have a right to appeal. This research will assess the desirability of having a Constitutional Court with a jurisdiction that has the effect of taking away the right of appeal.

The South African Constitutional Court, on the other hand, has been in existence since 1994.⁸ The Constitutional Court was established in terms of the interim Constitution and the Constitutional Court Complementary Act No. 13 of 1995.⁹ The highest Court in all constitutional matters in South Africa is the Constitutional Court. Section 167 (3) of the South African Constitution provides that the Constitutional Court may decide only constitutional matters and issues connected with decisions on constitutional matters. It further provides that the Court has power to make the final decision on a constitutional matter.

Section 167 (4) goes on to give the Constitutional Court jurisdiction in deciding disputes about powers and constitutional status of branches of government. This includes powers to decide on the constitutionality of any parliamentary or provincial Bill; the constitutionality of

⁸ H. R. Hahlo and E. Kahn, *The South African Legal System and its Background* (Cape Town: Juta & Co. Limited, 1973) 32.

⁹ H. R. Hahlo and E. Kahn, *The South African Legal System and its Background* (Cape Town: Juta & Co. Limited, 1973) 32.

any amendment to the Constitution; on whether or not Parliament or the President has failed to fulfil a constitutional obligation and on disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs.

It is worth noting that Section 167 of the South African Constitution allows a person, "*when it is in the interests of justice and with leave of the Constitutional Court*" to bring a matter directly to the Constitutional Court; or to appeal directly to the Constitutional Court from any other Court. This procedure is ordinarily permitted only in exceptional circumstances. Rule 17(2),¹⁰ which was adopted pursuant to Section 167(6)(a) of the South African Constitution, requires an applicant for direct access to set out, among other things "...*the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted.*" However this research will focus on the fact that the jurisdiction of the Constitutional Court of South African is mainly appellate.

From the onset it is evident that while the Constitutional Court provided for by the Final Draft has original and final jurisdiction to hear all constitutional matters, the South African Constitutional Court generally has appellate jurisdiction and is the highest Court in all constitutional matters. It is this difference that is the main focus of this research.

1.3 STATEMENT OF THE PROBLEM

The importance of having an effective mechanism that ensures that the provisions of the constitution are upheld cannot be overemphasised. A Constitutional Court, is such a mechanism, which protects the implementation of the constitution.¹¹ It plays a positive role in

¹⁰ Rules of the Constitutional Court, (Regulation Gazette) 1995.

¹¹ X. Zuo, "A Study on Constitutional Court's Jurisdiction" (Masters Thesis, Chongqing University, 2011), 19.

promoting the protection of human rights, to limit the national public authority and to coordinate the powers of the state organs.¹²

Giving the Constitutional Court original and final jurisdiction may, however, be undesirable. This is because petitioners would have no right to appeal from decisions of the Constitutional Court whether or not those decisions are wholly sound in law. The right of a party to proceedings to appeal any judicial decision is important to a legal system as it facilitates the rule of law. This right is the most obvious way in which judges are accountable.¹³ Appeals enable errors to be corrected thus maintaining and enhancing the confidence of citizens in the justice system. They also provide guidance for future cases and thus facilitate certainty.¹⁴

During the deliberations of the National Constitutional Conference (NCC) on the provisions of the 2010 Draft Constitution, some members of the NCC were not in favour of the Constitutional Court having original and final jurisdiction.¹⁵ It was argued that the Court would be congested if original jurisdiction was conferred on it.¹⁶ Instead the recommendation was that original jurisdiction be conferred on a lower Court.¹⁷ Thus, the implication was that it was necessary for the Constitutional Court to have appellate jurisdiction.¹⁸ Accordingly granting the Constitutional Court original jurisdiction, would imply that the litigants would have nowhere to appeal to if they were not satisfied with the ruling since the decision of the

¹² X. Zuo, "A Study on Constitutional Court's Jurisdiction" (Masters Thesis, Chongqing University, 2011), 19.

¹³ "The right to appeal," Courts and Tribunals Judiciary, Last modified January 16, 2015, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal>

¹⁴ "The right to appeal," Courts and Tribunals Judiciary, Last modified January 16, 2015, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal>

¹⁵ Republic Of Zambia. *Initial Report of the National Constitutional Conference* (Lusaka: Government Printers, 2010) 606.

¹⁶ Republic Of Zambia, *Initial Report of the National Constitutional Conference*, 606.

¹⁷ Republic Of Zambia, *Initial Report of the National Constitutional Conference*, 606.

¹⁸ Republic Of Zambia, *Initial Report of the National Constitutional Conference*, 607.

Court would be final.¹⁹ However, despite these recommendations, the 2014 Final Draft Constitution provides for a Constitutional Court that has original and final jurisdiction.

1.4 OBJECTIVES OF THE STUDY

This research seeks to achieve the following objectives:

1. To examine the nature and purpose of a Constitutional Court. This will be done in order to highlight why a particular kind of jurisdiction would be more advantageous over another in fulfilling the purpose that the Constitutional Courts seek to serve.
2. To critically analyse the jurisdiction given to the proposed Constitutional Court and the South African Constitutional Court. Highlighting the strengths and weaknesses of the powers given to them.
3. To analyse whether or not it is practical to have a Constitutional Court in Zambia that has original and final jurisdiction on all constitutional matters. This will be done in comparison with whether it would instead be more practical to have a Constitutional Court with appellate jurisdiction.

1.5 RESEARCH QUESTIONS

1. What is the nature and purpose of a Constitutional Court?
2. What is the jurisdiction of the proposed Constitutional Court and the South African Constitutional Court?
3. Should the proposed Constitutional Court have original and final jurisdiction or appellate jurisdiction?

1.6 SIGNIFICANCE OF THE STUDY

The research will add value to the body of literature on the jurisdiction of Constitutional Courts. This is because the research will highlight the strengths and weaknesses of the

¹⁹ Republic Of Zambia. *Initial Report of the National Constitutional Conference* (Lusaka: Government Printers, 2010) 607.

successfully operational South African Constitutional Court. The comparative analysis of a Court with appellate jurisdiction and the other with original and final jurisdiction will help Zambia ensure that it establishes an effective Constitutional Court once the Final Draft Constitution comes into force.

1.7 LITERATURE REVIEW

Benjamin Nwabueze²⁰ states that the purpose of Constitutional Courts is to “serve as a protector of the constitution specifically, and constitutionalism generally.” Nwabueze²¹ also states that Constitutional Courts are vested with the power to ensure that laws conform to the principles and values enshrined in the constitution. In relation to the nature of Constitutional Courts, Nwabueze²² holds that the Court’s decisions on the constitutionality of governmental measures will rarely be a product of a mechanical application of, or logical deductions from, the text of the constitution. This means that the decisions of the Constitutional Court are not based solely on what is contained in the constitution. Nwabueze,²³ identifies that policy consideration cannot be excluded from the court’s decision on constitutionality and states that in making the choice, the text of the constitution may afford but little assistance hence the need to have a separate Court for constitutional matters. In agreement with Nwabueze,²⁴ this research will look at what the implications of the “policy-orientated” nature of the Constitutional Court has on the jurisdiction conferred on the Court.

Alfred Chanda²⁵ states that it is important that those judges that are well vested with the constitution are entrusted with the duty of interpreting it. According to Chanda²⁶ a Constitutional Court may improve on the delivery system as judges groomed from the

²⁰ B.O. Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, (New York: St. Martin’s Press, 1977) 15.

²¹ Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, 15.

²² Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, 139.

²³ Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, 139.

²⁴ Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, 139.

²⁵ A. W. Chanda, *Zambian Constitutional Law: Cases and Materials* (Lusaka: Unza Press, 2012) 472.

²⁶ Chanda, *Zambian Constitutional Law: Cases and Materials*, 472.

magisterial ranks are not well equipped to handle the complexities of human rights issues. The judges of the Court would be specialists in constitutional law and, according to Chanda,²⁷ it is difficult to see what value would be added by providing for an appeal to another Court consisting of judges who are not specialists in the subject matter. Chanda²⁸ also cites the need to encourage specialisation, as an advantage of giving a Constitutional Court original and final jurisdiction. This research opposes the view that there is no need for an appeal system in Constitutional matters merely because the Court handling such matters is specialised. Whether or not it is practical for Zambia to have a single Court deciding on all constitutional matters as opposed to having a specialised Constitutional Court of final appeal, as is the case in South Africa, is of importance and this an issue that this research seeks to consider.

On the other hand, Arthur Chaskalson,²⁹ has observed that the South African Constitutional Court has taken the view that it is undesirable for a Court having to deal with issues which may be of great importance to the development of the law, to have to do so as a Court of first and last instance.³⁰ The South African Constitutional Court does not hear evidence or question witnesses.³¹ It is a Court that mainly operates as a Court of appeal, it considers the record of the evidence heard in the original Court that heard the matter.³² Chaskalson³³ states that it is not practical for the Court of eleven judges, who sit as a full bench, to hear evidence.³⁴ Chaskalson³⁵ thus holds that claims should therefore be argued up through the

²⁷ Chanda, *Zambian Constitutional Law: Cases and Materials*, 472.

²⁸ Chanda, *Zambian Constitutional Law: Cases and Materials*, 472.

²⁹ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³⁰ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³¹ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³² A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³³ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³⁴ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

lower Courts and get a full development of the facts and legal arguments before the case reaches the Constitutional Court. Accordingly, the proposed Constitutional Court of Zambia that shall also consist of eleven judges should be given appellate jurisdiction so as to get a full development of the facts and legal issues in the various constitutional cases.

In contrast, Jackie Dugard,³⁶ arguing for a pro-poor jurisdiction of the South African Constitutional Court, insists on less strict requirements of direct access. With regards to the argument that if the gates are opened, a flood of applications will ensue, Dugard³⁷ states that criteria such as ‘urgency’ and ‘exceptional circumstances’ are too limiting. Dugard³⁸ suggests that these should be replaced by a consideration of whether the issue is in the ‘public interest’. According to Dugard³⁹ the Constitutional Court is not currently under threat of drowning in applications and that it probably could make the time to hand down decisions in more than the approximately 25 cases it currently does a year. The Court should still be in a position to control its roll using existing criteria such as merit and ‘exhaustion of other remedies or procedures’.⁴⁰ While Dugard’s argument has merit it does not address the importance of the right of appeal. Decisions given by Courts on appeal offer opportunities for greater reflection and discussion, and the achievement of greater coherence within the entire judicial system, than decisions given by Courts sitting as Courts of first and last instance.⁴¹

³⁵ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³⁶ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 264.

³⁷ Dugard, “First Instance? Towards A Pro-Poor Jurisdiction for the South African Constitutional Court” 279.

³⁸ Dugard, “First Instance? Towards A Pro-Poor Jurisdiction for the South African Constitutional Court” 279.

³⁹ Dugard, “First Instance? Towards A Pro-Poor Jurisdiction for the South African Constitutional Court” 282.

⁴⁰ Dugard, “First Instance? Towards A Pro-Poor Jurisdiction for the South African Constitutional Court” 282.

⁴¹ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

Gianluca Gentili⁴² observes that systems of direct access to constitutional and supreme Courts are generally considered positively, as they can provide better protection of fundamental rights. Gentili⁴³ thus states that a balance must be struck between an effective protection of human rights and an efficient and timely exercise of the Court's functions. However, Gentili⁴⁴ states that if not properly designed, these systems are likely to result in the overburdening of a Constitutional Court due to the high number of applications lodged. Gentili⁴⁵ notes that several States have declined to adopt a system of individual constitutional complaint altogether, while others, such as South Africa, have established strict accessibility requirements making direct recourse a merely subsidiary mechanism for the protection of constitutional rights.⁴⁶ These States require, for example, the previous exhaustion of all other legal remedies or the special "constitutional significance" of the question of constitutionality to be lodged.⁴⁷ It is therefore important to consider the design of the proposed Constitutional Court in Zambia, the strengths and weaknesses of the design that has been adopted and whether or not the proposed Constitutional Court would be overburdened.

In appraising the 2010 Draft Constitution of Zambia, which also provides for original and final jurisdiction of the Constitutional Court, Muna Ndulo⁴⁸ notes that constitutional matters are going to arise at various levels in the Court system. Ndulo⁴⁹ states that all Courts must be allowed to hear such cases. According to Ndulo,⁵⁰ the constitutional court should have the

⁴² G. Gentili, "A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court". *The Penn State International Law Review* 29, no. 4 (2011): 707.

⁴³ Gentili, "A Comparative Perspective on Direct Access" 709.

⁴⁴ Gentili, "A Comparative Perspective on Direct Access" 709

⁴⁵ Gentili, "A Comparative Perspective on Direct Access" 709.

⁴⁶ Gentili, "A Comparative Perspective on Direct Access" 709.

⁴⁷ Gentili, "A Comparative Perspective on Direct Access". 710.

⁴⁸ M. Ndulo, "The Draft Constitution of Zambia". *UK Zambians*, 27th August, 2012, accessed 7th November, 2014, <http://ukzambians.co.uk/home/2012/08/27/the-draft-constitution-of-zambia-by-professor-muna-ndulo>.

⁴⁹ M. Ndulo, "The Draft Constitution of Zambia"

⁵⁰ M. Ndulo, "The Draft Constitution of Zambia"

last say and cannot operate as a Court of first instance. Ndulo⁵¹ also notes that the South African Constitutional Court sits as the final arbiter in constitutional matters in contrast with the Court of Appeal, which sits as final Court in all other matters. Ndulo⁵² further states that in most countries in the world, one can raise constitutional matters in all the Courts. This research acknowledges that making constitutional matters the reserve of one Court may not be desirable. However extending these powers to all Courts, as Ndulo⁵³ suggests, including inferior Courts that lack specialisation may also be undesirable. This is because, as Nwabueze⁵⁴ puts it, “the role of the Constitutional Court is policy orientated” therefore requiring judges of a higher qualification and better understanding of constitutional principles. This research will therefore comparatively analyse the extent of jurisdiction that can best be employed so as to achieve the establishment of an efficient Constitutional Court.

1.8 METHODOLOGY

This research was undertaken by making reference to different sources of law including local and foreign legislation and judicial decisions, books, journals, newspaper articles and other relevant publications. It is therefore qualitative research focusing on the analysis of the different sources of law.

1.9 OUTLINE OF CHAPTERS

This research will progress as follows:

Chapter two will discuss the nature and purpose of a Constitutional Court. Chapter three will critically analyse the jurisdiction of the proposed Constitutional Court in Zambia as provided for under the 2014 Final Draft Constitution. It will discuss how practical it is to have a Constitutional Court that has original and final jurisdiction. The chapter will also highlight

⁵¹ M. Ndulo, “The Draft Constitution of Zambia”

⁵² M. Ndulo, “The Draft Constitution of Zambia”

⁵³ M. Ndulo, “The Draft Constitution of Zambia”

⁵⁴ Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, 139.

the strengths and weakness of such a jurisdiction. Chapter four will critically analyse the appellate jurisdiction of the South African Constitutional Court. Finally, Chapter five will conclude and summarise the findings of the research. It will also give relevant recommendations.

1.10 CONCLUSION

This chapter generally introduced the research topic. The chapter gave a brief background of the proposed Constitutional Court and the South African Constitutional Court. The chapter has also given a statement of the problem that the research will tackle. This chapter has laid out the research aim and objectives, the significance of undertaking the research and the methodology that will be employed in achieving the research aim.

CHAPTER 2

THE NATURE AND PURPOSE OF A CONSTITUTIONAL COURT

2.1 INTRODUCTION

This chapter will discuss the characteristics of a Constitutional Court. The purpose that Constitutional Courts seek to serve is considered. In addition, the jurisdiction that Constitutional Courts are usually vested with is examined. This will be done in order to help determine, why a particular kind of jurisdiction would be more advantageous over the other in fulfilling the purpose that the Constitutional Courts seek to serve.

2.2 NATURE OF A CONSTITUTIONAL COURT

A Constitutional Court may be defined as a Court whose jurisdiction is solely or primarily over claims that legislation, and sometimes executive action, is inconsistent with a nation's constitution.¹ Hans Kelsen is often quoted as the 'father of modern constitutional review'.² This is because Kelsen designed the Austrian Constitutional Court which has served as a model for some European countries such as Germany, Spain and Hungary, among many others.³ According to Kelsen, Constitutional Courts are Courts which have a centralised competence on constitutional cases and which are institutionally independent.⁴ Constitutional Courts as defined by Kelsen are the Courts under examination in this research.

Generally Constitutional Courts are not political institutions but may be considered political because they can never act in total isolation from the political system.⁵ They have to be involved in political proceedings according to their competences. As such, legal arguments

¹ B. Garner, *Black's Law Dictionary*, 8th ed., (New York: Thomson West, 2004) 331.

² T. Tetzlaff, "Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan" *National Taiwan University Law Review* 1, no. 2 (2006): 77.

³ Tetzlaff, "Kelsen's Concept of Constitutional Review Accord in Europe and Asia" 77.

⁴ Tetzlaff, "Kelsen's Concept of Constitutional Review Accord in Europe and Asia" 77.

⁵ K. Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy: What Price Rights?." (PhD thesis, Georgia State University, USA, 2014) 41.

concerning Constitutional Courts must be sensitive to the political context.⁶ Political context affects the use of national and international sources in Court decisions.⁷ Both Zambia⁸ and South Africa⁹ are sovereign democratic states and both states practice multi-party politics and enact laws through their representatives in the legislature. This research will take into consideration the political context of Zambia and South Africa as it analyses the jurisdiction of the Constitutional Courts.

2.3 THE PURPOSE AND IMPORTANCE OF CONSTITUTIONAL COURTS

In analysing whether the appellate jurisdiction given to the South African Constitutional Court is to be preferred over the original and final jurisdiction given to the proposed Constitutional Court of Zambia, it is important to look at the purpose and importance of Constitutional Courts in general.

Constitutional Courts established after World War II were a symbol of democracy and protection against the return of dictators.¹⁰ They were expected to protect and consolidate democracy by protecting the rights and legal principles enshrined in the national constitution.¹¹ As a result, Constitutional Courts had the power to review legislative actions for conformity with the constitution.¹²

Most constitutions around the world acknowledge the power of Courts to interpret constitutional provisions and to invalidate unconstitutional laws and other measures.¹³ For example the development of constitutional review in Africa and beyond reflects a broad political and academic consensus that constitutional democracy requires the establishment of

⁶ Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 41.

⁷ Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 41.

⁸ Article 1 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

⁹ Section 1 of the Constitution of the Republic of South Africa

¹⁰ Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 50.

¹¹ Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 50.

¹² Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 50.

¹³ A. K. Abebe, C. M. Fombad, "The Advisory Jurisdiction of Constitutional Courts in Sub-Sahara Africa". *The Georgia Washington International Law Review* 46, (2013): 55-56.

procedures to monitor compliance with constitutional standards.¹⁴ Almost all constitutions in Africa establish procedures through which the constitutionality of laws and executive measures may be challenged, especially based on fundamental rights provisions.¹⁵ In Zambia, Article 28 of the Constitution provides for the enforcement of rights. In this Article the High Court is empowered to make any order that it considers appropriate to secure the protection of rights.

Kelsen's belief was that, if there is no special institution guaranteeing that unconstitutional acts are invalid, an erosion of the constitution itself would most likely be the consequence.¹⁶

Kelsen named three reasons why he preferred the institution of a Constitutional Court to a diffused system.¹⁷ Firstly, that the protection of political rights demands a Court which is especially concerned about human rights issues. Secondly, that independence in relation to other constitutional bodies is only sufficiently guaranteed when judges can claim a special authority on the same level. Lastly that constitutional review requires judges who are educated and trained not only as judges but as scholars of constitutional law.¹⁸

The purpose of a Constitutional Court system is to establish a system to protect the implementation of the constitution.¹⁹ Constitutional Courts play a positive role in upholding the protection of human rights, to limit the national public authority and to coordinate the powers of the state organs.²⁰ The major function of the Constitutional Court is to safeguard

¹⁴Abebe and Fombad, "The Advisory Jurisdiction of Constitutional Courts in Sub-Sahara Africa" 55.

¹⁵Abebe and Fombad, "The Advisory Jurisdiction of Constitutional Courts in Sub-Sahara Africa" 56.

¹⁶Tetzlaff, "Kelsen's Concept of Constitutional Review Accord in Europe and Asia" 79.

¹⁷Tetzlaff, "Kelsen's Concept of Constitutional Review Accord in Europe and Asia" 79.

¹⁸Tetzlaff, "Kelsen's Concept of Constitutional Review Accord in Europe and Asia" 80.

¹⁹Zuo, "A Study on Constitutional Court's Jurisdiction" 19.

²⁰Zuo, "A Study on Constitutional Court's Jurisdiction" 19.

the implementation of the constitution by constitutional review.²¹ In countries with a written constitution, such as Zambia,²² the constitution is regarded as the supreme law of the land.²³

The function of constitutional review where it is available is to protect the supreme authority of the constitution and to maintain the constitutional order.²⁴ Constitutional review is important, because the sovereignty of the people is not fully expressed by the political discourse within a parliament and it has to be carried out by a Court, whose independence supports the legitimacy of acts of legislation on the basis of the constitution.²⁵ Therefore it is important to establish a Constitutional Court that has jurisdiction that best achieves this purpose whether that Court is of original and final jurisdiction or of appellate or final jurisdiction only.

Constitutional Courts make the separation of powers more effective by balancing the powers of one organ against those of another.²⁶ They serve as a mechanism of checks and balances. Many Constitutional Court activities are related to reviewing the constitutionality of laws passed by the legislature and acts of the executive.²⁷ These powers enable Constitutional Courts to serve as a guardian of the constitution and to ensure that the executive and legislative branches respect the legal norms enshrined in the constitution.²⁸

A Constitutional Court serves as a separate Court devoting itself solely to solving constitutional matters.²⁹ Policy consideration cannot be excluded in judicial legislation but it

²¹ Zuo, "A Study on Constitutional Court's Jurisdiction" 19.

²² Article 1 (3) of the Constitution of Zambia, Chapter One of the Laws of Zambia.

²³ Zuo, "A Study on Constitutional Court's Jurisdiction" 19.

²⁴ Zuo, "A Study on Constitutional Court's Jurisdiction" 19.

²⁵ Tetzlaff, "Kelsen's Concept of Constitutional Review Accord in Europe and Asia" 88.

²⁶ A. W. Chanda, *Zambian Constitutional Law: Cases and Materials* (Lusaka: Unza Press, 2012) 46.

²⁷ K. M. Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" (PhD thesis, University of Kentucky, USA, 2009) 35.

²⁸ Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 35.

²⁹ J. Frank, *Courts on Trial: Myth and Reality in Justice*, (Princeton: Princeton University Press, 1950) 313.

is far more extensive in constitutional cases.³⁰ The role of a Constitutional Court is thus necessarily policy-oriented.³¹ Public policy is broadly, principles and standards regarded by the legislature or by the Courts as being of fundamental concern to the state and the whole of society.³² Constitutional Courts ensure that the policy considerations that are necessary in the determination of constitutional matters do not carry over in the determination of matters under other fields of the law.³³

2.4 GENERAL JURISDICTION OF CONSTITUTIONAL COURTS

The purpose of Constitutional Courts is reflected in the jurisdiction that they are vested with. A general examination of the jurisdiction usually given to Constitutional Courts also helps in the analysis of what kind of Constitutional Court would be most effective in protecting the constitution. An examination of the general jurisdiction that Constitutional Courts are usually vested with will help establish whether such jurisdiction is viable for a Court with original and final jurisdiction or one with appellate jurisdiction.

Jurisdiction may be defined as the authority or the competence of a particular Court to hear a matter which has validly been brought before it and to grant relief in respect of that matter.³⁴ If the Court lacks jurisdiction it may refuse to adjudicate and dismiss the matter.³⁵ It follows that a consideration of jurisdictional principles will be a necessary prerequisite to the institution of legal proceedings, moreover proceedings that involve constitutional matters.³⁶

Even though there is variance across countries, Constitutional Courts are, generally, empowered to ensure that the laws conform to the principles and values enshrined in the

³⁰ B.O. Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, (New York: St. Martin's Press, 1977) 139.

³¹ Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, 139.

³² Garner, *Black's Law Dictionary*, 8th ed., (New York: Thomson West, 2004) 1267.

³³ J. Frank, *Courts on Trial: Myth and Reality in Justice*, (Princeton: Princeton University Press, 1950) 313.

³⁴ C. Theophilopoulos et al, *Fundamental Principles of Civil Procedure* (Durban: Butterworths, 2006) 7.

³⁵ Theophilopoulos et al, *Fundamental Principles of Civil Procedure*, 7.

³⁶ Theophilopoulos et al, *Fundamental Principles of Civil Procedure*, 7.

constitution.³⁷ Constitutional Courts can expand or contract their duties by applying the constitution in either a broad or restricted manner.³⁸

Constitutional review powers can be divided into five main categories: interpretative powers; judicial review of legislative and executive actions; powers related to the distribution of powers among public authorities; elections and political parties; and human rights and civil liberties.³⁹ A consideration of these five categories of constitutional review power will help determine whether such powers must be vested in a Constitutional Court with original and final jurisdiction or one with appellate jurisdiction.

2.4.1 Interpretative Powers

Several Constitutional Courts such as those of South Africa⁴⁰ and Uganda,⁴¹ among many others, are vested with the power to interpret fundamental legal norms and various procedural rules.⁴² This power is justified by the need to guarantee the uniformity of interpretation of constitutional provisions and of legal norms. Interpretative functions are generally exercised in a consultative and advisory capacity.⁴³ This function may include the following; interpretation of the constitution; international treaties; statutes and other norms, such as executive decrees, administrative regulations; and matters related to the conformity with the constitution such as the implementation of a law, decree, regulation or any other norm.⁴⁴

³⁷ Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 3.

³⁸ Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 3.

³⁹ Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 26.

⁴⁰ Section 167 of the Constitution of the Republic of South Africa.

⁴¹ Article 137 of the Constitution of the Republic of Uganda.

⁴² Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 26.

⁴³ Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 26.

⁴⁴ Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 27.

2.4.2 Judicial Review of Legislative and Executive Actions

When reviewing laws Constitutional Courts have three options. Firstly, the Constitutional Court can uphold the law.⁴⁵ In this case, the law remains as it is and requires no further action by the legislature. Secondly, the Court can declare all or part of the law unconstitutional.⁴⁶ When this occurs, the aspects of the law found to be unconstitutional are no longer in effect.⁴⁷ Such a pronouncement by a Constitutional Court would be of great consequence that is why this research considers whether it is desirable to vest such powers in a Court with original and final jurisdiction. This is because, by implication, if such a Court wrongly declares a law unconstitutional, that decision is final and cannot be appealed against.

Some Constitutional Courts such as the Indonesian Constitutional Court (*Mahkamah Konstitusi* or MK)⁴⁸ have positive decision-making powers and may declare the law or act conditionally constitutional.⁴⁹ Conditional constitutionality means that the law under scrutiny conforms to the constitution only if interpreted or applied in a certain way.⁵⁰ In the *Water Resources Law*⁵¹ case, the Indonesian Constitutional Court raised questions about the constitutionality of the Water Resources Law but refused to invalidate it. The Indonesian Constitutional Court in this case stated that the future validity of the statute depended in large measure on how it was enforced and whether the regulations passed later to ‘implement’ the statute were themselves constitutional. Similarly, the Constitutional Court may decide to declare the law inapplicable only in certain circumstances.⁵² Third, the Constitutional Court

⁴⁵Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 19.

⁴⁶Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 19.

⁴⁷Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 27.

⁴⁸Article 24C of the Constitution of Indonesia

⁴⁹Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 28.

⁵⁰Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 27.

⁵¹Water Resources Law (MK Decision No 058-059-060-063 of 2004)

⁵²Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 27.

can instruct the legislature to make changes to the law. This option requires action by the legislature to amend the law.⁵³

The powers of Constitutional Courts to review executive actions include the power to review conformity with the constitution of executive decrees and regulations, of acts of the Head of State, of rules of national and local administrative units with the constitution.⁵⁴ For instance, the Court may declare a governmental act unconstitutional and void under the following circumstances; if it was not enacted or done in the prescribed manner and form;⁵⁵ it violates guaranteed rights;⁵⁶ it violates or usurps constitutional powers or jurisdiction of other organs of government;⁵⁷ it is an unauthorised delegation or abdication of power to another organ or agency; it violates or usurps the powers of another government in a federation;⁵⁸ it conflicts with some other provision of the constitution.⁵⁹

2.4.3 Distribution of Powers among Public Authorities

In some countries such as Germany⁶⁰ and Italy,⁶¹ it is the responsibility of Constitutional Courts to resolve conflicts between public authorities.⁶² These conflicts can be horizontal, vertical or negative.⁶³ Horizontal as between two branches of government at national, regional or local level.⁶⁴ Vertical as between government entities at two different levels of

⁵³Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy" 28.

⁵⁴Chanda, *Zambian Constitutional Law: Cases and Materials*, 6.

⁵⁵See case of *The Attorney General V The Local Government Election Commission* (1990--1992) Z.R. 182 (H.C.)

⁵⁶See case of *Christine Mulundika and Others v The People* [1996] 2 LRC 175

⁵⁷See case of *Re Nalumino Mundia* (1971) Z.R. 70 (H.C.)

⁵⁸Article 138 of the Constitution of Austria

⁵⁹Chanda, *Zambian Constitutional Law: Cases and Materials*, 46.

⁶⁰See Article 93 (3) of the Constitution of Germany

⁶¹See Article 134 of the Constitution of Italy

⁶²Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 29.

⁶³Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 30.

⁶⁴Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 30.

government.⁶⁵ Negative in relation to failure to act from any branch or entity of government at any level.⁶⁶

2.4.4 Elections and Political Parties

The Constitutional Court has been entrusted with a variety of powers in relation to electoral and political processes in many countries such as Russia that follow European models of constitutional review.⁶⁷ Specifically, the Court's powers related to electoral and political processes may include capacity of a Head of State and other representatives to hold office; oath of the Head of State and impeachment of the Head of State or of other State representatives.⁶⁸ The Constitutional Court also has the power to control the constitutionality of acts and activities of political parties; to control the conformity of electoral processes with the constitution, as regards the actual holding of the election and not the election law; to control the conformity of referenda with the constitution; to confirm election results and to authorise or dissolve political parties.⁶⁹

2.4.5 Human Rights and Civil Liberties

Constitutional Courts have come to play a central role in the protection of first, second and third generation rights in both consolidated and newly established democracies.⁷⁰ The responsibility of protecting human rights and civil liberties is largely given to a Constitutional Court.⁷¹ Many of these rights have been enshrined in constitutions and laws in almost all constitutional democracies around the world. For example, in Zambia Part III of the constitution provides for the Protection of Fundamental Rights and Freedom of the

⁶⁵Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 30.

⁶⁶Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 30.

⁶⁷Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 31.

⁶⁸Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 31.

⁶⁹Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 31.

⁷⁰G. Gentili, "A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court". *The Penn State International Law Review* 29, no. 4 (2011): 707.

⁷¹Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 34.

Individuals. These are enforceable in the High Court as provided for in Article 28 of the Zambian constitution.

Such powers include the power to hear direct appeals for preliminary constitutional rulings from proceedings before the Courts of general jurisdiction; to hear constitutional complaints from ordinary citizens in the interest of the public welfare; to hear constitutional complaints related to the protection of individual human rights; as well as matters related to specific complaint procedures, such as habeas corpus.⁷²

The effects attached to the decisions of the Constitutional Court deserve mention. Decisions of unconstitutionality may apply *erga omnes* (general) or *intra partes* (only parties), *ex tunc* (retroactive) or *ex nunc* (only for the present and future).⁷³ For example, decisions only applicable *intra partes* will not affect the Courts of general jurisdiction, except maybe as an element of general interpretative guidance. On the other hand, an annulment *erga omnes* means that all Courts must subsequently disregard the annulled law in their decisions.⁷⁴ These effects accordingly raise the question as to whether or not it would be desirable to have a Constitutional Court that sits as a Court of first and last instance in all constitutional matters. By implication the effects of the decisions of a Constitutional Court that has original and final jurisdiction in constitutional matters would be irreversible.

In terms of the opinion writing, the vast majority of Constitutional Courts rely on the French model, which usually does not include a detailed statement of reasons for the decision.⁷⁵ Additionally, although many Courts formally authorise dissenting votes and opinions, they are often not published and only the fact of dissent is noted in the majority opinion.⁷⁶ In some instances, the rules of procedure require support from a supermajority of judges for a

⁷²See case of *Rasul v Bush* 542 U.S. 446 (2004).

⁷³Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 37.

⁷⁴Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 37.

⁷⁵Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 35.

⁷⁶Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 36.

decision, but most often, simple majority is sufficient.⁷⁷ This, as well, may not be desirable for a Constitutional Court that sits as a Court of first and last instance in all constitutional matters such as the proposed Constitutional Court of Zambia. In such an instance a petitioner's fate is decided by a simple majority of judges whose reasons for the decision are not fully stated.

2.5 CONCLUSION

This chapter has defined a Constitutional Court, based on Hans Kelsen's description, as a Court which has a centralised competence on constitutional cases and which is institutionally independent. The chapter has also stated the purpose of Constitutional Courts. The Chapter has further highlighted this purpose by examining constitutional review powers given to Constitutional Courts. This has been done in five main categories: interpretative powers; judicial review of legislative and executive actions; powers related to the distribution of powers among public authorities; elections and political parties; and human rights and civil liberties. Finally, the chapter has noted the effects of the decisions passed by Constitutional Courts. The next chapter will critically analyse the jurisdiction of the proposed Constitutional Court in Zambia as provided for under the 2014 Final Draft Constitution.

⁷⁷Bumin, "Viable Institutions, Judicial Power, and Post-Communist Constitutional Courts" 36.

CHAPTER THREE

THE JURISDICTION OF THE PROPOSED CONSTITUTIONAL COURT IN ZAMBIA AS PROVIDED FOR UNDER THE 2014 FINAL DRAFT CONSTITUTION

3.1 INTRODUCTION

This chapter will critically analyse the jurisdiction of the proposed Constitutional Court in Zambia as provided for under the 2014 Final Draft Constitution. The chapter will examine Article 157 of the 2014 Final Draft Constitution which provides for the jurisdiction of the Constitutional Court. It will further consider arguments that have been advanced for and against original and final jurisdiction. The chapter will also analyse whether or not the jurisdiction of the proposed Constitutional Court achieves a balance between an effective protection of human rights and an efficient and timely exercise of the Court's functions.

3.2 ARTICLE 157 OF THE 2014 FINAL DRAFT CONSTITUTION

Part IX of the 2014 Final Draft Constitution provides for the Judiciary. The Constitutional Court is established as one of the Superior Courts.¹ It is ranked equivalently with the Supreme Court which is the highest Court of appeal in all matters except constitutional matters.² This means that an applicant cannot appeal a decision of the Constitutional Court in the Supreme Court.

Article 157 provides for the jurisdiction of the Constitutional Court. The Constitutional Court has original and final jurisdiction to hear: a matter relating to the interpretation of the constitution;³ a matter relating to a violation or contravention of the constitution;⁴ a matter relating to the President, Vice-President or an election of a President;⁵ and whether or not a

¹ Article 156 of the Final Draft Constitution of Zambia

² Article 150 of the Final Draft Constitution of Zambia

³ Article 157 (a) of the Final Draft Constitution of Zambia

⁴ Article 157 (b) of the Final Draft Constitution of Zambia

⁵ Article 157 (c) of the Final Draft Constitution of Zambia

matter falls within the jurisdiction of the Constitutional Court.⁶ This provision effectively makes all constitutional matters the preserve of the Constitutional Court. It also means that before the Constitutional Court can hear a matter it has the discretion to decide whether or not a matter brought before it is a constitutional matter. The Constitutional Court has been vested with the power to hear petitions concerning an Act of Parliament or statutory instrument; an action, measure or decision taken under law; or an act, omission, measure or decision by a person or an authority; that contravenes the Constitution.⁷

Constitutional matters arising during the proceedings of other matters must be referred to the Constitutional Court.⁸ Article 157 (4) provides that a decision of the Constitutional Court is not appealable to the Supreme Court. This implies that petitioners of constitutional matters will not have a right to appeal but will directly access the Constitutional Court which will give a final ruling.

Systems of direct access to constitutional and supreme Courts are generally considered positively, as they can provide better protection of fundamental rights.⁹ However, if not properly designed, these systems are likely to result in the overburdening of a Constitutional Court due to the high number of applications lodged.¹⁰ The balance between an effective protection of human rights and an efficient and timely exercise of the Court's functions has been struck differently in different jurisdictions.¹¹

Several States have declined to adopt a system of individual constitutional complaint altogether, while others, such as South Africa, have established strict accessibility

⁶ Article 157 (d) of the 2014 Final Draft Constitution of Zambia

⁷ Article 157 (3) of the 2014 Final Draft Constitution of Zambia

⁸ Article 157 (2) of the 2014 Final Draft Constitution of Zambia

⁹ Gianluca Gentili, "A Comparative Perspective on Direct Access". *Penn State International Law Review* 29, no. 4 (2011): 708.

¹⁰ Gentili, "A Comparative Perspective on Direct Access" 709.

¹¹ Gentili, "A Comparative Perspective on Direct Access" 709.

requirements making direct recourse a merely subsidiary mechanism for the protection of constitutional rights.¹² These States require, for example, the previous exhaustion of all other legal remedies or the special "constitutional significance" of the question of constitutionality to be lodged.¹³ It is therefore important to consider the design of the proposed Constitutional Court in Zambia, the strengths and weaknesses of the design that has been adopted and whether or not the Constitutional Court would be overburdened.

3.3 ARGUMENTS FOR AND AGAINST ORIGINAL AND FINAL JURISDICTION

The establishment of a Constitutional Court was one of the recommendations of the Mung'omba Constitution Review Commission that was adopted by the National Constitutional Conference (NCC) in 2005.¹⁴ In debating the provision on the jurisdiction of the Constitutional Court, Members of the Conference advanced arguments for and against giving the Court original and final jurisdiction. Some Members were of the view that the Court should be granted original and final jurisdiction, while other Members supported the view that the Court should have appellate jurisdiction only.¹⁵ These arguments will be considered in order to help determine whether or not the proposed Constitutional Court should adopt original and final jurisdiction or appellate jurisdiction.

Members of the NCC that were in favour of the Constitutional Court having original and final jurisdiction advanced a number of arguments.¹⁶ They argued that since issues of human rights were cardinal, the Constitutional Court should have original and final jurisdiction in such matters so that cases of gross violation of human rights could directly go to the Constitutional

¹² Gentili, "A Comparative Perspective on Direct Access" 709.

¹³ Gentili, "A Comparative Perspective on Direct Access". 710.

¹⁴ Republic Of Zambia. *Initial Report of the National Constitutional Conference* (Lusaka: Government Printers, 2010) 606.

¹⁵ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

¹⁶ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

Court.¹⁷ They also argued that since the Constitutional Court was being established to handle constitutional matters, it should have original and final jurisdiction in such matters.¹⁸ Citing the need to decongest the High Court, some Members, stated that giving the Constitutional Court appellate jurisdiction in constitutional matters would defeat the intended purpose of expediting the determination of such matters.¹⁹

Another argument advanced by Members that were in favour of original and final jurisdiction, is that the concept was a well-established and not a novel idea, and that the demand for a Constitutional Court to have original and final jurisdiction dated as far back as 1990.²⁰ Members reiterated that the Mvunga, Mwanakatwe and the Mung'omba Constitution Review Commissions had received submissions for the establishment of a Constitutional Court.²¹ They stated that the Constitutional Courts of Uganda, South Africa and India had original and final jurisdictions in the matters under review.²²

However, it must be stated that the view held by these Members was erroneous. The Indian²³ and Ugandan²⁴ Constitutional Courts, in actual fact, have original jurisdiction but do not have final jurisdiction as appeals lie to the respective Supreme Courts. The South African Constitutional Court has appellate jurisdiction and only allows for direct access to the Court in exceptional circumstances.²⁵ The argument advanced by these Members that were for original and final jurisdiction therefore falls on this premise.

¹⁷ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

¹⁸ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

¹⁹ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

²⁰ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

²¹ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

²² Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

²³ Article 214 of the Constitution of India

²⁴ Article 137 of the Constitution of the Republic of Uganda

²⁵ Section 167 of the Constitution of the Republic of South Africa, See also *Christian Education of South Africa v. The Ministry of Justice* 1998 (12) BCLR 1449 (CC), 1999 (2) SA 83 (CC)

On the other hand, Members of the NCC who were in favour of the Constitutional Court having appellate jurisdiction argued that the Court would be congested if original jurisdiction was conferred on it.²⁶ The Spanish Constitutional Court (*Tribunal Constitucional*) is an example of a Constitutional Court that was overburdened and eventually had to revise the requirements for accessing the Court.²⁷ Since the enactment of the Spanish Constitution, an increasing number of appeals for protection have reached the Constitutional Court.²⁸ As a consequence of the high number of individual complaints filed with the *Tribunal Constitucional*, the functionality of the body was significantly affected.²⁹ The average time needed for the Court to perform all its functions significantly increased.³⁰ The structure of the constitutional *amparo* underwent therefore significant reform in 2007, focusing on the requirements for accessing the *Tribunal Constitucional*.³¹

The reform was aimed at limiting the possibility for individuals to directly access the Constitutional Court.³² This was on the assumption that fundamental rights could and should be protected-first and foremost-by ordinary judges and only afterward by the Constitutional Court and exclusively in cases in which the plaintiff could demonstrate the novelty of the constitutional issues.³³ An additional accessibility requirement was therefore introduced in 2007 whereby the applicant is now required to demonstrate the "significant constitutional relevance" of the recourse presented.³⁴

Article 149(5) of the Final Draft Constitution provides that “*Superior Courts shall sit as circuit Courts in districts, in accordance with a circuit schedule issued by the Chief Justice.*”

²⁶ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

²⁷ Gentili, “A Comparative Perspective on Direct Access” 723.

²⁸ Gentili, “A Comparative Perspective on Direct Access” 722.

²⁹ Gentili, “A Comparative Perspective on Direct Access” 722.

³⁰ Gentili, “A Comparative Perspective on Direct Access” 756.

³¹ Gentili, “A Comparative Perspective on Direct Access” 722.

³² Gentili, “A Comparative Perspective on Direct Access” 723.

³³ Gentili, “A Comparative Perspective on Direct Access” 722.

³⁴ Gentili, “A Comparative Perspective on Direct Access” 723.

The Constitutional Court being one of the Superior Courts will also sit as a circuit Court. A circuit Court may be defined as one that has jurisdiction over several districts and holds sessions in all those areas.³⁵ While this will make the Court accessible to more people it will also mean that there will be a large number of cases involved requiring a lot of time. This would in turn be in violation of Article 147(2) (b) which provides for the principles that are to guide the Court in exercising judicial authority, particularly that justice shall not be delayed. Therefore, the jurisdiction accorded to the proposed Constitutional Court must conform to this principle.

Constitutional Courts were created to serve the litigants and the interest of the public at large. Unnecessary delay erodes the public's confidence in the judicial system.³⁶ The prompt disposition of cases is very important because judges have an obligation to operate the Court in a manner that is lawful, fair, just and efficient for the benefit of all litigants that come before it.³⁷ In order to expedite the disposition of cases some Courts have formulated rules that help achieve this. For example the Court is the Court of Common Pleas, Franklin County Ohio has formulated case flow management rules that apply to all civil cases.³⁸ According to these rules 90 percent of all civil cases should be settled, tried, or otherwise concluded within 12 months of filing; 98 percent within 18 months of filing; and 100 percent within 24 months of filing, except for individual cases where the Court determines exceptional circumstances.³⁹ Therefore, the proposed Constitutional Court may draft similar rules to help ensure that cases are disposed of promptly.

Another argument advanced by Members of the NCC was that if the Constitutional Court was given original jurisdiction, the litigants would have nowhere to appeal to if they were not

³⁵ B. Garner, *Black's Law Dictionary*, 8th ed, (New York: Thomson West, 2004) 379.

³⁶ Gentili, "A Comparative Perspective on Direct Access" 723.

³⁷ Gentili, "A Comparative Perspective on Direct Access" 723.

³⁸ Rules of Practice of the Court of Common Pleas: Case Flow Management Practice and Procedure

³⁹ Rule 33.02 Case Flow Management Practice and Procedure

satisfied with the ruling since the decision of the Court would be final.⁴⁰ Chanda,⁴¹ arguing against the right to appeal, stated that the judges of the Constitutional Court are specialists in constitutional law and it is difficult to see what value would be added by providing for an appeal to another Court consisting of judges who are not specialists in the subject matter.⁴²

However the right of a party to proceedings to appeal any judicial decision is important to a legal system as it facilitates the rule of law.⁴³ This right is the most obvious way in which judges are held accountable.⁴⁴ Moreover, Article 147 (1) of the Final Draft Constitution states that judicial authority is derived from the people of Zambia and “*shall be exercised in a manner that promotes accountability.*” The absence of the right to appeal in the proposed system in which the Constitutional Court has been given original and final jurisdiction does not promote accountability. Appeals enable errors to be corrected thus maintaining and enhancing the confidence of citizens in the justice system.⁴⁵ They also provide guidance for future cases and thus facilitate certainty.⁴⁶

The NCC resolved that the Constitutional Court should have original and final jurisdiction in the following matters; to determine a presidential election petition challenging the election of a President-elect; to determine disputes between State organs or State institutions and to

⁴⁰ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

⁴¹ A. W. Chanda, *Zambian Constitutional Law: Cases and Materials* (Lusaka: Unza Press, 2012) 47.

⁴² Chanda, *Zambian Constitutional Law: Cases and Materials*, 47.

⁴³ “The right to appeal,” Courts and Tribunals Judiciary, Last modified January 16, 2015, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal>

⁴⁴ “The right to appeal,” Courts and Tribunals Judiciary, Last modified January 16, 2015, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal>

⁴⁵ “The right to appeal,” Courts and Tribunals Judiciary, Last modified January 16, 2015, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal>

⁴⁶ “The right to appeal,” Courts and Tribunals Judiciary, Last modified January 16, 2015, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal>

determine whether or not a matter falls within the jurisdiction of the court.⁴⁷ The NCC also decided that the Constitutional Court should have appellate jurisdiction in the following matters: all matters of interpretation of the Constitution; to determine whether an Act of Parliament or statutory instrument contravened the Constitution; and to determine a question of violation of any provision of the Bill of Rights.⁴⁸ It also resolved that the Constitutional Court should have powers to review its own decisions.⁴⁹

The NCC's resolution seems to better achieve the balance between an effective protection of human rights and an efficient and timely exercise of the Court's functions referred to above. A system of judicial review operating more broadly but less timely, due to the overburdening of the Court, would be less beneficial than one operating promptly but on a narrower scale.⁵⁰ The resolution essentially proposes that the Constitutional Court be given original jurisdiction for urgent matters that are of fundamental importance such as the determination of a Presidential petition. An example of the importance of the expediency of such matters is the case of *Mazoka and others v Mwanawasa and others*,⁵¹ the presidential petition that challenged the election of President Levy Mwanawasa in 2001. In this case that lasted three years, the Supreme Court stated that "*Matters pertaining to elections must be determined very expeditiously lest they be rendered an academic exercise at the end.*" This therefore stresses the need for timely determination of constitutional matters that are of fundamental importance.

3.4 CONCLUSION

The chapter has examined Article 157 of the Final Draft Constitution that provides for the jurisdiction of the proposed Constitutional Court. It has also considered arguments advanced

⁴⁷ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

⁴⁸ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

⁴⁹ Republic Of Zambia. *Initial Report of the National Constitutional Conference*, 606.

⁵⁰ Gentili, "A Comparative Perspective on Direct Access" 756.

⁵¹ *Mazoka and others v Mwanawasa and others* Z.R. 138 (S.C.)

for and against original and final jurisdiction by the members of the NCC. It has analysed whether or not the jurisdiction of the proposed Constitutional Court achieves a balance between an effective protection of human rights and an efficient and timely exercise of the Court's functions.

The next chapter will critically analyse the jurisdiction of the South African Constitutional Court. It will highlight the successes and failures that the Court has experienced since its establishment in 1994. The chapter will also look at the advantages and disadvantages of a Constitutional Court that only has appellate jurisdiction.

CHAPTER FOUR

THE JURISDICTION OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

4.1 INTRODUCTION

The aim of this chapter is to critically analyse the appellate jurisdiction of the Constitutional Court of South Africa under Section 167 of the Constitution of the Republic of South Africa. This chapter will progress as follows. Firstly, the nature and development of the Constitutional Court of South Africa is examined. Secondly, this chapter examines the jurisdiction of the Constitutional Court of South Africa particularly matters considered to be constitutional in nature. Lastly, the three areas in which the Court has non appellate jurisdiction is examined; that is the exclusive jurisdiction, the jurisdiction to confirm decisions by other Courts and the powers to allow direct access to the Court.

4.2 NATURE AND DEVELOPMENT OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

The Constitutional Court of South Africa was established in terms of the Interim Constitution of South Africa and the Constitutional Court Complementary Act No. 13 of 1995. Its existence is confirmed by section 167 of the Final Constitution of South Africa.¹ The Constitutional Court was initially placed at the same hierarchical level as the Appellate Division, both as apex Courts of the Supreme Court.² In practice this meant that neither Court was able to hear appeals from the other and that the Constitutional Court enjoyed parallel jurisdiction with the Appellate Division.³ However, this arrangement proved to be

¹ The Constitution of the Republic of South Africa

² J. Dugard, "Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court" *South African Journal on Human Rights* 22, no. 2 (2006): 264.

³ J. Dugard, "Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court" *South African Journal on Human Rights* 22, no. 2 (2006): 264.

unsatisfactory.⁴ One such unsatisfactory consequence, was that if a constitutional issue was raised during adjudication in the Appellate Division and if a decision on that issue was necessary for disposing of the appeal, the case was suspended mid-stream and the constitutional issue referred to the Constitutional Court for argument *de novo*.⁵

The jurisdictional problems that resulted were remedied in the 1996 Constitution.⁶ The new Constitution established a new hierarchy of Courts, in which the Constitutional Court became the Court of final instance for all constitutional matters, including appeals on constitutional matters from the newly-named Supreme Court of Appeal (the former Appellate Division).⁷ The Supreme Court of Appeal (SCA) was no longer a division of the Supreme Court but it became a judicial entity in its own right.⁸ Under the current system, both the Constitutional Court and the SCA have Republic wide jurisdiction and both are appeal Courts.⁹ Therefore, it is this jurisdiction that is provided for in the 1996 Constitution that is under examination in this chapter.

Section 167 (3) of the South African Constitution provides that the Constitutional Court may decide only constitutional matters and issues connected with decisions on constitutional matters. It further provides that the Court has power to make the final decision on a constitutional matter. Therefore it is important to consider what exactly is meant by a ‘constitutional matter’.

⁴ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 264.

⁵ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 264.

⁶ The Constitution of the Republic of South Africa

⁷ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 269.

⁸ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 269.

⁹ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 269.

4.3 WHAT IS A CONSTITUTIONAL MATTER?

Generally, the Constitutional Court has the discretion to determine whether or not a matter is a ‘constitutional matter’.¹⁰ This is with the exception of where an Act has already been declared invalid and the Court is required to confirm the finding.¹¹ In Section 167 (7) a constitutional matter is referred to as one which “includes any issue involving the interpretation, protection or enforcement of the constitution”. Since the Court may only hear constitutional matters, an applicant must show that the case concerns a constitutional matter. The proposed Constitutional Court of Zambia has also been given similar powers to determine what matters fall within its jurisdiction.¹²

The South African Constitutional Court has given a wide interpretation to what must be considered a constitutional matter. For example, in *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*,¹³ the Constitutional Court stated that the control of public power by the Courts through judicial review is, and always has been, a constitutional matter. Further, the Court stated that this is so irrespective of whether the principles are set out in a written Constitution or contained in the common law. This case was referred to the Constitutional Court by the High Court for confirmation of its order. The Transvaal High Court declared the decision of the President to bring the South African Medicines and Medical Devices Regulatory Authority Act into force, null and void. The Constitutional Court confirmed the order.

¹⁰ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 270.

¹¹ Section 167 (4) of the Constitution of the Republic of South Africa

¹² Article 157 (1) (d) of the 2014 Final Draft Constitution of Zambia

¹³ *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*, 2000 (2) SA 674 (CC)

According to Dugard,¹⁴ the comprehensive interpretation of ‘constitutional matters’ in cases such as the *Pharmaceutical Manufacturers*¹⁵ blurs the position that the Constitutional Court occupies in the judicial system. This is mainly so as regards the concurrent jurisdiction exercised by the High Courts, the SCA and the Constitutional Court in respect of appeals.¹⁶ However, the difficulty arises in demarcating ‘constitutional matters’ since, while the SCA is empowered to hear any appeal, the Constitutional Court may decide ‘only constitutional matters.’¹⁷ The proposed Constitutional Court of Zambia is however not at risk of this uncertainty as it has been accorded original and final jurisdiction to hear all constitutional matters.¹⁸

4.4 NON APPELLATE JURISDICTION

Notwithstanding that the Constitutional Court of South Africa is a Court of appeal, it has non-appellate jurisdiction in some instances. The non-appellate jurisdiction of the Constitutional Court may be divided into three areas: exclusive jurisdiction, confirmation jurisdiction and direct access to the Court.¹⁹ An examination of these three areas helps in analysing whether or not the proposed Constitutional Court of Zambia should be vested with a similar jurisdiction.

4.4.1 Exclusive Jurisdiction

In terms of Section 167(4) of the Constitution of South Africa, the Constitutional Court has exclusive jurisdiction over certain matters. These matters include disputes between national

¹⁴ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 270.

¹⁵ *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*, 2000 (2) SA 674 (CC).

¹⁶ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 275.

¹⁷ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 275.

¹⁸ Article 1 (5) of the 2014 Final Draft Constitution of Zambia

¹⁹ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 276.

or provincial spheres of government concerning the constitutional status, powers or functions of these organs of state; the constitutionality of parliamentary or provincial Bills, as well as the constitutionality of amendments to the Constitution and determinations as to whether the President or Parliament has failed to fulfil a constitutional obligation, and certification of provincial constitutions.²⁰ Therefore in these matters the Constitutional Court has original and final jurisdiction. All matters concerning constitutional issues, other than those listed in section 167(4), commence in the High Court.²¹

4.4.2 Confirmation Jurisdiction

The Constitutional Court is given the power to make the final decision on any order of invalidity of an Act of Parliament, a provincial Act or conduct of the President.²² Normally, cases that reach the Constitutional Court start in the High Court, which has the power to grant various remedies and can declare legislation invalid.²³ No order of unconstitutionality given by the Supreme Court of Appeal, a High Court or a Court with similar status is valid until that order has been confirmed by the Constitutional Court.²⁴

4.4.3 Direct Access to the Court

Section 167(6) (a) of the Constitution of South Africa empowers the Constitutional Court to function as the Court of first instance by allowing direct access ‘when it is in the interests of justice and with leave of the Constitutional Court’. This means that the Constitutional Court’s power to allow direct access is discretionary.²⁵ The Rules of the Constitutional Court set out the procedure to be followed in bringing a case before the Court.

²⁰ Section 167(4) of the Constitution of the Republic of South Africa

²¹ Section 167(4) of the Constitution of the Republic of South Africa

²² Section 167(5) of the Constitution of the Republic of South Africa

²³ Section 169 of the Constitution of the Republic of South Africa

²⁴ Section 167(5) of the Constitution of the Republic of South Africa

²⁵ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 282.

Under Rule 18 of the 2003 Rules, applications for direct access to the Court are only considered if exceptional circumstances exist.²⁶ The Constitutional Court is reluctant to exercise this jurisdiction. In the case of *Dudley v City of Cape Town and Another*²⁷ the Constitutional Court dealt with the matter of direct access to the Court. This case involved an application for leave to appeal directly to the Constitutional Court from a decision of the Labour Court.²⁸ Ordinarily, an appeal from a decision of the Labour Court lay to the Labour Appeal Court (LAC).²⁹ The Court in dismissing the application stated that in deciding what is “in the interests of justice,” each case has to be considered in the light of its own facts.³⁰ Further, the Constitutional Court stated that a factor which will always be relevant is that direct appeals deny the Court the advantage of having before it the judgments of the LAC, which is specialised on the matters in issue.³¹ The other factors that the Court cited include the importance of the constitutional issues raised, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success.³²

Chaskalson,³³ has observed that the Constitutional Court has taken the view that it is undesirable for a Court having to deal with issues which may be of great importance to the development of the law, to have to do so as a Court of first and last instance.³⁴ The Constitutional Court does not hear evidence or question witnesses.³⁵ It is a Court that mainly operates as a Court of appeal, it considers the record of the evidence heard in the original

²⁶ The Rules of the Constitutional Court of South Africa

²⁷ *Dudley v City of Cape Town and Another*(CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC)

²⁸ *Dudley v City of Cape Town and Another*(CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC)

²⁹ *Dudley v City of Cape Town and Another*(CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC)

³⁰ *Dudley v City of Cape Town and Another*(CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC)

³¹ *Dudley v City of Cape Town and Another*(CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC)

³² *Dudley v City of Cape Town and Another*(CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC)

³³ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 282.

³⁴ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³⁵ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

Court that heard the matter.³⁶ The Constitutional Court, thus, works largely with written arguments presented to it.³⁷ The hearings are intended to tackle difficult issues raised by these arguments.³⁸

Moreover, if oral evidence were necessary, it is not practical for the Court of eleven judges, who sit as a full bench, to hear the evidence.³⁹ The Constitutional Court ordinarily requires all such cases to be dealt with first by ordinary courts such as the Provincial or Local Division, unless there is great urgency for a final decision to be given.⁴⁰ Claims should therefore be argued up through the lower Courts and get a full development of the facts and legal arguments before the case reaches the Constitutional Court.⁴¹ Accordingly, the proposed Constitutional Court of Zambia that shall also consist of eleven judges should be given appellate jurisdiction so as to get a full development of the facts and legal issues in the various cases.

Whether or not a case is likely to succeed is not necessarily a premise on which the Constitutional Court refuses leave to appeal directly to the Court.⁴² As the Constitutional Court stated in the case of *Mkangeli and Others v Joubert and Others*,⁴³ the Court may refuse leave to appeal directly to it, because it considers the matter to be one which ought properly to be dealt with by the Supreme Court of Appeal before it is called on to consider hearing the matter. In the *Mkangeli* case, the Court also held that an order refusing leave to appeal

³⁶ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³⁷ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³⁸ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

³⁹ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁴⁰ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁴¹ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁴² *Mkangeli and Others v Joubert and Others* [2001 \(2\) SA 1191](#) (CC)

⁴³ *Mkangeli and Others v Joubert and Others* [2001 \(2\) SA 1191](#) (CC)

directly to the Constitutional Court did not preclude the litigant from applying again for leave to appeal. Another application is permitted after the Supreme Court of Appeal has disposed of the matter either by way of a judgment, or by refusing the petition for leave to appeal.⁴⁴ In such an instance the Constitutional Court would consider the application on its merits in the light of the decision of the Supreme Court of Appeal.⁴⁵ Accordingly, if the proposed Constitutional Court of Zambia is, similarly, vested with direct access only in exceptional cases, litigants would still have an opportunity to apply again for leave to appeal.

Dugard,⁴⁶ arguing for a pro-poor jurisdiction of the South African Constitutional Court, insists on less strict requirements of direct access. With regards to the argument that if the gates are opened, a flood of applications will ensue, Dugard⁴⁷ states that criteria such as ‘urgency’ and ‘exceptional circumstances’ are too limiting. Dugard⁴⁸ suggests that these should be replaced by a consideration of whether the issue is in the ‘public interest’. According to Dugard⁴⁹ the Constitutional Court is not currently under threat of drowning in applications and that it probably could make the time to hand down decisions in more than the approximately 25 cases it currently does a year. The Court should still be in a position to control its roll using existing criteria such as merit and ‘exhaustion of other remedies or procedures’.⁵⁰ While Dugard’s argument has merit it does not address the importance of the right of appeal and does not give guidance as to what exactly should consist of ‘public interest’. Decisions given by Courts on appeal offer opportunities for greater reflection and

⁴⁴ *Mkangeli and Others v Joubert and Others* [2001 \(2\) SA 1191](#) (CC)

⁴⁵ *Mkangeli and Others v Joubert and Others* [2001 \(2\) SA 1191](#) (CC)

⁴⁶ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 279.

⁴⁷ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 279.

⁴⁸ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 279.

⁴⁹ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 282.

⁵⁰ J. Dugard, “Court Of First Instance? Towards A Pro-Poor Jurisdiction For The South African Constitutional Court” *South African Journal on Human Rights* 22, no. 2 (2006): 282.

discussion, and the achievement of greater coherence within the entire judicial system, than decisions given by Courts sitting as Courts of first and last instance.⁵¹

Making reference to Europe, Chaskalson⁵² notes that it is much more difficult to control the case load where cases are referred to Constitutional Courts by other Court, by way of constitutional complaints instead of appeals.⁵³ This is a problem experienced by the European Court of Justice (ECJ) where referrals from national Courts are so numerous that the Court has difficulty in coping with its work-load.⁵⁴ This has resulted in delays and in the increasing use of “panels” of three or five judges to enable it to get through its work.⁵⁵ Chaskalson⁵⁶ thus states that the balance sought between the uniformity of European law and efficiency, is more likely to be achieved if the ECJ were permitted to concentrate on more important cases which are of fundamental importance to European law. According to Chaskalson,⁵⁷ the solution may be to devise a system whereby the ECJ is able to deflect referrals which are of lesser importance to the Court of first instance. Taking this example, the proposed Constitutional Court of Zambia also stands at the risk of being unable to manage the workload as it will be receiving referrals from other Courts.⁵⁸ Therefore cases should only be referred to the proposed Constitutional Court by way of appeals.

⁵¹ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁵² A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁵³ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁵⁴ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁵⁵ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁵⁶ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁵⁷ A. Chaskalson, *Constitutional Courts and Supreme Courts – A Comparative Analysis with Particular Reference to the South African Experience*. <http://www.ecln.net/elements/conferences/>

⁵⁸ Article 157(2) of the 2014 Final Draft Constitution

4.5 CONCLUSION

This chapter has analysed the appellate jurisdiction of the Constitutional Court of South Africa under Section 167 of the Constitution of the Republic of South Africa. The chapter has examined the development of the Constitutional Court of South Africa which now ranks equivalently with the SCA. Both Courts have Republic-wide jurisdiction and both are appeal Courts. The chapter then examined what a ‘constitutional matter’ is. The Constitutional Court has widely interpreted what a ‘constitutional matter’ is as is evidenced in the *Pharmaceutical Manufacturers*⁵⁹ case. The three areas in which the Court has non appellate jurisdiction have been examined. The Constitutional Court’s power to allow direct access to the Court ‘when it is in the interests of justice’ has been criticised as being too strict and should instead be replaced with a requirement of whether the issue is in the public interest. However this argument does not take into consideration the importance of decisions of the Court on appeal to the entire justice system.

The next chapter will summarise the contents and findings of the previous chapters. The chapter further makes recommendations on the jurisdiction that the proposed Constitutional Court of Zambia should be given.

⁵⁹ 2000 (2) SA 674 (CC)

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter aims at summarising the contents and findings of the previous chapters. The chapter will conclude the research by recapping the main points of the research. The chapter also makes recommendations on the jurisdiction that the proposed Constitutional Court of Zambia should adopt.

5.2 CONCLUSIONS

The purpose of this research was to undertake a comparative analysis of the jurisdiction accorded to the proposed Constitutional Court as provided for in Article 157 of the 2014 Final Draft Constitution of Zambia and the Constitutional Court of South Africa. The main objectives of this research were: to examine the nature and purpose of a Constitutional Court, to critically analyse the jurisdiction given to the proposed Constitutional Court and the South African Constitutional Court and to analyse whether or not the proposed Constitutional Court of Zambia should be vested with original and final jurisdiction on all constitutional matters, instead of appellate jurisdiction on all constitutional matters.

This research, in Chapter Two, has highlighted that a Constitutional Court serves as a separate Court devoting itself solely to solving constitutional matters. Further that the major purpose of a Constitutional Court system is to establish a system to protect the implementation of the constitution by constitutional review. Constitutional review is important, because the sovereignty of the people is not fully expressed by the political discourse within a parliament. It, thus, has to be carried out by a Court, whose independence supports the legitimacy of acts of legislation on the basis of the constitution. This research has also stressed that Constitutional Courts play a positive role in upholding the protection of

human rights, in limiting the national public authority and coordinating the powers of the state. The proposed Constitutional Court should thus be accorded a jurisdiction that better achieves these purposes.

In Chapter Three, this research has shown that the arguments advanced against original and final jurisdiction of the proposed Constitutional Court of Zambia by the members of the NCC have merit. This research has stressed that a system of judicial review operating more broadly but less timely, due to the overburdening of the Court, would be less beneficial than one operating promptly but on a narrower scale. This research has also shown that case flow management rules that give a time frame within which to dispose of cases helps to achieve the prompt disposition of cases. This research has shown that the NCC's resolution that the Constitutional Court be given original jurisdiction for only matters that are of fundamental importance such as the determination of a Presidential petition seems to better achieve this. This is so because it effectively narrows the jurisdiction of the Constitutional Court thus enabling it to operate promptly.

This research has shown that most States, such as South Africa and Spain that have adopted a system of individual constitutional complaint, have established strict accessibility requirements making direct access a merely subsidiary mechanism for the protection of constitutional rights. This research has stressed that these States require the previous exhaustion of all other legal remedies or the special "constitutional significance" of the question of constitutionality to be lodged. In this Chapter the research has thus revealed that the proposed Constitutional Court would be congested if original jurisdiction and final jurisdiction was conferred on it and that direct access to the Court must only be permitted in exceptional circumstances.

Further, this research has revealed that while the Constitutional Court operating as a circuit Court will make the Court accessible to more people, the case load may be too much. This may in turn cause delays and consequently violate Article 147(2) (b) which provides that justice shall not be delayed. This research has also brought to light the fact that the absence of the right to appeal in the proposed system does not promote accountability. This in turn results in a violation of Article 147 (1) of the Final Draft Constitution. This Article imposes an obligation on judicial authority to exercise their powers in a manner that promotes accountability.

In Chapter Four, this research has highlighted that the Constitutional Court of South Africa mainly exercises appellate jurisdiction as provided for in Section 167 of the Constitution of the Republic of South Africa. This research has shown that there is no automatic right of appeal to the Constitutional Court of South Africa. The Court has the discretion to determine whether or not a matter is a 'constitutional matter'. This research has further highlighted that the Constitutional Court has given a wide interpretation to what a 'constitutional matter' is in landmark cases such as the *Pharmaceutical Manufacturers* case. This research also notes that the proposed Constitutional Court of Zambia has also been given similar powers to determine what matters fall within its jurisdiction. This research has shown that the Constitutional Court of South Africa has the power to allow direct access to the Court 'when it is in the interests of justice'.

This research has established that claims should therefore be argued up through the lower Courts and get a full development of the facts and legal arguments before the case reaches the Constitutional Court. This research has done this on the basis that the balance between the uniformity of laws and efficiency of Constitutional Courts, is more likely to be achieved if the Courts were permitted to concentrate on more important cases which are of fundamental importance to the constitutional order.

Chapter Four has also revealed that while the criticism that the requirements for direct access are too strict and that it should instead be a consideration of whether the issue is in the public interest has merit it does not address the importance of the right of appeal. This research has revealed that decisions given by Courts on appeal offer opportunities for greater reflection and discussion, as well as the achievement of greater coherence within the entire judicial system, than decisions given by Courts sitting as Courts of first and last instance. This research has further revealed that an order refusing leave to appeal directly to the Constitutional Court does not preclude the litigant from applying again for leave to appeal.

Over all this research establishes that according the proposed Constitutional Court appellate jurisdiction would better achieve the purposes that Constitutional Courts seek to fulfil. Further that original and final jurisdiction of the Court should be reserved for the most fundamental constitutional matters. Such a jurisdiction is narrower and thus more efficient. It does not take away the benefits of coherence, uniformity and accountability that a system of appeals produces.

Having established the above, this research proceeds to make recommendations. These recommendations are modelled to render an opinion on the more preferable jurisdiction that should be accorded to the proposed Constitutional Court once it is operational.

5.3 RECOMMENDATIONS

With regards the jurisdiction of the Constitutional Court, the NCC resolved that the Constitutional Court should have original and final jurisdiction in the following matters: to determine a Presidential election petition challenging the election of a President-elect; to determine disputes between State organs or State institutions and to determine whether or not a matter falls within the jurisdiction of the Court.¹ The Conference also decided that the

¹ Republic Of Zambia. *Initial Report of the National Constitutional Conference* (Lusaka: Government Printers, 2010) 606.

Constitutional Court should have appellate jurisdiction in the following matters: all matters of interpretation of the Constitution; to determine whether an Act of Parliament or statutory instrument contravened the Constitution; and to determine a question of violation of any provision of the Bill of Rights.² It also resolved that the Constitutional Court should have powers to review its own decisions.³

It is therefore submitted that the resolution passed by the NCC should be adopted. This is because the resolution largely mirrors the provisions of the South African Constitution in relation to the jurisdiction of the Constitutional Court.⁴ As has already been established, the South African Constitutional Court operates more efficiently than similar Courts that have a wider jurisdiction.

Furthermore, it is recommended that original jurisdiction of constitutional matters, which are not exclusively reserved for the Constitutional Court, must continue to be presided over by the High Court. This will help to get a full development of the facts and legal arguments in cases such as those concerning the violation of human rights before the cases reach the Constitutional Court. Moreover petitioners that are unsatisfied with the decision of the High Court will have the opportunity to appeal to the Constitutional Court which will make a final pronouncement on the matter. Accordingly this will ensure that there is accountability in the manner that the judicial authority exercise their powers, in conformity with Article 147 (1) of the Final Draft Constitution. Lastly, it is recommended that the proposed Constitutional Court should devise rules that will help ensure that there is prompt disposition of cases that are brought before it. The prompt disposition of cases will uphold the principle provided for in Article 147 (2) (b) of the Final Draft Constitution that justice shall not be delayed.

² Republic Of Zambia. *Initial Report of the National Constitutional Conference* (Lusaka: Government Printers, 2010) 606.

³ Republic Of Zambia. *Initial Report of the National Constitutional Conference* (Lusaka: Government Printers, 2010) 606.

⁴ Section 167 of Constitution of the Republic of South Africa

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