CONSTRAINTS ON THE DOMESTICATION AND OBSERVANCE OF HUMAN RIGHTS:

ZAMBIAN CASE STUDY

BY

MWITWA IRENE MULONDA

UNZA 2011
I recommend that the obligatory essay prepared under my supervision by

MWITWA IRENE MULONDA

ENTITLED

CONSTRAINTS ON THE DOMESTICATION AND OBSERVANCE OF HUMAN RIGHTS IN ZAMBIA; A ZAMBIAN CASE STUDY

Be accepted for the Examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing Obligatory Essays.

.......................................................... ..........................................................
STUDENT: MWITWA MULONDA        SUPERVISOR: MISS LWATULA
CONTRAINTS ON THE DOMESTICATION AND OBSERVANCE OF HUMAN RIGHTS; A ZAMBIAN CASE STUDY

BY

MWITWA IRENE MULONDA

A dissertation submitted to the school of Law of the University of Zambia in partial fulfilment of the requirements of the award of the Degree of Bachelor of Laws (LLB)

March 2011
DEDICATION

This research work is dedicated to my late father and mother Essie Zayon Mulonda and Salome Miyanda Mulonda, my late brother Chibesa Hilary K. Mulonda and all my brothers and sisters who have encouraged me during this time of my education pursuit and most of all to God my creator.
ACKNOWLEDGEMENTS

In this work, I wish to thank a number of people who have inspired and encouraged me in so many different ways and at different stages of my academic endeavours. I would like to thank all those that have given me unwavering support in my intellectual pursuits. First and foremost I would like to thank my heavenly father for always making a way for me and secondly to the following; Miss Lwatula, for so ably supervising my dissertation. Miss Lwatula has been most understanding, encouraging and receptive in all my inquiry, Mr. Palan Mulonda who has also given me support and inspiration, Professor Gudmunder Alfresson, Mr. Enock Mulembe, and Dr. Mpazi Sinjela for their continuous encouragement,

MWITWA IRENE MULONDA

UNIVERSITY OF ZAMBIA, 2011
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and People's Rights</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>CAT</td>
<td>Convention against Torture</td>
</tr>
<tr>
<td>CERD</td>
<td>Convention on all forms of Racial Discrimination</td>
</tr>
<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Convention on Economic Social Cultural Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Convention on Civil and Political Rights</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of Discrimination against Women</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>PPCA</td>
<td>Police Public Complaints Authority</td>
</tr>
</tbody>
</table>
## CONTENTS

<table>
<thead>
<tr>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>i</td>
</tr>
<tr>
<td>ii</td>
</tr>
<tr>
<td>iii</td>
</tr>
<tr>
<td>iv</td>
</tr>
<tr>
<td>v</td>
</tr>
</tbody>
</table>

### CHAPTER 1

<table>
<thead>
<tr>
<th>Paragraph</th>
<th>Title</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.0</td>
<td>Title of study</td>
<td>1</td>
</tr>
<tr>
<td>1.1</td>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>1.2</td>
<td>Statement of problem</td>
<td>1-2</td>
</tr>
<tr>
<td>1.3</td>
<td>Objections</td>
<td>2-3</td>
</tr>
<tr>
<td>1.4</td>
<td>Rational and justification</td>
<td>3</td>
</tr>
<tr>
<td>1.5</td>
<td>Research questions</td>
<td>3-4</td>
</tr>
<tr>
<td>1.6</td>
<td>Methodology</td>
<td>4</td>
</tr>
<tr>
<td>1.7</td>
<td>Outline of Chapters</td>
<td>4-5</td>
</tr>
</tbody>
</table>

### CHAPTER 2

<table>
<thead>
<tr>
<th>Paragraph</th>
<th>Title</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.0</td>
<td>The historical evolution of human rights standards in Zambia</td>
<td>6</td>
</tr>
<tr>
<td>2.1</td>
<td>Extension of human rights standard in Northern Rhodesia 1953</td>
<td>6-7</td>
</tr>
<tr>
<td>2.2</td>
<td>Continuation of human rights in Zambia through the bill of rights at independence.</td>
<td>7-10</td>
</tr>
<tr>
<td>2.3</td>
<td>Constitutional developments, creation of the human rights commission, public complete authority, judicial complaint authority</td>
<td>10-12</td>
</tr>
<tr>
<td>2.4</td>
<td>The Human rights Commission</td>
<td>12-13</td>
</tr>
<tr>
<td>2.5</td>
<td>The police public complaints authority</td>
<td>13-14</td>
</tr>
<tr>
<td>2.6</td>
<td>Judicial complaint authority</td>
<td>14-15</td>
</tr>
</tbody>
</table>
CHAPTER 3

3.1 Constitutional framework for ratification and domestication into domestic legislation .................................................. 16-22

3.2 Article 54 of the constitution in relation to the executive ............... 22-23

3.3 Article 62 of the constitution in relation to the legislature ............. 23-24

CHAPTER 4

4.1 Legal framework of the constitution against torture in relation to article 15 of the Zambian constitution ............................................ 25-30

4.2 The administrative framework .................................................. 30-31

4.3 The judicial framework ................................................................ 31

CHAPTER 5

5.0 Recommendations and conclusion ............................................. 32

5.1 Recommendations .................................................................... 32-34

5.2 Conclusions ................................................................................ 35-36

5.3 Bibliography .............................................................................. 37-39
CHAPTER 1

1.0 Title of the Study

Constraints on the Domestication and Observance of Human Rights- A Zambian Case Study

1.1 INTRODUCTION

This dissertation will primarily focus on the constraints in domesticating and observing human rights standards ratified or acceded to by the Government of Zambia. The paper will interrogate the concept of dualism as it impacts on domestication and the observance of human rights instruments in Zambia. The paper will further examine the normative content of international human rights standards contained in various regional and universal human rights instruments with a view to establish the appropriate domestication method.

The inquiry will establish why there has been minimal domestication of certain human rights standards in Zambia. In addition the impact of non domestication through the legislature on judicial decisions will be examined with a view to establishing the reasons for the non observance of certain fundamental human rights embraced by Zambia. The paper will conclude by offering possible solutions to this challenge.

1.2 STATEMENT OF THE PROBLEM

Zambia as a developing country has a good record in signing, assenting to and ratifying numerous regional and international human rights instruments. It should also be noted that a number of countries have also signed and ratified international instruments dealing with the protection of various human rights. Upon signing and ratifying these international instruments, each state has the responsibility to fulfil, respect and protect the human rights in question. However, as noted by one commentator,
The burden seems to be heavier and the task complicated when economic, social or cultural rights are involved\textsuperscript{1}.

Due to their normative character, these human rights influence how a country deals with them with regard to domestication in the local legislation. Under General Comment No.3 (13)

\textquote{the committee notes that article 2 of the covenant generally leaves it to the states parties concerned to choose their method of implementation in their territories within the framework set out in that article}\textsuperscript{2}.

This provision gives the states an option on the method of implementing international human rights instruments. As is well known, signature alone does not imply that a state becomes legally bound to observe the protection of human rights in question. Zambia has a dual legal system. Therefore, an international instrument that has been signed and ratified does not automatically become part of Zambian law unless it has been domesticated or internalised by an act of parliament. The type of legal framework existing in a particular state such as Zambia also influences how a country deals with the issues under discussion.

In the case of Zambia Sugar Plc v Fellow Nanzaluka, Appeal No. 82/2001, the court opined that:

\textquote{international instruments on any law, although ratified and assented to by a state, cannot be applied unless domesticated.}

According to Professor Anyangwe,

\textquote{this case is an example of Zambia’s failure to give domestic effect to a treaty ratified by it}\textsuperscript{3}.

The legal principle is therefore that international instruments in Zambia are not legally binding unless they go through the process of domestication.

1.3 OBJECTIVES

\textsuperscript{1}Katarina Krause and A Han Rosas, Economic Social and Cultural Rights, A Text Book Edited By Asbjorn,


\textsuperscript{3}Introduction to Human Rights and International Humanitarian Law, Carlson Anyangwe, PG195
The objective of this study is to explore whether a dual legal system is a constraint in the observance of international human rights instruments. The study also aims at assessing whether this notwithstanding, international instruments can still be an effective tool for the protection of human rights following accession or ratification by a member state but without being domesticated into international law by that state. The primary objective of this research work is also to identify the various international instruments that have been ratified and assented to such as the International Covenant on Economic Social and Cultural Rights (ICESCR 1966), International Covenant on Civil and Political Rights (ICCPR 1966), Convention on the Child (CRC1989), Convention on the Elimination of Discrimination against Women (CEDAW 1979), amongst others, and make various comparisons between those domesticated and those that have not been domesticated into national law and the reason why. The second objective of this study is to assess the effectiveness of ratifying such human rights instruments and domestication into the local law and if not the case, to advocate for a change in policy with regard to the process of domesticating such ratified international human rights instruments.

1.4 RATIONAL AND JUSTIFICATION

International human rights have taken a centre stage at various international forums in the world. In the past there have been numerous violations of human rights and non compliance of international human rights standards. As G.M Salasini states;

"it has been observed that most governments now realise that a bad human rights record can hinder their ability to engage in trade, attract tourists or foreign investors, or receive military and economic aid from other states".

Most countries especially developing countries have failed to domesticate international instruments. This may be due to the dual legal system adopted by them or the attitude of political leaders in charge of implementing policy. This paper will analyse the current situation in Zambia with regard to domesticating human rights instruments. Suggestions will be made on how international instruments ratified by the state can be domesticated.

1.5 RESEARCH QUESTIONS

"G. M Salasini, Principles of Public International Law ; Paper Presented To Course Participants Of The Human Rights And The Law Course ,PG 4
1. Has the ratification of international human rights instruments been helpful towards the domestication of human rights instruments into law?

2. Is the dual legal system responsible in delaying the domestication of human rights instruments?

3. What is the experience of other countries with regard to the domestication of human rights standards?

4. Should countries be obliged to domesticate human rights instruments whenever they ratify them?

1.6 METHODOLOGY

This study will rely on primary and secondary sources of information. The study will examine various General Comments and Recommendations of Treaty bodies on the Economic Social and Cultural Rights, Civil and Political Rights, Convention against Torture and Convention on the Elimination of Discrimination against Women. Furthermore various Acts such as the Human Rights Act, Police Public Commissions Act, Judicial Commissions Act, scholarly works which include judgements, books, research papers, presentations, amongst will be examined.

1.7 OUTLINE OF CHAPTERS

Chapter one will contain the title of the study, the introduction, the statement of the problem, the objectives, the rationale and justification, the methodology and lastly the outline of the study.

Chapter Two will consider the extension of human rights to Commonwealth African countries including Zambia, the continuation of human rights through the bill of rights adopted in the constitution upon Zambia’s attainment at independence and constitutional developments thereafter.
Chapter Three will consider the constitutional framework for ratification and domestication into local law.

Chapter Four will consider the legal framework, administrative and judicial framework in relation to domestication into local law.

Chapter Five will contain recommendations, conclusions, and suggestions to improving the observance of human rights, its domestication by changing the current legal system or finding a way to implement these international standards.
CHAPTER 2

2.0 The Historical Evolution of Human Rights Standards in Zambia.

2.1 Extension of Human Rights Standards to Northern Rhodesia 1953

It is a known fact that the Northern Rhodesian colonial government was the first administration to attempt domesticating international human rights standards in the territory known as Zambia today way back in October 1953. This was done through what is known as the

'colonial clause'\(^5\),

of article 63(3), of the European Convention on Human Rights to be more precise.

'European Convention on Human Rights is an international treaty to protect human rights and fundamental freedoms in Europe'\(^6\)

Under this arrangement, the colonial power Britain in this case extended the enjoyment of a limited number of human rights and freedoms to the territory. The second time when international human rights were domesticated was at independence through the Independence Constitution of 1964 which provided for a bill of rights which still stands as Part III of the Zambian Constitution to date. Important to note is that

'the rights enshrined in Part III are basically civil and political rights'\(^7\).

The position is as it is, because the Zambian Bill of Rights was influenced by the European Convention which was adopted as an instrument containing only civil and political rights. It may be argued that the absence of economic, social and cultural rights in this instrument could account for the absence in the Zambian Bill of Rights. Unlike Civil and Political rights, Economic Social and Cultural rights are therefore unenforceable before courts of law in Zambia. The post independence period in Zambia in the area of domestication of human rights law into domestic law is characterised by

---


\(^7\)Carlson Anyangwe, Introduction to human rights and humanitarian law, pg 147
none domestication of universal and regional instruments ratified or acceded to by Zambia.

2.2 Continuation of Human Rights in Zambia through the Bill Of Rights at Independence

Northern Rhodesia (as Zambia was then called) as a colonial possession in Africa, could not succeed to the European Convention on Human Rights upon attaining independence as she was not a member of the Council of Europe within whose framework the European Convention was adopted. This was a challenge to Zambia as the Convention could no longer be extended to her as an African independent state and no longer a British protectorate. As a way out of this difficulty the British government when negotiating the Zambian Independence Constitution with the founding fathers of the nation, provided a Bill of Rights styled and framed along the European Convention lines for Zambia. This was how the form and style of most human rights standards found their way into African independence constitutions.

"The bills of rights were patterned on the lines of the European Convention of Human Rights (1950) itself based on the Universal Declaration."8

As mentioned above this is the way Zambia had the Bill of Rights included in its independence constitution. The bill of rights was first written in Zambia’s self government constitution of 1963 followed by the Independence Constitution of 1964 and then retained in Zambia’s one party State constitution of 1973. The Zambian Bill of Rights was made in the same way as the Nigerian Bill of Rights of 1960, which in turn traced its origins directly to the European Convention on fundamental Rights and Freedoms, of 1950. It is mentioned in the book by Mr Lawrence Zimba that the European Convention was itself inspired by the Universal Declaration of Human Rights of 1948. However, the origins of human rights go much further in European history than is sometimes imagined.

Furthermore apart from the bill of rights being negotiated in the independence constitutions, most African states generally accepted human rights and had become aware

8Lawrence Zimba, The Zambian Bill of Rights, Africa, pg 19
of them even before independence through their colonial masters. Because of being aware of human rights the negotiators of the independence constitution were more than willing to protect and ensure the implementation of these human rights. Also With a background of being aware of these rights, most African states and leaders also became acquainted

"of their value in government an indispensable attribute to democracy"\textsuperscript{9}.

The United National Independence Party before independence had already a declaration of human rights to create confidence in all those concerned that the independence constitution would contain fundamental safeguards guaranteeing the freedom of the individual and providing against abuses of power by the executive. The styling and framing in these lines made it difficult for the

"bill of rights in Commonwealth Africa, which were more or less an importation of the European Convention, to deal with the Social and Economic rights in the African constitutions"\textsuperscript{10}.

This is because these human rights were individualistic in nature and not collective. These human rights can be said to be difficult to achieve as

"they aim at ensuring everyone's access to resources, opportunities and essentials for an adequate standard of living"\textsuperscript{11}.

"The problem relating to the legal nature of economic and social rights dose not relate to their validity but rather their applicability"\textsuperscript{12}.

The African setting was more of a communal nature than an individualistic one. The ability by governments to ensure that all individuals benefited from these rights even to date could not be met. One of the reasons is due to non-availability of recourses. In the past things in Africa were done in a communal manner, land and everything else was held communally therefore people were accustomed to benefitting as a group and not individually. Chiefs could interfere with the way land was used by those to whom it had been allocated. This allocation however did not mean it was entirely theirs. In such a

\textsuperscript{9} Lwarence Zimba, The Zambian Bill of Rights, pg 24
\textsuperscript{10} Lawrence Zimba, The Zambian Bill of Rights, Zimba, pg 25
\textsuperscript{11} Zambia's Economic, Social and Cultural Rights: Why Should They Be a New Constitution, pg 1
\textsuperscript{12} Katarina Krause and A Han, Economic, Social and Cultural Rights, pg 41
situation one can relate to the difficulty of the economic and social rights when one talks about property rights that are found in the Economic, Social and Cultural rights.

'Article 17 of the UNHR guarantees everyone the right to own property alone as well as in association with others, and prohibits arbitrary deprivation of property. The authors of Economic, Social and Cultural rights, a text book, further go on to say that the right to property failed to be included in some treaties including the European Convention on Human Rights but was included in protocols such as the Protocol No. 1 of 1952.

'According to article 14 of the African Charter on People’s Rights (ACHPR), the right to property shall be guaranteed, and this can be encroached upon in the general interest of the community and in accordance with the provisions of appropriate laws'.

Therefore, the individualistic nature of human rights in the United Nations Declaration of Human Rights (UNDHR) could not set out into conventions due to social and cultural traditions of different areas. Everything was done in a communal manner in the protectorates. It therefore must be noted that this form of domestication that is the inclusion of the bill of rights in the independence constitution was foreign driven in the main. This can also be argued as the second time human rights were domesticated within the Zambian context. It can be argued that human rights were actually extended and domesticated through the ‘Colonial Clause’ in the European Convention and the time the British Government negotiated the Bill of Rights into the Zambian independence constitution of 1964 with the fathers of the nation.

It is also important to take note that the bill of rights contained a declaratory section which is more of a preamble which only guarantees the rights and freedoms. The fact that the rights and freedoms are guaranteed in the preamble does not mean that they are binding or have any legal effect. They are in the preamble and are mentioned in it as a way of recognition and one can only bring about an action when that person has locus standi. To have locus standi one’s rights must be about to or are being violated. This is

---

13 Katrina Krause and A Han, Economic, Social and Cultural Rights, pg146
contained in articles 11 to 26 of the constitution. The Bill of Rights is contained in part III article 13 of the Constitution of Zambia.

"Zambia has had a Bill of Rights since independence and it has virtually remained the same through three republics"\textsuperscript{16}.

2.3 Constitutional Developments, Creation of the Human Rights Commission, Police Public Complaints Authority, Judicial Complaints Authority.

Notwithstanding the record that may not be considered impressive with regard to the domestication of human rights conventions into domestic law during the post independence period, Zambia has recorded some important milestones in so far as institutional developments are concerned. The institutions such as the Human Rights Commission, Judicial Complaints Authority and the Police Public Complaints Authority have been established through the constitution and acts of parliament in an effort to domesticate and to promote and protect the human rights standards in Zambia. Zambia has gone through constitutional developments and to date Zambia is still going through the process of enacting yet another constitution. Before independence there was the constitution of Northern Rhodesia. This was followed by the independence constitution following the dissolution of the federation in 1963 and negotiations between the African elite and the colonial masters.

"The constitution that resulted at Lancaster House had an entrenched Bill of Rights which provided that every person in Zambia regardless of race, place of origin, political opinion, colour, or sex was entitled to fundamental rights and freedoms"\textsuperscript{17}.

The independence constitution was later replaced by the One Party Constitution of 1972. This constitution provided that the country could only have one political party. One of the arguments for enacting the One Party Constitution was that the independence constitution was viewed as a colonial vestige. The Zambian government believed that it would be better to create a constitution that was "home grown" and also one that would convey the

\textsuperscript{16} Permanent Human Rights Commission, National Plan of action, For Human Rights 1999-2009, pg 13

\textsuperscript{17} Constitutional Review: the Zambian search for an ideal constitution, www.jctir.org.zm/churcst.html accessed on 5\textsuperscript{th} November 2010
aspirations of the Zambian people. Next there was the Multi Party Constitution of 1991, whose significance was that of removing article 4 of the one party constitution,

'‘to allow for the formation of opposition political parties'\(^{18}\).

Article 4 in essence prohibited the formation of other political parties and only allowed one political party which was the United National Independence Party (UNIP). This was followed by the 1996 constitution, whose aim was not to be partisan in nature and instead show high goals of national interests. Notwithstanding the proliferation of these constitutions there has also been the establishment of the National Constitutional Conference which was mandated with the task of preparing a new draft constitution. The Government considered that such a constitution would stand the test of time as it would be sorely made by the Zambian people and would thus possibly be favourable to the Zambian people.

It is important to note that during the process of the enactment of these constitutions a number of institutions have been established as earlier mentioned with the aim of enhancing the protection of human rights and implementation of various international human rights instruments in the country. A number of cases have been heard by the courts of law or brought before certain institutions where individuals have claimed that their human rights have been violated. This process is made possible in Zambia through article 28 of the constitution which states that an individual who claims that article 11 to 26 has been or is been contravened can bring before the courts a complaint for redress.

In the case of *Kachasu V. Attorney-General (1967) Z.R 145*,

‘an 11 year old girl, a member of the Watch Tower Sect, was suspended from school for refusing to sing the national anthem and to salute the national flag'\(^{19}\).'

However, despite

‘finding that the petitioner had been hindered in the exercise of her freedom of conscience’ the law which suspended her was upheld in the interest of defence, public safety, and public order\(^{20}\).

\(^{18}\)Constitutional Review: the Zambian search for an ideal constitution,Pg47

www.jctr.org.zm/churcs.htm accessed on 5th November 2010

\(^{19}\) Permanent Human Rights Commission, National Plan of Action , For Human Rights pg 10
Some of the institutions where petitions or complaints of human rights abuse can be brought for consideration are the Human rights Commission, Police Public Complaints Authority and the Judicial Complaints Authority.

2.4 The Human Rights Commission

'The Human Rights Commission was established following a recommendation by the Munyama Human Rights Commission of inquiry, appointed in 1993 to investigate the human rights situation in the Second Republic'.

By the operation of article 125 of the Zambian constitution, section 3 of the human rights act, the commission is an independent institution free from any external control. The functions of the human rights Commission are clearly stipulated in article 9 of the Human Rights Commission Act. Not only does the Human Rights Commission investigate human rights violations, it also puts measures in place and tries to prevent human rights abuses, protect human rights in general, and make recommendations amongst others.

The Human Rights Commission was established through Act no. 39 of 1996 by the Parliament of Zambia to provide for the functions and powers of the Human Rights Commission. It was later

'established in 1997 in accordance with the Paris Principles. It is mandated inter alia, to investigate human rights violations and maladministration of justice, and propose measures to prevent human rights abuses'.'

The Human Rights Commission can also be seen as a mechanism of implementing international human rights standards in Zambia through the resolution of human rights complaints brought before the commission and the various recommendations made to improve human rights. Numerous cases have been brought before the commission for resolution by those who believe that in relation to them articles 11 to 26 have been and are being contravened. The commission further in its operations tries to put in place mechanisms to improve and promote human rights standards in the country for example

20Permanent Human Rights Commission, National Plan of Action, for Human Rights, pg11
21Judith Mulenga, Muzuiila, Mariana Duarte, Cecile Trouch-Grasso and Patrick Mutzenburg, Human Rights Situation In Zambia, Implementation of the UN Convention against Torture pg 11
by ensuring that prison conditions are in a good state. The commission also brings in line the constitution and the legislation with international and regional instruments ratified by Zambia. Furthermore it deals with delayed trials of human rights violations.

'The Human Rights situation in the country still remains unsatisfactory despite the Bill of Rights and international instruments to which Zambia is a party.23.

The establishment of the human rights commission has been to ensure that constitutional commissions are available which will specifically deal with human rights issues. Therefore its establishment can be looked at as a way of observing and domesticating human rights international standards.

'The Human Rights Commission has handled numerous cases involving different types of human rights issues' some of which it refers 'for further considerations' to other public institutions and the courts of law.24.

2.5 Police Public Complaints Authority

This was established by an act of parliament through the Police (Amendment) Act no. 20 of 1999 and established in 2002. This institution looks into public queries or complaints against the police service who commit acts of misconduct. It in fact also protects the rights of the Zambian citizens just like the Human Rights Commission.

'It has been reported that a number of officers found to be violating or abusing human rights have been dismissed from police service as a result of the authority.'25.

This by itself shows that the institution as was intended by the constitution has helped in the protection and implementation of human rights. However, it should be noted that despite having the responsibility of protecting people from human rights abuses, the police service has been found to be involved in human rights abuses such as torture, extra-judicial killing of suspects amongst others. Need foot note to substantiate your claim. They have also been found guilty of numerous crimes of human rights abuse as mentioned above such as

'these arrests, illegal detention without trial'26.

---

24Judith Mulenga, muziula Kamaga, Mariana Daurta, Cecilia Trouchu-Grasso & Patrick Mutzenberg Human Rights Situation in Zambia , pg 13
Authority are cardinal institutions playing a major role in the protection and implementation of human rights and international human rights standards in Zambia.
CHAPTER 3

3.1 Constitutional Framework for Ratification and Domestication into domestic legislation

Part III of the Constitution of Zambia deals with the protection of fundamental rights and freedoms of the individual. The articles related to the protection of fundamental rights and freedoms in the Constitution of Zambia are articles 11 to 26. In addition the part includes an enforcement provision namely article 28

"which stipulates that if any person alleges that any of the provisions of articles 11 to 26 (Bill of Rights) has been, is being or is likely to be contravened in relation to him, or her...that person may seek redress before a legally instituted and competent body or tribunal."\(^{28}\)

It can be argued that the Constitution of Zambia provides for the protection of most of the rights contained in various international conventions that Zambia has ratified and are provided for in the Constitutions Part III. Zambia has ratified and is

"a party to all major treaties these include....the Convention on all forms of Racial Discrimination (CERD), ratified on 4\(^{th}\) February, 1972, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979, ratified on 21 June 1985, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment acceded to in August 1998; the Convention on the Rights of the Child (CRC) 1989, ratified 6 December 1991\(^{29}\)."

The International Convention on Civil and Political Rights (ICCPR) acceded to on the 10\(^{th}\) April 1984 and the first Optional Protocol to ICCPR acceded to on the 10\(^{th}\) April 1984. In an interview with the Director for the Human Rights Commission, on the 1\(^{st}\) March 2011 Mr Enoch Mulembe, says that most recently Zambia became a party to yet another convention on the Rights of the Persons with Disabilities (CRPD). Despite the good trend of signing and ratifying of key international conventions, there are still some key conventions that Zambia is not yet a party to, such as the optional protocol to the International Covenant on Economic Social and Cultural Rights (ICESCR), the optional

\(^{28}\)Permanent Human Rights Commission, National Plan of Action, For Human Rights 1999-2009, pg 10

\(^{29}\)Permanent Human Right Commission , National Plan of Action, For Human Rights 1999-2009, Pg 6

16
protocol to CEDAW, the optional protocol to CAT. Zambia has become a party to these conventions through the signing and ratification by the executive branch of government.

Ratification is an act by which a state declares an agreement to be legally binding on it either in part or in full. This act places an obligation on a state to ensure that the standards are accepted and accessible in real terms within the domestic legal regime. To ratify a treaty,

'the state first signs and then fulfils its own national legislative requirements'\textsuperscript{30}.

For example as already mentioned above Zambia has ratified and acceded to the Convention against Torture. This international convention prohibits torture and other cruel, inhuman or degrading treatment and punishment and provides for a state party to 'out law torture in their national law'\textsuperscript{31}

This is provided for under article 4 of the (CAT). The International Convention against Torture provides

'for an international inquiry if there is reliable information'\textsuperscript{32}

that a particular state party is involved in torture. Article 20 of the convention provides that if the committee receives

'reliable evidence that torture is being systematically practised in the territory of a state party, it may invite the state in question to co-operate in examining the evidence. It should be noted that states parties have the ability to "opt-out" of this procedure if they so wish at the time of signature or ratification, or accession'\textsuperscript{33}.

Zambia had initially placed a Reservation on article 20 of the Convention against Torture. Having made the Declaration in any other convention would mean that Zambia would not be bound by that particular provision but that is not the case with the Convention against Torture. There are rules of jus cogens which are peremptory norms of international law

\textsuperscript{30} Brief Notes on HIV and Labour Migration in Zambia, Current Legal And Policy Interventions In Zambia, pg 8. \url{www.iom.int/jahia/webdav/.../Briefing_Notes_HIV_Zambia.pdf} Accessed on 12\textsuperscript{th} December 2010

\textsuperscript{31}Permanent Human Rights Commission, National Plan of Action, For Human Rights 1999-2009, Pg 27

\textsuperscript{32}Permanent Human Rights Commission , National Plan of Action, For Human Rights 1999-2009, Pg 28

\textsuperscript{33}International Law, Fourth Edition, Malcolm N. Shaw, pg 244
which are binding on all states including those that have not ratified them. A state is not allowed to deviate from those norms of international law. Therefore even though Zambia had placed a reservation on article 20 of the CAT, it was nevertheless still bound by virtue of the fact that the crime of torture has become a peremptory norm of international law or *jus cogens*.

Despite having held this position Zambia as a state party to the Convention against Torture has an obligation according to article 19 to ensure that it reports on the measures it has or intends to take to implement the provisions of the CAT. It is noteworthy that the Declaration on article 20 has since been removed by Zambia. The said Declaration was removed in 1998 because it undermined the full implementation of the Convention at the domestic level. The removal of the Reservation on article 20 was a positive move nationally and internationally because this shows commitment to the observance and implementation of the CAT.

*The concept of Jus Cogens is based upon an acceptance of fundamental and superior values within the system and in some respects akin to the notion of public order or public policy in domestic legal orders*.34

The principle of *jus cogens* is a rule of international law which is binding on all states including those that have not ratified or acceded to a convention. The principle of *Jus Cogens* cannot be derogated from by any state. In *R v Bow Street Magistrates EX P Pinochet*, (2000) 1 A.C. 147, House of Lords,

*in 1998 the former head of state, while visiting the United Kingdom for medical treatment, Spain requested the applicants extradition to face charges, inter alia, of torture in the Spanish courts. In Judicial Review proceedings, the Divisional Court quashed a request, on the ground that the applicant had immunity from prosecution as a former head of state. In these proceedings, the House of Lords heard an appeal against this decision. It held, by six votes to one, that the appeal should be allowed*.35

This shows how acts of torture are perceived as an act of evil and no one is above the law no matter who they are once they commit such acts. Zambia has an obligation to ensure that all forms of torture and inhuman practices are abolished and treated as unlawful at the national level. Taking into account the functions of the Human Rights

Commission, such as carrying out investigations on human rights violations and issuing recommendations

to the appropriate authorities\textsuperscript{36}, the Commission does not have the ability to implement these international instruments in full as they can only investigate and recommend. This in itself is another hindrance to the observance and implementation of international human rights instruments. Despite this, the Human Rights Commission has been able to report for example on torture to the relevant authorities so that those involved are made to account. In the book Human Rights Situation in Zambia, Implementation of the UN Convention against Torture,

the Human Rights Commission reported to the relevant authorities that ‘the 1997 failed coup suspects had been tortured and as a result a Commission of Inquiry had been established to find out the truth on these allegations and it was eventually discovered that it was true. This led to the compensation of victims though those implicated were not made to account\textsuperscript{37},

in part due to the absence of the offence of torture in the Zambian statutes. The establishment of the Human Rights Commission can be seen as a positive measure as it advocates for the domestication of international instruments. The reports by the Commission can be seen as an attempt to remind the relevant authorities about their need to observe International Human Rights Standards. As earlier mentioned, the Commission, despite its functions has no implementation or enforcement powers. This is a hindrance to the domestication of International Instruments. It should also be noted that Zambia is a dualist state and as such upon the signing and ratifying of an international convention, the convention does not automatically become a part of national law but has to be domesticated.

The signing and ratification of a treaty is carried out by the executive branch and for an international convention to become part of national law, it has to pass through Parliament for domestication. Therefore

\textsuperscript{36} Judith Mulenga, Muziula Kamanga, Mariana Daurte, Cecilie Trouhu-Grasso and Patrick Mutzenberg, Human Rights Situation in Zambia, Pg 12.

\textsuperscript{37} Judith Mulenga, Muziula Kamanga, Mariana Daurte, Cecilie Trouhu-Grasso and Patrick Mutzenberg Human Rights Situation In Zambia, pg 11
'under the dualist approach, treaties are a part of a separate legal system from that of the domestic law, they do not form part of domestic law directly.\textsuperscript{38}

According to Mr Mulembe, the dual system has delayed the adoption of international standards due to the fact that customary law has been used sometimes to resist the acceptance of progressive international human rights standards. In particular, standards relating to children and women have met some resistance. Some people see human rights standards as an erosion of their culture and tradition, through which customary law operates. As already mentioned, Zambia is bound by the provisions of the international convention that it has ratified. At this point the legislature is not involved. But at the point of the international convention being domesticated into national law, there is need for the involvement of parliament or the national assembly. Parliament will have to transform the treaty so as to enforce it domestically.

Parliament is one framework that is used to transform international conventions into national law as it is only through parliament that for example a bill can be passed to turn an international convention into national law. Without this process and the involvement of Parliament, an international convention cannot be fully observed at the national level. In the case of Attorney General for Canada v Attorney General for Ontario, (1937) A.C. 326 Judicial Committee of the Privy Council, Lord Atkin ably stated that;

\begin{quote}
'if the national executive, the government of the day, decide to incur the obligations of a treaty which involve the alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes\textsuperscript{39}'.
\end{quote}

The general perception of the process of domesticating international human rights conventions by the two branches of government is that it is slow. It is also important to note that the legislature can only move at the pace the executive is moving. It is the executive arm of government that introduces legislation for enactment in the Parliament. Some of the legislation may and does not include aspects of human rights. At most the Members of Parliament in their debates can only call on the executive to seriously speed

\textsuperscript{38} HOW TREATIES BECOME LAW, pg 1.

\textsuperscript{39}D J Harris Cases and Materials on International Law ,Pg 84
up the domestication process. At the same time Parliament can be a stumbling block if it is not in favour of certain treaties entered into by the executive and brought before it for domestication. This leaves the whole process hanging and unresolved.

In an interview with Mr Mulembe on the 1st of March 2011, he said that it is only in the recent years that there have been some legislative developments that have sought to domesticate some provisions of International Human Rights Conventions. He gave an example that since the decision of The People v. John Banda HPA/6/1998, various pieces of legislation that allowed for corporal punishment have been amended, including Chapter 87, of the Laws of Zambia Penal Code, Chapter 97 of the Laws of Zambia Prisons Act of 2000 among others. He noted the effect of this is that, to some extent, the state is trying to live up to the standards in international human rights law, such as the Convention against Torture (CAT).

With regard to domestication of international human rights conventions into national law, Mr Mulembe also noted that very recently the government introduced the Anti-Gender Violence Bill. This bill inter alia, seeks to domesticate the Convention on the Discrimination against Women (CEDAW) 1979, particularly as the convention relates to gender-based violence.

In view of the foregoing, one can state that even though the process of domestication is slow, measures are being taken to speed up the process and ensure that international conventions are domesticated. The national courts in Zambia fall under the Judiciary. On numerous occasions the national courts have made reference to international conventions in passing stating that these conventions are not enforceable in Zambia due to non domestication. For example in the case of The Attorney General v. Roy Clark, Supreme Court Zambia No. 4 of 2008, it was stated that

"in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these international of persuasive value unless they are domesticated in our laws".\(^{40}\)

\(^{40}\) The Attorney General v. Roy Clark SCZ No. 4 of 2008, pg j41
The courts cannot therefore rely on an international convention that has not been domesticated in their adjudication since such a convention is not a part of Zambian domestic law due to non domestication. However, in the case of Sara Longwe v. Intercontinental Hotel 1993 LRC 221, the issue of discrimination against women was considered from an international law perspective.

It was held in this case that ‘in deciding an issue not covered by domestic legislation, a court could take judicial notice of international treaties and conventions, like the African Charter on Human and Peoples Rights and the Convention on the Elimination of All Forms of Discrimination against Women, when they had been ratified without reservation by a state, indicating its willingness to be bound by it.\(^{41}\)

It is hoped that with the enactment of the Anti-Gender Violence Bill this will be the closest thing to domesticating the Convention against Discrimination against Women (CEDAW). This development will be a positive step in an effort towards implementing and observing international human rights standards.

3.2 Article 54 of the Constitution, in relation to the Executive

The executive branch in Zambia is one of the three branches of government and is headed by the President of the Republic of Zambia. The Constitution under article 33 states that there shall be a President of the Republic of Zambia who shall be Head of State and Government. Article 33(2) of the Constitution further states that the executive power of the executive branch shall vest in the President. Among the notable functions of the president is to

‘negotiate and sign international agreements and to delegate the power to do so.\(^{42}\)

Therefore under this provision the President delegates this function to various public officers to negotiate and draw up international conventions to which Zambia will become a party. Article 54 of the Constitution of Zambia also establishes the Office of the Attorney general in Zambia. The Attorney General has among other functions, the following

\(^{41}\) Sara Longwe v Intercontinental Hotels 1992/HP/765;(1993) 4 LRC 221
'being the principal legal adviser to the government... and subject to the constitution, an agreement, treaty, or convention cannot be concluded without the legal advice of the Attorney General, except where the National Assembly otherwise directs and subject to the conditions provided by an act of Parliament'.

This provision therefore means that the Government cannot enter into international treaties without consulting the Attorney General. Article 54(2) (b) of the Constitution of Zambia mandates the Attorney General

'...to draw up agreements, contracts, treaties, conventions, to which the government is a party or in respect of which the government has an interest'.

The Attorney General works in conjunction with the Ministry of Foreign Affairs and other line ministries on all treaty making issues in conjunction with the Department of Development Cooperative and Organisations within the Ministry of Foreign Affairs which amongst others, is mandated to

'coordinate and organise the preparation of ratification of instruments and the number of international and regional conventions to which Zambia is party'.

As earlier mentioned, being legal adviser to the government and the government having the responsibility of entering into treaties, there is a need for the Attorney General to review all international conventions before they are ratified.

3.3 Article 62 of the Constitution, in relation to the Legislature

The legislature is also one of the three branches of government. It consists of the President and the National Assembly. It also consists of elected and nominated members of Parliament. These members of parliament carry out a wide range of public functions such as helping enact laws amongst others. The functions of the National Assembly

'include making laws (acts of Parliament) approving proposals for taxation and public expenditure, and keeping the work of government under scrutiny and review'.

---


44 The Constitution of Zambia

Ratification or accession of international agreements has been in existence in all other previous constitutions as a function of the executive branch. Before the treaty can become law it needs or must be domesticated first and this must be initiated by the executive branch and later brought up for discussion in Parliament. In the book Human Rights in Zambia, Implementation of the UN Convention against Torture, it is noted that

"all the international treaties, which it ratifies, do not apply automatically as part of national law unless domesticated or internalized by an act of parliament"\textsuperscript{47}.

According to the Report of the Promotional Mission to the Republic of Zambia, it was observed that

"despite Parliament not having much to do with the ratification and domestication of international human rights treaties, once the new constitution is enacted, this responsibility will shift to parliament. Furthermore, just to note, most of the instruments have not been domesticated, but they are contained in domestic laws one way or another"\textsuperscript{48}.


\textsuperscript{47} Judith Mulenga, Muziula Kamanga, Mariana Daurte, Trouchu-Grasso and Patrick Mutzenberg, Human rights situation in Zambia, pg 11

CHAPTER 4

4.1 Legal Framework of the Constitution against Torture in Relation to Article 15 of the Zambian Constitution.

Article 15 of the constitution of Zambia is a provision which makes torture an illegal act in Zambia. Torture is defined by article 1 of the Convention against Torture as

‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any person acting in an acting capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

Torture has been associated with those in power or in authority entrusted to make public decisions and public institutions using their authority on certain citizens or individuals to extract sensitive information, amongst others. This information if extracted in a forceful and violent manner leading to the inhuman or degrading treatment of an individual thereby leaving him or her physiologically or physically impaired can be considered as tortured. The Convention against Torture prohibits such illegal methods of extracting information at the international and national level. When a member state signs and ratifies the international Convention against Torture (CAT), it becomes bound by the provisions of the Convention.

However in a situation where the convention is not signed by a state, it is still bound by the rules of jus cojens because of the nature of the acts such as inhuman and degrading treatment of an individual amongst others. These acts are not only prohibited by law or conventions but natural law as well and no one is permitted to commit them. In the case of R v Bow Street Magistrates EX P Pinochet, (2000) 1 A.C. 147, it was stated that

---

49 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46. Entry into force: 28th June 1987 in accordance with article 27.
acts of torture are perceived as an act of evil and no one is above the law no matter who they are once they commit such acts".50

jus cojens are a 'set of principles from which no derogation is permitted"51.

‘Article 53 of the Vienna Convention on the Law of Treaties states that, a treaty that is contrary to an existing rule of jus cojens is void ab initio"52.

In this particular case the Convention against Torture enunciates rules which form a part of jus cojens or peremptory norms of international law which bind all states including those that have not ratified the treaty. Furthermore, the domestication of the Convention through Parliament into national law would make the act of torture justiciable. This means that if there is a case where it is believed an individual has been tortured, he or she can petition the High Court under Part III of the Constitution of Zambia under article 28. Torture is illegal and article 2(2) of the Convention against Torture states that

'The Constitution of Zambia prohibits torture. This means Zambia is expected to respect, fulfil and implement the provisions of the Convention and the Constitution Itself. Failure to comply means that the affected party can report the state to the Committee against Torture or bring a petition before the High Court of Zambia as earlier stated. The Constitution of Zambia prohibits torture caused by the government or institution against any individual or group. This means that the government is not permitted to torture any individual or group of individuals whatever the situation or reason.

'Torture is never justified under any circumstances, and no public official has any defence available to him or her for committing torture".54

Article 5 of the Universal Declaration of Human Rights also prohibits torture. Torture

'is prohibited in virtually the same terms in the International Covenant on Civil and Political Rights (art. 7); the African Charter on Human and People’s Rights (art 5); the

50 D J Harris, Cases and Materials on International Law, pg 333
51 Malcolm N Shaw, International Law, pg544
52 Malcolm N Shaw, International Law, pg 98
54 Professional Training Series No.5, Human Rights and Law Enforcement, A Manual on Human Rights Training for the Police, Pg 76
American Convention on Human Rights (art. 5, paragraph 2) and the European Convention on Human Rights (art. 3)\textsuperscript{55}. These regional and international conventions including the Convention against Torture are other legal frameworks against torture. Even when an individual is believed to have committed an offence or has vital information that the state would like to obtain, it is illegal for them to use torture in an attempt to obtain such information. The Constitution has established public institutions such as the Police Public Complaints Authority (PPCA)

'established in terms of the Police Act' of 2000\textsuperscript{56}.

'The act establishing this institution has been given the authority to direct prosecution or dismissal of those officers found guilty of violation of human rights (torture inclusive)\textsuperscript{57}.

The institution is the overseer of the police who are supposed to promote and protect human rights in the country. Through the Constitution, article 15 makes torture illegal and those public officials or individuals or other members of society found wanting can be brought before the courts of law or tribunals. Despite the establishment of such institutions,

'reports of torture are still widespread in Zambia\textsuperscript{58}.

A Case of Grade 12 pupil, Bertha Mugamazila at Matero Girls Secondary School. During the Grade 12 exams in November 1998, she was accused of having brought a paper into the examination hall, which was said to have contained answers to the exam questions. After questioning in the headmistress office she

\textsuperscript{57} Zambia: Constitution from the World Organisation Against Torture (OMCT) to the Universal Periodic Review (UPR) Process. \url{http://docs.google.comviewer?av=a&v=cache:NKFYmPrMJLibOH...}. Accessed on 6\textsuperscript{th} March, 2011.
\textsuperscript{58} Permanent Human Rights Commission, National Plan of Action, for Human Rights 1999-2009, pg 28.
was taken to Matero Police Station for questioning and was locked up in the police cells.\textsuperscript{59}

In this particular case Bertha died in the police cells and the case is still ongoing as it needs to be established whether she was tortured or not. If it is so established then it means that there will be a criminal case against the perpetrators.

'It is important to note that officers found guilty by the PPCA have been dismissed or discharged of their duties on recommendation of the PPCA.'\textsuperscript{60}

The acts of torture are prevalent in the police force where most people have been detained and claimed to have been tortured by the police in order to obtain information from them or a confession etc. Some allegations of torture by the police have been denied by them. When it comes to implementation, the provision of article 15 is not exactly followed.

'On the 12\textsuperscript{th} June 2007 the chairperson of the Human Rights Commission reported that prisoners were being tortured at Mufurila Prison in the Copper belt. In one case a prisoner had been beaten with a hoe handle and dirty water was poured over him. The prisons authorities denied that the incident occurred and accused the Human Rights Commission of misrepresentation.\textsuperscript{61}"

Notwithstanding the prohibition of torture, there are wide allegations against the police service that torture is routinely applied in attempt to obtain information from the accused. It is also important to note that

'evidence obtained by torture is admissible and can be used to convict a suspect.\textsuperscript{62}

During a seminar held at the Zambia Institute of Advanced Legal Education, in July 1998 on Human Rights and the Law, Justice P. Chitengi cited a decision of the Supreme Court

\textsuperscript{59}Torture in Zambia’s Police Cells, JCTR Bulletin Article 43 http://webcache.googleusercontent.com/search?q=cache:vPeGWKuv... Accessed on 6\textsuperscript{th} March 2011
\textsuperscript{60}Human Rights Situation in Zambia: implementation of the UN Convention against Torture, pg 20.
\textsuperscript{61}Cruel and Inhuman Treatment of Inmates, pg 1, http://webcache.googleusercontent.com/search?q=cache:2_aKXx5-Jh4J:www.iss.co.za/pgcon... Accessed on 6\textsuperscript{th} March 2011
(Liswaniso v. The People) on illegality obtained evidence. The justice stated that the principle in Zambia is that evidence is admissible so long as it is relevant. It is the authors' opinion that if torture is illegal, then information obtained through torture is also illegal and therefore should not be used in any court of law. Evidence obtained through torture should not be admissible before the courts of law because for as long as this practice is permitted, the scourge will continue as a means of extracting information from an accused. Institutions like the police will perceive this practice to be a normal procedure despite it being illegal. It is the authors opinion that there is need to put measures in place at the national level which will be in line and ensure that article 15 of the Constitution of Zambia is adhered to.

Furthermore at the national level there certain Acts of parliament which can be said to be in conflict with article 15 of the constitution of Zambia. Some of the national legislation which was in conflict with article 15 was Chapter 97 of the Laws of Zambia (Prisons Act.) This act legalized corporal punishment, which included flogging of an offender. The act also gave rules as to the process or procedure to use by the relevant officers to flog the offender. For example the Zambia Prisons Act stipulates in rule 173 that the cane to use for flogging an offender should be at least three to four feet long. Despite such a requirement, the actual act of flogging an offender in itself can be considered as inhuman or degrading treatment.

Such an act which was legal and binding at the national level was illegal at the international level through the Convention against Torture according to article 16 of the convention. However,

'in 1999 the Supreme Court of Zambia ruled that corporal punishment as a sentence, was in direct conflict with article 15 of the Zambian constitution meaning that corporal punishment as a sentence imposed by a court is unconstitutional....however, some decisions still need to be repealed such as 73 (1) e of the juvenile Act which provides that a court may order the offender to be caned.'

---

The Penal Code and other laws were subsequently amended by this august house to make them consistent with the constitution\textsuperscript{65}.

Article 15 states that

‘each state party shall undertake to prevent the territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or instigation of or acquiescence of a public official’\textsuperscript{66}.

It is the authors opinion that article 15 of the constitution of Zambia is not strictly adhered to despite being the ‘relevant provision’ prohibiting torture because ‘reports of torture are widespread in Zambia’\textsuperscript{67}.

However, at present a lot is being done to prevent acts of torture. One such example is as earlier mentioned the removal of the reservation initially placed on article 20 of CAT by Zambia.

4.2 The Administrative Framework

The administrative framework of the state falls under the executive branch and

‘the primary role of the public administration in any country is to ensure that government can provide an enabling environment for sustainable socio-economic development’\textsuperscript{68}.

The executive branch as mentioned above is responsible for the running of state affairs and it has different ministries that run the administration of the state.

One of such ministries is the ministry of Foreign Affairs responsible for all international relations with other states. In relation to international conventions, the ministry of Foreign affairs and the ministry of Justice through the Attorney General’s office handle these issues such as drafting agreements, ratification and acceding to them. Despite all these efforts the domestication of these international instruments has not been impressive.

\textsuperscript{65} National Assembly of Zambia –Database-Friday, 15\textsuperscript{th} October, 2010, Pg1, http://webcache.googleusercontent.com/search?q=cache:dSpLWiz... Accessed on 3\textsuperscript{rd} March 2011
\textsuperscript{66}Permanent Human Rights Commission, National Plan of Action, For Human Rights, 1999-2009
\textsuperscript{67}Permanent Human Rights Commission, National Plan of Action for Human Rights 1999-2009, pg 28
\textsuperscript{68}Good Governance in Zambia’s Public Administration, Challenges and Opportunities, Pg 3, http://docs.google.com/viewer?a=v&q=cache:394Fs8GkfwkJ:unpan1... Accessed on 5\textsuperscript{th} November 2010
The domestication of international instruments such as the International Convention on social and Economic Rights has not been domesticated due to few recourses and financial support by administrative frameworks. Furthermore the pace at which the process is done is very slow and not well coordinated.

4.3 The Judicial Framework

The judiciary is the third branch of government that consists of the courts of law. The courts are divided as follows: Local court, Magistrate court, High court and Supreme Court. The High Court is the only place where a petition can be presented. International human rights instruments can be effected through petitions brought to the high court. The decisions are a channel of domesticating these international laws into national law. However, the accessibility of the courts of law is limited.

This is because in order for one to be heard, one needs to have Locus Standi and if not, then one's complaint cannot be brought before the courts of law. Locus Standi also limits the number of individuals who can bring a petition before the courts of law. This is done in accordance with article 28 of the constitution of Zambia. This has been a hindrance to the domestication and observance of international human rights instruments because not everyone or anyone can bring a petition before the courts of law. The fact that a petition can only be brought before the High Court or tribunal, limits the number of courts to which an individual can take his or her petition. The courts have also found it difficult in domesticating international human rights conventions and have upheld national law on numerous occasions their decisions. The decisions they make are based on national law because Zambia is a dualist state

'...that does not allow international instruments to be self-executing domestically. In addition, covenants cannot be invoked before a domestic court of law as courts do not consider an international instrument as being part of Zambian law'.

69 Human Rights Situation in Zambia, Implementation of the UN Convention against Torture, pg 11
CHAPTER 5

5.0 RECOMMENDATIONS AND CONCLUSION

There is a general perception among states that subscribing to international conventions is cardinal in terms inter alia, of friendly relations and international trade. These international conventions have from the outset helped member states to live in harmony with one another by providing economic development, protection of the human race and security in the world, amongst others.

5.1 RECOMMENDATIONS

Having endeavoured to explain the inadequate legal framework governing the observance and domestication of human rights conventions in Zambia, the paper recommends the following;

Zambia having adopted a dualist system does not permit an international convention to be automatically domesticated, it is therefore imperative for the government to adopt an easy framework that will facilitate the domestication of relevant human rights conventions. The dualist system has shown that the non automatic domestication of human rights conventions has slowed down the implementation of human rights conventions. It is important that the executive branch which is charged with negotiating international treaties should move at the same pace with parliament which gives the assents in order for the process of domestication of treaties into domestic law to be speeded up.

"This low domestication rate also reflects the country's limited capacity in processing protocols". This low processing of protocols can be enhanced by establishing a system such as a special committee which will examine the ways and means of domesticating international human rights instruments to enhance this process. Professor Gudmunder Alfredsson of Lund University in an interview held on the 15th of March 2011 attributed the lack of domestication and observance of human rights conventions to lack of seriousness by our national leaders in general. His comment was not necessarily with reference to the situation in Zambia. There is also the issue of preservation of power,
property and other privileges by those in charge who do not like to see challenges to or criticism of the same. It is important that those in charge put aside their personal agendas and implement international conventions that will be of benefit to everyone.

It is therefore important that those elected to parliament should be obliged even by law to ensure that during their tenure of office, they bring up a motion in parliament to recommend a particular convention for domestication. Elected members of parliament should be seen as crusaders for international human rights conventions in order to enhance the preservation and protection of the human rights. Professor Alfredsson also refers to inadequate knowledge of international standards amongst politicians and officials as reason for the low level of domestication of international human rights conventions. In order to accelerate this process, education can play a critical role. The general public should be sensitized as well as politicians. We should all receive some form of education regarding International Human Rights Conventions and their importance to good governance and national development.

Such awareness can be done through workshops or seminars for those in public institutions and radio and television programs for the rest of the citizenry. The subject of human rights should also be included in the school syllabus of secondary schools. Furthermore the constitutional framework governing international conventions is not effective enough to ensure the domestication and observance of these conventions. Despite the government having gone a long way in establishing institutions such as the Human Rights Commission amongst others, a lot more remains to be done. For example the functions of the Commission state that pursuant to section 9 of the Human Rights Commission Act it can only investigate allegations and recommend. It does not have the power to enforce any of the recommendations it makes or implement or put systems in place that would help in the domestication and observation of international human rights conventions.

It is therefore the authors’ recommendation, similar to what others have earlier recommended that institutions such as the Human Rights Commission should be empowered to make and implement decisions. It should not just have the responsibility to recommend. The ability to only recommend in the authors opinion is a hindrance for
the Commission to be effective in its work because "these recommendations can either be adopted or ignored by government authorities". The Human Rights Commissions Act should be revised so that more power is given to the Commission in its work and also increase the funding at the Commission so that more work can be done effectively and efficiently.

The Commission is not well funded and according to section 22 of the Human Rights Commissions Act, the commission cannot receive any form of grant from international organisations or contributions. The author recommends that section 22 be amended so that the commission may be able to receive grants. This will go a long way in assisting the commission in its operations. In situations where the funding is low the commission will not perform at its best and the lack of sufficient funds has limited the Commission’s area of operations.

It is also recommended that the Government should provide additional funds in order to allow for the provisions of such conventions as the Economic, Social and Cultural Rights to be implemented at least in a limited manner at the outset so as to improve the standard of living. Furthermore, the Human Rights Commission should play a role in the process of domestication of international human rights conventions. There being part of this responsibility and their awareness on the importance of human rights conventions can help achieve a lot more domestication of these conventions. With its involvement in the domestication of international human rights conventions, it can assist in speeding up the process. Its mandate should not just end at investigating and recommending but implementation as well.

In terms of the observance of international human rights conventions, it is important to ensure that all conventions signed and ratified regardless of Zambia being a dualist state should be observed even if not domesticated. But this would be counter to the principle of dualism which Zambia had chosen. For example the Convention against Torture should be strictly observed so as to preserve the human race as it involves cruel, inhuman and degrading treatment which can lead to death of an individual or mental incapacitation. It must be seen to be observed and not only be made to be theoretical in nature. The Police Public Complaints Authority has had police officers dismissed from
duty after having been found guilty of committing such illegal acts as torture. However, none of the perpetrators of torture have been prosecuted. This in itself is a hindrance towards the observation of the Convention against Torture (CAT) in particular. It is the authors’ recommendation that it should not just end at dismissal of the perpetrators but also ensuring that they are taken to court and tried. This will assist curb the vice.

5.2 CONCLUSION

In considering the current situation in Zambia, the dualist system has made it difficult for a speedy domestication and thus observe international human rights conventions. These conventions are considered foreign law from national law. It is important to note that the process governing the domestication and observance of international human rights conventions must be seriously reviewed to allow for the implementation of an effective legal framework. As illustrated in the preceding chapters, it may be noted that the current legal framework is not effective and therefore playing a major role in the slow process of domesticating and observance of international human rights conventions. This leads to a lack of respect or observance of human rights, despite the fact that Zambia may have signed and ratified the conventions in question.

The whole issue of observing international human rights conventions has been more theoretical than practical as we have seen in the case of the Convention against Torture and as illustrated in the preceding chapters. The issue of the courts accepting evidence obtained through torture is also a sign of the lack of will to adhere to the observance of human rights standards in Zambia. The judiciary should be seen to be active and proactive in getting rid of practices that are a hindrance to the promotion of human rights. It should not in this case accept evidence obtained through torture and assist put in place a system which will ensure that all perpetrators of torture are not only dismissed upon recommendation from the Police Public Complaints Authority but also brought before the courts for conviction.
Those that may play a major role in the domestication and observance of the international human rights conventions such as the Human Rights Commission are not well equipped to play this role. They lack adequate funding, human resources and are not sufficiently independent. This makes it difficult to achieve their objectives of the protection of human rights. Zambia should rise to the challenges and ensure that it domesticates and observes international human rights conventions.

It is therefore important to note that the constraints on the domestication and observance of human rights are due to the dualistic system in place in Zambia. This means that with a dualist system in place in relation to human rights, it is not possible for them to be automatically implemented or turned into national law. The inability to automatically become national law means that Zambia has the opportunity to decide which of the international instruments to domesticate. With a dualistic system, there seems to be no other alternative to use which make things to be done the other way round. Jus cojens are the only rules with which it does not have a choice but observe. We also see that there is reasonable amount of lack of knowledge by politicians who are supposed to spear head development and are responsible for the enacting of laws through parliament.

There is also the attitude of not wanting to domesticate international institutions for various reasons such as selfish motives. We have also seen that some international human rights instruments such as Economic Social and Cultural Rights have not been domesticated due to non availability of recourse and inadequate funding for those constitutional institutions mandated to help in the observance and domestication of these human rights such as the Human Rights Commission who not authorised to get grants. The funding for these institutions is generally inadequate. It will be an added advantage to harmonise the constitution with international instruments so as to help in the observance and domestication of human rights.
BIBLIOGRAPHY

BOOKS

1. Anyangwe Carlson, Introduction to Human Rights and Humanitarian Law


7. Zimba Lawrence, Zambian Bill of Rights, an Historical and Comparative Study of Human Rights in Commonwealth Africa

ARTICLES

1. Brief Notes on HIV and Labour Migration in Zambia, Current Level and Policy Intervention in Zambia;


2. About the Ministry of Foreign Affairs


3. Good Governance in Zambia's Administration: Challenges and Opportunities


LIST OF CASES AND TABLE OF STATUTES

A. LIST OF CASES

1. “A Case of a Grade Twelve Pupil”

Accessed on 12th December 2010

5. HRC Inspects Prisons & Police Cells, Human Rights Commission
18th January 2011

6. How Treaties Become Law

7. National Assembly of Zambia –Database-Friday,15th October,2010,pg1
March 2011

8. Principles of International Law Paper: Paper Presented to Course Participants of
the Human Rights and Law Course

9. Republic of Zambia, National Constitutional Conference, Public Service
Commission Committees no 9, detailed Terms of Conference, August 2008
unpan/un.org/intradoc/groups/publicdocuments/un...unpan038430.pdf Accessed
on 12th December 2010

accessed on 12th December 2010

11. Torture in Zambia’s Police Cells
March 2011

12. Zambia Contribution the World Organisation against Torture (OMCT) to the
Universal Periodic Process
http://docs.google.com/viewer?a=v&q=cache:NKFYmPrMj:lib.oh... Accessed 6th
March 2011

LIST OF CASES AND TABLE OF STATUTES

A. LIST OF CASES

1. “A Case of a Grade Twelve Pupil”

Committee of the Privy Council
4. R v Bow Street Magistrate EX P Pinochet (2000) 1 A.C. 147
5. The People v John Banda HPA/6/1998
6. The Attorney General v. Roy Clark, Supreme Court of Zambia No. 4 of 2008
7. Sara Longwe v. Intercontinental Hotel (1993) LRC 221
8. Zambia Sugar PLC v Fellow Nanzaluka, Appeal No. 82/2001

B. LIST OF STATUTES

1. Human rights act of 1999
3. Police (Amendment) Act No. 20 of 1999
4. Police Act of 2000
5. Prisons Act, CAP 97
6. The Constitution of Zambia
7. The Bill of Rights,