JURISDICTION AND INSTITUTIONAL FRAMEWORK OF THE CONSTITUTIONAL COURT OF ZAMBIA

By

Annie Musonda Kawandami

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DECLARATION

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ABSTRACT

The newly established Constitutional Court of Zambia is expected to play the pivotal roles of interpreting, protecting and defending the Zambian Constitution. To do this, the Court requires appropriate jurisdiction and an adequate institutional framework. Thus, the purpose of this study was to assess the Court's jurisdiction and institutional framework in order to determine its probable efficacy. More specifically, the study examined the Court's original and appellate jurisdiction as conferred by Article 128 (1) of the amended Constitution of Zambia. The study undertook a qualitative and triangulatory research paradigm because a study of this nature requires detailed descriptions and prose which a quantitative study could not provide. Both primary and secondary data were collected in order to add knowledge to the subject. The primary data was collected from legislation, case law and interviews. The secondary data from books, journals and peer reviewed articles among others, provided support for primary sources, ground for comparison, gauging and defining the topic which was in a novel area of constitutional law in Zambia. Regarding the jurisdiction of the Court, the study found that original and appellate jurisdictions of the Court are necessary for it to effectively carry out its mandate. The powers under the Court's original jurisdiction would allow it to function as a specialised Court, solely dedicated to adjudicating over matters arising from the Constitution. On the other hand, its appellate powers would enable it to effectively hear those matters which would overwhelm the Court's docket if heard originally. Further, on the subject of jurisdiction, the study noted that wide though its powers; it is excluded from hearing matters under the Bill of Rights which forms a fundamental part of the Zambian Constitution. This is because Zambia has had an entrenched Bill of Rights since 1991 which can only be amended using a referendum. According to Article 28 (1) and (2) of the said Constitution, all matters arising under the Bill of Rights are a preserve of the High Court of Zambia with appellate jurisdiction vested in the Supreme Court of Zambia. The study seeks to demonstrate that the Constitutional Court will have complete jurisdiction over the Zambian Constitution only if the necessary constitutional amendments are made to allow the Court to hear matters arising from the Bill of Rights.About the Court's institutional framework, the study found that the position of the Constitutional Court and the Supreme Court as apex courts in the hierarchy of the Zambian judicial system, may lead to delineation problems. The study therefore recommends that the Constitutional Court be the highest court in Zambia to be headed by the Chief Justice and the Deputy Chief Justice to be included as a member of the Court. Further research about the Constitutional Court may explore whether persons, institutions and authorities will comply with the Court's decisions as this is key to determine its success in the role of interpreting, protecting and defending the Zambian Constitution.

Keywords: Constitution, Jurisdiction, Powers, Institutional Framework and judicial system

DEDICATION

This study is dedicated to my beautiful daughter Unathi Ndinawe Ngulube. You are a constant reminder of all that is good. Always set out to accomplish what you desire with a goal to be happy my daughter. Nothing is impossible, it can all be done with hard work, consistency and determination. You will forever be my shining star.

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CHAPTER ONE

THE BIRTH OF THE CONSTITUTIONAL COURT IN ZAMBIA

1.1 Introduction

Every Country has a set of laws or principles that lay out the basic duties and rights of its citizens. These rules and principles are simply referred to as a Constitution. The Constitution may be written down or not. Zambia has a written Constitution which contains the guiding principles and values for the people of Zambia to aspire to. The Constitution organises government, limits its powers and distributes powers between its various organs. The Constitution is therefore a valuable document which must be protected and defended adequately. For this reason, most jurisdictions, including Zambia, choose to have in place an exclusive institution whose sole responsibility is to uphold the Constitution. In the case of Zambia, this institution is known as the Constitutional Court of Zambia (hereinafter referred to as "ConCourt").

The ConCourt was established to have original and final jurisdiction on constitutional matters in order to encourage expertise, specialisation and reduce the delays experienced in the administration of justice.[1] To achieve this, it is cardinal that the jurisdiction with which the ConCourt was conferred by the Constitution enabled it to exercise its powers in a way which pushed forward its mandate. It is also important that the institutional framework of the Court was one which created an enabling environment for it to meet its mandate. If its jurisdiction was inappropriate, situations may arise whereby the Court would be overwhelmed with cases or was underutilised, and this would then defeat the purpose for which it was created.

[1] Final Report of the Technical Committee and the Draft Constitution of Zambia Bill, 30th December 2013.

It has been observed that courts can be provided with powers that are too broad and expansive; this can undermine their legitimacy.[2] Similarly, if the Court's institutional framework was inadequate, the court would be unable to thrive and the challenges arising from a weak institutional framework would have a negative impact on the court's ability to deliver its mandate. If the ConCourt was incapable of carrying out all the functions assigned to it, this could have a negative impact on the institutional framework essential for it to carry out its mandate.[3] Therefore, it is necessary that the ConCourt has the appropriate jurisdiction and an adequate institutional framework to support it. Thus, this study aimed at analysing the jurisdiction and institutional framework of the ConCourt, with a view to establishing its adequacy. The study has also offered conclusions and recommendations where necessary.

Chapter One of this study seeks to lay a foundation for the analysis of the jurisdiction and institutional framework of the ConCourt to ascertain if they are adequate for the Court to fulfil its role. To begin with, a historical background to the ConCourt of Zambia is given to appreciate what factors necessitated the introduction of the Court. In order to establish from the onset what problem the study seeks to address, the statement of the problem is also given. The Chapter also lays out the purpose of the study, the objectives, research questions, rationale, scope of the study and operational definitions. The study is anchored on Hans Kelsen's theories on the requirement of a constitutional court which theories justified the need for a separate court within the judicial hierarchy for a constitution to be firmly protected. The study gives an overview of these theories as they relate to this type of Court. Thereafter, the Chapter presents a review of literature, to (among other things) appreciate what has been written by others on the subject of, the jurisdiction and institutional framework of the ConCourt. The literature review further identifies gaps that may exist in the literature

[2] S.L Haynie, *"*Framework and Context of Judicial Institutions in Democratising Countries: The Philippines and South Africa*" in Proceedings, Louisiana State University, (2000)*, pp. 6-7.
[3] S.L Haynie, "Framework and Context", pp. 6-7.

consulted. This background is followed by the methodology which explains the methods used to gather, analyse and verify data. A summary of this chapter is given at the end.

1.2 Historical Background

The origins of the ConCourt as a separate court within the court hierarchy system could be traced to the writings of the legal theorist Hans Kelsen. When the Austrian Republic was formed in 1918, a young scholar then, Kelsen designed the Austrian Constitution and provided in it the establishment of the Constitutional Court of Austria.[4] However, it was in 1920, when the Federal Constitution of the Republic established the Constitutional Court as it is, with a comprehensive power of judicial review of laws for their conformity with the Constitution and additional competencies to enforce criminal law against high governmental authorities, to supervise the regularity of elections and referenda, international treaties and ordinances and to protect fundamental rights against last instance individual administration decisions.[5] The Kelsenian model establishes constitutional justice to be exercised by judges in a centralised court, specialised on constitutional questions.[6] In systems that have the Kelsenian model of constitutional courts, it is typically the case that only the Constitutional Court has the power to rule on constitutional matters.[7] As a result, in these systems, all constitutional questions have to be referred to the Constitutional Court, both from other courts and from other places in the political system.[8] Not only is the Constitutional Court the only court to hear constitutional questions, but it also has the jurisdiction to hear only constitutional questions, which means that questions of routine interpretation of other legal

[4] Thilo Tetzlaff, "Kelsen and Constitutional Review Accord in Europe and Asia," *National Taiwan University Law Review* volume 1:2 (2006), 89.
[5] Gabriele Kuscko-Stadhomeyer, Constitutional Review in Austria: Traditions and New Developments, International Conference dedicated to the 20th Anniversary of the Constitutional Court of Romania, accessed on 7th December, 2016, available at http://193.226.121.81/events/conferiata/kucksco, p.1.
[6] Kuscko-Stadhomeyer, "Constitutional Review in Austria", p.2.
[7] Kim L. Scheppele, "Guardians of the Constitution, Guardians of The Constitution: Constitutional Court Presidents and The Struggle for the Rule of Law in Post-Soviet Europe" *Pennsylvania Law Review*, 154 (2006): p.1758.
[8] Scheppele, "Guardians of the Constitution", p.1759.

sources are simply never on a constitutional court's docket.[9] The "ordinary courts" do not deal with constitutional questions, and the constitutional court does not deal with ordinary legal questions.[10] As a result, a constitutional court is generally the only court that has the power to nullify laws inconsistent with the Constitution and to require the government to take steps to correct the problem.[11]

In Zambia, the creation of a ConCourt was first proposed by President Kenneth Kaunda on 24th September, 1990 at an address to the Twenty-Fifth National Council of the United National Independence Party (hereinafter referred to as "UNIP"), the policy making body of the party.[12] In Kaunda's view, the ConCourt would have the responsibility of ensuring that the provisions of the constitution were strictly adhered to and that neither the President nor Parliament abused their powers. To realise this goal, there was need for an institution, in the form of the ConCourt, to serve as the protector of the Constitution with the responsibility to ensure that all institutions of government respected and operated within the confines of the Constitution. To ensure this, every citizen would have the right to go to the ConCourt for redress.

A few days after the National Council, on 8th October 1990, The First Republican President appointed the Mvunga Constitution Review Commission.[13] The Mvunga Commission received a number of submissions including the need to establish a ConCourt in Zambia.[14] The Mvunga Commission found, on the basis of the submissions received, that there was consensus on the establishment of the Court with special mandate to deal with constitutional

[9] Scheppele, "Guardians of the Constitution," p.1759.
[10] Scheppele, "Guardians of the Constitution," p.1759.
[11] Scheppele, "Guardians of the Constitution," p.1759.
[12] J.P. Sangwa, "Brief to the President of the Republic of Zambia on the Qualifications of the Six Nominees to the Constitutional Court", March 2016, p.2.
[13] The Commission was appointed pursuant to the Inquiries Act, Volume 4, and Chapter 41 of the Laws of Zambia.
[14] *Mvunga Constitution Review Commission Report (Lusaka)* 1991, p. 152.

matters.[15] However, it appears that there were differences of opinion on how the court ought to be structured.

It was submitted by some, that such a court should be a special division of the Supreme Court with mandate to deal exclusively with constitutional matters.[16] Others called for the creation of a special division of the Supreme Court with mandate to deal exclusively with constitutional matters.[17] The third structure was for the Court to be at the same level as the Supreme Court, clothed with original and final jurisdiction on constitutional and other related matters.[18] Ultimately the Mvunga Commission recommended for the establishment of a separate ConCourt within the Zambian judicial system which would be at the same level as the Supreme Court with original and final jurisdiction.

The Mvunga Commission recognised the fact that the rights and freedoms of the people were poorly protected under the one-party system. It was, therefore, necessary to ameliorate this situation and the ConCourt was a key institution in addressing the wrongs, mistakes and failures of the past. The recommendation for the establishment of the ConCourt was, however, rejected by the Movement for Multi-Party Democracy (hereinafter referred to as "MMD").[19]

The Mwanakatwe Constitutional Review Commission was appointed in November, 1993.[20] This followed the downfall of one party rule and the coming to power of the MMD led by the Second Republican President[21] The Mwanakatwe Commission's terms of reference included

[15] Mvunga Report, p.152.
[16] Mvunga Report, p.152.
[17] Mvunga Report, p.152.
[18] Mvunga Report, p.152.
[19] Sangwa, "Brief to the President of the Republic of Zambia", p.4.
[20] The Mwanakatwe Commission was appointed on 22nd November 1993, pursuant to Statutory Instrument No. 151 of 1993 as amended by Statutory Instrument No. 173 of 1993.
[21] Sangwa, "Brief to the President of the Republic of Zambia", p. 2.

the making of appropriate arrangements which would protect human rights, the rule of law and good governance.[22]

The Commission recommended for the creation of a separate ConCourt within the Zambian judicial system which would exercise jurisdiction over any alleged violation or threatened violation of any matters or rights guaranteed by the Constitution and any matter relating to the interpretation of the Constitution.[23] However, the government did not adopt most of the Commission's recommendations, including that of establishing a ConCourt. The reasons advanced for this were legal and practical limitations.[24] Due to these limitations (which were not elaborated), the provision to establish the ConCourt did not make it into the Constitution which was birthed out of the Mwanakatwe Commission's recommendations.

The Mwanakatwe Commission was followed by the Mung'omba Commission which was appointed by the Third Republican President in 2001.[25] Like its predecessor, the Mung'omba Commission also recommended for the establishment of a Constitutional Court. This recommendation was, however, rejected by the Mwanawasa-headed government along with other recommendations also on the basis of legal and technical difficulties.[26] To find a way around these legal and technical difficulties, a popular body to come up with a draft constitution that could be enacted by parliament and then be partly presented to the Zambian people in a referendum was constituted by means of a National Constitution Conference (hereinafter referred to as the "NCC") Act. The NCC comprised five hundred and forty-two members from a cross section of the Zambian society.[27] The rationale behind such a large number was to have a representative voice into the NCC. After carrying out its deliberations,

[22] Muna B. Ndulo and Robert B. Kent, "The Constitutions of Zambia," *Zambia Law Journal,30* (1998):1-28 at 22.
[23] Ndulo & Kent, 22.
[24] Malila, "Facing the Elusive Search for a New Zambian Constitution", at p. 108.
[25] Appointed under Statutory Instrument No. 40 pursuant to the Inquiries Act.
[26] Malila, "Facing the Elusive Search for a New Zambia Constitution", at p. 111.
[27] Malila, "Facing the Elusive Search for a New Zambia Constitution, 3 at p.114.

the NCC presented its report and draft constitution to the Minister of Justice on 30th August 2010 which also included the provision for the establishment of the ConCourt.[28] The final draft constitution was subsequently drafted into the Constitution of Zambia bill and presented to Parliament, but it failed to pass at the second reading stage.[29]

Despite this failure, the newly elected government of the Patriotic Front (hereinafter referred to as the "PF") led by the fourth Republican president, continued in its quest to deliver a constitution to the Zambian people to reflect their will and aspirations. Sata appointed a Technical Committee on the Review of the Constitution (hereinafter referred to as "the Committee").[30]

Among the Committee's terms of reference was to draft a national constitution that would ensure the separation of powers amongst the various state organs, including the executive, legislature and the judiciary, so as to create checks and balances amongst them which would ensure accountability of the state and its officers to the people of Zambia.[31] Pursuant to its terms of reference to provide for any other constitutional or democratic issues that would promote and enhance democracy and good governance, the Committee recommended that ConCourt be established as a separate court with the Zambian court system and have jurisdiction in any matter arising under the Constitution[32].

Accordingly, the recommendation for the establishment of a ConCourt as made by previous constitutional review commissions was adopted in Article 162 Committee on the draft Constitution. The justification for the ConCourt was to have a court specialised solely in constitutional matters and whose main mandate would be to defend and interpret the Constitution.

[28] See NCC Final Report, 2010 and NCC Draft Constitution, 2010.
[29] Malila, "Facing the Elusive Search for a New Zambia Constitution", at p.117.
[30] Appointed on 16th November 2011.
[31] Final Report, p.671.
[32] Final Report (2013).

1.3 Statement of the Problem

The ConCourt is a new court that has been established by Article 127 of the Constitution of Zambia. It is worth exploring if the Court will effectively carry out its various powers as conferred by its jurisdiction. Another important factor to the existence and functions of the Court is its institutional framework. In this regard, it is necessary to analyse whether the institutional framework of the ConCourt in its current form is adequate to enable it to efficiently and effectively achieve its role of protecting the Zambian Constitution.

1.4 Study Objectives

The objectives of this study are:

1.4.1 General objective

To critically analyse the jurisdiction and institutional framework of the ConCourt.

1.4.2 Specific Objectives

(i) To analyse the jurisdiction of the ConCourt, with a view to determining its efficacy.

(ii)To analyse the institutional framework of the ConCourt with a view to determining its adequacy.

1.5 Research Questions

(i) Is the jurisdiction of the ConCourt enough to enable it to effectively carry out its various constitutional powers?

(ii) Will the institutional framework of the ConCourt enable it to carry out its

Role effectively?

1.6 Rationale of the Study

The importance of this study lies in the fact that it focuses on the newly established ConCourt of Zambia. In so doing, the research attempts to establish if the Court would be able to carry out the various powers conferred upon it effectively.

To the extent that the study will make relevant recommendations, it will also contribute to the body of knowledge on these important and topical issues. Specifically, the study will benefit the Constitutional Court of Zambia by enriching its jurisprudence, Law making bodies such as Parliament, Legal Drafters such as Ministry of Justice, Jurists, Lawyers and Students, among others.

1.7 Scope of the Study

This study confines itself to the analytical examination of the jurisdiction and institutional framework of the ConCourt.

1.8 Conceptual Framework

This study's Conceptual Framework is derived from Kelsen's theories which argue that only a constitutional court endowed with the generalised and centralised power authoritatively to repeal constitutionally defective acts of legislation, as well as other unconstitutional acts taken by organs of government in immediate execution of the Constitution will be fully a safeguard of constitutional legality.[33] Kelsen argues that the protection of human rights demands a court especially concerned with human rights issues.[34]

In systems that use the Kelsenian model in their Constitutional Courts, it is very much a norm that only the Constitutional Court has the power to rule on any issues arising from the Constitution.[35] The Constitutional Court therefore has the unique position to hear matters arising from various constitutional questions. This theory associates itself with the positivist

[33] Lars Vinx, pp.157-161.
[34] Thilo Tetzlaff. "Kelsen and Constitutional Review Accord in Europe and Asia", p.80.
[35] Kim L. Scheppele, 'Guardians of the Constitution, Guardians of The Constitution: Constitutional Court Presidents and The Struggle for the Rule of Law in Post-Soviet Europe' *Pennsylvania Law Review*, 154 (2006): p.1758.

school of thought which says the law should be free of any foreign discipline such as sociology or politics.[36]

For Kelsen, legal or moral statements are purely normative and must not be confused with physical facts.[37] Moreover, a norm cannot be derived from facts, but only from other norms.[38] Thus, norms are regulations setting forth how men are to behave.[39] According to Kelsen, a norm is an "ought" proposition; it expresses not what is, or is done, or must be, but what ought to be, given certain conditions; its existence can only mean its validity and this refers to its connection with a system of norms which it forms a part. It cannot be proved to exist factually, but simply to be derivable from other norms, and is therefore, valid in that sense.

Kelsen's pure theory of law further argues that due to the dynamic character of the law, a norm is valid because, and to the extent that, it had been created in a certain way, that is, in a way determined by another norm; therefore that other norm is the immediate reason for the validity of the new norm.[40] His theory states that the relationship between a norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of superior and subordination. The norm which regulates the creation of another norm is therefore higher and created in conformity with the former is the lower one. In this way, the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms. Harmony ensues by the connection that results from the fact that the validity of a norm, created according to another norm, rests on that other norm, whose creation in turn, is determined by a third one. This is a regression that ultimately ends up in the presupposed basic norm, whose creation in

[36] Kelsen's theory of law has been criticised in part for casting the law in a light that divorces it from sciences such as sociology and politics. Critics argue that a legal system is not an abstract collection of bloodless categories but a living fabric in a constant state of movement.
[37] Hans Kelsen, General Theory of Norms (Oxford: Oxford University Press, 1991) p.19.
[38] Hans Kelsen, p.19.
[39] Hans Kelsen, p.20.
[40] Hans Kelsen, Pure Theory of Law (California: University of California Press, 1967) pp. 3-9.

turn, is determined by a third one.[41] This basic norm, therefore, is the highest reason for the validity of the norms, one created in conformity with another, thus forming a legal order in its hierarchical framework.[42]

Kelsen's theory provides an excellent concept for a Constitutional Court because if designed the way he envisaged the court; it will trace the validity of every official act to the ultimate authority of the original constitution of the state. If there is in place a formal constitution, it is likely to give rise to situations in which the decisions of an organ or set of organs that are commonly recognised to have legislative power can make prima facie claim to be valid. Similarly, their full procedural or substantive conformity with all constitutional rules makes the valid exercise of legislative power less open to doubt. This, according to Kelsen, is what necessitates the creation of the institution now famously known as the, 'Constitutional Court'.[43]

In Kelsen's view (and ultimately this study subscribes to this view) constitutional courts should be in a position to scrutinise any parliamentary decision, be it a statutory act or any other (self-binding) norm.[44] Kelsen suggested that the court would function as a kind of negative legislator; he named three reasons why the court would function as such, firstly, that 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 claim a special authority on the same level and thirdly, that constitutional review requires judges who are educated and trained not only as judges but as scholars of constitutional law.[45] Kelsen understood constitutional review of statutes to be

[41] Hans Kelsen, Pure Theory of Law, pp.3-9.
[42] Hans Kelsen, Pure Theory of Law, pp 10-15.
[43] The term constitutional court derived from a work by the renowned jurist, Georg Jelinek who in 1885 published a brief essay titled '*a constitutional court for Austria'*.
[44] Tetzlaff. "Kelsen and Constitutional Review Accord in Europe and Asia." *National Taiwan University Law Review*, volume 1:2 (2006): 77-105 at p. 89.
[45] Thilo Tetzlaff. "Kelsen and Constitutional Review Accord in Europe and Asia", p.80.

an inherently political activity however judicial in form, since the reviewing authority would inevitably participate in the legislative function.[46]

It is important to note, however, that the application of the Kelsenian model in each country depends on local conditions, and that the general trend has been to expand the competencies of Constitutional courts over time beyond the model.[47] That said, it should be pointed out that the genesis and evolution of constitutional courts followed a different pattern depending on the constitutional design and the legal family to which a particular institution that was assigned to review parliamentary legislations' compliance with the constitution belonged.[48] Despite this, constitutional courts have shared the same set of liberal democratic principles and values. In constitutional courts, protection of the rule of law, starting with the constitutional supremacy and fundamental human rights, has been the most common feature, while the differences have concerned paths of development, growth, logistics of enforcement and quantity of the courts enforcing constitutional review.[49]

Accordingly, Kelsen's theories provide a conceptual framework for this study to assess whether the ConCourt of Zambia follows the same set of liberal democratic principles and values as other ConCourts which have emulated the Kelsenian model. The conceptual framework gives this study room to ascertain if the ConCourt of Zambia is a specialised court solely for the purposes of safeguarding the constitution by rendering pieces of legislation unconstitutional as well as other unconstitutional acts taken by organs of government in immediate execution of the Constitution void.

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[46] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe." *International Journal of Constitutional Review*, volume 5:1 (2007), pp. 69-92.

[47] Tom Ginsburg & Nuno Garoupa. "Building Reputation in Constitutional Courts: Political and Judicial Audiences", *Arizona Journal of International & Comparative: 28, No. 3* (2011), p. 540.

[48] Evgeni Tanchev, "Constitutional Review design and Functions, Implications for the Separation of Powers", in *Proceedings of 2015 European Commission for Democracy through Law*, 24-25th September 2015 (Chisanau, Moldova: European Commission for Democracy through Law, 2015), p.6.

[49] Evgeni Tanchev, "Constitutional Review design and Functions," p.6.

1.9 Literature Review

The Constitutional Court serves as a separate watchdog of the constitution and protector of the constitutionality, legality, and the citizens' freedoms and rights within the national legal system.[50] The institution, as already noted, was first suggested by Hans Kelsen for the Austrian Constitution of 1920.[51] Kelsen, in accordance with his positivist jurisprudence, believed in a strict hierarchy of laws and that ordinary judges should apply only law that is legislated by the Parliament.[52] To restrain the legislature effectively and ensure the compatibility of law with the higher normative order of the Constitution, Kelsen believed a special, extra judicial organ was necessary.[53] The Kelsenian Model established a centralised body outside the framework of the conventional judiciary to exercise constitutional review and act as a guarantor of the constitutional order.[54] This body, typically called a Constitutional Court, should operate as a negative legislator because it has the power to reject but not to propose legislation. This role also highlighted by Karakamisheva-Jovanovska[55] is the same role the ConCourt in Zambia is expected to play as this study has shown. Lech Garlicki[56] argues that the emergence of a separate ConCourt in any Court system may be regarded as one of the most typical features of continental constitutionalism. Further, that it may also be regarded as one of the most successful improvements on the traditional European, parliament-oriented concepts of democracy and rule of law. However, this study does not focus on assessing how well placed the ConCourt is to champion democracy and the rule of law.

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[50] Tanja Karakamisheva-Jovanovska, "Different Models for Protection of Constitutionality, Legality and Independence of the Constitutional Court of the Republic of Macedonia", *in Proceedings of World Conference on Constitutional Justice* (2009), p.1, accessed June 23rd, 2016, https://www.venice.coe.int>WCCJ<Rio<Papers.

[51] Tom Ginsburg & Nuno Garoupa. "Building Reputation in Constitutional Courts: Political and Judicial Audiences," *Arizona Journal of International & Comparative Law: 28 No. 3* (2011), p. 539.

[52] Ginsburg & Garoupa, "Building Reputations in Constitutional Courts," p.540.

[53] Ginsburg & Garoupa, "Building Reputations in Constitutional Courts," p.540.

[54] Ginsburg & Garoupa, "Building Reputations in Constitutional Courts," p.540.

[55] Karakamisheva-Jovanovska, "Different Models for Protection of Constitutionality", p.1.

[56] Lech Garlicki, "Constitutional Courts verses Supreme Courts", *Oxford Law International Jnl. of Constitutional Law 5, Issue 1* (2007): pp. 44-68. http://icon.oxfordjournals.org/content/5/1/44. Accessed on August 16th, 2016.

In analysing the jurisdiction and institutional framework of the ConCourt, the starting point has been the Zambian Constitution. This is because, as pointed out by Maruste,[57] there cannot be a Constitutional Court without a Constitution; this is more so that, the main role of the ConCourt is to ensure that the Constitution is enforced.[58] According to Cheema, important elements for the institutional framework of the ConCourt include security of tenure with effective procedures for performance, evaluation and promotion, length of tenure (life tenure and fixed term) and the framework of the judiciary, including adequate budget and the role of private lawyers and bar associations. [59]The study has attempted to assess the composition, jurisdiction and power of the ConCourt of Zambia in line with Maduna's study, except that the former focused his thesis on the Constitutional Court of South Africa.[60] The jurisdiction of the ConCourt was also dealt with in part by Silungwe[61] and Sakala[62] who write about the original and appellate jurisdiction of the ConCourt of Zambia. The study has also drawn on the work of Loots and Marcus, [63] whose research is in part on the jurisdiction of the Constitutional Court of South Africa, as the Zambian ConCourt borrows good practices from that court. Particularly, one such good practice is that the Constitutional Court of South Africa has the jurisdiction to make the final decision regarding constitutional matters. As this study, has shown, this position is like that of the ConCourt of Zambia.

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[57] Raite Maruste, "The Role of the Constitutional Court in Democratic Society." *Juridica International Law Review, 1632* (2007): p. 8-13, accessed on June 5th, 2016. http://www.juridicainternational.eu/id.

[58] B. Oagile & K. Dingake, "The Role of the Judiciary and the Legal Profession in protecting the rights of vulnerable groups in Botswana" (2014) in 'Using the Courts to Protect Vulnerable People,' SALC, p.22.

[59] G. Shabbir Cheema, "*Building Democratic Institutions: Governance Reform in Developing Countries*", (2005), (Kumarian Press Inc., USA, 2005) p. 137.

[60] Penuell Mpapa Maduna, "The Impact and Influence of the Constitutional Court in the Formative Years of Democracy in South Africa," (Doctor of Laws Thesis, University of South Africa (1997), accessed June 23rd, 2016. https://hdl.handle.net/10500/18713.

[61] Anell Silungwe, "Original and Appellate Jurisdiction of the Constitutional Court- What Is Envisaged Under Article 128 of The Amended Constitution-Where Do We Draw The Line?" *in Proceedings of 2016 Orientation Workshop of Constitutional Court Judges, Lusaka, 10th -13th May 2016* (Lusaka: Judiciary, 2016), p.13.

[62] Ernest L. Sakala, "*Process of The Constitutional Court as Regards Original and Appellate Jurisdiction And Interlocutory Proceedings." In Proceedings of 2016 Orientation Workshop of Constitutional Court Judges, Lusaka, 10th -13th May 2016* (Lusaka: Judiciary, 2016), p. 18.

[63] C. Loots and G. Marcus, "Jurisdiction, Powers and Procedures of the Court" p. 31, accessed on 12th September 2016, https: www.chr.up.ac.za/chr.

This study also endeavours to examine the institutional frameworks of other established courts in Zambia, so as to determine whether the challenges faced by those courts are likely to spill over to the newly established ConCourt.[64] Some of these challenges, including poor infrastructure, economic hardships and political intolerance by government, are brought out by Muna Ndulo's article.[65] According to Epstein, Knight and Shvetsova,[66] if the institutional frameworks of the ConCourt are adequate, the Court would not only be successful in carrying out its role as alluded to, but would also be able to elevate democracy. To be specific, the court may in fact contribute to the development of a politically active civil society as well as promote good governance, accountability and the rule of law in the country. This view is corroborated by Hatchard, [67] who focuses on procedures for amending Constitutions in Commonwealth Africa. However, this study's focus is not the subject of democracy in its strict form but rather, the Constitutional Courts role in a democratic society, particularly, the ConCourt. [68]

The study also draws on the work of Conrado Hübner Mendes, who in part looks at the institutional design of constitutional courts.[69] The study argues that if the institutional framework of the ConCourt is adequate, then other concepts relevant to the life of the court could be better embraced. Some of these concepts include judicial independence as elaborated by Kunda[70] According to Kunda, the Judiciary of Zambia should only be guided by the very principles of independence of the judiciary. On the aspect of the institutional

[64] Ndulo and Robert Kent. "The Constitutions of Zambia," pp. 1-28.
[65] Muna Ndulo, "The Democratic State in Africa: The Challenges for Institution Building." *Zambia Law Journal 31* (1999), p. 39.
[66] Lee Epstein, Jack Knight and Olga Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," *Law & Society Review, 35,* No. 1 (2001), pp. 117-164, accessed June 23rd, 2016. https://books.google.co.zm/books.
[67] J. Hatchard, "Perfecting Imperfections: Developing Procedures for Amending Constitutions in Commonwealth Africa," *The Journal of Modern African Studies 36* (1998):381, accessed June 23rd, 2016, https://www.books.google.co.zm.
[68] See objectives of the study in the latter pages of this work.
[69] Conrado Hübner Mendes, "Deliberative Performance of Constitutional Courts" (Ph.D. Thesis, University of Edinburgh, 2011), pp.165-200, accessed June 11th, 2016. https://www.era.lib.ed.ac.uk.
[70] George Kunda, "The Zambian Judiciary in the 21st Century." *Zambia Law Journal, 30* (1998): 29-50.

framework of the judiciary, Kunda has given an enlightening account of the office of Judge, particularly on the appointment, removal and emoluments of a Judge. Kunda argues further that as the judiciary is an important organ of the government, it must be an important priority for the executive and legislature which control the running of government and its resources. These are some of the issues that this study has considered in its analysis of the institutional framework of the ConCourt. Furthermore, on the point of the need for adequate resources in the judiciary, Mzikamanda[71] argues that resources for the judiciary are often under the control of the executive. As such, problems arise when justice is starved of resources at the expense of other matters which the Executive consider a priority.

While the principle of judicial independence is Kunda's main argument[72], it is worth considering that judicial independence is not always a case of design but one of judicial activism[73] as proposed by Evan.[74] Judicial activism believes that judges assume a role as independent policy makers or independent "trustees" on behalf of society that goes beyond their traditional role as interpreters of the constitution and laws.[75] However, it is possible that the Columbian Constitutional Court may have succeeded in advancing its judicial independence in the manner advanced by Evan, owing to the environment created by its institutional framework and jurisdiction which are important to the existence of a court (as this study has shown). Furthermore, as the work of Monteleagre[76] shows in part, the Columbian Constitutional Court's jurisdiction through the power of *'Tutela'* has rendered

[71] Rizine R. Mzikamanda, 'Constitutionalism and the Judiciary: A perspective from Southern Africa', p.14 https://www.justice.gov.za>alraesa>conferences. Accessed on 12th September 2016.
[72] George Kunda, "The Zambian Judiciary in the 21st Century." *Zambia Law Journal, 30* (1998): 29-50.
[73] As has had to be done by the Russian Constitutional Court. See: Bill Bowring, "The Russian Constitutional Court," New Law Journal 143 (1993): 682.
[74] Landau, David Evan, "Beyond Judicial Independence: The Construction of Judicial Power in Colombia", Ph.D. Thesis (Harvard University, 2015) accessed, June 11, 2016. http://nrs.harvard.edu/urn-3:HUL.InstRepos:14226088.
[75] Available at https://definitions.uslegal.com/j/judicial-activism/, accessed on 11/12/2016.
[76] Evalrado Lempere Monteleagre, "When Accountability Meets Judicial Independence: A Case Study of 2008 Civil Society Transparency Observation of the Colombian Constitutional Court's Nominations", Masters Dissertation (University of Stanford 2009), accessed June 30th, 2016, https://www.law.stanford.edu>publications.

itself highly effective in carrying out its mandate. *Tutela* is a procedural device which allows an individual to complain without the aid of a lawyer to any judge with jurisdiction over a dispute.[77]

Regarding the power conferred upon the Colombian Constitutional Court, Nagle argues that when regarded retrospectively, the power given to the court appears to have been ill-conceived and poorly orchestrated. However, while the Columbian Constitutional court has the benefit of hindsight, the Zambian ConCourt does not. This study therefore analyses the institutional framework of the court and its jurisdiction with a forward looking approach in order to make recommendations where appropriate.

The argument advanced by Macmillan that delays in delivery of judgments impede access to justice is also worth considering.[78] This is because if the jurisdiction with which the ConCourt is conferred is inappropriate, delays in delivery of justice may be the result. Thus, this study has explored if the jurisdiction of the ConCourt is appropriate in that regard.

One of the main arguments advanced in this study is that if the ConCourt's jurisdiction is appropriate, and the institutional framework adequate, then the ConCourt may attain a certain level of success in achieving its role. This is more so because, as Martin Shapiro[79] argues, to have a Constitutional Court does not necessarily mean that it would be successful. The author argues that success is difficult to define or measure and proceeds to define and measure success of a Constitutional Court in the confidence public institutions; private institutions as well as individuals have in its judgments. However, this study will argue that success is in

[77] Available at https://www.equalrightstrust.org/ertdocumentbank/Legislating%20colombia, Accessed on 30th December, 2012.
[78] Joyce Shezongo-Macmillan. *Zambia: Justice Sector and the Rule of Law, The Open Society Initiative for Southern Africa* (2013), p. 105.
[79] Martin Shapiro, "Some Conditions for the Success of Constitutional Courts" (2002), accessed on June 4th, 2016, https://www.springer.com.

part defined by the adequacy of the court's institutional framework and the appropriateness of its jurisdiction.

The study argues that other African countries also have their own constitutional courts or a semblance of it as a part of their court system. For instance, regarding the competence of the South African Constitutional Court, Chaskalson[80] points out that the 1996 Constitution of South Africa provides that the court may decide only constitutional matters and issues connected with decisions on constitutional matters. A constitutional matter "includes any issue involving the interpretation, protection or enforcement of the Constitution."

Since law or conduct inconsistent with the Constitution is invalid, and obligations imposed by the Constitution must be fulfilled, any breach of the Constitution is justiciable. Further, the Constitution also requires the common law and customary law be developed and all legislation be interpreted to "promote the spirit, purpose and objects of the Bill of Rights". Constitutional matters thus cover an extremely wide field. Similarly, the latter Chapters of this study will show that the ConCourt of Zambia is clothed with extensive powers that include the interpretation, protection or enforcement of the constitution. The study will also show that the ConCourt of Zambia can learn some lessons from the South African experience.

1.10 Methodology

This study employs a qualitative approach. This is because a study of this nature requires detailed descriptions and prose which a quantitative study could not provide.

[80] Arthur Chaskalson, "Constitutional Courts and Supreme Courts: An analysis with Particular reference to the South African experience", available at https://www.ecln.net/elements/conferences/,p.106.

(I) Research Design

The research design follows a doctrinal technique. To describe a doctrinal legal research as qualitative recognises that law is reasoned and not found.[81] Such an approach takes into account the nature of the law which is that it cannot be objectively isolated.[82] In this regard, the research involved a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding the social context and interpretation, with a view to answering the specific research questions posed by the study.[83]

(II) Data Collection

In this study, both secondary and primary data was collected.[84] In order to ensure accuracy of research methods, research techniques and findings, the study used the concept of triangulation.[85] Triangulation is rooted in the view that employing two or more ways or perspectives of examining or analysing a problem is better than using only one.[86] The main objective of this concept is deepening, widening or broadening the scope and paradigms of producing knowledge.[87] The concept involves comparison, use of multiple methods and cross-checking of variables as a means of maximising chances of data validity and accuracy.[88]One of the means of triangulation is to use two or more data bases. Thus, based on this concept, the study used different methods of data collection, including analysis of documents, interviews and researcher participant. Secondary sources of data from the libraries of the University of Zambia (UNZA), Supreme Court and National Assembly were consulted to provide a starting point and to get a theoretical framework of the study. Articles of peer reviewed journals, textbooks, conference proceedings, reports and internet materials were

[81] Mike Mc Conville and Wing Hong Chui, Research Methods for law (Edinburgh: University Press, 2007) p.22.
[82] Mc Conville and Chui, *Research Methods*, p.22.
[83] Mc Conville and Chui, *Research Methods*, p.40.
[84] Sophie Kasonde-Ng'andu, *Writing A Research Proposal in Educational Research*, p. 45.
[85] Andrew Chiponde Mushingeh, *Basic Steps in Conducting Qualitative Research: A Manual for Students & Researchers*. (Ndola: Mission Press, 2007), p. 65.
[86] Mushingeh, *Basic Steps*, p. 65.
[87] Mushingeh, *Basic Steps*, p.65.
[88] Mushingeh, Basic Steps, p. 65.

also consulted. These provided support for primary sources, ground for comparison, gauging and defining the topic, which was in a novel area of constitutional law in Zambia. The research was done with a view of contributing to the body of knowledge on this subject.[89]

Since doctrinal research is based on authority and hierarchy[90], primary data was collected from legislation and case law. It was also collected using semi-structured interviews, informal discussions and direct observations with key respondents, who included Judges, Constitutional Law experts, a Civil Procedure expert, the Law Association of Zambia (LAZ) and the Judiciary. The selection of key informants was driven by the need to collect relevant data from those directly involved in constitutional law in Zambia. Consent was obtained from the respondents before being interviewed and they were urged to be forthcoming and free. Primary data was secured by means of tape recording with a micro-cassette recorder, and transcription and coding of data. This was done to allow for smooth flow of the interviews and accurate reporting of the results. For interviews, an interview schedule was prepared to guide the discussions, and this assisted in data coding and in determining the main responses of the participants.

(III) Sampling

The respondents were selected using purposive sampling to be efficient. In this method, the researcher purposively targeted a group of people believed to have common characteristics and possessing special insights into the issues under study.[91] The power of purposive sampling lies in selecting respondents with rich information for in-depth analysis related to the focal issues being studied. Thus, only key respondents relevant to the study were selected as they were expected to have special knowledge about the study.

[89] Mc Conville and Hong Chui, Research Methods for law, (Edinburgh: Edinburgh University Press 2007) p. 32.
[90] Mc Conville and Chui, Research Methods, p.23.
[91] Kasonde-Ng'andu, Writing A Research Proposal in Educational Research, p. 41.

(IV) Data Analysis

Thematic and content analysis was used. In this regard, the relevant information to the research objectives and questions was identified. The related themes were categorised, and a coding system was developed, after which the coded materials were placed under the major themes. The frequency with which the theme description appeared was used to interpret the importance or attention attached to it by the respondents and to determine the main themes of the study.

1.11 Outline of Chapters

This study is divided into five chapters. Chapter Two is an analysis of the various models of constitutional jurisdiction in existence. Chapter Three of the analyses the concept of jurisdiction as conferred on the ConCourt by the Constitution. Other relevant constitutional provisions are also examined in this regard. The Chapter also comments on the Bill of Rights, *vis a vis* the ConCourt.

Chapter Four examines the institutional framework of the ConCourt. Particularly, the study considers the rules of the court, the hierarchy of the courts, the appointment and removal of the judges, the appointing authority, support staff and the institutional framework of the ConCourt and ends with a summary. Chapter Five is a recapitulation of the main points of the study and the recommendations thereof.

1.12 Summary

In analysing the jurisdiction and institutional framework of the ConCourt, it is important that the study should give the historical background of the Court to appreciate the factors which necessitated its creation. This is what the study has done in Chapter one. It has also given a statement of the problem to enable the reader to understand the issues which the study has addressed. Similarly, the purpose and rationale of the study have been outlined. The study has also set out its objectives and the research questions which it sought to answer. Theories supporting the study have also been elaborated. A literature review to show other works done

in relation to the topic has equally been undertaken. The study further involves a systematic explanation of the methodology used in data collection and analysis.

CHAPTER TWO

MODELS OF CONSTITUTIONAL JURISDICTION

2.1 Introduction

The purpose of this Chapter is to analyse some of the dominant constitutional models that are in existence with a view to better understanding the Zambian model of constitutional jurisdiction. The Chapter begins by defining the term 'jurisdiction'. It also explains the dominant models of constitutional jurisdiction in existence after which it narrows into the Zambian model as conferred on the ConCourt.

2.2 Meaning of Jurisdiction

The term 'jurisdiction' is one which lends itself to many meanings. For the purposes of this study, however, the meanings adopted are those used in the context of a court of law. It is important to understand what the term jurisdiction means when used in reference to a court of law before any discussion regarding the constitutional jurisdiction of a particular court can be undertaken. This is because the very use of the word 'jurisdiction' implies the power of the court to adjudicate cases and issue orders. Any court possesses jurisdiction over matters only to the extent granted to it by the Constitution, or legislation of the sovereignty on behalf of which it functions. Therefore, the jurisdiction of a court can be understood to mean the power of a court to decide a matter in controversy and presupposes the existence of a duly formed constitutional court with control over the subject matter and the parties. as derived from statute to exercise its authority over matters that are brought before it.

[1]It can be said that the inherent jurisdiction of a court is the power of each court over its own

process which is unlimited; it is a power incident of all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter of the most careful discretion.[2] The starting point is that a court of law has inherent power to act in a certain manner by its own discretion. The justification for a court's inherent jurisdiction is that it is a necessary part of the armory of the courts to enable them to administer justice according to law.[3] The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers, and free from the restraints of their jurisdiction in contempt and the Rules of Court. Inherent jurisdiction operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice.[4]

However, in addition to the inherent jurisdiction, statute grants the courts of law the power to adjudicate cases and issue specific orders. Therefore, an important question to consider of a court's jurisdiction is if it has the power to preside over a given case. Such a jurisdictional question may be broken down into three components: whether there is jurisdiction over the person (*in personam*), whether there is jurisdiction over the subject matter or *res*[5] (in *rem*), and territorial jurisdiction.[6] Personal jurisdiction, or *in personam* jurisdiction, refers to the power of a court to enter a binding judgment against a person or other legal entity.[7] It is necessary for a court to be able to exercise personal jurisdiction over a party if its orders are to be binding on that party. As for jurisdiction over the subject matter, it refers to the power of

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1 Garner, B.A., & Black, H.C. (1999). Black's law dictionary (6th Edition).
[2]*Cocker v. Tempess*, 151 ER 864 (1841).
[3]Halstead v. Anderson, 1993 CanLII 9038 (SK QB).
[4] Halstead v. Anderson, 1993 CanLII 9038 (SK QB).
[5]A thing (as a property, interest, or status) as opposed to a person that is the object of rights and especially that is the subject matter of litigation. Available at https://www.merriam-webster.com/dictionary/res, Accessed on 13th December 2016.
[6]Legal Information Institute.
[7] Lawnix, accessed on 29th November 2016, available at http://www.lawnix.com/cases/personal-jurisdiction.html.

the court to adjudicate a particular type of matter and provide the remedy demanded.[8] Subject matter jurisdiction is the requirement that a given court has power to hear the specific kind of claim that is brought to that court as authorised by the laws of that jurisdiction.[9] On the other hand, territorial jurisdiction is the authority confined to a bounded space, including all those present therein, and events which occur there.[10]

Other forms of jurisdiction include original, appellate, exclusive, and concurrent and diversity jurisdiction. Original jurisdiction refers to the court's power to hear cases as they are first initiated by a party to an action.[11] Appellate jurisdiction refers to the power of a higher court to overrule or overturn the decisions of a lower court.[12] Exclusive jurisdiction is where a court has complete or total jurisdiction over a territory or a subject matter and is the only court that is authorised to address that matter.[13] Concurrent jurisdiction is the notion that two or more courts might share the power to hear cases of the same type, arising in the same facts.[14] Diversity jurisdiction is the power of Federal courts to hear cases in which the parties are from different states and as such is typical to Federal states.

In Zambia, the Supreme Court has also had occasion to interpret the term 'jurisdiction'. In the case of *Zambia National Holdings and United National Independence Party (UNIP) v. The Attorney General*[15], the appellants sought an order from the High Court to issue an injunction to restrain the respondents from taking possession of the UNIP headquarters during the trial. The issue was whether the High Court could issue such an order despite the provisions of the

[8] Wex Legal Dictionary, accessed on 29th November 2016, available at https://www.law.cornell.edu/wex/subject_matter_jurisdiction.
[9] Wex Legal Dictionary.
[10] Wex Legal Dictionary.
[11] US Legal, accessed on 29th October 2016, available at http://civilprocedure.uslegal.com/jurisdiction/.
[12] US Legal.
[13] US Legal, accessed on 29th October 2016, available at http://civilprocedure.uslegal.com/jurisdiction/.
[14] Legal Information Institute, accessed on 15th August 2016, available at /https://www.law.cornell.edu/wex/jurisdiction/.
[15] (1994) S.J 22.

State Proceedings Act which precluded the court from issuing such an order. Quoting Diplock, L.J., in *Garthwaite v. Garthwaite*[16], the court held that: -

> The expression 'jurisdiction' of a court may be used in two different senses. In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense, the concept embraces also the settled practice of the court as to the way in which it exercises its power to hear and determine an issue which falls within its 'jurisdiction' (in the strict sense), or as to the circumstances in which it grants a particular kind or relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances.

In the same case, the Zambian Supreme Court added that in the one sense, jurisdiction is the authority which a court must decide matters that are litigated before it; in another sense, it is the authority which a court must take cognisance of matters presented in a formal way for its decision. The Court also stated that the authority of each of the courts is stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the court has cognisance or to the area over which the jurisdiction extends, or both.

In this regard, the limits of authority of the ConCourt of Zambia are set out in the Zambian Constitution as shown in the latter parts of this study when we analyse the Zambian ConCourt model of constitutional jurisdiction. However, before an analysis of the same could be undertaken, the study lays out the various forms of constitutional jurisdiction, to distinguish and better understand the Zambian model of constitutional jurisdiction.

[16] [1964] 2 ALL E.R. 233.at pages 241 to 242

2.3 An Insight into Existing Models of Constitutional Jurisdiction

As earlier established, the court exercising constitutional review is a special body which, being the bearer of the protection of constitutionality holds a certain legal superiority in relation to other branches of power.[17] Its review covers all legislative acts that are the highest legal instruments of a specific legal and political system.[18] The status of an institution with the power to provide constitutional review should only be held by an institution that in the specific system of the separation of powers holds such a limiting relation to the legislative power (the parliament).[19] In this way, it may annul statutes adopted by the legislative body.[20] It is a judicial institution established with special and exclusive decision-making powers on constitutional matters and it is located outside the ordinary court system. In this way, it is not regarded as being a part of the judiciary. It is also fully independent of other branches of public authority.[21] There are two dominant models of constitutional jurisdiction, the American Model and the European Model, with variations in certain instances as explained below.

2.3.1 The American Model of Constitutional Jurisdiction

In the United States of America the country is governed by a written constitution which mandates the division of power among the various branches of government, including the legislature, judiciary and the executive.[22] The division of power therefore necessitated the doctrine of judicial review which entailed the courts having the power and obligation to

[17] Arne Marjan Mavcic, "Some Comparative Comments to the Introduction of Constitutional Review in the State of Palestine," *in Proceedings of the European Commission for Democracy Seminar on Models of Constitutional Jurisdiction, Strasbourg, 7th November 2008* (Ramallah, 2008), p.2.
[18] Mavcic, "Some Comparative Comments", p.2.
[19] Mavcic, "Some Comparative Comments", p.2.
[20] Mavcic, "Some Comparative Comments", p.2.
[21] Mavcic, "Some Comparative Comments", p. 2.
[22] Devashri Sinha, "Constitutional Review: Study of American Model", *ILI Law Review*, (2016):158-169 at p.159.

determine the legitimacy of the executive acts and legislative Acts.[23] If laws were found to be contrary to the constitutional principles, they could be declared void.[24] A key feature of the American model is that it gives the authority to all courts to assess the constitutionality of the laws.[25] The power of courts to invalidate laws that infringe constitutional mandate also emanates from the constitution which provides that when there is a conflict between the higher law and the lower law operating in the same field, the higher law should prevail.[26]

2.3.2 European Model of Constitutional Jurisdiction

As has already been stated in the conceptual framework of this study, the European model of constitutional jurisdiction is the invention of Hans Kelsen, who drafted the Austrian Constitution and embodied in it his style of constitutional review.[27] According to Kelsen's theory, parliament requires a separate institution to keep it in check. This institution would also be responsible for interpreting the constitution. According to Teztlaff, Kelsen's primary concern was with the legitimisation of the constitutional court since Austria was coming from a multinational monarchy.[28] The constitutional issues, according to this model, are reviewed and resolved by the constitutional court whose composition includes judges who are qualified to decide on constitutional matters, or by the highest regular courts, or by the special boards within the regular courts that work exclusively on constitutional matters in a separate procedure.[29] In some countries, the composition of constitutional court judges includes

[23] Sinha, "Constitutional Review", p. 159.
[24] Sinha, "Constitutional Review", p.159.
[25] Karakamisheva-Jovanovska, "Different Models for Protection of Constitutionality", p.1.
[26] Sinha, "Constitutional Review", p.159.
[27] Tetzlaff, "Kelsen and Constitutional Review Accord in Europe and Asia," *National Taiwan University Law Review*, volume 1:2 (2006), 77-105 at p. 89.
[28] Thilo Tetzlaff, "Kelsen and Constitutional Review Accord in Europe and Asia," p.78.
[29] Karakamisheva-Jovanovska, "Different Models for Protection of Constitutionality," p.2.

professional legal persons as well.[30] The Constitutional Court serves the purpose of reviewing authority; at the same time it preserves the sanctity of the sovereign state.[31]

2.3.3 Zambian Model of Constitutional Jurisdiction

On 5th January 2016, the Constitution of Zambia was amended by the Constitutional (Amendment) Act No. 2 of 2016. It introduced several new institutions, including the ConCourt. The ConCourt exists within the judicial system as a separate court established to interpret the Constitution and deal with all constitutional matters. From this, it can be deduced that the Court in part fits within the European model of constitutional jurisdiction as proposed by Kelsen. However, while it may have been the intention of the legislators and indeed the Zambian people to have a specialised court, solely dealing with constitutional matters as envisaged, this has not been the case entirely. In a sense, it could be argued that the court does in fact, retain some characteristics of the American model of constitutional jurisdiction.

Firstly, the ConCourt of Zambia is not the only court mandated to deal with all constitutional matters. A key aspect of constitutional review as argued by Kelsen (pointed out in the conceptual framework of this study), is that the constitutional court should be concerned with all human rights issues as they are guaranteed by the constitution.[32] Presently, the High Court of Zambia is still the court with original jurisdiction to deal with all human rights issues which are also dealt with by the Supreme Court on appeal.[33] This issue is considered further in this study in the section dealing with the Bill of Rights *vis a vis* the ConCourt; suffice to state here that the fact that human rights issues are not dealt with by the ConCourt of Zambia. This is different from the European Model where the Constitutional Court is mandated to handle all constitutional issues.

[30] Sinha, "Constitutional Review," p.160.
[31] Sinha, "Constitutional Review," p.161.
[32] Tetzlaff. "Kelsen and Constitutional Review Accord in Europe and Asia," p. 80.
[33] Article 27 (1) and 2 (b) of the Constitution of Zambia.

Secondly, the Zambian ConCourt, unlike the typical European Model, exercises posteriori judicial review, that is, after the act has taken place.[34] This form of judicial review as already established is a main feature of the American Model of constitutional jurisdiction. The study draws the conclusion that while the Zambian ConCourt is modelled largely after the European 'Kelsenian' Model of constitutional review, it departs from the same in certain aspects and adopts elements from the American model of constitutional review. It is therefore the arguable that the Zambian model of constitutional jurisdiction is a hybrid between the American model and the European model.

The ConCourt's jurisdiction consists of both original and final jurisdiction. The Court therefore hears certain matters as a court of first instance and others at appellate level. In determining the original and final jurisdiction of the ConCourt, various arguments had been advanced for and against.

Those for the idea of both original and appellate jurisdiction argued that since human rights were cardinal, the ConCourt should have original and final jurisdiction in such matters, so that cases of gross violation of human rights could be dealt with directly by the ConCourt.[35] Further that since the ConCourt was being established to handle constitutional matters, it should have original and final jurisdiction in such matters. Citing the need to decongest the High Court, some Members of the Constitutional Review Commissions also stated that appellate jurisdiction in appeals arising from the election of Members of Parliament would better serve the ConCourt's purposes.

[34] See: Article 128 (3) of the Constitutional of Zambia.
[35] Final Report of the National Constitutional Conference, 696-698.

Those against the ConCourt having original and final jurisdiction were of the view that the ConCourt ought to have appellate jurisdiction only. The main reason advanced for this was that the Court would be congested if original jurisdiction was conferred on it.

This study argues that since the ConCourt's main purpose is to be a specialist court, dedicated to determining matters arising from the constitution; there is great value in it having both original and appellate jurisdiction. As shown in the latter parts of this study, original jurisdiction would enable the Court to deal with those issues which require expertise and experience in constitutional matters. As a specialist court, the ConCourt's members should be endowed with the necessary qualifications to make them capable of handling constitutional matters. Thus, this study is of the view that the ConCourt would be more effective in handling those constitutional issues which require experience and expertise and do not have the effect of congesting the Court's docket. On the other hand, the study is of the view that appellate jurisdiction is necessary in certain special matters as shown in Chapter three, including those relating to election appeals from Members of Parliament.

2.4 Summary

This Chapter has provided an in-depth analysis of the term 'jurisdiction' from a legal perspective. Further, this study identified the various forms of jurisdiction as American, European and Zambian. From the analysis, the study concluded that the Zambian model of constitutional jurisdiction is a hybrid of the European and American model. In narrowing into the Zambian model of jurisdiction, the study assessed its main characteristics and identified that the Court has both appellate and original jurisdiction. The study noted that the appellate and original jurisdiction are fitting and enable the Court to be effective in carrying out its role of adjudicating over constitutional matters.

CHAPTER THREE

THE JURISDICTION OF THE CONSTITUTIONAL COURT OF ZAMBIA

3.1 Introduction

This Chapter examines in depth the jurisdiction of the ConCourt of Zambia. This is done with a view to determine the various powers of the Court. The study aims to ultimately establish if the Court will carry out its powers effectively. To begin with, the study examines the various powers of the ConCourt as laid out in the Constitution. Not only does the study examine the Court's powers but further looks at other areas which are likely to impact the Court's jurisdiction. This includes an analysis of Article 118 of the Constitution (Amendment) Act No. 2 of 2016, which the court is enjoined to abide by and is likely to affect how the Court carries out its powers. The Chapter also considers the referral aspect of the ConCourt's jurisdiction as referrals are likely to form a large part of the court's docket. Finally, the Chapter analyses the jurisdiction of the ConCourt vis-vis the Bill of Rights since the Bill of Rights is a key part of the Zambian Constitution.

3.2 Jurisdiction of the Constitutional Court of Zambia

As pointed out in the conceptual framework of this study, at the core of the Kelsenian model of ConCourts, is the need to uphold the supremacy of the Constitution. The Constitution, as explained in the Conceptual Framework of this study, is the highest law to which all other laws must align. As such, there is need to ensure that all subordinate laws conform to the superior law, the Constitution. Zambia is a sovereign republic under a constitutional form of governance.[1] Thus on similar grounds, the Constitution of Zambia[2] provides in Article 1 (1) that the Constitution is the supreme law of the Republic of Zambia and that any other written

[1] Article 4 (1) of the Constitution of Zambia.
[2] The Constitution (Amendment) Act No. 2 of 2016.

law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency. To be supreme according to the Oxford Dictionary means to be of highest in rank or position.[3] The effect of this provision therefore is that the Constitution of Zambia ranks highest in authority at all given times and all other laws must be in conformity with it. The issue is one which has long been settled in Zambia, for instance in the case of *Christine Mulundika and 7 others v. The People*,[4] This case established that legislation which is unconstitutional will be invalidated by the courts of law. It concerned a challenge to the constitutionality of certain provisions of the Public Order Act, Chapter 105 of the Laws of Zambia, specifically, section 5 (4) which was viewed as an infringement on the fundamental freedoms and rights guaranteed by Article 20 and 21 of the Zambian Constitution. The Supreme Court held that section 5 (4) of the Public Order Act contravened Articles 20 and 21 of the Constitution and were null and void.[5]

Before the 2016 amendment to the Zambian Constitution, the power to declare laws unconstitutional lay with the High Court of Zambia.[6] Presently, save for the Bill of Rights, all such powers are now within the purview of the ConCourt.[7] This is in accordance with the Constitution (Amendment) Act No. 2 of 2016, which provides in Article 1 (5) that "a matter relating to the Zambian Constitution is to be heard by the Constitutional Court". This Article is important as it is the genesis of the jurisdiction of the ConCourt. By specifically providing that constitutional jurisdiction is a matter for the ConCourt, the people of Zambia expected that a such a court would be formed with appropriate jurisdiction to enable it to carry out its role. This jurisdiction is enshrined in Article 128 (1) of the Constitution which provides that: -

[3] Sally Wehmeier, *Oxford Advanced Learners Dictionary* (London: Oxford University Press, 1972) p1487.
[4] SCZ No. 25 of 1995.
[5] Christine Mulundika and 7 Others v. The People SCZ No. 25 of 1995 at page 31.
[6] See: Article 94 of the Constitution of Zambia.
[7] As per Article 128 of the Constitution.

(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—

(a) a matter relating to the interpretation of this Constitution;

(b) a matter relating to a violation or contravention of this Constitution;

(c) a matter relating to the President, Vice-President or an election of a President;

(d) appeals relating to election of Members of Parliament and councillors; and

(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.

From the provisions of article 128 (1), it can be argued that the ConCourt has both original and appellate jurisdiction. These powers are examined in detail below in order to fully understand whether the ConCourt will be able to carry them out effectively.

3.3 Interpretation of the Original Jurisdiction of the Constitutional Court as conferred by Article 128 of the Constitution

Original jurisdiction refers to a court's power to hear cases as they are first initiated by a party to an action.[8] The importance of this form of jurisdiction is that a court has the benefit of forming its own opinion without having to hear the evidence on appeal through a third party.[9] Therefore, the court is able to observe first- hand the demeanour of the witnesses and analyse the evidence as it is first presented to the court. The importance of a ConCourt of Zambia lies in the need to protect and uphold the Zambian Constitution. As Karakamisheva argues, the ConCourt is a separate body within the Zambian judicial system that serves as a watchdog of the Constitution in a given country, and as a protector of the constitutionality, legality, and the citizens' freedoms and rights within the national legal system.[10] Given this critical role which the court is expected to play, it is not surprising that the bulk of the power with which the ConCourt of Zambia is clothed is original jurisdiction.[11]

[8] US Legal, accessed on 29th October 2016, available at http://civilprocedure.uslegal.com/jurisdiction/.
[9] Interview with Professor M. Munalula at Supreme Court Conference Room, on 1st December 2016.
[10] Karakamisheva-Javanovska, "Different Models for Protection of Constitutionality," p. 1.
[11] See: Article 128 of the Constitution (Amendment) Act No. 2 of 2016.

A perusal of the Constitution as amended by Act No. 2 of 2016 reveals that the ConCourt must exercise original jurisdiction as provided in Article 128 (1) (a) (b) (c) and (e). This concerns matters relating to the interpretation of the Constitution, matters relating to a violation of the constitution, matters relating to the President, Vice-President or election of a president, and whether a matter falls within the jurisdiction of the Constitutional Court respectively.

3.3.1 Matters relating to the Interpretation of the Constitution

At the heart of any constitutional court's powers is the power to interpret the Constitution. On the one hand, a constitutional court makes explicit the principles and mandates implicit in the Constitution and, on the other hand, it establishes a means by which to interpret and harmonise precepts in the Constitution which may appear to be in conflict or even unrelated to each other.[12] The interpretative role of the court has a positive impact in providing general criteria and guidance for the acts of public powers. In this way, the constitutional court defines the meaning of the concepts found in the Constitution and of the general framework within which public powers may act.[13] Through the interpretation of the Constitution, the constitutional court provides the other organs of the state with conceptual tools and criteria for their conduct.[14] To interpret the law, the ConCourt may adopt interpretive decisions which are of two kinds;[15] those which state that law is constitutional as long it is interpreted in a sense to conform to the Constitution and those which state that a particular interpretation of the law is unconstitutional, while all other interpretations consistent with the Constitution are permitted.[16]

[12]Anton La Pergola, "The role and competences of the constitutional court", *in Proceedings Seminar on the role of constitutional courts in the consolidation of the rule of law*, Bucharest, 8-10, 1991.
[13] La Pergola, "The role and competences of the constitutional court."
[14] La Pergola, "The role and competences of the constitutional court."
[15] Maria Dicosola, "Constitutional Adjudication and Interpretation of the Italian Constitution," Available at www.jus.unitn.ii/cocoa/papers/interpretation, Accessed on 20th December, 2016.
[16] Dicosola, "Constitutional Adjudication".

In cases where complexity and uncertainty arise as to what an Act provides in relation to the Constitution, statutory interpretation may be employed by the ConCourt.

The power which the ConCourt is expected to exercise when interpreting cases is that of original jurisdiction. The question to be answered by this study is whether the ConCourt will be effective in interpreting the Constitution by hearing matters as a court of first instance? As already stated by this study, the value in having a ConCourt lies in the fact that there is within such a court, specialisation and capacity to better handle matters relating to the Constitution. In this way, a ConCourt can be said to be the right forum to handle interpretative issues of the Constitution. In Zambia, it was decided that the ConCourt should have original jurisdiction to handle constitutional matters since it was going to be established specifically to handle all matters arising from the Constitution including the interpretation of the Constitution.[17] Other scholars on the subject such as Gentili have argued that if the systems of access to the Con Court are not properly designed, they can have the effect of overburdening the Court due to the high number of applications lodged with the Court.[18] However this study is of the view that the ConCourt is the best forum to handle the interpretation of the Constitution because that is the whole idea behind having an exclusive court to handle constitutional issues as argued by Kelsen.

In interpreting the Constitution, the ConCourt has been enjoined to do so in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles.[19]

It is yet to be seen, how effective the interpretive powers of the ConCourt will be used in comparison to the Courts powers to defend the Constitution against violations or contraventions. To be effective, the Court's interpretation of the Constitution must be seen to be respected not only by the lower courts but the parties to the action. This may pose a

[17] Final Draft on the Review of the Constitution.
[18] Gentili, 'A comparative perspective on Direct Access', p. 709.
[19] See: Article 267 (1) of the Constitution (Amendment) Act No. 2 of 2016 as explained in Steven Katuka (Suing as Secretary General of the United Party for National Development) United Party for National Development (Selected Judgment No. 29 of 2016).

challenge where the other party to the action is the executive and they choose to adopt a different interpretation of a statutory provision from that which the Court has adopted. In the case of *Steven Katuka (Suing as Secretary General of the United Party for National Development) & Law Association of Zambia v. The Attorney General*[20], one of the issues which arose was whether Ministers could continue in office after dissolution of parliament. It was argued by counsel on behalf of the ministers that the relevant constitutional provisions ought to be taken to mean that Ministers, despite parliament being dissolved were to remain in office until the President Elect assumed office. However, the ConCourt was of a different view. Adopting the purposive approach of interpretation, the Court took the view that because Ministers were in office by virtue of their positions as members of Parliament, remaining in Ministerial offices after the dissolution of Parliament would lead to an absurdity. The effect of the Court's decision was that the ministers had to vacate office immediately. This led to both public jubilation and dismay on the part of the Ministers. While the Ministers vacated office, they did not fulfil the other part of the judgment requiring them to repay emoluments for the period that they were in office illegally. They later requested the ConCourt to review its decision. Coincidentally, some of the Ministers whose seats were declared vacant had retained their seats in the general elections held in August 2016 and have since been appointed as Ministers in the present PF government. It remains to be seen how this shall play out since at the time of conducting this study, this case was still in the courts of law. However, the case illustrates some clear ambivalence on the part of the Executive in giving effect to a decision of the ConCourt. If the ConCourt is to carry out its interpretive powers effectively, compliance with its judgments is necessary. This corroborates Shapiro's argument that a Constitutional Court's success is measured by whether the court has achieved

[20] Stephen Katuka (Suing as Secretary General of the United Party for National Development) & The Law Association of Zambia v. Attorney General.

acquiescence in its judgments by other public institutions, private institutions and individuals.[21]

3.3.2 Matters relating to a violation or contravention of the Constitution

The ideas and legal theories of Kelsen and his model of the constitutional court as a negative legislator have influenced the design of specialised constitutional courts around the world.[22] In its origins, this model put the emphasis on the defence of the Constitution as the supreme norm.[23] As the highest law of the state, all the states powers are limited by the Constitution's mandates and organs of the state may only act within the bounds of the competences which the Constitution grants them.[24] As such, a core element of the ConCourt's powers is legislative review. Other powers include the defence of the Constitution from actions, decisions or omissions of those in authority or taken under law. To act beyond the realm of the competences stipulated in the Constitution, would constitute ultra vires conduct, with respect to the Constitution and, thus, the commission of acts which would be legally invalid.[25] This is especially dangerous for the system when these acts are performed by the legislature, passing laws which are contrary to the Constitution. The creation of a ConCourt with the competence to annul unconstitutional laws makes it possible to maintain the principle that all powers are subject to the law while, at the same time, guaranteeing that the law conforms to the Constitution.[26]

In Zambia, the Constitution is explicit that it is the supreme law of the Republic of Zambia and that any other written law, customary law and customary practice that is inconsistent with

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[21] Martin Shapiro, "Some Conditions for the Success of Constitutional Courts" (2002), accessed on June 4th, 2016, http://www.springer.com.

[22] Tom Ginsburg & Mila Versteeg, "Why Do Countries Adopt Constitutional Review?" *Journal of Law*, Economics and Organization 587 (2014):540.

[23] Gabriele Kuscko-Stadhomeyer, Constitutional Review in Austria: Traditions and New Developments, *International Conference dedicated to the 20th Anniversary of the Constitutional Court of Romania*, accessed on 7th December, 2016, available at http://193.226.121.81/events/conferiata/kucksco, p.1.

[24] Kuscko-Stadhomeyer, Constitutional Review in Austria, p.1.

[25] La Pergola, "The role and competences of the constitutional court."

[26] Pergola, "The role and competences of the constitutional court."

its provisions is void to the extent of the inconsistency.[27] The defence of the Constitution can be done by every person in the Republic of Zambia.[28] By virtue of Article 128 (1) (b) the ConCourt is granted the power of legislative review. Of importance to note is that unlike other jurisdictions[29], the ConCourt only has concrete review concerning laws already enacted. This is evident from article 128 (3) which provides that 'subject to article 28, a person who alleges that an Act of Parliament or statutory instrument contravened the Constitution may petition the ConCourt for redress.' The ConCourt cannot therefore review those laws which Parliament is about to enact, also known as priori review. This form of review is useful as it enables the court to block unconstitutional legislation before it comes into effect. This power also promotes efficiency of the ConCourt as the court would not have to wait before it has a pending case before it in order to exercise its authority.

Another typical feature of legislative review in the Kelsenian theory is that a Constitutional Court can exercise abstract judicial review, which is the power of the ConCourt on the request of the federal government or the state government to determine whether a state law or federal law is constitutional. This power would, however, not be appropriate for the Zambian ConCourt as Zambia is unitary state. Therefore, it is the view of this study that the lack of abstract judicial review in the jurisdiction of the ConCourt is appropriate. The study recommends however, for the Court's powers to be extended reviewing even that legislation which is yet to be enacted into law. This would be essential for the promotion of the rule of law especially in a situation where the opposition vote in Parliament is heavily outnumbered by the ruling vote. Most importantly, it will enhance the court's ability to deal with matters relating to a violation or contravention of the Constitution more effectively.

[27] Article 1 (1) of the Constitution (Amendment) Act, 2016.
[28] Article 2 (a) of the Constitution (Amendment) Act, 2016.
[29] In South Africa for instance the ConCourt has power to review bills which threaten to contravene the constitution before they are passed into law.

Apart from legislative review, the defence of the Zambian Constitution may also be from legislation which violates the Constitution and from an action or measure taken under law, as well as from an act, omission, measure or decision by a person or an authority. In hearing matters relating to a violation or contravention of the Constitution, the ConCourt exercises original jurisdiction. This fits into Kelsen's theory of having a ConCourt which is purposefully positioned to defend the Constitution. The study is of the view that original jurisdiction in this regard is necessary as it will assist the Court in its role of defending the Constitution by allowing it first-hand to hear the matters arising. This is more so that it is expected that a ConCourt has individuals with the right set of skills to determine constitutional matters.

3.3.2 Matters relating to the President, Vice President or an election of a President

Article 128 (1) (c) provides that Constitutional Court shall have original jurisdiction to hear a matter relating to the President, Vice-President or an election of the President. These powers are dealt examined by this study in sections 3.3.3.1 -3.3.3.4.

3.3.3.1 The President

In Zambia, executive authority derives from the people of Zambia. The office of the President of the Republic forms part of the executive and the executive authority of the State vested in the President to be exercised directly or through public officers or other persons appointed by the President.[30] In exercising executive authority the President is obliged to do so in accordance with the Constitution. Any violation of the Constitution in this regard is subject to the review of the ConCourt which has the power to review all violations of the Constitution as already discussed.

The Constitution also specifically provides that where the performance of an executive function is expressed by this Constitution to be subject to approval by the National Assembly,

[30] Article 91 (1) and (2) of the Constitution of Zambia.

the National Assembly shall, in the sitting next after receipt of the request for approval, give the approval within twenty-one days of the commencement of the sitting.[31] However, where the approval is not given within the period specified in clause (1), or the National Assembly unreasonably refuses to give an approval as requested, the President shall refer the matter to the ConCourt for hearing and the decision of the ConCourt is final in such a case.[32] The Con Court may decide that the refusal or delay by the National Assembly is justified, in which case the President is to comply with the order of the Court.[33] On the other hand, if the Court takes the view that the refusal or delay is unreasonable, the National Assembly is required to proceed and approve the matter.[34] Here it is clear to see the ConCourt playing a role of go-between for the legislature and the executive and in so doing, upholding the Constitution in accordance with its mandate. The study is of the view that such a role is necessary for the Court to effectively exercise its jurisdiction concerning the office of the president. The study is also of the view that matters from the office of the President as provided by the Constitution are best heard by the ConCourt as a court of first instance so that they are dealt with expeditiously.

3.3.3.2 The Vice President

As for the jurisdiction of the ConCourt over the office of the Vice-President, although Article 128 1 (c) gives the ConCourt original and final jurisdiction to hear a matter relating to the Vice-President, Article 110 (1) of the Constitution which provides for the office of Vice-President does not make a reference to the ConCourt. Despite this, any violation of the Constitution from the office of the Vice-President is amenable to review by the ConCourt. This is progressive since the office of the Vice-President being a high office also requires

[31] Article 94 (1) of the Constitution of Zambia.
[32] Article 94 (2) of the Constitution of Zambia.
[33] Article 94 (3) of the Constitution of Zambia.
[34] Article 94 (4) of the Constitution of Zambia.

expediency in the way its matters are heard thereby justifying the ConCourt's original jurisdiction in that regard.

3.3.3.3 An Election of a President

On 11th August 2016, Zambia went to the polls. A new president was elected and declared as later declared as President- Elect. The result of the election was a close call that saw the President-Elect win with 1,860,877 votes and the Runner up with 1,760,347 votes.[35] Leaving only a gap of 100, 530 votes between them. It was a possibility that a Presidential Election Petition could be filed with the ConCourt in accordance with Article 101 (4) and (5) of the Constitution (Amendment) Act No. 2 of 2016, which provides that: -

> (4) A person may within seven days of the declaration made under clause (2), petition the ConCourt to nullify the election of a presidential candidate who took part in the initial ballot on the ground that: -
> (a) The person was not validly elected; or
> (b) A provision of this Constitution or other law relating to presidential elections was not complied with.
> (5) The Constitutional Court shall hear an election petition filed in accordance with clause (4) within fourteen days of the filing of the petition.
> Article 104 (5) above bestows jurisdiction upon the ConCourt to handle a presidential election petition within fourteen (14) days.

Following the announcement of results of the 11th August 2016 General elections, an Election Petition was filed at the ConCourt registry on 19th August 2016 by the runner up. As this was the first time that the ConCourt was exercising its jurisdiction over a Presidential Election Petition, it was crucial to exercise the said jurisdiction in accordance with the law above. The clock was ticking, and urgency was a necessity. When the matter came up on Monday the 22nd of August 2016 for one of the application hearings, the application was adjourned as the Respondent to the action had not been served of the application itself and of the Petition. The Respondent's therefore had not had an opportunity to respond.[36] What followed was a series

[35] This information is available at https://www.elections.org.zm**,** accessed on 26th December 2016.
[36] Search on the file at Constitutional Court of Zambia Registry on 12th December 2016.

of Applications from both sides leading to time running out. Ultimately the matter was dismissed for want of prosecution. In its ruling, the Court adopted a literal interpretation of Article 104 (5) which provides that an election Petition is to be heard within 14 days from the date that it is filed. The dissenting judgments of Munalula J. and Chibomba J. took a different view. Particularly, Munalula J. had this to say-

> Literal and conservative interpretation of Article 101 (5) is tenable in an abstraction that unshackles the Court from the normal rigour of procedural justice. It also entails interpreting the said provision in isolation and without primary regard for the need to fulfil the purpose of the provision. I am fully aware that the framers of the Constitution were faced with a history of endemic delays in the disposal of presidential election petitions that made a mockery of the process. They wanted a speedy resolution to any future petitions. However, that need for speedy resolution must be tempered by a need to have a hearing. The primary purpose of article 101 (5) is to hear a petition and make one of the pronouncements set out in Article 101 (6) based on a solid finding of both fact and law. If the process of hearing has not been concluded, the stated purpose has not been achieved and complying with a deadline without the intended event having taken place is an absurdity. This view is supported by a purposive interpretation of Article 101 (5) and it is the position which I would have supported. The issue of a presidential election petition is too heavy for a mechanical response by the Court and a well-reasoned decision would have helped heal the nation.

The above view of Judge Munalula emphasises the need to have heard the Petition which what is the Constitution has mandated the ConCourt to do in Article 128 1 (c). To have run out of time to do so whether as a result of a delay on the part of the Court or the parties should have necessitated an interpretation of Article 101 (5) that was not literal but purposive. This study argues that the mandate of the Court in Article 101 (5) is clear and it is to hear presidential petitions therefore to not hear a Presidential Petition based on procedural shortcomings defeats the whole purpose of the Court's jurisdiction in this respect.

The majority Judgment came under attack by a cross-section of members of the public, as well as other legal scholars who bemoaned the lack of a hearing of the Petition. Mbao put it this way: -[37]

[37] Email from Professor Mbao dated 15th December 2016.

> Constitutionalism demands more from the people. As justice Learned Hand stated in his famous Spirit of Liberty speech, 'constitutionalism lies in the hearts of the men and women being governed. When it dies there, no Constitution can save it.

Mbao was of the view that the lack of a hearing failed to uphold constitutionalism.[38] Others, however, held the view that 14 days meant 14 days and that the ConCourt was perfectly entitled to hold as it did.[39] The controversy surrounding the interpretation of Article 105 (4) by the ConCourt calls for a consideration of whether or not the jurisdiction granted to the Con Court to hear the Presidential Petition within fourteen (14) days is appropriate. Firstly, it is worth pointing out that as a Presidential Petition involves the determination of who is to take up the highest office in the Country, it is of absolute importance that the issue be determined by a Court with the specialisation and experience to handle such a technical issue. As already argued, this was the whole point of establishing a ConCourt, to have a separate Court to deal with all constitutional matters. The election of a President is a constitutional matter and as such it is appropriate that the ConCourt deal with the Presidential Election Petition. As it is not desirable that a vacuum be left in the chain of command from the highest office, it is also appropriate that the ConCourt deal with the Election Petition as a court of first instance within a given timeframe. This also gives the Court an opportunity to observe the demeanour of the witnesses and to evaluate the evidence without having to see it through the eyes of a third person; further justifying the ConCourts original jurisdiction.[40]

This leaves the issue of the adequacy or lack thereof of the fourteen (14) day period. As observed by Munalula J., who was a member of the Technical Committee on the Review of the Constitution which recommended the establishment of the ConCourt, the framers of the Constitution were faced with a history of endemic delays in the disposal of Presidential

[38] Email from Professor Mbao.
[39] For example, Professor M. Ndulo and Professor Hansungule held strong views against the C. Court's ruling.
[40] Interview with Prof. Justice Munalula.

Election Petitions that made a mockery of the process and wanted a speedy resolution to any future petitions. This was the rationale or justification for the fourteen (14) day period.

In order to assist the ConCourt to meet the constitutional timeframe and hear the Petition within the 14 day period, this study is of the view that the rules of the ConCourt should be cleaned up to include among other things, the need for immediate service once a Petition is filed and also to do away with interlocutory applications due to the special nature of the proceedings. This will give the parties more time to prepare for the actual Petition hearing and enable the Petition to be determined speedily. Furthermore, there is need for the rules to reflect the need for the full Court and the parties to meet as soon as the Petition is filed in order to determine from the on-set particular preliminary issues which could affect the course of the Petition.[41] Such an approach will guarantee a court driven Presidential Election Petition which would be in the interest of justice. These changes would better equip the court to exercise its powers in respect of Presidential Petitions effectively.

3.3.3.4Whether or not a matter falls within the Jurisdiction of the Constitutional Court

Where any matter arises, which brings into question the jurisdiction of the ConCourt, the Court has jurisdiction to decide whether it is the right forum to hear such a matter. Such a situation arose in the case of *Hakainde Hichilema and Another v. Edgar* Lungu and another[42], where the ConCourt was called to determine whether it had the jurisdiction to consider an issue relating to the Bill of Rights. The Court decided that whereas all matters relating to the Bill of Rights are in the purview of the High Court, the ConCourt is not mandated to refer any matter to a lower court. However, constitutional matters may be referred to it by a lower court. The significance of this power is that it eliminates possible disagreement among the courts where an issue arises which calls into question the jurisdiction of the ConCourt. By

[41] This was the approach taken by the Kenyan Supreme Court in determining the Raila Odinga Petition. It is worth noting that the Kenyan Constitution has a similar provision as the Zambian Constitution and provides that the Petition of ought to be heard and determined within fourteen (14) days.

[42] (Ruling No. 33 of 2016).

allowing the ConCourt to decide on its own jurisdiction, matters are dealt with speedily without protracted delays. Unnecessary delay erodes the public confidence in the judicial system.[43] In this way, it is therefore appropriate that the ConCourt has original jurisdiction so that such matters are not delayed by being heard by other Courts before being heard by the ConCourt. The ConCourt is also better able to carry out its functions and such powers as given the ConCourt are appropriate.

3.4 Interpretation of the Appellate Jurisdiction of the Constitutional Court as conferred by Article 128 of the Constitution

Article 128 (1) of the Constitution confers appellate jurisdiction upon the ConCourt. It has been argued by the study above that appellate jurisdiction refers to the power of a higher Court to overrule or overturn the decisions of a lower court. The advantage with this is that the litigants can appeal a decision which they may not agree with. This point corroborates the views of Constitutional Law Practitioner, Eric Silwamba, who argues that Judges are not infallible and that they may make mistakes and even disagree; in the event of disagreement, a litigant ought to have a right of appeal because majoritarian judgments are not always correct.[44] Appellate jurisdiction was deemed necessary by the drafters of the Constitution in relation to election appeals of Members of Parliament and Councillors as shown below. This was because, it as it was necessary for the ConCourt to not be congested with these appeals which are bulky and would have the effect of overwhelming its docket.

Appellate jurisdiction of the ConCourt is provided in Article 128 (1) d, being jurisdiction to hear appeals relating to election of Members of Parliament and Councillors. This jurisdiction will now be examined in sections 3.4.1 and 3.4.2 below.

[43] Gentili, 'A comparative perspective on Direct Access', p. 723.
[44] Interview with State Counsel Eric Silwamba at Silwamba, Jalasi and Linyama Associates held on 22nd December 2016.

3.4.1 Appeals relating to election of Members of Parliament

The High Court of Zambia has original jurisdiction to hear Petitions relating to Members of Parliament.[45] With the establishment of the ConCourt, the appeals from the High Court relating to these appeals now lie with the ConCourt.[46] After the 2016 general elections, a total of 73 election petitions were heard by the High Court.[47] Of the 73 Petitions which the High Court disposed of, a total of 39 appeals were filed into the ConCourt registry as at 15th December, 2016.[48] Evidently, appeals are bulky matters and it is therefore in order that they are heard by the High Court at first instance and on appeal by the ConCourt. That way, the ConCourt would not be overwhelmed with cases which they would take too long to dispose of, considering that the Court has other matters to hear beside the appeals. Most importantly, by giving the ConCourt appellate powers, the litigant's right of appeal is preserved. In this regard, it can be asserted that the ConCourt will be able to exercise jurisdiction in Parliamentary Appeals in an effective manner.

3.4.2 Appeals Relating to Councillors

Councillors are elected pursuant to Article 153 (1) of the Constitution (Amendment) Act No. 2 of 2016. By virtue of Article 159 (1) of the Constitution (Amendment) Act No. 2 of 2016, the Chief Justice is mandated to establish such number of ad hoc Local Government Elections Tribunals as are necessary to hear whether a person has been validly elected as a Councillor or the office of a Councillor has become vacant. Those aggrieved from a decision of the Local Government Tribunal may appeal to the ConCourt.[49] After the 2016 general elections, over 50 Petitions were heard by the Local Government Tribunal while a total of five (5) appeals were filed with the ConCourt. Concern has been expressed regarding the requirement

[45] Article 73 (1), Constitution of Zambia.
[46] Article73 (3), Constitution of Zambia.
[47] Search conducted at the High Court Registry on 22nd December 2016.
[48] Search conducted at the Constitutional Court Registry on 15th December 2016.
[49] Article 159 (5), Constitution of Zambia.

for appeals from the Local Government Tribunal to lie with the ConCourt.[50] This is because a local government tribunal consists of a Magistrate and two Legal Practitioners.[51] These can hardly be equated to a High Court judge who is required to have, without exception, a minimum of ten (10) years' experience before they can be appointed as Judge.[52] It is thus contended that the judicial system may be compromised by the requirement to have appeals from the tribunals to be heard by the ConCourt.[53] The result may be that while the ConCourt may be effective in carrying out its powers relating to appeals of Councillors, the judicial system would have been compromised in the process. A solution could be to have a constitutional division at the High Court to which these appeals could lie before being heard by the ConCourt. This division would also deal with other constitutional matters which the ConCourt only hears on appeal such as appeals from Members of Parliament.

Apart from the ConCourt's original and appellate jurisdiction, the Zambian Constitution lays down principles by which the Court ought to be guided by. The principles are contained in Article 118 (2) (e); the study shall examine these in the next section.

3.5 The effect of Article 118 (2) (e) on the jurisdiction of the ConCourt

In exercising its jurisdiction, the ConCourt is bound by other laws and the Constitution of Zambia.[54] The Constitution itself has laid down principles by which the Court ought to abide by as it exercises its authority. The ConCourt is mandated to exercise its authority in a just manner that promotes accountability.[55] The Court is also required to ensure that justice is administered without discrimination or delay.[56] In circumstances where compensation is payable, the same must be adequate.[57] Furthermore, alternative forms of dispute resolution, including traditional dispute resolution mechanisms would be promoted so long as they do

[50] Interview with State Counsel Silwamba.
[51] Article 159 (2) of the Constitution of Zambia.
[52] Article 141 (1) (d) of the Constitution of Zambia.
[53] Interview with State Counsel Silwamba.
[54] Article 119(1), Constitution of Zambia.
[55] Article 118 (1), Constitution of Zambia.
[56] Article 118 (2) (a) and (b) of the Constitution of Zambia.
[57] Article 118 (2) (c) of the Constitution of Zambia.

not contravene the Bill of Rights, or be inconsistent with other provisions of the Constitution or other written law, or be repugnant to justice and morality.[58] The Court is also required to protect and promote the values and principles of the Constitution.[59] In accordance with Article 118 (2) (e), the ConCourt is further enjoined to administer justice without undue regard to procedural technicalities. One of the issues worth considering is that the ConCourt is a court of record which must follow prescribed processes and procedures.[60] In this way, it must consider Article 118 (2) (e) by following the said prescribed processes and procedures without undue regard to procedural technicalities. This provision may prove problematic as litigants may rely on it unnecessarily as an excuse for flouting court processes and procedures.

The issue is one which the ConCourt had to consider in part, in the case of *Henry M. Kapoko v. the People*[61]. In that case, it was argued by the Applicant that since the passing of Article 118 (2) (e), the rules in sections 207 and 208 of the Criminal Procedure Court ('CPC') prescribing that an accused person's testimony must precede that of his witnesses, need not be adhered to. The rigid adherence to the rules offends Article 118 (2) (e) and hindered enjoyment of the right to fair trial. In response to this, the respondent argued that procedural rules and even technicalities are part of the legal system and are there in order to facilitate the administration of justice. The ConCourt held that Article 118 (2) (e) is mandatory and of general application in the administration of justice and all courts are bound by it. In giving its meaning, the ConCourt held that given the multiplicity and range of issues that the provision would come up against in the future, the ConCourt was constrained to give the provision a meaning which would enable future delivery of justice, the protection of human rights or the

[58] Article 118 (2) (d) and Article 118 (3) of the Constitution of Zambia.
[59] Article 118 (3) (a), (b) and (c) of the Constitution of Zambia.
[60] Article 120 (2) and (3) (a) of the Constitution of Zambia.
[61] 2016/CC/0023.

growth of the law in line with the values and principles that bring the Constitution to life. In this regard, the ConCourt was of the view that Article 118 (2) (e) cannot be treated as a 'one size fits all' answer to all manner of legal situations. That Article 118 (2) (e) is a guiding principle of adjudication framed in mandatory terms. It is a basic truth applicable to different situations. Further that, the Article's beneficial value is achieved well if it is applied in an eclectic fashion depending on the nature of the rule before it. Further, that Article 118 (2) (e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities but, is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to technicalities.

The ConCourt found that Article 118 (2) (e) is relevant to the administration of rules because our Constitution is the means of ensuring the validity, and to a large degree, the legitimacy of all our rules. The Court referred to Kelsen's theory of a legal order as a system of legal norms derived from the basic norm. This is the theory on which this study is anchored. The Court also referred to the case of *NFC Africa Mining Plc. v. Techro Zambia Ltd*[62] where the Supreme Court affirmed that rules of the Court are intended to assist in the proper and orderly administration of justice.

This study agrees with this interpretation of the ConCourt with respect to Article 118 (2) (e) because with this interpretation, the Court will consider the circumstances of each case before deciding whether the rule in question can indeed be done away with as a procedural technicality. The important point to note here is that the rule is not intended to do away with existing rules even where the same are necessary for the orderly administration of justice.

3.6 The Jurisdiction of the ConCourt as regards Referrals

It is provided in Article 128 (2) of the Constitution (Amendment) Act No. 2 of 2016 that subject to Article 28 (2) of the Constitution, where a question relating to the Constitution arises in a Court, the person presiding in that Court should refer the question to the ConCourt.

[62] SCZ No. 22 of 2009

This is the basis on which all other Courts in Zambia are obliged to refer Constitutional questions to the ConCourt. The importance of a referral procedure as provided in the Constitution lies in the need to have a specialised court dealing with all Constitutional issues. In Zambia, it has been pointed out that the rules of the ConCourt have not adequately covered the procedure for referrals to give detailed guidelines on how best referrals can be handled.[63]

It is also important to learn from South Africa' experience on how referrals can be handled in an efficient manner. When the Constitutional Court of South Africa was first established, the other courts did not adjudicate matters of constitutionality. If such a matter arose in the provincial and local divisions of the Supreme Court, it had to be referred to the Constitutional Court.[64] Similarly, the Appellate Division was required to dispose of appeals without deciding the constitutional issues if that where possible.[65] If that could not be done, the Appellate Division had to refer the constitutional issues to the Constitutional Court for decision.[66] Since there are not always clear boundaries between the constitutional issues and the other issues in such cases, the importance of the constitutional issues to the outcome of the appeal might only have become apparent once argument on issues within the jurisdiction of the Appellate Division had been heard.[67] In that event the appeal would have to be interrupted and the constitutional matter would be referred to the Constitutional Court.[68]

The problem was that if evidence on the merits was relevant to the determination of the constitutional issue, two courts might have to consider the same evidence for different purposes and possibly come to different conclusions on the weight to be given to it.[69] The

[63] Interview with Prof. Justice Munalula.
[64] Penuell Mpapa Maduna, "The Impact and Influence of the Constitutional Court in the Formative Years of Democracy in South Africa," Doctor of Laws. Thesis, University of South Africa, p.157 (1997), accessed June 23rd, 2016. http://hdl.handle.net/10500/18713.
[65] Chaskalson, "Constitutional Courts and Supreme Courts," p.17.
[66] Chaskalson, "Constitutional Courts and Supreme Courts," p.17.
[67] Chaskalson, "Constitutional Courts and Supreme Courts," p.17.
[68] Chaskalson, "Constitutional Courts and Supreme Courts", p.17.
[69] Chaskalson, "Constitutional Courts and Supreme Courts", p.17.

result was that the referral procedures led to the interruption of hearings, inconvenience to the parties and incurring of unnecessary costs.

As a solution, when South Africa passed its 1996 Constitution, in place of the referral system, it adopted a procedure designed to ensure that the South African ConCourt controls declarations of invalidity concerning provisions of an Act of Parliament, a Provincial Act or conduct of the President.[70] Currently, the 1996 Constitution provides that any such order of invalidity made by the Supreme Court of Appeal, a High Court or a Court of similar status must be referred to the ConCourt for confirmation.[71] Pending confirmation, such order has no force. An order dismissing the constitutional challenge does not have to be referred, but an aggrieved party is entitled to appeal against the order.[72] It enables cases to be disposed of in the lower courts without interruption, and allows the Constitutional Court to draw on the expertise of other Courts before making a final decision on the validity of provisions of Acts of Parliament or a Provincial Legislature and the conduct of the President.[73]

In the Zambian context, there is need to take another look at the referral provision to make it more efficient. This could be done by providing detailed rules in the Constitutional Court Rules to provide strict timelines within which Referrals can be determined by the Constitutional Court. Furthermore, a Constitutional issue/question ought to be specifically pleaded so that a Judge of the lower court can refer the matter to the ConCourt for determination before the main matter can be heard. This will avoid conflicts in the decisions of the two Courts since the Judgment of the lower court must align with the ConCourts resolve of the constitutional issue/question.

This study argues that Zambia cannot adopt the South African model referring constitutional matters only on a confirmation basis. This is because as already noted by this study, it is

[70] Chaskalson, "Constitutional Courts and Supreme Courts", p.18.
[71] See: Constitution Seventeenth Amendment, 2012.
[72] Chaskalson, "Constitutional Courts and Supreme Courts", p.18.
[73] Chaskalson, "Constitutional Courts and Supreme Courts", p.18.

preferable that the Constitutional Court return original jurisdiction to hear constitutional questions except in the limited circumstances where it exercises Appellate jurisdiction. However, the South African experience shows that the referral jurisdiction of the ConCourt is an area which deserves further consideration.

3.6 The Bill of Rights and the Constitutional Courts Jurisdiction

A Bill of rights is a written declaration, charter or instrument which sets out the standards upon which states or institutions, whether political or judicial, undertake to protect and promote individual or group rights and freedoms.[74] It can be used to protect individuals in a state against possible abuse of human rights by all-powerful and intolerant governments, which even the judiciary, might have no courage to control.[75] The Zambian Bill of Rights is contained in Part III of the Constitution of Zambia. It has remained in Part III since independence.[76] It is titled 'Protection of Fundamental Rights and Freedoms of the Individual.' The rights run from Article 11 to 26 inclusive.[77] The Zambian Bill of Rights has been in existence since 1963 when it was incorporated in the constitution of Northern Rhodesia which became Zambia a year later.[78] Protective Sections 1 to 13 inclusive in the Northern Rhodesia Constitution of 1963 were reproduced verbatim in the subsequent constitutions of Zambia as Articles 11 to 23 inclusive.[79]

In terms of Kelsen's theory of a Constitutional Court, there is a remarkable restriction in Kelsen's support for a constitutional court; although he suggests on the one hand that constitutional review is part of any order of a state that claims to be a legal entity, he only seems to have matters such as competences, the electoral system and so on in mind as matters

[74] Julius Bikiloni Sakala, "The Role of the Judiciary in the Enforcement of Human Rights in Zambia" (2013), Image Publishers Ltd., Lusaka, p. 56.
[75] Sakala, "The role of the Judiciary." P.56.
[76] Sakala, "The Role of the Judiciary. P.57.
[77] Constitution of Zambia Act as amended by Act No. 18 of 1996.
[78] Sakala, "The Role of the Judiciary". P. 57.
[79] Sakala, "The Role of the Judiciary." P. 57.

for review. In contrast, Kelsen feared that a review of constitutional human rights could carry a constitutional court too far into politics.[80] This can be accepted as a statement against cataloguing human rights in constitutions[81], a view which is shared by Kulusika.[82] However, once human rights are embedded in the Constitution it follows that they must be used as a benchmark for constitutional review; otherwise they would either not be considered enforceable law in the same way as other provisions of the Constitution are.[83] This would be inconsistent with the doctrine of the hierarchic structure of norms, or it would leave the human rights elements of a Constitution to a different jurisdiction.[84] It is certainly not what Kelsen would have intended since control of the legislature would only be complete if the court is responsible for reviewing its adherence to all constitutional issues. The conclusion must be that if a Constitution contains human rights they must be enforced through the same procedure as are all the other provisions of the Constitution.

This study argues that the creation of a separate ConCourt would among other things, improve the protection of human rights. This role has been carried out by the High Court of Zambia (hereinafter HCZ) and the Supreme Court of Zambia (hereinafter SCZ) who have dealt with some notable human rights cases including the cases of *Kachasu v. Attorney General (1967) Z.R. 145*[85] *and Sarah Longwe v. Intercontinental Hotels (1992) HP 265*[86]. However human rights cases fell as part of the ordinary docket of the HCZ and the SCZ and were mixed with other ordinary cases. It was agreed by the drafters of the Constitution that a specialised Court in the area of human rights would be valuable to the Zambian court system. The value would be that

[80] Tetzlaff, "Kelsen and Constitutional Review Accord in Europe and Asia." P. 93.
[81] Tetzlaff, "Kelsen and Constitutional Review Accord in Europe and Asia." P. 93.
[82] Phone Interview with Kulusika.
[83] Tetzlaff, "Kelsen and Constitutional Review Accord in Europe and Asia." P. 93.
[84] Tetzlaff, "Kelsen and Constitutional Review Accord in Europe and Asia." P. 93.
85 The Supreme Court decided at page 166 that A regulation requiring pupils in Government schools to sing the national anthem and to salute the national flag, and a regulation giving the head of a school the power to suspend for failure to do so, are both reasonably justifiable in undemocratic society.
[86] Ms. Longwe was denied entry into a hotel bar on the basis that she was not accompanied by a male. The Court held that Ms. Longwe's constitutional right to protection from discrimination on the ground of sex had been violated.

the ConCourt would be solely focused on human rights law and constitutional law and this would deepen the jurisprudence in the two areas of the law.[87] This would be achieved by the Court gaining experience in judgment writing in the area of human rights due to the opportunity to focus on human rights and constitutional law. Having a specialised Court hearing human rights issues would also greatly increase the experience of the ConCourt in these two areas, such that they would be able to dispose of human rights issues more effectively and expediently.[88] This is more so that human rights issues are highly technical and require a certain level of expertise in order to be well handled.

For the ConCourt to assume jurisdiction over the Bill of Rights, it was necessary to amend Article 28 (1) of the Constitution of Zambia requiring that the enforcement of Bill of Rights fall under the jurisdiction of the High Court. It has been proposed that where there has been a contravention of the Bill of Rights, a person may apply for redress in the ConCourt or any other court which the person has access to.[89] Since the Bill of Rights is an entrenched part of the Constitution and can only be amended by a referendum,[90] the proposed Bill of Rights was put to a referendum vote on 11th August, 2016. The vote failed and the Bill of Rights therefore remains unchanged. This study argues that the reason that the referendum vote failed was because of political interference since the vote was carried out at the same time as the general elections. Therefore, political campaign messages could have overshadowed the referendum message. This could have ultimately contributed to the failed referendum vote as many Zambians may not have appreciated the importance of the referendum as a tool to enhance the enforcement of the Bill of Rights. [91]

87 Interview with Justice Palan Mulonda, Constitutional Court, Lusaka (17th August 2016).
88 Interview with Justice Mulembe, Constitutional Court, 7th August 2017.
89 Article 57 (1) of the proposed amendment to the Bill of Rights. 2016.
90 See Article 79 (3) of Constitution of Zambia.
91 The Constitution of Zambia.

Under the Constitution, the enforcement of the Bill of Rights is provided for under Article 28 (1) and (2).[92] It provides in part as follows:

> 28. (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-
>
> (a) hear and determine any such application;
> (b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);
> (2) (b) Any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court.

The above provisions are to the effect that the enforcement of the Bill of Rights in Zambia lies with the High Court of Zambia as a court of first instance and on appeal with the Supreme Court. This position is supported by Article 128 (1) of the Constitution (Amendment) Act No. 2 of Zambia which subjugates Article 128 (1) to Article 28 of the Constitution. Article 128 (1) provides that the ConCourt has original and final jurisdiction to hear matters relating to the Constitution.[93] The provision has been interpreted by the ConCourt of Zambia as follows: -

> It is our firm view that matters under the bill of rights lie with the High Court. Article 267 of the Constitution provides that constitutional provisions must be interpreted in accordance, not only with the Bill of Rights, but also in a manner that promotes the values and purposes of the constitution.[94]

It is this study's argument that issues pertaining to the Bill of Rights ultimately ought to be decided by the ConCourt since it is a specialised court tasked with hearing constitutional matters. According to Justice Mumba Malila, a Constitutional Law writer, the manner that the current Constitution is structured, the intention was that the ConCourt would have among its

[92] Constitution of Zambia.
[93] See Article 128 (1) of the Constitution of Zambia.
[94] Hakainde Hichilema & Geoffrey Bwalya Mwamba v. Edgar Chagwa Lungu, Inonge Wina, E.C.Z and the Attorney General 2016/CC/0031.

functions the role of adjudicating on the Bill of Rights.[95] Malila argues that, human rights are better protected if they are in the Constitution.[96] This study argues further that the ConCourt is the appropriate forum to deal with issues of the Bill of Rights because the court is a specialised court with men and women who are especially trained or experienced in the area of human rights issues and constitutional law. Hence, the promise to have the court deal with the Bill of Rights was well intended as it was since the court would have exceptional men and women dealing with the Bill of Rights. The study notes that it would be preferable if matters of Human Rights are dealt with by the ConCourt since they are provided in the Constitution.

Malila stated further that Article 28 (1) of the Constitution is a procedural provision rather than a substantive jurisdictional provision. The Respondent added that on this basis the ConCourt can in fact use Article 128 (1) of the Constitution to interpret a matter of the Bill of Rights. This view is corroborated by Kulusika, a constitutional law academic, who is of the view that in the process of interpreting constitutional issues, the court will determine whether the High Court has proceeded correctly or incorrectly regarding issues to deal with the Bill of Rights and then give directions to the High Court.[97] Kulusika, however, advocates that human rights issues should remain the purview of the High Court and not be heard by the ConCourt as a court of first instance. In his view, human rights issues are not per se constitutional issues but are only enshrined in the Constitution for convenience. He argues that various technical issues would arise in the determination of a human rights violation which would be better handled by a single judge of the High Court and then determined by the Supreme Court on Appeal. Thereafter, any matter of interpretation which hinges on the Constitution would be handled by the ConCourt. He further argues that such a system would preserve a parties' right of appeal. This study agrees with this position because there would be value in having a

[95] Interview with Mumba Malila, Supreme Court Chambers dated 21st December 2016.
[96] Interview with Malila.
[97] Phone Interview with Dr. Simon, Kulusika on 21st December 2016.

constitutional division at High Court level to handle constitutional and human rights issues whose appeals would lie to the ConCourt.

On the issue of the ConCourt dealing with human rights issues as a court of first instance, Justice Malila agrees that the ConCourt ought not to deal with Human Rights issues as a court of first instance because of the nature of a court of first instance.[98] The Respondent points out that the nature of the ConCourt sitting at the apex puts it in a bad state to deal with matters routinely as a court of first instance since when fully operational, the Court would have 13 judges, to have matters involving the collection of evidence by a minimum of 3 persons and a maximum of 13 is a difficult task which may result in procedural difficulties.

This study also agrees with Justice Malila's position on this issue because it would indeed be cumbersome to have if the ConCourt sitting as a full court was involved in the collection of evidence to determine the violation of human rights as a court of first instance. Going forward, this study hopes to see a ConCourt in Zambia which has appropriate powers to deal with all Human Rights issues so that Zambia. Similarly, it is hoped that the ConCourt of Zambia can be given effective powers by way of procedural devices which enable it to exercise its jurisdiction effectively.

With the foregoing in mind, this study argues that the jurisdiction of the ConCourt in its current form is not appropriate to the extent that it does not include the adjudication of matters arising from the Bill of Rights. The very point for the establishment of a ConCourt was to have a specialised court, better equipped to defend the Constitution; incidentally, the Bill of Rights is a central part of the Constitution. It therefore follows that issues of the Bill of Rights must be dealt with by the ConCourt. In order to preserve an individual's right of appeal, which is a procedural right to a fair trial; it is proposed that the High Court be a court of first

[98] Interview with Justice Malila.

instance hearing matters of the Bill of Rights. The ConCourt would then have the final say as an appellate court. This arrangement would better enhance the ConCourt's jurisdiction as it would have the benefit of drawing from the various viewpoints of the Judges in the HCZ. Furthermore, the procedural difficulties which would arise from the ConCourt having to hear evidence at first instance would be eliminated. It is the recommendation of this study therefore to have the Bill of Rights amended to be heard by a division of the High Court at first instance and the ConCourt as a final arbiter.

3.7 Summary

This chapter has analysed the jurisdiction of the ConCourt as conferred by Article 128 of the amended Constitution.[99] In doing so, the Article has examined the various powers of the ConCourt by critically assessing the original and appellate jurisdiction of the court.

Since the Court must exercise its jurisdiction in accordance with the principles provided for in Article 118 of the Constitution, this chapter examined Article 118 to understand how the Article might impact the ConCourt's jurisdiction. Furthermore, the Referral Procedure provided for in Article 128 (2) was considered with a view to ascertaining how best it could work to render the ConCourt effective in carrying out its mandate.

Lastly, the chapter took an in-depth look at the Bill of Rights in Zambia vis a vis the jurisdiction of the ConCourt. On this topical issue, the study's analysis revealed that the ConCourt was the right forum to deal with human rights issues and that it could best do so at appellate level.

[99] The Constitution of Zambia.

CHAPTER FOUR

THE INSTITUTIONAL FRAMEWORK OF THE CONSTITUTIONAL COURT OF ZAMBIA

4.1 Introduction

This Chapter critically analyses the institutional framework of the ConCourt of Zambia. The Chapter begins by examining the circumstances which led to the formation of the ConCourt.

As the ConCourt cannot function in isolation and must be a part of an existing judiciary, the study analyses the ConCourt's place in the hierarchy of the Zambian court system. The study proceeds to analyse the structure of the ConCourt, including its composition, appointing authority, collegiality, support staff, physical location and funding. The study also briefly examines the salient features of the Rules of the ConCourt.

4.2 Formation of the ConCourt of Zambia

Article 127 of the Zambian Constitution provides for the establishment of the ConCourt, which comprised the President, the Deputy President and eleven other judges or a higher number of judges as prescribed. Thus, in total, the Court should consist of thirteen judges. At the time of conducting this study, the ConCourt comprised six (6) Judges.[1] It was headed by the President of the Court who was responsible for the administration of the Court under the direction of the Chief Justice.[2] Following the publication of the rules of the Court, the ConCourt became operational and started attending to cases effective Friday, 27th May 2016.[3]

4.3 Situational analysis of the ConCourt's place in the hierarchy of Courts in Zambia

In Zambia, judicial authority is vested into the Courts which exercise the same in accordance with the Constitution and other laws.[4] Pursuant to this judicial authority, the Courts hear civil and criminal matters and matters relating to, and in respect of, the Constitution.[5] According to the Constitution, the judiciary consists of superior courts and other courts.[6] The superior

[1] Available at http://judiciaryzambia.com.
[2] Article 138, Constitution (Amendment) Act, 2016.
[3] Notice to all Legal Practitioner's and Members of the Public Dated 31st May 2016. Available at http://judiciaryzambia.com/2016/05/31/operationalisationoftheConcourt.
[4] Article 119 (1), Constitution of Zambia.
[5] Article 119 (2) (a) and (b).
[6] Article 120, Constitution of Zambia.

courts consist of the High Court, the Court of Appeal, the ConCourt and the Supreme Court.[7] The other courts are the subordinate courts, small claims courts, local courts and other courts as prescribed.[8] As a Superior Court, the ConCourt is expected to be a circuit court in accordance with a circuit schedule issued by the Chief Justice.[9] This is necessary to allow everyone to access the ConCourt.

In accordance with the Constitution, the ConCourt and the Supreme Court rank equivalently.[10] This means that the ConCourt sits at the apex with the Supreme Court and they are both the highest courts in Zambia in that regard.[11] To this end, the Constitution states that a decision of the ConCourt is not appealable to the Supreme Court.[12] This is in consonance with Kelsen's idea of a ConCourt as a separate Court in the hierarchy of the court system.[13] In line with Kelsen's theory, the general idea of delimitation appears relatively simple.[14] It is that the resolution of all cases and controversies of a constitutional dimension should be monopolised within the constitutional court, whereas the resolution of all cases and controversies involving the application of ordinary legislation (and, in particular, of the different "codes") should belong to the exclusive province of the ordinary courts (and, ultimately, to the Supreme Court).[15] This is because, conflicts between the highest court of ordinary jurisdiction, the Supreme Court and the ConCourt have taken place in many countries and usually arise when the supreme court rejects the authority of the constitutional

[7] See Article 120 of the Constitution of Zambia.
[8] Article 120, Constitution of Zambia.
[9] Article 120 (5), Constitution of Zambia.
[10] Article 12, Constitution of Zambia.
[11] Lech Garlicki, Constitutional Courts verses Supreme Courts, *Oxford Law International Journal of Constitutional Law 5*, Issue 1 (2007): pp, 44-68. http://icon.oxfordjournals.org/content/5/1/44. Accessed on August 16th, 2016.
[12] Article 128 (4), Constitution of Zambia.
[13] Lech Garlicki, "Constitutional Courts verses Supreme Courts," Oxford Law International Jnl. of Constitutional Law 5, Issue 1 (2007): pp. 44-68. http://icon.oxfordjournals.org/content/5/1/44. Accessed on August 16th, 2016.
[14] Garlicki, "Constitutional Courts verses Supreme Courts," pp.44-68.
[15] Garlicki, "Constitutional Courts verses Supreme Courts," pp.44-68.

court in a particular case.[16] These conflicts are typically exacerbated once a concrete constitutional review is fully developed.

Once developed, the interaction between judicial courts and the constitutional court becomes more intense, and coordination between the two systems is essential.[17] When this happens, the natural goal of the constitutional court is to achieve normative supremacy as the highest court in the country. In other words, the ConCourt aims to establish a degree of control over a traditionally depoliticised and deferential judicial system.[18] From a procedural perspective, it has not been possible to provide for a truly genuine separation of jurisdictions.[19] In almost all the countries that decided to establish a separate Constitutional Court, this court's powers eventually intervened in some areas traditionally controlled by the Supreme Court.[20]

4.4 South Africa's experience of having two Apex Courts

An example may be given here of South Africa. When the ConCourt was first established in South Africa, the interim Constitution of 1993 provided for the Court to be the apex court in all constitutional matters. Under this Constitution, the Constitutional Court and the Appellate Division of the Supreme Court formed the twin apex of the judicial structure, with a strict jurisdictional line dividing them.[21] The ConCourt had original and appellate jurisdiction and was the highest court in respect of constitutional matters.[22] It had exclusive jurisdiction in respect of certain matters including enquiries into the constitutionality of provisions of an Act of Parliament and disputes of a constitutional nature between national and provincial organs

[16] Tom Ginsburg & Nuno Garoupa, "Building Reputation in Constitutional Courts: Political and Judicial Audiences", *Arizona Journal of International & Comparative Law: 28 No. 3* (2011), p. 539.
[17] Ginsburg, "Building Reputation in Constitutional Courts," p.543.
[18] Ginsburg, "Building Reputation in Constitutional Courts," p.544.
[19] Ginsburg, "Building Reputation in Constitutional Courts,"
[20] Garlicki, "Constitutional Courts verses Supreme Courts", pp. 44-68.
[21] P. Langa & Edwin Cameron, "The Constitutional Court and Supreme Court of Appeal" (2010) available at http://www.sabar.co.za/law-journals/2010/april/2010-april-vol,p. 29.
[22] Chalskalson, "Constitutional Courts and Supreme Courts, A Comparative Analysis with Particular Reference to the South African Experience." Accessed on 21st December 2016, Available at https://www.ecln.net/elements/conferences/ p.101.

of state.[23] Other matters, such as the control of subordinate legislation for compliance with the Constitution, and claims under the Bill of Rights which did not involve the validity of provisions of Acts of Parliament, were within the jurisdiction of the Provincial and Local Divisions of the Supreme Court, which dealt with such matters as courts of first instance.[24] Although the Constitutional Court also had original jurisdiction in respect of such matters, it was a discretionary jurisdiction, which the Court was reluctant to exercise save in exceptional circumstances.[25] The Appellate Division continued to be a court of final instance in all criminal and civil matters, but had no jurisdiction at all over constitutional issues.[26] The dichotomy between the exclusive constitutional jurisdiction of the Constitutional Court and the jurisdiction of the existing judicial hierarchy was potentially contentious.[27] This was plainly because there was no neat divide between constitutional subjects and other matters.[28]

Under the final Constitution of 1996, the Constitutional Court of South Africa could decide only on constitutional matters and issues connected with decisions on constitutional matters.[29] A constitutional matter 'includes any issue involving the interpretation, protection or enforcement of the constitution'.[30] The Appellate Division became the Supreme Court of Appeal (hereinafter 'SCA') which, together with the High Courts, was given power to strike down Presidential conduct, Acts of Parliament and provincial Acts, although subject to confirmation by the Constitutional Court.

Currently, the ConCourt of South Africa is (except in respect of certain labour and competition matters) the highest court in South Africa while the SCA is the second highest

[23] Section 98(3) read with section 98(2) (a) and 101(3) and (6) of the Interim Constitution of 1993.
[24] Section 101(3) of the interim constitution of 1993.
[25] Chaskalson, "Constitutional Courts and Supreme Courts", p. 101.
[26] Chaskalson, "Constitutional Courts and Supreme Courts", p.101.
[27] Johann Krieglar, "The Constitutional Court of South Africa", *Cornell International Law Journal*, Vol. 36: Issues. 2, Article 5. (2003), pp. 361-366 at 364 Available at: http://scholarship.law.cornell.edu/cilj/vol36/iss2/5
[28] Langa & Cameron, "The Constitutional Court and Supreme Court of Appeal", p. 29.
[29] Chaskalson, "Constitutional Courts and Supreme Courts", p. 105.
[30] Chaskalson, "Constitutional Courts and Supreme Courts", p. 105.

court.[31] Similarly, the title of Chief Justice which was previously held by the most senior judge of the SCA is now held by the head of the Constitutional Court of South Africa.[32] As for the SCA, it is now headed by a President and Deputy President.[33]

Despite these changes, the Constitutional Court of South Africa is still seen to occupy a blurred position in the judicial system.[34] This is particularly because of the concurrent jurisdiction exercised by the High Court, the SCA and the Constitutional Court in respect of appeals.[35] Problems arise when delineating constitutional matters; while the SCA is empowered to hear any appeal, the Constitutional Court of South Africa may decide only on constitutional matters.[36]

The task of disaggregating constitutional matters from other legal matters has been significantly complicated by the Constitutional Court's jurisdictionally inclusive jurisprudence developed in land mark decisions.[37] An example is the case of Pharmaceutical Manufacturer's Association of SA: In re exparte President of the Republic of South Africa,[38] The case raised the question whether a Constitutional Court has the power to review and set aside a decision by the President of South Africa to bring an Act of Parliament into force. The matter arose when the Transvaal High Court was requested to review and set aside the President's decision to bring the South African Medicines and Medical Devices Regulatory Act 1998 into operation on 30th April 1999. The purpose of the Act was to govern the registration and control of medicines for human and animal use. The Applicants (the President and Others) alleged that through an error made in good faith, the Act had been

[31] See: http://www.justice.gov.za/sca/historysca.htm.
[32] See s. 11 of the Constitution Sixth Amendment Act of 2001.
[33] See: http://www.justice.gov.za/sca/historysca.htm
[34] 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.
[35] J. Dugard, "Court of First Instance?" p.263.
[36] J. Dugard, "Court of First Instance?" p.264.
[37] J. Dugard, "Court of First Instance?" p.264.
[38] (2000) (2) SA 674 (CC).

brought into operation before the necessary regulatory infrastructure had been put in place. The matter was referred to the Constitutional Court of South Africa for confirmation of its order declaring the decision of the president to bring the Act into force null and void. The first issue the Court had to determine was if the matter could be determined solely under the common law by the High Court or if it was a question of Constitutional invalidity to be determined by the Constitutional Court. The Court held that since there was in place a written Constitution, all law including the common law was to conform to the Constitution. Consequently, that there was only one system of law. The complication from such a holding is that it implies that every Court even if it is not the Constitutional Court may decide a constitutional matter thereby leading to jurisdictional conflicts between the Constitutional Courts and other courts.

4.5 Proposed Court Hierarchy for Zambia's Court System

In Zambia, the ConCourt has both original and final jurisdiction to hear all matters relating to the Constitution. It is yet to be seen whether this exclusive jurisdiction of the court is bound to cause problems of delimitation between the ConCourt and the Supreme Court, since both courts are at the apex of the court's hierarchy. The question is whether the two apex courts would be able to achieve a level of separation which would allow them to coexist. In the case of *Access Bank (Zambia) Limited and Group Five/ZCON Business Park Joint Venture*, a 2016 judgment decided by the Supreme Court,[39] the constitutional issue which arose was the interpretation of Article 118 1 (e), that required justice to be administered without undue regard to procedural technicalities. In resolving the issue, the court made it clear that it did not intend to engage in anything resembling interpretation of the Constitution. However, rather than end there, the court added that, "the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the

39 Supreme Court Judgment No. 24 of 2016 at page 33.

courts".[40] In making this addition, it can be argued that the Supreme Court stepped out of its arena as an ordinary court to one of interpreting the Constitution. It should have sufficed for the court to end at the aspect of their task being one which did not involve the interpretation of the Constitution. This is because any comments which hinge on constitutional provisions should be left to the ConCourt in accordance with Article 128 of the Constitution (amendment) Act No. 2 of 2016.[41]

It is decisions such as that in the Access Bank Case which raise the questions of whether the ConCourt of Zambia and the Supreme Court are likely to have delimitation issues in the future. In order to allow the ConCourt efficiency and legitimacy, it is important for other courts to allow it to function as a separate court by not deciding on those issues which are in accordance with the Zambian Constitution reserved for the ConCourt. This means allowing it to make its own decisions in relation to the interpretation of the Constitution without rendering it suggestions on how to do so. To effectively prevent delineation disputes between the two courts, this study is of the view that the ConCourt ought to be at the top of the Court hierarchy in Zambia. This would be a more suitable arrangement considering that the ConCourt is concerned with interpreting the most supreme law of the land; the Constitution.

Another important question that arises from the institutional framework of the ConCourt is how the role of the Chief Justice as the head of the judiciary is to interplay with the role of the President of the ConCourt as its head. It appears that the main reason for this separation in the heads of the two-apex courts is in order to promote independence of the courts and to allow for them to function as two separate courts.[42] The concern raised by this study is that in the future, this could lead to friction and contradictions were the two heads are unable to agree on issues. One of the difficulties in having two apex courts of the same ranking is that

40 Supreme Court Judgment No. 24 of 2016 at page 33.
41 See Article 128 (1), Constitutional of Zambia.
[42] Interview with Prof. Justice Munalula.

the heads of the two courts may both claim entitlement to the final say over certain decisions, especially those decisions which have their basis on the Constitution. The framers of the Constitution seem to have gone around such a situation by providing that the ConCourt was to be headed by the President of the court who was responsible for the administration of the ConCourt under the direction of the Chief Justice.[43] The words 'under the direction of the Chief Justice' could be taken to mean that although the ConCourt and Supreme Court were at the same level, the heads of the two courts were not of the same ranking and that the Chief Justice had the last word in the event of a disagreement concerning a constitutional issue. This argument is supported by Article 136 (1) of the Constitution (Amendment) Act No. 2 of 2016, which provides that there shall be a Chief Justice who was to be the head of the judiciary. Some constitutional experts have argued that the more desirable situation would have been to have the Chief Justice not only as the head of the Supreme Court but also as the head of the ConCourt, so as to avoid disputes within the judicature.[44] The study is of the view that the Chief justice and the Deputy Chief justice should be sitting on the ConCourt which should be at the top of the court hierarchy in Zambia.

In effect, it is very difficult to delimit any clear border between the constitutional law and the rest of the legal system since the former permeates the entire structure of the latter.[45] The main point here is that the functions of Constitutional courts and those of ordinary courts, such as the Supreme Court as an ordinary court, are bound to overlap, and this may be a source of tensions and conflicts.[46]

4.6 ConCourt's Composition, Qualifications and Terms of Office

The ConCourt's composition is set out in Article 127 of the Constitution. The Article provides for the establishment of a ConCourt which would consist of the President, the

[43] Article 138 (1) of the Constitution of Zambia.
[44] Interview with Prof. Justice Munalula and Email from Linda Kasonde dated 2nd January 2017.
[45] Garlicki, "Constitutional Courts verses Supreme Courts", pp. 44-68.
[46] Garlicki, "Constitutional Courts verses Supreme Courts", pp.44-68.

Deputy President and eleven other judges or a higher number of judges as prescribed. The ConCourt is headed by the President of the Court who is responsible for the administration of the Court under the direction of the Chief Justice.[47] The Deputy President of the Court is expected to perform the functions of the President of the Court when the President of the Court is absent or there is a vacancy in the office of the President.[48] However, at the time of conducting this study, the position of Deputy President had not been filled.

As for the qualifications, in accordance with the Constitution, any person who was of proven integrity and had been a legal practitioner 15 years at the bar qualified to be appointed as a judge of the ConCourt.[49] According to the Constitution, the definition of a legal practitioner was that provided in the Legal Practitioners Act.[50] The Legal Practitioner's Act provided that, a practitioner was a person who had been admitted to practice as an Advocate under the provisions of the Act and whose name is duly entered on the Roll.[51] In addition, for a person to be appointed as a judge of the ConCourt, he or she must have been a legal practitioner for at least fifteen years with specialised training or experience in human rights or constitutional law.[52]

Following the establishment of the ConCourt, the president of Zambia, on the recommendation of the judicial service commission, nominated six nominees to the ConCourt. The nominations were met with some resistance from a cross section of the Zambian society, including the Law Association of Zambia. It was argued that whilst some of the nominees may have had some training in human rights, they all lacked experience in prosecuting constitutional or human rights law related cases.[53] It was further said that the provisions of article 141 of the Constitution did not support an understanding that previous

[47] Article 138 of the Constitution of Zambia.
[48] Article 139 of the Constitution of Zambia.
[49] Article 141 of the Constitution of Zambia.
[50] Chapter 30 of the Laws of Zambia.
[51] See section 2 of Cap. 30.
[52] Article 141 of the Constitution of Zambia.
[53] Sangwa, Brief to the President of the Republic of Zambia, p. 16.

experience as judge was relevant to the appointment of ConCourt judge.[54] According to Sangwa, Article 141 of the Constitution was unambiguous as it required that the nominees to the ConCourt be individuals who had practised law for a period of fifteen years and received specialised training or experience in human rights or constitutional law.

After Parliament scrutinised the appointments, the motion for Parliament to appoint them as judges of the ConCourt pursuant to Article 140 of the Constitution was brought before the Members of Parliament for ratification on 11th March 2016. The notable part of the debate proceedings was as follows[55]:

> It was, therefore, imperative that the persons appointed to sit on the Constitutional Court have the requisite qualifications and experience to discharge the functions of the court. Sir, your Committee deliberated on the issue raised and in order to resolve it, had recourse to the Legal Practitioners Act, Cap. 30 of the Laws of Zambia. Your Committee found that Section 2 of the Act defines "Practitioner" as a person who has been admitted to practice as an advocate under the provisions of the Act and whose name is duly entered on the roll. In view of this, your Committee is of the considered view that a legal practitioner is one who has been admitted to the Bar and whose name is entered on the roll of the practitioners whether that person appears in court to represent clients.

From the above parliamentary proceedings, Parliament took the view that a legal practitioner need only be one who had their name entered on the roll. They also took the view that the practice of the law was very broad and comprised legal practitioners in various sectors, with some engaged as in-house counsel, administrators, academicians, drafters and adjudicators. It is thus not restricted to those practitioners who chose to engage in litigation. This also meant that any person with the prescribed qualifications could be appointed as judge regardless of their experience in the prosecution of constitutional law or human rights law cases.

This study agrees with the interpretation of a legal practitioner applied by Parliament. To adopt an interpretation of practitioner that is restricted to litigation would be too narrow; the

[54] Sangwa, Brief to the President of the Republic of Zambia, p. 16.
[55] Address by Mr. Chenda, Honourable Member for Bwana Mukubwa Constituency. Available at http://www.parliament.gov.zm/node/5092.

ConCourt would not benefit from the experience and legal minds of those who had not prosecuted or defended constitutional or human rights cases including academicians and human rights experts. There is value in appointing legal practitioners from a broad category as their varied experiences and viewpoints would be cardinal to bringing the constitution to life. This study is of the view that to be more effective the ConCourt judges should be appointed in accordance with the constitutional provisions. This is that the men and women appointed, be firstly, of proven integrity and secondly, that they have at least 15 years' experience in the practice of law. Thirdly, that they have specialist training or experience in human rights or constitutional law. This would mean that a person would qualify to be appointed judge if they met two of the above requirements. For academics, specialised training in human rights and constitutional law would suffice, even if they did not have experience in courts. Therefore, a judge of the ConCourt can have either experience or specialised training in constitutional law or human rights law but must always have proven integrity and at least 15 years as a legal practitioner.

In terms of the Kelsenian theory, Kelsen insisted on judges who had legal qualifications to be appointed to the constitutional court. Kelsen considered legal expertise as a mandatory requirement; legal qualifications would enable one to interpret a Constitution properly. It could be asserted in this regard that the framers of the Zambian Constitution aligned the qualifications of the ConCourt judge to Kelsen's theory when they provided as they did in Article 141 of the Constitution in the manner that it appeared.

As for tenure of office, according to the Zambian Constitution, a judge should retire from office on attaining the age of seventy years. A judge may also retire with full benefits on attaining the age of sixty- five years.[56] In terms of the President of the ConCourt, the

[56] Article 142 (1) of the Constitution of Zambia.

Constitution stipulates that he/she shall hold office for not more than ten (10) years. Thereafter, he/she may continue as a judge of the Supreme Court or ConCourt if he/she is less than the age of seventy.[57] The Constitution has provided adequate tenure for a judge of the ConCourt to be secure which is essential to the independence of judges in the ConCourt; this goes to the root of efficacy of the institutional framework of the Court. The Constitution has provided for procedures relating to the removal and discipline of judges. In terms of removal from office, "a judge shall be removed from office on grounds of mental or physical disability that makes the judge incapable of performing judicial functions, incompetence, gross misconduct or bankruptcy".[58] It is not clear exactly what qualifies as gross misconduct. The question appears to be one for the Judicial Complaint's Authority, now Commission. The removal of a judge may be initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission[59] based on the above grounds.[60] Where the Judicial Complaints Commission shows that a prima facie case has been established against a judge, it should proceed to submit a report to the Republican President.[61] Within seven (7) days from the date of receiving the report, the President may suspend the judge from office and inform the Judicial Complaints Commission.[62] Upon being so informed, the Judicial Complaints Commission should then hear the matter against the judge or constitute a medical board as the case may be within thirty (30) days of being so informed.[63] Where the Judicial Complaints Commission decides that allegations based on a ground specified in Article 143 (b), (c) and (d) are not substantiated, then the president is notified who is obliged to immediately revoke the suspension.[64] If on the other hand, the

[57] Article 142 (2) of the Constitution of Zambia.
[58] Article 143 of the Constitution of Zambia.
[59] The commission is appointed pursuant to Article 236 of the Constitution of Zambia.
[60] Article 144 of the Constitution of Zambia.
[61] Article 144 (2) of the Constitution of Zambia.
[62] Article 144 (3) of the Constitution of Zambia.
[63] Article 144 (4) (a) and (b) of the Constitution of Zambia.
[64] Article 144 (5) (a) of the Constitution of Zambia.

judicial complaints commission finds that allegations are substantiated, it is mandated to recommend the removal of the judge from office and accordingly the Republican President must immediately remove such a judge from office.[65]

4.7 Appointing Authority of the Judges of the ConCourt

The appointment of the judges to the ConCourt is done by the President of the Republic of Zambia who does so, on the recommendation of the Judicial Service Commission (hereinafter the 'JSC') subject to ratification by the National Assembly.[66] The Judicial Service Commission is established pursuant to Article 219 of the Constitution (Amendment) Act, 2016 in accordance with the Service Commissions Act.[67] The JSC has wide representation, consisting of the Chairperson, who is appointed by the President. The Chairperson is a person who holds or qualifies to hold high judicial office or has held high judicial office. Other members are a judge nominated by the Chief Justice; the Attorney-General, with the Solicitor-General as the alternate; the Permanent Secretary responsible for public service management; a magistrate nominated by the Chief Justice; (f) a representative of the Law Association of Zambia, nominated by that Association and appointed by the President; the Dean of a Law School of a public higher education institution, nominated by the Minister responsible for justice; and one member appointed by the President. This wide representation is necessary as it ensures that judges of the ConCourt are be recommended by different stakeholders which would result in a desirable selection of judges. However, it could be seen from the Commission's composition that virtually every member was appointed directly or

[65] Article 144 5 (b) of the Constitution of Zambia.
[66] Article 140 of the Constitution of Zambia.
[67] Section 5 of Act No. 10 of 2016.

indirectly by the President.[68] The concern with such appointments is that the integrity of the Judiciary could end up compromised.

Once the Judicial Service Commission recommended a judge, the president would appoint that judge subject to the ratification of the National Assembly. The reasoning behind Presidential appointments being ratified by the National Assembly is to insulate senior judicial appointments from nepotism and political manipulation.[69] It is argued, however, that the appointment process in not completely protected from nepotism and political manipulation especially in circumstances where a large majority of the members of Parliament were from the ruling party. These may be obliged to support the Republican President's appointments.

4.8 Collegiality

A matter in the ConCourt is heard by a minimum of three judges, save for interlocutory matters.[70] In this regard, the Court is a collegial court. A collegial court is one which allows for judges to interact with each other in arriving at a decision. Collegiality implies that views are discussed seriously and respectfully. Therefore, the court has the advantage of different viewpoints when arriving at a unanimous decision. This is a key advantage to collegiality. A disadvantage to collegiality may be that it appointed individuals may lack the spirit of listening to other people's views with an open mind.

The essence of collegiality is that court proceedings are not conducted with a spirit of competition. If this happens then the decision-making process will be undermined since the decision makers will not be united. The standard of collegial engagement mandates judges to listen and to incorporate their peer's reasons into theirs, either to adhere or to dissent.[71] Judges are not obliged to hide or suppress disagreement, but should be committed to frank

[68] Sakala. "The Role of the Judiciary". p.123.
[69] Sakala. "The Role of the Judiciary". p.123.
[70] Article 129 (1) of the Constitution of Zambia.
[71] Mendes, "Deliberative Performance of Constitutional Courts", p.128.

argumentation in the search of the best answer.[72] The driving-force of collegial engagement is three-fold: the effort to take into account all positions the Court was able to collect and to empathetically conceive the search for the best principal answer and the pursuit of consensus or, if it does not come forth, minimise dissension.[73] The Court must strive to balance these demands as they deliberate. It is hoped that the ConCourt would operate and function in this framework thereby overcoming the constraints of collegiality.

For collegiality to be effective, the proper institutional framework should be in place. One way to achieve this is by involving professional colleagues. It is also done by requiring all decision-makers to be adequately in their subject matter. In the Zambian case, this appears well covered by the requirements in the Constitution for the qualifications of a judge of the ConCourt which include, proven integrity, a minimum of 15 years, as a legal practitioner and specialisation or expertise in human rights law and constitutional law.[74]

The concept of collegiality in the way that the ConCourt determines matters is certainly a step in the right direction. If guided by the above principles outlined by this study, the Court's deliberative process is guaranteed to be effective. The study therefore asserts that the institutional framework of the ConCourt is effective to the extent that it has provided for collegiality in the court. If properly done, the decisions of the court promise to be rich and to contribute positively to the jurisprudence of constitutional law in Zambia.

4.9 Court Rooms, Facilities and Support Staff

At the time of this study, ConCourt cases were heard in the Supreme Court Rooms as the ConCourt did not have premises of its own. The Constitution provides that the judiciary shall be a self-accounting institution, capable of dealing with and shall deal directly with the

[72] Mendes, "Deliberative Performance of Constitutional Courts", p.128.
[73] Mendes, "Deliberative Performance of Constitutional Courts", p. 128.
[74] Article 141 (1) of the Constitution of Zambia.

Ministry responsible for finance in matters relating to its finances.[75] Further, the judiciary is envisaged to be adequately funded in a financial year to allow it to carry out its functions effectively.[76] However, funding from the treasury remains a challenge and this ultimately affects the effective functioning of the court.[77] For instance, a search of the Supreme Court library, which is shared with other courts, including the ConCourt, reveals that the library is highly crippled in terms of constitutional law materials which could assist the ConCourt as it renders decisions.

In terms of support staff, a judge of the ConCourt is entitled to a Research Advocate to assist with research, two Secretaries, a Marshal and a Driver. As part of the fringe benefits, a judge is also entitled to security, a cook, a house-servant and a gardener. However, owing to inadequate funding, not all judges of the ConCourt have had a Research Advocate. There was also a shortage of Secretaries during the duration of this study. To exacerbate the problem, the support staff was not always well paid, making it difficult for the judiciary to hold on to its human resource.[78] This undoubtedly makes the work of a ConCourt judge difficult and renders the institutional framework ineffective to this extent.

4.10 Salient features of the Constitutional Court Rules

The Constitutional Court Rules (hereinafter 'Rules') are contained in Statutory Instrument No. 37 of 2016, These were made pursuant to the Constitutional Court Act No. 8 of 2016 and came into effect on 24th May 2016.[79] To start with, the Rules explicitly provide that in exercising its jurisdiction, the Court may borrow from the law and practice applicable in England and in the Court of Appeal up to 31st December 1999.[80] This is an important provision since the ConCourt is newly established and requires all the support it could gather in terms of procedure and precedents. The Rules provide that the ConCourt's Registry is to be

[75] Article 123 (1) of the Constitution of Zambia.
[76] Article 123 (2) of the Constitution of Zambia.
[77] Participant Observer, Annual Judicial Conference, 2016.
[78] For example, as by 2016, a secretary's monthly salary was less than K7,000-00.
[79] Upon publication in Government Gazette No. 37 of 2016.
[80] Order 1, Rule 1(1) of the Constitutional Court Rules.

at Lusaka. This means that in order to commence a matter in the ConCourt's registry, those in other towns must travel to Lusaka to do so. This may prove challenging in terms of access to the ConCourt since those wishing to access the ConCourt from other towns will require resources such as transport and lodging to do so. Order III of the Rules makes provision for electronic documents and filing, this is a progressive provision as more and more people can access technology from most parts of Zambia. Therefore, once the matter is commenced, other documentation may be filed electronically once the framework to do so is provided. However, people in remote towns with no access to technology will not benefit from electronic filling.

Order IV Rule 1 of the Rules provide for commencement of proceedings and states generally that matters in the Court are to be commenced by petition as prescribed. Order V of the Rules provides generally regarding parties to the proceedings while Order VI provides for production and proof of documents. This is important as litigants can produce documentary evidence in support of their cases which in turns allows the ConCourt to exercise its jurisdiction by arriving at a decision. Order VII of the rules provides for objections raised during the proceedings and Order VIII provides for evidence of witnesses. This gives credibility to hearings as litigants can speak up if they have an opposing view to the procedure adopted by another party. In terms of service of the court process, Order IX provides for the same, allowing litigants to inform those they have sued of the cases against them and in turn allowing those sued to respond. Of worth noting, rule 16 provides that the Court is as soon as practicable, but not later than seven days after the petition has been filed, required to call for a scheduling conference and give such directions as may be necessary and set a date of hearing. This provision is relevant as it would benefit the ConCourt especially where the matter to be heard has a strict timeline such as is the case in a Presidential Election Petition.

Order X of the Rules provides for the hearing and determination of matters in the C. Court while Order XI provides for appeals and cross appeals. The Rules also provide for judgments in Order XII and costs in Order XIII. Additional Rules relating to Presidential Election Petitions are contained in Order IV. It suffices to state that this study recommended in Chapter 2 that in order to have a speedy determination of election petitions, the rules could be reviewed so that issues relating to service and preliminary issues may better enhance the ConCourt's ability to hear the matter in a timely manner.

Finally, remedies, errors, fees, oaths and time are provided for in Order XV of the ConCourt rules. In the schedule to the Rules, standard forms, including a Petition, Cross-petition, originating summons and notice of motion are also provided for.

Overall, the Rules have made provision for relevant issues, necessary to the proceedings in the ConCourt. However, it is necessary for the rules to make better provision for procedure relating to referrals. This is because, in its current form, the jurisdiction of the ConCourt to hear referrals may prove to be problematic if every issue touching on the Constitution is referred to the ConCourt by other courts. It is proposed that only issues falling within a prescribed bracket of seriousness be referred to the ConCourt, while other issues should be dealt with by other courts and the ConCourt should act as a court of confirmation. This point is also clearly covered by the Rules As the study has shown, such a procedure has proved effective in other countries such as South Africa. Accordingly, such finer details relating to the procedure of referrals may be reflected in the Constitutional Court Rules.

4.11 Summary

The purpose of this Chapter was to analyse the institutional framework of the ConCourt of Zambia. The Chapter started by giving a brief background to the institutionalisation of this Court. The background laid out the circumstances which led to the establishment of the ConCourt. The main reason for the establishment of the ConCourt was the need to have a

separate court within the Zambian Court system whose role would be solely to defend the Zambian Constitution.

The Chapter further analysed the ConCourt's position in the hierarchy of the courts of Zambia. It was established that both the ConCourt and the SCZ are apex Courts in Zambia. The Chapter argued that it is less than desirable for both these Courts to be apex courts. In aid of this argument, the Chapter analysed South Africa's Constitutional Court's experience with having two apex Courts and demonstrated how South Africa had to move away from the position of two apex Courts as it led to delineation problems between the two Courts. It is better that the ConCourt which is the guardian of the Constitution (Zambia's highest law) is the apex Court and the Supreme Court its subordinate to avoid delineation problems in the future. The study also critically analysed the ConCourts structure as it is provided for in the Constitution including the Court's composition, qualifications, tenure, appointing authority, court rooms, support staff and collegiality among others.

Finally, the Chapter critically examined the Constitutional Court Rules and established that some elements of the Rules such as allowing the ConCourt to borrow from the law and practice applicable in England and in the Court of Appeal are necessary to assist the new ConCourt to implement its role effectively. The Chapter also noted some aspects of the Rules which require revising including the provisions relating to Referrals as they may cause the ConCourts docket to be overflooded.

CHAPTER FIVE
CONCLUSION

5.1 Introduction

This Chapter is a recapitulation of the main points and conclusions emerging from this study and includes recommendations based on the findings of this study.

5.2 Main Findings and Conclusions

The ConCourt of Zambia was established on 5th January 2016 following the amendment of the Zambian Constitution. Its mandate is to be the guardian of the Zambian Constitution. Thus, the main purpose of this study as laid out in Chapter one, was to assess the jurisdiction and institutional framework of the ConCourt and to determine their probable efficacy. Chapter one indicated that this study is anchored on Hans Kelsen's theories on the importance of a ConCourt as the main defender of a constitution, the grund norm of the land.

Chapters two and three of the study tackled the subject of jurisdiction. Chapter two examined the dominant forms of constitutional jurisdiction at a theoretical level. This included the American and European models. The study concluded that Zambia's model of constitutional jurisdiction is a hybrid of the American and European models as it retains features from both models of constitutional jurisdiction. The study found that, as a hybrid model, the main characteristic of the Zambian constitutional jurisdiction was to be a separate court within the Zambian judicial system.

In relation to the subject of jurisdiction, Chapter two analysed the various powers of the ConCourt. These powers are enshrined in Article 128 (1) of the Constitution which conferred the ConCourt with original and final jurisdiction to hear matters relating to the Constitution. The study examined the ConCourts powers including jurisdiction to hear a matter relating to a violation or contravention of the Constitution; a matter relating to the President, Vice-President or an election of a President; appeals relating to the election of Members of Parliament and councillors and to determine whether a matter falls within the jurisdiction of the ConCourt. The study concluded that in having original and appellate jurisdiction, the ConCourt promised to deliver on its mandate of protecting and defending the Constitution. This is because, in certain instances, such as the interpretation of the Constitution, defence of

the Constitution and deciding whether a matter fell within the jurisdiction of the ConCourt, original jurisdiction was necessary. This should be so because such matters arose from the Constitution and the ConCourt was primarily established for the sole purpose of hearing matters arising from the Constitution. The requirement for the ConCourt to hear matters relating to the President, Vice-President or an election of a President is in this study's view also justified. This is because these matters by their very nature raise high public interest and must be disposed of expeditiously.

The study also found that appellate jurisdiction is necessary for the court to be effective in hearing appeals relating to Members of Parliament and Councillors. This is because such matters were bulky by their very nature and would overwhelm the court docket if they were heard by the ConCourt as a court of first instance. The study concluded that appellate jurisdiction in this regard is useful to the court's efficacy and effectiveness. Be that as it may, the study argued that a more desirable situation would be in having appeals from Councillors first heard by a constitutional division at High Court level before they are finally heard by the ConCourt. This would accord Councillors a similar treatment as provided for MP's regarding the ConCourt. Moreover, it would allow the ConCourt to contribute positively to the judicial system which may be compromised if matters relating to councillors are heard on appeal by the ConCourt. This is because, the qualifications of members of a local government tribunal which is mandated to hear matters from Councillors as a court of first instance are lower than those of a High Court judge.

The study also analysed the ConCourt's power to hear referrals from other courts. The study concluded that referrals would constitute a large part of the ConCourts powers as all other Courts in Zambia were mandated to refer all constitutional questions to the ConCourt for interpretation. Therefore, the study suggested that the referral procedures needed to be refined to ensure that the ConCourt was not overwhelmed with constitutional questions from other

Courts. The point has been made that referral questions could lead to delays in the administration of justice in other Courts as the main disputes in the lower courts are put on hold once a constitutional question is referred to the ConCourt.

Lastly, under the subject of the ConCourt's jurisdiction, the study considered whether it was appropriate for courts other than the ConCourt to have jurisdiction over matters arising from the Bill of Rights. The study found that since the Bill of Rights were enshrined in the Constitution; it would be desirable for issues arising from the Bill of Rights to be heard by the ConCourt at appellate level. The study also concluded that the ConCourt being a specialised court would be better equipped to deal with these issues. Zambia should therefore to amend part 3 of the Constitution in order to achieve a better alignment of the Bill of Rights to the ConCourt. In order to avoid a failure of the referendum, it is recommended that the referendum vote should be subjected to the Zambian people at a time separate from the general elections to avoid a political interference of the referendum as was seeing with the 2016 failed referendum vote. This would better increase the success of the referendum vote. Zambian's must also be educated on the importance of the required amendment so that they are well informed as they vote.

To be effective in carrying out its role as the custodian of the Constitution, it is important for the ConCourt to have an adequate institutional framework. Therefore, in Chapter four, the study examined the ConCourt's institutional structure by analysing its position in the hierarchy of the Courts in Zambia. The study found that the ConCourt is an apex court which sits at the top of the hierarchy in the Zambian judicial system together with the Supreme Court of Zambia. The study concluded that the Chief Justice being a member of the Supreme Court and heading the entire judiciary including the ConCourt, his or her absence from the ConCourt could lead to possible administrative complications. On this point, the study found that this situation was less than desirable as it may lead to delineation disputes between the

two courts with each court seeking the last word over an issue. This is because the ConCourt, as an apex court, has a President in charge of its affairs, who may err by claiming authority over matters which do not relate to the operations of the ConCourt. The study concluded that a solution to this problem would be to move to a model were the ConCourt was at the apex of the court hierarchy with the Chief Justice and her/his deputy as members of the ConCourt.

As part of the subject of the ConCourt's institutional framework the study also examined the Courts composition, qualifications of the judges and their terms of reference. The study found that the qualifications of a ConCourt judge as provided in the Zambian Constitution were both adequate and in consonance with Kelsen's theory of Constitutional Courts, which argues for the Constitutional Court to have qualified judges who are educated and trained to meet the court's purposes. In Zambia's case, this has been achieved by the Constitution's requirement to have judges of the ConCourt who men and women of proven integrity with a minimum of are not only fifteen (15) years at the bar, but also who had specialist training or experience in human rights or constitutional issues.[1] In order to have a comprehensive view of the institutional framework of the ConCourt, the study also covered other mundane matters of operational facilities, support staff and procedures of the Court and made pertinent observations in the relevant sections of the study.

[1] Article 141 (1) (b) of the Constitution of Zambia.

5.3 Recommendations

In view of these findings, the study has made the following recommendations: -

1. The study recommends that Zambia should amend part III of its Constitution in order to enable the ConCourt to have jurisdiction over the Bill of Rights at appellate level.
2. The Constitutional Court Rules should be reviewed to provide in detail for, matters relating to service and preliminary issues.
3. Regarding the ConCourt's institutional framework, the study recommends that the ConCourt should be at the apex of the court system in Zambia and that the Chief Justice and Deputy Chief Justice of the Judiciary should be members of the ConCourt. This is important as it would prevent problems of delineation which are likely to arise as a result of both the ConCourt and the SCZ being at the top of the hierarchy of the Zambian court system. This study argues that the ConCourt would better serve the needs of the Zambian people if it remained a separate court in the judicial framework of Zambia, at the top of the court hierarchy, with specialised individuals, solely dealing with all constitutional issues. This would entail the Chief Justice and the Deputy Chief Justice to be members of the ConCourt. The Supreme Court would be subordinate to the Con Court and second highest in the court hierarchy with a President, Deputy President and other members of the Court.

5.4 Suggestions for further research

1. Further studies about the ConCourt may explore whether persons, institutions and authorities will comply with the Court's decisions as this is key to its success in the role of interpreting, protecting and defending the Zambian Constitution.
2. Further studies may also examine the ConCourts decisions to assess the extent to which they are upholding the Constitution of Zambia.

3. The Referral procedure as provided for in the Constitutional Court Rules is an area which requires to be refined, studies may explore ways in which such refinement can be done.

BIBLIOGRAPHY

1. Interviews

Kulusika, Simon, Telephone Interview, 21 December 2016.

Malila, M, Supreme Court Chambers, Lusaka, 21 December 2016.

Mulembe, E, Constitutional Court Chambers, Lusaka, 17, August 2017.

Mulonda, P, Constitutional Court Chambers, Lusaka, 17' August 2017.

Munalula, M (Prof.), Supreme Court Conference Room, Lusaka, 1 December 2016.

Silungwe, A, Royal Zambezi Hotel, Livingstone, 19, November 2016.

Silwamba, E, Silwamba, Jalasi and Linyama Associates, Lusaka, 22 December 2016.

2.Online Materials

Chalskalson A., "Constitutional Courts and Supreme Courts, a Comparative Analysis with Particular Reference to the South African Experience." Accessed on 21 December 2016. at http://www.ecln.net/elements/conferences/.

Loots, C and G. Marcus, "Jurisdiction, Powers and Procedures of the Court", Revision Service 5, (1998) p. 31, Accessed on 12 September 2016, https: www.chr.up.ac.za/chr.

Melvin, M (Prof.), 15 December 2016, Email.

Nagle, E.L., "Evolution of the Colombian Judiciary and the Constitutional Court". Indiana International & Comparative Law Review, 6, 1, 1995. Accessed June 23, 2016 at https://books.google.co.zm/books.

Shapiro, M., "Some Conditions for the Success of Constitutional Courts," 2002. Accessed on June 4th 2016 at https://www.springer.com.

3.Theses/Dissertations

Evan, L. D., "Beyond Judicial Independence: The Construction of Judicial Power in Colombia," Doctoral Dissertation, Harvard University, 2015. Accessed, June 11, 2016. http://nrs.harvard.edu/urn-3:HUL.InstRepos:14226088.

Maduna, M.P., "The Impact and Influence of the Constitutional Court in the Formative Years of Democracy in South Africa," Doctor of Laws Thesis, University of South Africa, 1997 accessed June 23, 2016. http://hdl.handle.net/10500/18713.

Mendes, C.H., "Deliberative Performance of Constitutional Courts," (Ph.D. Thesis, University of Edinburgh, 2011. Accessed June 11, 2016. https://www.era.lib.ed.ac.uk.

Monteleagre, E. L., "When Accountability Meets Judicial Independence: A Case Study of 2008 Civil Society Transparency Observation of the Colombian Constitutional Courts Nominations," Master's Thesis, University of Stanford, 2009 Accessed June 30, 2016, https://www.law.stanford.edu>publications.

4.Books

Combo, D. K and D. L. A. Tromp, Proposal and Thesis Writing: An Introduction. Nairobi: Pauline's Publications, 2006.

Kelsen, H, General Theory of Norms. Oxford: Oxford University Press, 1991.

Kelsen, H, Pure Theory of Law. California: University of California Press, 1967.

Kothari, C.R and G. Aura, Research Methodology, Methods and Techniques 3rd edition. New Delhi: New Age International Limited Publishers, 2014.

Lord Lloyd of Hampstead, Introduction to Jurisprudence. London: Stephen & Sons, 1972.

M.C. Cornville Mike and Wing Hong Chui, Research Methods for Law. Edinburgh: University Press, 2007.

Mushingeh, Andrew, Chiponde, Basic Steps in Conducting Qualitative Research: A Manual for Students & Researchers. Ndola: Mission Press, 2007.

Sakala, Julius, Bikiloni, The Role of the Judiciary in the Enforcement of Human Rights in Zambia. Lusaka: Image Publishers Ltd, 2013.

Vinx, Lars, Hans Kelsen's Pure Theory of Law: Legality and Legitimacy. Oxford: The Oxford University Press, 2007.

5.Journal Articles

Dotard, J, "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.

Epstein, L., J. Knight and O. Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," Law & Society Review, 35 No. 1, 2001. Accessed June 23, 2016. https://books.google.co.zm/books.

Garlicki, L., "Constitutional Courts verses Supreme Courts", Oxford Law International Jul. of Constitutional Law, 5, Issue 1 (2007): 44-68.

Ginsburg T. & M. Versteeg, "Why Do Countries Adopt Constitutional Review?," Journal of Law, Economics and Organization, 587, 2014.

Hatchard, J., "Perfecting Imperfections: Developing Procedures for Amending Constitutions in Commonwealth Africa," The Journal of Modern African Studies, 36, 1998. Accessed June 23, 2016, https://www.books.google.co.zm.

Krieglar, Johanne, "The Constitutional Court of South Africa", Cornell International Law Journal, 36, 2003.

Kunda, G., "The Zambian Judiciary in the 21st Century," Zambia Law Journal, 30, 1998: 29-50.

Malila, M., "Facing the Elusive Search For a New Zambian Constitution Fifty Years On", Zanzibar Yearbook of Law, 3, 2013.

Maruste, R., "The Role of the Constitutional Court in Democratic Society." Juridica International Law Review, 2007.

Ndulo, M.B. and R.B. Kent, "The Constitutions of Zambia." Zambia Law Journal, 30, 1998.

Ndulo, M. B., "The Democratic State in Africa: The Challenges for Institution Building," Zambia Law Journal, 31, 1999:1-28.

Otugile, B. & K. Dingake. "The Role of the Judiciary and the Legal Profession in Protecting the Rights of Vulnerable Groups in Botswana," in 'Using the Courts to Protect Vulnerable People' SALC: South Africa, 2014.

Scheppele, K. L, 'Guardians of the Constitution, Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe,' Pennsylvania Law Review, 154, 2006.

Tetzlaff, T. "Kelsen and Constitutional Review Accord in Europe and Asia," National Taiwan University Law Review, 1, 2, 2006.

6.Conference and Workshop Presentations

Karakamisheva-Jovanovska, T., "Different Models for Protection of Constitutionality, Legality and Independence of the Constitutional Court of the Republic of Macedonia", in

Proceedings on the World Constitutional Justice,2009, Accessed June 23, 2016. https://www.venice.coe.int>WCCJ<Rio<Papers.

La Pergola Anton, "The Role and Competences of the Constitutional Court", in Proceedings Seminar on the Role of Constitutional Courts in the Consolidation of the Rule of Law, Bucharest, 8-10, 1991.

Mavcic, Arne, Marjan, "Some Comparative Comments to the Introduction of Constitutional Review in the State of Palestine," *in Proceedings of the European Commission for Democracy Seminar on Models of Constitutional Jurisdiction, Strasbourg, 7 November 2008*, Ramallah, 2008.

Mzikamanda, R.R., "Constitutionalism and the Judiciary: A Perspective from Southern Africa", Accessed on 12 September 2016. https://www.justice.gov.za>alraesa>conferences.

Sakala, E.L., "Process of the Constitutional Court as Regards Original and Appellate Jurisdiction and Interlocutory Proceedings," *in Proceedings of 2016 Orientation Workshop of Constitutional Court Judges,* Lusaka, 10-13 May 2016. Lusaka: Judiciary, 2016.

Sangwa, J. P., "Brief to the President of the Republic of Zambia on the Qualifications of the Six Nominees to the Constitutional Court, March 2016."

Silungwe, A., "Original and Appellate Jurisdiction of the Constitutional Court: - What Is Envisaged Under Article 128 of The Amended Constitution-Where Do We Draw The Line? *in Proceedings of 2016 Orientation Workshop of Constitutional Court Judges*, Lusaka, and 10-13 May 2016. Lusaka: Judiciary, 2016.

7.Government of the Republic of Zambia Reports

Final Report of the Technical Committee and the Draft Constitution of Zambia Bill, Lusaka, 2013.

Mvunga Constitution Review Commission Report, Lusaka, 1991.

National Constitutional Conference Final Report", 2010.

National Constitutional Conference, Draft Constitution, 2010.