The sources of labour law and the jurisdictional limitations of the Zambian Industrial Relations Court

Kabanda RK Mushota*
Advocate of the High Court of Zambia, Rhodes Scholar, former lecturer of commercial law at Aston University, Birmingham

The Industrial Relations Act (IRA) was enacted at the end of 1971 to provide for *inter alia* the establishment of an Industrial Relations Court (IRC) for the first time in the labour relations history of the country. To date no one has, it seems, bothered to inquire into the constitutional status of the IRC to try and determine its constitutionality. This, it appears, has been taken for granted by the Zambian society and its government. In this discussion our task will be to demonstrate that from the legal point of view the creation or establishment of the IRC with its present jurisdiction was unconstitutional and therefore, illegal. We shall argue primarily to show that the IRC is not a "court" in the sense that this term is known to lawyers and the legal profession; and also that Part (X) of the IRA is *ultra vires* the Zambian constitution. All the above arguments can hardly be appreciated unless we first conduct a resume of the relevant statutory provisions establishing the IRC and providing for its jurisdiction procedure and composition.2

The Industrial Relations Court under the Act
(a) Composition and procedure of the IRC

The provision in the IRA which creates the IRC is s 96(1). In accord-

---

1See the preamble and Part X of Act 36 of 1971. But the IRA did not come into force until 1974.
2See Vasant V Desai "Role of the Industrial Relations Court in Zambia" in *Some Aspects of Zambian Labour Relations* Vol 1 No 1 1975 (ed) E Kalula at 69 et seq. The learned judge never even addressed his mind to the issue which makes the subject matter of this paper. Instead he, with all due respect, decided to embark, rather unindustriously, on an academic exercise in which he merely succeeded in transcripting the provisions of the IRA and also in reproducing the work of another person on the same topic, which was presented at a conference on Industrial Courts at Lusaka. See the address by Mr SR Cockar, President of the Kenya Industrial Court, to the Conference on Industrial Courts held at Lusaka, on 21 October 1971. Mr Justice Desai is a former Deputy Chairman of the Zambian IRC and also a former judge of the High Court for Zambia.
Labour law of Zambia and jurisdiction

In accordance with s 96(2), (3), (4), and (5) of the IRA, the IRC consists of the chairman and his deputy who are appointed by the president of Zambia from persons who are either judges of the High Court or are qualified to be so. Apart from the chairman and his deputy, the president also has power to appoint two other members or such greater number as he may prescribe. In practice the president has prescribed four members for the purpose.  

Rule 2 of the IRC provides that the term “judge” means the chairman or the deputy chairman. Section 96(7) gives the Minister of Labour and Social Services power to nominate an even number of assessors not exceeding fourteen. Half of the number of assessors shall be representatives of the employers and the other half shall consist of representatives of employees. In any one case the chairman is empowered to call upon two such assessors, one from each side, to sit with the court. While the court is at liberty to give due consideration to the opinion of the assessors, it is nonetheless not bound to conform to their opinion.

When hearing any matter which is before the IRC, the court shall be duly constituted if it consists of three members or such an uneven number as the chairman may direct. An interlocutory matter may however, be heard by a single judge under rule 34 of the IRC rules, 1974; while on the other hand, the determination of any matter before the IRC shall be according to the opinion of the majority of the members considering or hearing the matter. It would appear therefore that as regards interlocutory matters the chairman and his deputy have been given virtual monopoly in determining them. This is in accordance with ordinary judicial practice whereby such matters are usually dealt with by a single judge in chambers.

Under s 101 of the IRA the chairman has the power to make rules by which all proceedings before the IRC are to be governed. In exercise of this statutory power, the first chairman of the IRC, Mr Justice Baron, made the IRC rules 1974, some of which we have already referred to. These rules include provisions to ensure that parties to any proceedings may always avail themselves of conciliation facilities just as provided by the rules of civil procedure (and at times of criminal procedure) in ordinary courts of law. We shall turn to procedural aspects of the IRC later in our discussion. Meanwhile let us outline the powers and jurisdiction which the IRA has conferred upon the IRC.

(b) Powers and jurisdiction of the IRC

Section 98 of IRA is the source of IRC’s powers and jurisdiction. It provides that the IRC has mainly the power, authority and jurisdiction to examine and approve collective agreements; to inquire into and make awards and decisions in collective disputes and any matters relating to industrial

---

*a*See eg SI 28 of 1975.
*b* S 96 (8) of IRA.
*b*Ibid s 96(6).
*b*See SI 206 of 1974.
*b* S 96(9) of IRA.
*b*See Rule 46.
*b*Especially in divorce proceedings.
relations which may be referred to it; to interpret the terms of awards and agreements; to commit and punish for contempt any person who disobeys or unlawfully refuses to carry out or to be bound by an order made against him by the court under the IRA; to perform such acts and carry out such duties as may be prescribed under the IRA or any other written law; and generally to inquire into and adjudicate upon any matter affecting the rights, obligations and privileges of employees, employers and representative organisations thereof.

As we shall later see, the above powers of the IRC are the widest possible that can be given to a tribunal. Indeed, it is this wide nature of the powers and jurisdiction of the IRC that renders it, in our view, unconstitutional.

It should be remembered also that in addition to the above powers, the IRC rules further give the court power to direct that any person not already party to proceedings be added as a party; to issue directions as to future conduct of proceedings; to administer interrogatories; to order discovery of documents; to compel attendance of witnesses; and production of documents. There can be no doubt that in these respects the powers of the IRC closely resemble those of the Subordinate and High Courts of Zambia as provided for under the various orders and rules in their respective legislation.

The independence and separateness of judicial power in constitutional law of Commonwealth countries

In order to develop the argument which forms the gist of this discussion, it is imperative that the reader is made to appreciate the nature and scope of the judicial function under the various constitutions of the Commonwealth countries including Zambia. In addition the reader must also appreciate the efficacy of the doctrine of separation of the judicial power in constitutional law.

(a) The nature and scope of the judicial function

Most constitutions of Commonwealth countries do not seem to offer a comprehensive guide as to the nature and scope of the judicial function. What they merely do is to provide for the establishment of, in most cases, a supreme court and the court of appeal or high court and for the appoint-

---

10 Emphasis supplied.
11 Rule 32.
12 Rule 36.
13 Rule 40.
14 Rule 41.
15 Rule 104 of IRA.
16 Ibid.
17 See both the High Court Act, cap 50, and the Subordinate Courts Act, cap 45. Note also that not only has the IRC power to hear interlocutory applications but also to make interim orders such as injunctions.
18 This topic has been fully dealt with in major works on constitutional law such as Nwabueze BO Judicialism In Commonwealth Africa (1977) London chap 8; LG Barnett The Constitutional law of Jamaica (1977) OUP chap 13; De Smith Judicial Review of Administrative Action 2 ed 64 et seq.; HO Phillips Constitutional and Administrative Law 6 ed London.
ment and security of tenure of the judges of these courts. Certain constitutions do not expressly provide for the establishment of lower courts or furnish a code governing the appointments, discipline and tenure of office of inferior judicial officers. But they generally contain provisions which regulate the appointment and disciplinary control of resident magistrates and senior resident magistrates (as opposed to non-professional magistrates and the local courts' adjudicators in case of Zambia). As regards the jurisdiction conferred upon these superior courts one may generalise and say here that most constitutions in the Commonwealth countries tend to confer original jurisdiction in all embracing terms. Thus, the Jamaican constitution expressly leaves the powers of the superior courts to be defined by ordinary law and in this connection makes absolutely no reference to the inferior courts. In Zambia while the constitution establishes the supreme court as the final court of appeal it does not expressly provide for its jurisdiction; just as it does not for the subordinate courts. But as regards the high court the Zambian constitution provides that “there shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this constitution or any other law.”

From the foregoing it may be said that the nature and scope of the functions and powers to be exercised by the judiciary emanate from the necessary implications of the constitutions but are largely to be discovered in the principles of the common law and the provisions of the various statutes such as the High Court Act or the Subordinate Courts Act or the Judicature Acts.

In Zambia, just as in other common law jurisdictions, it is important to define and characterise the judicial functions and judicial institutions not only in order to determine the applicability in each case of the common law rules relating to the review of judicial as against executive functions, and the privileges and immunities which should be accorded to a particular body in accordance with whether it constitutes a court or not, but also for the purpose of identifying those powers which (as our argument will soon show) according to the constitution should only be exercised by judicial bodies. The institutions, offices and functions which may be labelled judicial vary with the purposes for which the classification is made. But varied

---

18 See, eg, LG Barnett supra at 335.
19 Art 107. But note that it is possible to argue that in fact art 109(5) of the constitution of Zambia does expressly point out that subordinate courts have jurisdiction over civil and criminal proceedings when it provides that the High Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial.
20 See art 109(1).
21 For example in relation to the equitable orders of certiorari and prohibition which will only issue to bodies which are under a duty to act judicially.
22 This relates eg to the absolute privileges which attaches to judicial bodies in the law of defamation and immunity from suit in respect of bona fide though negligent judicial acts – see eg Royal Aquarium & Summer and Winter Garden Society v Parkinson (1891) 1 KB 431 (absolute privilege does not apply to a licensing meeting of a county council as it is not a judicial body).
though the circumstances may be, experience has shown that certain characteristics are regarded as indicative of the existence of a judicial authority or power. The late Professor de Smith has suggested three major tests for characterising judicial functions when he says that a judicial function is indicated where:

(1) the performance of the function terminates in a decision or order that is \textit{per se} conclusive and binding in law, and cannot be impeached (if the court has acted within its jurisdiction) indirectly in collateral proceedings; or

(2) the manner in which the function is to be performed conforms with the procedural characteristics of a court; or

(3) after inquiry and deliberation, an act is performed or a decision is made that is binding and conclusive and imposes obligations upon or affects the rights of individuals.

As Professor de Smith points out the courts apply these tests with varying emphasis in accordance with the nature of the situation and the purpose for which the decision is made. No one of these tests is in itself decisive, but where most of these characteristics are present it will be very likely that not only will the function be regarded as judicial but the institution will also be classified as a court. Where the purpose of the classification is to identify the judicial power as an exclusive prerogative of the judicial organs of government, the test is stricter than, say, a case in which the purpose is to determine whether \textit{certiorari} should issue because the authority had exceeded its jurisdiction. As an Irish judge stated after reviewing numerous authorities:

From none of the pronouncements as to the nature of judicial power which have been quoted can a definition at once exhaustive and precise be extracted, and probably no such definition can be framed. The varieties and combinations of powers with which the legislature may equip a tribunal are infinite, and in each case the particular powers must be considered in their totality and separately to see if a tribunal so endowed and is invested with powers of such a nature and extent that their exercise is in effect administering that justice which appertains to the judicial organ, and which the constitution indicates is properly entrusted only to judges.

\textsuperscript{84}De Smith \textit{supra}.

\textsuperscript{85}These attributes include the method of initiating the action by means of the act of the parties to the disputes; the hearing of evidence and arguments submitted to them (as a general rule in public) by both sides in accordance with definite rules of evidence and procedure; the power to compel the attendance of witnesses who may be examined on oath, the power to enforce compliance with their orders and decisions – See \textit{Durayappah v Fernando & Others} (1967) 2 ALL ER 152.

\textsuperscript{86}Op cit 76–80.

\textsuperscript{87}See Shell Co of Australia v Federal Commissioner of Tax (1931) AC 275 per Lord Sankey at 297.

\textsuperscript{88}See \textit{Waterside Workers' Federation of Australia v R & The Boilermakers' Society of Australia} (1957) AC 288; \textit{The Queen v Commonwealth Industrial Court, Ex Parte The Amalgamated Engineering Union} (1960) 103 CLR 368; See also \textit{The State v Irish Land Commission & Others} (1951) IR 250.

\textsuperscript{89}In \textit{Re Solicitors Act 1954} (1960) IR 239 per Kingsmill Moore J at 271.
(b) The doctrine of the separation of powers and the independence and separateness of judicial power

Again this is another topic which prominent students of constitutional law have already dealt with in their works.\(^9\) It may suffice, however, to mention that the doctrine of separation of powers connotes that the functions of government are differentiable according to their distinctive features. "Three categories are easily recognisable, viz execution or measure-taking (which comprises 'political' direction and pure administration), law-making, and law-interpretation/adjudication. The idea of function is linked with that of procedure."\(^1\) However, although most constitutions of Commonwealth countries reflect the pattern of dividing the organs and powers of responsible cabinet government into the three branches seen above, they nonetheless ignore the doctrine in its orthodox form and provide to a large extent, for a close relationship between the executive and the legislature "recognising that the one may be controlled by or exercise the functions of the other, and requiring that the central executive body, the Cabinet, should comprise members of the legislature".\(^2\) But in relation to the judicial function the doctrine of separation of powers becomes truly efficacious and necessary to uphold; for the constitution of any country is fundamentally intended to ensure the protection of the principle of constitutionalism.\(^3\) Constitutionalism, therefore implies the rule of law which is premised not only on the existence of an independent and impartial judiciary, but also on the safeguarding of its powers and jurisdiction from usurpation by the other two branches of government. The question which then arises is: what do we mean by the assertion that the judiciary or the judicial system should safeguard constitutionalism? And what implications does this hold for the legal status of tribunals in general whether it be in labour law or in other areas of law such as land law, administrative law, etc? In other words, what is a "court"?

What is a "court"?: Examples from other countries

The question whether or not a tribunal not constituted under the pro-

\(^{9}\) See n 18 supra. See further, professor CH McIlwain Constitutionalism: Ancient and Modern Cornell University Press revised ed 1947 esp at 141.

\(^{1}\) BO Mwabueze Constitutionalism In the Emergent States (1973) London at 12.

\(^{2}\) It is now generally accepted that the doctrine of separation of powers, in the form attributed to Montesquieu, is impracticable. See Hood Phillips op cit 16-18; Wade and Phillips op cit chap 3. In the Irish case of The Pigs Marketing Board v Donnelly (Dublin) Ltd (1939) IR 413 Hanna J at 421 justified the delegation of legislative powers on the ground that the complication of modern government made it necessary; but it seems that the doctrine is inapplicable to legislative-executive relationship under a constitution based on responsible cabinet government. See eg AG of the Commonwealth of Australia v the Queen (1956) 95 CLR 529 per Lord Simonds at 540. An attempt by parliament to abdicate its legislative powers would of course be clearly unconstitutional as being inconsistent with the provisions vesting legislative power in that body. See In re Initiative and Referendum Act (1919) AC 935. (Act providing for passing of law by electoral vote without concurrence of parliament held void.)

\(^{3}\) This concept, according to Professor BO Nwabueze supra connotes that while society accepts the necessity of government, there is nonetheless the problem of how to limit the arbitrariness inherent in government, and to ensure that its powers are to be used for the good of society. It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism.
visions of the constitution of the country may adjudicate on a given issue
is one which probably ought to be answered by looking at the nature of the
function for which that tribunal was created. But in a country with a written
constitution efforts should be made to examine the constitutional provisions
and see what tribunals it establishes and the powers with which they are
endowed. Thus, LG Barnett has rightly pointed out that if, for example,
"the constitution implies that criminal causes can only be dealt with by
tribunals which are part of the normal judicial system then it may be im-
possible to create new types of courts by ordinary legislation unless their
personnel are made subject to the jurisdiction of the judicial service Com-
mission". This view has in fact found support in certain countries whose
constitutions provide to that effect. Thus, s 71 of the Commonwealth of
Australia Constitution Act 1900 provides that the judicial power of the
Commonwealth shall vest only in certain federal courts established in ac-
cordance with chapter III of that constitution; and art 34 of the Irish Con-
stitution prescribes that justice shall be administered in public courts es-
tablished by law by judges appointed in the manner prescribed by the
Constitution.

The approach by the courts to the question of the vesting of strictly
judicial powers in persons or authorities other than the judiciary has been a
revealing one. Hence, in what is now Sri-Lanka (formerly Ceylon) two
famous cases arose in which, it appears, that the Judicial Committee of the
Privy Council took the view that the absence of provisions akin to the ones
found in the Irish and Australian Constitutions as seen above was imma-
terial. In Bribery Commissioner v Ranasinghe the board was concerned with
the legality of orders made by the Bribery Tribunal which had been created
by an ordinary legislative measure, the Bribery (Amendment) Act 1958. The
respondent had been prosecuted for a bribery offence before the tribunal
which convicted and sentenced him to a term of imprisonment and a fine.
The tribunal was appointed by the Governor-General on the advice of the
Minister of Justice and not by the Judicial Service Commission in which the
constitution vested the power to appoint "judicial officers". The Privy
Council held that the Bribery Commissioners who comprised the tribunal
were "judicial officers" and the statutory provision requiring their appoint-
ment otherwise than by the Judicial Service Commission was inconsistent
with the constitution, and since it had not been passed in accordance with
the prescribed amendment process it was ultra vires and invalid. As a result
the orders made by the tribunal were null and void. Although the opinion
was largely concerned with determining whether the members of the tribunal
were "judicial officers" and therefore had to be appointed by the Commis-
sion, it contained references to the appreciation by the constitution-makers
of "the importance of securing the independence of the judiciary and main-
taining a dividing line between the judiciary and the executive" as well as
to the dangers of the executive being free "to appoint whom they chose to
sit on any number of newly created tribunals which might deal with various

84 Supra at 338.
85(1965) AC 172.
86 Per Lord Pearce at 190.
aspects of the jurisdiction of the ordinary courts and thus by eroding the courts' jurisdiction render the provisions relating to the appointment of judicial officers 'valueless'.”

In *Liyanage v The Queen* the board was concerned with the constitutionality of the statutes amending the Criminal Procedure Code by purporting to widen the classes of offence which could be tried without a jury by three Supreme Court judges nominated by the Chief Justice; for the admission of evidence not otherwise admissible and for the application of new minimum penalties. The provisions were expressed to be retrospective to cover a particular incident. The Judicial Committee held that the Acts were directed to secure the conviction and punishment *ex post facto* of particular persons for particular offences on specific occasions and therefore involved a usurpation of the judicial power. This case unlike the former was not dependent on the express provisions of the constitution relating to the appointment of “judicial officers” for the members of the court were duly appointed judges. The board pointed out that while in the United States and Australia there were no federal courts before the establishment of their constitutions and therefore it was necessary to create such courts and expressly invest them with jurisdiction, in Ceylon, the judicial system continues as before independence, and hence there was no “compelling need” to make specific reference to the judicial power when the legislative and executive powers changed hands.

Their Lordships also regarded it as significant that the Ceylonese constitution is divided into separate parts although it seems clear that this division does not imply any true separation of powers between the governmental organs dealt with in the other parts of the constitution. More importantly, their Lordships examined the provisions relating to the appointment and security of tenure of the judges, and concluded:

> These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitutions' silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.

On this basis the Act was held to be inconsistent with the constitution, *ultra vires* and void. After reviewing the arguments and judgments in the local Supreme Court in connection with an interlocutory application their Lordships stated, “there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature”.

---

*37 Ibid 192.*

*38 (1967) 1 AC 259; (1966) 2 WLR 682.*

*39 Ibid 693.*

*40 Ibid 694.*
In the Irish case of *Re Solicitors Act (ante)* the power conferred on the Solicitors Committee of Ireland to hear disciplinary charges against solicitors and to impose penalties including striking them off the roll was held to be part of the judicial power exercisable only by courts. In yet another Irish case of *Deaton v AG & Revenue Commissioners* the court held that the power which a statute conferred on Revenue Commissioners to elect which of the two statutory penalties should be applied against a tax defaulter was part of the judicial power reserved to ordinary courts of law. From this it can be seen that Irish courts have not hesitated in treating quasi-criminal matters or proceedings in which penalties may be imposed as attracting the same protection as the criminal jurisdiction of the courts. In this connection it may also be of interest to note the Nigerian case of *Olawoyin v Commissioner of Police* where Brett FJ, in holding that a judge of a Native Court could not sit as an additional member of the High Court, stated:

"(T)he detailed provisions which the Constitution contains for the qualifications and Independence of judges of the High Court could be defeated if it were within the power of the regional legislature to enable other persons to take part in the exercise of the jurisdiction of the Court . . . . The Constitution establishes a number of special authorities for the exercise of particular functions and it seems clear on principle that any law which provides for the sharing of those functions with other persons must, unless the Constitution expressly permits it, be regarded as inconsistent with the Constitution."

One legal development in Jamaica also provides a rather more striking illustration. Due to the increase in armed robberies at the time, the Jamaican government came up with the idea of passing an Act to establish what came to be known as the Gun Court. In the cases dealing with the constitutionality of the Gun Court the question was raised as to whether parliament had acted *ultra vires* the Jamaican constitution by purporting to establish a superior court of record exercising jurisdiction similar to that of the Supreme Court and by providing for the designation thereto of judicial officers other than by the eclectic process of appointment by the Judicial Service Commission. In the majority judgment in the second appeal their Lordships, in adopting the conclusion of the Privy Council in the case of *Lyanage v The Queen (ante)*, that there did exist in the judicature "a separate power" which could not be usurped or whittled away by the legislature, said:

"In the opinion of this Court an examination of the elaborate and detailed provisions of Chapter VII of the Constitution of Jamaica compels, perhaps with much greater force, a like conclusion. Those provisions demonstrate the anxious care taken by the authors of our Constitution to make it abundantly clear that it was their intention that the judicial power of the State should be vested in the Supreme Court and in the other three organs of the judicature."

---

41(1963) IR 170.  
42(1961) 1 ALL NLR 203.  
43Ibid 212.  
45On appeal to the Privy Council the majority opinion of the board expressly affirmed the application of this principle to the Jamaican constitution. *Hinds and Others v The Queen* (1976) 1 All ER 353. One consequence of this was that the provisions of the Gun Court Act by which a Review Board not comprised of judicial officers was entrusted with the power of fixing the duration of sentences was struck down as being inconsistent with the constitution. See also the Irish case *State v O’Brien* (1973) IR 50.
In their purpose, namely securing the conviction and punishment of certain alleged offenders, both enactments that formed the basis of litigation in the Ceylonese case of Lyanage and in the Jamaican cases of the Gun Court are approximately analogous to the amendments to the Criminal Procedure Code in Ghana, following the abortive attempt in August 1962 to assassinate the now late President Nkrumah at Kulungugu, as he was returning from a state visit to Upper Volta. An earlier amendment in 1961 had created a special Criminal Division of the High Court for the trial of offences against the state, offences against the person, and such other offences as the president might specify by legislative instrument. The court was to be constituted with a bench of one judge and two other members, by the Chief Justice in accordance with a request made to him by the president. Trial was by summary procedure and the decision of the court, to be arrived at by a majority, was final. The intention was of course to facilitate the conviction of persons charged with these offences. It did not, however, guarantee conviction of persons charged with these offences; and failed indeed to secure it in respect of those charged with involvement in the abortive assassination attempt. Their acquittal gave rise to a second amendment, which authorised the president, if it appeared to him that it was in the interest of the state so to do, to declare by an executive instrument the decision of the court to be of no effect, the instrument to be deemed a *nolle prosequi* entered in terms of s 54 of the Criminal Procedure Code by the Attorney-General before the decision in the case was given. The operation of the amendment was made retrospective to 22 November 1961, the date of the first amendment. The acquittal of the accused persons having been nullified by the president in pursuance of this power, a third amendment was enacted which reconstituted the special division. It was now to consist of the Chief Justice or one other judge, sitting with a jury of twelve whose verdict was to be by a majority. The reconstituted court then retried and convicted the accused persons and sentenced them to death, later commuted by the president to a prison term. We have narrated the Ghanaian example primarily to demonstrate how the legislature and the executive in a presidential system may collude in order to usurp the powers of the judiciary. But it is hoped that the foreign cases we have referred to above have fully demonstrated the extent to which the courts in the common law system are prepared to defend the doctrine of the separation of the judicial power.

In the succeeding paragraphs we shall endeavour to highlight the gist of our argument here by examining not only the sources of Zambian indus-

---


47Criminal Procedure (Amendment) (No 2) Act 1963.

48In criminal law and procedure this phrase signifies that the prosecution may, with the consent of the Director of Public Prosecutions, stay proceedings at any time before judgment is passed. It should be noted, however, that a *nolle prosequi* is not equivalent to an acquittal and therefore is no bar to a new indictment for the same offence.

49Criminal Procedure (Amendment) (No 3) Act 1963.

50They had been kept in prison all the time under the Preventive Detention Act.
trial or labour relations law, but also the constitutional status of the IRC in Zambia.

Sources of labour law of Zambia and the jurisdiction of the IRC

To speak of the jurisdiction of the IRC entails knowing not only the matters that the IRC is empowered to deal with, but also the law applying to such matters. For example, if the IRC is to deal with the question of collective agreements then it ought to know or parliament ought to direct it as to the source of law applicable to collective agreements. It may be contended that whilst s 98 of the IRA provides for the jurisdiction of the IRC, it hardly specifies the sources of law to which the IRC ought to turn when considering the wide ranging matters that seemingly fall under its jurisdictional purview. In our view, it is hardly enough for anyone to simply assert that the IRC is to have recourse to the provisions of the IRA in order to determine issues that fall within its jurisdiction. Of course, this is true; but it should be remembered that the IRA itself deals with a number of issues that are in fact regulated by some other specific statutes or even by common law. It may therefore be possible to argue that there are at least three major sources of labour law in Zambia namely:

- Legislation – including the IRA and the ILO conventions;
- Common law; and
- The constitution.

We shall consider each of these separately.

Legislation

In an age when state or governmental regulation of both industrial and social welfare of the society is undeniably accepted, it is hardly unusual to find parliament consistently engaged in legislating towards that goal. Within our context, the rational for government intervention through legislation has been vividly stated thus:

Government intervention is necessary because there are large sections of industry which, left to themselves, cannot remedy the hardships of the workers. In Zambia demand for Government intervention in industrial relations became particularly pronounced immediately after independence and has become increasingly insistent with the rising expectations of the general population. Apart altogether from humanitarian sympathies, the state has a direct interest in securing standards of living and other conditions necessary for a healthy population and one with good standard of education and industrial efficiency. Removal of hardships and privation can diminish the danger of social unrest. For these purposes therefore the state has introduced and progressively raised the standards of industrial safety and welfare by the Factories Act. It has also established systems of fixing minimum wages in industries where the lack of organisation among employers and the workers makes it difficult for wages to be regulated through the process of collective bargaining.

In many countries, including Zambia, laws have been passed to define the functions of trade unions and employers' organisations, to regulate Collective Agreements, and to impose restrictions on industrial disputes and the conduct of persons taking part in them.

The state has a direct interest in preserving industrial peace. Unrest may cause disorder which would be costly to control, and stoppages of work may reduce prosperity and cause national revenues to fall ... 61.

Legislation on labour matters in Zambia is massive. Since 1974 we have

61See SD Sacika “The role of the State In Industrial Relations” in Some Aspects of Zambian Labour Relations Vol 1 No 1 (1975) E Kalula (ed).
had the IRA whose purpose has been given in the preamble thereto as “to provide for the registration of trade unions, the Zambia Congress of Trade Unions, (ZCTU), the Employers’ Associations and the Zambia Federation of Employers (ZFE); to provide for the establishment of Works Councils, Collective agreements, the settlement of collective disputes and the establishment of an Industrial Relations Court; to repeal certain enactments relating to trade unions and trade disputes and industrial conciliation; and to provide for matters incidental to or connected thereto”. In other words, the IRA is a prime source of labour law in so far as it contains provisions dealing with the organisation of labour and the relations between labour and management. Although the IRA does not necessarily encompass provisions relating to the history of the trade union movement in the country, it nonetheless goes a long way towards codifying some older legislation on and practices in Zambia labour relations.

Apart from the wide ranging law contained in the IRA aforesaid, the Zambian parliament has passed legislation covering the field of social security insurance. The idea is to insure the worker against the numerous risks in his working environment. Thus, the Workmen’s Compensation Act, the Zambia National Provident Fund Act, and the Civil Service (Local Conditions) Pensions Act are all intended to establish insurance schemes covering occupational accidents, diseases, and the old age of eligible employees. There is also legislation providing for terms and conditions of employment. These statutory provisions are automatically implied into every contract of employment to which they relate; and none of the parties to the contract of employment may choose to contract out of them lest the courts hold such a contract null and void for illegality. Examples of such legislation are the Employment of Women, Young Persons and Children Act, the Minimum Wages, Wages Councils and Conditions of Employment Act, the Public Holidays Act, the Apprenticeship Act, the Employment Act, and the Factories Act.

Of relevance to the legislative sources of Zambian labour law are the International Labour Organisation Conventions. Zambia became the 111th member of the ILO in 1964 and has since then ratified a number of ILO Conventions. This ratification usually takes the form of national legislation on the relevant subject matters. In this way, the ILO Conventions may be regarded as an important legislative source of our labour law.

Finally, some legislation passed by the British parliament constitutes

---

52Cap 509.
53Cap 513.
54Cap 410.
55Cap 505.
56Cap 506.
57Cap 510.
58Cap 511.
59Cap 512.
60Cap 514.
61For a discussion of the impact of the functions of the ILO on Zambian legislation see SD Sacika op cit 123 et seq.
part of the Zambian labour law by virtue of the statutes of reception. Essentially, the English law (Extent of Application) Act makes applicable to Zambia all the principles of the English common law and the doctrines of equity and also all British statutes passed prior to 1911. In addition the Zambian parliament has, through the enactment of the British Acts Extension Act, empowered the government to specifically procure the extension of any British legislation passed in the UK after 1911. From this it can be seen that all British legislation enacted prior to 1911 concerning labour relations is very much part and parcel of the Zambian labour law.

Common law: What exactly is meant by the term “common law” is still a moot point in the academic circles; let alone in those circumstances in which British or English common law principles are said to be applicable to former British colonies and protectorates such as Zambia. But for the purpose of this discussion it may suffice to define “English common law” as that part of the law of England formulated, developed and administered by the old common law courts, based originally on the common customs of that country and unwritten. In the UK decisions of the courts are abundant on such labour law issues as the formation of the contract of employment; contracts of service generally, and in particular, with the Crown; wrongful dismissal; the status and legality of trade unions and their activities; the duty of reasonable care and tortious liability at work; vicarious liability; and the right to go on strike. As seen above the English Common Law (Extent of Application) Act makes English common law part of the Zambian legal system and therefore all the English judicial decisions covering the above issues form a source of Zambian labour law.

The constitution of Zambia: Our republican constitution contains a few provisions dealing with labour relations. Thus, under art 16(2) of the constitution it is provided that no person shall be required by another person to perform forced labour. There is, further, a provision which guarantees freedom of assembly and association. Art 23(1) states that except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests. These two constitutional provisions constitute yet another fundamental source of our labour law.

Having identified the various sources of Zambian labour law, the next question to be answered is: Is the IRC such a court as would be entitled to apply the above sources of labour law or does the purported jurisdiction of the IRC violate some or all of the legislation and common law principles on

---

62 That is, the English Law (Extent of Application) Act: Cap 4 and British Acts Extension Act: Cap 5.
63 For example of such legislation see generally BW Rideout Principles of Labour Law (2 ed), Wedderburn The Worker and the Law, and also O Kahn-Freund Labour and the Law (1972).
64 In relation to Zambia this point has been skillfully dealt with by WL Church The Common Law and Zambia (1970) Vol Zambia Law Journal 1.
65 See fn 63 supra. See in particular the Crofter case (1942) AC 435.
labour matters and the relevant provisions of our republican constitution? In other words, has parliament vested strictly judicial powers in the IRC? If so, what are the likely consequences in law?

The legality of the jurisdiction of the IRC and the determination of civil matters under the constitution of Zambia

The main difficulty that arises in considering this matter is that under our constitution there is no general provision that vests the power to lay down authoritative interpretations of the constitution in the courts which the constitutional provisions themselves establish and protect. This does not, however, mean that the Zambian constitution does not call for the protection of the principle of constitutionalism which, as we have already seen, hinges not only on the existence of an independent and impartial judiciary but also on the protection of its powers and jurisdiction from being usurped by the executive and/or the legislature. It can hardly be denied or doubted that in Zambia, practice as well as the law have come to recognize as a matter of constitutional law principle, that the rights and obligations of individuals should be determined by judicial bodies which are not subordinated to the control or directions of the legislature, the party, or the traditional executive arm of government. It may, in fact, here be contended that in Zambia the position of the judiciary is protected by the express provisions, as well as the apparent implications of the constitution which is supreme. Thus, art 109(1) of the constitution expressly vests in the High Court unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. It may be argued that if any dispute arises as to whether or not a particular person is entitled to become a member of a particular trade union, or whether or not he in association with others can form a trade union in a particular industry or company, such a question is one which properly falls under the jurisdiction of the High Court. Indeed, we have already established that the right to belong or not to belong to a trade union is a protected fundamental right under our constitution; as should be the question of having more than one union in a given company or industry. And according to art 29(1) of the constitution, if any person alleges that any of the provisions relating to protected fundamental rights under arts 13 to 27 inclusive, has been, is being, or is likely to be contravened in relation to him that person may apply to the High Court for redress. Yet, s 98 of the IRA purports to endow the IRC with power to inter alia "inquire into and adjudicate upon any matter affecting the rights, obligations and privileges of employees, employers and representative organisations thereof". This it is submitted, could be held illegal and ultra vires the constitution in so far as the fundamental constitutional rights are concerned; for there can be no doubt as to who art 29(1) intended to vest with powers to interpret the protective fundamental rights under our constitution. It is the High Court first and also the Supreme Court on appeal thereto from the former. To ensure that the High Court exercises jurisdiction in such matters art 29(3) even goes further to expressly require the person presiding over any proceedings in any subordinate court where fundamental rights are

"See art 29(4) of the constitution of Zambia."
alleged to have been contravened to refer the issue to the High Court. This clearly emphasizes the point that if an issue of constitutionality arose in the field of labour law it is not, contrary to s 98 of IRA, for the IRC to determine it but the High Court. Indeed, the definition of the word “court” under art 31(1) of the constitution indicates that the IRC is not a court for the purposes of Part III of the constitution. But this definition of the term “court” should be read against other provisions in the constitution if we are to appreciate its relevance to our discussion here.

Art 31(1) states that “court” means any court of law having jurisdiction in Zambia, other than a court established by a disciplinary law, which regulates the discipline of any disciplined force namely, a naval, military or air force; the Zambia Police Force; or any other force established by or under an Act of parliament. But the definition in art 31(1) states, on the other hand, that the word “court” will include a court established by a disciplinary law where the issue at hand involves either the question of protection of the fundamental right to life or the protection of the right from slavery and forced labour. An examination of arts 116(4) and 138(1) of the constitution shows also that the word “court” does not include the IRC; neither is the IRC established under our constitution. Art 138(1) supra is of particular interest here for it is the interpretation provision for the whole constitution although it does not generally define the word “court”. Instead, it specifically defines each constituent court; though still it makes no attempt to define the IRC. Under art 138(1) the High Court is defined as being the High Court established by the constitution. The Supreme Court is similarly defined. But art 138(1) defines the “Subordinate Court” to mean “any court established for the Republic other than:

- the Supreme Court;
- the High Court;
- a court-martial; or
- the Industrial Relations Court.”

From the above it can be observed that the IRC is clearly not part of the judicature set up under the provisions of Part VIII of the constitution of Zambia; and for this reason, it is not a court. But this is not the end of the matter; for we still have to establish what is meant by saying that a court is that which is established or prescribed by law. What then is meant by the phrase “the court of law”? Is the IRC not a court established or prescribed by law? Is it a “court of law”? Art 20 of the constitution seems to offer some strong guidance as to the way these questions may be answered.

Art 20(1) stipulates that “if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.” In the case of civil matters art 20(9) has even made the whole issue all the more imprecise when it provides thus:

---

67 Eg the Zambia National Service Force.
68 Under art 14 of the constitution.
69 Under art 16 of the constitution.
70 Emphasis added.
Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

In the light of our discussion above concerning the definition of a "court" there can be no doubt that art 20 supra provides for constitutionalism, and that since it falls within the fundamental rights of an individual, only those courts which are part of the judicature as established by the constitution itself would have the jurisdiction over both criminal and civil matters. This, in essence, is what even courts in the Commonwealth countries that we have already referred to have come to conclude.

However, art 20(9) makes mention of the possibility of parliament establishing an "adjudicating authority" for the determination of civil matters. It may therefore be possible to argue that on the basis of art 20(9) the IRC can have or has power to determine civil rights and obligations. But such an argument may be rebutted on two possible grounds: Firstly, the powers given to the High Court under the relevant provisions of the constitution and the High Court Act to determine civil disputes as well as criminal cases are so overwhelming that it is possible for any litigant to defy the jurisdiction of another tribunal such as the IRC over any issue which is provided for by law under the authority of art 20 of the constitution. Secondly, although it may be inferred from art 20(9) supra that there are civil matters which may be determined by an authority other than an ordinary court of law, this cannot mean that every type of civil matter may be determined by tribunals which are not part of the normal judicial machinery. Judicial authority clearly supports this view.

For example, the Australian Commonwealth Conciliation and Arbitration Act 1904–15, established a Commonwealth Court of Conciliation and Arbitration as a court of record, with a president appointed by the Governor-General for a seven year term. Its primary function was the settlement of industrial disputes by conciliation and arbitration, terminating in what was called an award. In the exercise of its conciliation and arbitration functions, it was given power to alter the standard hours of work in an industry, the basic wage for workers, and to make provision for long service leave with pay. These were found to be functions of an administrative, arbitral and executive character. Powers of a judicial character were also given to it namely: (i) to impose penalties for breach or non-observance of an award; (ii) to order compliance with its order or award; (iii) to grant mandamuses and injunctions against committing or continuing a contravention of the Act; and (iv) to punish for contempt of itself to the same extent as the High Court. It was contended that the "court" was not a court in terms of the constitution, as its president was appointed, not for life, as required by the constitution, but for seven years, and that the vesting of judicial functions in it was a usurpation. The High Court held that the power conferred upon the court to enforce the rights or liabilities created by an award made by it was judicial. Therefore, it could only be conferred on a court strictly so

---

71See Waterside Workers' Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434.
called; that the Court of Conciliation and Arbitration was not such a court because its president was appointed for seven years and not for life; accordingly the provisions of the Act conferring upon it power to enforce its awards were invalid. Chief Justice Griffith said:72

It is impossible under the constitution to confer such functions upon any body other than a court, nor can the difficulty be avoided by designating a body, which is not in its essential character a court, by that name, or by calling the functions by another name. In short, any attempt to vest any part of the judicial power . . . in any body other than a court is entirely ineffective.

It is interesting to note that following this decision of the Australian High Court, the Act was subsequently amended, altering the membership of the “court” to a Chief Judge and such other judges as might be appointed, and their appointment, tenure and remuneration were placed on the same footing as those of judges of the High Court under the constitution. But notwithstanding all these statutory reforms, the judicial Committee of the Privy Council held, affirming a majority of the High Court, that by its primary functions the “court” remained an administrative body, and that notwithstanding that its members were now appointed for life, the vesting of judicial functions in it was invalid.73

From Australia again, two more illustrations may be cited. By an Act of the Australian parliament, the Inter-State Commission was established as a court of record, with jurisdiction to hear and determine any complaint, dispute or question in respect of inter-state trade and commerce under the Act, to adjudicate upon certain other specified matters, and for the exercise of that jurisdiction to grant any appropriate relief, including damages and injunctions, to fix penalties for disobedience of its orders, which might be enforced by summary conviction, and generally to exercise all such powers, rights and privileges as are vested in the High Court. These were held to be indisputably judicial powers,74 and the only question was whether they were authorised by the provision in the constitution that the Commission should have “such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance . . . of the provisions of the Constitution relating to trade and commerce, and of all laws made thereunder”. In the view of the court, the adjudicatory functions to be conferred on the commission were to be incidental to its primary function of executing and maintaining the laws relating to trade and commerce, and did not cover strictly judicial functions, such as were in fact conferred on it; the enactment was thus ultra vires and invalid.

Similarly, legislation which vested in a Fair Rent Board (which was not a court in the terms of the constitution) power to decide disputes between landlords and tenants relating to the right to possession of premises and to order the recovery thereof or the ejectment of the tenant therefrom was held invalid on the ground that, the power being judicial, it was a usurpation to

72Ibid 442.
73See also Attorney-General For Australia v R & Boilermakers’ Society of Australia (1957) AC 288.
74The State of New South Wales v The Commonwealth (1915) 20 CLR 54.
vest it in a body which was not a court.\textsuperscript{75} The legislation also encroached on the judicial power by its provisions that a Fair Rent Board should have all the powers possessed by courts of summary jurisdiction, that its decision should not be subject to appeal, and that its orders for recovery of premises or for ejectment of a tenant might be enforced in the same manner as if the order had been made by a court which, but for the legislation, would have had jurisdiction to make the order.

It is hoped that the authorities we have so far cited clearly cover the circumstances of the Zambian Industrial Relations Court and its constitutional status. It is clear from the framing of s 98 of IRA that the powers which it gives to the IRC are by and large of a judicial as opposed to an administrative nature. For example, according to s 98 the IRC has jurisdiction over, \textit{inter alia}, the question of the right to strike or lock-out.\textsuperscript{76} Yet, if one examines the legal development of this issue one discovers that it is an issue which has always fallen within the jurisdiction of the judicature. Hence, to establish whether or not the right to strike exists in a given case, one has to examine the different types of civil liability for economic interference and intimidation in labour relations.\textsuperscript{77} Naturally, these are matters of industrial relations which properly fall under the jurisdiction of the ordinary courts because they are of a strictly judicial nature.

The same argument seems to apply to the question of whether or not a collective agreement is a legally enforceable contract; that is, whether it is legally binding on the parties thereto. In England this question has always been a very vexed one.\textsuperscript{78} But in the case of Zambia, s 84(3) of IRA makes it plain that a collective agreement binds the parties. In other words, it is a legal contract which ordinary courts should normally interpret. Yet s 88 of IRA purports to give the IRC power to interpret any of the provisions or terms contained in a collective agreement. The same section provides further that the decision of the IRC as to the interpretation of a collective agreement shall be final and binding upon the parties concerned therewith. This, it is submitted, amounts to the usurpation of what is strictly a judicial power – it is for the judicature to determine the legal validity of contracts. Another good illustration of this point is contained in s 114 of IRA which prohibits employers from terminating the services of an employee or from imposing any other penalty or disadvantage upon such employee on the grounds of his race, colour, sex, marital status, religion, political opinion or affiliation, tribal extraction or social status. The section further provides that any employee who has reasonable cause for believing that his services have been terminated or that he has suffered any other disadvantage on any of the grounds mentioned above, may lay a complaint before the IRC, and it shall,

\textsuperscript{75}Silk Bros Pty Ltd v State Electricity Commission (1943) 67 CLR 1; British Imperial Oil Co v Fed Com of Taxation (1925) 35 CLR 422.
\textsuperscript{76}See also s 116 of IRA.
\textsuperscript{77}See such relevant cases as \textit{the Croftes case} (1942) AC 435; (1942) 1 ALL ER 142 (HL); \textit{Rookes v Barnard} (1964) AC 1129; (1964) 1 ALL ER 367 (HL); and numerous other cases cited by Professor KW Wedderburn \textit{The worker and the Law supra} chap 8.
\textsuperscript{78}See KW Wedderburn \textit{supra} chap 4 and the case cited there.
if it finds in favour of the complainant, grant him such remedy as it may
deem fit, including reinstatement in employment or compensation for loss of
employment. Under the Zambian constitution any person is protected from
discriminatory practices\(^8\) such as the ones provided for in s 114 of IRA.
In the light of our discussion so far, it is possible to submit that the subject
matter of s 114 is squarely based upon art 25 of the constitution the con-
travention of which can only be adjudicated upon by the High Court or
the Supreme Court and not by the IRC.

It also seems that if an application was lodged for an order to determine
the legality of the rules of a particular trade union or employers' association,
the jurisdiction of the normal courts of law rather than that of the IRC as
the IRA provides, ought to be invoked. Thus, in the Australian case of
*The Queen v Commonwealth Industrial Court: Ex parte The Amalgamated
Engineering Union*\(^8\)\(^9\) the power conferred on the Commonwealth Industrial
Court to hear and determine applications for orders declaring the rules of
an organisation contrary to the relevant provisions of the Act was held to
be part of the judicial power of the ordinary courts. Indeed, the whole issue
of providing remedies, especially the equitable remedies such as *mandamus*,
*prohibition*, *certiorari* and *injunction* is, as every lawyer and law student
knows or ought to know, a proper province of our courts of law namely,
the High Court, subordinate courts and the Supreme Court.\(^8\) For this
reason it is difficult to see how the draftsman of IRA, or indeed, parliament
itself, would justify the presence of all those provisions in the IRA that
empower the IRC not only to make these various orders and awards, but
also to lay final and non-appeallable decisions on most issues of tremendous
legal and constitutional significance affecting labour relations. Such provi-
sions of the IRA (which are many in fact) are, it is submitted, contrary to
art 29(2) of the Constitution which empowers only the High Court to make
such orders, issue such writs and give such directions as it may consider
appropriate for the purposes of enforcing or securing the enforcement of
not only fundamental constitutional rights of an individual but also his legal
rights in general.

Section 98 of IRA also seems to contravene the sources of our labour law
generally. Thus, an examination of the legislative sources of Zambian labour
law reveals that only the judicature as established under the constitution has
competent jurisdiction over any matters or disputes that may arise under the
provisions of such statutes. In these statutes there is no mention of the IRC
having jurisdiction over matters provided for therein. Indeed, all of them
(except, of course, the IRA itself) were enacted prior to the establishment
of the IRC and therefore could not have possibly provided for its jurisdic-
tion. Consequently, the word "court" in the definition section of all these
statutes is said to refer not to the IRC but to the ordinary courts of law
known as the judiciary or the judicature.\(^8\)\(^2\)

\(^7\) Art 25.
\(^8\) (1960) 103 CLR 368.
\(^9\) See generally CP Gupta *Cases and Materials on the Administrative Law of Zambia* (un-
published teaching materials, the University of Zambia, School of Law); Garner
*Administrative Law* London.
\(^8\) See the definition section of each of the statutes cited in n 52 to 60 supra.
Assuming, however, that the IRC were to qualify as a court of law, there seems to be a further hurdle as regards its composition or personnel. As we have already seen the chairman and the deputy-chairman of the IRC are appointed by the president of Zambia from persons who are either judges of the High Court or are qualified to be so. In addition to these two persons, the president has been empowered to appoint two or more persons from the general public to sit with the chairman and his deputy. This method or procedure of appointing persons to hold judicial office, differs radically from the one prescribed under art 116 of the constitution. Art 116 provides:

(1) Power to appoint persons to hold or act in offices to which this Article applies (including power to confirm appointments), to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the Judicial Service Commission acting in the name and on behalf of the President.

(2) The Judicial Service Commission may, subject to such conditions as it thinks fit, delegate any of its powers under this Article by directions in writing to any person, or any court of law or any person holding or acting in any office to which this Article applies.

(3) The offices to which this Article applies are:
   (a) the office of Master or Deputy Master or Assistant Master of the Supreme Court;
   (b) the office of the Registrar or Deputy Registrar or Assistant Registrar of the High Court;
   (c) the office of Senior Resident Magistrate, Resident Magistrate or Magistrate;
   (d) the office of presiding officer or member of any subordinate court;
   (e) such other offices of presiding officer or member of any court of law as may be prescribed by or under an act of parliament.

From the above it can be observed that judges and the subordinate court magistrates are a special category in so far as their appointments and security of tenure are concerned. It may be argued here that if the framers of our constitution had intended that the IRC be endowed with such jurisdiction to deal with civil causes as s 98 of the IRA seems to provide and imply, the constitution itself would have either provided for the establishment of IRA under its provisions or at least would have subjected the IRC and its personnel to the jurisdiction of the Judicial Service Commission. Two reasons may be given here for holding the above view. The first is that where the constitution intended certain matters to be determined by special tribunals other than the judicature, such tribunals have been established or constituted under its provisions, providing for their jurisdictions as well as the appointments of their personnel. Thus, art 28 of the constitution provides for the establishment of a special tribunal to consider: (1) a request for a report on a bill or statutory instrument made by more than 21 MPs; and (2) to consider claims for legal aid in respect of cases concerning the enforcement of fundamental constitutional rights guaranteed under Part III of the constitution. Art 28 provides further that the Chief Justice shall appoint a tribunal which shall consist of two persons selected by him from amongst persons who hold or have held the office of judge of the Supreme Court or the High Court. Another example is contained in art 35(1) of the constitution which provides that an allegation that a person has not complied with, or has committed a breach of the Leadership Code shall be
heard and determined by a tribunal consisting of a chairman, to be appointed by the Chief Justice, who is or is qualified to be a judge of the High Court, and two other persons to be appointed by the president. Again, under art 27(1)(C) of the constitution it is provided that where a person’s freedom of movement is restricted, or he is detained he may request that his case be reviewed “by an independent and impartial tribunal established by law and presided over by a person, appointed by the Chief Justice, who is or is qualified to be judge of the Court.”

It is submitted that the phrase “adjudicating authority” in art 20(9) seen earlier could only have been intended to cover, not the IRC, but tribunals such as those mentioned above. Unlike the IRC, these are the tribunals designated by the Constitution as being capable of sharing jurisdiction with the judicature in specified civil matters aforesaid. The status of these tribunals is far superior to that of the IRC which, in our view, is not a tribunal capable of sharing jurisdiction with those forming part of the normal judicial system.

The second reason for holding this view is simply that art 116(4) of the constitution itself expressly states that “references to a court of law do not include references to a court-martial or to the Industrial Relations Court.” There cannot, it is submitted, be any better authority for our views on the constitutional status of the IRC than art 116(4) of the constitution. This is so despite the fact that the IRA at times uses the words “judge” and “court” to respectively refer to the chairman and deputy-chairman, and the IRC itself. As the learned Justice Barton once rightly remarked: “whether persons were judges, whether tribunals were courts, and whether they exercise what is now called judicial power, depended and depends on substance and not on mere name.” What is also remarkable is the fact that s 3 of the IRA itself defines the term “court” as meaning “a court of competent jurisdiction for Zambia other than the Industrial Relations Court.”

Conclusion

It is hoped that we have managed in this discussion to persuade the reader that the constitutional status of the Zambian Industrial Relations Court is a many faceted question. We have endeavoured to demonstrate that s 98 of IRA is by and large unconstitutional for reasons herein tendered. It is basically unconstitutional because it tends to usurp what are, strictly speaking, judicial powers and vesting them in the IRC which, as we have seen, is no court of law. It is not a part of the judicature. Thus, in yet another Australian case it was stated that, like punishments for crimes, trial of actions for breach of contract or for wrongs are in their nature “appropriate exclusively to judicial action”. We have laboured here to try and impress upon the reader that a wholesome kind of conferment of the civil jurisdiction normally exercised by the judicature which IRA generally (and s 98 thereof in particular) does in relation to the IRC, would, on the basis of the various authorities already cited, be inconsistent with the supreme law of the land.

88See Waterside workers’ Fedn of Australia case (1918) supra at 451.
44Federal Commissioners of Taxation v Munro (1925–6) 38 CLR 153.
Consequently, it is hereby suggested that the provisions of IRA conferring jurisdiction on the IRC be reviewed in the hope that the new provisions would avoid enshrining a legislative interference with the judicial function. The objective should now be to constitute the IRC as an administrative rather than a judicial tribunal.