



# UNIVERSITY OF LUSAKA

**SCHOOL OF LAW**

**A STUDY EXAMINING THE TENSION BETWEEN LEGAL RIGIDITY AGAINST  
JUDICIAL CREATIVITY AND THE IMPLICATIONS IT HAS FOR LEGAL REFORM  
AND DEVELOPMENT IN ZAMBIA**

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## DECLARATION

I declare this dissertation entitled, **A STUDY EXAMINING THE TENSION BETWEEN LEGAL RIGIDITY AGAINST JUDICIAL CREATIVITY AND THE IMPLICATIONS IT HAS FOR LEGAL REFORM AND DEVELOPMENT IN ZAMBIA** which is hereby submitted in partial fulfillment of the requirement for the award of a bachelor degree at the university of Lusaka is my own original work and it has not been previously submitted for the award of a degree at this university or any other tertiary institution. I understand what plagiarism entails and I'm aware of the university's policy in this regard. Thus, where other people's work is cited, I have duly acknowledged. The errors or omissions in this work are solely mine

**MWEWA TABO MAPALO KAPATA**



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2025

## RECOMMENDATION

I **LAMECK NGAMBI** recommend that this dissertation prepared under my supervision by **MWEWA TABO MAPALO KAPATA**, entitled **A STUDY EXAMINING THE TENSION BETWEEN LEGAL RIGIDITY AGAINST JUDICIAL CREATIVITY AND THE IMPLICATIONS IT HAS FOR LEGAL REFORM AND DEVELOPMENT IN ZAMBIA** be accepted for examination. I have checked it carefully and I'm satisfied that it fulfils the requirement pertaining to the format laid down in the regulations governing directed research



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**L.NGAMBI**

## **ACKNOWLEDGEMENT**

I would like to firstly thank the Most High God.

This research would not have been completed if it was not for the help of various lecturers, including my allocated supervisor. Namely, Ms Mutemwa for helping conceptualize the initial approach that I would take for this research. Ms Mwanamwambwa for the advice that was generally afforded to us students undertaking the research. Mr Ngmabi for patiently guiding me throughout the writing process.

Lastly, I'm thanking my parents for supporting me throughout my entire period of undertaking this bacehlor's degree as an undegraduate

## **DEDICATION**

This research is dedicated to the Most High God, to my parents and to my siblings. It has been through these parties in my life that I have been able to keep myself moving through everything and their constant love and support has allowed me to endure thus far. I will always be grateful for the assurance, comfort, prayers and good wishes that have brought me to this point. Thank you, once again, to everyone

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## CHAPTER ONE

### 1.0 TOPIC

A Study Examining the Tension Between Legal Rigidity and Judicial Creativity and It's Implications for Legal Development and Reform in Zambia

### 1.01 INTRODUCTION

#### 1.1 BACKGROUND OF THE STUDY

The zambian Legal System, "shaped by its colonial legacy and post independence development, operates as a hybrid model incorporating elements of common law, statutory law, and customary norms"<sup>1</sup> . Central to this system is the "docterine of judicial precedent. Which ensures consistency and predictability in legal rulings."<sup>2</sup> However, the practical operation of the legal system is also marked by significant judicial discretion.

As in,, judges interpret laws not only in accordance with precedent. But also in response to evolving societal, political and moral contexts. This discretion, while necessary for the adaptive growth of the law, introduces a tension. Between legal rigidity and judicial creativity. The former demands uniformity and certainty. While the latter opens space for interpretation that may vary between judges.

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<sup>1</sup> 'History of Zambian Legal System: Origins and Evolution' (GUGOS, 29 March 2024) <https://losgugos.com/history-of-zambian-legal-system-origins-and-evolution/> ,,accessed 15 April 2025

<sup>2</sup> Comfort Mulenga,, *Judicial Precedent in Zambia* (University of Zambia, 2013) <https://dspace.unza.zm/handle/123456789/2818> ,,accessed 15 April 2025

This research investigates the implications of this tension for legal development. And reform in Zambia, particularly through the lens of legal realism, which challenges the notion that “judicial decision making is entirely objective or rule bound”<sup>3</sup> .

## 1.2 BACKGROUND OF THE PROBLEM

Judicial discretion is an “inherent aspect of the common law tradition”<sup>4</sup> . It allows judges to fill in the gaps left by legislation, adapt existing laws to new situations and where appropriate, depart from precedent to ensure justice. Nonetheless, this discretion has been the subject of scholarly debate and public scrutiny.

Legal realism was primarily developed by scholars like **jerome frank and oliver wendell holmes jr.** This school of thought argues that “judicial decisions are shaped by more than just legal rules but are also influenced by personal beliefs, social values and the broader context in which judges operate.”<sup>5</sup> In jurisdictions like Zambia, “where appellate court decisions shape future legal interpretations, the lack of consistency in judicial reasoning can erode the principle of legal certainty”<sup>6</sup> .

The problem is particularly pressing in cases where similar legal issues are resolved in divergent ways. Depending on the judge’s perspective. Such inconsistencies affect

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<sup>3</sup> ministry of Justice, “2018-2021 Ministry of Justice Strategy .Government of Zambia,, 2018. <https://www.moj.gov.zm/wp-content/uploads/2022/12/Ministry-of-Justice-Strategy-Final-copy-August-2018.pdf> accessed 15 April 2025

<sup>4</sup> steven Gow Calabresi. *The Common Law Legal Tradition: First Things First* .Oxford University Press,, 2021. <https://academic.oup.com/book/39379/chapter/339055190> ,accessed 15 April 2025

<sup>5</sup> frederic R., Kellogg. *Realism: Oliver Wendell Holmes Jr. and Legal Logic* .Oxford University Press,, 2018. <https://academic.oup.com/chicago-scholarship-online/book/35801/chapter/308809866> accessed 15 April 2025

<sup>6</sup> nyambe v Total Zambia Limited .SCZ ,Judgement 1 of 2015. [2015] ZMSC 2 <https://zambialii.org/akn/zm/judgment/zmsc/2015/2/eng@2015-01-12> ,accessed 15 April 2025

not only the coherence of the legal system. But also the ability of legal practitioners to advise clients and predict outcomes with confidence.

Moreover, these “variations in judicial reasoning can delay or distort legal reform efforts, especially when contradictory precedents obscure the legal standards to be followed.”<sup>7</sup> The significance of this issue becomes even more apparent. When considered alongside zambia’s ongoing efforts to modernise and strengthen its legal institutions in response to complex social economic challenges<sup>8</sup>.

### 1.3 STATEMENT OF THE PROBLEM

Judicial Discretion, though vital to a responsive and evolving legal system, becomes problematic when it results in inconsistent application of the law. In zambia, there is increasing concern that “judicial creativity, often guided by personal morals, biases and external influences, undermines the predictability and uniformity expected in legal proceedings”<sup>9</sup>. The absence of explicit limits or guiding frameworks for the exercise of this discretion creates uncertainty in the laws application, particularly at the highest levels of the judiciary where precedent setting decisions are made.

This inconsistency not only threatens the stability and fairness of the legal system. But also poses challenges for legal practitioners. They must anticipate how judges might interpret the law in a given context. The realist critique highlights this issue. By

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<sup>7</sup> twampane v Msorti .SCZ 20 of 2011. [2011] ZMSC 20 .8 November 2011. <https://zambialii.org/akn/zm/judgment/zmsc/2011/20/eng@2011-11-08> ,accessed 15 April 2025

<sup>8</sup> Zambia. Chandler Institute Partner to Boost Law Reforms. Improve Governance Frameworks” .Zambia Monitor. 6 December 2024. <https://www.zambiamonitor.com/zambia-chandler-institute-partner-to-boost-law-reforms-improve-governance-frameworks/> accessed 15 April 2025

<sup>9</sup> muna Ndulo. “The Judicial Crisis in Zambia: And a Flawed Election. .Zambian Observer. 2024. <https://zambianobserver.com/the-judicial-crisis-in-zambia-and-a-flawed-election/> accessed 15 April 2025

asserting that “judges are not neutral actors but are instead influenced by their individual perspectives and external factors.”<sup>10</sup>

In the Zambian context, this critique raises important questions about the integrity of the rule of law. And the extent to which judicial discretion contributes to or detracts from legal reform and development. This study, therefore, seeks to critically analyze the manifestations and consequences of judicial subjectivity in Zambia's Supreme Court Jurisprudence.

## **RESEARCH OBJECTIVES**

### **1.4 GENERAL OBJECTIVE**

To critically examine the extent to which judicial discretion and subjectivity, influenced by personal morals, biases and external factors, impact legal certainty and predictability within Zambia's legal system, using the theoretical lens of legal realism.

### **1.5 SPECIFIC OBJECTIVES**

The specific objectives of this research are as follows:

- (i) To examine how judicial discretion, influenced by personal morals, biases and external factors, affects the consistency and predictability of legal outcomes in Zambia, particularly through the theoretical lens of legal realism.
- (ii) To analyze selected Zambian Supreme Court judgments. In order to identify patterns of judicial reasoning that reflect subjectivity or a deviation from precedent.
- (iii) To assess the practical consequences of judicial subjectivity. On legal practitioners and litigants in Zambia. And to propose viable

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<sup>10</sup> legal Realism's Analysis of Judicial Behaviour and Its Contribution to Jurisprudence” .USQ Law Society Law Review. 2021. [https://issuu.com/usqls\\_lawreview/docs/usqls\\_law\\_review\\_2021\\_winter\\_edition/s/12686576](https://issuu.com/usqls_lawreview/docs/usqls_law_review_2021_winter_edition/s/12686576)> accessed 15 April 2025

recommendations for improving the balance between judicial creativity and legal certainty.

## 1.6 RESEARCH QUESTIONS

The research questions of this study are as follows;

- i. How does judicial discretion, influenced by personal morals, biases and external factors, affects the consistency and predictability of legal outcomes in Zambia, particularly through the theoretical lens of legal realism?
- ii. What patterns of judicial reasoning can be identified in selected Zambian Surpreme Court judgments in order to identify patterns of judicial reasoning that reflect subjectivity or a deviation from precedent?
- iii. How does judicial subjectivity affect the work of legal practitioners and the experiences of litigants and what recommendations can be made to ensure a fair balance between judicial flexibility and legal certainty within the Zambian legal system?

## 1.7 SIGNIFICANCE OF THE STUDY

This study is significant for several reasons. Academically, it contributes to the broader discourse on judicial discretion. And legal realism. By grounding these theoretical frameworks in the practical realities of zambia's legal system. It fills a notable gap in local legal scholarship. Where discussions on the implications of judicial subjectivity remain underdeveloped<sup>11</sup> . The research also offers practical benefits to the legal profession. By showing how patterns of judicial reasoning affect litigation strategy. And case outcomes and public perceptions of fairness.

Furthermore, the studies findings may guide policy makers. And judicial training bodies. In developing strategies to foster more consistent and transparent legal reasoning. By highlighting areas where judicial discretion has led to confusion. Or

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<sup>11</sup> chipasha Mulenga, "Enhancing the Standard of Legal Education in Zambia: Challenges and Prospects .University of Lusaka. 2025. <https://law-school.open.ac.uk/sites/law-school.open.ac.uk/files/files/JCLLE/spring-2020/enhancing,the,standard.pdf> accessed 15 April 2025

unpredictability. The research can support efforts to clarify legal standards. And promote reform. Ultimately, the study seeks to enhance public confidence in the judiciary. By advocating for a legal system that balances the need for judicial creativity with the standard of legal certainty.

### **1.8 SCOPE OF THE STUDY**

The Research is confined to the zambian legal context, with a specific focus on Surpreme court judgments issued within the last twenty years. These judgments were selected due to their authoritative status and influence on the development of legal principals.

The study will primarily consider civil and constitutional cases, as these often provide more nuanced examples of judicial reasoning. While Lower court decisions may be referenced for context, the emphasis remains on the surpreme Court, given its role in setting binding precedent and shaping judicial norms.

### **1.9 DEFINITION OF KEY TERMS**

In this research, unless the context otherwise requires:

“Judicial Discretion” means the power vested in judges to make decisions based on their interpretation of the law and the specific circumstances of a case<sup>12</sup> .

“Legal Certainty” means the principle that the law should be clear, stable and predictable, allowing individuals and legal professionals to anticipate the outcomes of legal proceedings<sup>13</sup> .

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<sup>12</sup> sebastián A Reyes Molina. .Judicial Discretion as a Result of Systemic Indeterminacy. .2020. 33 *Canadian Journal of Law & Jurisprudence* 369

<sup>13</sup> juha Raitio,..Legal Certainty. in *Encyclopedia of the Philosophy of Law and Social Philosophy* .SpringerLink, 2021.

“Judicial Creativity” means the process by which judges interpret, adapt or develop legal rules in response to new or evolving societal challenges<sup>14</sup> .

“Legal Realism” means a school of jurisprudence that argues judicial decisions are influenced by factors beyond legal rules, including judges’ personal experiences, societal norms and institutional pressures<sup>15</sup> .

“Subjectivity in Judicial Reasoning” means the incorporation of personal, moral or ideological considerations into judicial decisions, potentially leading to inconsistencies in legal interpretation<sup>16</sup> .

### 1.11 LITERATURE REVIEW

The literature underpinning this study will focus on the jurisprudential debate between legal formalism and legal realism, with the latter serving as the primary theoretical lens for the research. Legal realism challenges the notion that judicial decisions are derived solely from legal rules and formal logic, proposing instead that judges’s decisions are influenced by various nonlegal factors such as personal beliefs, psychological predispositions, societal pressures and institutional contexts.

One of the earliest legal realists, **John Chipman Gray**, in *The Nature and Sources of the Law* (1909), questioned the objectivity of law and emphasized the human element in its application. **Gray** posited that “laws derive not just from statutes and precedents but also from the behavior and judgments of those interpreting the law and these are primarily judges”<sup>17</sup> . This foundational view laid the groundwork for future realist thought by framing law as a dynamic, human centered process rather than a fixed set of abstract rules.

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<sup>14</sup> sanjeyvignesh Jeyasekar. “Judicial Activism and Creativity of the Supreme Court. The Tools and Techniques of Creativity”

<sup>15</sup> realist School Of Jurisprudence” .Lawnote. 2024

<sup>16</sup> rachel J Cahill oCallaghan. “The Influence of Personal Values on Legal Judgments .2013. 40 *Journal of Law and Society*. 596

<sup>17</sup> John Chipman Gray, *The Nature and Sources of the Law* (Columbia University Press, 1909).

**Oliver Wendell Holmes Jr.**, in his seminal work *The Common Law* (1881), famously asserted that "the life of the law has not been logic; it has been experience."<sup>18</sup> **Holmes** argued that judges often make decisions first based on intuition or experience and later rationalize them through legal reasoning. His work reflects a fundamental departure from the formalist idea that legal outcomes are predictable solely through deductive reasoning from statutes.

**Karl Llewellyn**, in *The Bramble Bush* (1930), expanded the realist critique by asserting that "legal rules often fail to determine case outcomes with precision"<sup>19</sup>. He emphasized the need to study the actual behavior of courts and the social consequences of judicial decisions. **Llewellyn** also distinguished between the "paper rules" of law and the "real rules" applied by judges, urging legal scholars to investigate the law in action rather than law in books.

**Jerome Frank**, in *Law and the Modern Mind* (1930), introduced the "psychological dimension of legal realism, focusing on the unpredictability of judicial behavior"<sup>20</sup>. **Frank** argued that the personal attitudes and mental processes of judges play a significant role in shaping legal outcomes, thereby undermining the predictability that legal formalism purports to offer. His work further emphasized the indeterminacy of law and highlighted the subjective factors that affect judicial reasoning.

**Karl Olivecrona**, a Scandinavian realist, contributed to the movement with his book *Law as Fact* (1939).<sup>21</sup> **Olivecrona** rejected the idea of law as a system of commands backed by sanctions, instead portraying it as a set of social facts shaped by human behavior. He argued that legal rules have meaning only as far as they are practiced and enforced, aligning with the realist position that law must be understood through its function in society rather than through abstract theorising.

In addition to these foundational thinkers, the literature review will engage with diverse legal articles on judicial decision making, particularly the ways in which legal realism

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<sup>18</sup> Oliver Wendell Holmes Jr., *The Common Law* (Little, Brown & Co. 1881).

<sup>19</sup> Karl N. Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (Columbia University School of Law, 1930).

<sup>20</sup> Jerome Frank, *Law and the Modern Mind* (1st edn, Routledge 1930).

<sup>21</sup> Karl Olivecrona, *Law as Fact* (Oxford University Press, 1939).

manifests within the social political context of common law legal systems.<sup>22</sup> The study will also consider contemporary zambian legal literature, highlighting local perspectives on precedent, judicial discretion, and the balance between legal certainty and flexibility.<sup>23</sup> Chapter Two will present a comprehensive review of this information and provide the conceptual foundation for analyzing Supreme court Judgments in Zambia.

## **RESEARCH METHODOLOGY**

### **1.12 RESEARCH APPROACH**

This study employs a research Methodology through the means off qualitative content analysis.<sup>24</sup> Primary data will be drawn from supreme Court Judgments selected through purposive sampling. Judgments will be analysed for indicators of subjectivity, such as the invocation of moral arguments, departure from precedent or emphasis on social outcomes.

Secondary sources, including academic books, journal articles and legal commentaries, will provide contextual support and theoretical grounding.

The research is framed by the legal realist approach, which prioritizes the examination of how laws are applied in practice rather than how they appear in theory.<sup>25</sup> This approach is particularly suited to the study of judicial discretion, as it allows the researcher to explore the real world implications of subjective judicial reasoning on legal predictability and reform.

### **1.13 RESEARCH DESIGN**

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<sup>22</sup> Matthew Angelosanto, 'Legal Realism and the Predictability of Judicial Decisions' (2023) *Interdisciplinary Studies in Society, Law, and Politics* 2(3).

<sup>23</sup> Comfort Mulenga, *Judicial Precedent in Zambia* (University of Zambia, 2013).

<sup>24</sup> 'Research Methodology: Qualitative and Doctrinal Methods in Research' (National Law University Delhi, 2025).

<sup>25</sup> 'Understanding Legal Realism: Principles and Implications in Law' (Laws Pulse, 2024).

This study employs a doctrinal research design, which involves critical analysis of legal texts, judicial decisions and scholarly commentary. The design is appropriate for investigating the influence of judicial discretion within the framework of existing legal doctrines and statutory provisions

#### **1.14 RESEARCH TYPE**

This study is qualitative in nature. It focuses on non numeric, descriptive content drawn from judicial opinions, legal literature and scholarly debates in order to understand and interpret patterns of judicial reasoning

#### **1.15 STUDY POPULATION**

The study population consists of supreme Court Judgements in Zambia. These include constitutional and civil cases that demonstrate the exercise of judicial discretion and creativity

#### **1.16 SAMPLE SIZE**

The sample size will comprise 15 Supreme court judgements selected purposively based on their relevance to the study objectives

#### **1.17 SAMPLING TECHNIQUE**

Purposive sampling will be employed to identify cases where judicial reasoning reflects subjectivity, creativity or deviation from established precedent

#### **1.18 DATA COLLECTION METHOD**

Data will be collected through desk research using online legal databases, law reports, and legal libraries to retrieve relevant supreme Court judgements and scholarly articles

### **1.19 DATA ANALYSIS**

Qualitative content analysis will be used to examine themes and patterns in judicial reasoning. This will involve categorizing and interpreting the data in relation to the research questions and objectives

### **1.20 ETHICAL CONSIDERATIONS**

Well, since the study is based on publicly available legal texts and academic materials, it poses minimal ethical risks. However, care will be taken to present critiques objectively and to avoid personal attacks on individual judges. All case citations and scholarly references will be accurately attributed in accordance with academic standards.

### **1.21 RESEARCH OUTLINE**

Chapter One: Introduction, Presents the study's background, objectives, problem statement, and significance

Chapter Two: Judicial discretion and legal Realism in zambia, Explores the theoretical and scholarly context of judicial discretion, legal realism, and legal certainty.

Chapter Three: Case Analysis, Provides a critical examination of selected judgments and identifies patterns in judicial reasoning.

Chapter 4: Consequences of Judicial subjectivity. Discusses the consequences for legal practitioners.

Chapter Five: Conclusion and Recommendations, Summarises findings and proposes measures to enhance consistency in judicial decision making

## CHAPTER TWO

### 2.0 JUDICIAL DISCRETION AND LEGAL REALISM IN ZAMBIA

This chapter explains, in clear terms, what legal realism is and why it matters for this study. It looks at five key writers, **Oliver Wendell Holmes Jr, John Chipman Gray, Karl N Llewellyn, Jerome Frank and then Karl Olivecrona** and shows how each one thinks judges actually decides cases. It then links those ideas to legal certainty in zambia. The chapter ends with a simple framework that will guide the Case' Analyses in Chapter 3.

### 2.1 OLIVER WENDELL HOLMES JR: EXPERIENCE AND PREDICTION

It was **Holmes** wrote that “the life of the law has not been logic; it has been experience”<sup>26</sup> . He meant judges do not decide only by strict logic. They also look at what works in real life, including policy and practical effects. **Holmes** also said the law is a prediction of what courts will do. And then certainty comes when courts make choices in ways that others can understand and expect.

In zambia, surpreme court Decisions guide other courts and lawyers. Following **Holmes**, certainty grows when the court explains its reasons plainly, especially policy reasons and when those reasons stay steady over time. Certainty weakens when the court suddenly changes its style of reasoning, hides policy behind formal words or departs from past reasons without saying why<sup>27</sup>

### 2.2 JOHN CHIPMAN GRAY: LAW AS WHAT COURTS DO

It was **Gray** who said that “law is not just the words in books. It is the rules that courts actually use to decide cases”<sup>28</sup> . He focused on the operative rule, the real standard a court applies. If courts apply the same operative rule over time, people can plan with

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<sup>26</sup> Oliver Wendell Holmes Jr., *The Common Law* (Little, Brown & Co. 1881).

<sup>27</sup> *ibid*

<sup>28</sup> John Chipman Gray, *The Nature and Sources of the Law* (Columbia University Press, 1909).

confidence. If the operative rule quietly changes or differs from what the judgment says the rule is, certainty suffers

In Zambia, this means it is not enough to quote a statute or an old case. What matters for predictability is the pattern of how the supreme Court applies those texts in practice, case after case<sup>29</sup>

### 2.3 KARL N LLEWELLYN: PAPER RULES VS REAL RULES

**Llewellyn** drew a line between ‘paper rules’, what opinions and statutes say and ‘real rules, what courts keep doing again and again’<sup>30</sup>. He urged lawyers to study law in action. Courts improve certainty when they state tests or factors and then applies them faithfully over time. Certainty drops when the words of the rule and the results do not match or when judges change course without a clear reason

For zambia, the key question is whether the supreme Court has settled workable tests in areas like constitutional review or administrative law and whether or not later cases stick to those tests<sup>31</sup>.

### 2.4 JEROME FRANK: PSYCHOLOGY AND FACTS

**Frank** added the idea of fact skepticism. He said ‘judging depends a lot on how decision makers see and weigh facts, including which witnesses they believe and which details they think matter’<sup>32</sup>Because people differ, fact finding can differ too. Even on appeal, judges may describe the same record in different ways

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<sup>29</sup> *ibid*

<sup>30</sup> Karl N. Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (Columbia University School of Law, 1930).

<sup>31</sup> *ibid*

<sup>32</sup> Jerome Frank, *Law and the Modern Mind* (1st edn, Routledge 1930).

If facts are handled in different ways from case to case, rules alone cannot secure certainty. Courts help certainty when they show clearly how facts support their conclusions and when they follow steady standards of review for fact issues <sup>33</sup> .

## 2.5 KARL OLIVECRONA: LAW AS SOCIAL FACT

This **Olivecrona**, from the scandinavian realist school, said law works because people and institutions accept and follow certain practices. Words like 'right' or 'duty' guide action only when courts use them in stable, repeatable ways. When courts often change course without reasons, those words lose their steady effect, and outcomes become hard to predict<sup>34</sup> .

In zambias mixed system, customary Law, statutes and common law, certainty improves when the supreme Court intergrates these sources into clear routines that it applies consistently<sup>35</sup>

## 2.6 REGIONAL AND ZAMBIAN SCHOLARSHIP

They are writers across africa that discuss legal pluralism, the role of courts after independence and the pressures of fast social change. They note that judges often rely on policy reasoning in hard cases. Zambian scholarship and professional commentary raises similar points about precedent, discretion and certainty, including concern about changing reasons across judges and uneven use of customary law in constitutional and private law cases<sup>36</sup> .

## 2.7 ANALYSIS FRAMEWORK

Across these thinkers, two big ideas stand out. First, judicial discretion or subjectivity. Judges choose reasons, frame facts and shape the real rule they apply. Second, legal

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<sup>33</sup> *ibid*

<sup>34</sup> Karl Olivecrona, *Law as Fact* (Oxford University Press, 1939).

<sup>35</sup> *ibid*

<sup>36</sup> Muna Ndulo, 'The Judicial Crisis in Zambia: And a Flawed Election' (Zambian Observer, 2024)

certainty or predictability. People can plan only if courts act in stable and understandable ways over time.

This study will therefore look for;

1. Reasons: Are policy and consequence reasons explained and used steadily?<sup>37</sup>
2. Operative rules: What rule did the court actually apply? Is it stable across similar cases?<sup>38</sup>
3. Tests or factors: Has the Court set out tests and followed them?<sup>39</sup>
4. Facts: Are facts handled openly and consistently, with clear links to the rule?<sup>40</sup>
5. Practices: Do the Court's choices build stable institutional routines?<sup>41</sup>

These bullet points will guide the case selection and analyses in chapter 3

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<sup>37</sup> Oliver Wendell Holmes Jr., *The Common Law* (Little, Brown & Co. 1881).

<sup>38</sup> John Chipman Gray, *The Nature and Sources of the Law* (Columbia University Press, 1909).

<sup>39</sup> Karl N. Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (Columbia University School of Law, 1930).

<sup>40</sup> Jerome Frank, *Law and the Modern Mind* (1st edn, Routledge 1930).

<sup>41</sup> Karl Olivecrona, *Law as Fact* (Oxford University Press, 1939).

## CHAPTER THREE

### 3.0 CASE ANALYSIS

#### 3.1 CONSTITUTIONAL LAW CASES (2005 to 2025)

##### 1. *Anderson Mazoka & Others v. Levy Mwanawasa & Others (2005); Presidential Election Petition.*

In this landmark case, the supreme Court upheld the controversial 2001 election of president Mwanawasa, despite acknowledging significant voting irregularities. The court exercised broad discretion in applying a ‘substantial effect’ test, deciding that proven electoral flaws did not materially affect the overall result and thus refusing to order a recount.<sup>42</sup>

This pragmatic, policy driven reasoning, emphasising national stability and avoiding a constitutional crisis, exemplified judicial subjectivity. Observers noted the court’s reluctance to nullify an election, likely to prevent costly reruns and instability, at the expense of strict legality. The case illustrates how judicial reasoning style and value judgements, here prioritizing political continuity, can undermine legal certainty in electoral law by departing from a purely rule bound approach

##### 2. *Attorney General v. Mutuna & Others (2013); Tribunal of Judges and Executive Powers.*

Here, a deeply divided supreme Court addressed the president’s suspension of three judges and appointment of a tribunal to investigate them. The majority adopted a literalist interpretation of the constitution, holding that under Article 98 the President has “unfettered discretion” to suspend judges and need not follow ordinary due process or consult the Judicial Complaints Authority. Notably, the court explicitly refused to ‘imply anything’ into clear constitutional text or import doctrines of natural justice, a stance critics dubbed “executive supremacy.”

This formalistic yet value-laden choice to shield executive action marked a departure from precedent favouring judicial independence. Paradoxically, the Court added a

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<sup>42</sup> *Mazoka v. Mwanawasa* SCZ EP 1 of 2002 [2005] ZMSC 25

*dictum* ‘advising’ that, given the circumstances, it would be prudent not to proceed with the tribunal, an unusual, extra legal suggestion.<sup>43</sup>

This case reveals judicial creativity, or inconsistency, on one hand strictly construing the Constitution to favor the executive, while on the other injecting a subjective moral appeal. The outcome, allowing the tribunal legally but cautioning against it, injected uncertainty into the law, showing how judicial discretion in constitutional interpretation can affect predictability

### **3. *Kelvin Hang’andu v. Law Association of Zambia (2014); Mandatory Bar Membership vs. Religious Freedom.***

In this Bill of Rights case, a lawyer, Hang’andu, challenged the requirement to belong to the national bar association, LAZ, arguing it infringed his Seventh day Adventist beliefs because LAZ meetings were held on Saturdays, his Sabbath. The Supreme Court dismissed the appeal, finding no actual violation of freedom of conscience. The judgment, delivered by Chibesakunda Ag. CJ, reasoned that the Appellant remained free to practice his religion, not attending Saturday meetings did not hinder his faith, and that participation in association meetings or seeking office was not a constitutionally protected right.<sup>44</sup>

The Court’s reasoning reflects a value judgement drawing a line between genuine rights and mere privileges. It relied on comparative jurisprudence, citing U.S. cases on religious accommodation, and a policy balancing test: the collective choice of LAZ’s majority to meet on Saturdays outweighed the individual’s preference. This exercise of discretion, effectively reading the Bill of Rights narrowly, demonstrates how the Court’s reasoning style can impact legal certainty.

By deferring to majoritarian and administrative convenience over a broad interpretation of religious freedom, the court maintained predictability in mandatory bar membership but arguably at the cost of a more rights generous approach. The case highlights judicial restraint, or conservatism, in rights adjudication, with the court consciously

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<sup>43</sup> *Attorney General v. Mutuna* (Appeal 88/2012) [2013] ZMSC 38

<sup>44</sup> *Hang’andu v. LAZ* (109/2013) [2014] ZMSC 114

avoiding a precedent that would open floodgates to exempting professionals from regulations on religious grounds

#### **4. *Attorney General v. Roy Clarke (2008)*; *Satire, Deportation and Proportionality*.**

Roy Clarke, a British Zambian journalist, was ordered deported after publishing a satirical article that lampooned the President as an ‘animal.’ The supreme Court’s response showcased creative adjudication. While the Court agreed that Clarke’s article was insulting, it pointedly held that the Minister’s use of deportation powers was “too extreme an action’ and disproportionate.

Interestingly, the Court did not frame the issue as a direct free expression violation, it found no per se breach of Article 20, free speech, since deportation was ostensibly for national security, but nevertheless quashed the deportation on administrative law grounds of unreasonableness<sup>45</sup>

This nuanced reasoning, affirming the law’s validity but tempering its application, reflects judicial creativity; the court invoked common law principles of proportionality and the need for a measured response, thus embedding broader human rights values into domestic law without explicitly expanding constitutional rights. The policy based argument, that punishment must fit the offense, injected a form of substantive fairness into the law.

Clarke’s case is now a key precedent for the proposition that even if an executive action is lawful, courts will examine whether it undermines legal certainty by being irrational or overly harsh. It underscores how the Court’s subjective judgement, what is “extreme” or ‘reasonable’, can creatively influence legal outcomes, enhancing predictability that executive powers will be checked by implied principles of fairness

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<sup>45</sup> *Attorney General v. Clarke* (96A/2004) [2008] ZMSC 1

**5. *Godfrey Miyanda v. Attorney General (2009)*; *Presidential Immunity and Accountability*.**

This case, arising from an attempt by a former vice president to challenge or clarify a President's legal immunity, spotlighted the Court's interpretive philosophy. The supreme Court reaffirmed that, 'strictly speaking, the President is not above the law,' yet went on to uphold the constitutional provisions that grant a sitting president immunity from civil or criminal suit. In doing so, the court exhibited a formalistic approach; it refused to "import glosses and interpolations' into the immunity clause, stressing that any accountability of a President must come through political processes, impeachment or post tenure prosecution, rather than judicial intervention during the term.<sup>46</sup>

This reasoning reveals a tension between principle and pragmatism, the Court recognized the ideal of equality before the law, but in practice gave effect to an expansive immunity that shields a President while in office. The decision has been criticized for prioritizing a policy of executive latitude, to enable governance without litigation distractions, over immediate legal accountability, illustrating how judicial interpretation can tilt toward stability at the expense of legal consistency. The case's outcome, effectively insulating a sitting president's actions from judicial scrutiny, shows the court's willingness to exercise creative restraint, a subjective choice that impacts legal predictability by deferring certain disputes entirely to the political realm

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<sup>46</sup> *Miyanda v. AG* (Judgment No. 9/2009)

### 3.2 CRIMINAL LAW CASES (2005 to 2025)

#### 1. *Mwape v. The People (2012)*; *Defilement Case: Procedure vs. Substantive Justice*.

In this case, a step grandfather was convicted of defilement, child rape. On appeal, the supreme court exhibited flexible, policy driven reasoning in two key ways. First, despite a procedural irregularity at trial, the magistrate failed to conduct a voir dire, competency test, before hearing the child victim's sworn testimony, the supreme Court upheld the conviction.

It reasoned that other independent evidence amply proved the crime, making a retrial unnecessary. This marked a departure from strict procedural precedent in favor of efficiency and child protection, showing the Court's willingness to use discretion where insistence on procedure would thwart justice. Second, the court went beyond the statutory minimum sentence, 15 years, and enhanced the punishment to 20 years' hard labour, citing the aggravated breach of trust by a guardian<sup>47</sup>.

This reflects a clear value based judgment: the Court signalled moral outrage and a policy of deterrence for sexual violence against minors. By exercising its own sentencing discretion, even absent a prosecution cross appeal, the Supreme Court introduced unpredictability for defendants, who generally expect the minimum if no aggravating factors are legislatively defined. Mwape thus exemplifies judicial creativity in criminal law; the judges privileged substantive justice and societal interests, child welfare, over the comfort of strict procedural and sentencing rules, inevitably affecting legal certainty about how rules, like voir dire requirements or minimum sentences, will be applied

#### 2. *Abedinego Kapeshe & Another v. The People (2017)*; *Witchcraft Motivated Killing: Cultural Belief as Extenuation*.

This case involved defendants convicted of murder after killing an elderly woman accused of witchcraft. The supreme court's handling demonstrates how judicial subjectivity can temper the rigidity of criminal law. Following a line of prior authority,

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<sup>47</sup> *Mwape v. The People* (S.C.Z. Judgment No. 12 of 2012)

the court treated the defendants' genuine belief in witchcraft as an extenuating circumstance that reduced moral blameworthiness.

Consequently, it avoided imposing the death penalty, effectively treating the offense as manslaughter for sentencing purposes. The Court's reasoning, mirrored in comparable judgements in the region, is that while witchcraft belief is unreasonable in law, it can deeply affect the accused's state of mind. By acknowledging social context, that fear of witchcraft can subjectively provoke or diminish intent, the supreme Court departed from a strictly objective standard of malice aforethought<sup>48</sup>.

This infusion of cultural understanding is a form of judicial creativity that, on one hand, promotes individualized justice, but on the other hand, may reduce predictability. It introduces a quasi defence not codified in statute, an accused's belief, however irrational, mitigating a murder. Future cases involving witch killings thus rely on judicial discretion to decide if the belief was "genuine" and extreme enough to warrant leniency.

Kapeshi underscores how reasoning style, here, a semi anthropological and policy based approach, affects legal outcomes; the court balances the need to condemn violence with sensitivity to ingrained beliefs, a balance struck through subjective judicial calibration rather than black letter law

### **3. *Saidi Banda v. The People (2015); Circumstantial Evidence and Legal Evolution.***

In this appeal against a murder conviction based solely on circumstantial evidence, the supreme Court seized the opportunity to clarify and develop the law. The Court endorsed the traditional rules governing circumstantial proof, eg. that all inculpatory facts must be incompatible with innocence, but also expanded upon them, providing refined guidance on the standard of inference and the need for caution. The judgment is notable for its reasoning style; it reads almost like a scholarly treatise, reviewing precedents and articulating how triers of fact should approach gaps in the evidence.

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<sup>48</sup> *Kapeshi v. The People* (SCZ Judg. No. 35 of 2017)

By doing so, the Court injected greater certainty into an area often criticized for subjective judgement. However, the manner in which it was done, through judicial exposition rather than legislative action, is itself a form of discretion<sup>49</sup>.

The court chose to expound principles not explicitly codified, thus creatively shaping the law of evidence. This has a dual effect on legal predictability; it improves consistency in how courts handle circumstantial cases, a positive for certainty, but it also demonstrates that higher courts may reorient standards by departing from or nuancing past precedent when they deem it policy wise to do so. *Saidi Banda* is now a touchstone in zambian Jurisprudence for the proposition that circumstantial evidence can suffice for conviction if handled with ‘common sense and reason’, a standard ultimately hinging on judges’ subjective assessment of what inferences are reasonable

#### ***4.Simfukwe v. The People (2020); Sentencing Policy: Manifestly Excessive Sentences.***

In this case, the Supreme court reviewed an appellate sentence of 20 year imprisonment for an offense, burglary and arson, and found it unduly harsh. Emphasizing that sentencing must remain proportionate and consistent, the Court held that a 20 year term was ‘manifestly excessive as to induce a sense of shock,’ and it accordingly set the sentence aside. This instance highlights the court’s role in standardising punishment through subjective judgement.

There were no statutory guidelines strictly dictating the sentence; instead, the supreme Court relied on its own sense of justice and comparable cases to decide that the lower court had departed from accepted sentencing ranges. By substituting a lower sentence, in the case, 20 years was replaced with 15, the court injected certainty and fairness into the law, signalling to lower courts that outlier sentences will be corrected<sup>50</sup>

At the same time, this discretionary intervention underscores that sentencing in zambia is an area of judicial policy as much as black letter law. Judges explicitly invoke societal values, eg. the shock test, and crime policy goals, deterrence vs.

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<sup>49</sup> *Saidi Banda v. The People* (Appeal No. 114/2015)

<sup>50</sup> *Simfukwe v. The People* (Appeal No. 122/2018) [2020] ZMSC 11

Rehabilitation, in their reasoning. The Simfukwe decision thus reflects judicial creativity in moderating punitive zeal with uniformity.

It reassures the public and the legal community that the supreme court will act as a guardian of proportionality, even though the very notion of what is ‘excessive’ inevitably rests on the judges’s subjective outlook. This case contributes to a more predictable sentencing regime, but only through the medium of case by case discretionary corrections

***5.Mwewa Murono v. The People (2019) Reaffirming Burden of Proof (No-Case Submission).***

In Murono, the supreme Court confronted a trial where the High court had improperly shifted the burden of proof to the accused at a no case to answer stage. The Supreme court firmly reasserted that the legal burden in criminal trials never shifts to the accused, the prosecution must prove a prima facie case before an accused is called to defend. While on its face this simply applies a long standing principle, the context revealed the Court’s proactive stance in correcting lower court errors and preventing erosions of fair trial rights.

The judgement’s tone is notably educational; the court took the opportunity to lecture on the proper approach to no case submissions, likely to guide magistrates and judges in future. This shows a different aspect of judicial discretion, not in changing the law but in choosing to strongly reinforce first principles to preserve predictability <sup>51</sup> .

The court’s subjective choice here was how forcefully to intervene. By quashing the conviction and acquitting Murono, since the prosecution’s case had been too weak to require a defence, the supreme Court underscored the inviolability of the presumption of innocence. Such decisions, which often reference lofty concepts of justice, contribute to legal certainty by making clear that departures by trial courts from fundamental doctrine will not be tolerated.

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<sup>51</sup> *Mwewa Murono v. The People* (SCZ Judg. No. 4 of 2019)

In sum, Murolo illustrates the supreme court's creative use of its authority to maintain doctrinal purity in criminal law, a perhaps less flashy but equally important facet of judicial creativity that serves the rule of law

### 3.3 FAMILY LAW CASES (2005 to 2025)

#### 1. *Chandiwira Nyirenda v. Bibian Nyirenda (2008)*; *Fault vs. Irretrievable Breakdown in Divorce*.

This case, decided just after the 2007 Matrimonial Causes act, epitomizes the court's grappling with changing divorce standards. The high Court had refused to grant a divorce to the husband, Chandiwira, essentially on a fault principle, it held that since the wife's misconduct was the cause of breakdown, she should have been the one to petition and in fact she testified she still 'loved' her husband. The supreme Court overturned that decision, criticizing the lower court's rigid, moralistic approach.

Sakala CJ, for the court, emphasized that the key question was whether the respondent's behavior made it unreasonable for the petitioner to continue the marriage and on the evidence of the wife's chronic drunkenness and violence, it clearly was intolerable. The supreme Court thus granted the divorce and in doing so, signaled a shift from old fault based notions to the modern 'irretrievable breakdown' standard<sup>52</sup>.

This judgement reflects judicial creativity in family law; the Court consciously moved away from subjective moral judgments, eg. which spouse is the innocent party, toward a more objective analysis of a broken marriage. However, the reasoning also reveals subjectivity in another sense, the justices had to decide how egregious the behaviour must be to warrant divorce. Here they found the trial judge undervalued the harm to the husband and children.

The result improves legal predictability by aligning with statutory divorce criteria, yet it underscores that judges retain wide discretion in evaluating marital conduct. Notably, the court also dismissed the trial judge's peculiar reliance on the spouses' physical stature, he had doubted the wife could hurt her stronger husband, implicitly warning lower courts against injecting personal biases in evaluating evidence

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<sup>52</sup> *Nyirenda v. Nyirenda* (196/2006) [2008] ZMSC 19

## **2. *Anne Scott v. Oliver Scott (2007); Matrimonial Property Distribution.***

In this important decision, the Supreme court exercised broad equitable discretion under the Matrimonial Causes Act 1973, applicable then, to achieve a fair division of marital property on divorce. The case involved substantial real estate acquired during a childless marriage. The trial Deputy Registrar had awarded the wife, Anne, only two out of several houses on the couple's Lusaka property. On appeal, the Supreme Court varied that order, holding that all improvements on the jointly-titled main property, Stand 5672, Kalundu, should be valued and divided equally, 50/50, between the spouses.

This reflected the Court's policy stance that marriage is an equal partnership, a marked evolution from the traditional needs or contribution based distribution. However, the court's reasoning was nuanced and somewhat subjective; it took into account not just monetary contributions but also the intent behind certain assets. For example, a second property, Olympia Park, was left entirely to the husband because evidence showed it was bought solely for his son from a prior relationship, the Court deemed it equitable to honor that arrangement. *Scott v. Scott* thus demonstrates judicial creativity in balancing formal legal entitlements with fairness and personal circumstances<sup>53</sup>.

By departing from the lower court's piecemeal approach and instead fashioning a holistic remedy, including an option for one party to buy out the other, the Supreme Court injected predictability in one sense, endorsing equal division as a starting point but also left room for case by case subjectivity in considering special factors, like a child's welfare or source of funds. The judgment explicitly invoked authoritative texts, like *Rayden & Jackson, Bromley's Family Law* and Zambian precedents, signalling a more principled, yet flexible, approach to matrimonial property. It has since guided courts that judicial discretion must be exercised to achieve a 'just and equitable' settlement, with reasoning that transparently weighs each party's contributions and needs rather than relying on arbitrary gender roles or purely who held title

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<sup>53</sup> *Scott v. Scott* (122/2004) [2007] ZMSC 3

**3. *Zanetta Nyendwa v. Kenneth Spooner (2010)*; *International Child Custody and Jurisdiction*.**

In this case, essentially Zambia's first encounter with a Hague Convention style child abduction scenario, the supreme court had to decide whether to enforce an ex parte foreign custody order. The English High court had ordered that two young children, born in the UK to a Zambian mother and British father, but unwed, be returned to England from Zambia, and the Zambian high Court registered that order under the Foreign Judgments (Reciprocal Enforcement) Act.

On appeal, the supreme Court set aside the registration, in effect refusing to send the children back immediately. The Court's reasoning blended black-letter law with protective discretion. Technically, it found that the English custody order did not fall under the Act's reciprocity requirements, since the UK order was made ex parte and the UK is not designated under Zambia's Act.

But beyond technicalities, the court was 'firmly of the view' that the father ought to have filed a custody application in Zambia rather than 'circumventing' local jurisdiction by rushing to an English court. This resonated with a nationalistic, child centric exercise of discretion; the supreme Court implicitly prioritized the Zambian forum as better placed to assess the children's best interests on the ground<sup>54</sup>.

The judgment reflects judicial subjectivity in private international family law, a mix of legal formalism, strictly interpreting the enforcement statute and policy, protecting citizens from potentially unfair foreign process and asserting sovereignty in child welfare matters. The outcome introduced some uncertainty in cross border family cases, as Zambia was not party to the Hague Convention then, but it made the court's stance clear: the child's welfare and due process must be assured before foreign orders are honored. This decision has been influential in later cases involving foreign elements, indicating that Zambian Courts will exercise a nurturing, independent review rather than rubber stamp foreign judgements, thereby injecting a layer of predictability, ie. the need for a local hearing, born out of judicially crafted policy

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<sup>54</sup> *Nyendwa v. Spooner (21/2009) [2010] ZMSC 2*

#### **4. *Febian Ponde v. Charity Bwalya (2016)*; *Post Divorce Property Adjustment*.**

This case, arising under the Matrimonial Causes act 2007, illustrates the supreme Court's effort to articulate clear principles for property division, effectively guiding lower courts and litigants on what to expect. The couple's main asset was a house with two structures; local courts had awarded the smaller house to the wife and the larger to the husband, with an option for the husband to buy out the wife's share. Ponde, the husband, appealed, objecting to sharing the plot.

The high Court, upheld by the Supreme court, forcefully rejected his position, stating "there is no family property too small for a former husband and wife to share after divorce." Even if living on the same subdivided lot would be inconvenient, the solution was not to deprive one party of a share, but rather to sell and split the proceeds equally if necessary.

The supreme court in Ponde went further to define the term "property adjustment", 'universally understood to mean allocation of one or more properties among family members (former spouses) on a just basis.' This exposition is a classic example of judicial creativity; the Court is building doctrine, almost legislating, by interpreting broad statutory language in light of universal principles of fairness<sup>55</sup>.

The reasoning style here is overtly policy based, emphasizing post divorce economic justice and non discrimination. By dismissing the husband's appeal and endorsing equal division and buy out mechanisms, the court enhanced legal certainty; it sent a strong message that sentimental or practical concerns, eg. "I don't want to share a gate with my ex", are immaterial to property rights. At the same time, the decision shows the court's sensitivity to context, it allowed flexibility in implementation, sale or buy out, to achieve equity.

Ponde vs. Bwalya has become a cornerstone case, frequently cited for the proposition that each spouse is entitled to a fair share of matrimonial assets and that courts will actively use their discretion to enforce that fairness, resisting any attempt to short change one party due to technical or trivial arguments

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<sup>55</sup> *Ponde v. Bwalya* (51/2011) [2016] ZMSC 26

**5. *Sililo Sitali v. Scholastica Sitali (2014); Evidence of Marital Breakdown and Gender Bias.***

In this appeal, a husband challenged the high Court's refusal to grant him a divorce. The trial judge had not been convinced by the husband's allegations of the wife's unreasonable behaviour, even remarking, erroneously, that the physically larger husband likely could not have been seriously harmed by the wife's actions. The supreme court's handling of Sitali's case is instructive.

Ultimately, the Court dismissed the husband's appeal, effectively agreeing that he hadn't proven the marriage had irretrievably broken down. But significantly, the supreme Court reprimanded the trial judge's improper reasoning, particularly the gendered assumption about physical stature, ie. that a man cannot be victimized by a smaller woman, calling it irrelevant and speculative.<sup>56</sup>

The appellate judgment thus demonstrates the court's commitment to neutral and objective fact finding in divorce cases. The justices focused on the statutory test; whether the evidence showed cessation of cohabitation and intent not to resume, the essence of irretrievable breakdown. They found that standard not met, largely because the husband failed to articulate his grounds coherently, he appeared pro se and struggled. While the outcome maintained the status quo, the reasoning is what makes this case noteworthy

The supreme Court exercised discretion by effectively stepping into the shoes of the trial court to evaluate the evidence afresh, given the lower court's misdirection. In doing so, it removed a layer of subjectivity, the trial judge's bias and reinforced a more principle based approach; that any spouse, regardless of gender, can be the victim in a marriage and what matters is the proof of intolerable conduct.

Sitali underscores that even when upholding a lower court's result, the supreme court will refine the reasoning, thereby shaping the law. It contributes to predictability by clarifying that outdated stereotypes have no place in judicial decisions, a creative and progressive, stance ensuring that future family law determinations rest on facts and law, not personal prejudices

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<sup>56</sup> *Sililo Sitali v. Sitali* (168/2010) [2014] ZMSC 27

## CHAPTER FOUR

### **4.0 CONSEQUENCES OF JUDICIAL SUBJECTIVITY AND PROPOSALS FOR REFORM**

This chapter builds on the patterns surfaced in chapter 3 to examine how judicial subjectivity, seen in reason giving, fact framing, treatment of precedence and the articulation, or absence, of tests affects actors within zambia's legal system. It then advances concrete, implementable reforms designed to preserve necessary judicial flexibility while strengthening legal certainty and predictability. The chapter closes with practical considerations for implementation, foreseeable risks and then a brief summary.

### **4.1 CONSEQUENCES OF JUDICIAL SUBJECTIVITY**

#### **4.1.1 FOR LEGAL CERTAINTY AND THE DEVELOPMENT OF LAW**

##### **1. Doctrinal drift and fragmentation.**

When judges use different ways of reasoning , for example, one using only the written law, another using policy or moral ideas, the main rule becomes confusing. This slows down the growth of the law and makes it harder for lower courts to know what to follow

##### **2. Thin or unstable tests.**

Sometimes judges make tests or standards but do not use them again or they change them without saying why. This makes decisions different from one another and makes it harder to rely on past cases for guidance

##### **3. Fact volatility.**

Even when the law itself is clear, differences in how judges handle facts or judge credibility cause uncertainty. This is common in criminal and family law cases

#### **4.1.2 FOR LEGAL PRACTITIONERS**

##### **1. Advisory uncertainty and transaction costs.**

When standards are not steady, lawyers find it hard to tell clients what might happen in court. This means longer time spent preparing, higher costs and less confidence in the system

##### **2. Briefing burdens.**

Lawyers often have to prepare arguments using many different styles, legal text, fairness or policy because they don't know which approach the court will choose. This spreads their focus and increases expenses for clients

#### **4.1.3 FOR LITIGANTS**

##### **1. Perceived fairness and trust.**

When similar cases end differently without clear reasons, people feel like the system is unfair. This weakens public trust in the courts.

##### **2. Access to justice.**

When cases take longer and cost more, poor people suffer the most because they can't afford long or complex cases

##### **3. Remedial uncertainty.**

In family or constitutional cases, when judges don't use the same balancing tests or frameworks, people don't know what to expect. This makes conflicts last longer

#### **4.1.4 FOR JUDICIAL INSTITUTIONS**

##### **1. Appellate load and relitigation.**

When court standards are not clear, more people appeal their cases. This increases the work for higher courts

##### **2. Legitimacy pressures.**

When the public sees judges use different reasoning methods, even fair judgments can look biased. This harms the reputation of the courts

### **3. Internal coordination.**

Without shared guidelines like steps for proportionality or standard ways of reviewing facts, court decisions start to look different from each other. This hurts the system's consistency

## **4.2 NORMATIVE ASSESSMENT: FLEXIBILITY VS. CERTAINTY**

The study shows that giving judges freedom is not a problem by itself. The problem comes when that freedom is not organized, when judges make decisions without clear steps, tests or reasons for agreeing or disagreeing with past cases. On the other hand, when discretion is structured and reasons are clear, predictability improves and creativity still survives. The reforms below focus on how judges reason and explain, not who wins or loses

## **4.3 RECOMMENDATIONS**

### **4.3.1 SYSTEM-WIDE REFORMS**

#### **1) Opinion Writing Practice Direction or Checklist.**

Issue a Chief Justice Practice Direction requiring judgements to;

- i. State issues and the governing legal test or standard
- ii. Identify treatment of precedent, followed, distinguished or departed, with reasons
- iii. Set out key fact finds and the credibility rationale, where relevant, alongside the standard of review on appeal
- iv. Disclose policy or public interest considerations where they influence balancing

#### **2) Protocol for Departing from Precedent.**

When departing, a judge should;

- (i) quote the earlier rule

- (ii) specify the ground for departure whether it's error, inconsistency, social change or unworkability
- (iii) promulgate a replacement test with prospective guidance.

### **3) Supreme Court “Compendium of Tests & Standards.”**

Each year, the supreme Court should publish a short, easy to read book listing the main tests and standards from its decisions, for example, the steps for proportionality, factors for best interests and rules for evidence or sentencing

#### **4.4 SUMMATION**

Judicial subjectivity affects lawyers, litigants and the courts most when reasoning is unclear and rules are not steady. The goal is not to stop judges from thinking freely but to make their reasoning easy to understand and apply. By using open explanations, repeatable methods, careful handling of facts and clear guidance on precedent, zambia's Courts can make the law stronger and more predictable while still allowing it to grow and adapt to society's needs.

## CHAPTER FIVE

### 5.0 CONCLUSION

This chapter ends the dissertation by restating the main problem, explaining how each goal was met and showing what the study found. It also highlights how this work helps students, lawyers and lawmakers understand the law better. Finally, it talks about the limits of the study and suggests ways Zambia can make its legal system more stable without taking away judges' freedom to think and decide

### 5.1 RESTATEMENT OF THE PROBLEM AND PURPOSE

Zambia's legal system mixes common law, statutory law and customary law. It depends a lot on past court decisions, precedent, to make the law stable and predictable. But judges also use their own judgment, shaped by their experience, beliefs and the situation around them. The problem this study looked at is how a judge's personal views, morals or outside influences affect fairness and consistency in the law. The question was whether this subjectivity weakens or can actually support the fair growth of the law. Using ideas from legal realism, the study examined how discretion works in Zambia's supreme Court and how the system can keep a balance between flexibility and predictability

### 5.2 ACHIEVEMENT OF THE RESEARCH OBJECTIVES

#### **Objective 1 (Chapter Two):**

To examine how judicial discretion, personal morals, biases and external influences shape judges' decision making and to assess the role of legal realism in these rulings, with a focus on how they affect legal certainty and consistency.

Chapter Two showed that judges are influenced not only by written laws but also by experience, social context and policy. It explained that real stability comes not from removing discretion but from having clear and repeatable methods that others can understand and expect. The chapter used theories from Holmes, Gray, Llewellyn, Frank and Olivecrona to build a framework for studying how supreme Court judges reason in practice

**Objective 2 (Chapter Three):**

To identify patterns in judicial reasoning by analyzing selected supreme Court judgements and to determine whether judges display consistent interpretive methods or whether rulings are shaped by subjective factors.

Chapter Three analysed fifteen Supreme Court cases in constitutional, criminal and family law. It found that judges often rely on policy reasoning and practical effects. Sometimes the “real rule” used in practice was not the same as what was written in earlier rulings. Where judges gave clear reasons and followed stable tests, decisions were easier to predict. But when reasons changed without explanation, uncertainty increased

**Objective 3 (Chapter Four):**

To explore the consequences of judicial subjectivity for practitioners and litigants and to propose recommendations for balancing judicial flexibility with legal certainty.

Chapter 4 showed that when judges use their own judgment without structure, it increases confusion for lawyers, adds cost and creates distrust among the public. It suggested simple reforms like a checklist for writing judgments, clear steps for when to change precedent, a yearly summary of legal tests and better training for judges. These ideas help guide how judges reason, not who wins or loses

**5.3 KEY FINDINGS****1. Discretion is compatible with certainty when structured.**

When judges explain their reasons clearly, use stable tests and apply standards consistently, discretion actually strengthens the law

**2. Operative rules matter as much as paper rules.**

Predictability depends on how courts truly act in practice, not just what they say in judgments

**3. Fact handling is a major source of variability.**

In criminal and family cases, how judges treat facts or believe witnesses changes outcomes. Without clear rules for reviewing these facts, the results become less predictable

#### **4. Field specific baselines improve clarity.**

Having fixed methods, like proportionality steps in rights cases, sentencing ranges or family law checklists, gives everyone a shared understanding

#### **5. Institutional practices can be consolidated.**

Some patterns in judgments are already stable. Turning them into written guides or practice directions can make the system more consistent

### **5.4 CONTRIBUTION OF THE STUDY**

#### **Academic Contribution**

This study used legal realism to study zambia's supreme Court in detail. It turned complex theories into simple, real tools that lawyers and scholars can use to understand how judges make decisions

#### **Practical Contribution**

It gives easy to use solutions, like judgment checklists and standard tests, that can make legal advice clearer and court work faster

#### **Policy or Institutional Contribution**

It suggests reforms that are simple and low cost, such as training, official guides and better reporting methods to make court reasoning more transparent and reliable

### **5.5 LIMITATIONS**

The study only used published Supreme Court judgments between 2005 and 2025. It did not include private or unreported decisions. There were no interviews with judges or lawyers, so the analysis relied only on written opinions. It also focused mainly on constitutional, criminal and family law, not on administrative or commercial cases

## **5.6 CLOSING REFLECTION**

The study shows that Zambia can make its legal system stronger not by limiting judges' freedom, but by helping them use it better. When judges clearly explain issues, use the same tests again and again, and give reasons for how they treat facts and past rulings, the law becomes something everyone can trust. The proposed reforms keep the courts independent but also make their work easier to follow. A system that is open about its reasoning and steady in its methods can stay fair, flexible and predictable and thus building both public confidence and the rule of law

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L400B / Dissertation II – DIRECTED RESEARCH (OBLIGATORY ESSAY)

RESEARCH CLEARANCE FORM

NAME: Mwewa Tabo Mapalo Kapata STUDENT NUMBER: LLB22113436

SUPERVISOR: Lameck Ngambi TOPIC: A STUDY EXAMINING THE TENSION BETWEEN LEGAL RIGIDITY AGAINST JUDICIAL CREATIVITY AND THE IMPLICATIONS IT HAS FOR LEGAL REFORM AND DEVELOPMENT IN ZAMBIA

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Chapter 3 –	Approved	4/10/2028 	
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