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**AN ANALYSIS OF THE REALIST THEORY OF LAW VIS-À-VIS THE
PRACTICABILITY OF RULES RELATING TO DISPATCH AND RECEIPT OF
DATA MESSAGES IN THE ECT ACT 2021 OF ZAMBIA: LESSONS FROM THE
UK AND MALAYSIA**

By:

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**AN OBLIGATORY ESSAY SUBMITTED TO THE UNIVERSITY OF LUSAKA
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF
THE BACHELOR OF LAWS (LLB) DEGREE,**

2025

DECLARATION

I, **NYONI JOHN**, do hereby declare that this research paper entitled, **AN ANALYSIS OF THE REALIST THEORY OF LAW VIS-À-VIS THE PRACTICABILITY OF RULES RELATING TO DISPATCH AND RECEIPT OF DATA MESSAGES IN THE ECT ACT 2021 OF ZAMBIA: LESSON FROM UK AND MALAYSIA**, which is hereby submitted for the award of bachelor of Laws (LLB) degree at the University of Lusaka School of Law is my original work and has not been previously submitted for the award of a degree at this or any other tertiary institution. Where other people's work has been used, due acknowledgements have been made, and the errors or omissions are solely the author's.



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NYONI JOHN

10th November, 2025

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SUPERVISOR'S RECOMMENDATION

I, **INONGE MUTEMWA**, recommend that this dissertation, prepared under my supervision by **NYONI JOHN**, entitled **AN ANALYSIS OF THE REALIST THEORY OF LAW VIS-À-VIS THE PRACTICABILITY OF RULES RELATING TO DISPATCH AND RECEIPT OF DATA MESSAGES IN THE ECT ACT 2021 OF ZAMBIA: LESSONS FROM UK AND MALAYSIA**, 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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Ms INONGE MUTEMWA
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10th November, 2025

DATE

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I dedicate this dissertation to the Almighty God, through whom all things are made possible, working together for good to them that love Him, also to my lovely family, and lastly, myself.

ACRONYMS

Electronic Communications and Transactions Act no. 4 of 2021	(ECT)
National Root Certificate Authority	(NRCA)
The Information and Communication Technologies Act No.15 of 2009	(ICT)
The United Nations Commission on International Trade Law	(UNCITRAL)
UNCITRAL Model Law on Electronic Commerce	(MLEC)
Zambia Information and Communication Technology Authority	(ZICTA)

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Public Prosecutor v Datuk Harun bin Haji Idris [1977] 1 MLJ 15

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INTERNATIONAL TREATIES

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UNCITRAL Model Law on Electronic Signatures (2001)

United Nations Commission on International Trade Law (United Nations 1986)

United Nations Convention on the Use of Electronic Communications in International Contracts (2005)

United Nations Convention on the Use of Electronic Communications in International Contracts (adopted 23 November 2005, entered into force 1 March 2013) 2499 UNTS
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ABSTRACT

This research provided a comprehensive analysis of the realist theory of law concerning the practicability of rules related to the dispatch and receipt of data messages in Zambia's e-commerce; it includes a comparative study based on best practices, with a particular focus on the legal framework governing electronic communication transactions in Zambia, especially the Electronic Communications and Transactions Act no. 4 of 2021. Like many other countries, Zambia has responded to the way technology has changed how people engage in business and interact as customers by enacting legislation to promote secure online transactions. This study carefully examines whether Zambia's Electronic Communications and Transactions (ECT) Act's regulations on the dispatch and receipt of electronic communications effectively achieve the aims of providing legal certainty, security, and consumer protection in the digital environment.

To unpack this, the research began by examining how realist legal theory can help interpret statutory provisions in a way that's more aligned with real-world conditions. In an economy where online business is no longer niche but increasingly mainstream, a purely literal interpretation of the law often falls short. Realism, with its focus on how laws function in practice rather than solely on paper, offers a useful perspective for understanding the challenges of regulating electronic transactions.

One of the main issues this study highlighted is ambiguity, especially in how certain terms are defined and used. Words like "data messages" and "electronic record" may appear simple, but in practice, they can cause confusion. This uncertainty can erode trust, particularly for consumers who depend on clear legal protections when entering into online contracts. The research pointed out specific sections of the ECT Act that raise doubts about how e-contracts are created and enforced, and how these gaps might influence users' confidence in digital transactions.

The study's main goals were threefold: to examine the practical difficulties of applying dispatch and receipt rules to electronic communications, to assess the broader legal framework governing online transactions in Zambia, and to evaluate how well the ECT Act holds up against its intended purpose. Drawing on existing literature, statutory analysis, and international best practices, the research aims to pinpoint where the law falls short and suggest realistic reforms.

But this isn't just a technical analysis. The study also considered the bigger picture of how Zambia's digital economy could benefit from a more responsive legal framework. By applying realist theory to the operational challenges of the ECT Act (No. 4 of 2021), the research anticipations to show how law and technology can be better aligned, especially in contexts where digital adoption is moving faster than legal and institutional readiness.

Ultimately, the study contributed to ongoing conversations about legal harmonisation and best practice in digital governance. It argued that while Zambia has made commendable progress in setting up a legal structure for electronic communications, there's still work to be done. With targeted reforms and clearer regulations, the country can strengthen consumer protections and build greater trust in its digital marketplace, benefiting businesses, individuals, and the broader economy alike.

CHAPTER ONE

1.0 INTRODUCTION

Realist legal theory takes a more grounded view of how law actually works. Instead of treating it as a fixed set of abstract rules, it sees law as something shaped by the realities of society, how judges think and act, and by how laws are enforced in practice. It's less about the ideal and more about the everyday workings of the legal system. This approach provides a useful way to examine modern legal frameworks not just through the lens of what the law says, but how it is lived, interpreted, and applied.¹ In Zambia's drive toward a more digitally connected economy, the Electronic Communications and Transactions Act No. 4 of 2021 (ECT Act) represents a bold effort to bring legal structure to online interactions. Realist legal theory offers a useful way to examine how the Act's provisions, particularly those dealing with the dispatch and receipt of data messages, hold up against the practical realities of digital communication². However, the practicability of its provisions, particularly **sections 15 and 16**, concerning the dispatch and receipt of data messages, raises serious questions about the interplay between theoretical legal constructs and their real-world application.

Therefore, the study will draw comparative lessons from Malaysia and the United Kingdom (UK), two countries with robust electronic commerce frameworks founded on the UNCITRAL Model Law on Electronic Commerce 1996. The study will assess the degree to which the ECT Act's regulations on the sending and receiving of data messages reflect a realist approach that prioritises societal context and enforceability over strict formalism using this comparative lens. It will also make suggestions to improve the regulations' applicability in Zambia's particular socioeconomic environment.

1.1 BACKGROUND STUDY

The necessity for electronic transactions has become increasingly central to how modern commerce operates. There's been a growing need for legal systems that can keep up with frameworks that not only acknowledge digital communication but also regulate it in meaningful ways. In Zambia, the 2021 Electronic Communications and

¹ Holmes, O. W. The path of the law. *Harvard Law Review*, (1897). 457–478.

² Electronic Communications and Transactions Act No. 4 of 2021

Transactions Act marks a major step in that direction. It replaces the 2009 version to create a more secure and functional environment for online transactions, while also encouraging legal clarity and supporting innovation in the digital space.³ Part II of the Act, titled "Legal Requirements for Data Messages," establishes the foundational rules for the validity, dispatch, and receipt of data messages, key components in determining the formation and enforceability of electronic contracts and electronic evidence.⁴ Specifically, **Sections 15 and 16** address the time and place of dispatch and receipt, stipulating that dispatch occurs when a data message enters an information system outside the originator's control, while receipt is tied to the message entering the addressee's designated or retrievable system.⁵ These provisions aim to provide clarity in an inherently fluid digital environment, yet their practical application remains underexplored in Zambia's context.

The realist theory of law, pioneered by scholars such as Oliver Wendell Holmes and Karl Llewellyn, posits that law is not an autonomous system of rules but a reflection of how judges, lawmakers, and society interact with it in practice⁶. Holmes famously asserted that "the life of the law has not been logic; it has been experiences," emphasising the importance of contextual factors, such as judicial discretion, societal norms, and technological capabilities in shaping legal outcomes⁷.

This study sets out to explore the Zambian ECT Act through the lens of legal realism, asking not just whether the law looks good in legislation, but whether it actually works in practice, especially within Zambia's evolving socio-technical landscape. By comparing Zambia's approach with those of the UK and Malaysia, both of which have more established electronic commerce laws shaped by the UNCITRAL Model Law, the research seeks to review both strengths and weak spots in Zambia's current framework. The goal is not to criticise, but to understand how legal rules can be legislated or interpreted in ways that reflect the real-world dynamics of digital communication. In the end, this work aims to add to the broader conversation about law and technology in developing contexts, offering a realist-informed perspective that

³ Electronic Communications and Transactions Act No. 4 of 2021.

⁴ *ibid*

⁵ *ibid*

⁶ Oliver Wendell Holmes Jr, *The Common Law* (1st edn, Routledge 2004).

⁷ *ibid*

supports a more functional and future-ready legal environment for Zambia's digital economy.

1.2 STATEMENT OF THE PROBLEM

The Realist theory of Law, considered during the introduction to Information and Communication Technology Law, provides that judges, as opposed to legislation, create law⁸. This position seems to be desirable and practical in interpreting provisions such as **Sections 15 and 16** of the ECT Act. An ordinary interpretation of **Section 15 and 16** of the **ECT Act** seem to bring about challenges including the fact that it rises absurdity and it is impracticable, in a way that it is uncertain as to what point a dispatched data message will be deemed to have entered an information system outside the control of the originator or sender of the message when in reality, neither the sender nor the receiver is in control of the information system which is the internet. **S15⁹** also rises absurdity and impracticability on the evidential aspect when one commit a breach or rescinds a contract to be entered using WhatsApp, the offeree may send an acceptance text and deletes it at the point when the offeror took a screen shot of acceptance, vis versa, but the law impliedly states that a message is not sent when the sender can still retrieve it, meaning it's still under their control, this in itself as per the ECT Act means one can't be found liable for breach because they retrieved the acceptance or offer which was already seen.

Considering the above, a need arises to critically analyse the two sections for the purpose of bringing about clarity, which is a cardinal component of good legislation. The above creates a perfect opportunity to examine the Realist Theory of Law using the above provisions.

This dissertation, therefore, seeks to conduct a critical analysis of both the Realist theory and the Section alluded to above, considering when the realist theory is required to interpret the sections and when not.

1.3 GENERAL OBJECTIVE

To critically analyse the practical implementation and effectiveness of the dispatch and receipt rules for data messages under Zambia's ECT Act 2021 through the lens of legal realist theory

⁸ Oliver Wendell Holmes Jr, *The Common Law* (1st edn, Routledge 2004).

⁹ Electronic Communications and Transactions Act No. 4 of 2021

1.3.1 SPECIFIC OBJECTIVES

1. To consider and explore the concept of the realist theory of law.
2. To consider silent provisions and critical analysis of S15 and 16 of the ECT Act.
3. To do a comparative analysis of the use of the realist theory of law in the interpretation of legislation providing for the dispatch and receipt of electronic data, Zambia, Malaysia and the UK.

1.4 RESEARCH QUESTIONS

1. What are the core tenets of the realist theory of Law?
2. What are the silent provisions and the effects of S15 and S16 of the ECT Act?
3. How is the realist theory of law applied in the judicial interpretation of legislation governing the dispatch and receipt of electronic data in Zambia, Malaysia, and the UK?

1.5 SIGNIFICANCE OF THE STUDY

This study holds significant academic, practical, and policy-related value by bridging the realist theory of law with the operational challenges of regulating electronic communications in Zambia's legal framework (ECT Act 2021), while drawing lessons from the United Kingdom and Malaysia. Academically, this study will contribute to the evolving discourse on legal realism by applying these principles to the digital realm, an area which has, over time, been dominated by positivist and formalist studies. By examining how societal context, judicial discretion, and practical enforcement it will shape the rules on dispatch and receipt of data messages, this research will endeavour to enrich the theoretical understanding of law as a dynamic, experience-driven phenomenon rather than a static set of rules. It will offer a different perspective on how legal realism can help to explain the intersection of law and technology, especially in developing jurisdictions where technological adoption has outpaced the readiness of legal and institutional frameworks.

This research will address a more demanding issue in Zambia's legal landscape, which is how well the current legal framework supports the livelihood realities of a growing digital economy compared to how e-commerce and digital governance have become more central to economic activity, looking at the current rules on receipt and dispatch of data messages under the ECT Act of 2021 there is a real concern on consequences not just for businesses, but also for consumers and public institutions. The research will also investigate whether the Act's provisions may not align with

Zambia's day-to-day realities, such as slow internet access, uneven levels of digital literacy, and a judiciary still adapting to this space. These gaps mentioned matter because they might quietly undermine how the law functions.

To make sense of this, the study will draw comparisons with the United Kingdom and Malaysia, two countries with a developed electronic legal framework that have faced similar challenges. Their experiences will offer practical lessons on how courts will interpret provisions related to digital communications, how enforcement can be tailored to fit societal realities, and how legislation can evolve to remain relevant. These insights are very valuable for Zambia, because legal certainty in electronic transactions and electronic evidence is key to building trust and supporting economic growth. In short, the study isn't just about criticising what the law says, but it's also about finding ways to make it work better for the people and institutions that rely on it every day.

From a policy perspective, the findings of this research are more likely to assist lawmakers and regulators in Zambia and other African countries in aligning electronic communications laws with global standards. It is essential to understand the practical effects of such laws to create policies that are both visionary and practically applicable. The insights gained in the UK regarding a developed framework and the situation in Malaysia concerning context-specific solutions provide Zambia with a roadmap for improving the law to support technological innovation and to strike a balance between equitable access and effective enforcement.

1.6 SCOPE OF THE STUDY

This study is premised on the **realist theory of law**, by focusing on the core principles, such as the emphasis on how the law is mostly practiced, the role of judicial discretion, and the influence of social and technological contexts on the legal consequences, the study will also delve into examining how this theory applies to the interpretation and application of rules governing dispatch and receipt of data messages in our day to day electronic transactions, the focus is on Zambia's legal framework (**Electronic Communications and Transactions Act No. 4 of 2021**).

The study will strive to analyse the practicability of these rules by trying to assess their extent of clarity, enforceability, and alignment with Zambia's technological realities in electronic transactions, digital communications environments, and admissibility of electronic evidence. The research will also conduct a comparative analysis of the

United Kingdom and Malaysia legal frameworks to draw lessons and identify best practices, challenges, and potential improvements for Zambia's Electronic Communications Transaction Act No. 4 of 2021. This study will focus only on the rules governing the dispatch and receipt of data messages in the Zambian ECT Act 2021, such as the timing, place, and legal effects of these actions in electronic transactions; this study will not cover other aspects of the ECT Act, such as electronic.

1.7 LIST OF DEFINITIONS OF TERMS

Data Message is defined in **section 2** of the ECT Act 2021 to mean data generated, sent, received or stored by electronic, optical or similar means and includes, but is not limited to, electronic data interchange (EDI), voice, stored record, electronic mail, mobile communications, audio and video recordings.¹⁰

Electronic Record, on the other hand, is not defined by the ECT Act. The term is, however, defined as "Information or data that has been captured and fixed for storage and manipulation in an automated system and requires the use of the system to render it intelligible by a person."¹¹

Electronic Transaction, means a transaction, action or set of transactions of a commercial or non-commercial nature that takes place electronically.¹²

Information System, means a system for generating, sending, receiving, storing, displaying or otherwise processing a data message.¹³

Law in Action vs. Law in Books: This is a fundamental concept in Legal Realism, which endeavours to highlight the difference between laws on paper and how they are being enforced and interpreted in practice.¹⁴

Rule-Scepticism: This is basically the view that legal outcomes may not be solely determined by legal rules but are influenced by the judges' personal biases, social factors, and specific circumstances.¹⁵

Legal Realism: This theory emphasises that legal outcomes may depend on enforcement mechanisms, judicial discretion, and social realities rather than rules on paper.¹⁶

¹⁰ Electronic Communications and Transactions Act No.4 of 2021

¹¹ Archives Terminology <https://dictionary.archivists.org/entry/electronic-record.html> 16/04/2025

¹² Electronic Communications and Transactions Act No.4 of 2021

¹³ Ibid

¹⁴ Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12, 15

¹⁵ Jerome Frank, *Law and the Modern Mind* (Brentano's 1930) 46

¹⁶ Ibid

Empirical Approach: The study of laws using methods similar to natural sciences, focusing on observing how laws are applied in practice and analysing their social effects.¹⁷

1.8 LITERATURE REVIEW

Legal realism, as articulated by scholars like **Oliver Wendell Holmes and Karl Llewellyn**, suggests that law is not a set of abstract rules but a process shaped by what judges and officials do in practice.¹⁸ Holmes' famous dictum, which states that "The life of the law has never been logic, but experiences," underscores the realist view that legal rules need to be assessed based on their societal implication and enforceability. Llewellyn (1930) further argued that judges' decisions are influenced by psychological, economic, and cultural factors, making the application of law inherently context-specific.¹⁹ This study builds on the works of these scholars, its richness is in the criticism of the fact that the law should not be seen for what it is in legislation, but rather what is really being practised by society in to align with societal change, this study will employ legal realism to examine how the rules on dispatch and receipt of data messages in the **Zambian Electronic Communications Transaction Act No. 4 of 2021**, align or respond to the practical realities in electronic transactions.

Modern realist scholars, such as **Brian Leiter (2007)**, emphasise "naturalised jurisprudence," where law is studied logically to understand its possible effects rather than its normative ideals.²⁰ Leiter disagrees with the formalist approach that assumes legal rules are self-executing, advocating for an analysis of how rules function in practice. This research is particularly based on electronic transactions where technological complexities have arisen, it will further strive to show that the realist perspective is crucial for evaluating Zambia's ECT Act 2021 in relation to the provisions on rules of dispatch and receipt of data messages, as the practicability of its provisions on data messages depends on judicial interpretation, technological literacy, and infrastructure, therefore, this study is important because there is an urgent need to interpret **Sections 15 and 16**.

¹⁷ Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (OUP 2014) 52

¹⁸ Holmes OW Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457

¹⁹ *ibid*

²⁰ Leiter B, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007)

Scholars like **Kenneth Lutena** highlight that the ECT Act seeks to promote legal certainty and confidence in electronic transactions and evidence of data messages²¹, which is very important for Zambia's growing digital economy. However, this research will further the author's writing by examining the practicality of rules relating to the dispatch and receipt of data messages in e-transactions and contracts. With the realities of Zambia's limited internet penetration, approximately 20% as of 2023,²² and the uneven technological infrastructure, which may undermine the assumption that parties can reliably designate or access information systems.²³ Hence, this research seeks to explain and provide insight into how there can be certainty once precedent is set through judicial interpretation of the provisions to align with practical realities in Zambian societies.

Szostek (2021) emphasises the need for regulation in the rapidly progressing field of AI, the author argues that conventional legislation is insufficient to control AI due to the complexity of the latter.²⁴ This view could be considered a valid reason why current Zambian ICT sector-related legislation is inadequate to regulate present-day technologies. The above emphasises the need for a study such as the one in this paper to be conducted. Szostek suggests an innovative approach to regulation, incorporating law into programming code. Further, it was evoked that legislation should consider AI's potential change, activity, and ability to interpret structured and unstructured data.²⁵ This implies that to ensure that AI, such as WhatsApp, which can send and unsend a message, there is a need to consider the constraints imposed by the laws that govern it. This research is important because it investigates into what happens when acceptance of a contract is sent via WhatsApp, then later unsend the acceptance, hence the ECT Act of 2021 is silent on the recourse.

Mukonho, discusses the adequacy and appropriateness of the legal framework Governing Electronic Communications and Transactions in Zambia. The author

²¹ Lutena K, 'Reviewing Data Protection Act of 2021' (*Zambia Monitor*, 2024) <https://www.zambiamonitor.com/reviewing-data-protection-act-of-2021-by-kenneth-lutena/> accessed [15/04/2025]

²² *Digital 2024: Zambia* (DataReportal, 2024) <https://datareportal.com/reports/digital-2024-zambia> accessed [14/04/2025].

²³ World Bank, *Digital Economy for Africa: Zambia Country Report* (World Bank Group 2023).

²⁴ D Szostek, 'Is the Traditional Method of Regulation (the Legislative Act) Sufficient to Regulate Artificial Intelligence, or Should It Also Be Regulated by an Algorithmic Code?' (2021) 26 *Białostockie Studia Prawnicze* 3 <https://sciendo.com/article/10.15290/bsp.2021.26.03.03> accessed 15 April 2025.

²⁵ Ibid

examines whether the ECT Act effectively fulfils its intended purpose of promoting legal certainty, security, and consumer protection in the digital realm.²⁶ However this study will further the above writer's discussion by particularly focusing on the uncertainty and impracticability of **Sections 15 and 16** which discusses the rules on dispatch and receipt of data Messages, incorporating challenges that may arise when deciding at what point did the data message enter the information system outside the control of the originator, when in the actual sense neither the sender nor the receiver is ever in control of info system, and also the inventing of new technology like WhatsApp which enables you to unsend or delete for all a message which was sent, it's impossible to control info system. Hence, when viewed through a realist lens, the above sections will only be enforceable and practical once a judge interprets on how it should be construed. This study will also provide an insight into or propose solutions faced by regulators in regulating AI and new technology systems as well as appropriate techniques by which risks can be best mitigated. Such techniques include anticipatory regulation and technology-neutral legislation. This is predicated on the idea that technology will probably develop more quickly than any legislation that would try to manage it. Particularly the distinction between this study and **CAROLINE PEACE MUKONHO's** study is that, Mukonho's study was general while this study is specified in critically analysing **sections 15 and 16** of the ECT Act no. 4 of 2021, secondly that this dissertation is looking at **sections 15 and 16** on a philosophical perspective of the realist theory of law and lastly this dissertation is a comparative analysis of United Kingdom, Malaysia and int'l best practice.

1.9 METHODOLOGY

This section highlights the research design, research methods and techniques to be used in carrying out the research.

1.9.1 RESEARCH APPROACH

The research will be qualitative in nature, as it will be based on knowledge claims on practical grounds.

²⁶ C. P. Mukonho, 'An Analysis of The Adequacy and Appropriateness of the Legal Framework Governing Electronic Communication and Transactions in Zambia' (LLB Thesis, University of Lusaka, 2024).

1.9.2 RESEARCH DESIGN

The research design is comparative and relates to a case study, as the study will critically examine a particular piece of legislation – the Electronic Communications Transactions Act no. 4 of 2021. The bulk of the information considered is based on study and observation.

1.9.3 RESEARCH TYPE

The research type is exploratory as the main focus will be to obtain non-numerical data that will be analysed from the perspective of a newly found defect in the law. The researcher will rely on thematic analysis to enable the organisation of materials used in accordance with the common themes from the research.

1.9.4 DATA PRESENTATION

Data presentation will be made in line with the objectives set out in conducting this study. In that regard, all data collected and presented will be in relation solely to the stated objectives and research questions.

1.9.5 DATA COLLECTION TECHNIQUES

The techniques to be used will include information obtained from statutes, institutions, international conventions and any other written document by scholars which are in relation to the objectives of the study.

1.10 ETHICAL CONSIDERATION

In order to conform with research ethics requirements, first, permission will be sought from the Unilus research ethics committee, second, permission will be sought from organisations, third, permission will be sought from individual research subject. The researcher will endeavour to follow academic writing principles like referencing and acknowledgement of other people's work, and treat all information collected confidential.

1.11 CHAPTER OUTLINE

Chapter one has provided an overview of the research, with a particular focus on highlighting provisions in the ECT Act relating to the practicability of rules relating to the dispatch and receipt of data messages. It clarifies the key points of this study, which include the introduction, background of the study, statement of the problem, the goal and importance of the research, the methodology, and the chapter's structure.

Chapter two will discuss the realist theory of law, to explore and critically analyse the concept of legal realism, by offering a comprehensive examination of its theoretical basis, historical context, key thinkers, application of legal realism, and critiques of the theory, the aim is to provide a clear and detailed understanding of the realist concept of law.

Chapter three will strive to examine the Zambian legal framework, particularly the Electronic Communications and Transactions Act no 4 of 2021, whose purpose is to ensure security, facilitation, and regulation of electronic communications and transactions, as well as promoting legal certainty and confidence in relation to electronic transactions. The chapter aims to critically analyse Silent provisions and particularly the impracticability or real-life implications of sections 15 and 16, which regulate the dispatch and receipt of electronic data messages.

Chapter four strives to conduct a comparative study on the three jurisdictions and determine how the realist theory of law is applied in electronic transaction disputes to archive an outcome that reflects the realities of societies, because realism predicts that judges will interpret legislation not just by its plain text, but with a keen eye on what purpose the law has to serve in reality, which is to facilitate commerce, create legal certainty, and reflect modern commercial realities.

Chapter five shall strive to provide recommendations for legal and judicial reforms to enhance E-commerce and align with international best practices. It will propose amendments to some provisions in the Electronic Communications and Transactions Act.

CHAPTER TWO

TO CONSIDER AND EXPLORE THE CONCEPT OF THE REALIST THEORY OF LAW

2.0 INTRODUCTION

2.1 CORE PRINCIPLES OR TENETS OF LEGAL REALISM.

2.1.2 Law as Behaviour

The Legal realists have always argued that law is not just what is written in statutes or precedents, but the actual behaviour which is exhibited by legal actors like the Judges, Lawyers, and officials. It basically challenges the traditional view of law as a rigid, rule-based system by formalists. Realists claim that judicial decisions are heavily influenced by a range of factors, which include personal biases, societal conditions, economic pressures, and practical considerations, which makes the law a dynamic, human-driven process.²⁷ For example, where a judge is presiding over a contract dispute, the realists claim that their ruling might reflect their personal perspective, like economic climate or public opinion, rather than strictly following what the law states in legislation. This perception emphasises that legal rules are often vague in nature and open to interpretation, giving the Judges significant freedom to shape legal principles.²⁸ Oliver Wendell Holmes Jr. famously suggested that law is all about predicting what the courts will do in practice, driven by experience rather than just logic.²⁹ Similarly, Jerome Frank, a realist philosopher, emphasised that judges' decisions can be swayed by their individual "hunches" or psychological tendencies, which then shows that law is less predictable than formalist philosophers claim.³⁰ Hence, by focusing on "law in action" rather than "law in books", this principle clearly reveals how law operates in real-world contexts in response to societal demands.

2.1.3 Scepticism of Formalism

The concept of Legal realism rejects the reasoning of the formalist view, which asserts that judicial decisions are mechanically derived from clear, abstract legal rules or precedents, as articulated by early 20th Century formalist scholars like Pound.³¹ Realists contend that legal rules are normally indeterminate, ambiguous, or open to

²⁷ Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10(8) Harvard Law Review 457.

²⁸ Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications, 1930).

²⁹ (n27) 457, 461

³⁰ Jerome Frank, *Law and the Modern Mind* (Brentano's 1930).

³¹ Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8(8) Columbia Law Review 605

multiple interpretations, thereby affording judges considerable discretion when making judgments.³² This indefiniteness will always allow judges and officials to incorporate personal judgment, societal values, or pragmatic considerations into their decisions, rather than strictly adhering to statutory mandate or existing precedents. For example, a judge presiding over a contract dispute might interpret ambiguous terms such as “fair dealing” based on current economic conditions or local business practices, rather than relying solely on set precedents in similar cases. For this reason, emerging scholars like *Brian Bix* reinforce this view, with an observation that legal realism shows the gap between formal rules and their practical application, which calls for judicial discretion as a response to the indeterminate rules.³³ Additionally, studies exploring modern legal realism review how the judges in practice navigate through ambiguous legal frameworks in response to social and political pressures faced, further challenging formalism’s assumption of the law being objective and predictable.³⁴ This principle illustrates that the law is a flexible, context-driven process, shaped by real-world factors beyond abstract legal rules.

2.1.4 Context and Social Factors:

The realism concept perceives Law as rooted in society, emphasising that legal processes and their outcomes are profoundly shaped and influenced by cultural, economic, and political realities, rather than existing as an abstract, autonomous system. Legal realists like Llewellyn argue that law cannot be fully understood through statutes or precedents alone but must be studied as “law in action”, looking at how it is enforced, interpreted, and experienced in a real-world context.³⁵ Recent scholars like Brian Bix share the same views by affirming that legal realism’s focus on law’s practical operation encourages empirical studies of how judicial decisions and social dynamics interact in present-day legal systems, such as in analysing the impact of economic or political pressures on court rulings.³⁶ For example, a judge’s ruling in a labour dispute may reflect or be influenced by prevailing economic conditions, such as unemployment levels in a country, or social attitudes toward worker’s rights, rather

³² Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications 1930).

³³ Brian Bix, ‘The Many Faces of Modern Legal Realism’ (2022) 2022(2) *Ordines* 18, 22 https://scholarship.law.umn.edu/faculty_articles/1041/ accessed 11 August 2025.

³⁴ Miles TJ and Sunstein CR, ‘The New Legal Realism’ (2008) 75(2) *University of Chicago Law Review* 831 <https://lawreview.uchicago.edu/print-archive/new-legal-realism> accessed 11 August 2025

³⁵ n33

³⁶ n34

than strictly legal rules. This perspective underscores the dynamic interplay between law and its societal realities, clearly highlighting how social factors influence judicial decision-making and legal enforcement.

2.1.5 Focus on Outcomes

Realism concept focuses on legal outcomes, which are the practical consequences of legal processes over abstract legal principles or formal rules. Realists argue that the true significance of the law lies in its tangible impact on individuals and society, such as how judicial decisions affect economic relations, social equity, or public welfare, rather than their adherence to doctrinal consistency.³⁷ For instance, in a legal dispute concerning environmental regulations, a realist judge would prioritise how a ruling will influence the pollution levels and affect community health over strict interpretations of statutory language. This perspective advocates for practical analysis of legal systems to assess their real-world effects, urging scholars and practitioners to study data on outcomes, such as sentencing patterns or economic impacts, to understand the law's actual operation. Recent legal philosophers like Thomas J Miles and Cass R Sunstein highlight this approach in their article.³⁸ This focus underscores the role of law as a tool for social change, prioritising measurable impacts over theoretical purity.

2.1.6 Judicial Discretion

Realist theory of law highlights the significant role of discretionary power exercised by judges and officials because it helps in shaping legal outcomes. The fundamental role that judges' personal values, experiences, and external pressures, such as public opinion or political influences, play in shaping legal outcomes challenges the formalist notion that law is a predictable, rule-driven system.³⁹ Realists argue that because legal rules are often indeterminate or ambiguous, judges exercise significant discretion, allowing their individual perspectives or societal contexts to influence rulings.⁴⁰

2.2 KEY THINKERS AND MOVEMENTS

Legal realism has distinct branches, with American and Scandinavian realism being the most prominent.

³⁷ Holmes Jr(n4) 464

³⁸ Thomas J Miles and Cass R Sunstein, 'The New Legal Realism' (2008) 75(2) *University of Chicago Law Review* 831, 833-835 <https://doi.org/10.2307/20141901> accessed 11 August 2025.

³⁹ Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 608-610

⁴⁰ Jerome Frank, *Law and the Modern Mind* (Brentano's 1930) 127-129.

2.2.1 AMERICAN LEGAL REALISM:

The American legal realism emerged in the 1920s and 1930s, and the movement was led by prominent scholars such as Oliver Wendell Holmes Jr., Karl Llewellyn, and Jerome Frank.

2.2.2 Oliver Wendell Holmes Jr. (1841-1935)

Holmes is often considered the father of realism. He famously stated in his book “*The Common Law*” (1881) that “the life of the law has not been logic; it has been experience.”⁴¹

Contribution: Often considered a proto-realist, Holmes laid the groundwork with his pragmatic view of law. In “*The Common Law*” (1881), he argued that law evolves through experience, not just logic, famously stating, “The life of the law has not been logic; it has been experiences.”⁴²

Key Idea: Holme’s “prediction” or “bad man” theory suggested that law is essentially what courts will decide, emphasising practical outcomes over abstract rules. He stated that the Law should be understood from the perspective of someone who wants to avoid its penalties.

Impact: Holmes’s work paved the way for further exploration of the gap between formal rules and judicial practices. And influenced realists by shifting focus from legal texts to judicial behaviour, encouraging scepticism of formalist ideals.

2.2.3 Karl Llewellyn (1893-1962)

This philosopher, in his works like, “*The Bramble Bush*” (1930), argued that legal rules are tools, not absolute truths, and emphasised studying judicial behaviour.⁴³

Contribution: A leading figure in American legal realism, Llewellyn’s “*The Bramble Bush*” (1930) and “*The Common Law Tradition*” (1960) emphasised that legal rules are tools shaped by context, not universal truths. And argued that the study of law

⁴¹ Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10(8) Harvard Law Review 460-461

⁴² Ibid

⁴³ Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications 1930).

should focus on what courts and lawyers actually do, rather than on legal doctrine alone.⁴⁴

Key Idea: Llewellyn, in his book, highlighted the indeterminacy of legal rules and the importance of studying “law in action” (how courts and officials apply law) rather than “law in books.” He underscores the importance of legal institutions and processes. Llewellyn introduced the concept of 'law jobs,' which refers to the various functions that law serves in society. These include resolving disputes, maintaining social order, facilitating change, and shaping societal expectations. He also advocated for legal reform to align the law with societal needs.⁴⁵

Impact: Llewellyn’s work influenced the Uniform Commercial Code and legal education, promoting a practical, case-based approach.

2.2.4 Jerome Frank (1889-1957)

Frank was a more radical realist amongst the American realists, his famous works highlighted the psychological and subjective factors in judicial decision-making, famously noting in *Law and the Modern Mind* (1930) that legal certainty is an illusion.⁴⁶

Contributions: Frank highlighted the unpredictability of judicial decisions, citing factors such as judicial temperament and personal biases. His primary contribution to legal realism lies in his ground-breaking work, “Law and the Modern Mind” (1930), where he challenged the formalist notion of law as a predictable, rule-driven system. He introduced a psychological perspective to legal realism, arguing that judges’ decisions are shaped by personal biases, emotions, and subconscious factors, rather than solely by statutes or precedents.⁴⁷

Key Ideas: He highlighted the subjectivity in judicial decision-making. Emphasising the role of psychological and emotional factors in judicial decision making.

Impact: Frank’s ideas spurred debates about the psychological aspects of law. His work encouraged law students to critically analyse judicial behaviour, contributing to the case method’s focus on real-world decision-making processes.

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Jerome Frank, “Law and the Modern Mind” (Brentano’s 1930)

⁴⁷ Ibid

2.3. SCANDINAVIAN LEGAL REALISM

This branch of legal realism is associated with thinkers such as **Axel Hägerström** and **Karl Olivecrona**, focused on a more philosophical critique of legal concepts.

2.3.1 Axel Hägerström (1868-1939)

Hagerstrom is considered as the father of Scandinavian realism. In his works, he rejected metaphysical notions like “rights” as meaningless, advocating for a scientific approach to law.⁴⁸

Contributions: Hägerström challenged traditional legal theories in his seminal work, “1” (1953, published posthumously). As a Swedish philosopher, he critiqued the metaphysical foundations of law, arguing that concepts like “rights” or “justice” lack objective reality and are instead rooted in emotional and social constructs.⁴⁹ His philosophical approach to the law, known as “value nihilism,” rejected moral absolutism, urging scholars to study law as a product of observable human behaviour and societal practices.

Key Idea: Rejection of Metaphysical Concepts: Hägerström mostly argued that legal concepts like “*rights*” or “*duties*” are not objective truths but are social constructs driven by emotions, cultural norms, or power dynamics, and devoid of metaphysical significance.⁵⁰ For example, a “property right” is merely a societal agreement enforced through behaviour, not an inherent truth.

Impact: Hägerström’s work laid the intellectual foundation for Scandinavian legal realism, influencing scholars like Alf Ross and Karl Olivecrona. His emphasis on law as a social phenomenon bridged legal theory with practical social science, encouraging studies on the actual function of the law in society.⁵¹ This approach challenged formalist and natural law traditions, reshaping Scandinavian jurisprudence to focus on observable effects rather than abstract ideals.

⁴⁸ Axel Hägerström, *Inquiries into the Nature of Law and Morals* (C D Broad tr, Almqvist & Wiksell 1953)

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Brian Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2015) 111(2) *Ethics* 278.

2.3.2 Karl Olivecrona (1897-1980)

Olivecrona significantly developed the Scandinavian legal realism through his influential work called, "*Law as Fact*" (1939), where he expanded on Hägerström's rejection of metaphysical legal concepts, by arguing that law is not a command issued by a sovereign, as posited by legal positivists like John Austin, but a system of binding rules that are sustained by social practices and psychological influences.⁵²

Key Ideas: Olivecrona expanded on Hägerström's ideas by arguing that law is not a command but a set of binding rules which are upheld by social practices. He introduced the concept of "independent imperatives," which explains how legal rules function as directives that are detached from any commanding authority but still exert a psychological influence on individuals. These imperatives derive their power from societal acceptance and habitual compliance, rather than from a sovereign's direct commands. He rejected the idea of law as a command from a sovereign, and also proposed that law functions as a psychological tool to regulate behaviour.⁵³

Impact: His ideas solidified Scandinavian legal realism's focus on law as a social and psychological phenomenon, influencing modern legal theory by highlighting the empirical study of legal norms' effects. His concept of independent imperatives offered a novel way to understand law's authority without relying on sovereign power, impacting debates in legal positivism and realism.⁵⁴

2.4 STRENGTH OF LEGAL REALISM

2.4.1 Pragmatic Approach,

The pragmatic approach of legal realism, which advocates for "laws in action" over "laws in books," remains highly relevant to understanding how the law functions in practice, offering valuable insights for policymakers and legal practitioners. A recent exploration of this concept can be found in *Paul R. Tremblay's article, "The Ethics of Honouring Law in Action," published in the (Georgetown Journal of Legal Ethics), Volume 37, Issue II (2024)*. Tremblay discussed how legal realists have long recognised the gap between formal legal rules ("law in books") and their practical application ("law in action"). He argues that this gap informs effective legal practice,

⁵² Karl Olivecrona, *Law as Fact* (Ejnar Munksgaard 1939).

⁵³ Ibid

⁵⁴ Ibid

as lawyers must navigate the real-world application of law to serve their clients.⁵⁵ The article further explores the ethical implications for lawyers who prioritise practical outcomes over strict adherence to the formal rules, highlighting the relevance of legal realism in present-day legal practice.⁵⁶ This approach ensures that legal analysis remains relevant to real-world challenges, such as addressing social inequalities or economic pressures, making it a practical tool for designing responsive legal frameworks and improving judicial practice.⁵⁷

2.4.2 Empirical Emphasis

The empirical emphasis of legal realism is a core strength which promotes a data-driven approach to the study of the law's actual effects or outcomes, aligning with legal analysis with social science methodologies. The realists advocate for examining how laws are enforced, interpreted, and experienced in practice, focusing on observable outcomes rather than abstract principles.⁵⁸

2.4.3 Flexibility

The flexibility of legal realism is a significant strength which stems from its recognition of judicial discretion, which enables the law to adapt to complex and evolving social issues. By acknowledging that judges often interpret indeterminate legal rules based on personal judgment, societal context, or practical needs, the concept of realism allows the courts to respond dynamically to the changing circumstances, such as shifts in economic conditions or cultural values.⁵⁹ This position has been perceived by many recent scholars whose articles highlight this strength, *Talesh. S & Mertz. E. (2021)*. Scholar explores how New Legal Realism (NLR) builds on traditional legal realism by emphasising judicial flexibility in addressing complex social issues. He discusses how judges use discretion to interpret laws in light of shifting societal contexts, such as globalisation and technological advancements, ensuring legal adaptability. The

⁵⁵ Tremblay PR, 'The Ethics of Honoring Law in Action' (2024) 37(2) *Georgetown Journal of Legal Ethics* <https://www.law.georgetown.edu/legal-ethics-journal/in-print/volume-37-issue-2-spring-2024/the-ethics-of-honoring-law-in-action/> accessed [15/08/2025].

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Alf Ross, *On Law and Justice* (Stevens & Sons 1958)

⁵⁹ Jerome Frank, *Law and the Modern Mind* (Brentano's 1930) 45.

authors provide case studies showing how courts respond to economic and cultural changes, aligning with realist principles.⁶⁰

Bix, B. H. (2023). This scholar's article examines how legal realism's acknowledgment of judicial discretion allows courts to navigate indeterminate legal rules in response to modern challenges like economic instability and evolving cultural norms. Bix argues that this flexibility is crucial for addressing issues like data privacy and social justice, where rigid formalism may fail to account for dynamic societal needs.⁶¹

2.5 CRITICISMS OF LEGAL REALISM

2.5.1 Undermines Legal Certainty

Critics argue that legal realism's emphasis on judicial discretion and the indeterminacy of legal rules undermines the predictability and stability essential to the rule of law. By suggesting that outcomes depend on judges' subjective factors rather than fixed rules, realism challenges the formalist ideal of consistent, predictable legal decisions, potentially eroding public trust in the legal system's reliability.⁶² The same view is given by recent legal scholars like *Waldron, J.* explores the tension between legal realism's embrace of judicial flexibility and the rule of law's need for predictability. The article critiques realism for suggesting that legal outcomes often depend on judges' personal or contextual factors, arguing that this indeterminacy can undermine the public's trust in the legal system, particularly in high-stakes areas like criminal justice and property law.⁶³

2.5.2 Overemphasis on Judges

Legal realism's focus on judicial behaviour is criticized for downplaying the significance of legislation, precedent, and broader legal principles. By prioritizing what judges do, realism may marginalize the role of statutory frameworks or societal norms in shaping law, presenting an incomplete view of the legal system.⁶⁴ For instance, in statutory

⁶⁰ Shauhin A Talesh, Elizabeth Mertz, and Heinz Klug, *Introduction—Modern Legal Realism: Paving the Way for Theoretically-Informed Empirical Research in the Legal Academy* (UC Irvine School of Law Research Paper No 2020-56, SSRN 2020) <https://ssrn.com/abstract=3671933> accessed [Day Month Year].

⁶¹ Brian H Bix, 'The Many Faces of Legal Realism' [2023] *Ordines* <https://www.ordines.it/wp-content/uploads/2023/02/3-B.H.-BIX-The-Many-Faces-of-Legal-Realism-docx.pdf> accessed 15 July 2024.

⁶² H L A Hart, *The Concept of Law* (Clarendon Press 1961)

⁶³ Jeremy Waldron, 'Judicial Discretion and the Erosion of Legal Certainty' (2024) 44(1) *Oxford Journal of Legal Studies* 23, 25

⁶⁴ Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8(8) *Columbia Law Review* 605.

interpretation cases, realism might overlook the legislature's intent in favour of judicial discretion.

2.5.3 Lack of Normative Guidance:

Realism is often faulted for being descriptive, explaining how law operates without offering prescriptive guidance on what law "should be." Critics, such as *H.L.A. Hart*, argue that its focus on judicial behaviour and outcomes lacks a normative framework to ensure fairness or moral grounding, leaving law directionless.⁶⁵ This limits its utility in addressing ethical questions in legal reform.

2.6 CONCLUSION

Legal realism offers a pragmatic and dynamic framework for understanding law, emphasising its practical application over abstract rules. Its strengths lie in its focus on "law in action," empirical analysis, and judicial flexibility, which allow the legal system to adapt to evolving social, economic, and cultural contexts. By highlighting the significant role of judicial discretion and the indeterminacy of legal rules, realism provides valuable insights for policymakers and practitioners, aligning legal analysis with real-world outcomes and societal needs. However, critics argue that this emphasis on discretion undermines legal certainty, potentially eroding the predictability and stability essential to the rule of law, which may weaken public trust in the legal system's reliability.

⁶⁵ H L A Hart, *The Concept of Law* (Clarendon Press 1961)

CHAPTER THREE

TO CONSIDER SILENT PROVISIONS AND CRITICAL ANALYSIS OF SECTIONS 15 AND 16 OF THE ZAMBIAN ECT ACT

3.0 INTRODUCTION

The Zambian ECT Act was enacted to create a legal framework for the use, security, facilitation, and regulation of electronic communications and transactions, as well as promoting legal certainty and confidence in relation to electronic transactions. Therefore, this chapter seeks to explore and critically analyse Silent provisions and particularly the impracticability or real-life implications of sections 15 and 16 relating to the dispatch and receipt of data messages in depth.

3.1 ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT NO. 4 OF 2021

The Electronic Communications and Transactions Act No. 4 of 2021, is the primary statutory authority in Zambia which governs e-commerce or electronic transactions in the digital space, the preamble states that its purpose is to provide a safe and effective environment for electronic transactions; promote secure electronic signatures; facilitate electronic filing of documents by public authorities; provide for the use, security, facilitation and regulation of electronic communications and transactions; promote legal certainty and confidence, and encourage investment and innovation in relation to electronic transactions; regulate the National Public Key Infrastructure; repeal and replace the Electronic Communications and Transactions Act, 2009; and provide for matters connected with, or incidental, to the foregoing⁶⁶.

3.2 THE SCOPE OF APPLICATION

The scope of application of this act is detailed in section 3(1)⁶⁷ to extend to electronic transactions, electronic communications and electronic records used in the context of commercial and non-commercial activities that include domestic and international transactions, arrangements, agreements and exchanges and storage of information and other related transactions. Sub-section (2)⁶⁸ of the same section further states that except as otherwise specified, this Act shall not be construed as; (a) requiring any person to generate, communicate, produce, process, send, receive, record, retain,

⁶⁶ Act no 4 of 2021

⁶⁷ Ibid S3

⁶⁸ Ibid

store or display any information, document or signature by, or in electronic form; or (b) prohibiting a person from establishing requirements in respect of the manner in which that person will accept data messages.

3.3 NON-PRE-EMPTIVE CLAUSE

The non-supremacy of this Act with respect to other pieces of legislation is stated under Sub-section (3) which provides that, "Except as otherwise specified, this Act does not limit the operation of any written law that authorizes electronic payments, electronic money and value transaction services, prohibits or regulates the use of data messages, including any requirement by, or under, any law for information to be posted or displayed in a specified manner, or for any information or document to be transmitted, stored or retained by a specified method."⁶⁹ This in itself suggests that the provision is non-mandatory, allowing businesses and individuals to choose whether to contract electronically or not. However, there is a possibility of leaving gaps in enforcement if people opt to avoid electronic methods to bypass regulations.

3.4 OTHER SALIENT PROVISIONS OF THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT No. 4 of 2021

The salient provisions in the ECT Act 2021 form the backbone for the act's application in various contexts, hence explanation of their content and significance will be provided based on the act's text. **Section 8⁷⁰ (determination of originality of data message)** This section deals with how electronic data is treated in court. It states that data messages are admissible as evidence and their weight is assessed based on reliability, such as how they were generated, stored, and communicated. Factors like the integrity of the information system are considered. The aim of incorporating this provision is to *fundamentally enable the legal acceptance of electronic documents as "originals"*, which has a huge impact on how we conduct business and legal affairs in the digital age. It therefore requires that for a data message to be an "original," it must meet two main conditions:

⁶⁹ Ibid

⁷⁰ Ibid S8

(a) the integrity of the information from the time when it was first generated in its final form as a data message, or otherwise, has passed the assessment specified under subsection (2); and

(b) that information is capable of being displayed or produced to the person to whom it is to be presented.

Section 22⁷¹ (Expression of intent or other statement) An expression of intent or other statement as between the originator and the addressee of a data message shall not be without legal effect merely on the grounds that it is (a) in the form of a data message; or (b) not evidenced by an electronic signature, but by other means from which that person's intent or other statement may be inferred., Section 22 *removes a major legal barrier for digital communication to be considered legally binding*, thereby fostering trust and certainty in electronic transactions and agreements, which aligns with the Act's overall objective to promote legal certainty and confidence, and encourage investment and innovation in relation to electronic transactions.

Section 40⁷² (Audit services). (1) A certification authority shall conduct an information system audit annually and submit the audit report to the National Root Certification Authority. (2) Despite subsection (1), the National Root Certification Authority may require a certification authority to conduct an information system audit as and when the Authority considers it necessary at the cost of the certification authority. mandates regular audits of certification authorities, which is crucial for maintaining trust and security in electronic transactions.

- **Ensuring Trustworthy Systems:** Certification authorities are fundamental to the integrity of electronic signatures by managing and issuing certificates. Section 40 requires these authorities to conduct *annual information system audits* and submit reports to the National Root Certification Authority. This directly enforces the requirement for certification authorities to utilize "trustworthy systems," which are defined as being "reasonably secure from intrusion and misuse" and providing a "reasonable level of availability, reliability and correct operation".

⁷¹ Ibid S22

⁷² Ibid S40

- **Maintaining Public Confidence:** By ensuring that certification authorities' systems are regularly audited and found to be secure and reliable, Section 40 helps to *build and maintain public confidence* in the validity and security of electronic signatures and the overall National Public Key Infrastructure (NPKI).
- **Enabling Regulatory Oversight:** It grants the National root certification authority (NRCA) the power to monitor and ensure compliance, even allowing it to request additional audits as needed at the certification authority's cost. This provides essential *regulatory oversight* to safeguard the foundational elements of electronic transactions.

Section 60⁷³ (Requirements for time stamping service provider), Establishes the *critical requirements for timestamping service providers*, ensuring the reliability and trustworthiness of services that certify the existence of electronic data at a given time.

- **Ensuring Service Reliability:** It explicitly requires timestamping service providers to "comply with the requirements established by this Act and be capable of ensuring a reliable timestamping service". This is fundamental for proving the official time and temporary order of digital signatures and seals.
- **Mandatory Audits and Oversight:** Similar to certification authorities (Section 40), timestamping service providers must conduct annual information system audits and submit these reports to the Authority. The Authority retains the power to demand additional audits at the provider's cost, this strict oversight ensures that these providers operate "trustworthy systems" (as defined in Section 38), which are "reasonably secure from intrusion and misuse" and provide "a reasonable level of availability, reliability and correct operation" [38(a), 38(b)].
- **Consumer/User Protection:** The provision mandates that timestamping service providers *procure insurance* related to their licensed services up to a prescribed amount. This adds a layer of financial accountability and protection for users relying on their services.

⁷³ Ibid S60

3.5 CRITICAL ANALYSIS OF SECTIONS 15 AND 16 ON DISPATCH AND RECEIPT OF DATA MESSAGES

Sections 15 and 16 of the Electronic Communications and Transactions Act, No. 4 of 2021 (ECT Act) are central to establishing legal certainty in electronic contracts and communications. These provisions define the time of dispatch and receipt of electronic records (or "data messages"); these sections are more central and may have a direct influence on the formation of electronic contracts. The time at which offers are accepted, or notices are deemed effective is more key when it comes to electronic evidence in e-commerce. Drawing from international models like the UNCITRAL Model Law on Electronic Commerce, the aim is to equate electronic transactions with traditional postal rules by promoting e-commerce in a developing economy like Zambia. However, this analysis scrutinises the provision's theoretical coherence against their impracticability, particularly in adapting to Zambia's uneven infrastructural, economic, and cultural realities. With internet penetration hovering around 33.0% in 2025 and a stark urban-rural digital divide where 47.2% of the population is urban but rural areas (52.8%) lag significantly in access,⁷⁴ these sections often prove to be idealistic rather than being practical. This study will incorporate real-life scenarios and hypothetical examples to illustrate these gaps, highlighting how they are more likely to exacerbate disputes in e-commerce and daily digital interactions.

3.5.1 OVERVIEW OF SECTIONS 15 AND 16

Section 15⁷⁵ (Dispatch of Electronic Record)

Unless otherwise agreed between the originator and the addressee, the dispatch of an electronic record occurs when it enters an ***information system outside the control of the originator or the agent of the originator***.

Theoretical Coherence: As Thomas Katuma Malama, an IT Law expert, said, these provisions are logically sound in theory. They establish a clear point where the originator relinquishes control and the message is considered "sent," preventing disputes over whether a message was truly dispatched from the sender's end, shifting the legal responsibility for transmission once it leaves their direct control. It reflects the

⁷⁴ Simon Kemp, 'Digital 2025: Zambia' (DataReportal, 18 February 2025) <https://datareportal.com/reports/digital-2025-zambia> accessed 18 September 2025.

⁷⁵ Ibid(n10) S15

technical reality of how email servers or messaging platforms operate, where a message is queued for delivery once it leaves the sender's device or immediate server.⁷⁶

Section 16⁷⁷ (Receipt of Electronic Record)

The time of receipt of an electronic record shall be determined as follows:

(a) where the addressee designates an information system for the purpose of receiving electronic records, receipt occurs at the time when the electronic record enters the designated information system; or

(b) where the addressee does not designate an information system, receipt occurs when the electronic record enters an information system of the addressee through which the addressee retrieves the electronic record.

Theoretical Coherence: Theoretically, these provisions attempt to provide clarity on receipt, especially distinguishing between a passive entry into a designated system (often associated with businesses) and entry into a system from which the addressee actively retrieves messages (more common for individuals with multiple accounts or less formal arrangements). The distinction aims to balance the addressee's control over receiving communications with the need for a clear legal timestamp.⁷⁸

Theoretically, both sections 15 and 16 are coherent and well-aligned with global standards. They provide clear, objective criteria for timing, avoiding subjective debates over "awareness" or "actual reading." By focusing on system entry, they mirror the physical postal rule on dispatch (e.g., dropping a letter in a mailbox), fostering predictability essential for contract law. This coherence supports the ECT Act's broader objectives of legal certainty and innovation in electronic transactions, as outlined in its preamble.⁷⁹ In a perfect digital environment, these provisions would minimise disputes by establishing presumptive evidence of timing, verifiable through logs or timestamps. They also allow party autonomy via "*otherwise agreed*," enabling customisation in contracts, which adds flexibility. Overall, the sections are logically

⁷⁶ Thomas k. Malama, 'functional equivalence' (Lecture, University of Lusaka, 23rd April, 2025)

⁷⁷ Ibid S16

⁷⁸ n76

⁷⁹ Act no.4 of 2021

sound, promoting trust in digital dealings without overcomplicating traditional principles.

3.5.2 CRITICAL ANALYSIS OF IMPRACTICABILITY AND ADAPTABILITY TO ZAMBIA'S REALITIES

Despite theoretical strengths, Sections 15 and 16 may not be practical when applied to Zambia's technological context as of 2025. The country's digital infrastructure is unreliable due to certain factors, such as frequent power outages, slow internet speeds, and network congestion, especially in rural areas where network connectivity is often intermittent.⁸⁰ The other influencing factor is economic barriers, such as high data costs (averaging 1-2% of monthly income for low earners) and limited access to devices, which may further hinder the adoption and reliability of electronic transactions.⁸¹ Culturally, there's a preference for face-to-face or cash-based transactions due to low technological literacy (estimated at under 50% in rural zones) and mistrust of digital systems stemming from past fraud incidents. These factors render the sections' reliance on "information systems" and "entry" points unrealistic, leading to disputes over proof and enforcement.⁸²

3.5.3 INFRASTRUCTURAL REALITIES (UNEVEN DIGITAL PENETRATION)

Limited and Unreliable Internet Access: The premise of these sections assumes consistent and reliable internet infrastructure, but when we look at Zambia's technological infrastructure, it is not uniformly available across the nation. With urban centres like Lusaka enjoying 4G/5G network coverage, while rural areas in provinces like Eastern or Western rely on patchy 2G/3G networks, which are poor, slower, and less stable.

"Information system outside the control of the originator" (Section 15): In areas with unreliable service, an electronic record might "enter an information system outside the control of the originator" (e.g., a mobile network's server) but this may not be instantaneous it may *remain in the information system for extended period of time*

⁸⁰ Simon Kemp, 'Digital 2025: Zambia' (DataReportal, 18 February 2025) <https://datareportal.com/reports/digital-2025-zambia> accessed 18 September 2025.

⁸¹ USAID Zambia, *Disability Inclusive Climate Smart Agriculture, Green Economy and Natural Resource Management Assessment in Zambia* (Public Version, July 2022) <https://www.gender.gov.zm/wp-content/uploads/2024/04/USAID-Zambia-DECA-Report-Jul2022-Public-Version.pdf> accessed 18 September 2025.

⁸² Ibid

due to network congestion or outages before actual transmission to the addressee's device. Then the deemed legal dispatch could have occurred long before practical deliverability. yet, the rule's rigidity assumes a perfect frictionless digital transmission, ignoring "linger" effects where messages queue indefinitely due to system glitches and slow internet. This theoretical elegance will falter in uneven environments, where intermediaries such as service provider networks delay beyond the originator's foresight or control. Honestly, the Act's silence on force majeure-like exemptions for systemic failures, for example, no carve-out for outages and liability allocation in Part III of the ECT Act 2021, exposes a doctrinal gap, it prioritises form over substance, potentially validating "dispatches" that are functionally inert. For instance, if we consider a small-scale farmer in a remote area of Luapula Province attempting to send a mobile money payment confirmation or an email related to agricultural produce sales. It can be seen that the moment the farmer hits "send," the message might *legally* enter the mobile network's information system (outside their control). However, due to intermittent network coverage, overloaded cell towers, or frequent power outages, the message may be significantly delayed in actual transmission to the recipient. Hence, the legal "dispatch" might occur hours or days before the message truly begins its journey, leading to potential disputes over timelines in time-sensitive transactions.

"Enters the designated information system" vs. "retrieves the electronic record"
(Section 16):

Receipt of dispatch data messages may be a challenge, especially for individuals based in rural setups or remote areas to designate a specific "information system" is **uncommon or impractical**. Due to the unavailability of digital devices, as such they may rely on shared devices, public internet cafes, or basic feature phones with limited email capabilities. Meaning even if a message "enters" an addressee's system like an email server or box, the addressee might have *infrequent or no access to retrieve it due to lack of electricity, device ownership, or internet availability*. But the legal fiction of "receipt" (when it enters the system) could precede actual knowledge or access by days or weeks, creating legal obligations without actual awareness. This clashes with the implicit need for "accessibility and usability for subsequent reference" mentioned in Section 10 for retained information. In a real-life situation, consider a small-scale farmer in Chipata using WhatsApp or email to negotiate a maize supply contract with a Lusaka buyer. The farmer sends an acceptance message (dispatch under Section

15), but a network blackout delays its entry into the buyer's email system or WhatsApp inbox. Then, when the buyer claims non-receipt (under Section 16(b)), the farmer will be required to prove system entry, but this is challenging to prove without advanced logging tools, hence it may lead to contract repudiation and financial loss.

3.5.3 ECONOMIC REALITIES (COST AND DEVICE OWNERSHIP)

Cost of Data and Devices: The cost of internet data and smartphones or computers may restrict many Zambians, particularly in lower-income and rural areas. This may affect regular access to and interaction with electronic communications.

Implication for "Designated Systems": many businesses in urban centres might have sophisticated "designated information systems," but small businesses or individuals in economic hardship are less likely to. Therefore, relying on such a distinction for legal receipt creates an *unequal application of the law*.

Affordability of "Trustworthy Systems": The Act defines a "trustworthy system" to mean computer hardware, software and procedures that— (a) are reasonably secure from intrusion and misuse; (b) provide a reasonable level of availability, reliability and correct operation; (c) are reasonably suited to perform their intended function; and (d) adhere to generally accepted security procedures.⁸³ Based on the definition of a trustworthy system, it can be ascertained that the economic reality for many individuals and small entities means that investing in such "trustworthy systems" (secure devices, reliable internet subscriptions, backup power) is simply not feasible, undermining the foundational security and integrity presumed by the Act. High broadband costs and low financial inclusion (only 59% banked in 2023, lower in rural areas) make consistent access unaffordable.⁸⁴ Sections 15 and 16 presuppose reliable "information systems," but many Zambians use shared or prepaid devices, blurring control lines. Economically, this impracticability hits SMEs hard; e-commerce platforms or local sites face non-delivery complaints, where receipt timing disputes arise from payment confirmations delayed by mobile money glitches.

⁸³ Act no.4 of 2021

⁸⁴ ⁸⁴ USAID Zambia, *Disability Inclusive Climate Smart Agriculture, Green Economy and Natural Resource Management Assessment in Zambia* (Public Version, July 2022) <https://www.gender.gov.zm/wp-content/uploads/2024/04/USAID-Zambia-DECA-Report-Jul2022-Public-Version.pdf> accessed 18 September 2025.

Trust in Digital Systems: While the Act aims to "promote legal certainty and confidence", the practical challenges can erode trust. If legal dispatch or receipt can occur without the practical ability to send or retrieve, it undermines the very confidence the Act seeks to build. An example regarding *Receipt, under Section 16, would be where* an elderly villager in Eastern Province may have a basic mobile phone but little understanding of "information systems" or the distinction between a message being "sent to a server" versus "read on their device." They might receive an SMS that *legally* constitutes receipt under Section 16, but they interpret "receipt" at the moment they *physically see and comprehend* the message. Hence, this gap in understanding may lead to serious non-compliance with legally binding communications, not out of malice, but out of a lack of familiarity with the underlying digital concepts that the law presumes. This reflects broader challenges, as noted in CCPC reports on e-commerce vulnerabilities, where literacy gaps lead to exploitation.⁸⁵

3.6 CONCLUSION

Nonetheless, critical examination of Sections 15 and 16 governing the dispatch and receipt of data messages has revealed an unambiguous disconnect between legislative intent and practical application. While theoretically coherent in adopting a "mailbox rule" for digital communications, these sections prove to be impractical amid Zambia's infrastructural vulnerabilities, economic disparities, and cultural contexts. Because the reliance on "entry into an information system outside the control of the originator" (Section 15) often results in legal dispatch preceding actual delivery of data messages, as seen in real-life scenarios like rural farmers facing network outages during crop negotiations or urban e-commerce disputes exacerbated by telecom disruptions. With internet penetration estimated at 38.32% in 2025 and a pronounced urban-rural divide where urban access reaches about 57% but rural connectivity lags at under 23% frequent power blackouts, high data costs, and low digital literacy amplify evidentiary burdens and contractual uncertainties. This may not only suffocate SME growth in sectors like e-agriculture and online retail but also perpetuates exclusion, contradicting the Act's preamble on inclusive innovation.

⁸⁵ CUTS International Lusaka, 'Promoting E-Commerce Without Leaving Consumers Behind' (CUTS, 28 February 2024) <https://cuts-lusaka.org/promoting-e-commerce-without-leaving-consumers-behind/> accessed 18 September 2025.

CHAPTER FOUR

TO DO A COMPARATIVE ANALYSIS OF THE USE OF THE REALIST THEORY OF LAW IN THE INTERPRETATION OF LEGISLATION PROVIDING FOR DISPATCH AND RECEIPT OF ELECTRONIC DATA, ZAMBIA, MALAYSIA AND THE UK.

4.0 INTRODUCTION

This chapter seeks to explore and conduct a comparative analysis of the three jurisdictions on how the realist theory is applied in e-commerce disputes to achieve an outcome that reflects the realities of societies. The concept of legal realism, when applied to emerging fields of law like electronic commerce, predicts that judges will interpret legislation not just by its plain text or meaning, but with a keen eye on what purpose the law was meant to serve in reality, which is to facilitate commerce, create legal certainty, and reflect modern commercial realities. However, case law or precedence on the dispatch and receipt of data messages remains limited, particularly in Zambian and Malaysian jurisprudence, due to the relative novelty of their statutes and fewer legal disputes on the subject. While the UK Courts demonstrate a more evolved realist application through case-by-case adaptations. This analysis integrates statutory provisions, available case law, and interpretive trends to illustrate realist influences in the interpretation of e-commerce. The key question is: *How do courts balance the literal text with the need for fairness and commercial practicality?*

4.1 ZAMBIA'S ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT, 2021 (ECT ACT)

Zambia's ECT Act 2021⁸⁶ recognises electronic records for the dispatch and receipt of data messages, which mirrors the United Nations Commission on International Trade Law (UNCITRAL) standards to promote functional equivalence with paper transactions.⁸⁷ *Section 15*⁸⁸ defines dispatch as occurring when the electronic record leaves the originator's control and enters an external system called an information system, and *Section 16*⁸⁹ specifies receipt when it enters the addressee's designated system, with presumptions for time (dispatch time) and place (originator's location).

⁸⁶ Act no. 4 of 2021

⁸⁷ United nations commission on international trade law (1986)

⁸⁸ (n86) S15

⁸⁹ Ibid S16

In Zambia, judicial interpretation adopts a purposive approach, as demonstrated in the case of *Law Association of Zambia v Attorney General*, which applied the reasoning from the case of *Daniel Pule and others v Attorney General and others*. Considering legislative purpose and context, this approach aligns with legal realism by enabling judges to consider practical evidence such as metadata, which is crucial for Zambia's developing digital infrastructure. However, there is limited case law directly addressing dispatch or receipt disputes, reflecting the recency of the Act and its focus on establishing foundational electronic transaction frameworks. Nonetheless, related rulings on the admissibility of electronic evidence display pragmatic, realist tendencies. in *Shuko Willie Chunga V Hildah Nukwase Mwanza Chunga and 2 others*.⁹⁰ The court emphasised certification requirements for data messages under ECT Act *Section 35* to ensure reliability, admitting electronic evidence only if authenticated to prevent fabrication risks. This decision pragmatically balances technological proof with evidentiary integrity, adapting rules to real-world digital forensics rather than excluding evidence outright. Similarly, the ruling in *Bentry Siamalambwa and Magna Mining Limited*.⁹¹ affirms the rebuttable presumptions for electronic records in proceedings, prioritising the functional use over formalism. Viewed through a realist lens, the application would involve judges assessing transmission logs or connectivity issues in low-infrastructure areas, ensuring laws serve commercial intent without rigid timelines that could invalidate transactions. The challenges include enforcement gaps, but purposive methods enable realist flexibility, fostering e-commerce growth.

4.2 MALAYSIA'S ELECTRONIC COMMERCE ACT 2006 (ECA)

Malaysia, as a common law jurisdiction, is influenced by English law, it primarily employs a purposive approach to statutory interpretation, as demonstrated in the case of *Public Prosecutor v Datuk Harun bin Haji Idris*, where the court interpreted the constitutional provision through a realist lens, stating that "the powers of the Yang di-Pertuan Agong, including the power to pardon, are statutory and constitutional powers that must be exercised strictly within the limits set by the Federal Constitution, the court also stated that it cannot give a liberal interpretation that would extend a power beyond its defined scope."⁹² This is further supported by Section 17A of the

⁹⁰ 2025 ZMHC 23

⁹¹ [2024] ZMHC 136

⁹² [1977] 1 MLJ 15

Interpretation Acts 1948 and 1967 (which mandates interpreting laws to uphold their purpose or object), which aligns with the realist principles. It enables the judges to consider legislative intent, contextual factors, and practical outcomes to ensure laws function effectively in modern contexts, like e-commerce.

In e-commerce disputes involving dispatch and receipt of electronic messages (e.g., emails, SMS, or online forms), Malaysian courts apply the purposive lens to prioritise functional equivalence between electronic and traditional communications, commercial certainty, and technological adaptability. The reasoning can be seen in the judgment passed by the Malaysian court in the case of *Moffatt v. Air Canada*, where the court found the Air Canada company liable for a contract executed by their chatbot.⁹³ This pragmatic focus reflects legal realism by grounding decisions in "law in action", how rules operate amid digital realities like delays or system errors rather than rigid formalism. Nonetheless, it is worth mentioning that case law on dispatch and receipt under the Electronic Commerce Act 2006 (ECA 2006) is limited, as e-commerce litigation in Malaysia often focuses on contract formation, evidence admissibility, or consumer protection rather than timing disputes.

4.2.1 THE ELECTRONIC COMMERCE ACT

This act provides the primary legal framework for recognising electronic messages in commercial transactions in Malaysia, ensuring that they are not denied legal efficacy solely due to their electronic form. It applies to commercial e-transactions but excludes certain matters like wills or powers of attorney pursuant to *Section 2*.⁹⁴ The Act promotes functional equivalence, allowing purposive interpretation to address technological nuances in dispatch and receipt. *Sections 20–24* are key provisions on dispatch and receipt but are criticised for ambiguities, such as lacking rules for delays or non-designated systems, prompting calls for amendments to align with modern standards like the UN Convention on the Use of Electronic Communications in International Contracts 2005.⁹⁵

Section 20 (Time of Dispatch): Unless otherwise agreed between the originator and the addressee, an electronic message is deemed sent when it enters an information

⁹³ 2024 BCCRT 149

⁹⁴ Act 2006 (Malaysia)

⁹⁵ United Nations Convention on the Use of Electronic Communications in International Contracts (adopted 23 November 2005, entered into force 1 March 2013) 2499 UNTS 169.

processing system outside the control of the originator.⁹⁶ Hence, the Courts are likely to interpret this provision purposively to consider evidence like server logs in disputes, prioritising practical transmission over theoretical presumptions.

Section 21 (Time of Receipt): Unless otherwise agreed between the originator and the addressee, an electronic message is deemed received (a) where the addressee has designated an information processing system for the purpose of receiving electronic messages, when the electronic message enters the designated information processing system; or (b) where the addressee has not designated an information processing system for the purpose of receiving electronic messages, when the electronic message comes to the knowledge of the addressee.⁹⁷ This receipt rule is ambiguous for non-designated systems (relying on subjective "knowledge"), which may lead to purposive judicial assessments of retrievability or awareness via metadata.

Section 22 (Place of Dispatch) Unless otherwise agreed between the originator and the addressee, an electronic message is deemed sent from the originator's place of business, and— (a) where the originator has more than one place of business, from the place of business that has the closest relationship with the transaction or where there is no place of business that has the closest relationship with the transaction, from the originator's principal place of business; or (b) where the originator does not have a place of business, from the originator's ordinary place of residence.⁹⁸ This ties location to business ties, interpreted contextually in cross-border e-commerce to determine jurisdiction.

Section 23⁹⁹ (Place of Receipt): Similar to Section 22 but applied to the addressee: Unless otherwise agreed between the originator and the addressee, an electronic message is deemed received at the addressee's place of business, and— (a) where the addressee has more than one place of business, at the place of business that has the closest relationship with the transaction or where there is no place of business that has the closest relationship with the underlying transaction, at the addressee's principal place of business; or (b) where the originator does not have a place of

⁹⁶ Act 2006 (Malaysia)

⁹⁷ Ibid S21

⁹⁸ Ibid S22

⁹⁹ Ibid S23

business, at the addressee's ordinary place of residence. From this provision it can be ascertained that it reaffirms the realist purposive determinations of receipt location based on practical business relationships.

Section 24¹⁰⁰ (Acknowledgement of Receipt): Allows parties to agree on acknowledgments (e.g., via automated responses) to confirm receipt, which courts may use as evidence in disputes to resolve ambiguities in *Sections 20–21*. Other Supporting provisions include *Section 7 (Validity of Contracts)*, which validates e-contracts,¹⁰¹ and *Section 8 (Writing Requirement)*, deeming electronic messages equivalent to writing if accessible and retrievable.¹⁰² These enable realist-like flexibility in interpreting dispatch/receipt as part of contract formation.

4.2.2 CASE LAW: REALIST APPLICATION IN DISPUTES

Malaysian courts apply purposive interpretation in e-commerce cases to achieve pragmatic outcomes, such as upholding electronic evidence based on reliability and intent rather than format. This mirrors realism by focusing on technological realities and commercial efficacy. While no cases directly litigate *Sections 20–23* (due to limited disputes), equivalent rulings on electronic messages demonstrate this approach in contract formation and evidence contexts, often inferring dispatch/receipt from accessibility.

In the case of *Yam Kong Seng & Anor v Yee Weng Kai*, this was a debt acknowledgement dispute, the defendant denied an SMS message as a "written" document. The federal court purposively interpreted **Section 8** of the ECA 2006, holding that an SMS qualifies as writing if "accessible, intelligible, and extractable for subsequent reference."¹⁰³ In this case, we can see a pragmatic ruling which treated receipt as effective upon the message's retrievability (implying Section 21's "knowledge" criterion), rejecting formalistic denials and focusing on real-world communication efficacy. The decision embodies realism by adapting the law to mobile technology, ensuring e-messages serve practical contractual purposes without undue barriers.

¹⁰⁰ Ibid S24

¹⁰¹ Ibid S17

¹⁰² Ibid S8

¹⁰³ [2014] 4 MLJ 478

Another case reference is ***Dato' Vijay Kumar Natarajan & Anor v Malaysia Airlines Bhd.*** In this case, Plaintiffs challenged an online flight ticket contract formed via website acceptance. The High Court applied **Section 7** purposively, upholding the e-contract as valid where terms were disclosed and accepted electronically (via a clickwrap contract).¹⁰⁴ While not directly on dispatch/receipt, the ruling inferred effective dispatch (*Section 20*) upon order submission and receipt (*Section 21*) when accessible on the airline's system. *Quay Chew Soon JC* emphasised functional equivalence and clear presentation, reflecting realist pragmatism by prioritising consumer awareness and commercial reality in digital transactions over strict procedural formalism.

In summary, the Malaysian court's purposive approach in e-commerce disputes embodies realist theory by emphasising contextual, outcome-driven interpretations of the ECA 2006. This fosters digital trust amid limited case law.

4.3 UK ELECTRONIC COMMUNICATIONS ACT 2000 AND E-COMMERCE REGULATIONS 2002

Legal realism is not formally adopted in the United Kingdom's legal system, because courts traditionally lean toward doctrinarism and textualism, however, elements of realism manifest through the purposive approach to statutory interpretation. This approach was endorsed in cases like *R (Quintavalle) v Secretary of State for Health*,¹⁰⁵ to allow the courts to consider legislative purpose, context, and practical implications to achieve workable outcomes, particularly in evolving areas like e-commerce. In disputes over the dispatch and receipt of electronic data messages, UK courts apply this pragmatic lens to adapt common law principles and statutes to technological realities, prioritising commercial certainty and fairness over rigid formalism.

4.3.1 ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002 (SI 2002/2013) AS AMENDED

This transposes the EU E-Commerce Directive (2000/31/EC) into UK law, governing information society services including e-commerce. It focuses on order processes rather than general data messages, but courts apply it broadly to electronic contracts.

¹⁰⁴ [2021] MLJU 407

¹⁰⁵ [2003] 2 AC 687

Regulation 9¹⁰⁶ (Information to be provided where contracts are concluded by electronic means): (1) Unless parties who are not consumers have agreed otherwise, where a contract is to be concluded by electronic means a service provider shall, prior to an order being placed by the recipient of a service, provide to that recipient in a clear, comprehensible and unambiguous manner the information set out in (a) to (d). (a) the different technical steps to follow to conclude the contract; (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible; (c) the technical means for identifying and correcting input errors prior to the placing of the order; and (d) the languages offered for the conclusion of the contract. (2) Unless parties who are not consumers have agreed otherwise, a service provider shall indicate which relevant codes of conduct he subscribes to and give information on how those codes can be consulted electronically. (3) Where the service provider provides terms and conditions applicable to the contract to the recipient, the service provider shall make them available to him in a way that allows him to store and reproduce them. (4) The requirements of paragraphs (1) and (2) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

These regulations require service providers to supply clear pre-order information, including the different technical steps to follow to conclude the contract and the technical means for identifying and correcting input errors prior to the placing of the order.¹⁰⁷ This implicitly addresses dispatch by ensuring transparency in how orders (data messages) are sent and processed. Hence, making it easy for Courts to interpret when there is a dispute over misunderstood electronic processes, focusing on practical user experience.

Regulation 11¹⁰⁸ (Placing of the order): (1) Unless parties who are not consumers have agreed otherwise, where the recipient of the service places his order through technological means, a service provider shall; (a) acknowledge receipt of the order to the recipient of the service without undue delay and by electronic means; and (b) make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors prior to the placing of the order.

¹⁰⁶ SI 2002/2013, reg 9

¹⁰⁷ *ibid* reg 11

¹⁰⁸ *Ibid* reg 11

(2) For the purposes of paragraph (1)(a) above- (a) the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them; and (b) the acknowledgement of receipt may take the form of the provision of the service paid for where that service is an information society service. (3) The requirements of paragraph (1) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Regulation 12 (Meaning of the term 'order'): Except in relation to regulation 9(1)(c) and regulation 11(1)(b) where “order” shall be the contractual offer, “order” may be but need not be the contractual offer for the purposes of regulations 9 and 11.¹⁰⁹

Regulation 13 (Liability of the service provider): The duties imposed by regulations 6, 7, 8, 9(1) and 11(1)(a) shall be enforceable, at the suit of any recipient of a service, by an action against the service provider for damages for breach of statutory duty.¹¹⁰

Regulation 15¹¹¹ (Right to rescind contract): Permits rescission if error correction tools are absent, interpreted to protect consumers in faulty dispatch/receipt scenarios.

Electronic Communications Act 2000¹¹²: Supports electronic signatures and communications but does not directly address dispatch/receipt. Section 7 recognises electronic data as admissible evidence, aiding realist assessments of transmission proof (e.g., metadata) in disputes. **Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR)¹¹³:** Overlaps with e-commerce by regulating unsolicited messages, requiring clear identification upon receipt (Regulation 22). Courts apply purposive interpretation to ensure practical compliance, e.g., in spam disputes.

4.3.2 CASE LAW: REALIST APPLICATION IN DISPUTES

The UK courts have not explicitly invoked "legal realism" but employ a contextual, outcome-oriented approach, especially in adapting pre-digital precedents to emails and online orders. This involves weighing evidence of actual receipt, party intentions, and business efficacy, rejecting universal rules for case-specific pragmatism.

¹⁰⁹ Ibid reg 12

¹¹⁰ Ibid reg 13

¹¹¹ Ibid reg 15

¹¹² Electronic Communications Act 2000 (UK)

¹¹³ The Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426.

Nevertheless, there are limited direct e-commerce disputes due to preventive statutory design, but analogous cases illustrate the trend. For example, in ***Entores Ltd v Miles Far East Corporation***, a foundational case on instantaneous communications, the English sellers sued a Dutch buyer for breach after a telex (electronic message) acceptance. The court of appeal held that the postal rule does not apply, acceptance is effective only on receipt, where the message is received by the offeror. Lord Denning MR emphasised practical realities, if a telex fails due to the recipient's fault (e.g., an unattended machine), no contract forms until actual notice.¹¹⁴ This realist view shifts from formalism prioritising evidence of communication over dispatch alone, influencing e-commerce interpretations (e.g., emails as "instantaneous"). When applied to data messages, it requires proof of receipt accessibility under Regulation 11(2), adapting to tech like spam filters.

Brinkibon Ltd v Stahag Stahl GmbH, the buyers in London accepted a contract via telex to sellers in Vienna. The House of Lords court confirmed the receipt rule, holding the contract formed in Vienna upon message arrival. Lord Wilberforce's speech embodies realism: "No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie."¹¹⁵ This contextual analysis, considering time zones, office hours, and fault, rejects rigid dispatch rules, focusing on pragmatic outcomes.

In ***Thomas v BPE Solicitors***, A lender sued solicitors over an email sent at 5:59 PM on a Friday, arguing it was ineffective as "out of hours." Blair J, obiter, ruled emails are received upon server arrival (inbox entry), analogous to *Brinkibon*, but effectiveness may defer to the next business day based on context.¹¹⁶ This realist adaptation weighs practical monitoring (e.g., email always "on") against business norms, applying to e-commerce orders where receipt under Regulation 11(2) depends on accessibility evidence, not just dispatch time. Other supporting cases on how the UK courts employ realism are; ***J Pereira Fernandes SA v Mehta***, An email footer counted as a signature for guarantees, with the court pragmatically validating intent despite informality,¹¹⁷

¹¹⁴ [1955] 2 QB 327

¹¹⁵ [1983] 2 AC 34

¹¹⁶ [2010] EWHC 306

¹¹⁷ [2006] EWHC 813

reflecting realism in electronic evidence. And ***Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd***¹¹⁸: the email chains formed a binding guarantee; the court used purposive interpretation to infer intent from context, akin to realist focus on real-world dealings. In summary, UK courts apply realist principles through purposive interpretation, adapting statutes like the 2002 Regulations and common law to e-commerce realities. This ensures disputes over dispatch/receipt prioritise evidence, context, and commercial efficacy, evolving with technology (e.g., from telex to AI-driven messages).

4.4 CONCLUSION

The purposive approaches across the three jurisdictions enable realist pragmatism, emphasising evidence and intent over formalism to ensure e-transaction validity. They all draw from UNCITRAL, which facilitates cross-border harmonisation. However, the UK's mature case law exemplifies explicit realist adaptation, rejecting outdated analogies for tech-specific outcomes. While Zambia and Malaysia's emerging jurisprudence offer realist potential amid statutory evolution, with fewer cases on the dispatch and receipt of data messages, it infers realism through electronic evidence rulings, but Zambia's newer Act limits precedents, potentially requiring more judicial discretion for local contexts like connectivity.

¹¹⁸ [2012] EWCA Civ 265

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

This chapter will conclude the present study and provide recommendations to the overall research thereof, which examines the suitability, efficacy, and adequacy of the legal framework in Zambia regulating electronic communication transactions while proposing solutions for identified deficiencies.

5.1 SUMMARY OF CHAPTER

This study, structured into five chapters, provided a comparative analysis of the realist theory of law vis-à-vis the practicability of rules relating to the dispatch and receipt of data messages in the ECT Act 2021 of Zambia, drawing lessons from best practices such as the United Kingdom and Malaysia. The study begun by exploring the silent provisions of Zambia's ECT Act, highlighting their transformative impact on the E-commerce transaction, it then delved into discussing the rules relating to dispatch and receipt of data messages of the Electronic Communications and Transactions Act and making a comparison to other jurisdictions; the UK and Malaysia, assessing their practicability, suitability and effectiveness in addressing modern-day challenges in Zambia's E-commerce. The study identifies some of the key and anticipatory shortcomings in the interpretation of these laws, particularly concerning electronic contracts formed via emails and modern-day tech, for example, WhatsApp or Facebook. Finally, it offers actionable recommendations aimed at enhancing the legal framework, promoting fairness, and ensuring a secure environment for digital transactions. Overall, the findings underscore the need for ongoing reforms to adapt to the rapidly evolving landscape of electronic commerce in Zambia.

5.1.1 CHAPTER ONE

Basically, this chapter laid the groundwork for this study by presenting an in-depth summary of the statutory obligations related to data messages as defined in the relevant legislation. And helps the reader to appreciate the role of data messages in e-commerce activities. Given the growing dependence on digital transactions, a detailed analysis of Part II in the ***Electronic Communications and Transactions Act***¹¹⁹ is essential, as it covers the legal effects of such messages. This part offered a

¹¹⁹ Act no. 4 of 2021

background by examining the development of laws governing data messages and their importance in the modern online environment. The chapter was arranged to methodically direct readers through the core components of the investigation, starting with a primer on data messages, moving to an assessment of legal stipulations, highlighting the ambiguities, and ending with insights into the impacts on different interested parties. This summary captured the key points from Chapter One, delivering a straightforward path for readers tackling the intricacies of data message regulations.

5.1.2 CHAPTER TWO

This chapter discussed the realist theory of law in its entirety to make the reader understand what the theory is all about and why it is considered as law in action and not contextual.¹²⁰ The concept of the theory is centred on how judges shape laws in various jurisdictions by interpreting the law using purposive interpretation, which aims at ascertaining the intention of the framer of the law. Several philosophers have written about the theory, some supporting the theory, others criticising. In short, the essence of the discussion realist theory in this study is to show how judges can iron out the creases in the law, by looking at the realities in a society and the purpose the law is meant to serve, hence that becomes judge-made law.

5.1.3 CHAPTER THREE

This chapter critically examined the Zambian legal framework on electronic transactions governed by the Electronic Communications and Transactions Act,¹²¹ particularly focusing on the rules relating to dispatch and receipt of data messages in Sections 15 and 16. The chapter examined the impracticability and absurdity of these rules. The Zambian legal framework has a *robust statutory foundation but interpretive uncertainty*: Sections 15 and 16¹²² of the Act provide a clear, MLEC-aligned framework. This objective, technology-neutral approach seeks to minimise disputes by focusing on system entry rather than subjective awareness. However, in system failure scenarios such as delayed entry due to infrastructure issues common in Zambia, such as power outages or poor connectivity, the Act is silent on burden of proof, liability allocation, or evidentiary standards, creating uncertainty.

¹²⁰ Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12, 15

¹²¹ Act no. 4 of 2021

¹²² Ibid

5.1.4 CHAPTER FOUR

This chapter conducted a comparative study which examined the legal framework of three jurisdictions; Zambia, UK and Malaysia and how the realist theory is applied in the interpretation of e-commerce laws when there is a dispute such as failure of dispatch or receipt of a data message caused by the system failure, however research discloses that there is *lack of domestic case law which highlights reliance on similarities*: as of October 2025, no reported Zambian cases directly address these provisions(dispatch and receipt) in failure contexts, despite growing digital adoption (e.g., e-government services and mobile banking). Broader electronic evidence cases, like *Shuko Willie Chunga V Hildah Nukwase*,¹²³ Emphasise authentication, but do not extend to timing disputes. This gap means Zambian courts may draw from common law principles (e.g., frustration of contract) or international MLEC analogues, such as *India's L&T Hydrocarbon Engineering Ltd. v. Oil and Natural Gas Corporation Ltd.*¹²⁴ where bids were deemed received upon server entry despite glitches.

5.2 RECOMMENDATIONS

To address the concerns highlighted in Chapters three and four regarding the adequacy of Zambia's legal framework governing electronic communication transactions and enhancement of judicial interpretation of dispatch and receipt rules in system failure disputes, the following recommendations are proposed, drawing on best practices from the UNCITRAL Model Law on Electronic Commerce (1996)¹²⁵ adopting countries like the UK and Malaysia.

5.2.1 LEGISLATIVE ENHANCEMENTS

1. Amend part II of the Electronic Communications and Transactions Act to include specific provisions on system failures, such as mandatory acknowledgement mechanisms (inspired by MLEC Article 14) and presumptions of receipt after a reasonable delay period (e.g., 24–48 hours). As is adopted in the Malaysian Electronic Commerce Act **Section 24**¹²⁶ (Acknowledgement of Receipt), allowing parties to agree on acknowledgements (e.g., via automated responses) to confirm receipt, which courts may use as evidence in disputes to resolve ambiguities in dispatch and receipt

¹²³ 2025 ZMHC 23

¹²⁴ W.P.(C) 9151/2018

¹²⁵ UNCITRAL Model Law on Electronic Commerce 1996

¹²⁶ Electronic commerce act S24 (Malaysia)

of data messages. This could allocate risk based on fault, requiring parties to maintain audit trails.

2. Adopt and incorporate similar provisions from the *UK Electronic Communications Act 2000 and e-commerce regulations 2002*, which do not explicitly codify "dispatch" in the same way as some UNCITRAL-based frameworks, but treats order placement as akin to dispatch, with receipt tied to accessibility. This common law position fills gaps, rejecting the postal rule (acceptance effective on dispatch) for instantaneous electronic communications in favour of a receipt rule, adapted contextually.

Regulation 9 (1)-(4) (Information to be provided where contracts are concluded by electronic means), places an obligation on service providers to supply clear pre-order information, including "the different technical steps to follow to conclude the contract" and "the technical means for identifying and correcting input errors before the placing of the order."¹²⁷ **Regulation 13¹²⁸ (Liability of the service provider)**: Enforces duties like acknowledgement as statutory, allowing damages for breaches, which courts interpret pragmatically to uphold e-commerce trust. Equally, this is highly recommended because it allows users or consumers to pursue a claim against the service provider when there is a system failure or glitch, unlike the *Zambian ECT Act* is silent on service provider liability.

3. Amend **Section 15¹²⁹** to account for modern technology on messaging features like the "unsent feature on WhatsApp and Facebook Messenger." The law should be very clear as to what happens when a message is considered dispatched and establish that once a message is sent, it cannot be deemed retracted, even though in practice it can be retracted or unsent without mutual consent between the parties, unless specified otherwise. There is an urgent need to amend existing laws or allow the judges to interpret the legality and applicability of S15¹³⁰ to ensure that consumers have recourse in cases where electronic communications are unsent or retracted after transactions have been initiated.

3. Integrate the *ECT Act* with the *Cybersecurity and Cybercrimes Act* by mandating standards for resilient infrastructure in critical sectors (e.g., finance, government),

¹²⁷ SI 2002/2013, reg 9

¹²⁸ Ibid reg 13

¹²⁹ Act no. 4 of 2021

¹³⁰ Ibid

reducing failure incidence. Incorporate guidelines for cross-border disputes, aligning with UNCITRAL's 2017 Model Law on Electronic Transferable Records for modern applications like blockchain. And consider introducing a safe harbour clause for good-faith errors in automated systems, protecting users in rural areas with unreliable connectivity.

5.2.2 JUDICIAL AND INSTITUTIONAL REFORMS

Develop judicial guidelines or practice directions through the Judiciary of Zambia, emphasising objective evidence (e.g., timestamps, IP logs) over subjective claims. Training programs, in collaboration with bodies like ZICTA¹³¹, could equip judges with digital forensics knowledge, using simulations of failure scenarios.

5.3 CONCLUSION

Overall, this thesis discussed in depth part II of the electronic communications and transaction act no. 4 of 2021 particularly section 15 and 16 on the rules relating to dispatch and receipt of data messages, also discussed other silent provision in the ECT Act and how the realist theory of law can be used to interpret ambiguous provisions in the ECT Act, went further to make a comparative study with best practice, UK and Malaysia. Hence implementation of the recommendations provided for can help strengthen Zambia's digital legal system, reducing disputes and boosting e-commerce confidence.

¹³¹ Zambia Information and Communication Technology Authority

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RESEARCH CLEARANCE FORM

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