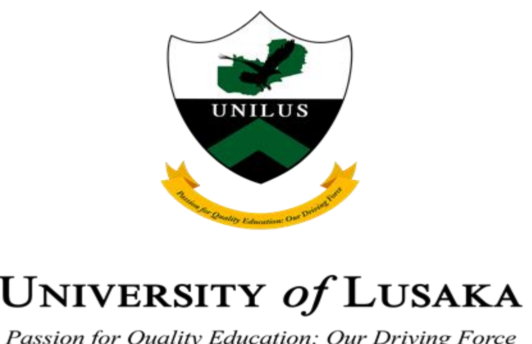

SCHOOL OF LAW

AN ANALYSIS OF THE JURISPRUDENCE OF INTERPRETATING LEGISLATION: A COMPARATIVE STUDY WITH THE UNITED STATES OF AMERICA

BY

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A DISSERTATION SUBMIITTED TO THE UNIVERSITY OF LUSAKA FOR THE PARTIAL FULFILLMENT OF THE REQUIREMENTS OF BACHELOR OF LAWS (LLB)

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DECLARATION

I, **MIKE MUKUKA** of student No. **LLB212462503** do hereby declare the contents of this research paper entitled "**AN ANALYSIS OF THE JURISPRUDENCE OF INTERPRETING LEGISLATION: A COMPARATIVE STUDY WITH THE UNITED STATES OF AMERICA"** which is hereby submitted to the School of Law at the University of Lusaka as part of the requirements for the award of the Bachelor of Laws (LLB) Degree, is my original work and that I have not in any respect used any persons work without acknowledging the same.

Signature …… …………….

Date ....14/11/2025..................................

SUPERVISOR'S RECOMMENDATION

I **KASWALALE MWAULUKA** recommend that this dissertation prepared under my supervision by **MIKE MUKUKA** entitled **AN ANLYSIS OF THE JURISPRUDENCE OF INTERPRETING LEGISLATION: A COMPARATIVE STUDY WITH THE UNITED STATES OF AMERICA** 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.

……………………………………………………………………………….

MRS KASWALALE MWAULUKA

(SUPERVISOR)

14/11/2025

……………………………………………………………………….

(DATE)

DEDICATION

This dissertation is dedicated to the people who have supported, encouraged and inspired me throughout not only law school but my entire academic journey thus far. To my guardians Christopher Chenga Mukuka and Himaala Mwiinga Mukuka, to whom I owe the person I am becoming, their relentless support and encouragement throughout my academic journey cannot be overstated. To my siblings who have always keenly looked up to and motivated me.

Additionally, this work is also dedicated to the love of the written word and the pursuit of knowledge, both of which I personally equate to the pursuit of happiness.

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I would also like to extend special thanks to the following friends for their special contribution to not only my law school journey but also my life: To Pemba Manengu; his extensive knowledge on all things legal and Zambian current affairs was, and continues to be inspiring. To Lombe Chisanga; for his support, our ludicrous adventures, shared love for literature and our verbal case exchanges before an exam were some of the highlights of my law school journey. To Charles Masompe, a truly inspiring person and big brother figure, his words of encouragement and unapologetic rebuke when need be, have helped me improve myself in ways that I was previously oblivious to. To Davy Sisii, an unexpected friendship that flourished into a brotherhood, our debates on any and all things were always unforgettable.

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ABSTRACT

The judiciary is the final authority on legal disputes; the branch of government saddled with the power to interpret the law with finality. This study critically analyzed and compared the jurisprudence developed by the courts in Zambia and the United States with particular focus on cases relating to Constitutional law as the former's Constitutional structure, like many other democracies in the world, is modeled after the latter's. To that end, the study discussed and analyzed some of the more prominent cases in both jurisdictions on legislative interpretation, focusing on how the courts have chosen to enforce the law promulgated by its respective legislatures, pointing out the courts' tendency to move away from the literal rule of interpretation, thereby venturing into potentially problematic territory in this regard. The study pointed out the various factors that lead to this phenomenon, in turn revealing that the courts' decision not to strictly adhere to the primary rule of interpretation is one that is rooted in highly complex considerations which have, to some unspecified degree, even been endorsed by the legislatures in both jurisdictions. The study focused on how this uncertainty can, and has, led to potential abuse in the form of judicial activism, as well as highlighting the profound influence the judicial branch has on matters of public importance.

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CHAPTER ONE

GENERAL INTRODUCTIONS

1.0 INTRODUCTION

Parliament is the only branch of government vested with the legal authority to enact laws, subject to the Constitution[1]. Likewise, the Judiciary is the only arm of Government that is vested with the authority to give final and binding judgment on how the laws so enacted are to be interpreted, in cases where the court is called upon to do so,[2] and in so doing, the court fulfils its Constitutional mandate to resolve such matters once and for all. In interpreting legislation, the courts rely on various rules of interpretation, all with the aim of expressing the intention of parliament. As the court put it in ***Ealing London Borough Council v. Race Relations Board***[3]: "It is the duty of a court so to interpret an Act of Parliament as to give effect to its intention." However, this task is not as simple as it may sound as some courts have often expressed that the 'intention' of parliament cannot be speculated upon; that it can only be gleaned from the literal meaning of the words and nothing more.[4]

The rationale being that it is the reserve of the legislature, and not the judiciary, to promulgate legislation. Therefore, any interpretation that purports to do more than just express the intention of the lawmakers is a practice that, although helpful in strait forward cases, has produced controversial court decisions raising concerns on whether the same amounts to legislating from the bench[5]. This research therefore seeks to examine the existing jurisprudence on interpreting legislation in Zambia and the United States of America; addressing the problems and challenges the courts of law in these two jurisdictions are faced with when moved to interpret legislation.

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[1] Article 62 of The Constitution of Zambia (Amendment) Act No. 2 of 2016

[2] Gouriet v. Union of Post Office Workers [1977] 3 All ER 70

[3] [1972] 1 All ER 105

[4] Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810

[5] Attorney General v. Hakainde Hichilema [2021] ZMSC 35.

1.1 BACKGROUND OF STUDY

The Constitution of Zambia vests the legislative authority of the republic in parliament. According to ***Dicey***, "the very keystone of the law of the Constitution is that parliament… has… the right to make or unmake any law whatever; and further, that no person or body is recognized by the law… as having a right to override or set aside the legislation of parliament."[6] These words are more or less reechoed in Article 62(3)[7] of the Constitution prohibiting any other "person or body" from making laws except in accordance with the Constitution. The exceptions, as stated, are provided by the Constitution itself such as with respect to the local authorities that make by-laws, and ministers, who can issue statutory instruments, all of which must be in line with the principle Act granting that authority[8], and ultimately the Constitution. Be that as it may, what is abundantly clear is that the Constitution does not grant the Courts of law the authority to legislate. However, it is also true that legislation is one form of law and judicial precedent another, and the two are not mutually exclusive because a court may be moved to pronounce itself on the interpretation of a particular piece of legislation, which interpretation creates binding precedent, depending on the court.

There have been many instances where the courts have faced challenges in interpreting a statute, having determined that the same is ambiguous or is silent on a particular issue. In those cases, the courts have sought to cure the defect thus determined by deviating from the primary rule of interpretation upon determining that strict adherence to the same leads to an outcome that could have not possibly been the 'intention' of the legislature. But how exactly does the court arrive at this determination? One of the earliest well-known cases in Zambia to espouse this position was the case of ***Attorney General and Movement for Multiparty Democracy v Lewanika and 4 Others***.[9] In that case, the Supreme Court, pronouncing itself on a Constitutional issue, held thus:

"Article 71(2) (c) is discriminatory in itself against an independent member who joins any party and against a member who resigns from one party and joins another party. It is

[6] A.V Dicey, Introduction to the Study of the Law of the Constitution (1885) 25
[7] The Constitution of Zambia (Amendment) Act No.2 of 2016
[8] Attorney General v. Local Government Election Commission [1992] ZMHC 8
[9] S.C.Z. Judgment No.2 of 1994

discriminatory and, therefore, unreasonable and unfair and it is the duty of the court to make it reasonable as it offends against Article 23 of the Republican Constitution."

It is startling to say the least, that the Constitution could be impugned based on a court's opinion of reasonableness. The decision puts forward the proposition that the Constitution can be in conflict with itself, which consequently invites the court to take sides as to which provision should prevail at the expense of the other, a stark contrast from the widely accepted position in contemporary approaches to interpreting the Document which posits that provisions in the Constitution must be read in harmony with each other in order to promote the Constitution's spirit and purpose.[10] Unsurprisingly, this decision was criticized in by a later court in ***Hakainde Hichilema v. Attorney General***. Noting with concern the precedent set by that case, the court opined thus:

"We did not only read words into the Constitution, but amended it by actually adding the words 'vice versa' at the end of the provision in question. This approach, which, in fact, was a 'direct legislation' by the Court, was received with mixed feelings." (emphasis added).[11]

The court further went on to say; "Perhaps the approach by our Court in the Lewanika case was an extreme case of judicial activism, which should not ordinarily be adopted. Ideally, courts should keep to their lane of interpreting the law and leave the task of passing and amending the law to the legislature. The fear of those vehemently opposed to 'direct legislation' by courts is that unelected judges would usurp power from elected representatives, who alone, have the mandate to make and amend laws."[12]

Nevertheless, the court did not overrule the decision in adherence to the principle of legal certainty; that is, in order that there may be certainty in the law, the apex court should adhere to the principle of *stare decisis* even if those decisions were wrong, unless there are strong and compelling reasons to depart from them.[13]

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[10] Milford Maambo & Others v. The People CCZ Selected Judgment No. 31 of 2017.
[11] n.5, at p.J71.
[12] n.5, at p.J72.
[13] Abel Banda v. The People (1986) Z.R 105 (S.C.).

The American position as regards the problem of this form of judicial activism was discussed at length in a recent landmark decision: ***Dobbs v. Jackson Women's Health Organization***,[14] which held that the Constitution did not in fact provide for the right to obtain an abortion. The decision overruled the longstanding precedent set in ***Roe v. Wade***,[15] a 1973 decision that saw the court devising a set of rules to be applied by the States in regulating abortion after the first trimester of pregnancy, effectively reading words into the Constitution. In overruling that case, Roberts C.J. delivering the majority opinion stated *inter alia* that "the scheme Roe produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body."[16]

Nevertheless, it is still important to note that the decision to overrule a previous decision and the basis upon which to do so is ultimately entirely at the discretion of the court.[17] It is the exercise of this judicial prerogative that the study seeks to scrutinize.

1.2 STATEMENT OF THE PROBLEM

The Judiciary's core function is to interpret the law as promulgated by the legislature. However, difficulties have arisen as to what 'interpretation' entails. This is especially so in cases where a court of law is called upon to pronounce itself on the meaning of a contentious legislative provision—contentious—because it may be couched in ambiguous terms or is silent on a particular subject matter, as the court may determine. As the courts have noted repeatedly, these types of cases lead courts to depart from the cardinal literal rule of interpretation by adopting other methods of interpretation such as the purposive rule which invites the court to move away from the literal rule of interpretation to an approach that seeks to determine the objective of the enactment.

This departure has at times led to controversial decisions as it is widely viewed by many legal scholars, including the courts themselves as an overreach of the judicial function; that the courts of law do not possess the authority to substitute their social and economic views for the judgment of legislative bodies.[18] The problem is further exacerbated by the

[14] Dobbs v. Jackson Women's Health Organization 597 U.S. 215 (2022)
[15] Roe v. Wade, U.S. 410 (1973)
[16] n.14, at p.49 of single judgment extracted from the Law report.
[17] Hertz v. Woodman, 218 U.S, 212 (1910)
[18] Ferguson v. Skrupa, 372 U.S. 726, 729-730 (1963)

thin line that exists between legislation (law, properly so called), and judicial precedent (law, improperly so called), specifically in regards to the interpretation of the former as and when the court is moved to do so. This practice has led to the questioning of what American jurisprudence has termed the "actual and perceived integrity of the judicial process"[19], a principle that denotes that justice must not only be done but it must also be seen to be done. This is especially so if the case is dealing with politically charged issues such as election candidate eligibility and election petitions, as judges may be perceived as using their judicial authority to support their personal political leanings.

1.3 RESEARCH OBJECTIVES

The study will look at the following objectives:

i. To analyze the Zambian judiciary's authority in interpreting legislation.
ii. To analyze American statutory interpretation jurisprudence.
iii. Compare and examine the factors that have led to a lapse in strict adherence to the literal rule of interpretation between Zambia and the United States of America.

1.4 RESEARCH QUESTIONS

i. What is the Zambian Judiciary's authority on interpretation of legislation?
ii. What is the American jurisprudence of interpreting legislation?
iii. What are the comparative and examinable factors that have led to a lapse in strict adherence to the literal rule of interpretation in Zambia and the United States of America?

1.5 SIGNIFICANCE OF STUDY

The significance of the study is in how it will highlight the challenge that exists in the practice of interpreting statutory law, where the court of law is put in a position where it has to do more than just interpret what the law says owing to the fact, or at least the perception of it, that piece of legislation is lacking in some way. This practice has led to questions on the scope and meaning of the court's power to interpret legislation, a question that again can only be determined with finality by the courts themselves, which

[19] Payne v. Tennessee, 501 U.S. 808, 828 (1991)

has given rise to a conundrum of untold proportions, further emphasizing the importance of judicial integrity and accountability.

Consequently, the study addresses how the possible lack of integrity and partiality, actual or perceived, in judicial decision making can potentially erode public trust in this most sacred of institutions. As well as highlighting this problem, the study also brings out some recommendations on how a potential solution to how the courts and the legislature can approach the problem of this kind of problematic legislation.

The United States as the choice of comparison is deliberate due to much of its influence in shaping modern democracies the world over. In particular, the Zambian Constitution has many features that are modeled after that country's Constitution, and so it is significant to compare and analyze the judicial approach to legislative interpretation in that jurisdiction in particular for a better understanding of the issue at hand.

1.6 LITERATURE REVIEW

There is numerous literature written by legal scholars and the like on the subject matter of legislative interpretation and integrity of the judicial process. The research will analyze the following pieces of literature from which it will indicate largely a departure from the same whilst taking a more nuanced approach.

Gray[20], a proponent of the realist school of jurisprudence argued that the law must not be understood as merely that which is limited to enactments of the legislative bodies, but that it must be understood to include judicial decisions, which decisions he argues are a more accurate depiction of how the law enacted by the legislature actually works in real life.

Holmes[21] posits that real law is consequentialist in nature; that is, it must be looked at in terms of how it has been applied in order to best predict how it'll be applied in future. This proposition is anchored on the principle of precedent. The significance being that the law

[20] J.C Gray, The Nature and Sources of Law (The Macmillan Company 1909)
[21] O. W, Holmes, The Common Law (Dover Publication 1991)

enacted by a legislative body is only as good as the extent to which, or if at all, it is adhered to.

According to **Frank**[22] the apparent subjective nature of judicial decisions is evidence of personal biases and other psychological factors that weigh heavily on the minds of adjudicators when making their decisions; that the fact that different judges can reach different and often contradictory conclusions on the same matter emphasizes the need for judicial accountability and integrity and restraint. This observation saves as the basis upon which a distortion of legislative provisions once passed through an adjudicator's hands may be made apparent.

Mcleod[23] discusses the idea of legislative intention, exploring the approaches that courts in common law jurisdictions have taken in when interpreting legislation. He as well recounts the development of statutory drafting and the English Legislature from which Zambia borrows its own system of law making.

Dicey[24] discussed the principle of separation of powers between the three organs of government, pointing out that the judiciary's mandate is to interpret the law as promulgated by the legislature and nothing more. Additionally, he emphasized that there must be a clear and defined line between the judicial and legislative functions in order for the system of government to function properly.

Freeman[25] discusses the various theories of adjudication such as legal reasoning, the idea of judge-made law, the common law and statutory construction to mention a few. All centered on the discussion of how the courts arrive at a particular decision depending the situation at hand and precedent.

Jaffe[26] asks a number of questions regarding the justification upon which the judiciary stands in making law. He further examines whether there are any effective limits on the

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[22] J. Frank, Law and the Modern Mind (Coward-Mcann 1930)
[23] I. Mcleon, Legal Method (6th edn Palgrave Macmillan Law Masters 2005)
[24] n. 6
[25] M. Freeman, Lloyd's Introduction to Jurisprudence (9th edn Sweet and Maxwell 2014) 1549-1580
[26] L. L, Jaffe, English and American Judges as Law Makers (Oxford University Press 1969) 34-35

exercise of judicial power, and if in fact the judiciary is entitled to take that position, it can be trusted to move in the right direction.

Malila[27] shades light on the scrutiny that judges face as a result of decisions they have passed, citing real examples of cases in contempt of court as well as a discussion on why negative public perception should worry the judiciary.

Dworkin[28] discusses the interplay between emerging political issues and questions of moral philosophy. He discusses the potential effect judges, whose appointment is by politicians, can have on the justice system in as much as, on paper, the courts are not subject to the direction of the appointing authority.

Jay, Madison and **Hamilton**[29], the latter two of whom, took part the signing of the United States Constitution, in their work *"The Federalist"* give a background and a discussion on some of the motivations that formed the structural basis of the United States Constitution.

1.7 RESEARCH METHODOLGY

This research is primarily qualitative in nature and as such shall therefore mainly focus of field research and desk research. The desk research shall be conducted through the collection of data in the form of law reports, textbooks, newsletters, journals, essays and dissertations. The field research however, will be conducted through the collection of data from the court registry and Ministry of Justice.

1.8 SCOPE OF STUDY

The research, whilst placing much emphasis on analyzing cases on interpretation of the Zambian and American Constitutions, will in addition thereto, analyze the approach in cases involving ordinary pieces of legislation as well as include discussions on various theories of adjudication from prominent legal scholars and jurists.

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[27] M. Malila, The Contours of a Developing jurisprudence of the Zambian Supreme Court (InsideData 2019)
[28] R. Dworkin, A Matter of Principle (Harvard University Press 1985)
[29] A. Hamilton, J. Jay & J. Madison 'The Federalist on the New Constitution' (Benjamin Warner 1818)

1.9 OUTLINE OF CHAPTERS

Chapter One introduces the subject matter of the study and gives a background of some of the problems that have arisen when courts are faced with interpreting problematically drafted legislation. The chapter highlights some of the misgivings the courts in Zambia and in the United States have expressed regarding the potential abuses by courts in the exercise of the prerogative. Chapter two will discuss the background and origin of legislative drafting in Zambia, highlighting its inherent problematic nature, how the courts deal with the problem with established rules of statutory interpretation developed to address these defects, Parliament's supremacy as a lawmaking body and the challenge that is presented to the courts by obscure legislation.

Chapter Three will analyze American jurisprudence as regards the Supreme Court's Constitutional mandate to interpret legislation with particular focus on decisions passed by the Supreme Court.

Chapter Four will critically compare and analyze the factors that have led to a lapse in strict adherence to the literal rule of interpretation between Zambia and the United States of America. Coupling this with a discussion a discussion on the relevant jurisprudential schools of thought that influence judicial decision making.

Chapter five will conclude and summarize the findings of the study and proffer some recommendations to the problem.

CHAPTER TWO

ZAMBIAN JUDICARY'S AUTHORITY ON STATUTORY INTERPRETATION

2.0 INTRODUCTION

This chapter will discuss the background of legislative drafting, the practice of statutory interpretation by courts of law generally and the concept of Parliamentary Supremacy in promulgating legislation and lastly the general concept of legislating versus judicial precedent, to highlight the challenge presented to the courts by problematically drafted legislation.

2.1 BACKGROUND OF STATUTORY INTERPRETATION AND DRAFTING

Statutory interpretation and drafting are complementary in nature. Put simply, they are an exercise in communication by way of the written word, save that in this context, what is being written is either legislation, in the case of the latter, and a court's interpretation of it in the case of the former. The courts have adopted certain principles of statutory interpretation so as to best lend credence to the words expressed in a statute. Nevertheless, one must never lose sight of the fact that these methods of interpretation adopted by the courts of law are at best no more than the ordinary principles of language and communication. However, these linguistic principles are further complicated in the context of statutory construction. This is partly due to the fact that different judges have different perceptions on the role of the court in statutory interpretation and partly due to defective legislative drafting on the part of the legislator, or at least the perception of it.

In order to best appreciate the problem thus arising, need arises to look at the origin of parliament itself and the legislative powers. According to **Radcliffe and Cross**[30], "few matters in English history are more controverted than the origin of parliament", what is reasonably clear from the history however, is that it must have started out as a sort of special formal gathering convened by the English monarch for purposes of passing decrees; that it was an occasion rather than an institution. In these early stages of its development, the legislative powers were solely vested in the monarch who acted with

[30] Radcliffe and Cross, The English Legal System (6th edn 1977) 53

the advice of the *Curia Regis,* the predecessor of the modern Privy Council. In those days, one had to submit a petition to the monarch requesting that a particular law be enacted. A committee of royal advisors, adjudicators and other government officials would be convened for purposes of drafting the statute. Overall, the history of statutory drafting indicates that the obscurity of statutory draftsmanship is not a problem unique to modern statutes.[31]

These statutes were originally drafted in Latin or Norman French as these were viewed to be the most suitable media for formal writing. This changed in 1414 when the House of Commons (lower chamber of Parliament) introduced the first Bill drafted in English. This shift was largely influenced by the writings of famed English poet Geoffrey Chaucer, whose widely circulated works established the suitability of the language as a medium for formal writing.[32] After the transfer of the legislative function from the monarch to parliament, the resulting effect was that 'statutes', which simply means "established decrees", became known as Acts of parliament, indicating the change in the source of the legislation. However, the change in language did not take away the obscurity that often characterizes legislation. As **Allen** points out: "from the laconic and often obscure terseness of our earliest statutes, especially when in Latin, we swung in the sixteenth, seventeenth and eighteenth centuries to a verbosity which succeeded only in concealing the real matter of the law under a welter of superfluous synonyms."[33]

The inescapable reality of legislative drafting is that despite the best efforts of the draftsman in trying to successfully draft a Bill that is intelligible and free from ambiguities, the nature of litigation in itself makes it inevitable that some litigator or adjudicator will find it problematic. As one jurist points out; "it is not enough that the draftsman should attain a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."[34] While the focus of the draftsman is understandably to produce an intelligible and unambiguous

[31] n.23, p.241.
[32] ibid
[33] Allen, Law in the Making (7th edn, 1964) 482.
[34] In Re Castioni [1891] 1 QB 149.

piece of legislation, these sentiments seem to suggest, and rightly so, that when drafting any Bill, the clarity of the wording should be considered primarily from the point of view of the ultimate user, who is usually not lay in that regard.

2.2 IMPORTANCE OF STATUTORY INTERPRETATION

The importance of the need to ascertain the exact meaning of the words used in a statute cannot be overstated. So much so that legislative drafters have adopted the practice of including an interpretation section in a statute so as to aid the user in understanding the proper context of the language used. This is in due recognition that looking at the language used in the intended context may indicate a departure from the plain meaning of the words used.[35] Nevertheless, in cases where the statute does not provide this aid, the primary rule of consideration is the plain meaning of the words used. As Tindal CJ famously stated in the ***Sussex Peerage*** claim:

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver[36]."

Notwithstanding the foregoing, the literal approach of interpretation has proven to be inadequate in such cases as its application has led to what some have termed "absurdities" and it is this school of thought that has led to contemporary approaches to statutory construction which seek to express the drafters' intention using other considerations such as an ascertainment of the mischief which the legislator was trying to remedy. One such case was that of ***Whiteley v. Chappell***[37] wherein the defendant's appeal against a conviction for impersonating a person entitled to vote in an election was allowed on the basis that the person so impersonated had died before the election hence making it impossible to commit the offence. The court reasoned that the intention of the statute was to prevent one person from stealing the vote of another thereby depriving the latter of their right to vote but if the latter was deceased, this could not be so.

[35] Attorney-General v. Prince Ernest Augustus of Hanover [1957] 1 All ER 49

[36] [1844] 8 ER 1034

[37] (1868-69) LR 4 QB 147

In that case, the mischief the statute was trying to address could just have easily been gleaned from a plain reading of the offense as the statute made no mention of the death of the person being impersonated as a defense to the charge. The court's decision, which appears to offend common sense, presumed that the statute's intention was to prevent the impersonation of "living" voters rather than any person who would have been entitled to vote, had they been in a position to do so.

Similarly, in *Attorney-General and MMD v. Lewanika and Others (supra)*, the court's presumption that the Constitution's silence on how an independent member of parliament's seat was to be treated when they cross the floor of the House was an oversight that resulted in a double-standard, is not the kind of consideration that adjudicators typically concern themselves with when construing statutes. The different jurisprudence that informs a judge's decision inevitably means that others will disregard the departure entirely. As Lord Esher MR opined in ***R v. Judge of the City of London Court***[38]:

"If the words of an Act are clear you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity."

The words seem to find support in the standard applied to justify the departure, namely: 'absurdity' in the import of the plain meaning of the words used. This standard does little to resolve the issue, as what may be absurd to one adjudicator may not be so to another. Lord Bramwell in ***Hill v. East & West India Dock Co***[39] lays out the challenge thus presented, in particularly poignant terms when he stated:

"I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems to be absurd to one man does not seem absurd to another."

It seems to be the case that for proponents of the departure from the rule, the objective is to avoid occasioning an injustice that the legislator could not have possibly intended,

[38] [1884] 1 QB 273

[39] (1884) 9 App Cas 448

stemming from the presumption that it is not the Parliament's intention that the laws it enacts should lead to injustice or hardship. But is a court of law in such cases concerned with what would be a morally fair decision? Or should its concern be with merely expressing the intention of the lawmaker as indicated by the legal text, whether such a decision seems unjust? A consideration which further muddies the waters. The Supreme Court dealing with this very conundrum in the case of ***Isaac Tantameni (Executor of the Estate of Mwalla Mwalla) v. Liseli Mwala***[40], wherein it was asked to determine whether the respondent, a 27 year old working woman who had been sexually abused by her father and bore a child by him as a result, was entitled to benefit from his estate as a dependent by way of the court's variation of his Will, dismissed the appeal, stating that:

"Our conclusion in this appeal which is based on the law as it stands may appear morally hard. But it must be recognized that section 20 of Act No. 6 of 1989 is a departure from the long standing recognition of unfettered right of disposition by the testator of his property… The court's jurisdiction to make reasonable provision for the dependent only arises if it is of the opinion, that it is satisfied, that such provision has not been made by the testator."

Nevertheless, the practice to depart from the plain meaning rule is not one that has been repudiated by the court, though the standard for the departure is not set in stone, the agreed upon rule of thumb is that upon a reading of the statute as a whole, the ordinary and plain meaning of the words in the specific provision of the statute should be so inconsistent with the rest of it as to convince a court, properly directing itself on the facts of the case before it, to conclude that the primary rule should be departed from.[41]

2.4 PARLIAMENTARY SUPREMACY

In the modern world, most countries have adopted a democratic system of governance which simply entails that the governed can actively participate in the affairs of the state through their elected representatives. A typical democratic state will consist of Legislative, Executive and Judicial branches of Government, each operating to check on the activities

[40] SCZ Appeal No.2 of 1997
[41] River Wear Commissions v. Adamson (1877) 2 App Cas 743

of the other two to ensure that the Government of the People endures unencumbered by the activities of any one branch. In the words of utilitarian, ***Mill***:

"Parliament is at once the nation's committee of grievances, and its Congress of Opinions: an arena in which not only the general opinions of the nation, but that of every section of it, and as far as possible of every eminent individual whom it contains…"[42]

Flowing from this therefore; the concept of parliamentary supremacy denotes that the only legally recognized law in the republic is that which has been passed by the people's representatives in parliament in accordance with its laid down procedure or delegated by it by virtue of an Act of Parliament.[43] Whatever the case, all laws derive their legitimacy from the Parliament. The implication then is that parliament has the power to repeal any law passed by it either expressly or by implication. Express repeal is fairly straight-forward as it merely entails a situation where parliament passes an Act that contains in its preamble a statement to that effect.

This is not the case for implied repeal as the actual declaration that an Act of Parliament has been impliedly repealed is one that can only be made by a court of law. The doctrine of implied repeal is warranted where: "A later Act cannot stand with an earlier, Parliament (though not said so), is taken to intend an amendment of the earlier. This is a logical necessity, since two inconsistent texts cannot both be valid without contravening the principle of contradiction." These sentiments were endorsed by Mutuna JS delivering the minority ruling in ***Zambia Revenue Authority v. Professional Insurance***[44], a case where the court was split due to a difference of opinion on whether it was the Supreme Court or the newly instituted Court of Appeal that had the jurisdiction to hear the substantive appeal. Even the majority decision stated in passing that: "The fact that the preliminary objection was raised at all and so seriously debated, coupled with the division of opinion on our part should be sufficient indication that there is need for the relevant

[42] Gustavo Hessmann Delaqua, 'Representative Democracy, Conflict, Consensus in J.S. Mill' (Dphill, University of Sao Paulo 2019) p.67
[43] M. Besa, Constitution, Governance and Democracy (Mission Press 2015) 295
[44] SCZ Appeal No.34 of 2017

organs of government to take further steps to clarify the position regarding the path of appeals from quasi-judicial bodies…"

Nevertheless, as a matter of law the courts in Zambia recognize that parliament is omnipotent in all matters to do with the enactment of laws save the power to destroy its own omnipotence,[45] that is; the concept is limited in its application. This is due to the fact that although parliament can enact any law whatever, such laws cannot bind subsequent parliaments as this would go against the very concept of sovereignty in this regard.

Lastly, the doctrine of parliamentary sovereignty has within it the concept of exclusive cognizance which states that the parliament is to regulate its own affairs without interference from the other branches of government in that regard; that the courts cannot question the validity of a Bill that is before the House of Parliament as the court's exclusive domain in this regard is to pronounce itself on Bills that have already been passed into law.[46]

2.5 STATUTORY LAW VERSUS JUDICIAL PRECEDENT

As discussed in the foregoing segments, Parliament is sovereign as far as the enactment of laws is concerned and the judiciary's mandate is to interpret laws enacted by parliament in order give effect to its intention. At the outset, it is important to understand the possible reason why government structure is such that the lawmaker and the law interpreter as it were, are functionally separate. Lord Halsbury gives a possible reason when he states:

"I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect of what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though perhaps it was not done…"[47]

[45] Manuel v. Attorney General [1982] 3 All ER 822
[46] 2019/CCZ/0014
[47] Hilder v. Dexter [1902] AC 474

Whatever the reason, what is clear is that an apex court's interpretation of a statute is final and binding save where the decision is repudiated by a subsequent decision of that very court or an Act of Parliament.[48] The cardinal challenge presented by this system is the possible disparity between what parliament intended in the wording of a particular piece of legislation and how the court interprets it. The proper function of a court of law in the realm of statutory interpretation could be said to be that of partner, albeit an inferior one, in the legislative process; to explain at length what the drafters were trying to communicate. Therefore the judgment of the court may stand for the judgment of the parliament.

Although this is the accepted position, there are clear cases where the court overreaches by effectively reading words into the statute as was clearly the case in *Lewanika (supra)*. The problem of judicial activism in statutory interpretation is brought about by the obscurity in legislative drafting or the perception thereof. Therefore, the question that arises is whether the court should even pronounce itself, and if so to what extent, in such matters. One curious decision that seems to answer this question, albeit imprecisely, is the Constitutional Court's decision in the matter of ***Law Association of Zambia v. Attorney General.***[49] The court considered what is meant by "causing a vacancy" in the parliament in the context of Article 72 of the Constitution. The court found that while Article 72(2) of the Constitution provides for instances when the office of Member of Parliament can fall vacant it does not provide for a vacancy that was triggered by the nullification of an election by the High Court where the same is not appealed against; that it did not provide for the occurrence of a vacancy in the National Assembly following a decision of that Court to uphold the nullification of an election by the High Court or by the reversal of the decision of the High Court not to nullify the election of a Member of Parliament as the case maybe. Citing this reason, the court proceeded to declare thus:

"In our view the failure by the framers of the Constitution to provide for a vacancy occurring following the nullification of an election by the High Court where there is no

[48] Burmah Oil Ltd v. Lord Advocate [1964] 2 All ER 348

[49] 2022/CCZ/0051

appeal within the prescribed time as well as following a decision of this Court on appeal is a lacuna that requires addressing by the legislature."

Curiously enough, even having directed that the so-called *lacuna* should be addressed by the legislature, as is supposed to be the case especially that it was a provision of the supreme law of the Republic under contention, the court nevertheless held that the word 'petition' shall include an appeal so as to cure the gap so identified. This is but one example of the many instances where obscurities in legislative drafting have led the courts to decide what the best course of action, or rather what the law, should be. This practice has often solicited unsavory responses from the public which the court has now as a result declared thoroughly contemptuous.[50] A subject matter we shall discuss at length in Chapter Four.

2.6 CONCLUSION

This chapter has addressed the background and origin of legislative drafting, highlighting its inherent problematic nature, how the courts deal with the problem with the established rules of statutory interpretation developed to address these defects, parliament's supremacy as a lawmaking body and the challenge that is presented to the courts by obscure legislation. In essence, this chapter has established that the obscurity in legislative drafting adversely affects parliamentary supremacy by putting the judicature in a position where it potentially has to act as a legislator of sorts to cure the existing defects.

[50] Savenda Mangementg Services Limited v. Stanbic Bank Bank Zambia Limited and Gregory Chifire Selected Judgment No. 47 of 2018

CHAPTER THREE

THE UNITED STATES SUPREME COURT'S CONSTITUTIONAL MANDATE

3.0 INTRODUCTION

This chapter will discuss the background and establishment of the Supreme Court of the United States. The chapter will then proceed to analyze the jurisdiction of the court as provided in the Constitution and how the same has been interpreted. Finally, the chapter will analyze the various precedents created by the court through statutory interpretation.

3.1 BACKGROUND OF THE UNITED STATES SUPREME COURT

Before the ink on the last signatory to the document that would stand to be the foundation of a "more perfect union" could dry, the so-called 'Great Experiment' was quickly underway. The United States Constitution establishes the country's three branches of Government in its first three Articles, with the political branches (The Congress and Executive) in the first two Articles respectively, and the Judiciary in Article III. The curious position of the judiciary in this hierarchy, though in itself legally inconsequential, might serve as a glimpse into the intentions of the framers as far as which of the three wielded the least amount of governmental authority, a situation that was evidently the status quo in the fledgling years of the judiciary's highest court. As one of the signatories to the Constitution, **Hamilton**, remarks in the Federalist papers: "Whoever attentively considers the different departments of power, must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community: The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated: The judiciary, on the contrary, has no influence, over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this

faculty…This simple view of the matter suggests several important consequences: it proves incontestibly that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."[51]

This might have been the case at the time the court was established, and is perhaps still so to some extent. What is decidedly clear, however, is that the court over the years has garnered much prominence and power through the growth of its own jurisprudence. The first such development came in the landmark decision in ***Marbury v. Madison.***[52] The case arose out of a number of last minute appointments made by the outgoing president to the judiciary. However, the new president, viewing this as a power play by the outgoing administration, decided to block the appointments once he came to office and so the so-called "midnight appointments" were not all actualized. The new Secretary of State (Madison), declined to deliver the letters of commission, which would have enabled the new appointees to start executing their functions. One such appointee whose commission was not delivered was the petitioner, William Marbury. He petitioned the court for mandamus under section 13 of the Judiciary Act 1789 which gave the court jurisdiction "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

As earlier stated, the court was initially viewed as weak compared to the political branches of Government and was thus at risk of fading into obscurity in the newly minted Republic. In addition to this, the court's precise role in the system of checks and balances, though provided for by the Constitution was yet to be firmly and clearly established as a matter of precedent, and so with this in mind, the court had to tread carefully. If it granted the remedy prayed for, the executive would probably not abide by it, further cementing the perception that the court is helpless as far as keeping the political branches in check. But if it did not do so, it would create a dangerous precedent where the Executive's power would go unchecked.

[51] A. Hamilton, J. Jay and J. Madison, The Federalist on the New Constitution (Benjamin Warner 1818) 419-420
[52] 5 U.S. 137 (1803)

In a remarkable and unprecedented decision that saw the court establish itself as the final authority on all matters to do with the interpretation of the Constitution while simultaneously avoiding the prospect of unchecked Executive power, the court found that section 13 of the Judiciary Act (1789) contravened Article III Section 2 of the Constitution as it purported to extend the jurisdiction of the court beyond that which is provided for in the Constitution. With then Chief Justice John Marshall at the helm, a unanimous Supreme court, taking into account the fact that the case at hand was being heard pursuant to its original, rather than appellate jurisdiction, opined that "It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction."

The result of the decision in the case established the court's power to invalidate any statute or administrative action that contravenes the Constitution through the principle of judicial review. The precedent set by the case cannot be overemphasized. It formed the basis upon which the judicial branch would issue checks and balances on the political branches of Government. Over two centuries after its issuance, the incumbent head of the judicial branch, Chief Justice John Roberts reechoed his predecessor's sentiments as regards the judicial role in delivering checks and balances as established in that case, when in response to threats from the Executive branch to impeach judges whose decisions, though perfectly in line with the law, had gone against the administration's policies. In his words, the job of the judiciary is "obviously decide cases but in the course of that to check the excesses of Congress or the executive."[53]

3.1 THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The jurisdiction of the court is divided into two main types as outlined in Article III Section 2 of the Constitution, namely: appellate and original jurisdiction. It has original jurisdiction

[53] Abbie VanSickle, 'Court Must "Check the Excesses" of Congress and the President, Robert Says'(The New York Times, May 7 2025) https://www.nytimes.com/2025/05/07/us/politics/supreme-court-roberts-judicial-independence.html Accessed on August 26 2025 at 16:31 pm

when seated as the court of first instance and is only so seated in a limited number of cases; those involving ambassadors, public ministers and consuls and any to which a State in the Union is party. Appellate Jurisdiction on the other hand has been much more tenuously defined. For context, the relevant part of Section 2 declares thus:

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Emphasis added).

Unlike original, the exercise of appellate jurisdiction is contingent on "exceptions" and "Regulations" prescribed by the Congress. The Court has interpreted the so-called "exceptions clause" to mean that the Congress has been given wide latitude in prescribing which type of cases the Court can hear on appeal. Pursuant to this, the Congress has passed legislation such as the Judiciary Act of 1891[54] also known as the Circuit Court of Appeals Act because it served to relieve the court of the mandatory task to review a defined category of controversies by directing that the cases be first reviewed by appellate courts established thereunder, and the Certiorari Act of 1925[55] which expanded the Court's discretion to decide which cases it can hear on appeal, to mention but a few.

Nevertheless, there have been varying opinions on the issue. In some cases the Court has had to decide whether the grant of appellate jurisdiction in Article III Section 2 is one that is self-executing. Put differently, the court has on occasion had to consider whether that provision allows the Court to exercise appellate jurisdiction in the absence of "express" authorization from Congress, which authorization, on a plain reading of the provision, seems to be a necessary antecedent in the exercise of the jurisdiction.

In ***Wiscart v. D'Auchy***[56] for instance, the majority was of the view that prior authorization from Congress was necessary before the jurisdiction could be exercised; that if congress did not provide for a rule to regulate the exercise of the jurisdiction then the court could

[54] Judiciary Act of 1891, Ch. 517, 26 Stat. 826.
[55] Certiorari Act of 1925 43 Stat. 936
[56] 3 U.S. (3 Dall.) 321 (1796)

not exercise it. However, in a later decision the court had the following to say: “Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it... In omitting to exercise the right of excepting from its constitutional powers, Congress would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.”[57]

The case seems to suggest that if the appellate jurisdiction of the court expressly provided in the Constitution has not been made subject to any exceptions or regulations from the Congress, it will be taken that the legislature’s inaction, by implication, empowers the court to exercise the jurisdiction to the extent to which it interprets the Constitution as having conferred the same upon it.

Additionally, in instances where the Congress has enacted legislation affirming any appellate jurisdiction conferred by the Constitution, the court has taken the position that because it is the Constitution and not an Act of Congress that confers the court with appellate jurisdiction, any Act of Congress affirming the exercise of the same, that is, any law passed by the Congress prescribing the types of cases the court can hear on appeal, is construed to exclude cases not expressly mentioned in the Act.[58]

All in all, the upshot of the authorities on the United States Supreme Court’s jurisdiction seems to be that the court has both original and appellate jurisdiction. It has original jurisdiction in the few cases expressly mentioned in the Constitution and has appellate jurisdiction in all other cases in which it does not have original jurisdiction, subject to any rules and regulations that the Congress may impose upon the exercise of the jurisdiction and where the Congress does not exercise the prerogative to regulate, the court can still exercise the jurisdiction as generally conferred, but where the Congress has provided

[57] Durousseau v. United States 10 U.S. (6 Cranch) 307, (1810)
[58] Ex Parte McCardle, 74 U.S. (7 Wall.) 506. See also Lukenbuch S. S. Co. v. United States, 272 U.S. (1926), and United States v. Bitty, 208 U.S. (1908)

such exceptions and regulations, any affirmation of appellate jurisdiction by an Act of Congress impliedly negates appellate jurisdiction in all other cases not mentioned.

3.2 ANALYSIS OF THE SUPREME COURT'S CONSTITUTIONAL JURISPRUDENCE

Being that the court's mandate is exercised through its jurisdiction in accordance with the Constitution, an interrogation of the jurisprudence developed in furtherance of its mandate is necessary in order to ascertain whether there have been any actual, or perceived excesses on the part of the Supreme Court itself in the exercise of this authority.

The Constitution of the United States is extremely hard to amend. Since its adoption well over 200 hundred years ago, it has been amended a total of 27 times with the last amendment, which was initially proposed in 1789 being ratified in 1992, as Article V of the Constitution does not provide a time period within which the States should ratify a proposed amendment. According to the provision, an amendment can be initiated either by the federal Congress with the approval of two-thirds of both Houses respectively and then sent to the individual States for ratification, or it can be initiated on the application of two-thirds of the State Legislatures in the Union and whether the process is initiated in terms of the former or the latter, the proposed amendment(s) will not be adopted as part of the Constitution until ratified by the State legislatures of three-quarters of the States in the Union or by Constitutional conventions in three quarters thereof.

This state of affairs in the Constitutional amendment process as evidenced not only by the enormous concerted efforts needed to pass an amendment, but also by the number of proposed amendments that have actually been ratified in the document's long history, is perhaps the biggest reason why Supreme court decisions have become, in a manner of speaking, the third mode of amending the Constitution or rather, passing law in general. The court is well cognizant of this phenomena and has cautioned that the courts of law should not substitute their social and economic beliefs for the judgment of legislative bodies who are the people's representatives elected to make laws.[59]

However, some of the court's interpretations of the same provisions in the Document have evidently, as we shall shortly hereafter demonstrate, been heavily influenced by such

[59] n.18

extrinsic factors as were prevailing at the time they were decided. One such case is the 2015 decision in ***Obergefell v. Hodges***[60]. In that case, a 5-4 majority overruled the court's earlier decision in ***Baker v. Nelson***[61] wherein it summarily held that the exclusion of homosexuals from contracting marriage did not constitute a "substantial federal question." This loosened tone in the refusal perhaps indicated to the overruling court that it was a matter of showing that the exclusion had now constituted such a substantial question that it ought not only to be considered, but championed by the court. This is owing to the court's explanation for the basis upon which same-sex marriages had now become a fundamental right rooted in the country's social fabric. A rather lethargic one at that, as it stated that the "referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings… extensive litigation in state and federal courts…Judicial opinions addressing the issue" made since *Baker(supra),* had now raised such a substantial federal question.[62], and thus ruled that the Constitution's Due Process clause in the Fourteenth Amendment[63] thereto recognizes same-sex marriages as an implied fundamental right under Substantive Due Process. Not surprisingly, as one of the dissenters (Roberts CJ) pointed out: although Due Process, and particularly Substantive Due Process, as per the court's own plethora of established precedents, does serve to recognize "implied fundamental rights" which are "implicit in the concept of ordered liberty"[64], such recognition would have to be based on a finding of fact that the rights claimed, not being derived from the document itself, as is the case for the right to marry, are objectively and deeply rooted in that nation's history and tradition. This is deliberately so in order to guard against what one judge described as the "exercise of raw judicial power."[65] The dissent further pointed out that although marriage is one such fundamental right implicit under Substantive Due Process, since this could only be gleaned from a historical account, it is, and always has been, coupled

[60] 576, U.S. (2015)
[61] 409 U. S. 810 (1972)
[62] n 58 at p.23 of the case extract from the Law Report.
[63] U. S. Const., Amdt. 14, §1
[64] Washington v. Glucksberg 521 U.S. 702 (1997), see also Lochner v. New York, 198. U.S. 45 (1905)
[65] See Justice White's dissent in Roe v. Wade

with the implicit understanding that its definition is restricted to a heterosexual voluntary lifetime union. A point which the majority conceded on but nevertheless ignored.[66]

Similarly, in 1896 racial tensions were still rife even as the Civil War that ended just three decades earlier and saw the slave-owning Southern States (the confederacy) pitted against the abolitionist Northern States (the union), brought an end to institution of slavery when the latter emerged victorious and a Constitutional ban on slavery was effected.[67] Reconstruction[68], a policy instituted by the federal government in order to compel former Confederate States to comply with not only the ban but the full integration of colored minorities in American society, had evidently failed, owing to the controversial election compromise of 1877 which resulted in the federal government withdrawing troops from the Southern States meant to enforce Reconstruction policies thereby ushering in the insidious Jim Crow era, a sort of American apartheid.[69] It was against the backdrop thus described that in that year the court upheld in ***Plessy v. Ferguson***,[70] a Louisiana (formerly confederate state) law that required railway companies to create "separate but equal" accommodation for the colored and white races. The court reasoned that:

"While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act, that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power."[71]

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[66] n.60, at p.25 of excerpted case from Law Report.
[67] n.61, Amdt. 13 Section 1.
[68] n.61, Amdt. 13 Section 2.
[69] Aimee Landwehr, 'The End of Reconstruction'(study.com, November 11 2023) https://study.com/academy/lesson/the-end-of-reconstruction-and-the-election-of-1876.html Accessed on 1st August 2025 at 10:00pm.
[70] 163 U. S. 537 (1896).
[71] Ibid at p.548-549.

As with the societal changes that compounded the majority's decision in *Obergefell (supra)*, the case was overruled by a unanimous court close to six decades later against the backdrop of a heightening civil rights movement, when it held that the "separate but equal" scheme was a violation of the Fourteenth Amendment's 'equal protection' clause. In the court's own words: "…the plaintiffs and others similarly situated… are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment… that such segregation is a denial of the equal protection of the laws."[72]

The latitude that the Fourteenth Amendment affords the bench in formerly declaring as being part of the Constitution, fundamental rights which are not included in the text of the Document, is but one of the several factors the study identifies in the proceeding chapter as emboldening the court to engage in judicial activism in the realm of statutory interpretation so that the construing of a law promulgated by the legislative branch should bare the forbidden visage of original legislation rather than a judgment of it. As Justice Rehnquist aptly put it in his dissent in *Roe (supra):*

"The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."[73]

What is immediately evident from these cases is that the Constitutional provisions under scrutiny did not change, rather, what changed was the composition of the court and society. While bearing in mind that "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution"[74], it is still an unnerving reminder that indeed "the nature of injustice is that we may not always see it in our own life times."[75]

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[72] Brown v. Board of Education of Topeka 347 U. S. 483 (1954) at p.495.
[73] n.15, at p.174 of the excerpted case from the Law Report.
[74] Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 505 (1992) at p.963.
[75] n.60, at p.11 of the excerpted case from the Law Report.

The observation undoubtedly raises questions of law, justice and the judicature's role in society in determining civil discourse. For instance, the infamous ***Dredd-Scott v. Sandford***[76] decision, which has since been thoroughly repudiated in its entirety and is widely considered to be the worst decision in the court's history, reinforced the institution of slavery in the country thereby fueling tensions between the already polarized abolitionists and slave-owners. With the court's pronouncement that since it was the case that for centuries negroes had "been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations…" it should necessarily follow that "they had no rights which the white man was bound to respect." It is perhaps of little surprise that a mere four years after the decision was delivered, the country was thrust into a civil war whose outcome was to determine whether indeed this Government of the people was really for, and by, the people.[77]

3.3 CONCLUSION

This chapter gave a background of the origin of the Supreme Court of the United States, highlighting how it came to be a pivotal player in the country's democratic dispensation. It further discussed and analyzed the court's jurisdiction as conferred by the Constitution, and how the court has interpreted those provisions, setting the backdrop for a brief analysis of some of the most notable jurisprudence developed by the court in the course of executing its mandate to interpret the Constitution. Overall, the chapter sets the stage for the discussion on the judicature's role in the system of Government; a comparative analysis of the interpretative jurisprudence of Zambia and the United States of America.

[76] 19 How. 393 (1857) at p.407
[77] See President Lincoln's Address at Gettysburg in which he coined the now famous phrase defining democracy.

CHAPTER FOUR

A COMPARATIVE EXAMINATION OF THE FACTORS THAT HAVE LED TO A LAPSE IN STRICT ADHERENCE TO LITERALISM IN STATUTORY INTERPRETATION BETWEEN ZAMBIA AND THE UNITED STATES OF AMERICA

4.0 INTRODUCTION

In an attempt to show how statutory law is actually implemented by the courts, this chapter will examine and compare the jurisprudence developed by the Zambian courts with that of the United States as regards the interpretation of legislation. In furtherance of this objective, the chapter shall firstly discuss the function of law in general in order to best understand whether the examination of the lapses in strict adherence to the literal rule by the courts in both jurisdictions that will thereafter follow, has in any way affected this function. Coupled with this will be a brief discussion on the various competing jurisprudential schools of thought on the subject matter. Next, the chapter delves into how the courts have interpreted legislation dealing with individual's rights and those which establish and regulate the exercise of statutory authority by public officials.

4.1 THE FUNCTION OF LAW

It is beyond question that without this system of formally established and agreed upon rules known as law with its accompanying enforcement mechanisms, organized society as we know it would crumble under the weight of what seventeenth century philosopher **Hobbes** aptly termed as 'the state of nature'[78], a condition of perpetual chaos and lawlessness where every individual is out to serve their own interests regardless of whether this might be injurious to the interests of others. Thus, **Pound**[79] argues that the law exists for the sole purpose of averting this state of affairs; an instrument of social organization that seeks to devise sustainable ways of resolving conflicts for the common good.

While it might be easy to define the purpose of law, the same is not the case for identifying it. As the law has existed for as long as civilized societies have endured, its complex

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[78] T. Hobbes, 'Leviathan' (1651) p.186-190

[79] R. Pound, 'Philosophy of Law' (revised ed. 1954, Yale University Press)

development throughout different societies over the ages from mere informal traditions or regal decrees to the more modern formal system of legislation, the establishment of a trustworthy tribunal to put it all in context for purposes that we have in the preceding paragraph already alluded to, is imperative. The judiciary is therefore the mouthpiece of the written and informal law. Thus, the judicial mandate can be said to be that of animating the law. As the court in *Marbury (supra)* famously stated "It is emphatically the province and duty of the judicial department to say what the law is."[80] **Malila,** shared similar sentiments when he wrote; "cases can either be creative of the law or declaratory of it."[81] To this end, whether creative or declaratory, the jurists' task is to give a final and binding definition of the applicable law in order to resolve conflicts.

4.2 THE REALIST'S VIEW ON THE WRITTEN LAW

A revolt against formalism,[82] the realist school of jurisprudence posits that the application of written law is dependent on various extraneous considerations such as social, political, psychological and even moral considerations by the judges involved in applying it; that law is not what is contained in legislation but rather how the courts apply it.[83] Here may be discerned a pragmatic view of what the law is and here also may be discerned the foundation of the problem identified by the study, that is; the tendency by judges to deviate from strict adherence to the literal rule of statutory construction. While we concede that this approach has its use as seen from the discussion on its endorsement by the legislatures of both the United States and Zambia later on this study, the focus is on its potential distortion of the legislative intention as expressed in the text of written law. Some impassioned proponents of the theory have gone so far as to suggest that statutes themselves are not law until the courts pronounce themselves on their import.[84]

Other proponents of the theory take a more modest approach. **Frank[85]** for instance focuses on two kinds of legal uncertainty as being what lends credence to the realist movement. These being uncertainty as to the facts and the law. As regards the former,

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[80] n.52
[81] M. Malila, 'The Contours of a Developing Jurisprudence of the Supreme Court of Zambia'(InsideData 2019) p.81
[82] Formalism focuses on written law without any extraneous considerations. See n 23, p.823
[83] n.19, p.1
[84] n.18
[85] n.19

the argument is that the peculiar facts of a case are what will make the courts apply the same legal provision differently so as to give the impression of deviation and in terms of the latter, it has been posited that the uncertainty that lies principally in the enacted law itself is what gives the judge leeway to determine, by their own wisdom, what the legislature was trying to put across.

4.3 THE PURE LAW PERSPECTIVE

A complete deviation from realism, as the name suggests, the position taken by proponents of this theory, and more specifically its most notable advocate **Kelsen**,[86] is that the law, in this instance legislation, exists separate from any other considerations that are not contained in the legislation. Put differently, this theory advocates for the literal rule of construing legislation in order that the problem identified by this study may be averted. But as other supporters of this approach make clear, the point is not to exclude altogether other considerations such as doing justice to the particular facts of the case—no—as a matter of fact, the point is to advance justice not by reference to extralegal considerations such as severe hardship that may be suffered by a particular claimant if the relief sought is not granted, but only to what the text of the law says should be done.[87]

Thus, under this line of thought, justice is only determined in reference to the law. Consequently, if a "court of law" is of the view that a particular piece of legislation contains a gap, its place to attempt to mend it, as doing so would in turn create a new law altogether, under the guise of interpreting an existing one. Thus, the court must exercise restraint in interpreting the law, especially the Constitution, which we opine cannot, technically speaking, contain such gaps as has on occasion been suggested by the courts in its endeavors to add to the Document that which was not added by the only authority in the republic empowered to alter it. The position we take is fortified by the very salient fact that the court as an institution of the State is subject to the Supreme law of the land and not the other way round.[88]

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[86] n.20, p.251
[87] n.23, p.252
[88] See Article 1(3) of the Constitution of Zambia as amendment by Act No.2 of 2016

4.4 FACTORS RELATING TO LEGAL RIGHTS ENFORCEMENT

"Claims that individuals assert as a matter of fact and which the law must have a say if civilized society is to endure"[89], thus pound defines legal interests, and since it is the courts that in turn define the law, it necessarily follows that the courts define what these claims are and in so doing the ends of law are fulfilled. But as we have already discussed elsewhere in this study, the law as written in the statute books (*de jure)* may not always be compatible with how it is implemented *(de facto)*. Coupled with this reality are the many extrinsic considerations with which an adjudicator may be seized when interpreting the law. As the chapter shall demonstrate, the courts in Zambia and the United states decide in the same way or in a different ways depending on any number of considerations that may arise out of the circumstances that attend the case.

When it comes to the enforcement of legal rights, American jurisprudence on the subject discloses a tendency to prioritize legal rights interests over any other conflicting interest whereas the Zambian position tends to veer in the opposite direction or attempts to strike a balance between conflicting claims. One such legal right that has in both jurisdictions been the subject of consideration is the right to privacy. Article 17(1)[90] of the Zambian Constitution, an entrenched provision, declares as unconstitutional, any acts that infringe upon an individual's right to privacy; their right not to have their person or property, without their consent, subjected to any entry and/or search save for the numerous instances mentioned in the claw-back clause that follows. It lists various other interests i.e public order(a), protection of others' legal rights(b), the execution of a necessary public good by a government agent(c), and the execution of a court order(d), as the interests that the court should prioritize when an individual's right under that Article comes in conflict with them.

Thus, the case of ***Liswaniso v. The People***[91] is one that is demonstrative of the court's tendency not to adhere strictly to the literal interpretation of a Constitutional provision protecting fundamental rights. As the court explained in that case, the overarching factor that led the court to decide as it did was that in its view, public policy demanded that

[89] n.78
[90] n.1
[91] (1976) Z.R. 277(S.C.)

evidence that is both true and relevant be admitted in order to meet the ends of justice, regardless of how it was obtained, with one exception: an involuntary confession.

In that case, the appellant challenged the admissibility of the evidence that led to his conviction. The said evidence was obtained by the execution of a warrant obtained under a falsity; that such evidence was obtained in violation of the appellant's right to privacy under the Constitution. The court weighing the appellant's interest in having his right to privacy safeguarded against the public interest in having the ends of justice met, held that save for an involuntary confession, evidence obtained illegally was admissible as long as it was true and relevant but warned that those engaged in securing evidence in this manner ran the risk of facing civil or criminal sanctions.

The American position on the hand is totally different. Much like the Zambian Constitution and also part of its Bill of rights, Article IV of the United States Constitution declares the right to privacy in largely dissimilar terms but with the same basic import. The major difference being that under this provision, the claw-back clause declares that a violation of this right shall not be warranted without probable cause which shall be present if on an examination of the "totality of circumstances" of the case, it is seen to have been readily apparent.[92] Accordingly then, and in contrast to the position taken in *Liswaniso (supra)*, the Supreme Court in ***Mapp v. Ohio***[93] held as inadmissible, illegally obtained evidence used to convict the defendant on a charge of having in her possession, lewd and lascivious material. The court charged that such evidence could not be safely relied upon owing to the objectionable manner in which it was obtained; that it was a fruit of the poison tree.

As earlier stated, the American courts tend to adhere to a more rigid approach when dealing with cases that have to do with the interpretation of provisions dealing with the rights of individuals. Therefore, to the extent indicated in this regard, the American position adheres to the literal rule of interpretation.

[92] Illinois v. Gates 462 U.S. 213 (1983)
[93] 367 U.S. 643 (1961)

Though this be the case, it does not follow that the Zambian courts do not venture into the realm of stringent adherence to legal rights enforcement. This is especially the case when the obstacle to strict enforcement of that right is not one that concerns the interests of what the court would readily term as a superseding interest such as public policy considerations and national security. Thus, in ***George Peter Mwanza and Melvin Beene v. Attorney General***[94], the court had to determine whether the right to food, and more specifically, a balance diet, a non-justiciable right under Zambian law, could be made so in the case of inmates living with the Human Immunodeficiency Virus (HIV), as its deprivation could injure the inmates' right to life, a right which, unlike that before mentioned, is justiciable under the Constitution. Put simply, can a none-justiciable right be made justiciable if its violation amounted likewise to a violation of a justiciable right? The court held in the affirmative, fortifying its position by the fact of Zambia's ratification of a convention (The International Convention on Economic, Social and Political Rights) that recognized the right.

It appears that the court in this case sought not to adhere to the fact that the specific right being asked for was not one enshrined in the Constitution. The court instead found a backdoor, as it were, by connecting it to a right that was justiciable, and so in this particular instance, it can be said that the lapse in strict adherence to the literal rule was one influenced by Zambia's international commitments; an unusual one at that because it involved the court interpreting a legal provision broadly so as to include all its attendant dimensions.

Similarly, in ***Maxwell Mwamba and Stora Solomon Mbuzi v. Attorney General***[95], the focus is on the dissenting judgment. The appellants challenged the appointment by the Republican president, of state officials who had in the past been implicated in illegality, charging that the Constitution obliged the President to execute the duties of his office in a proper manner. The majority, whilst acknowledging that there was need to balance the need to have citizens actively participate in matters of public concern with the undesirability of having individuals engage in the frivolity of moving the courts in matters

[94] SCZ Appeal No.153/2016
[95] SCZ Judgment No. 10 of 1994

in which they do not possess legal standing, nevertheless declined to make pronouncements on the issue of *locus standi*. The minority opinion on the other hand, delivered by Musumali JS, criticized the position taken by the majority in that regard owing to the uncertainty it created on the question of legal standing, stating that the default position should be that the Constitution is deemed to grant to all citizens *locus standi* in cases of public concern unless the Constitution has expressly, or by necessary implication, taken away the right.

In the 'going against the grain' fashion he was well known for[96] that minority decision seemed to deviate from the Constitutional order at the time by prioritizing the public's interest in maintaining integrity in the governance system over the Constitution's silence on the public's legal standing in such cases. Once again an adjudicator compelled by their personal belief of what the law is, sought to read words into the Constitution under the auspices of interpretation.

Additionally, and still in the realm of Constitutional freedoms, the courts in both jurisdictions have had occasion to pronounce themselves on the right to free speech where a public figure alleges to have been defamed. In ***Michael Chilufya Sata v. Post Newspaper***[97], the appellant, a politician and public official, sued the respondent newspaper publisher for defamation. The court found that there was need to balance the legitimate public interest in criticizing officials for actions taken in that capacity because unlike private individuals, public figures are taken to have offered themselves up to these types of attacks and as such to have a public official maintain an action for defamation where the alleged defamation was not a personal attack, would place an undue fetter on the right to freedom of expression, especially that it concerned an issue of utmost public importance.

Likewise, in ***New York Times v. Sullivan***[98], the respondent, an elected official from Montgomery, Alabama, then a hotbed for massive civil rights protests, alleged that the appellant had libeled him owing to a publication that alleged that he as the official in

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[96] See M. Malila (2020). Righting the Wrongs: The Legacy of Justice Clever Mule Musumali's Legacy of Judicial Activism. International Journal of Research and Innovation in Social Science (IJRISS) Vol. 6,12.
[97] HCZ Judgment No.1 of 1995.
[98] 376 U.S. 254 (1964)

charge of supervising the police department oversaw the mistreatment by the latter, of students involved in civil rights demonstrations in that city. As with the *Sata* case, the court set a different threshold for proving defamation claims brought by public officials, one that went beyond a mere demonstration that the defamatory remarks were false, stating that “A State cannot under the First and Fourteenth Amendments award damages to a public official for a defamatory falsehood relating to his official conduct unless he proves "actual malice", that is; the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false.”

The two cases demonstrate in strikingly similar fashion, the court’s attitude towards freedom of expression as it relates to an alleged defamation of a public figure. The heightened threshold for proving the tort in cases involving public figures demonstrates, as we discussed in an earlier segment of this chapter (The Realist’s View on the Written Law), a tendency by the court to interpret the same provision of the law in a different way depending on the facts of the case even though the text itself does not warrant this.

The courts have equally pronounced themselves on rights related to the family as a societal institution. As it had earlier been mentioned in this study, parts of the United States were enforcing the discriminative ‘Jim Crowe’ laws whose subsistence was perpetuated under the “separate but equal” doctrine established in *Plessy (supra).* As a result of these discriminatory practices, the civil rights movement began to take hold in the country in the early 1950s to protest these unfair practices, which saw the likes of prominent activists like Rosa Parks, an African American woman who, after being arrested for refusing to give up her seat on a public bus to a white passenger after she defiantly took a seat on the “white section” of the bus, rising to nationwide prominence.[99] Such protests characterized the American political scene for most of the 1950s through the 1960s, and was thus the backdrop of the decision that eventually overruled *Plessy.*

It was not that the Constitutional order with regards to the provisions under consideration had changed but that society had, and with it, the composition of the court. Hence in 1967,

[99] Myles Burke, ‘Rosa Parks: The ‘no’ that sparked the Civil Rights Movement’ The British Broadcasting Corporation (28 November 2023) https://www.bbc.com/culture/article/20231128-rosa-parks-the-one-moment-that-sparked-the-civil-rights-movement Accessed 17 October 12, 2025 at 4:12pm

when the court in ***Loving v. Virginia***[100] was asked to strike down a statutory scheme in Virginia that outlawed interracial marriages, it unanimously ruled in favor of the appellant stating that the laws violated the Fourteenth Amendment's Equal Protection and Due Process clauses. The conclusion therefore is that progressions in societal beliefs and attitudes has an enumerable degree of influence in the way the court interprets the law which can lead it to not necessarily deviate from the literal rule, but rather redefine it altogether. In other words; while in an earlier case "equality" interpreted literally meant "separate but equal" in a later case, after much socio-political changes, the same term interpreted literally impugned an earlier interpretation of it.

In Like manner, the Zambian High Court in the celebrated case of ***Edith Zewelani Nawakwi v. Attorney General***[101] struck down a law that required a mother intending to have her child endorsed on her passport to first get permission from the child's father. The law was found to be discriminating on the basis of sex and therefore unconstitutional. The law in question was from the colonial era and its implementation was no doubt, as the court observed, influenced by the status quo in the social order at the time, and so its negation in this case was as well influenced by the change in the social order as the court took judicial notice of the fact that single parent families headed by either a woman or a man were prevalent in Zambia and therefore recognized as a family unit, as such, there could be no support for the regulation even in fact.

Overall, the authorities on factors relating to legal rights enforcement disclose a tendency by the courts in both jurisdictions to interpret the law based on socio-political changes, resulting in inconsistent interpretation of the same legal provisions.

4.5 FACTORS RELATING TO THE EXERCISE OF LEGAL AUTHORITY

Legislation, starting from the Constitution itself, in various instances will establish public offices, their functions, and powers to be wielded by holders of those offices. It is no surprise then that the exercise of the authority by these officials, including the judicature itself, is often the subject of many a court case, for it is a desirable attribute of the

[100] 388 U.S. 1 (1967)
[101] 1990/HP/1724

democratic process that any authority established by law should be open to public scrutiny.

While some cases will challenge in some way the exercise of powers by low-level government officials, the focus shall be the exercise of powers by senior state officials. In Zambia, as in the United States, these are the types of cases that tend to elicit considerable public attention. There is no shortage of case law in either jurisdiction where the apex court was asked to pronounce itself on the limits, if any, of powers granted to a constitutional office holder. In one such case, ***United States v. Richard Nixon***[102], that arose out the infamous Watergate Scandal, the then President challenged a subpoena issued against the Executive by a special prosecutor investigating a break-in at the Watergate building, his political opponents' headquarters. The subpoena demanded that the president hand over secret recordings from conversations in the Oval Office that could potentially implicate him in the break-in, he claimed Executive privilege in this regard hence the case before the court.

The scandal was a political spectacle, that resulted in congressional hearings and the indictment of several of the president's own close associates, and the president, whose second term of office was won by a landslide that has never before or since been replicated, had become so unpopular that his impeachment was now imminent. One judge in this case (Rehnquist J) even recused himself citing a possible conflict of interest[103]. Not surprisingly, against this backdrop, a unanimous Supreme Court resolved that; "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."[104]

It was mentioned earlier in this study that, unlike the Zambian position, the American courts tend to lean more towards the protection of an individual's rights rather than public interests when interpreting the Constitution. This was not the case here. Though we

[102] 418 U.S. 683 (1974)
[103] Chris Schmidt, 'History of the Court, This Day in the Supreme Court' (blogs.kentlaw.iit.edu July 24 2017) https://blogs.kentlaw.iit.edu/iscotus/day-supreme-court-history-july-24-1974/ Accessed on November 8 2025
[104] n.98

concede that this is open for debate, the political atmosphere at the time seemed to weigh heavily on the court in that case. We say so because, unlike in *Mapp (supra)*, which was also interpreting the operation of the Fourteenth Amendment's Due Process clause with regards to the production of potentially prejudicial evidence in criminal proceedings, the court in this case opted to deviate from its usual literal interpretation of that clause by prioritizing the rising public interest in the case over that of the appellant's generalized interest in concealing potentially sensitive information contained on the tapes.

As well as demonstrating how much sway the court holds even in the political space as the embattled president resigned his office a mere 16 days after the court delivered its decision, the case also shows how public interest considerations can potentially influence the way the court interprets the law.

A similar issue arose in Zambia's Constitutional court in the case of ***Mutembo Nchito v. Attorney General***.[105] In that case, the petitioner challenged his removal from the office of Director of Public Prosecutions (DPP) by the Republican president following a recommendation by a tribunal instituted to inquire into allegations of abuse of authority when the petitioner, among other things, entered a *nolle prosequi* in his own criminal case. That tribunal's findings were availed to the petitioner. The Court interpreting the applicable repealed Article 58 of the 1991 Constitution upon which the removal proceedings were anchored, took a purposive approach stating that if the clause was to be given its literal import which required neither the tribunal nor the president to furnish the petitioner with the reasons upon which his removal was based, it would impede natural justice; that although the president was not required to furnish said reasons because the recommendation from the tribunal was not subject to discretion, the same could not be said for the tribunal's findings since the same was subject to judicial review and the petitioner could not effectively challenge it without being given those reasons.

Stemming from the foregoing, it can be concluded that one of the reasons that will compel a court in Zambia to deviate from interpreting a provision of the law in its strict literal sense, is if in so doing, the principles of natural justice relating to a person's ability to

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[105] 2016/CC/0029

challenge a decision by way of judicial review would be curtailed. This case was yet another one of the numerous examples we've cited in this study that demonstrates a tendency by courts to modify, as it were, the import of the literal meaning of a statutory text in an attempt to effectuate what they determine to be the legislative drafter's intention but which by some presumed oversight on their (drafters') part, had either not found its way in the legal instrument, or had been, according to a now entrenched doctrine of statutory construction, drafted in such a way that if a literal construction was to be used, it would disclose an absurdity, the presence of which could not, in the court's opinion, have been the drafters' intention.

Other cases of public importance have involved gaps in the law, or more specifically; omissions by the legislative body. One such case is ***Sean Tembo v. Electoral Commission of Zambia and Attorney General***.[106] The petitioner asked the court to make a declaration that the incumbent president should have been compelled by the Election Commissioner to disclose his assets and liabilities when filling his nomination for the general election in accordance with the Constitution. However, because that Constitutional provision also provides that the declaration is to be made "as prescribed" or in other words: in accordance with an Act of parliament, the majority, though lamenting the curious lack of legislative provision(s) to enforce the provision in the Constitution when all other similar provisions relating to candidatures in lower rank elections such as those of Members of Parliament had been duly implemented, held that this gap in legislative enactment defeated the enforcement of the provision by the Election Commission; and that at any rate, the case was rendered an academic exercise by virtue of the fact that those elections had already been decided. The court yet again resolved to merely recommend that the legislature address the oversight.

The dissenting judgment on the other hand posited that the provision could still be implemented even though there was no statutory enactment for the mode of its enforcement, dismissing the requirement as mere "minutiae" that could not defeat the operationalization of the provision.

[106] 2021-CCZ-0047

What is once more evident in this case, as with others in this study, is that the court was divided as to whether the silence of the law could, or even should be, cured by an interpretation that allowed for its enforcement in accordance with the court's own extrapolations on what the drafters' intentions were with regards to its enforcement. Perhaps more relevant to the topic under the chapter's discussion is that it demonstrates that a judges' personal jurisprudential preferences may influence them to interpret the law more broadly beyond the contents of the text under scrutiny as was clearly the case with the dissenting opinion.

Despite the confusion that often characterizes these cases on questions of law, other cases of a similar nature have been decided by the courts with ease, and without any substantial controversy. One such exemplary case is the Constitutional court decision in **Steven *Katuka and Law Association of Zambia v. Attorney General and 64 Ors*.**[107] The petitioners in this case moved the court to declare unlawful, the Republican president's decision to keep ministers and deputy ministers on active service and on the government payroll even after the dissolution of parliament ahead of the 2016 general election. They contended *inter alia* that it would be an abrogation of the new Constitutional order that discarded the office of deputy minister, to continue the existence of that office, potentially in perpetuity. Consequently, the decision saw the court interpret the law as it was couched and ordered that ministers that had been in office receiving emoluments illegally, as it were, had to refund the government, and that the office of deputy minister was to be done away with in accordance with the law.

These are the types of cases in which the court has stepped in to prevent unlawful use of Constitutional authority. The court in these cases saw no need for any special interpretation of the law regardless of what was prevailing on the socio-political scene. For example, in a recent landmark decision, the United States Supreme Court likewise was called upon to prevent an overreach of Constitutional authority by a State's Supreme Court in ***Trump v. Anderson*.**[108] In that case, the appellant challenged a decision of the Colorado Supreme Court rejecting his eligibility to run for the office of president for a

[107] [2016] ZMCC 1
[108] 601 U.S. 100 (2024)

second term on the basis that he had, during the subsistence of his first term, engaged in an "insurrection" when on the day the Congress was gathered to certify the results of the 2020 presidential election, which he lost, he implored his supporters to protest the election results, which protest turned awry when the protesters stormed the Capitol building resulting in several fatalities[109]. The decision was anchored on Section 3 of the Fourteenth Amendment. The relevant part of the provision states:

"No person shall be…, President…under the United States…who, having previously taken an oath… to support the Constitution of the United States, shall have engaged in <u>insurrection or rebellion</u> against the same… But Congress may by a vote of two-thirds of each House, remove such disability." (Emphasis added).

The federal Supreme Court on the other hand unanimously ruled that based on this very provision, a State in the Union could not determine the eligibility of an individual to hold federal office, including that of the president as this was the exclusive province of the federal government, with a majority of the court adding that Section 3 was non-justiciable, that is to say: only the Congress can enforce or authorize the enforcement of the disqualification clause.

The case clearly shows a reluctance on the part of the instant court, unlike that in Colorado, to delve into determinations as to whether the appellant had actually engaged in the conduct alleged. It is evident that the clause does not make mention as to who actually makes this determination, only that the Congress can take away that disability, which necessary implies that at that point, some authority should have disqualified the individual beforehand. With regards to justiciability, we hold the view that a literal interpretation of the clause necessarily meant that a determination of whether the individual in question engaged in insurrection or rebellion was premised on a determination by a court of law. Therefore the determination of this question of law by the court in this case was made due to the silence of the Constitution as it does not expressly mention which authority is entitled to make that finding. It follows from this that non-

[109] Selly Tan, Youjin Shin, Danielle Rindler, 'How one of America's Ugliest Days Unraveled inside and outside the Capitol' The Washington Post (January 9 2021) Available at https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/ Accessed on October 10 2025

adherence to the rule can at times be as a result of the silence of the law, just as in *Sean Tembo (supra)*, the court can simply decline to make a determination on that basis.

4.6 CONCLUSION

This chapter discussed the function of law in society in order demonstrate how judicial decisions interpreting legislation have had a significant influence on important spheres of organized society. To this end, the chapter discussed, by way of comparing Zambian jurisprudence to that of the United States, how the courts have interpreted legislative provisions touching on the protection of citizens' rights as well as those conferring legal authority on public officials as well as the various circumstances prevalent at the time the decisions were made which undoubtedly played a part in how the courts interpreted the law. In doing so, the chapter paints a real life picture of how the law contained in the statute books actually works in practice; that the law as written may be interpreted through the lens of the socio-political status quo at the time they are decided.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

The purpose of this study was to not only show the various challenges the courts encounter in interpreting statute law and the resulting effect it can have on how the judicial branch is ultimately perceived in the public eye, but to also demonstrate that the judicial branch of government wields considerable influence over the progression of society and how an ever-changing society likewise exerts its own influence on the court, so that the interpretation of legislation is at times coupled with considerations other than those contained in the statute itself. This conclusion will therefore give an overview of the study and shall thereafter conclude with recommendations.

5.2 OVERVIEW OF STUDY

The study began, in line with the research's first objective, with a discussion in *Chapter two* of the Zambian Judiciary's authority on interpreting legislation. At this point, the study was attempting to identify how it is that the judiciary in Zambia possess the authority to interpret legislation by delving into the history of legislative drafting and interpretation in England as this is where Zambia inherited its system of judicature. This is particularly relevant to the study in order that the origin of the problem identified hereunder may be more clearly understood. The chapter outlines the importance of statutory interpretation to the practice of law owing to the salient fact that though parliament is the supreme law making organ in the republic, the laws it promulgates tend to raise questions as to whether there was some kind of oversight on its part which sometimes prompts the court to attempt to fix it. Nevertheless, the study states that parliament is supreme as far as law making is concerned but proceeds to point out that this is not a clear cut issue as there is a profoundly unavoidable dilemma created by the potential incompatibility between statute law and the precedent created by the court in pursuance of the interpretation of it. It is a dilemma because it is only the court that make a binding determination on this issue but as the study shows throughout, there are clear cases when this incompatibility was evident.

The same approach is taken in the discussion on the United States Supreme Court's Constitutional mandate. The chapter is restricted to Supreme Court jurisprudence as this is the most pertinent to the subject of the study seeing as how that country uses a federal system of government which in this instance means each State has its own Supreme Court and a somewhat unique legal system. At this point in the study, whilst highlighting some of the most consequential jurisprudence created by the court since its inception, the study raised important questions stemming from the problem under discussion; questions as to what the proper role of the judiciary in the legal system and society overall is. That is, whether this role was one of lawmaker, interpreter, or some combination of the two.

An investigation of this question in *Chapter Four* coupled with the comparisons between Zambia and the United States, yielded mixed opinions in both jurisdictions. What was evident in both jurisdictions, however, was that despite some Jurists adhering strictly to literalism, in opposition to judicial activism, and others taking a relaxed approach, changes in the status quo in society, whatever the area of concern, have had an undeniable influence on the way the court interprets the law, whether or not the court expressly states this in their decisions.

Additionally, the study has shown that, court decisions, no matter how seemingly incompatible they are with the text of the legislation they sought to interpret, are met with little or no resistance from the only branch of those respective Governments that is Constitutionally mandated to make laws. The opposite in fact, as the study shows that it appears to have the endorsement of the legislatures in both countries with the Zambian Constitution encouraging the overruling of past decisions if the court is of the view that this would aid the development of jurisprudence and the American Constitution giving the court the enormous latitude of importing into it, any rights that, by its (the court) own criterion, it considers to be fundamentally woven into the fabric of society. A provision that has, to say the least, consistently inspired dissent in the court whenever invoked.

It is perhaps the intention of the legislative branches in both jurisdictions through such provisions that since case law develops much faster than statute law, the latter being many a time marred by political debacles ensuing, the judiciary, as the non-political

branch of Government is to be entrusted to develop the law in a fair and unbiased manner. In the case of Zambia, this position seems to find some support in the 1996 Amendment to the Constitution. One of the newly added clauses[110] to the Constitution included a formal adoption of the Supreme Court's decision in the *Lewanika* case, hereinbefore discussed, where the court effectively amended the Constitution by reading words into it whose effect was to make it so that an independent member of parliament's seat who crosses the floor of the House was to be declared vacant on the basis of "fairness".

But is it really the court's place to impugn a law on any basis other than its incompatibility with the Constitution, especially when the law in question is the Constitution itself? Are we to suppose that the validity of a Constitution should be evaluated on some other basis other than whether it was adopted in accordance with the law? These are but a few of the difficult questions the study endeavored to raise—difficult—because at the same time, it is trite law that the apex court's decision cannot be challenged by any other tribunal. Overall, the study's main focus was to show how the implementation of statutory law by the courts in Zambia and the United States is often a complex process that is not merely a question of repeating, word for word, what is contained in the statute books; that the often problematic way in which legislation is couched, a subjective determination in and of itself, has led to a lapse in strict adherence to literalism in the process of statutory construction, and that this approach has often led to controversial decisions that have painted the judiciary in a bad light.[111]

5.3 RECOMMENDATIONS

Criticisms of judicial decisions are not uncommon[112], as a matter of fact they are arguably inevitable. The Constitutional right to freedom of expression makes this so. Often times, as has been mentioned elsewhere in this study, the criticisms faced by the courts have risen to thoroughly contemptuous levels, prompting the courts to respond in order to safeguard Institution's integrity.[113]

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[110] Article 71(2)(c) of The Constitution of Zambia (Amendment) Act No.18 of 1996

[111] See the Zambian Supreme Court's decision in the Savenda contempt case (Selected Judgment No.47 of 2018) See also Oswald's, 'Contempt of Court' (3rd edn) p. 5-6. (Reproduced in 'n.70' at p.390)

[112] n 70, p.386

[113] Ibid

The study has made it clear that problematically worded legislation puts the court in this awkward position as the court's interpretation of it narrows, if not completely erases, the line between legislating and interpreting. We have also cited cases in which both the Supreme and Constitutional Courts identified gaps in the law, but in due recognition that it was not the judiciary's place to attempt to fill those so-called gaps, opted instead to recommend that the legislative wing addresses the issue if it so chooses. This approach is highly commendable and we think this is the correct approach and should as a matter of official judicial policy be the position taken by the courts in every such case. As an added measure, there is need for the enactment of legislation to that effect as current legislation, namely; the Interpretation and General Provisions Act[114], is severely lagging in this regard.

This approach might be met with an equally valid counterargument that the implementation of such a policy has the potential to impede the development of jurisprudence and understandably so. But the position we take is that any development in statutory interpretation jurisprudence should be strictly confined to just that—interpretation—and any deviations from it should be those that arise by necessary implication, that is; as we pointed out in our discussion on *Trump (supra)*, when the words of the statute themselves presume with absolute certainty that what has been left out is part of the statute.

5.4 CONCLUSION

In conclusion, in order to avoid any number of problems that can arise from not strictly adhering to the literal rule of statutory interpretation, the most serious of which being judicial overreach, there is urgent need to implement policies in the country's legal system meant to curtail the practice to the extent heretofore described so as to avoid the blurring of the line between legislating and interpreting. Let it not be said of this sacred Institution that it has constantly sought to usurp the Authority from which it derives its own.

[114] Chapter 2 of the Laws of Zambia.

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SCHOOL OF LAW

L400B / Dissertation II – DIRECTED RESEARCH (OBLIGATORY ESSAY)

RESEARCH CLEARANCE FORM

NAME: Mike Mukuka STUDENT NUMBER: LLB212462503

SUPERVISOR: Mrs K Mwauluka TOPIC: An Analysis of the Jurisprudence of Interpretation Legislation: A Comparative Study with the United States of America

Stage	Supervisor's Comments	Supervisor's Signature & Date	Student's Signature & Date
Research Proposal	APPROVED		
Chapter 1 – Introduction	APPROVED		
Chapter 2 –	APPROVED		
Chapter 3 –	APPROVED		
Chapter 4 –	APPROVED		

Chapter 5 – Conclusions & Recommendations	APPROVED	[signature]	[signature]
Abstract, Table of Contents, Bibliography and Appendices	APPROVED	[signature]	[signature]
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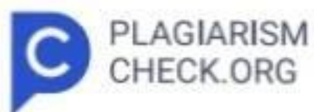

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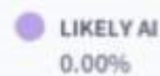

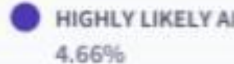

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UNIVERSITY OF LUSAKA SCHOOL OF LAW AN ANALYSIS OF THE JURISPRUDENCE OF INTERPRETATING LEGISLATION: A COMPARATIVE STUDY WITH THE UNITED STATES OF AMERICA BY MIKE MUKUKA LLB212462503 A DISSERTATION SUBMIITTED TO THE UNIVERSITY OF LUSAKA FOR THE PARTIAL FULFILLMENT OF THE REQUIREMENTS OF BACHELOR OF LAWS (LLB) 2025 DECLARATION I, MIKE MUKUKA of student No. LLB212462503 do hereby declare the contents of this research paper entitled "AN ANALYSIS OF THE JURISPRUDENCE OF INTERPRETING LEGISLATION: A COMPARATIVE STUDY WITH THE UNITED STATES OF AMERICA" which is hereby submitted to the School of Law at the University of Lusaka as part of the requirements for the award of the Bachelor of Laws (LLB) Degree, is my original work and that I have not in any respect used any persons work without acknowledging the same. DEDICATION This dissertation is dedicated to the people who have supported, encouraged and inspired me throughout not only law school but my entire academic journey thus far. To my guardians Christopher Chenga Mukuka and Himaala Mwiinga Mukuka, to whom I owe the person I am becoming, their relentless support and encouragement throughout my academic journey cannot be overstated. To my siblings who have always keenly looked up to and motivated me. Additionally, this work is also dedicated to the love of