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SCHOOL OF LAW

**EXAMINING THE INTERSECTION OF RELIGION AND EDUCATION IN ZAMBIA
THROUGH JURISPRUDENTIAL THEORIES: DRAWING LESSONS FROM KENYA,
MALAWI AND SOUTH AFRICA**

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

2025

DECLARATION

I, **Sungwe Maria Banda**, hereby declare that the dissertation entitled **EXAMNINING THE INTERSECTION OF RELIGION AND EDUCATION IN ZAMBIA THROUGH JURISPRUDENTIAL THEORIES: DRAWING LESSONS FROM KENYA, MALAWI AND SOUTH AFRICA** is solely my own and that it has to the best of my knowledge, not yet presented for any academic purposes in Zambia or elsewhere. Other peoples work used in the study has been acknowledged. The errors or omissions in this work are solely mine.

I hereby declare that I have read and understood the regulations governing the submission of the Bachelor of Laws Degree (LLB) dissertation including those relating to length and plagiarism, as contained in the rules of the University's policy and that this dissertation conforms to the regulations.

SUNGWE MARIA BANDA

A handwritten signature in black ink, appearing to read 'A Banda', is written over a light gray rectangular background.

2025

SUPERVISOR'S RECOMMENDATION

I RECOMMEND THAT this obligatory essay under my supervision

By

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Entitled

**EXAMINING THE INTERSECTION OF RELIGION AND EDUCATION IN ZAMBIA
THROUGH JURISPRUDENTIAL THEORIES: DRAWING LESSONS FROM KENYA,
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Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirement pertaining to the format laid down in the regulations governing directed research.

Supervisor: MS INONGE MUTEMWA

Signature:


12 / 11 / 2025
Date:

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ABSTRACT

This thesis was on the intersection of religion and education in Zambia through jurisprudential theories with lessons drawn from Kenya, Malawi and South Africa. The purpose of the study was to critically assess how judicial decisions have endeavored to assess the intersection of the right to religion and conscience and education in Zambia and how the pure law theory and historical theories of jurisprudence can help balance these conflicting rights as well as bring out the need to have a balanced approach that ensures that learners especially those from minority groups in learning institutions are allowed to express their religious beliefs and school rules are not couched in a way that they are restricted and therefore coexist in the same environment such as through having clear laws and policies that protect both rights. The objectives of this study included providing a critical examination on how different judicial decisions have interpreted the challenges and legal disputes that arise through the intersection of the right to education and the right to religion and conscience in Zambia, secondly to analyse the impact of the pure law and historical theory of jurisprudence on the judicial decisions and lastly, to explore the lessons that Zambia can draw from Kenya, Malawi and South Africa in protecting the rights to education and religion and conscience for purposes of adopting a neutral approach that ensure they exist in the same environment.

The methodology of the research was as follows; this research was a qualitative mode of research as data was collected from both primary and secondary sources which include local and foreign legislation, journal articles, internet sources and textbooks. Additionally, data was equally collected from select schools, both primary and secondary, in Lusaka. The research design used is action research.

The major findings of this research were that the reason behind the denial of learners been allowed to practice and express their religious beliefs in schools was due to the fact that were attempting to foster an environment that is uniform but in way this led to learners been discriminated upon. Schools also lack clear guidance from the necessary school authorities and the government on how to handle religious freedom hence it leaves room for different interpretations by school administrators which tend to be

segregative and discriminatory due to the fact that they are not knowledgeable on how a balance that accommodates religious beliefs is to be struck.

CHAPTER ONE

1.0 INTRODUCTION

With the evolvement that modern society has undergone, there has been a relationship between education and religion because as individuals access education, they bring with them their religious beliefs and conscience which at times tend to clash with the rules and policies that learning institutions have established. Consequently, there comes a problem of how the balance is to be struck between the right to education as well as the right of religion and conscience enshrined in different pieces of legislation and international instruments. According to **Britannica**,¹ religion is defined as what human beings consider holy, sacred, absolute, spiritual, divine or worthy of especial reverence as well as the way in which people deal with ultimate concerns about their lives and their fate after death. It can also be defined as a structure of faith and worship involving belief in a supreme being and usually containing a moral or ethical code that its believers are conformed to follow.

Education on the other hand as provided for in **S2** of the **Education Act**² is defined as the full development of an individual's judgment, personality, talents, mental and physical ability. It can also be defined as a mechanism created for purposes of receiving instructions in a systematic manner usually at a school or university. Education and religion are aspects that are recognized and codified as fundamental human rights both locally and internationally. However, numerous issues, debates, problems and legal disputes have arose in trying to balance these rights as learning institutions are likely to create policies for purposes of maintaining uniformity and discipline which are likely to go against the religious beliefs of individuals that are a part of the learning institutions hence there is need to have a balanced approach that will take a neutral path and will promote inclusivity while respecting an individual's religion and conscience without compromising the manner in which they access their education.

1.1 BACKGROUND OF THE STUDY

¹The Editors of Encyclopaedia Britannica, 'religion' available at <https://www.britannica.com/topic/religion> (accessed on 26 February, 2025)

² Act 3 of 2011

Human rights have a rich history both in Zambia and the world at large. The need for human rights was greatly emphasized after World War II following the extermination by Nazi Germany of over six million Jews which had terrified the world; this led to the birth of the United Nations and creation of the United Nations Declaration on Human Rights (UDHR)³. This international instrument has codified what the world considers to be most fundamental human rights and freedoms⁴ and acts as a guideline on what states are to enact as their fundamental human rights. Two treaties which are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights were created as a means of enforcing the rights in the UDHR.⁵ Zambia is no exception as it has provided for these rights in **Part III** of the **Constitution**⁶ such as the right to religion and conscience in **Article 23** as provided for in **Article 18** of the **International Covenant on Civil and Political Rights**.⁷

The right to education provided for in **S14 and S10** of the **Education Act**⁸ and the **Children's Code Act**⁹ respectively has also been codified in line with **Article 13** of the **International Covenant on Economic, Social and Cultural Rights**¹⁰. This means that every individual in Zambia has the fundamental privilege to access education at different stages of their life tailored to the needs of individuals and society at large.

However, these rights in Zambia have been seen to be in conflict with each other in many occasions such as in the case of **Feliya Kachasu v Attorney General**¹¹ and the recent case of **Nathan Mubanga (Suing in his capacity as the father and next friend**

³ Nancy Flowers, 'A Short History of Human Rights' available at hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm (accessed on 07 April, 2025)

⁴ Ilias Bantekas and Efythymios Papastavridis, *International Law* (Second Edition, Oxford University Press, 2015) 158

⁵ *ibid*

⁶ Chapter 1 of the Laws of Zambia

⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1977) UNTS 999 art 18

⁸ Act 23 of 2011

⁹ Act 12 of 2022

¹⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into 3 January 1976) UNTS 993 art 13

¹¹ (1967) ZR 145 (HC)

of a minor Chisanga Mubanga) and Another v Attorney General¹² which both involved the ability of school going children to be able to express their beliefs in relation to them accessing their statute given right of education.

1.2 STATEMENT OF THE PROBLEM

It is provided for in **Article 11 of the Constitution**¹³ that every person in Zambia shall be entitled to fundamental rights and freedoms such as the freedom of conscience regardless of their race, place of origin, political opinions, colour, creed, sex or marital status. This right is further explained in **Article 19** which provides that unless with his consent, no person will be hindered from enjoying his freedom of thought and religion and no person attending any place of education is to be forced to receive religious instructions or take part in activities that are different from his own. It is further provided for in **Article 23 of the Constitution**¹⁴ that no person is to be discriminated upon by any person acting by virtue of any written law or in performance of the functions of any public office or public authority based on different reasons such as their creed or colour. The aforementioned fundamental human rights and freedoms have caused and raised conflicts in the education sector. Every person in Zambia has the right to education which provided for in **S14 of the Education Act** and **S10 of the Children's Code Act**. These provisions provide that subject to the Constitution and the other provisions of the Act, a person has the right to early childhood education, basic education, and high school education and it is the responsibility of the government to make education progressively accessible and available to all persons. Despite Zambia's declaration as a Christian nation that still recognises other religions such as Rastafarian, this inclusivity and tolerance has not been reflected in its legal framework. The recent case of **Nathan Mubanga (Suing in his capacity as the father and next friend of a minor Chisanga Mubanga) and another v Attorney General** highlighted the conflict between the rules of an institution and individual rights specifically the right to education and religion. The court upheld the school's rule prohibiting dreadlocks asserting that it was not unreasonable and that he could attend a private school that would accommodate his

¹² (2023/HP/0403)[2025] ZMHC 3

¹³ Chapter 1 of the Laws of Zambia

¹⁴ ibid

beliefs. However, it can be seen that the ruling infringed on the minor's religious beliefs and denied him access to public education which is a right the government is obliged to make accessible. The decision also went against Zambia's constitutional principle of religious tolerance as well as society's collective conscience which has for a long period of time tolerated the existence of other religions and the supremacy of the Constitution which renders laws that contradict it null and void. Additionally, the ruling does not align with international human rights standards and exposes the lack of legal clarity on how to resolve conflicts between institutional policies and individual freedoms.

Various scholars such as **Philip Barnes**¹⁵ have observed the historical tension between religion and secular influences in education by looking at the social and cultural dynamics that have shaped the intersection of these fundamental aspects of society and how developments have led to the marginalization of religion in public education which could have various implications on individuals, communities and society.

This research aims to critically assess how judicial decisions have endeavored to assess the intersection of the right to education and the right to religion and conscience in Zambia and how the pure law theory and historical theories of jurisprudence can help balance these conflicting rights. This is because these theories will help with achieving the aim of this study which is striking a balance between the right to education and the right to religion and conscience.

1.3 RESEARCH OBJECTIVES

- i. To critically examine how different judicial decisions have interpreted the challenges and legal disputes that arise through the intersection of the right to education and the right to religion and conscience in Zambia.
- ii. To analyse the impact of the pure law and historical theory of jurisprudence on the judicial decisions.

¹⁵ Philip Barnes, 'Religion, education and conflict in Northern Ireland' (2005) 26 Journal of Beliefs & Values 123-138

iii. To explore the lessons that Zambia can draw from Kenya, Malawi and South Africa in protecting the rights to education and religion and conscience for purposes of adopting a neutral approach that ensure they exist in the same environment.

1.4 RESEARCH QUESTIONS

i. How have judicial decisions interpreted the disputes arising through the intersection of the right to education and right to religion and conscience?

ii. How do the pure law and historical theory of jurisprudence influence the interpretation and application of judicial decisions on the right to education and religion?

iii. What lessons can Zambia draw from Kenya, Malawi and South Africa in ensuring there is a balance between the right to education and the right to religion and conscience?

1.5 SIGNIFICANCE OF THE STUDY

The significance of this study is both practical and academic in nature as it will address the intersection of two fundamental rights which are education and religion in Zambia. This research seeks to contribute to the already existing scholarly writings on the issue by providing insight into how this issue can be looked at in Zambia thereby filling an important gap in existing literature.

Looking at it from a practical view, this study has the possibility of leading to the implementation of policies and legal reforms in Zambia. The identification of how the judicial decisions can be remedied through the use of theories of jurisprudence is likely to lead to legal mechanisms that aim to balance these rights once the recommendations of the study have been actualised. It will further add to future research as it will provide a foundation and framework to be used in Zambia when different fundamental rights intersect and how these issues can be assessed.

1.6 SCOPE OF THE STUDY

The study shall physically be conducted in Zambia and shall focus on analysing judicial decisions, specific theories of jurisprudence and the Constitution of Zambia¹⁶, Cap 1 of the Laws of Zambia which is the primary regulatory framework that governs human

¹⁶ Act 2 of 2016

rights in Zambia. It shall make use of various statutory instruments, policies and relevant authorities both locally and internationally. It shall explore how religion intersects with education by assessing the impact of the intersection on individual freedoms and rights as well as the potential impact on future cases and policies in educational institutions.

1.7 DEFINITION OF KEY TERMS

In this research, the following words and phrases will have the following definition:

Strike a balance: Accepting both parts of two conflicting things so as to find a compromise for both parties as opposed to one.

Religion: Beliefs, practices, morals and worldviews often related to a spiritual being.

Education: Discipline that is concerned with methods of teaching and learning.

1.8 LITERATURE REVIEW

The conflict between religion and education has been widely studied and addressed in existing literature focusing on the issues that may arise as a result due to their intersection. While the works and contributions of various scholars on the topic are greatly appreciated, there is need for further research on the topic for purposes of establishing how a balance can be struck through the use of the pure law theory and historical theory of jurisprudence in Zambia by drawing lessons from countries such as Kenya, Malawi and South Africa. This research aims to fill the gap by looking at this issue from a Zambian perspective. There are various scholars and authors who have written on the subject, some of them are:

Zhenzhou Zhao¹⁷ posits that in post Mao China, a growing number of students particularly those in higher education are embracing religion which poses a potential challenge to Marxist ideology deep-rooted in the school curriculum. This has sparked a dynamic phenomenon as students navigate the intersection of their religious and Marxist based knowledge acquired throughout their education. The study focused on exposing the complex interplay between different forms of knowledge that shape the

¹⁷ Zhenzhou Zhao, 'Knowledge and power: the interface between religion and education in China' (2018) 48 Cambridge Journal Of Education 141-156

beliefs and identities of students in China, highlighting the tensions between religious faith, Marxist ideology and academic inquiry. This research will add to the body of research as it will analyse the tension between education and religion from a Zambian perspective through the pure law theory and historical theory and the lessons that Zambia can draw from different jurisdictions such as Kenya, Malawi and South Africa.

Philip Barnes¹⁸ explored the historical tension between religion and secular influences in education by looking at the social and cultural dynamics that have shaped the intersection of these fundamental aspects of society and how developments have led to the marginalisation of religion in public education which could have various implications on individuals, communities and society. He also examined the role of religion in the Northern Ireland conflict, the positive role it would play in schools and its impact on the efforts to secularise education as well as the need for a balanced and inclusive approach that accommodates both secular and religious influences in Northern Ireland's schools and respects the diversity of religious beliefs and values. He advocated for the need to reconsider the relationship between the importance of religion and education which looks at the importance of religion in shaping individual identities and promotes a more inclusive and just education system. This research will equally look at the need to have a balanced approach; however, it will do so by analysing the intersection from a Zambian perspective through the pure law and historical theory of jurisprudence and draw lessons from specific case studies in Kenya, Malawi and South Africa.

Rhona K Smith¹⁹ looked at the relationship between education and religion by looking at the intersection of religious beliefs and educational policies and highlighting the challenges that arise when religious beliefs intersect with education policies. Her writing also discussed the role of education in promoting tolerance and the conflicts that can arise between religion and secular education by using the headscarf cases as a specific example. It equally argued for the need to reconcile human rights and cultural diversity in education and suggests that international and regional human rights bodies can play

¹⁸ Philip Barnes, 'Religion, education and conflict in Northern Ireland' (2005) 26 Journal of Beliefs & Values 123-138

¹⁹ Rhona Smith 'Religion and education: a human rights dilemma illustrated by the recent 'headscarf cases' (2007) 5 Globalisation, Societies and Education 303-317

a crucial role in providing guidance to help states balance individual rights with the need for inclusive and tolerant education systems. This research will be different from the above article as it focused on the intersection of these rights in at an international scale while this one will look at from within the Zambian region through the pure law and historical theory of jurisprudence for purposes of achieving a balanced approach for the achievement and enjoyment of both rights in the same environment by drawing lessons from cases from Kenya, Malawi and South Africa.

Carol Ferrara²⁰ criticized France's decision to ban public school students from wearing headscarves and abaya which is a long dress or robe popular among women in certain Muslim cultures as this ban sends a powerful message about who belongs in French culture effectively excluding Muslim students who wear these garments as part of their religious beliefs. Despite the reputation as a secular country, France has a tangled relationship with Catholicism; this is because some aspects of Christianity such as the wearing of the cross, Christmas trees among other things are publicly exhibited as opposed to been enjoyed in private. This resulted into causing harm to Muslim girls' educational success as well as increasing the employment gap between Muslim and non-Muslim women. This writing will equally discuss how laws such as judicial precedent have affected the educational prospects of individuals due to their religious beliefs which send a message to the Zambian students about who belongs in Zambian culture and schools but it will do so by analysing it in light of the pure law and historical theory of jurisprudence.

Marie Juul Petersen²¹ has stated that the right to religion is linked in important ways with the achievement of Agenda 2030 and the Sustainable Development Goals (SDGs) which include SDG 4 which is on education. Around the world, the right to education is routinely violated which could be through the access to quality education or a safe educational environment. However, for some children, the education sector itself is a

²⁰ Carol Ferrara, French schools' ban on abayas and headscarves is supposedly about secularism – but it sends a message about who 'belongs' in French culture' available at <https://theconversation.com/French-schools-ban-on-abayas-and-headscarves-is-supposedly-about-who-belongs-in-french-culture-213543> accessed on 19th March, 2024 at 20:33

²¹ M Petersen, 'Freedom of Religion or Belief and Education' (2018) 31 The Danish Institute for Human Rights

site for the violation and discrimination of the freedom to religion and conscience. This acts as an obstacle to achieving SDG 4 which is providing an inclusive and equitable for all. Laws and policies will equally restrict and violate students' right to religion in education especially students from religious minorities, indigenous communities and those with non-majority beliefs. In contrast, this research will analyse the intersection of these rights from a Zambian perspective and look at the pure law and historical theory of jurisprudence for purposes of striking a balance between these two conflicting rights for purposes of solving the problem.

Charles J Russo²² opines that since time immemorial, humans all over the world have recognized the need to call on a higher being and honour deities of their choice while engaging in the freedom of religion. However, this has not come without any problems and restrictions as nations limit the ability of many to hand down their beliefs to their children. As important as the freedom of religion is, tension persists in its interaction with a right equally important which is education. These rights are considered to be essential and religious freedoms in education rarely find sufficient protection in public or state funded elementary and secondary schools in many nations across the globe. This research will look at the tension of these rights from a Zambian perspective through the pure law and historical theory of jurisprudence for purposes of striking a balance between these two conflicting rights.

Ales Crnic and Anja Pogacnik²³ explored the intersection of religion specifically religious symbols and educational spaces. As European societies increase in number, the presence of religious symbols is being challenged while minority groups such as Muslims are expressing their faith through the use of veils. The writing highlighted the challenges in trying to balance religion and education as well as how different European countries manage religious symbols in schools with some completely banning and others such as Slovenia who has recognised the need for regulation and inclusive management of religion in public schools to promote religious freedom and equality.

²² Russo C, 'Religious Freedom in Education: A Fundamental Human Right ' (2015) 42(1) Religion and Education 17-33

²³ Ales Crnic and Anja Pogacnik, 'Religious Symbols in Public Schools: Key Issues and Debates', CEPS Journal 9 (2019) 4 109-127

This research will look at the need to have these intersecting aspects present in the same environment which is the school environment in Zambia through the use of the pure law and historical theory of jurisprudence so as to adopt a balanced approach.

1.9 METHODOLOGY

RESEARCH APPROACH

The approach of this research shall be qualitative. This approach is best suited as it allows and gives the author the freedom to determine the various methods to which information will be collected and analyse which is cardinal for this study.

1.10 RESEARCH TYPE

The paper shall be associational and will make use of case study analysis as it will help with the objectives of this study which is analysing the relationship between two variables which are education and religion.

1.11 RESEARCH DESIGN

The research design of this study will be action research as it will take the form of ensuring there is a balance between education and religion so as to change conditions in Zambia.

1.12 STUDY POPULATION

The population for this study will be derived from Zambia's population which currently stands at 21 million.

1.13 SAMPLE SIZE

The sample size for this study will be 30 as per the requirement of the institution.

1.14 SAMPLING TECHNIQUES

The technique used will be purposive sampling, a technique best suited for qualitative research and accomplishing the objectives of this paper as it will help with the gathering of detailed and professional information relating to the subject of the research from experienced study participants.

1.15 DATA COLLECTION

This research will make use of both the primary and secondary method of data collection. It will be used to collect data by acquiring information from journals, articles,

books, cases and legislation as well as interviews from different individuals and institutions.

1.16 DATA ANALYSIS

The data collected will be analysed through the use of interpretative phenomenological analysis which involves deriving interpretation of derived information gathered by the researcher.

1.17 ETHICAL CONSIDERATIONS

For purposes of ensuring the highest ethical standards, the researcher commits to use the OSCOLA referencing style so as to acknowledge the works of other authors so that their copyright is protected. The researcher will equally ensure that the objectivity and accuracy of the findings is reliable and trustworthy. The researcher will equally acquire approval from the University of Lusaka to conduct the study so as to ensure compliance with the academic community's ethical standards.

CHAPTER TWO

2.0 A CRITICAL EXAMINATION OF THE JUDICIAL DECISIONS THAT ARISE FROM THE INTERSECTION OF THE RIGHT TO EDUCATION AND THE RIGHT TO RELIGION AND CONSCIENCE IN ZAMBIA

2.1 INTRODUCTION

The interplay between education and religion has led to major legal controversies in Zambia which are usually as a result of litigants wanting to be excluded from certain practices or be permitted to wear their religious attires while they are in learning institutions. Therefore, this chapter will aim to critically exam how different Zambian judicial decisions that stem from the intersection of the right to religion and education have been interpreted by looking at the facts, legal reasoning and precedential impact. It will also look at the impact that the judicial decisions have on the legal landscape in Zambia.

2.2 THE BILL OF RIGHTS, THE FREEDOM OF RELIGION AND CONSCIENCE AND ITS LIMITATION

The Bill of Rights refers to a summary and list of fundamental rights and freedoms a government guarantees its citizens often enshrined in a country's Constitution.²⁴ This is the case in Zambia as the fundamental rights and freedoms can be found in **Part III** of the **Constitution**²⁵. One of the fundamental rights provided for is the right to religion and conscience as per **Article 19**.²⁶ This means that every individual is allowed to hold and express their beliefs, opinions, take part in religious practices and/or thoughts in a private or public space without their enjoyment being hindered or violated by another individual or the government. This helps individuals engage in self-determination and autonomy as they will be able to decide what beliefs and opinions they would like to have and express therefore giving room for diversity to flourish. The right is not absolute in that it has and is subject to limitations which can be found in **Article 19(5)** of the **Constitution**²⁷ which include in the interest of public safety, order, morals or healthcare,

²⁴ Merriam Webster, 'Bill of rights' available at <https://www.merriam-webster.com/dictionary/bill%20of%20rights> (accessed on 30 July 2025)

²⁵ Chapter 1 of the Laws of Zambia, art 19

²⁶ *ibid*

²⁷ Chapter 1 of the Laws of Zambia, art 19

if it is reasonably justified in a democratic society and for the protection of the fundamental rights and freedoms of others.

2.3 AN IN DEPTH ANALYSIS OF THE CASE OF NATHAN MUBANGA (SUING IN HIS CAPACITY AS THE FATHER AND NEXT FRIEND OF CHISANGA MUBANGA) AND ANOTHER V ATTORNEY GENERAL

A brief summary of the facts are that the minor in the case was accepted at a government school which is Kasama Boys Secondary School to start his grade 8 in 2023. The applicant signed a pledge provided for in the acceptance letter that included a declaration not to engage in riotous behaviour and this pledge did not expressly or impliedly include any rule requiring the minor to denounce his religious beliefs.

When the minor finally reported for school, he was chased by the head teacher who demanded him to cut off his dreadlocks to which the first petitioner explained to the school that the minor is a member of the of the Rastafari Religious organization and he had taken up the Nazarene vow which strictly prohibits the cutting of hair and that such an act goes against the minor's religious beliefs under the said religion. Despite this explanation, the minor was still denied access and the opportunity to attend school and it was insisted that the minor would only be allowed to attend classes at Kasama Boys Secondary School if he cuts off his dreadlocks.

This led to a court matter where it was held that the minor's rights were not violated and has not been hindered as the requirement for him to cut off his dreadlocks in order to have access to the school as there were considered to be an improper wearing of the school uniform was not unreasonable and could attend a private school as opposed to a government school if he so wished where he could keep his dreadlocks as the school rules have to be followed generally by all students in order to promote uniformity, public order and unity. It was also stated that the school authorities had the legal rights to set conditions for attendance at the school in order to maintain order at their school.

2.4 CRITIQUE OF THE JUDICIAL DECISION

This decision failed to balance the right to education and the right to religion because instead of requiring the learning institution to accommodate religious freedom, it instead validated the discriminatory school rules thereby sending a message to minority groups

that their beliefs were not welcome in public learning institutions. It is important to ensure that learning institutions are a place that accommodates different religious practices without compromising its student's education.²⁸ The lack of this forces pupils to conform to practices that are not in line with their beliefs therefore going against the constitutional guarantees of non-discrimination, conscience and religious freedom.

2.5 AN IN DEPTH ANALYSIS OF THE CASE OF FELIYA KACHUSU V ATTORNEY GENERAL

The brief facts of the case are that the applicant was a Jehovah Witness and pupil at a government school which is Buyatanshi Primary School in Mufulira. She was taught that it was against her beliefs to worship idols, sing songs that praise anyone but Jehovah or salute. Following the enactment of the Education (Primary and Secondary) Regulations in 1996 which required all pupils in government or government aided schools to sing the national anthem and salute the national flag, the applicant was suspended from school as she did not sing the national anthem. An explanation was given by the applicant's father to the school authorities as to why she did not sing which was that she was a Jehovah's Witness and it was against her religious conscience to do so and asked to be reinstated and excused. Despite this, the applicant was not given access to the school and it was made clear that the applicant would only be reinstated if she agreed to comply with the regulations when required to.

This led to a court dispute where it was decided that the applicant's right to religion was not hindered or violated as the regulations were justified and reasonable in a democratic society such as Zambia hence there were appropriate to ensure compliance with school requirements and if students were not ready to comply, they should leave as she was not compelled to attend a government school. The Court equally stated that what had been hindered was the applicant's right to education which was not granted by the Constitution.

2.6 CRITIQUE OF THE JUDICIAL DECISION

²⁸ C.R. Whittaker, S Seland and H Elhoweris, 'Religious Diversity in Schools: Addressing the Issues' (2009) 44(5) Sage Journals

The decision showed that the court gave more priority to state interest as opposed to an individual's freedoms and rights when it decided to uphold the education regulations and rules of the school which in effect and practice were against the religious practices of the applicant. This interpretation shows that fundamental rights and freedoms are inferior to regulations passed by the government. The decision equally failed to balance the two fundamental rights thereby failing to consider that a true democratic society protects the rights of everyone especially those of minority groups.

2.7 MEANING OF HINDERANCE FROM OTHER CASES

Hindrance is defined as the state of being interfered with, held back or slowed.²⁹ With regards to the hindrance of a fundamental right or freedom, it can be defined as the state of one being held back from enjoying their given and guaranteed freedoms. Although occurring in a non-educational setting, the word was defined in the case of **Kelvin Haangandu v Law Association of Zambia**.³⁰ The brief facts of the case are that the appellant was a Seventh Day Adventist after converting from the Catholic Church. He was a member of the Law Association of Zambia since 1996 when he was admitted to the bar. The Adventist Church considers the day of Saturday to be sacred and set aside for worship, absenteeism from work and non-participation in non-religious activities therefore the appellant brought an issue before the court because the Law Association of Zambia held its annual general meeting on Saturday which was against his beliefs and therefore discriminatory.

The appellant appealed to the Supreme Court and it upheld the lower court's decision as it was its view that the respondent did not infringe on the appellant's right and the decision to hold meetings on a Saturday was made long before the appellant was a member of the Association. The Supreme Court went a step further and provided for the definition of the word 'hindrance' as it considered it to be the operative word in Article 19(1) of the Constitution which provides for the right to religion. It did so by relying on the dictionary which defined it as an impediment, obstacle, barrier, bar obstruction,

²⁹ Merriam Webster, 'hindrance' available at <https://www.merriam-webster.com/dictionary/hindrance> (accessed on 30 July, 2025)

³⁰ SCZ Judgment No 36 of 2014

restraint, restriction, limitation, encumbrance that tends to abrogate fundamental rights and freedoms that would require judicial intervention and redress.

From the foregoing, it shows that according to the Zambian courts, in order for one's rights to be hindered, it must be shown that one took positive action by creating an obstacle that prevented another from enjoying their rights or limiting their ability to exercise their fundamental rights and freedoms thereby hindering them.

By reason of what has been stated above, it can be seen that the Education Regulations in the case of **Feliya Kachasu v Attorney General** and the school rules in the case of **Nathan Mubanga (Suing in his capacity as father and next friend of a minor, Chisanga Mubanga) and another v Attorney General** were the positive action taken by the relevant authorities that limited the ability of the individuals that were pupils at various schools from enjoying and exercising their rights to education and religion and conscience.

2.8 PRECEDENTIAL IMPACT OF THE JUDICIAL DECISIONS ON ZAMBIA'S LEGAL FRAMEWORK

Precedent is defined as a doctrine which is a custom of the courts to stand by previous decisions so that once a point of law is decided upon by the courts, then the same law must be applied to future cases with materially similar facts.³¹ It can also be defined as a court decision that becomes authority and a guideline for courts when deciding future cases that share similar facts with the case that set the guideline. Zambia being a former colony of the British Empire is a common law country³² and therefore makes use of the principle of precedent which is one of the characteristics of the common law legal system. It can either be binding or persuasive where binding means that a court is bound to follow the precedent set in a decided case whatever the result of its application and persuasive precedent is one which is not absolutely binding but which may be

³¹ LexisNexis, 'Doctrine of precedent definition' available at <https://www.lexisnexis.co.uk/legal/glossary/doctrine-of-precedent> (accessed on

³² Margaret Munalula, *Legal Process: Zambian Cases, Legislation and Commentaries* (University of Zambia Press, 2004) 214

applied which means that a judge may consider it and decide that if it is the correct principle which is relevant to the facts in the case before him.³³

The doctrine of precedent is embodied in the principle of stare decisis which is a Latin phrase that means “stand by things said”³⁴. In effect, this means that courts are expected to abide by the decisions made in previous decisions as it provides a guideline on how future cases are to be decided hence influencing the way laws are interpreted by the courts. This ensures that the law is uniform and predictable as it will be possible to determine how a matter is to be settled and will equally apply to each and every individual.

The Zambian Courts have pronounced themselves on this principle in different cases such as in ***Abel Banda v The People***³⁵ and ***Kasote v The People***³⁶ where the court stated that in order to have certainty in the law, the Supreme court should stand by its decisions even if they are erroneous and/or outdated unless there is a sufficiently strong reason that such decisions should be overruled such as in the interest of justice and the development of the country’s jurisprudence as per **Article 125(3) of the Constitution**.³⁷

The case of ***Feliya Kachasu v Attorney General***³⁸ set a bad precedent in Zambia which was mostly due to the fact it was decided upon in reliance on a foreign case which is ***Minersville School District v Gobitis***.³⁹ Given the fact that the case was not from within the Zambian jurisdiction, it did not accurately align with the country’s unique and specific values, legal principles and social and legal frameworks that advocate for the need to protect fundamental human rights and the extent to which country has obligations under international law may differ.

³³ Thomas Reuters Practical Law, ‘Stare Decisis’ available at [https://uk.practicallaw.thomsonreuters.com/3-509-2489?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#:~:tex=Binding%20precedent.,or%20outcome%20of%20that%20decision](https://uk.practicallaw.thomsonreuters.com/3-509-2489?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:tex=Binding%20precedent.,or%20outcome%20of%20that%20decision). (accessed on 6 august, 2025)

³⁴ Cornell Law School, ‘stare decisis’ available at https://www.law.cornell.edu/wex/stare_decisis (accessed on 6 August, 2025)

³⁵ (S.C.Z Judgment 25 of 1986) [1987] ZMSC 1 (27 January 1987)

³⁶ (1977) ZR 75 (SC)

³⁷ Constitution of Zambia (Amendment) Act No 2 of 2016

³⁸ (1967) ZR 145 (HC)

³⁹ 310 US 686 (1940)

The decision also impacted future cases that involved religion and education such as the recent case of ***Nathan Mubanga (suing in his capacity as the father and next friend of Chisanga Mubanga, a minor) and another v Attorney General***.⁴⁰ However, this impact has not been positive as it has been shown that education and religion cannot exist in the same environment as individuals are expected to choose to enjoy one right at the expense of another. This would further mean that public learning institutions are likely to have the authority to have rules for the purposes of discipline and conformity which will be against an individual's religious expression and identity.

Furthermore, both decisions have the impact of placing unnecessary restrictions on courts when faced with cases that involve the right to education and religion and conscience as they will be bound to follow the decisions of the two aforementioned cases even if they are erroneous hence it will cause on going injustice because the cases that set the precedent were decided on a flawed foundation since it is probable that future judges will see the need to depart from the two cases but will not be able to due to the doctrine of precedent. This will cause the public to lose confidence in the judicial system particularly among minority and marginalised groups who are likely to be affected by these decisions due to the ongoing violations of their fundamental human rights and freedoms

2.9 THE RIGHT TO EDUCATION IN THE INTERNATIONAL SCENE AND ZAMBIA

The right to education is a universally recognised and enshrined fundamental right due to its inclusion in various international instruments thereby forming an important part of international human rights law. This is due to it being a right that empowers individuals to reach their full potential and effectively contribute and participate in society. Education provides a human being with essential tools for civilised behaviour and a gateway to an intellectually stimulation fulfilling life hence the recognition of the right is likely to foster peace and friendly relations between nations and all racial or religious groups.⁴¹ It has been included and codified in different international instruments such as

⁴⁰ 2023/HP/0403

⁴¹ Javaid Rehman, International Human Rights Law (Second Edition, Pearson Education Limited, 2010) 160

in **Article 13 of the International Covenant on Economic, Social and Cultural Rights**⁴².

A number of countries have recognised the importance of this right as they are state parties and have ratified the convention such as Mali⁴³ who has included this right in its constitution as provided for in **Article 18 of the Malian Constitution**⁴⁴ which guarantees the right to education by stating that every citizen has the right to education and public education is mandatory, free and non-religious while private education is recognised and must be carried out according to the conditions defined by law. This therefore indicates that Mali has taken a commitment to fulfill its international law obligation to grant and protect the right to education and dedication to ensuring accessible education for all thereby aligning its national commitments with its international law obligations. Another country that has recognised the importance of the right to education is Poland as it is a state party to the International Covenant on Economic, Social and Political Rights and has included the right in its constitution is Poland which guarantees the right to education by providing free access to education in public schools and higher education institutions by stipulating that education is compulsory until the age of 18 and is the duty of public authorities to ensure universal and equal access to education and to this end provide financial and organizational support to students.⁴⁵

This right has been legally recognised in Zambia given its ratification and harmonisation in different pieces of legislation such as the Children's Code Act and the Education Act for purposes of protecting this fundamental right. These provisions identify each person's right to early childhood education, basic education and high school

⁴² International Covenant on Economic, Social and Cultural Rights (adopted 16 December, 1996, entered into 3 January 1976) UNTS 993 art 13

⁴³ United Nations Human Rights Treaty Bodies, 'Ratification Status for CESCR – International Covenant on Economic, Social and Cultural' available at https://tbinternet.ohcr.org/_layouts/15/TreatyBodyExternal/treaty.aspx?treaty=cescr&lang=en (accessed on 6 August, 2025 at 21:40)

⁴⁴ Constitution of Mali 1992

⁴⁵ Polish Eurydice Unit, 'The system of education in Poland 2025' available at https://www.frse.org.pl/brepo/panel_repo_files/2024/12/17/cblhay/the-system-of-education-in-poland-2025-online.pdf (accessed on 6 August, 2025)

education.⁴⁶ These provisions equally ensure that every individual has access to free basic education and prohibits discrimination in educational institutions thereby guaranteeing equal access for every individual. However, this right is not safeguarded by the constitution and as a result its enforcement and protection is limited because citizens can not directly petition its violation in court as it is considered to be a right that the government is not obligated to provide hence there is an absence of accountability on the government's part given the fact that it is not justiciable despite having an obligation under the international covenant to abide by the obligations contained in the covenant.

2.10 CONCLUSION

The determination of disputes between education and religion in Zambia has continuously remained to be a complex legal hurdle hence this chapter has shown how the Zambian courts have interpreted the decisions that come from the intersection of education and religion and has criticised these decisions as they have not lived up to the values, standards and principles of the constitution that advocate for religious tolerance all in all areas such as education. It has equally shown how the principles of precedent and stare decisis that aim to ensure that there is equality, consistency and uniformity with regards to the decisions made by the courts in a legal system can be used to prevent the achievement of justice and equality due to a bad precedent been set by an earlier case which has continued to affect future cases in a negative manner due to the continued discrimination of minority groups. It has also shown how the courts have pronounced themselves on the definition of hindrance and the steps that other countries have taken to ensure that the right to education is protected regardless of one's religious affiliations.

⁴⁶ Right to Education Initiative, 'Right to Education Country Factsheet Zambia' available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Country_Factsheet_Zambia_2012.pdf (accessed on 29 July, 2025)

CHAPTER THREE

3.0 JURISPRUDENTIAL ANALYSIS OF THE JUDICIAL DECISIONS THAT ARE AS A RESULT OF THE INTERSECTION OF THE RIGHT TO RELIGION AND EDUCATION THROUGH THE USE OF THE PURE LAW AND HISTORICAL THEORY OF JURISPRUDENCE

3.1 INTRODUCTION

This chapter will aim to analyse judicial decisions that arise due to the intersection of the right to religion and education in Zambia through the lens of two very distinct but equally important theories of jurisprudence which are the pure law theory and historical theory. This analysis will be done by looking at the impact and effect these theories are likely to have on the judicial decisions and how they can influence them as well as steps that can be taken to ensure that the courts are in line with these theories.

3.2 OVERVIEW OF JURISPRUDENCE

Jurisprudence which is a word derived from the Latin term 'Jurisprudential' which means knowledge of the law is defined as the study that deals with the fundamental principles and various concepts of law.⁴⁷ Ulpian, a Roman jurist defined it as the knowledge of things divine and human, the science of the just and unjust.⁴⁸ This definition emphasises the importance of differentiating between just and unjust actions as society aims to achieve justice. It can equally be defined as what different schools of thought consider what valid law should look like depending on its origin and key legal concepts that make up the legal theory for purposes of understanding how the law operates in different spheres of society. Jurisprudence therefore helps different stakeholders deeply understand the law, its impact on individuals and society as a whole, address legal issues and help with the further development of the law.

The development of jurisprudence has been shaped by different time periods but its early beginnings and deep roots can be found in Roman Times where the Romans analysed and explored the importance and nature of law. The Romans took a restrictive approach which was limited by the blurred lines used to approach the ideas of law and

⁴⁷ LexisNexis, 'An Introduction to Jurisprudence: Complete Guide available at <https://www.lexisnexis.in/blogs/introduction-to-jurisprudence/> (accessed on 15 August, 2025)

⁴⁸ Edgar Bodenheimer, Province of Jurisprudence, 46 Cornell Law Review 1 (1960) available at <https://scholarship.law.cornell.edu/clr/vol46/iss1/1> (accessed on 15 August, 2025)

ethics.⁴⁹ After the Roman Empire fell, Roman jurisprudence declined and Christian thought emerged and dominated what was earlier known as Roman jurisprudence. This Christian thought came with secularism which meant that religion was separated from political and public life thereby ensuring that the state was neutral in matters that concerned religion. This made room for new perspectives on law and jurisprudence which led to the exploration of new methodologies and the emergence of new ideologies that facilitated the occurrence of distinct theories and jurists each with different interpretations of the law and jurisprudence.

Theories such as naturalism, positivism, pure law, realism, utilitarianism, sociological and historical emerged as a result of the emergence of different ideologies; however, this chapter will focus on the pure law theory and historical theory of jurisprudence.

3.3 PURE LAW AND HISTORICAL THEORY OF JURISPRUDENCE

The pure and historical theories of jurisprudence are very fundamental theories in the sphere of jurisprudence as they offer very distinctive and key perspectives on the source, nature and what is considered to be valid law as well as its development. They equally offer different implications with pure law focusing on the hierarchy of norms and historical theory focusing on how tradition and customs shape the law therefore highlighting the complexity and richness of jurisprudence.

3.3.1 PURE LAW THEORY

The pure law theory is one of the theories of jurisprudence and is a sect from the positive law theory which asserts that in order for laws to be valid, they must come from human hands such as a sovereign and there must be a separation of law and morality.⁵⁰ Hence, it can be seen that all individuals that believe in the pure law theory are by extent and effect equally believers of the positive theory due to the fact that philosophers such as **John Austin** propounded that in order to have valid laws, they

⁴⁹ LexisNexis, 'An Introduction to Jurisprudence: Complete Guide available at <https://www.lexisnexis.in/blogs/introduction-to-jurisprudence/> (accessed on 15 August, 2025)

⁵⁰ Hans Kelsen, 'What is the Pure Law' (2017) Law and Morality 101-108

must originate from a sovereign authority but he went further by stating that it must have sanctions attached to it⁵¹.

The pure law theory equally believes in laws coming from a sovereign authority as propounded by **Hans Kelsen** who is considered to be the key leading figure of the theory who stated that the positive nature of law can be found that it is created and annulled by human beings therefore it is independent from morality and similar norm systems.⁵² In order for one to understand the essence of the law, one would have to exclude all extraneous and non-logical elements such as moral, sociological, psychological and political factors.⁵³ This means that laws must be kept in their purest form and should stand on its own therefore nothing such as sociology, morals, politics and should be considered when they are been enacted and applied.

Kelsen described the legal process as a hierarchy of norms and the validity of each norm other than the basic norm resting upon a higher norm.⁵⁴ This means laws are considered to be valid according to a structure and each part of the structure obtains its validity and authority from the layer above it other than the basic norm which is the grundnorm which needs no validation from a higher layer as it is accepted hence each norm derives its validity from the norm above it until it reaches the grundnorm. He developed the idea of a grundnorm in his article, 'Pure Theory of Law' which means the highest norm that is accepted of other legitimate norms hence society's conduct is to be in line with what the grundnorm prescribes.⁵⁵ This is because the grundnorm is a fundamental principle that provides a foundation on which all laws and the entire legal system rests.

The grundnorm is no longer a hypothesis but a fiction of laws hence its existence no longer has to be proven as it has been accepted to be a necessary fiction created for

⁵¹ Rajib Hassan, 'Law Is a Command of the Sovereign Backed by Sanction: Austinian Command Theory of Law-Revisited' (2023) 6 International Journal of Law Management and Humanities 2110 - 2112

⁵² Henry Cohen, 'Kelsen's Pure Theory of Law' (1981) 26 The Catholic Lawyer 147-157

⁵³ Denise Meyerson, Understanding Jurisprudence (Routledge Cavendish, 2007) 26

⁵⁴ Michael Freeman, Lloyd's Introduction to Jurisprudence, (Ninth Edition, Sweet & Maxwell, 2014) 254

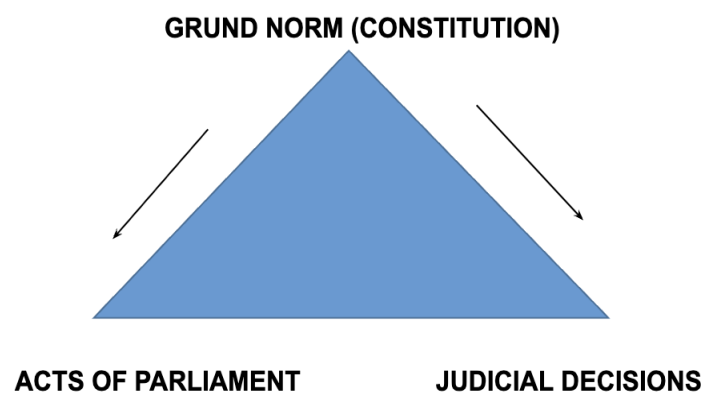
⁵⁵ Pushupa Sharma, 'The Rule of Recognition and Basic Norm' (2019) 6 International Journal of Emerging Technologies and Innovative Research 290-294

supporting the legal system.⁵⁶ The grundnorm might not be the same in every legal system but it is always there either in the form of a written constitution or the will of a superior.⁵⁷ In order for the norms created by the grundnorm to be considered legally valid, they should be effective and obeyed in society and the reason behind their validity is to be considered together with the constitution which acts as a physical representation of the grundnorm and authorises their creation therefore the norms below the grundnorm should be created in accordance with it.⁵⁸

By reason of what has been stated above, it can be concluded that the basic principles that govern the pure law theory are autonomy of the law, separation of law and morality, hierarchical nature which means that all laws should be in line with the grund norm and normativity.

3.3.2 ILLUSTRATION OF THE PURE LAW THEORY EXPLANATION:

At the apex of the triangle is the grundnorm which represents the highest norm of a legal system and from it other norms which can be considered laws such as Acts of Parliament and Judicial Decisions are below it therefore showing that they are deriving their validity and authority from the Constitution.



3.3.3 INFLUENCE OF THE PURE LAW THEORY OF JURISPRUDENCE

By reason of the fact that the pure law theory emphasises the separation of the law from other factors such as politics and morals among other things, this will have an influence in the manner that laws are to be enacted as this will be done in a way that ensures that the concept of purity of the law is achieved and the law has its source from one norm as its foundation. This ensures that there is a combined and centralised legal structure

⁵⁶ Law Notes, 'Kelsen's Pure Theory of Law available at <https://lawnotes.co/kelsens-pure-theory-of-law> (accessed on 20th August, 2025)

⁵⁷ *ibid*

⁵⁸ Denise Meyerson, *Understanding Jurisprudence* (Routledge Cavendish, 2007) 27

where all laws are related in some way to each other and derive their authority from the grundnorm which is the constitution. It equally ensures that laws are analysed and understood as there are written as opposed to understanding them in way as they should be written. This ensures legal certainty because once laws are formulated in way that eliminates all external factors; they will not be based on subjective notions where every individual as their own idea on what justice actually looks like.

The pure law plays an important role in constitutional law by enabling courts to assess the constitutionality of government actions and laws.⁵⁹ This is done by allowing courts to be protectors of the constitution who would guarantee that that all government actions and laws were in line with its core principles as this prevents the norms below the constitution from contradicting it. It also provided assurance that the rule of law would be preserved without the involvement of extra-legal factors.

3.3.4 HISTORICAL THEORY OF JURISPRUDENCE

The historical theory emerged as a reaction to the natural law thinking of the eighteenth century and it was mostly prolific in Germany.⁶⁰ The understanding behind the theory is that the law is an evolutionary process and concentrates on the origins and history of the legal system in that the laws have already acquired a certain trait that is unique to it.⁶¹ This means that in order for one to truly understand any law or regulation, it is important to look at the historical development of a particular society and is tied to the morals, culture or tradition of the people. Various philosophers have expressed their views on this theory such as **Friedrich Carl von Savigny** who stated that law was not an act of a legislator but a concept that has developed as a response to the people's national spirit which is known as the *volksgeist*.⁶² He equally stated that the law was deeply rooted in the past of a nation and its true sources were popular faith, custom and common consciousness of the people and its constitution, language and the manners of

⁵⁹ Nikita Ghimire, 'Pure Theory Unveiled: Kelsen's Legacy in Modern Jurisprudence' available at https://www.researchgate.net/profile/Nikita-Ghimire-2/publication/390662849_Pure_Theory_Unveiled_Kelsen%27s_Legacy_in_Modern_Jurisprudence (accessed on 5th September, 2025)

⁶⁰ Michael Freeman, Lloyd's Introduction to Jurisprudence, (Ninth Edition, Sweet & Maxwell, 2014) 911

⁶¹ Celsus Paul E Ekweme, 'The Postulate of the Historical Law Theory and Conflict of Laws: An Articulation of African (Ukele) Communal Legalism' (2020) 1 Journal of Rare Ideas 86

⁶² Michael Freeman, Lloyd's Introduction to Jurisprudence, (Ninth Edition, Sweet & Maxwell, 2014) 913

its people was to be determined by the peculiar character of a nation which is its national spirit.⁶³ This means it is not required to have laws coming from a sovereign authority due to the fact that laws will organically and naturally develop through the use of customs, tradition and what society has decided to be regulated by and the laws imposed suddenly on a society without considering the people's spirit may be not considered valid because true law comes from the people's collective identity and spirit. **Otto von Gierke** also stated that the growth of the law and associations throughout can be traced to the development of the law.⁶⁴ This means that in order to ascertain what the law is in a particular society, one should look at society's practice.

3.3.5 ILLUSTRATION OF THE HISTORICAL THEORY OF JURISPRUDENCE EXPLANATION:

At the base of the pyramid is the volkgeist which represents the spirit of the people and collective consciousness which includes its customs and traditions. It equally sets a foundation for the law by demonstrating that laws do not just arise but they originate society's shared values, traditions and cultures over time.

The middle layer of the pyramid comprises the legal institutions that are put in place to enact, codify and develop the law according to the volkgeist. They act as a link between the spirit of the people and the state.

The layer at the top of the pyramid represents the role that the state plays which is ensuring that the laws enacted and codified as a result of the volkgeist are enforced by



⁶³ Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Fourth Indian Reprint, Universal Law Publishing Co, 2004) 71

⁶⁴ Otto von Gierke, 'The Social Role of Private Law' (2018) 19 *German Law Journal* Volume 1018

the state which is done by ensuring that they are followed and applied equally to each and every individual.

3.3.6 INFLUENCE OF THE HISTORICAL THEORY OF JURISPRUDENCE

The historical theory influences the law by advocating for the importance of continuing the history and tradition of a particular society as well as its cultural identity when laws are being created and interpreted. This means that the traditions, customs, culture and collective consciousness of a society must be reflected in the laws that are present. This has led to the understanding of the law as something that is an organic product of a particular society as opposed to something that originates from the divine or sovereign rulers. It has equally helped with the respect and recognition of long standing practices and customary law as valid sources of law as can be seen in Zambia where **Article 7 of the Constitution**⁶⁵ includes customary law as one of the sources of law.

The theory has equally influenced authors from Nigeria to refer to laws emanating as a result of colonialism such as British laws to be alien and are not applicable to the Nigerian society with diverse ethnic groups due to the fact that British laws were created to cater for the British community who are very distinct from the Nigerian community.⁶⁶ Hence, the Nigerian parliament should rise up and exercise its primary duty by enacting laws that accommodate and leave room for Nigerian traditions, cultures and customs. Judges should also incorporate historical and cultural factors in the judicial decision making process.

3.4 APPLICATION OF THE PURE LAW AND HISTORICAL THEORY IN ZAMBIA

In countries such as Zambia which has a grund-norm physically represented by virtue of its constitution, it is cardinal that its laws are in accordance with it. This can be seen in **Part I of the Constitution**⁶⁷ which provides that the Constitution is the supreme law of the land and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of its inconsistency. This captures

⁶⁵ Act No 2 of 2016

⁶⁶ Majebi Samuel Ammune, 'Critical Appraisal of the Impact of Historical School of Jurisprudence in Nigeria Legal System (2025) 9 Irish International Journal of Law, Political Sciences and Administration 261-278

⁶⁷ Act No 2 of 2016

Kelsen's beliefs as it is seen that the Constitution is the country's grund-norm (highest norm) and all other norms such as statutes (lower norms) obtain their authority from it. This can be seen in the case of *Thomas Mumba v The People*⁶⁸ where it was stated that in countries like Zambia where there is a written constitution, the Constitution is the supreme law, any other laws are made because the Constitution provides for their being made; and are therefore subject to it. It follows therefore that unless the Constitution is specifically amended, any Act that is in contravention of the Constitution is null and void.

The application of the historical theory in Zambia can be seen in the way that **Article 8 of the Constitution**⁶⁹ provides for the country's national spirit which includes patriotism, national unity, human dignity, equity, social justice, equality and non-discrimination among other things as society's volksgeist and collective consciousness which are to be used as guidelines when interpreting the Constitution and enacting and interpreting any law as provided for in **Article 9 of the Constitution**.⁷⁰

Zambia's application of its national spirit specifically on non-discrimination can be seen in how for a long period of time the country has engaged in religious tolerance by not discriminating or excluding any religion thereby accepting and respecting different individuals to hold and practice their beliefs with no interference or hostility. This tolerance can be traced to as far as before Zambia's independence in 1949 where a mosque known as the Nchanga Mosque was built in Chingola⁷¹ was operating alongside a Jewish synagogue which was the Lusaka Hebrew Congregation which was founded in 1910.⁷² This prompted the creation of the Council for Zambia Jewery in 1978 which was an association created for purposes of representing the collective interests of the Jewish community.⁷³ This can similarly be seen in the present as it has been

⁶⁸ (1984) ZR 38 (H.C)

⁶⁹ Act No 2 of 2016

⁷⁰ *ibid*

⁷¹ Let Aquila Speak, 65 years, Behold a Zambian Mosque, available at <https://aquilaspeaks.com.wordpress.com/2014/08/21/65-years-behold-a-zambian-mosque/> (accessed on 22 August, 2025)

⁷² Africansynagogues, Zambia, available at <https://www.africansynagogues.org/html/countries/zambia/zambia3.html> (accessed on 22 August, 2023)

⁷³ World Jewish Congress, Zambia, available at <https://www.worldjewishcongress.org/en/about/communities/ZM> (accessed on 22 August, 2025)

reflected that the country is a multi-cultural society with Christianity been the dominant religion with also a significant adherence to Islam, Hinduism and other indigenous beliefs which contributes to society's collective norms thereby creating a unique environment for religious exploration.⁷⁴

This shows that Zambia has for a long time tolerated the practice of different religious to be ongoing in the country which by extent can be considered to be the country's tradition as it has met the requirements of a valid custom which are as provided for in the case of *Kaniki v Jairus*.⁷⁵

3.5 HOW THE PURE LAW THEORY AND HISTORICAL THEORY OF JURISPRUDENCE AFFECTS THE DECISIONS ON THE RIGHT TO RELIGION AND EDUCATION

The **Constitution of Zambia**⁷⁶ in its preambles states that the people of Zambia intend to uphold the human rights and fundamental freedoms of every person. In pursuance to this, various rights have been granted such as the right to religion by virtue of **Article 19(1) of the Constitution**.⁷⁷ It is further provided for in **Article 19(2)** that no person attending any place of education shall be required to receive religious instruction or take part in or attend any religious ceremony if that instruction or ceremony relates to a religion other than his own.

Due to this, the intersection of the right to religion and education in Zambia where the Constitution explicitly guarantees the right to religion in all aspects including educational environments, the pure law theory will influence judicial decisions in a manner that judges will critically analyse constitutional provisions and any other relevant legislation that involve religion and education and apply them exactly how they are written hence the court will not base its decision on moral or social factors instead it will base it on the application of the provisions in the Constitution. This will be done by the courts ensuring that their decisions are based on the constitutional norms such as guaranteeing that

⁷⁴ Afro Discovery, Religious Diversity in Zambia: Exploring Faith Traditions and Practices, available at <https://afrodiscovery.com/country/zambia/zambia-religious-diversity-in-zambia-exploring-faith-traditions-and-practices> (accessed on 23 August, 2025)

⁷⁵ (1967) Z.R 71 (H.C)

⁷⁶ Act No 2 of 2016

⁷⁷ Chapter 1 of the Laws of Zambia

students are allowed to manifest their religious practices in school while balancing their education. Therefore, any conflict arising from the intersection of religion and education will be settled by using an approach that will not exhibit preferential treatment over one religion that will override the constitutional provision that safeguards religious tolerance in educational settings.

The historical theory of jurisprudence will affect judicial decisions that involve the right to religion and education in a manner that judges will take into consideration Zambia's religious coexistence and acceptance hence the court will protect religious practices and beliefs that have been tolerated and accepted in different settings such as educational settings.

Collectively, the theories can be used in a manner that a balanced approach is adopted by ensuring that judicial decisions reflect the grund norm and history of the country which has engaged in religious tolerance and diversity.

3.6 CONCLUSION

The analysis of the judicial decisions on the intersection of the right to religion and education through the use of the pure law and historical theories of jurisprudence shows the complex manner in which laws are interpreted and applied. Due to them being complex but distinct in their own right and having different influences on the law, a balanced and more nuanced approach can be made through the use of the theories which will guarantee the enjoyment of both religion and education in the same environment in Zambia.

CHAPTER FOUR

4.0 INTERNATIONAL BEST PRACTICES: LESSONS ON RELIGIOUS DIVERSITY IN EDUCATIONAL SETTINGS FOR ZAMBIA FROM KENYA, MALAWI AND SOUTH AFRICA

4.1 INTRODUCTION

Many African countries have struggled with finding and striking a balance and achieving religious diversity in educational settings consequently making it a significant issue across the continent. Therefore, through this chapter, the author intends to propose what lessons Zambia can draw from international best practices around the African continent on how the strictness observed in different judicial decisions can be eased and how to balance the right to religion and education by looking at relevant law and practices from Kenya, Malawi and South Africa.

4.2 LESSONS FROM KENYA

4.2.1 KENYA'S HISTORICAL DEVELOPMENT OF RELIGION AND EDUCATION

In Kenya, about 70% of the population comprises of Christians (38% Protestant, 28% Catholic), 25% adhere to indigenous religions and 6% are Muslims. The Asian community comprises Hindus, Sikhs, Parsees and Bahais.⁷⁸

Although indigenous beliefs differ, they commonly involve a belief in an eternal, omnipotent creator often seen as distant such as the Kikuyu god 'Ngai'.⁷⁹ They recognise spiritual forces and ancestral spirits affecting daily life with continuing beliefs in sorcery and witchcraft.

Christianity spread significantly through missionary activity in the late 19th and early 20th century due to colonial mission policies which led to the creation of churches in the 1920s and 1930s especially in areas where Kikuyu, Luo and Luhya predominated.

⁷⁸ African Studies Centre, 'Kenya-Religion' available at <https://www.africa.upenn.edu/NEH/kreligion.htm> (accessed on 30 September, 2025)

⁷⁹ Ibid

Independent Christian churches like the Nomiya Luo Churches blend traditional and Christian elements.⁸⁰

Over half of Kenya's Muslim minority is of Somali origin. The remainder is largely made up of Galla-speaking people and the Swahili-speaking community on the coast, which has maintained uninterrupted contact with Muslims from the Arabian Peninsula since the fourteenth century.⁸¹

The history of Kenyan education dates back to as early the 18th century as per the historical records from the travels of missionaries such as John Ludwig and Johannes Rebmann as well as Swahili manuscripts like *Utendi wa Tambuka* (Book of Heraclius) which attest that Kenyans had access to institutionalised education around 1728. One of the earliest mission schools was established by the Church Missionary Society (CMS) in Rabai in 1846 and the missionaries later expanded their educational efforts into Kenya's interior.⁸²

During the colonial period, education in Kenya was stratified and racially divided with different systems for Africans, Europeans and Asians. When independence was achieved, reforms were put in place to unify the education system in 1967 with Uganda and Tanzania who adopted the 7-4-2-3 system of education through the East African Community involving seven years of primary school, four years of secondary, two years of high school and three to five years of university education.⁸³ Primary education in Kenya is universal, free and compulsory for children six to fourteen while secondary education starts at about fourteen and lasts four years with government subsidies supporting tuition fees especially in public schools.⁸⁴

⁸⁰ African Studies Centre, 'Kenya-Religion' available at <https://www.africa.upenn.edu/NEH/kreligion.htm> (accessed on 30 September, 2025)

⁸¹ *ibid*

⁸² Space Consult, 'History and Transformation of Kenya's Education System to C.B.C and its Architecture' available at <https://spaceconsult.co.ke/transformation-of-kenyas-education-system/> (accessed on 30 September, 2025)

⁸³ *ibid*

⁸⁴ *Ibid*

In conclusion, Kenyan education evolved from early missionary schooling through colonial grouping in schools to a national system aiming to provide equitable access to education at all levels thereby adapting to societal and economic needs.

4.2.2 CONSTITUTION OF THE REPUBLIC OF KENYA

The current **Constitution of Kenya**⁸⁵ was ratified by the Kenyan people and enacted by the President thereby coming into force and being the supreme law of the country. The Constitution includes different rights in its Bill of Rights which is to be found in Chapter Four such as **Article 32** which guarantees the right to religion by stating that every person has the right to freedom of conscience, religion, thought, belief and opinion which can be manifested through worship, practice, teaching or observance including a day of worship and any person should not be denied access to any institution, employment or facility as well as being compelled to act, engage in any act contrary to the person's belief or religion. It is also included in **Article 43 (1) (f)** of the **Constitution** that every person has the right to education

4.2.3 KENYA'S APPROACH TO BALANCING THE RIGHT TO RELIGION AND EDUCATION

Kenya has over time encountered cases on which religious beliefs have clashed with education. This has caused very fundamental issues on how a balance is to be struck between the right to religion and education.

This can be seen in the case of ***Philip Okoth (suing as next friend of several students) and Law Society of Kenya v Board of Management St Anne's Primary School and Others***⁸⁶ where the appellants who are Jehovah's Witnesses were students at the first appellant school, a Catholic sponsored school. The school required a mandatory 30 minute attendance of Catholic mass every Friday morning as part of its rules. The appellants and their parents petitioned this by arguing that it violated their right to freedom of religion since their faith prohibits participation in such activities.

This argument was rejected by the school and the first appellant was expelled which led to a constitutional petition being brought before the High Court claiming that their right to

⁸⁵ Act 1 of 2010

⁸⁶ Civil Appeal No 173 of 2020

freedom of religion and religion under the Kenyan constitution was being violated. The High Court rejected this claim and ruled in favour of the school.

The matter was brought before the Court of Appeal who held that the compulsory requirement by the school to attend Catholic mass amounted to indirect discrimination against the appellants as forcing them to attend mass violated their right to freedom of religion and education and the expulsion was null and void. The Court of Appeal found that the school failed to accommodate the appellants' religious beliefs reasonably and equally emphasised that constitutional rights cannot be taken away by mere signing of school rules.

Therefore, the key takeaway from the case is that freedom of religion in educational settings must be respected and accommodated hence students should not be compelled to take part in activities contrary to their sincerely held beliefs due to the fact that reasonable accommodation of religious beliefs in schools is required under constitutional and human rights principles.

The Ministry of Education of Kenya through the Office of the Principal Secretary on 4th April 2022 issued a circular to all country directors.⁸⁷ The circular addressed the violation of learners' religious practices in schools by highlighting that concerns that some school administrators are improperly denying admission or expelling students based on religious or forcing students to participate in religious activities against their beliefs such as banning religious attire, compelling students to take certain religious education classes and forcing participation in religious rites.

The circular emphasises that such actions violate the Constitution of Kenya particularly the Bill of Rights protecting the freedom of the right to religion and education and provisions of the Basic Education Act ensuring non-discrimination and access to free basic education for all children. The Ministry condemns these violations and warns that they disrupt peace and cause some students to drop out and it commits to protecting learners' religious rights and directs educational authorities to implement and communicate these protections to all schools under the Kenyan jurisdiction.

⁸⁷ MOE.HQS/3/10/18

4.2.4 LESSON FOR ZAMBIA FROM KENYA

Zambia can draw lessons from Kenya by looking at the stance taken by the Kenyan courts that ensured that educational policies and rules protect religious freedoms and no student is compelled to partake in religious activities contrary to their own hence schools with diverse populations should adopt reasonable accommodation frameworks.

The judiciary should also recognise the freedom of conscience, religion and belief as a fundamental constitutional right that students do not abandon upon entering the school premises and regain back upon leaving as well as the fact that fundamental rights cannot be contracted away by signing admission forms which include school rules.

The government should equally play a role in protecting the right to religion and education by issuing clear guidance or circulars to schools on the enforcement and applicability of religious rights to prevent discrimination based on religion thereby providing a comprehensive legal framework.

4.3 LESSONS FROM MALAWI

4.3.1 MALAWI'S HISTORICAL DEVELOPMENT OF RELIGION AND EDUCATION

The vast majority of Malawians practice some form of religion due to the influence of European missionaries, the most common religion being Christianity with about 87% of the population practicing the religion, 11% practicing Islam while the remaining 2% includes traditional religions, Judaism, Sikh, Bahai and Rastafarianism.⁸⁸

Historically, the Yao people of southern Malawi practiced Islam as far back as the 1600s owing their beliefs to traders who arrived from the Middle East and other parts of Africa and traditional religions being prominent as well which includes a belief in spirits, use of witchcraft and veneration of spirits which are interwoven into Malawian culture with even devout Christians having some lingering traditional superstitions.⁸⁹

Fortunately, the people of Malawi live in harmony and peace regardless of coming from different religions.

⁸⁸ Orant Charities Africa, 'A Short Introduction to Religions of Malawi' available at <https://orantcharitiesafrica.org/the-culture-of-malawi-malawian-religions/> (accessed on 1 October, 2025)

⁸⁹ *ibid*

The history of Malawian education dates back to 1875 when Robert Laws of the Free Church of Scotland opened the first missionary school.⁹⁰ Over the next forty eight years, missionaries sought to expand colonialism through schooling by training boys and men to staff colonial bureaucracies. After independence, the education policy shifted to reflect the educational policies of the current government who sought to restore a Chewa identity to prominence while expanding school access to staff an Africanised civil service. In 2004, access to secondary education expanded through policies of decentralised educational governance and by 2023 these efforts and other efforts had increased access across levels with gender parity achieved in primary schooling.

4.3.2 CONSTITUTION OF THE REPUBLIC OF MALAWI

The **Constitution of Malawi**⁹¹ serves as the fundamental legal framework governing Malawi and includes various human rights such as the right to equality in **Section 20** which prohibits any form of discrimination on the grounds of race, colour, sex, language, religion inter alia. It also provides in **Section 25** that all persons are entitled to education and it is equally provided for in **Section 33** that every person shall have the right to freedom of conscience, religion, belief and thought and to academic freedom.

4.3.3 MALAWI'S APPROACH TO BALANCING THE RIGHT TO RELIGION AND EDUCATION

Malawi has also encountered cases in which the rights to religion and education have been at odds such as the recent case of the ***State and Attorney General and Others v Makeda Mbewe (A minor through his father and next friend Wisdom Mahara Mbewe) and others***⁹² where the case involved two Rastafarian minors who were denied admission to government schools in Malawi because they had dreadlocks which was a religious practice. This was due to a policy by the Ministry of Education that required all learners in government schools to have trimmed or short hair including Rastafarian children. The applicant's challenged this policy and the decisions by the school authorities as violating their constitutional rights to equality, freedom of religion and non-discrimination.

⁹⁰ S Sharra and R Silver, 'History of Primary and Secondary Education in Malawi' (2023) Oxford Research Encyclopedia of African History

⁹¹ Act 20 of 1994

⁹² Case 55 of 2019

The High Court of Malawi held that the policy requiring students to cut their dreadlocked hair was unlawful, unconstitutional and discriminatory as the practice of wearing dreadlocks are protected religious beliefs and the policy was an unjustified limitation on the right to education and freedom of religion hence it violated the constitution and Education Act.

4.3.4 LESSONS FOR ZAMBIA FROM MALAWI

Zambia can learn from Malawi's approach of balancing the right to religion and education by the state through the judiciary ensuring that religious rights of minority groups in educational settings are respected which includes manifestation of religious beliefs through dress and appearance such as wearing dreadlocks.

Educational policies and rules should not limit access to education based on religious practices therefore they should be flexible enough to accommodate religious and cultural diversity without excluding students based on their religious practices hence courts should play a role in protecting constitutional rights when school and state policies infringe on student's access to education due to their religious practices.

The enforcement of constitutional human rights should prevail over unwritten or informal policies that exclude minorities from services deemed for the public such as the public schools hence the need to ensure uniformity in schools should ensure fundamental freedoms are protected and inclusivity is promoted.

4.4 LESSONS FROM SOUTH AFRICA

4.4.1 SOUTH AFRICA'S HISTORICAL DEVELOPMENT OF RELIGION AND EDUCATION

The earliest known religion in South Africa was the traditional beliefs and practices of the Khoisan people while the Bantu speaking people introduced further religious traditions in the region hence due to this, South Africa is home to a diversity of traditional African practices.⁹³

⁹³ C Scroope, South African Culture: Religion available at <https://culturalatlas.sbs.com.au/south-african-culture/south-african-culture-religion> (accessed on 1 October, 2025)

Christianity was first introduced in South Africa in the 1600s when large numbers of Christian missionaries began arriving from the Netherlands while other missionaries from the United Kingdom, France and Germany began to arrive in the 1800s therefore South Africa's religious composition was and continues to be deeply shaped by these early interactions.⁹⁴

Islam in South Africa was introduced by political exiles from British and Dutch colonies during the 17th to 18th century while Hinduism was introduced in the 1880s by indentured labourers from South Asia.⁹⁵

Education in South Africa is deeply shaped by colonialism, religious missionary efforts and apartheid era racial segregation.⁹⁶ Mission schools aimed at converting and educating locals particularly focusing on religious instruction and racial segregation and after the Union of South Africa in 1910, provincial systems mainly served European children, instituting compulsory attendance for them while separate and unequal schooling system were developed for other racial groups which continued in 1948 as a result of the apartheid policies put in place which resulted in unequal resources and opportunities especially for black South Africans.

In the late 20th century and early post-apartheid period, efforts were made to reform the education system which included revising the curricula to remove racial stereotypes and emphasising African languages and perspectives alongside English hence the current system offers both academic and vocational paths.⁹⁷

Overall, South African education reflects a long history of social and political division but continues to evolve towards greater inclusivity and equity.

4.4.2 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

⁹⁴ ibid

⁹⁵ ibid

⁹⁶ M Huq and H Marrou, Education: South Africa available at <https://www.britannica.com/topic/education/South-Africa> (accessed on 2nd October, 2025)

⁹⁷ ibid

The **South African Constitution**⁹⁸ acts as the foundation for all laws in the country and provides its citizens with numerous fundamental rights contained in its Bill of Rights such as **Section 15** which provides for the freedom of religion, belief and opinion which entails that every person has the right to entertain and manifest religious beliefs openly without fear of hindrance. The Constitution goes a step further by providing that persons belonging to a cultural or religious community may not be denied the right with other members of that community to enjoy their culture or practice their religion as per **Section 31**. The right to education is equally provided for in Section 29 that everyone has the right to basic education including adult education and to further education which the state through reasonable accommodation is to make it progressively available and accessible.

4.4.3 SOUTH AFRICA'S APPROACH TO BALANCING THE RIGHT TO RELIGION AND EDUCATION

South Africa is equally a country that has encountered legal cases that involve the right to religion such as in the case ***MEC for Education KwaZulu-Natal and others v Navaneethum Pillay (suing on behalf of her daughter and next friend Sunali Pillay) and others***⁹⁹ in which the brief facts are that the minor in the case was a pupil at Durban Girls High School who wore a small gold nose stud as part of her South Indian Tamil cultural tradition where piercing the nose signifies a rite of passage and cultural identity. However, this was against the school's code of conduct which prohibited jewelry except specific types of wristwatches and earrings. Her mother requested for her exemption based on religious and cultural grounds which was denied hence application was brought where unfair discrimination was claimed.

It was held by the Constitutional Court that the both school's uniform code and the refusal to grant her exemption amounted to unfair discrimination on grounds of culture and religion as these aspects hold equal constitutional recognition. The need to promote uniformity among students through the use of school rules is not a sufficient reason to justify the lack of granting reasonable accommodation as these rules must not infringe on learner's rights.

⁹⁸ Act 108 of 1994

⁹⁹ CCT 51/06

4.4.4 LESSONS FOR ZAMBIA FROM SOUTH AFRICA

Schools must develop rules and policies that allow exemptions or accommodations for sincerely held religious beliefs and cultural practices as opposed to having complete prohibitions that unfairly discriminate against students. This is due to the fact that requiring students to only practice or manifest their beliefs in other settings outside the school premises would undermine the practice and therefore amount to a significant infringement on her rights which would send a message that certain religions and cultures were not welcome.

It should be recognised by public schools that religious practices whether mandatory or voluntary deserve consideration and protection in school rules which are protected by the constitution therefore there is a need to uphold these religious practices in schools.

4.5 CONCLUSION

The aim of the chapter was to draw lessons from international best practices on how a balance has been struck in ensuring that the right to religion and education coexist in the same environment. The three jurisdictions that have been analysed have laws and policies that have played a very important role in achieving this balance hence observing these can be very beneficial for Zambia and its further development.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter will provide a summary of all the contents discussed and analysed in the preceding chapters of this thesis. In addition, this chapter will provide a summary of the findings collected from different individuals as well as the recommendations for purposes of aiding in the resolution of the problem identified in the thesis which is the lack of religious freedom in learning institutions due to the school rules and administrative policies put in place.

5.2 GENERAL CONCLUSION

The right to freedom of religion, opinion and conscience and education are very fundamental rights in a democratic as they allow individuals to practice their beliefs and equip them with knowledge, skills and values necessary for different things such as personal and economic development. However, the intersection of these two rights tends to lead to clashes because learning institutions may put policies in place for purposes of maintaining uniformity but may have the effect of denying learners the ability to express and manifest their beliefs.

In order to assess this intersection, the research paper has shown how fundamental freedoms and educational rights can cause conflict with institutional rules thereby leading to legal disputes that require judicial intervention. The research paper has equally shown how the pure law and historical theory of jurisprudence can influence judicial decisions and their outcome in cases involving competing rights as well as the need for Zambia to draw lessons from Kenya, Malawi and South Africa so as to adopt a neutral and balanced approach that religious freedom and education coexist thereby reflecting both constitutional principles and international human rights standards.

5.3 SUMMARY OF CHAPTERS

This research paper consists of five chapters which all analysed the problem relating to the lack of religious freedom in learning institutions in Zambia and how judicial decisions have enabled this. This was done by analysing key judicial decisions, using two theories

of jurisprudence to analyse the very decisions and drawing lessons from three jurisdictions which are Kenya, Malawi and South Africa.

5.3.1 CHAPTER ONE

The first chapter of this research paper provided an introductory overview of the thesis thereby establishing a foundation for this particular study. The chapter brought a brief background of the study as well as the statement of the problem which made reference to the case of **Nathan Mubanga (Suing in his capacity as the father and next friend of a minor Chisanga Mubanga) and another v Attorney General** as the current leading case on how learning institutions can be a place where individuals are denied the ability to express their religious beliefs. The chapter also brought out three research objectives and questions which were central to the research paper.

The chapter includes an extension literature review which not only criticised existing literature but also brought out a very important research gap. It also discusses the significance of the study which is to ensure that a comprehensive regulatory framework such as laws and policies are put in place to ensure that schools do not unnecessarily restrict its learners from being able to express their religious beliefs.

5.3.2 CHAPTER TWO

The chapter began with looking at Zambia's Bill of Rights which provides for different rights such as the right to freedom of religion, conscience and opinion. It also endeavoured to analyse how the courts have pronounced themselves on different judicial decisions involving the intersection of the right to religion and education and provided a critique of the said decisions as well as how it has weighed the two competing interests. It has equally discussed the implication that the said decisions have on future cases by looking at the fact that the principle of judicial precedent is widely practiced in Zambia. It also looked at what steps other countries and Zambia have taken to guarantee and protect the right to education.

5.3.3 CHAPTER THREE

Chapter three focused on the jurisprudential aspect and effect of the pure law and historical theory of jurisprudence. It did so by looking at the general influence that these theories have and went further by looking at their application in Zambia and how they

can influence judges as they come up with decisions involving the right to religion and education.

5.3.4 CHAPTER FOUR

The chapter focused on looking at how Kenya, Malawi and South Africa have ensured that there is a balance in relation to the right to religion and education within their respective jurisdiction. The reason behind this was to bring out the lessons that Zambia can draw.

This balanced approach has been adopted through strict use of what is included in key pieces of legislation by the courts. This has been brought out in their case law which has demonstrated that the countries through their courts have ensured that learners are allowed to manifest their religious practices in educational settings.

5.4 SUMMARY OF FINDINGS

Some schools do face challenges in trying to allow their learners to express themselves as once this is done, other learners due to lack of knowledge of what different religions entail tend to imitate the wearing of certain religious attires thinking its fashion. This was what occurred at Kamwala Secondary School as a Muslim student was allowed to wear her hijab which led to other female students imitating her without acknowledging that the hijab was worn as part of her religious beliefs. In order to eliminate this, the school rules were changed and students were allowed to express their beliefs provided that they were out of sight.

In order to avoid these challenges, Chibelo Primary School's rules are silent on if students are allowed to express their religious beliefs. Hence, after a conflict between a Catholic learner and teacher where the learner's rosary was stripped off their neck by the teacher, reference was made to the school rules and the Deputy Headteacher confirmed that due to this silence, the school has in a way allowed their learners to be able to express their religious beliefs in the school therefore the teacher was on the wrong side.

In order to curtail these challenges, schools have recognised the need for teachers and other staff members to receive training on how to handle religious expression and not

just entirely on what is learnt at university or college as they train to be teachers in courses such as social studies. Learners can also be encouraged to engage in discussions so as to foster understanding among students from different religious backgrounds through programs such as Scripture Union where learners from different religious backgrounds come together.

It was stated by religious leaders that it is necessary for them to provide guidance or support to schools to respect religious expression as this helps pupils and school authorities understand beliefs different from their own thereby reducing fear, misunderstanding and prejudice. They see themselves playing a role in fostering a culture of mutual respect and understanding among students of different faiths in educational settings and ensuring that school rules are inclusive by organising support inter-faith dialogues among students, school authorities and religious leaders so that pupils from different faiths share perspectives and school authorities gain a deeper understanding on what different faiths entail. This can also be done by having guest speakers from different religious groups been invited to schools so as to talk about their faith as well as the distribution of textbooks and materials that include multiple religious perspectives.

5.5 RECOMMENDATIONS

This research paper having brought out the problem of the lack of religious freedom in educational settings now proceeds to make recommendations that can assist Zambia with having a neutral approach that accommodates religious freedom in educational settings. The recommendations being:

5.5.1 INCLUSION OF THE RIGHT TO EDUCATION IN THE CONSTITUTION

In Zambia, the right to education is provided for in different pieces of legislation such as the Education Act and Children's Code Act. This means that the right has not been granted constitutional protection hence its enforcement is difficult as the right is treated more like a policy as opposed to it being a fundamental freedom as the government cannot be compelled to ensure that education is provided and accessible.

The inclusion of the right to education in the constitution will help with the adoption of a balanced approach because both rights will be granted equal recognition and status as

opposed to one right superseding the other hence this will necessitate both rights being exercised in the same environment as they will be at par.

5.5.2 ISSUANCE OF GUIDANCE FROM THE GOVERNMENT

The government should publish guidelines such as circulars or policies to schools on how to handle disputes involving religious freedom involving learners that ensure that learners are allowed to express their beliefs in the school premises. This active role by the government will ensure that school administrators understand what is contained in the constitution and other pieces of legislation thereby preventing discrimination and conflict between individual rights and school rules.

5.5.3 SCHOOLS TO HAVE RULES THAT HAVE ACCOMMODATIONS

Schools are of course allowed to put some form of rules and policies in place for purposes of order and uniformity. However, this should not be used as a reason to deny learners their rights therefore what should be done by school administrators is that as they are coming up with schools, some form of accommodation and exceptions must be put in place that allow learners to still express themselves but equally still be in line with school rules as opposed to having complete prohibitions. This is because learners do not abandon their rights once they enter the school premises and regain them back once they leave and they cannot be contracted away simply because a learner or their parents have signed certain documents such as admission forms that include school rules hence fundamental rights and freedoms should prevail as opposed to informal policies which will lead to education being accessible and free from discrimination.

5.5.4 THE JUDICIARY MUST PLAY A ROLE

The judiciary should play a role and be a protector by ensuring that educational policies do not limit access to education and schools do not become a place of discrimination. This can be done by the judiciary ensuring that once matters involving conflict between individual rights and school rules are brought to it, it should be a protector of fundamental rights not school rules thus learners should not be excluded from schools especially public schools which are created to be used and enjoyed by the public.

5.5.5 RECOMMENDATIONS FROM RESEARCH PARTICIPANTS

A teacher who is also the Head of Department - Social Sciences at Kamwala Secondary School suggested that the public should engage with policy makers in order to have discussions with them so that they realise there is a gap with regards to how school rules are to be enforced in schools where there are learners from different religious backgrounds that require them to express it in a certain way. Once these discussions have been conducted, it will then trickle down to schools who will liaise with parents so that they express what their religions entail and the school should then be accommodating in its school rules.

It was equally suggested by the Head of Department - Creative and Expressive Arts from the aforementioned school that school administrators and other members of staff should receive training on how to handle religious diversity and expression in schools due to the fact that some administrators and teachers may not understand and know what is expected of different religions. This can be done within the departments through what is known as Continuous Professional Development which is where teachers still help each other in terms of knowledge and experiences so as to coexist and help each other grow. Once these trainings have been conducted, school administrators and teachers will be more welcoming of different religious expressions as they will understand that learners are simply engaging in what their religions expect them to do.

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By: SUNGWE MARIA BANDA LLB22112366 AN OBLIGATORY ESSAY
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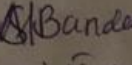
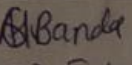
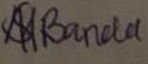
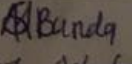
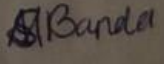
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Chapter 5 – Conclusions & Recommendations	Expressly state the schools visited for the fieldwork in the summary of finds	 1 November 2025	AlBanda 1 November 2025
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