I recommend that the obligatory essay prepared under my supervision by:

COMFORT MULENGA

Entitled

JUDICIAL PRECEDENT IN ZAMBIA

Be accepted for examination. I have checked it carefully, I am satisfied that it fulfils the requirements relating to format as laid down in the Regulations Governing Obligatory Essays.

Dated this 8th Day of December 2004

Signed by the said Professor Carlson Anyangwe as Supervisor

Signature...
DECLARATION

I COMFORT MULENGA, Computer number 99156008, HEREBY declare that I am the author of this Directed Research Paper entitled ‘Judicial Precedent in Zambia’ and that it is a creation of my own ingenuity. Due acknowledgement has been given where other scholars’ work has been used or cited. I therefore remain accountable for the contents, errors and omissions. I truly believe that this research has not previously been presented in the school for academic work.

STUDENT’S NAME: COMFORT MULENGA

SIGNATURE: [Signature]

DATED THIS: 8th DAY OF December 2004
# CONTENTS

SUBMISSIONS ................................................................. ii
DECLARATION .................................................................. iii
DEDICATION .................................................................... vi
ACKNOWLEDGEMENTS .................................................... vii-viii
ABSTRACT ....................................................................... ix
INTRODUCTION .............................................................. x

<table>
<thead>
<tr>
<th>CHAPTER ONE</th>
<th><strong>The General Doctrine of Precedent</strong></th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Introduction ..................................</td>
<td>1.0</td>
</tr>
<tr>
<td></td>
<td>Definition of Precedent ..................</td>
<td>1.1</td>
</tr>
<tr>
<td></td>
<td>Stare Decisis ..................................</td>
<td>1.2</td>
</tr>
<tr>
<td></td>
<td>Precedent and Stare Decisis ............</td>
<td>1.3</td>
</tr>
<tr>
<td></td>
<td>Non-binding Precedent ....................</td>
<td>1.4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER TWO</th>
<th><strong>The Conditions Required for the Existence of Precedent</strong></th>
<th>10</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Hierarchy of the Courts .............................................</td>
<td>2.0</td>
</tr>
<tr>
<td></td>
<td>Law Reporting ..................................................................</td>
<td>2.1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER THREE</th>
<th><strong>Instances When the Court May Depart From Precedent</strong></th>
<th>25</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Overruling by the Supreme Court of its previous decisions</td>
<td>3.0</td>
</tr>
<tr>
<td></td>
<td>Overruling generally ................................................</td>
<td>3.1</td>
</tr>
<tr>
<td></td>
<td>Distinguishing ..................................................................</td>
<td>3.2</td>
</tr>
<tr>
<td></td>
<td>Reversing .......................................................................</td>
<td>3.3</td>
</tr>
<tr>
<td></td>
<td>Lower courts cannot upset decisions of the superior courts</td>
<td>3.4</td>
</tr>
<tr>
<td></td>
<td>The High Court's power of review ....................................</td>
<td>3.5</td>
</tr>
<tr>
<td></td>
<td>Zambia's approach to precedents ...................................</td>
<td>3.6</td>
</tr>
</tbody>
</table>
CHAPTER FOUR  Other Factors Worthy of Consideration Under Precedent. .35
The need to do justice. ..............................................4.0
Precedent and public policy. ......................................4.1
Judge made law. ......................................................4.2
Constitutional supremacy and parliamentary supremacy ....4.3

CHAPTER FIVE  Recommendations and conclusions ..........48
Recommendations ....................................................5.0
Conclusions ...........................................................5.1
DEDICATION

This piece of work is dedicated to my late father Mr James Gershom Mulenga.
Daddy you were my inspiration and you always encouraged me to work hard and be the best that I could be. I know you would have been proud to see me today, well on the road to being a lawyer. It is because of you that I am what I am today. Thank you for being such a great dad. You’re greatly missed.
ACKNOWLEDGEMENTS

Firstly, I would like to thank my Lord and Saviour Jesus Christ whose been the source of my strength (Phillipans 4:13). Often times I felt like I would not make it, but Lord you constantly reminded me that: “Let us not be weary in well doing for in due season we shall reap if we faint not,” (Galatians 6:9) You encouraged me not to give up. Thank you for being my ever faithful guide in whom I can place my trust and confidence, you’ve seen me through thick and thin, I am truly blessed.

Special thanks go to:
My faculty Supervisor at the University of Zambia, Professor Carlson Anyangwe, without whose guidance, tolerance, valuable comments and patience the compilation of this work would not have been possible.

I am greatly indebted to the following: The Honourable Chief Justice Ernest Sakala, Judge Phillip Musonda, Judge Charles Kajimanga, Judge Frederick Chomba and Mr Patrick Matibini for sparing their valuable time and affording me an opportunity to interview them for purposes of this essay. Your contributions were of enormous value in the preparation of this work.

To my mother, Mrs Elizabeth Gillian Mulenga. Mummy you have been a source of strength and encouragement. You have taught me to dream big and how to make those dreams a reality, thank you for the spiritual and moral support. I love you, you’re the best mum I could ask for.

To my brother, Mr Fred Kafula, you have always been a motivating force in my life. Thank you for the constant material and financial support without which I would not be what I am today. May God richly bless you.
To my baby sister, Annie Chileshe Mulenga. Well Bob, its been a long and winding road, but look at us now, me a lawyer and you a computer scientist. Sister power y’all!

To my circle of friends: Chilufya and Fad, we go back a long way from the days of wheelathons, the wombles and Christmas pantomimes. Musonda, thanks for putting up with my moods and whining during the preparation of the oblig. Ali, thank you for always having been there for me. Kaluba, Diana, Ngosa, Augie, Don, Gabby and Mario, you guys have made my stay on campus worthwhile. To all of the above you’re a great set of friends and I thank God that I got to know you.

Grace and Namakuzu, I don’t know what I would have done if you guys had not been handing down your data to me ever so faithfully each semester. Lundu, thanks for letting me use your computer to type this essay. A friend in need is a friend indeed. Thank you very much.

To the 4th year law class of 2004. It has not been easy but it was worth it. You’ve been an interesting lot and I hope that you will all put the knowledge you’ve acquired to make a meaningful contribution to the nation.
ABSTRACT

This research essay is centred on the doctrines of judicial precedent as well as *stare decisis*, which is a subject tackled in both Legal Process and Jurisprudence. However, even after covering this topic in the two aforementioned courses, these doctrines were still vague in my mind. This was further compounded by the fact that there is a general tendency by most people to use them interchangeably. Therefore, I felt compelled to engage upon a study in this area in order to clarify them more.

The essay is divided into five chapters.

Chapter one focuses on the general doctrine of precedent and also *stare decisis*. It seeks to show that there is actually a distinction between the two.

The next chapter looks at the conditions that are necessary for the existence of precedent: a settled or established judicial hierarchy and an efficient system of law reporting.

Chapter three looks at the instances when the courts may depart from precedent. This may happen when a court overrules, reverses or distinguishes a case.

Chapter four focuses on other issues worthy of consideration under the broad doctrine of precedent. These issues are: the obvious need to do justice, social change, public policy and the principles of constitutional and parliamentary supremacy.

Recommendations and conclusions are discussed in the final chapter.
INTRODUCTION

Zambia is a common law jurisdiction and a former British colony. It has adopted many English court practices. These practices include the doctrines of precedent and *stare decisis*. Precedent is the practice of the courts to decide cases on the basis of principles established in prior cases which are close in fact or legal principles to the case under consideration. *Stare decisis* by contrast, is the system whereby a court is bound by the decisions of another court which is above it in the judicial hierarchy, unless they can reasonably distinguish between them.

For the proper existence of the doctrines of precedent and *stare decisis* there must be a settled judicial hierarchy, for this is the only way of knowing whose decisions bind whom. Fortunately in Zambia the judicial hierarchy is well established and settled. There also has to be an efficient system of law reporting. Unfortunately this is an area that needs to be improved in Zambia.

There are instances when the courts may depart from precedent and this is by way of overruling, distinguishing and reversing. One of the major tasks of precedents is to ensure that justice is done. In so doing social context considerations, public policy and constitutional supremacy are taken into account.

It is my considered opinion that the essay has attempted to clarify some of the issues that were vague as relates to the doctrines of precedent and *stare decisis*. It has also shown that there is actually a distinction between the two. The study was conducted mainly through desk research and made use of books, journals, theses, law reports and the internet. Further, interviews were carried out with key informants, namely, the Chief Justice, Judges of the High Court as well as some practising lawyers. The information thus obtained was processed in the usual way. This information together with data generated from desk research formed the basis of this study.
CHAPTER ONE

THE GENERAL DOCTRINE OF PRECEDENT

1.0 Introduction

This research essay is entitled ‘Judicial Precedent in Zambia.’ The purpose of the essay is to bring to light and analyse the actual practice of the courts in Zambia in so far as the common law doctrines of precedent and stare decisis are concerned. It shall attempt to determine with some precision the meaning of the terms as they are applied here. In view of this, other factors, which fall under the broad doctrine of precedent such as distinguishing, overruling, reversing, constitutional supremacy and public policy considerations shall also be considered.

Like most other countries formerly tied to England, Zambia is a common law jurisdiction. There is both historical and statutory support for the existence of the common law in Zambia. Section 2(a) of the English Law (Extent of Application) Act¹ provides that:

"Subject to the provisions of the constitution in Zambia and to any other written law, the common law...shall be in force in the Republic."

In view of this, it is recognised that constituent terms associated with the common law such as ‘precedent’ and ‘stare decisis’ are very much a part of the Zambian legal system.

¹ Cap 11 of the laws of Zambia, which is an Act to declare the extent to which the law of England applies in the Republic.
1.1 Definition of precedent

Blacks Law Dictionary defines precedent as: "An adjudged case or decision of the court considered as furnishing an example or authority for an identical or similar case afterwards arising on a similar question of law."\(^2\) Expanding on that definition the Dictionary explains that, courts attempt to decide cases on the basis of principles established in prior cases, and that prior cases which are close in fact or legal principles to the case in consideration.

A precedent influences future decisions. Every decision is pronounced on a specific set of past facts. From the decision on those facts a rule is extracted and projected into the future. No one can foresee the precise situations that will arise. Therefore, the rule has to be capable of applying to a range of broadly similar situations against a background of changing conditions. In general terms it has to be 'malleable.' Applying a precedent to the instant case is a process of matching the fact pattern of the precedent and the ruling thereon with the fact pattern of the instant case. If they match, the rule is applied, if not it is distinguished.\(^3\)

Lord Lloyd of Hampstead in his book *Introduction to Jurisprudence* states that: "...precedents have to be established as guides to future conduct..."\(^4\)

Precedent has thus always been the life blood of legal systems, whether primitive, archaic or modern. It is of course particularly prominent in the common law. The special features of the present day common law system of precedent may perhaps be summarised as:

1. A particular emphasis on judicial decisions as the core of the legal system.

2. A very subordinate role conceded to juristic writings as against decisions of the courts, in the exposition of the law.

3. The treatment of certain judicial decisions as binding on other judges and

4. The form of judicial judgments and the mode of reporting these.

1.2 Stare Decisis

It is not uncommon to find another term which is synonymous to precedent and this is \textit{stare decisis}.

Blacks Law Dictionary\textsuperscript{4} defines \textit{stare decisis} as follows:

```
"To abide by or adhere to a decided case. Policy of courts to stand by precedent and not to disturb settled points. Doctrine that when court has once laid down a principle of law applicable to a certain state of facts it will adhere to that principle and apply it to all future cases, where facts are substantially the same, regardless of whether the parties and property are the same. Under the doctrine when a point of law has been settled by decision, it forms precedent which is not afterwards to be departed from and while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain obvious principles of law and remedy continued injustice. The doctrine is not ordinarily departed from where the decision is long standing and rights have been acquired under it, unless considerations of public policy demand it."
```

\textsuperscript{4}(1985), 5\textsuperscript{th} edition p 1100
\textsuperscript{5}op. cit, p1406
1.3 **Precedent and stare decisis**

It is important to consider whether precedent and *stare decisis* are two distinct doctrines or if they are one and the same. Renowned jurist Dias appears to draw a distinction between precedent and *stare decisis*. In the fourth edition of his book entitled *Jurisprudence*\(^b\) he writes:

"Precedent in English law is of considerable antiquity while that of *stare decisis* is relatively modern. Judges in the 12\(^{th}\) century did listen to citations of earlier cases and were no doubt influenced by them in reaching their decisions...But there was never a suggestion that they were bound by them, nor do the early writers give such an indication."

Implied in the above statement is the fact that the doctrine of precedent came into existence and was practiced by the courts before that of *stare decisis*.

Simply put, judicial precedent is the process whereby judges follow previously decided cases where the facts are of sufficient similarity. Under *stare decisis*, a court is *bound* to follow any case decided by a court above it. Therefore if a precedent has been set by the Supreme Court then the High Court is *bound* to follow it unless they can reasonably distinguish it. When it is said that a court is bound to follow a case, or bound by a decision, what is meant is that the Judge is under an obligation to apply a particular *ratio decidendi* to the facts before him, in the absence of a reasonable legal distinction between those facts and the facts to which it was applied in the previous case.

\(^b\) (1976) p163
Thus in the case of *The people v Ian Kainda* the accused in this matter was sentenced by a magistrate to four strokes of the cane for conduct likely to cause breach of the peace. The case thereafter was referred to the High Court in light of its decision in *John Banda v The people* to the effect that corporal punishment violates the provisions of Article 15 of the Constitution which is that, 'a person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment.' The High Court noted that in order to maintain precedents, the courts must bear in mind that judgments of superior courts bind all inferior courts.

In Zambia however the courts appear to take the view that strictly speaking there is not much difference between these two doctrines, especially as regards their semantic use. However, it is acknowledged in practice that one relates to following a pattern of conduct in as far as previous cases laying down important points of law are concerned, that is precedent. The other refers to the aspect of being bound and that is *stare decisis*.

The Honourable Chief Justice, Ernest Sakala wrote in his Masters Dissertation: "The authority of case law as a source of law rests on judicial precedent. The doctrine of judicial precedent practised in Zambian courts has its foundation from the English common law tradition. In England, the authority of case law as a source of law is based

---

7 HLR / 01 / 2000  
8 HPA / 06 / 1998 (Unreported)  
on the doctrine of binding precedent sometimes known as stare decisis.” (emphasis added)

At first glance it would appear as though these terms are used interchangeably but the use of the word binding clearly shows that there is a distinction between these two doctrines, although it is a very fine one. In fact Dias at page 160 makes the following important observation: “It is because the things that stare decisis and precedent can accomplish are desirable that the two doctrines have moved so near to each other as to be barely distinguishable.”

What is law in a precedent is its ruling or ratio decidendi, which concerns future litigants as well as those involved in the instant dispute. Jessel M.R. stated that: “The only thing in a Judge’s decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided.

This is distinguishable from those pronouncements of law, which are not part of the ratio decidendi and are not authoritative and are classed as obiter dicta. The former have law quality and are binding on lower courts, dicta too, have law quality but are not binding at all.

---

12 Ibid
1.4 Non Binding Precedent

i) Foreign Precedents

Zambia is a common law jurisdiction and a former British colony. Zambian courts therefore tend to rely for the most part on British precedents. However, precedents from other commonwealth jurisdictions are also relied on, for instance, it is not unusual for Counsel and the courts to base their arguments and judgments on Indian, Australian, Zimbabwean, South African and even American precedents. However, these precedents are not binding but they are merely persuasive. Foreign decisions are cited for their usefulness and persuasiveness. Nevertheless if a case establishes a good point in law even though it is foreign it may be considered as binding as for instance the case of Donoghue V Stevenson. 14 That case is said to be conclusive in cases involving a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him and with no reasonable possibility of intermediate examination. This is with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer. This manufacturer owes a duty to the consumer to take reasonable care, although the manufacturer does not know the product to be dangerous and no contractual relation exists between him and the consumer.

13 Osborne v Rowlett (1880) 13 ChD 774 at 785
14 (1932) AC : 562, It was used to determine the case of Michael Sata v Coca Cola in which the plaintiff had found a cockroach in his drink. (However, the author was unable to find the full citation of the case).
The Honourable Chief Justice expressed it in these terms: "Don't invent the wheel it has already been invented."\textsuperscript{15} Further in his Masters Dissertation he wrote:

"In practice, matters heard before superior courts are determined by heavy reliance on precedents if the issue for consideration has already been settled by another court. Hence, arguments that Zambian courts are not bound to follow decisions of foreign courts are merely academic. If a court in England already decided on an issue raised before a court in Zambia, it cannot be said to be only persuasive when a Zambian court cites and relies on that decision. In Zambia, the law reports do show a list of cases referred to in each volume containing cases reported. A quick glance at the Zambian law reports shows a continuous list of 'cases referred to' than 'cases reported' in a particular volume. Most of the cases referred to are decisions reported in the English All England Law Reports. The very frequent reference and use of the English decided cases is a strong argument that in practice the English precedents successfully induce the Zambian courts to accept and rely on them. It is submitted that whether a foreign decision is binding or persuasive is irrelevant. In the end, once accepted it becomes part of the case law, one of the sources of law applicable in Zambian courts."\textsuperscript{16}

However, it must be borne in mind that the social context considerations are also of the utmost importance.\textsuperscript{17} Nonetheless, foreign precedents are quoted merely for their

\textsuperscript{15} Interview of 20\textsuperscript{th} July 2004, In so saying he simply meant that where a foreign precedent has clearly established a good and clear principle of law and it adequately answers the question at hand in the case before the court, the court need not belabour itself to go beyond that which is stated in the precedent being relied on.


\textsuperscript{17} This will be looked at in a bit more detail under chapter 4
persuasive value, they are not binding to the same extent as domestic judgments are on our courts. Persuasive value means something very significant in that judgment which will help the court to better address a particular case. The court will go by the principles laid therein if none of our cases can help or contains similar principles, then foreign precedents will be referred to.\(^{18}\)

In the case of *Sata v Post Newspaper Limited*\(^{19}\) Ngulube Chief Justice as he then was said: “...the opinion of other senior courts in various jurisdictions clearly with a similar problem tend to have persuasive value.” This is of course trite law.

In the landmark decision of *Christine Mulundika and Seven Others*,\(^{20}\) there was heavy reliance on Supreme Court decisions of the U.S.A, Zimbabwe, India as well as that of the European Court of Human Rights. Foreign precedents are usually cited where there is a shortage or total lack of Zambian authority on a point although not necessarily.

### ii) Decisions of the High Court on the Supreme Court.

The Supreme Court may follow decisions of the High Court although they are not bound to do so. However, where the High Court has made a good point of law there is no reason why it should not be followed. In this regard therefore they may be considered to be persuasive precedents.

---

\(^{18}\) Judge C. Kajimanga, interview of 12th July, 2004  
\(^{19}\) (1992) / HP/ 1399
CHAPTER TWO

THE CONDITIONS REQUIRED FOR THE EXISTENCE OF PRECEDENT

Two conditions need to be satisfied before precedent and *stare decisis* can become established.

1) There has to be a settled judicial hierarchy before there can be any clear cut doctrine of *binding* authority for this is the only way it can be known as to whose decisions bind whom.

2) There has also to be a system of law reporting (cases), if cases are to be authoritative as ‘law,’ there should be precise records of what they lay down.

2.0 Hierarchy of the Courts

In Zambia, the judicial hierarchy is well established and settled. The Judicature of the Republic consists of The Supreme Court of Zambia, The High Court for Zambia, The Industrial Relations Court, The Subordinate Courts and such lower courts as maybe prescribed by an Act of Parliament.\(^2\)
i) **The Supreme Court**

The Supreme Court is the final court of appeal for the Republic and is therefore the highest court in the land.\(^{22}\) The Judges of the Supreme Court consist of; the Chief Justice, the Deputy Chief Justice and seven Supreme Court Judges.\(^{23}\) The total number of judges is therefore nine.

Decisions of the Supreme Court bind all lower courts under the doctrine of *stare decisis* even if they are erroneous.\(^{24}\)

Where there are two apparently conflicting decisions of the Supreme Court all lower courts are bound by the latest decision. Thus it was held in the case of *Kasote v The People*\(^{25}\) that the principle of *stare decisis* is essential to a hierarchical system of courts. Such a system can only work, if when there are two apparently conflicting judgments of the Supreme Court all lower courts are bound by the latest decision.

Further it is submitted that the Supreme Court may follow a precedent of the High Court, although it is not strictly bound to do so. In determining the case of *John Mubanga Mulwila v The People*\(^{26}\) the Supreme Court considered the case of *Mbewe*

\(^{21}\) Article 91 (1) of the Constitution of Zambia
\(^{22}\) Article 92 (1) of the Constitution of Zambia
\(^{23}\) Article 92 (2) of the Constitution of Zambia
\(^{24}\) See the case of *Abel Banda v The People* (1986) Z.R. 105, this case is used more illustratively in chapter 3
\(^{25}\) (1977) Z.R. 75 (S/C)
\(^{26}\) SCZ Judgment No. 15 of 1998 (Unreported)
v The People\textsuperscript{27} which, the Court said, although it was a High Court decision, is still good law. In that case it was held that where the court rules that witnesses should be out of court, and a witness nevertheless remains in court, the judge has no right to refuse to hear his evidence; however, in such a situation in which a witness to be examined heard the evidence of the other witnesses, his evidence is still admissible but the court in considering that evidence at the end of the trial, will have to determine what weight to attach to that evidence.

As can be seen from the law reports and selected judgments some of the best decisions on certain aspects of law have been decided by the High Court. Thus it is not uncommon to hear the Supreme Court state that it has affirmed or upheld the decision of the trial court which happens to be the High Court. However, when a case is before the Supreme Court the Court does not encourage Counsel to cite High Court authorities unless they raise very important points of law.\textsuperscript{28} More often than not the Court will advise Counsel to rely on Supreme Court precedents as these are binding upon the Court whereas those from the High Court will be more or less persuasive.

\hspace{1cm} \textbf{ii) The High Court}

The High Court for the Republic has unlimited or original jurisdiction to hear and determine any civil or criminal proceedings except as to those proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour

\hspace{1cm} \textsuperscript{27} (1983) Z.R. 59

\hspace{1cm} \textsuperscript{28} Interview of 20\textsuperscript{th} July 2004 with The Honourable Chief Justice, Ernest Sakala.
Relations Act. The High Court is bound by decisions of the Supreme Court even if it considers them to be wrong; this is under the doctrine of *stare decisis*. In the same light, decisions of the High Court are ‘law’ although they are only binding on courts inferior to itself such as the Magistrates Court.

Single Judges of the High Court are not strictly bound by their Brethren’s decisions but they will as ordinary practice follow them. This is because in as far as the powers and jurisdiction of the High Court Judges is concerned all the Judges have and may exercise in all respects equal powers, authority and jurisdiction. In view of this a High Court Judge may depart from the decision of his or her Brother or Sister if need be. In practice however, first there is consultation among the Judges before there can be such departure this is so as not to create acrimony or to make the other Judge look foolish. Hence it is said that while a High Court Judge is not bound by the decision of his or her Brother or Sister and he may depart from it, in so departing he must do so modestly. This practice of consultation is not expressly stipulated or required by the High Court rules but it is common practice among the Bench.

This however does not mean that an unsuccessful litigant can take his case from High Court Judge to High Court Judge looking for a favourable result. Such was the holding in the case of *The Attorney General And The Speaker Of The National Assembly v The
People. The case was first brought before Muyovwe J. of the High Court, who heard arguments for and against the application. She then dismissed the application. The respondents then brought the same application to Ndhlovu J. also of the High Court. He accepted the application and entered an exparte injunction. The Supreme Court ruled that Judge Ndhlovu did not have jurisdiction either to receive the application or to enter the injunction. The Court stated that the High Court is a single court with many Judges. The ruling of one High Court Judge is therefore the judgment of the entire court. For this reason an unsuccessful litigant may only appeal to the Supreme Court.

iii) The Industrial Relations Court

The Industrial Relations Court (IRC) is established as a court of first instance with original jurisdiction in all industrial relations matters. Its operations and jurisdiction are clearly stipulated in the Industrial and Labour Relations Act.

The IRC like the High Court is bound by decisions of the Supreme Court under the doctrine of *stare decisis*. This was clearly demonstrated in the case of *Zambia Consolidated Copper Mines v Mulemwa*, in which the respondent had been dismissed from his employment for having given false information about an employee which had resulted in the employee’s dismissal. The Industrial Relations Court (IRC) held that the decision of the Supreme Court in *Ngwira v Zambia National Insurance Brokers Limited* was incorrect and that ‘social status’ in section 108 of the Industrial and Labour

---

34 SCZ Judgment No. 34 of 1999 (unreported)
35 See section 85 (9) of the Industrial and Labour Relations Act, see also Article 94 of the Constitution.
Relations Act related to employment hierarchy. It was held by the Supreme Court that until such a time as the Supreme Court itself upset its own earlier decision the IRC was bound thereby. Thus the decision of the IRC in which they had made an order of reinstatement was set aside.

iv) The Industrial Relations Court and The High Court

Initially the IRC was considered to be inferior to the High Court, the case which established this was that of Zambia National Provident Fund Board (ZNPF) v The Attorney General. The ZNPF Board dissatisfied with the decision of the IRC commenced proceedings to have the decision moved into the High Court and quashed. The legal argument centred upon the question whether the IRC was inferior to the High Court and whether certorari could issue despite the provision of section 101 (3) of the Industrial and Labour Relations Act (then). Justice Ernest Sakala as he then was, heard the application to issue an order of certiorari against the proceedings of the IRC on the ground that the IRC had misdirected itself in law in making a certain decision.

It was held that the IRC is an inferior court because it is a specialised court, therefore orders of certiorari, mandamus, and prohibition can be issued against it, to compel it to act accordingly irrespective of the fact that appeals lie to the Supreme Court. Therefore, the IRC was subject to the High Court's supervision in the manner in which it conducted its proceedings.

After the ZNPF Board case the matter was not pursued further to the Supreme Court to settle the actual status of the IRC. Thus until 1991 the IRC remained with the status of an
inferior court in the hierarchy of the courts in Zambia. The 1991 constitution made the IRC part of the autonomous judicature of Zambia. The Constitution further made specific provisions for the first time declaring the members of the court to be independent and impartial under Article 91 (2).

The exclusive jurisdiction conferred upon the IRC to hear and determine industrial relations matters does not however include cases of pure master and servant relationships because jurisdiction in this respect is shared with the High Court. This was determined in the case of *P.C. Cheelo and Others v Zambia Consolidated Copper Mines (ZCCM)* where it was held that the High Court has jurisdiction to try matters arising out of ‘pure master and servant relationship’ and that the exclusive jurisdiction conferred upon the IRC to hear industrial relations matters does not stop the High Court from resolving cases of pure master and servant.

v) **The Subordinate Courts**

The Subordinate Courts popularly known as Magistrates Courts are established by section 3 of the Subordinates Courts Act, Cap 28 of the laws of Zambia. These courts administer primarily the same law as that administered by the High Court which also exercises supervisory powers over them. These courts follow precedents set down by the superior courts, that is the Supreme Court, The High Court and the Industrial Relations

---

38 (1983) Z.R. 140


40 These views were expressed by the Honourable Chief Justice Ernest Sakala who was then the presiding judge in the *ZNPF* case in which he held that the IRC could not be equated to the High Court. He expresses these views at pages 19 to 20 of his Master’s Dissertation of 2000 entitled *Autonomy and Independence of the Judiciary in Zambia, Realities and Challenges*. However, as yet there has been no Supreme Court decision to determine the actual status of the IRC in relation to the High Court.

41 SCZ Judgment No. 27 of 1999 (unreported)
aware of the above precedent, it can be argued that they would be bound to follow the decision of the Supreme Court.

Decisions of the local courts are however ordinarily not binding since they are at the bottom of the court hierarchy. They are rarely important in law and are not reported in the law reports. The Local Court Justices usually do not possess any training in law and more often than not are guided more by common sense than the law in deciding cases that come before them.

2.1 Law Reporting

Before any kind of doctrine of precedent can operate there have to be reliable records of the decisions in previous cases and this is especially necessary for the doctrine of *stare decisis*.\(^{46}\) In a system where precedent is relied on less, as in France, the need for an efficient system of law reporting has non the less been emphasised.\(^{47}\)

**A background of law reporting in Zambia\(^{48}\)**

1945 – 1948

During this period Zambia was not yet independent and was known as Northern Rhodesia. The law reports were cited as Northern Rhodesia Law Reports and contained cases determined by the High Court of Northern Rhodesia in the exercise of its appellate

---

\(^{45}\) SCZ Judgment No. 38 of 2000, Appeal No. 60 / 99

\(^{46}\) Dias, *Jurisprudence*, 5\(^{th}\) edition, (1985) p 132. Also take note that the phrasing denotes a distinction between the doctrines of precedent and *stare decisis*.


\(^{48}\) The author was unable to access the law reports of the period 1949 to 1954 as they were not available in the library.
and original jurisdiction. They were edited by Horace S. Palmer a Barrister at Law and also a Resident Magistrate of Northern Rhodesia.

1955 – 1958

Zambia was still not independent and the law reports were still cited as Northern Rhodesia Law Reports and they contained cases determined by the High Court of Northern Rhodesia. These were edited by I.M Evans, Esquire, a Barrister at Law and a Resident Magistrate of Northern Rhodesia. The law reports were published by the authority of the Chief Justice.

The post independence era: 1965

Zambia attained independence on 24th October 1964. The law reports of 1965 were cited as the Zambia Law Reports. They covered cases determined in the Court of Appeal for Zambia, the High Court for Zambia, the Magistrates Courts and the Town and Country Planning Tribunal. Unlike in the 1940’s and 50’s where the law reports were edited by expatriate barristers, throughout the 1960’s they were printed and edited by the authority of the Council of Law Reporting from whom also the law reports were obtainable. The law reports were printed by Government Printers in Lusaka and were published yearly that is 1966, 1967, 1968 and 1969.

The 1970’s

In 1970, 1971 and 1972 the law reports contained the judgments of the Court of Appeal and the High Court, they were cited as the Zambia Law Reports. In 1973, the Court of
Appeal was substituted with the Supreme Court by virtue of the Supreme Court Act Number 41 of 1973. Thereafter the law reports which were published by the authority of the Council of Law Reporting contained cases of the Supreme Court and the High Court. The copies were obtainable from the Council of Law Reporting and were printed in Zambia by Government Printers in Lusaka yearly that is 1974, 1975, 1976, 1977, 1978 and 1979.

The 1980’s

The law reports of the 1980’s were also published and edited by the authority of the Council of Law Reporting and the copies were obtainable from them. They contained cases determined by the High Court and the Supreme Court and they were printed by government printers. These were also published yearly, that is 1980, 1981, 1982, 1983, 1984, 1985, 1986 and 1987.

The 1990’s

From 1988 the appearance of the law reports was changed from the hard cover that was characteristic of the previous years and was changed to a finer quality cover and the paper used to print the law reports was white and also of better standard. However, the law reports were no longer being published in yearly volumes but rather were being compressed into containing law reports accumulated over two or three years. Thus the result was that there were the law reports of 1988 – 1989, 1990 – 1992, 1993 -1994 and the last edition published was that of 1995 – 1997. There has been no credible explanation for the seven year lapse in the printing of the law reports but the author’s
guess would be that it could have been due to financial constraints. These law reports contained decisions of the High Court and the Supreme Court and were published by Juta and Company Limited of South Africa on behalf of the Council of the Law Reporting. The copies were obtainable from Juta and Company Limited in South Africa and were printed by Creda Communications of Cape Town, South Africa.

The trend changed over the years from having one person edit and generally do the bulk of the work on the law reports to team work by way of the Council of Law Reporting, it essentially became a collective effort.

The present

The body in charge of reporting cases is still the Council of Law Reporting based in Lusaka and is currently being chaired by prominent lawyer Mr Patrick Matibini. The Council of Law Reporting has the copyright in the law reports. They meet once a year for selection of cases which is done by the Editorial Board and the judgments forwarded to the Board would have been initially considered by The Supreme Court as selected judgments. The criteria for selection is that cases must contribute to the development of the law, this means it should represent a new ground broken, it should be able to demonstrate that it is updating precedents.\textsuperscript{49} This criteria can be contrasted with that of the Gambia, which is admittedly behind in the system of law reporting as they only began printing law reports in 1997. However, in their criteria the guide for what is to be included in a law report is simply the principles of law themselves. This means that even simple and elementary principles such as how to take a plea are reported.\textsuperscript{50}

\textsuperscript{49} Mr Patrick Matibini interview of 10\textsuperscript{th} June 2004.
\textsuperscript{50} Mr Justice F.M Chomba, interview of 31\textsuperscript{st} August 2004.
Selection of judgments is usually a vicious debate because a judgment cannot go into the law reports if its not contributing to jurisprudence. The point to be emphasised is that the judgments selected must contribute to the current legal knowledge, for instance its highly unlikely that cases of confession, murder, manslaughter will be considered or included since there are already so many reported cases on the same. It is the author’s submission that given the lapse of time, societal changes and new developments in the law, there is clearly a need for the criteria of including cases in law reports to be revisited.

The case of *Roy Clarke v The Attorney General*\(^{51}\) has been said to contribute to the development of the law and has represented a new ground broken and it is therefore likely to go to the Editorial Board and will probably be selected to be included in the law reports. The reason for this is as Justice Phillip Musonda said on page J 38 of the judgment, which is that: “It is a constitutional matter of prime importance in our legal history.”

The Editorial Board must be very strict and careful so as not to select erroneous decisions. The composition of the Council of Law Reporting includes Judges, lawyers, the Director of Public Prosecutions (DPP) and the Solicitor General (SG) and the Attorney General (AG).

The last law report published was the 1995 / 1997 edition and since then there has been a backlog. Currently efforts are underway to ensure that this backlog is cleared. According

---

\(^{51}\) HP/ 2004/003
to Mr Matibini, by the close of this year they would have completed and updated these reports.

In the absence of published law reports as is the case at the moment, the courts and lawyers make use of what are known as selected judgments where there is an important point of law discussed. It is from this type of judgment that law reports are made, before a judgment is included in a law report it will first be selected and in court it carries a citation of *selected judgment number 25 of 2004* for instance. For lawyers who want to be up to date after 1997, they can keep a record of all the selected judgments, but it must be borne in mind that it is not everyone who can have access to them for a number of reasons. The Deputy Chief Justice keeps a record of all the selected judgments.

As has been seen, in the Zambian system it takes time to have a law report, hence even if they are not contained in a law report as is the case with unreported decisions, they can still be cited and relied upon. The fact that it has not been reported does not mean that it is any less a precedent for as long as it is of significance in a particular field of law.\(^{52}\)

\(^{52}\) A decision does not cease to be an authority merely because it is not reported in a recognized series: R.E. Megarry 70 LQR (1954) : 246
CHAPTER THREE

INSTANCES WHEN THE COURT MAY DEPART FROM PRECEDENT

Notwithstanding the fact that precedents set by the superior courts are to be adhered to and are binding upon inferior courts under the doctrine of *stare decisis* and further that the Supreme Court should also stand by its past decisions even if they are erroneous, there are instances when the Court may depart from precedent by way of overruling, distinguishing and reversing.

The purpose of the present chapter is to analyse these instances in which the Court may depart from precedent.

3.0 **Overruling by the Supreme Court of its previous decisions**

It is not disputed that strict adherence to precedent could mean perpetuated injustice, bearing in mind that Judges are merely human beings and are likely to err in their exposition of the law as well as taking into account social changes over time. The House of Lords realised this and therefore issued A *Practice Statement* by which it was agreed that the House of Lords could overrule its own previous decisions, something which it had not been able to do in the past. Lord Gardiner made the statement on behalf of himself and the Lords of Appeal in Ordinary:

---

53 See the case of *Abel Banda v The People* (1986) Z.R. 105
54 (1966) 3 All. E.R. 77
“Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House.”

Zambia is a common law country and follows the practice and procedure of England in as far as precedents are concerned. The Supreme Court decided to adopt the Practice Statement and it applies to the Supreme Court concerning previous decisions of its own. This was first acknowledged in the case of *Paton v The Attorney General*, in which the Court said that:

“The relaxation of the rule is not abandonment and ordinarily the rule of *stare decisis* should be followed. Abandonment of the rule would make the law an abyss of uncertainty.”
This position was reiterated more recently by the Supreme Court in the case of *Match Corporation Limited v Development Bank Of Zambia And The Attorney General*.\(^5^6\) in the following terms:

"The Supreme Court being the final Court of appeal in Zambia adopts the practice of the House of Lords in England concerning previous decisions of its own and will decide first whether in its view the previous case was wrongly decided and secondly, if so whether there is a sufficiently good reason to decline to follow it."

The Supreme Court is now not absolutely bound by its own previous decisions. It can overrule itself. Thus in the case of *Abel Banda v The People*\(^5^7\) the appellant was convicted of murder by administering a pesticide contained in a drink of kachasu. The prosecution evidence included inter alia an interrogation conducted without administering a warn and caution by the village headman. In passing judgment in this case, the Supreme Court considered the precedent it had set in the earlier case of *Chibozu v The people*\(^5^8\) in which it was held that a village headman was a person in authority and therefore that he had to administer a warn and caution before taking a confession from an accused person.

In delivering the judgment of the court in the case of *Abel Banda v The people*, Justice F.M Chomba at page 114 had this to say:

---

\(^{5^5\text{ }}\) (1968) Z.R. 185
\(^{5^6\text{ }}\) SCZ Judgment No. 3 of 1999
\(^{5^7\text{ }}\) (1986) Z.R. 105 (S/C)
\(^{5^8\text{ }}\) (1981) Z.R. 2
"We are of the view that our decision in *Chibozu v The people* was wrong. We have already pointed out that *Chibozu* was wrongly decided and the next question for us to consider is whether there is sufficiently strong reason to decline to follow the decision in that case, it is our considered view that justice was not served in *Chibozu* because the symbolic scales of justice mean that just as an accused person should not be convicted unless there is sufficient and cogent evidence proving his guilt beyond reasonable doubt, the State should not be made to lose a case unless the evidence it adduces cannot in law support a conviction; that way the scales are balanced. On this basis we come to the conclusion that sufficiently strong reason does exist to warrant the overruling of *Chibozu* on the basis that it is *non sequitur*. We therefore hold that *Chibozu* is no longer good law to the extent considered in this judgment and it is therefore overruled."

In view of this, in the case of *Abel Banda* the court held that a village headman is not a person in authority for purposes of administering a warn and caution before interrogating a suspect, since his normal duties do not pertain to investigating crime.

3.1 **Overruling generally**

Overruling is primarily the prerogative of the court above that which decided the previous case. A higher court can overrule a decision made in an earlier case by a lower court, for instance the Supreme Court can overrule an earlier High Court decision, likewise the High Court can overrule the decision of the Magistrates court.
Overruling necessarily involves disapproval of the ratio, but never affects the previous decision so that the parties in the overruled case continue to be bound by the decision under the doctrine of res judicata and accounts that have been settled also are not affected.\(^{59}\)

A binding precedent is a decided case which a court must follow. But a previous case is only binding in a later case if the legal principle involved is the same and the facts are similar. Distinguishing a case on its facts or on the point of law involved is a device used by judges usually to avoid the consequences of an earlier inconvenient decision which is in strict practice, binding on them.\(^{60}\) For instance if in case B, a court with power to overrule case A says that case A is overruled, the ratio decidendi of case A ceases altogether to have any authority so far as the doctrine of precedent is concerned. It is completely ‘wiped off the slate’ to borrow Lord Dunedin’s metaphor. A case which has been overruled cannot be cited as authority for the proposition of law which constituted its ratio decidendi.

It must also be borne in mind that overruling relates not just to the decision but also to the law adumbrated by an inferior court in the decision.

Overruling can occur if:

a) The previous case was wrongly decided

b) The later court considers the rule of law contained in the previous case is no longer desirable.

\(^{59}\) Dias, Jurisprudence, 5\(^{th}\) edition, (1985) p 148

\(^{60}\) Asif Tufal.http://www.lawteacher.net. English legal system page 3
3.2 **Distinguishing**

A binding precedent is a decided case which a court must follow. But a previous case is only binding in a later case if the legal principle involved is the same and the facts are similar. Distinguishing a case on its facts or on the point of law involved is a device used by Judges usually to avoid the consequences of an earlier inconvenient decision which in strict practice is binding on them.

Paton puts it in these terms: “At the highest level the narrow theory of strictly binding authority has been thrust on English law by the need to distinguish inconvenient cases which there is no power to overrule.”

In *Jones v Secretary of State for Social Services* the court stated that:

> “It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing, they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty…”

Distinguishing does not simply involve pointing out a factual distinction between two cases, it involves further the use of this factual distinction as a justification for refusal to follow the earlier case. Repeated distinguishing of a case is evidence that the decision is not approved and the effect may also be to confine it more closely to its own special facts.

---

61. A Textbook on Jurisprudence, (1972) p 221
62. (1972) A.C. 944
It should be evident already that the bindingness in *stare decisis* is not rigid since judges have latitude in evading unwelcome authorities.\(^6^4\) All that the doctrine means is that a judge must follow a precedent except where he can *reasonably* distinguish it. A judge may, in the first place, restate the factual part of the precedent by lowering the level of generality in order to effect the necessary distinction. A distinction has to be reasonable, else it will not satisfy the desire that justice should be done.\(^6^5\) Alternatively a judge may restate the factual part of the precedent by treating as material such additional facts as will move it away from the case at hand.

The case of *Zambia Consolidated Copper Mines Limited v Reddy Daka And David Kantumoya*\(^6^6\) was said to be distinguished from that of *Jacobus Wynand Koekemoer v Martha Marion Gower*,\(^6^7\) in which under section 10 of the Debtors Act, cap 87 (now cap 77) of the laws of Zambia, it was determined that the words ‘High Court’ in the section included the Registrar of the High Court. It was also said to include his deputies and that they had the same jurisdiction as a Judge in chambers and therefore that the Registrar had the power to review his earlier decision. However, in the ZCCM case the application for review of the case was brought under order 39 of the High Court rules, cap 27 which refers to powers of ‘any judge’ to review his own decision and receive fresh evidence and to either vary or confirm his earlier judgment. This was taken to exclude the District

---

\(^{6^3}\) *Oxford Essays in Jurisprudence* edited by A.G Guest (1961) p 175


\(^{6^5}\) Dias p 146

\(^{6^6}\) SCZ Judgment No.3 of 1998 (unreported)

\(^{6^7}\) (1981) Z.R. 138
Registrar from such powers as the Act clearly referred to ‘any judge’ and not to ‘any court.’ It was held that the Registrar does not have power under order 39 of the High Court rules to review his own decision.\textsuperscript{68}

However, when a case is distinguished it does not mean it is bad law, but rather it is still good law on the facts of that decision.\textsuperscript{69} Distinguishing does allow judges to develop the law and create exceptions to a general rule established in a previous case.\textsuperscript{70}

3.3 \textbf{Reversing}

Reversing is the overturning on appeal by a higher court of the decision of the court below that hearing the appeal. The appeal court will then substitute its own decision. For example, the Supreme Court can reverse a decision of the High Court.

Dias\textsuperscript{71} writes that; ‘reversal which is the overthrow of a decision on appeal in the same case may involve disapproval of the ratio as stated by the lower court; but it need not, as where the decision is reversed on some other point.’

The effect of reversal is normally that the first judgment ceases to have any effect at all.

3.4 \textbf{Lower courts cannot upset the decisions of the superior courts}

A lower court is not entitled to upset a decision of the superior court so as to replace it with its own decision. For instance, the High Court cannot upset a decision of the Supreme Court, the lower court is bound to follow the decision of the superior court

\textsuperscript{68} However, it appears to be more of a case of construction than distinguishing.

\textsuperscript{69} The Honourable Chief Justice, interview of 20\textsuperscript{th} July 2004

\textsuperscript{70} \textit{The People v Mwamba Kakuya} (1990/ 1992) Z.R. 9 was distinguished from \textit{Mutoloki v The People} (1972) Z.R. 283
under the doctrine of *stare decisis*. The IRC attempted to do this in the case of *Zambia Consolidated Copper Mines v Mulemwa*\(^{72}\) where the IRC held that the decision of the Supreme Court in *Ngwira v Zambia National Insurance Brokers Limited*\(^{73}\) was incorrect and that ‘social status’ in section 108 of the Industrial and Labour Relations Act related to employment hierarchy. The Supreme Court held that until such a time as the Supreme Court itself upset its own earlier decision the IRC was bound thereby.

Citing the words of Lord Wilberforce in *Milangos v George Frank Limited*\(^{74}\) the Supreme Court in the case of *Kasote v The People*\(^{75}\) had this to say:

“ It has to be reaffirmed that the only judicial means by which decisions of this House can be reviewed is by this House itself.”

### 3.5 The High Court ‘s power of review

The High Court can review its own decisions under order 39 of the High Court rules which provides that: “ Any judge may upon such grounds as he shall consider sufficient review any judgment or decision given by him…and upon such review, it shall be lawful for him to open and rehear the case wholly or in part and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision.”

Under this rule, a lawyer can make an application for review if it is conceived that a decision was made without taking other issues into account and that if such issues had

---

\(^{73}\) (1993 / 1994) Z.R.140  
\(^{74}\) (1975) 3 All E.R. 80 (H/L)
been considered the Judge would not have arrived at that decision. Therefore in this manner the High Court can set aside its earlier decision or judgment by way of review. However, until this is done the lower courts such as the Magistrates Court are bound by such a decision.

3.6 *Zambia’s approach to precedents*

Zambia follows substantially the U.K or common law approach in as far as the application of the doctrines of precedent and *stare decisis* are concerned. This is essentially a more or less rigid approach as compared to the more flexible approach characteristic of the United States of America.

According to the Chief Justice, Ernest Sakala,\(^7\) at Supreme Court level the only way there can be a departure from a precedent is to increase the panel of judges. If the case in question was decided by a panel of three, then it will have to be increased to five. If it was decided by a panel of five, then it will be increased to 7, if it was decided by a panel of 7 then it will be increased to 9. However, if the case was decided by a panel of nine, then it will be necessary for the court to look at all the particular facts and circumstances of the case.

\(^7\) (1977) Z.R. 75 (S/C)

\(^7\) Interview of 20\(^{th}\) July 2004
CHAPTER FOUR

OTHER FACTORS WORTHY OF CONSIDERATION UNDER PRECEDENT

4.0 The need to do justice

One of the major tasks of precedent, is the need to do justice, that is the task of giving just decisions in disputes. This is not to imply that an unjust or an inconvenient precedent is not ‘law’ here and now, the point is that injustice or inconvenience will in time kill it and if this were to occur on a large enough scale may even bring about the demise of stare decisis itself.77

The service of justice is seen in the need to continue treating like cases alike thereby achieving equality and consistency. It basically means that cases are not decided by whim, partiality or favour. It is essential that there be underlying principles of law and that cases shall be decided by them, whether the parties to the case be rich or poor of high degree or low.

The view of the courts in Zambia is that a legal decision must be a just decision. Justice must be reflective of societies’ philosophical and moral values at any given time.

This of course brings in issues of the social context as well as public policy considerations. Nowadays there are many social factors that must be borne in mind when a court is determining a case and in particular if its relying on precedents.
Perhaps in looking at a case to do with rape or defilement, aside from the statutory provisions in the Penal Code and set precedents a court or judge, in line with social context considerations will have to bear in mind the prevalence of HIV/AIDS issues and this may warrant the court to distinguish the precedent from the case at hand in passing its sentence.

Likewise, long ago wife beating was seen as a sign of love but it is now characterised as wife brutality and obviously the court will not exercise the same leniency accorded to perpetrators in earlier precedents but rather will distinguish them by taking into account societal values and factors especially the obvious demand for human rights protection and in particular, respect for women’s rights.

Globalisation is another important aspect as it has led to cultural diversification thus leading courts to take into account different cultures. Perhaps in a case of indecent assault where the accused might claim that it was the complainants fault as she was inappropriately or indecently dressed because she was in a mini skirt or tight trousers, the court is likely to take judicial notice of the fact that it is now common for most women to be dressed in this manner due to the reception of European dress culture.

Thus in *Ray Clarke v The Attorney General*\(^7^8\) taking into account societal factors Justice Phillip Musonda at page 36 of his judgment had this to say: “The Honourable Minister’s decision to deport was not reflective of our Christian values as a Christian nation. You cannot deprive a man of a wife, where there are no compelling reasons of national

\(^7^7\) Dias, *Jurisprudence*, (1985) 5th edition p 158
\(^7^8\) HP/ 2004/ 003
security. In Christendom marriage is sacrosanct, and you cannot terminate it because one spouse has dissent views or has propensity to offend government. Diversity is the life blood of democracy."

The British government has sponsored a programme at Warwick University which has been running courses to generally sensitise Indian Judges on issues relating to changes in societal perceptions. For instance a couple of years back, Indian women were looked down upon and their families did not even bother to educate them. Nowadays things have changed somewhat as society does not look down upon them as much as they used to and there are a lot of successful and educated Indian women. The Judicial Services Board in England which trains the judges runs courses on the trial and treatment of minorities.70

For the lower courts, precedent can perpetrate injustice because they are bound to follow them by virtue of the doctrine of stare decisis. The courts in Zambia acknowledge that in fulfilling the demands of justice it may be necessary to depart from precedents, the superior courts have a way of ensuring that justice prevails perhaps by way of distinguishing, reversing or overruling. The case of Abel Banda v The people (cited in the previous chapter) overruled that of Chibozu v The people (also cited in the previous chapter) because the courts were of the view that justice was not served in Chibozu.

In fact it was considerations of the need to do justice that the House of Lords issued the Practice Statement of 1966 in which Lord Gardiner aptly stated that:

70 Interview with Justice Phillip Musonda on 8th June 2004.
"Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law."

The House of Lords by way of this Practice Statement could depart from precedent where it appeared right to do so.

One of the most important aspects of continued justice is that precedent and *stare decisis* should be adaptable to changing needs. In light of this Holdsworths observed that the English doctrine of precedent:

"Hits the golden mean between too much flexibility and too much rigidity; for it gives to the legal system, the rigidity which it must have if it is to possess a definite body of principles, and the flexibility which it must have if it is to adapt itself to the needs of changing society."

An unjust precedent is 'law' nonetheless but it is argued that it is sometimes too high a price for certainty in law. "Certainty in law," said Maitland "must not become certainty in injustice."\(^{80}\) For as Paton asks; "Should we carry our natural love for equality as our attribute of justice so far as to treat 20 plaintiffs unjustly because one case laid down an unjust rule?"\(^{81}\)

---

\(^{80}\) Maitland, Collected papers iii pp 486 - 487

\(^{81}\) cited in Lord Lloyd of Hampstead’s *Introduction to Jurisprudence*, 3rd edition (1972) at p 715
4.1 **Precedent and Public Policy**

How far is public policy taken into account in the application of precedents? Perhaps an interesting starting point would be to find out what public policy is. The view of the courts in Zambia is that public policy involves matters which are in the national interest as well as the need to administer justice. The Honourable Chief Justice said that: ‘You cannot separate the two, because what’s in the national interest must be in line with justice.’

Justice Charles Kajimanga expressed it in these terms: ‘If over time there has been a law in place, but later on the policy shifts so as to address something that was never foreseen at the time that decision was made, courts will follow the policy if it is intended to foster justice as for example concerns of national policy. Parliament keeps promulgating laws and perhaps some may have an effect on precedent or on a decided case, the courts will not be blind to that policy. Basically, they will look at it from the point of view of the national interest.’

William Church in his article, ‘The Common Law and Zambia’ wrote: ‘It was not possible any more to fail to see law as an instrument of social policy or to misapprehend the fact that as society and its policies change, so too must the law be readjusted. In Zambia, as throughout Africa, the emphasis began to switch from preserving the past to preparing for the future. Under such conditions, it was inevitable that the method of law would turn away from automatic recourse to past precedent, especially precedent from

---

82 Interview of 20th July 2004
83 *Zambia Law Journal*, 1974, Volume 6, p 31
outside the country and toward consideration of the practical needs of society as perceived by the law makers.”

However, the courts insist that primary reliance continues to be lodged not on policy analysis but on precedent cases, including many decided in England. There have been changes in the method of the law, but the pace of change has been slow.

As yet there is no decided Zambian case which reflects precedent and public policy. Perhaps the closest case there is, is that of *Frederick Jacob Titus Chiluba v The Attorney General*[^84] in which the issue at hand was the lifting of the second Republican President F.T.J Chiluba’s immunity so that he could be prosecuted for alleged criminal offences committed whilst he was Head of State. The court summarised the issue for determination as being whether there was impropriety on the part of the National Assembly either in lifting the immunity of the appellant or the manner in which such lifting was done. The court aptly stated in that case that since the appeal was raised for the first time and it was a matter of general public importance each side would bear its own costs.

The public policy concern in this case is that the MMD New Deal government under President Mwanawasa is pursuing the fight against corruption. Everyone suspected or alleged as having been involved in corrupt practices is liable to be prosecuted even if they are a former President.

[^84]: Appeal No. 125 of 2002 (S/ C)
However, Zambian courts do rely on English precedents which are premised on public policy considerations. A classic example of this is the leading contract case of *Nordenfelt v Maxim Nordenfelt Ammunition Co. Ltd*\(^{55}\) which deals with contracts in unreasonable restraint of trade. Nordenfelt, who in 1866 had invented a machine gun called ‘Maxim,’ covenanted with the company to which he had sold the patent that he would not be involved in the manufacture of guns for twenty five years, unless it was on the company’s behalf. The House of Lords held that the covenant (which of course was unrestricted as to area) was not wider than was reasonably required for the company’s protection, considering the specialised nature of the business and the limited number of customers which comprised, of course, the British government and those of other countries.

Lord Parker in reviewing the *Nordenfelt case* in the case of *Herbert Morris Ltd v Saxelby*\(^{56}\) said: “It will be observed that in Lord Macnagten’s opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties, the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must in no way be injurious to the public.”

\(^{55}\) (1894) A.C. 535
\(^{56}\) (1916) 1 A.C. 688
4.2 Judge Made Law

It can hardly be a matter of serious dispute at the present day that within certain narrow but clearly defined limits, new law is created by the judiciary. The attention centres on the ways in which this occurs and the motives, attitudes and reasoning which underlie the development of the law.

How far then, do Judges in Zambia make the law? According to Judge Charles Kajimanga,87 "Judge made law is basically done by the Supreme Court which is the final court of appeal and they actually make the law by making pronouncements in their judgments on issues that may not be contained in the statutes. If there is something not contained in the statute they will highlight that principle because their decision is final and binding."88

The Honourable Chief Justice Ernest Sakala had this to say on this particular subject:

"The truth most of the time is that Judges do make law because whatever they say becomes law. Judges do make law but not in the sense of enactments made by Parliament."89

Justice Phillip Musonda said: "Judges should as much as possible stay clear from law making when statute is unambiguous. Their role is interpretation and may only fill the gaps in executing that role."90

---

87 Interview of 12th July 2004
88 Interview of 12th July 2004
89 Interview of 20th July 2004
90 Interview of 9th June 2004
One thing is obvious from all this and this is that Judges do make law. Thus the learned authors in Lord Lloyd of Hampstead's *Introduction To Jurisprudence* write: "It is realised that in a sense whenever a court applies an established rule or principle to a new situation or set of facts or withholds them from these new facts, new law is being created. But this process is inevitably a very gradual and piece meal one, a step by step progression, graphically described in Holmes phrase of legislating 'interstitially' that is within the interstices of the existing fabric of the law. Sometimes indeed a court may take a bolder step, by laying down a new rule or principle which itself contains the potentially of creative expansion and development. Even here new law is virtually never created completely *in vacuo*, for the court will strive to follow such analogies as are derived from established legal principles and to root its decision so far as may be in the past rulings."\(^{91}\)

When you consider the case of precedents, the creativity or the judge made law comes from the fact that the court is able to distinguish, reverse or overrule on some point of law premised on the facts of a given case. More usually a Judge narrows, extends or otherwise modifies some existing rule. Judges sitting in superior courts as for instance the Supreme Court in Zambia whose decisions are final and binding on the inferior courts deliver reasoned judgments.

---

\(^{91}\) (1985), 5th edition, p 1130
In cases which seem to be of importance to the law, those judgments will be reported in the law reports. The Judge is therefore conscience of the fact that he is taking part in a law declaring process, at least and he may be taking part in a law making process.92 The Honourable Justice Rene J.J Oliver commenting on judicial creativity said: "Judges should become architects and not mere brick layers."93 What he meant simply is that Judges should be able to actively take part in the law making process.

4.3 Constitutional Supremacy and Parliamentary Supremacy

In the Zambian legal system we uphold the principle of constitutional supremacy. The Constitution is the supreme law of the land or the ‘grund norm.’94 Therefore if any other law is inconsistent with the provisions of the Constitution, that other law to the extent of its inconsistency is deemed to be void.95 Thus the Constitution binds all persons in Zambia and all legislative, executive and judicial organs of the state at all levels.

In the case of Ray Clarke v The Attorney General96 the appellant submitted a satirical article to the Post newspaper of 1st January, 2004 which the Permanent Secretary and Minister of Home Affairs found offensive and disturbing. In light of this, they purported to have him deported under section 26 (2) of the Immigration and Deportation Act.97 The court was of the view that the Honourable Minister did not apply section 26 (2) for the purpose the power was granted to him, that is to maintain and sustain public order. Rather

---

92 Paton, A Textbook on Jurisprudence, (1972) p 214
94 Article 1 (3) of the Constitution of Zambia
95 Article 1 (4) of the Constitution of Zambia
96 2004/ HP/ 003, judgment of 26th April, 2004
97 Cap 133 of the law of Zambia
he used the power given to him or the legal provision, to constrict a constitutional right or rights, that is section 20 which provides for freedom of expression. Further the court said that in a constitutional democracy, no organ or institution of government can take away a right guaranteed under the Constitution unless as prescribed by the Constitution, nor can any law do that unless in a manner prescribed by the Constitution. The deportation was quashed for violating the Constitution.

The earlier case of Re Thomas Mumba98 also illustrated this point. This was a case in which the applicant was standing trial in the Subordinate Court for an offence under the Corrupt Practices Act. Section 53 (1) of the Act required that where such an accused elected to say something in his defence, he had to say it on oath only, (thus excluding the option of making an unsworn statement ). The defence submitted that the provisions of the section referred to were in contravention of Article 20 (7) of the Constitution.

Judge D.K Chirwa of the High Court as he then was said in his holding: “As the Constitution is supreme and above all the laws and as section 53 (1) of The Corrupt Practices Act is in direct conflict with Article 20 (7) of the Constitution. I have no hesitation in declaring that section 53 (1) of The Corrupt Practices Act is unconstitutional and therefore null and void and it should be severed from the Act.”99

From the above it can be seen that the Zambian courts have jurisdiction to question the validity of legislation as well as to strike down any legislation which is found to be

---

98 (1984) Z.R. 38
99 See also the case of Christine Mulundika and 7 others (1995) Z.R. 20 (S/C). In this case the Supreme Court invalidated sections 5 and 7 of the Public Order Act which gave the police broad discretionary
incompatible with the Constitution. This being borne in mind, it is submitted that the courts in Zambia should not blindly follow English precedents because England unlike Zambia does not have a written constitution and further that it upholds the principle of parliamentary sovereignty.

In his keynote address in the proceedings of the Latimer House, Joint Colloquium, June 1998, Lord Irvine of Lairg, Lord High Chancellor of Great Britain stressed the issue of parliamentary sovereignty in the following terms: "In the U.K., the executive, legislative and judicial branches of government are not equal and co-ordinate. Parliament is the senior partner."\(^{100}\)

Therefore, the legislature, apart from any constitutional limitations is legally, if not defacto free to make innovations as it sees fit and deal in an abstract way with all future cases. A court on the other hand is limited to the actual issues and the parties before it and is to an extent restricted by the scope of legal issues and operates within a traditional framework and subject to the force of professional opinion of what is good law and the possibility of being reversed on appeal.\(^{101}\)

Unlike in Zambia, courts in the U.K. lack the jurisdiction to question the validity of legislation. Rather Judges are advised to avoid usurping the function of the legislature. In Zambia, the only ouster of the court's jurisdiction is in reference to matters which belong

\(^{100}\) Parliamentary Supremacy and Judicial Independence, A Commonwealth Approach edited by John Hatchard and Peter Slinn (1998) at p 4
purely to the internal arrangement of parliament such as the date the House adjourns, cost saving measures, power to remove strangers from the House and a myriad of other internal administrative functions. Even here however, the courts may intervene to settle a dispute between Parliament and any aggrieved individual who claims to have suffered grave injustice caused to him by Parliament. This was said to be the position in the case of *Fred M’membe and Bright Mwape v The Attorney General*\(^\text{102}\)

Thus in the words of Justice C. Kajimanga:\(^\text{103}\) “If the Constitution provides for a particular right you cannot rely on precedent to go against the Constitution, that precedent must be in conformity with the Constitution.”

In the case of *Roy Clarke v The Attorney General*\(^\text{104}\) Justice Phillip Musonda in his judgment at page 32 had this to say: “Herein lies the fallacy on transporting English decisions to this jurisdiction which are not based on a written constitution without analysing whether such decisions are in consonance with our constitution.”

In the above case, the comments of the Honourable Judge where due to the fact that in their submissions Counsel for the respondent cited a number of English precedents to support their case.

---

\(^{101}\) Ibid

\(^{102}\) Before the Honourable Justice K.C Chanda at Lusaka the 27\(^{\text{TH}}\) day of March 1996 in open court

\(^{103}\) Interview of July 12, 2004

\(^{104}\) 2004 / HP/ 003
CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

This is the final chapter of the research essay and it focuses on the recommendations and conclusions.

5.0 Recommendations

1) Lawyers and Judges should be encouraged to read more widely so that they expand their horizons beyond just considering English decisions when they are looking at foreign precedents, as is the current practice. For as long as the case is on all fours with the one under consideration, there is no reason why cases beyond the English jurisdiction cannot be followed. This will contribute to the development of Zambian jurisprudence.

2) Local Court Justices must be people who are knowledgeable or experts in customary law, whether they are literate or not as is the case in most West African countries. It would also be a good idea to come up with Customary Law Reports in which decisions of the local courts can be reported in as far as customary law issues are concerned.
3) Judges should have research assistants preferably law students on internship to help them do most of the research for them since they are so busy. The Judicature when working out their budget could include this issue as a crucial matter to be included in the budget allocation.

4) The system of law reporting has not been very efficient, efforts must be made to ensure that law reports are published in yearly volumes as was the case in the past and they should not be compressed into one report after they have accumulated over a number of years.

5) The criteria for including cases in law reports needs to be reviewed and revised. The current criteria which is that the case must contribute to the development of the law or represent a new ground broken is a very subjective and unsatisfactory standard to use. Perhaps the Zambian legal system needs to take a leaf from their Gambian counterparts for whom the criteria for inclusion in a law report is simply the principles of law themselves. Simple and elementary principles such as how to take a plea are included and reported. The cases reported in these law reports must be all encompassing and report as much as possible in all areas of the law since the society is ever changing.
6) The system of law reporting should be decentralised so that other institutions can also be allowed to publish the law reports. They can work in collaboration with the judicature in this respect. When one looks at the English system of law reporting, they do not just have one institution doing the job the system is decentralised, hence you have the All England Law Reports, The Weekly Law Reports, The Chancery Division, The Appeal Cases to list just a few. For instance it would be a good idea to let the UNZA law school publish their own volumes of the law reports, in so doing students should be used to research on the various cases to be reported as part of their legal training even if this is done during the vacation.

7) All lawyers should avail themselves of law reports so that they are abreast with precedents.

8) Judges must ensure that in following precedents they are alive to the fact that their primary role should be that of delivering just decisions. In so doing the needs of a changing society must be borne in mind.
5.1 **Conclusions**

1) Each court is bound by decisions of courts above it.

2) Precedent and *stare decisis* are two separate and distinct doctrines although they have moved so near to each other as to be barely distinguishable.

3) Individual judges of the High Court are not bound by each other's decisions although judicial courtesy requires that they do not lightly depart from the considered opinion of their brethren.

4) Where there are two conflicting decisions of the Supreme Court, the lower courts are bound to follow the latest decision.

5) The Supreme Court in Zambia has adopted the practice of the House of Lords in England concerning previous decisions of its own and will decide first whether in its view the previous case was wrongly decided and secondly, if so whether there is good reason to decline to follow it.

6) The Supreme Court being the final court of appeal, its decisions bind the lower courts (*stare decisis*) unless they can reasonably distinguish them.

7) An efficient system of law reporting is essential for the proper existence of the doctrines of *stare decisis* and precedent.
8) The courts may depart from precedent by way of overruling, distinguishing and reversal.

9) Any judgment of the court is authoritative only as to that part of it called the ratio decidendi, which is considered to have been necessary to the decision of the actual issue between the litigants.

9) The Court and Counsel can rely on rulings or precedents from foreign jurisdictions. These are merely of persuasive value to the court but they may also be called powerful influences on the development of Zambian law and there is a notable respect for them.

10) For all practical purposes, a precedent, which ignores or misconceives a clear and positive rule of law is no precedent.

11) It is well recognised that law gradually adapts itself to changing social conditions and that very ancient precedents are often inapplicable to modern circumstances. For this reason they are cited with comparative infrequency. ‘Precedents may be compared to wine which improves with age up to a certain point and then begins to go off.’\textsuperscript{105} If however, circumstances have not changed antiquity does not derogate from authority.\textsuperscript{106}

\textsuperscript{105} Per Lord Denning L.J. \textit{Richardson v LCC (1957)} 1 W.L.R. 751
\textsuperscript{106} \textit{Triefus & Co. Limited v Post Office (1957)} 2 Q.B. 352
12) Not only changed social circumstances but changes and developments in human knowledge may greatly affect the application of precedents. Law is a product of its own period and environment and so cannot remain static.

13) Allen in his book, ‘Law in the Making’\(^{107}\) commenting on precedent and justice observed that: “If it is true that precedents are employed only to discover principles, so it is true that principles are employed to discover justice. We speak of the Judge’s function as ‘the administration of justice’ and we are sometimes apt to forget that we mean or ought to mean, exactly what we say. Nobody claims that the law always achieves ideal moral justice, but whatever the inevitable technicalities of legal science may be, they exist for the prosecution of one aim only, which is also the aim of the Judge’s office: to do justice between the litigants, not to make interesting contributions to legal theory. This dominant purpose all precedents, all arguments and all principles must subserve and when precedents do not help, enlightenment must be found elsewhere.”

14) When dealing with the question of how far judges can and do legitimately ‘make’ law, Allen warns that: “we must use this word ‘make’ with caution.”\(^{108}\) In Zambia, it appears as though the ability of the judge to make

---

\(^{107}\) (1964) 7th edition, at p 298
\(^{108}\) Ibid p 302
law is limited to those areas, which are not covered by statute or where the statute is ambiguous.

15) Zambia upholds the principle of constitutional supremacy. Therefore, for any precedent to be applicable it must not offend the provisions of the Constitution otherwise it will be deemed to be void. Also caution must be exercised in applying English decisions as England does not have a written Constitution and it also upholds the principle of parliamentary supremacy. Therefore, in applying English precedents, care must be taken so as to ensure that those precedents are in consonance with the provisions of our constitution.
BIBLIOGRAPHY

Books


Journals


Theses


Internet working papers

Statutes

The Constitution, cap 1 of the laws of Zambia

The Industrial and Labour Relations Act, cap 269 of the laws of Zambia

The English Law (Extent of Application) Act, cap 11 of the laws of Zambia

Richardson v LCC (1957) 1 WLR. 751

Roy Clarke v The Attorney General HP/ 2004/ 003

Sata v The Post Newspaper Limited (1992)/ HP/ 1399

The Attorney General and the Speaker of the National Assembly v The people SCZ judgment no. 34 of 1999

The people v Ian Kainda HLR/ 01/ 200

The people v Mwambia Kakuya (1990/ 1992) Z.R 9

The Practice Statement (1966) 3 All E.R. 77

Triefus and co. limited v Post Office (1957) 2Q.B.352


Zambia Consolidated Copper Mines v Reddy Daka and David Kantumoya SCZ judgment no.3 of 1998