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**DIRECTORATE OF DISTANCE EDUCATION**

***School of Leadership and Business Management***

**DTL1400: LEGAL FRAMEWORK IN TRADITIONAL LEADERSHIP**

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**RATIONALE**

This module is formulated in a manner that will inculcate knowledge and skills and also invoke an inquiry mind in the learners on traditional leadership and its legal framework.

This will in turn strengthen the traditional leadership in various chiefdoms in Zambia by enhancing good governance. This module will help build capacities in the way conflicts are resolved by the traditional leadership.

AIM

The course aims at equipping the learners with knowledge and skills in traditional leadership legal framework and other issues that border on morality.

**LEARNER OUTCOMES**

It is expected that at the end of the end of this course learners will be able to:

a) Explain the concept of legal framework and its benefits to traditional leadership.

b) Describe the constitution making process and its implication on traditional leadership.

c) Describe the judicial system in Zambia and its role in good governance.

d) Apply the Zambian legal framework in traditional leadership and governance.

e) Demonstrate competencies in handling the emerging issues in traditional leadership and the legal framework.

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**UNIT 1**

1. INTRODUCTION TO TRADITIONAL LEADERSHIP AND ITS LEGAL FRAMEWORK

1.1 HISTORY OF TRADITIONAL LEADERSHIP AND LEGAL FRAMEWORK IN ZAMBIA

 1.1.1.0GOVERNANCE IN PRE-COLONIAL ZAMBIA STATES (KINGDOMS) IN ZAMBIA

 **INTRODUCTION**

In order to appreciate the traditional leadership and its legal framework in Zambia it would be wise to look at the historical background of the traditional leadership and matters incidental to it.

A pre-colonial time is the period before the colonialization of Zambia by the white settlers. A Governance in pre-colonial states in Zambia was organized in units called kingdoms. The perception of governance was purely based on the traditions, norms and practices of the particular group of people or clan or tribe. The Ngoni Kingdom had their own system of governance different from the Bemba Kingdom and were the Lozi and Lunda Kingdoms.

**LEARNER OUTCOMES**

By the end of the unit learners should be able to:

1. Identify four distinct kingdoms in pre-colonial Zambia
2. Discuss the style of governance that each of the four kingdoms practiced.

 GOVERNANCE IN GENERAL

Governance was not uniform. It depended on what group of people were being governed. It must also be stated that despite the variation in governance in pre-colonial Zambia, all the inhabitants at the time shared common characteristics of social-economic nature.

The following are the characteristics of pre-capitalist communities:

* Communities did not aim at producing any surplus. They only produced what was enough for their own consumption.
* Despite women being the major producers of food at the time, political activities were left to men alone. In a nut shell it was men’s activities which were looked at as being of value.
* Societies or communities were organised based on kinship. It was on the premise that people cooperated in these pre-colonial societies. Such societies were organised upon female lineage or male lineage or both. These kinships were synonymous with marriage, areas inhabited and systems of inheritance.
* During this era, it must be emphasised that various beliefs and mechanism existed to strengthen the limit of cooperating group such as myths, rituals, political leadership etc. Those who failed to confirm this type of cooperation were subjected to sanctions of ridicule, sickness by ancestral ghost. None of these societies were held together by political coercion. The absence of political structures made them vulnerable to the more technologically organised and advanced societies.

Bulra’s assertion on the four common characteristics of the pre-colonial Zambian societies could be said to be true and typical of the socio-economic life of the time. The political organisation of various groupings varied greatly. Some were based on clans while others were based on chiefdom’s and others were ideally based on tribal kingdoms. The leaders of these chiefdoms and kingdoms were selected based on patrilineal or matrilineal were leadership were traced through men and women respectively.

Andrew Roberts (Roberts, 1973) ironically describes the pre-colonial political arrangements. Before the eighteen century Zambia was inhabited by various groups of migrants from southern, Congo. The differences and similarities of these groupings led to the establishment of certain type of identification based on tribes. The political arrangement of these tribes varied greatly some did not have chiefs such as the Tonga’s who had occupied the southern part of Zambia.

Those who had chiefs as their leaders also had different ways of the way they ascended to the throne including their subjects perception. They were looked at mainly as leaders in ritual and not in political life.

In the early nineteenth century there emerged three large political limits in Zambia, namely the Lozi occupying the western part of Zambia, the Bemba system of chieftainship occupying the northern part of Zambia and Ngoni kingdom in the Eastern part of Zambia.

The limitary state was non-existence as it is today.

The Zambia society was based of fragments segmented into chiefdoms or clans. Nothing was able to be put on record though documentation as these societies could not write. Every practice of their kinship was passed on by way of oral history.

**1.1.1.1 FOUR STATES (KINGDOMS) IN PRE-COLONIAL ZAMBIA AND GOVERNANCE LUNDA OF KAZEMBE KINGDOM.**

Most of what we know about governance in pre-colonial Zambia could be traced to the Bemba Kingdom, the Lozi kingdom and the Ngoni kingdom. We would ably argue that the pre-colonial governance in Zambia was segmented according to the beliefs norms and tradition of the aforesaid kingdoms.

In Luapula river valley the Lunda of Kazembe established states after conquering the indigenous people they found. They adopted their subjects language through maintained their culture and traditions. They never subjected themselves the indigenous people’s cultural norms and values.

Lunda people of Kazembe got into a relationship with the Portuguese in Angola. The Portuguese started supplying guns to Kazembe.

On the East Coast Kazembe traded with the Arabs. The contacts with both the Portuguese and the Arabs made the Kazembe kingdom stronger both militarily and economically. This pre-colonial state because of the guns and the health accumulated as a result of trade made the conquest of the indigenous inhabitants easy.

**BEMBA KINGDOM**

There were several territories hinder the Bemba kingdom. Their leaders, this the chiefs to the Bemba kingdom ascended to the thrown following different lineage but hinder one clan. However, it must be noted here that the Paramount Chie Chitimukulu has its own district territory. The Bemba kingdom rapidly grew in size as a result of the Bemba conquering the neighboring tribes. The subjects were integrated into the Bemba clan by intermarriage.

LOZI KINGDOM

We of what we call modern Zambia today was the Lozi kingdom and the Litunga. This kingdom consisted of many tribes. The ‘true Lozi’ lived in the plans and various other tribes lived in the wood land areas. The ruling class was not exclusively drawn from the true Lozi, it included milers drawn from the assimilated subjects.

The Tonga and Illa being the neighbours were often attacked and their livestock raided. They also captured and enslaved the Tonga and Ila people. These slaves were later engage in done communal work with in the Lozi kingdom.

NGONI KINGDOM

In the Eastern part of the modern Zambia were the Ngoni speaking people who came from South Africa. They run away from the wars of Shaka Zulu. On reaching the present day Zambia, they found the Chewa people whose governance system was loosely organised and this gave chance to the war like Ngoni to easily subdue them and prevailed over as their milers.

Whilst maintaining their customary way of life the Ngoni adopted the local language. They got herds of cattle from the people they conquered and the people they captured were enlisted in their army as way of expanding their army and making a stronger kingdom.

COLONIAL RULE

Later, Zambia had its governance changed by the white settlers in the 19th century. This new kind of governance was referred to as colonial rule. The pre-colonial governance organised in form of kingdom became part of the global village and the colonial masters established and maintained relationships with the outside world.

The pre-colonial territories were amalgamated into one limitary state. A large limit emerged which resulted from the combination of kingdoms (Roberts 1973:1)

In order to understand and appreciate the colonial rule, it worth examining imperialism and monopoly

 CAPITALISM

This is where production of goods and services are chosen at a larger scale not only for he consumption of the producers themselves by use by others. Making such goods and services available to their at a cost. Production of such goods and services had one aim, that of making profits. The owners of the means production called the capitals or bourgeoisie and working class called proletariat provided labour in order to enable mass production of the time.

 IMPERIALISM

This is an indirect or country of state by another state. It is the domination of a state or states politically by way of colonialisation.

COLONIALISM

This is a political direct political control and dominion of people and territories by foreign states. This is the imposition of colonial rule

 MONOPLOLY CAPITALISM

This is the dominating of giant corporations in the stage of development. This brings about competition among corporations for raw materials, finance and investments opportunities in order for them to earn profits.

1.1.1.2 DEVELOPMENT OF COLONIALISM

The development of colonialism in Zambia could be discussed as below.

1. CRISIS FEUDALISM

In the sixteen century the desire for Europe to exporting increased. This was a stage of transition from feudalism to some form of trade for prosperity (Bernstrein 2000:245). There was a shift from one kind commodity economy to a move diverse economies based of various productions and demand merchant arose especially in urban areas wanting to production goods and services enmmassive and do so with a view of producing for profits.

Feudal lords were slow make weaker. The Agrian economy which was a characteristics of feudal lord were replace by a more aggressive economy dynasty wars had also started disappearing from the scene.

The urge for increased source of revenue by foreign states led to the expansion for secured for wealth in other societies. Explorers and merchants were in the fore front of opening up new markets for raw materials. The imposition of colonial rule therefore started in the 16th century.

1. MERCHANTS, SLAVES AND PLANTATIONS

In the seventies century there emerged another aggressive move to boost the treasury of individual governments by way of plunder of resources in foreign lands when included increased mining activities. Notably the British colonialisation North America and the Dutch economic activities in the Caribbean. The sugar plantation in Brazil escalated and widen slave trade as labour was in these plantations

The rapid could expans.ion of colonialism could be attribute to the competition for oversees raw materials as well as markets for the European manufactured goods coupled in the search for investment opportunities.

ACTIVITY

1. Explain the type of governance practiced by the Lozi Kingdom in pre-colonial Zambia.
2. What relationship existed between the Ngoni Kingdom and the Bemba Kingdom in pre-colonial Zambia?

**COLONIAL GOVERNANCE IN ZAMBIA**

 INTRODUCTION

Governance in Colonial Zambia was engineered by the British Colonial Masters. Initially British South African Company (BSA) was appointed by the British government to administer Zambia, then called Northern Rhodesia on its behalf. Later the British government moved in and established its own administration.

In a nut shell governance in Colonial Zambia left much to be desired especially among the indigenous Africans. The introduction of various forms of tax and the system of alienation of land in favour of White Settlers brought a lot discontent among the indigenous people.

LEARNER OUTCOMES

By the end of this unit learners should be able to:

1. Identify the stages of colonialism
2. Explain the rationale behind the federation as perceived by colonial masters.
3. Discuss the meaning of indirect rule.

Missionaries like David living by way of crossing Africa opened up Zambia to the outside world. However, Zambia on behalf of the British government directly to control of the territories. This saw the constructions of the rail line from Livingstone and later extending into Congo. North Eastern Rhodesia and North Western Rhodesia were united to make Northern Rhodesia in 1911. The BSA Co. handed Northern Rhodesia to British government in 1924.

1.1.1.3 COLONIAL RULE

All the limit of states as organisation on tribal and chiefdom lines were all subjected to one limitary rule of the British. The chiefs now became powerless although they continued administering justice by way of holding courts. Chieftainships were now forced to confirm to practices established by British those who showed disloyalty were abolished. There, therefore, must the chiefdoms as part of the colonial administrative system.

 AUTHORITARRRISANISM

During colonial rule participation in government matters by the governed was limited and some extent nonexistent.

 INDIRECT RULE

Chiefs were used by British colonial powers through the use of customary and traditional authority, to enhance the political rule of the colonial masters.

 FORCE

Colonial government used force to crush any opposition or descending views from the local people. Taxes were introduced to the natives as a way of finance the colonial power’s treasury. For those who failed to pay a way punishing was established. Indigenous people slowly realised the need to earn money because they need to pay taxes and therefore started migrating to areas of employment such as farms and mines.

THE RISE AGAINST COLONIAL RULE

The idea of nationalism was born out of the suffering that the indigenous people were subjected to by the colonial masters. The colonial master were in demonstrating subjected Africans not only to slavery wages but also to poor working conditions especially those who worked on white settlers frames and mines.

 WELFARE SOCIETIES

Welfare societies emerge pioneered by indigenous people Donald Siwale. The formation of societies increased along the line of rail, in Livingstone, Broken Hill and Ndola.

These welfare societies presented many presented many grievances among them the deprivation of land for the locals in preference for the white settlers including racial discrimination.

In 1946 DYamba formulated the federation of welfare societies, and became the mother body of welfare societies in Northern Rhodesia. In 1948 the federation became knows Northern Rhodesia Congress.

 AFRICAN TRADE UNIONS

The dictates of town life demanded that people found some form of employment for them to earn a decent living. This was not without challenges Africans were subjected to poor wages and working conditions by whites.

The unfolding events led to the 1935 and 1940 strike by the miners and the African railway workers strike of 1945. This led to the formation of Northern Rhodesia African Mine Workers Union (NRAMO) with Lawrence Katilungu as its leaders

 THE FEDERATION OF RHODESIA AND NYASALAND

Obviously, with the formation of various welfare societies including union movements to fight against the colonial administration brought about fear in the British colonial master. This in turn, at about 1948 brought about the idea of amalgamation by the colonialists. The amalgamation was to merge Southern Rhodesia, Northern Rhodesia and Nyasaland. The three were to form a federation.

There was visible resistance from both welfare societies and traditional leadership. Petitions were made against the idea of the federation to the house of parliament; Bemba chiefs along with others strongly opposed federation of the three separate states. As a response the colonial powers dethroned some chiefs while others were suspended.

These testimonies welfare movements and chiefs against the concept of federation was expressly presented to the commission which was looking at the possibility of the amalgamation in 1937.

The strong desire of the colonialist to have the three territories falling under one central administration, the federal government, made the Africans aware of the ill intention of the colonialists.

It meant enhanced oppression in many spheres of life for the Africans. Northern Rhodesia Congress came into being in 1948, a political transformation from the federation of welfare societies.

Dauti Yamba was the driving force behind. The rationale of the formation of the political movement was to ward off the intentions of federation and all the despotic regime of the colonialists.

David Kaunda a prominent member of Mufulira welfare society and a teacher by professional became a part of provincial council in 1949. On this return to Lubwa in Chinsali mission he transformed the local welfare associations into a branch of congress.

Later in 1951 congress was transformed into Northern Rhodesia National Congress. This was under the leadership of Harry Mwanga Nkumbula. This stance was meant to step up the fight against the formation of the federation. Despite all the efforts to stop the formation of the federation of Northern Rhodesia, Nyasaland and Southern Rhodesia was implemented in 1953.

1.1.1.4 TRANSFORMATION OF NORTHERN RHODESIA INTO ZAMBIA.

The land alienation which was biased towards the allocation of good fertile land to white settlers thereby disadvantaging the indigenous population and many other Mala Administrative.

Practices which did not favour the blacks invited uprising from various quarters of the black population. Harry Mwanga Nkumbula and David Kenneth Kaunda being president and secretary of the African National Congress respectively formulated a radical approach to rid the country off the colonialists, although Nkumbula was on the passive side of these radical approaches master minded by David Kenneth Kaunda. He, Nkumbula went further to participate in the elections in 1958. This annoyed most anti-white rule movements.

Consequently, Kaunda, Kapwepwe and Sikota Wina who did not agree with Nkumbula split and formed Zambia African National Congress (ZANC). The antagonistic approach by ZANC led to the declaration of the state of Emergency in Northern Rhodesia and ZANC was banned and several of its leaders were arrested.

A new party called United National Independence Party (UNIP) was formed. This party fought for many changes in the constitution. After the revision of the constitution in 1962 as a result of pressure from African movements and political parties. On 24th October, 1964 Zambia was granted independence with its president being Kenneth Kaunda.

ACTIVITY

1. In a well thought brief discuss how the pre-colonial units of government were organized
2. What attempts did the welfare societies initiate in order to fight the white rule?

**UNIT 2**

2.0 GOVERNMENT IN POST COLONIAL ZAMBIA

INTRODUCTION

Zambia became independent nation on 24th October,1964. This was after a series of resistance put up by indigenous blacks against the white minority rule.

Various warfare societies and including political parties fully applied themselves towards the eradication of the white minority rule by engaging in radical activities against the White Settlers. Many of these welfare societies and political party leaders were imprisoned as a way of suppressing the opposition by the whites.

Governance in the post-colonial Zambia can be classified into first, second and the third republic.

**LEARNER OUT COMES**

By the end of this unit learners should be able to:

1. Compare and contrast the ideals of the second and third republic
2. Explain how good governance has been enhanced in Zambia with re-introduction of multi-party democracy.

When Zambia attained its independence its new African leader’s priority was to rid the country off exploitation of Africans by the white rule. Kaunda Kenneth aligned himself move with China USSR (Soviet Union) and China at the same time embracing the socialist ideology.

It was realized that the former colonial masters still maintained with some influence through neo-colonialism, the indirect rule through political economical and other forms of social influence. Foreign capital for example was not to better the lives of indigenous Africans but to continue the exploitation of Africans (Kwame Nkrumah 1965)

 2.1 SYSTEM OF GOVERNANCE IN THE FIRST REPUBLIC

The first Republic was led by Dr David Kenneth Kaunda as president who was also UNIP leader while Harry Mwanga Nkumbula was the leader of ANC as the opposition leader. In a nut shell the first republic was a multiparty democracy which ran from 24th October 1964 to 1972. Prior to 1972 in 1971 Kapwepwe formed his own political party called the United Progressive Party (UPP) after resignation as vice president after failure to resonate with the UNIP policies led by DR. David Kenneth Kaunda.

Dr Kaunda embraced the humanism ideology which was man centred, that all activities under taken must put man at the center. In fighting off the multi-party politics in order to consolidate UNIP rule the following reasons were advanced.

1. That multi-party system of governance had brought violence and promoted tribalism in the country. This did not work well with human values and was not in line with the national development guidelines
2. The other reason advanced was that one party state system would enhance economic development and bring about Zambia as a non-violent state. It was further said that under multipartism each party had its own interest

**2.3 TYPE OF GOVERNMENT IN THE SECOND REPUBLIC**

The second republic type of governance ensued in 1973 under the second republic constitution which provided for one party participatory democracy.

Under this republic the central committee of the party was established. The UNIP and MCC were a supreme body to which the ministers were answerable and were also able to chair sub committees.

The post of the vice president was abolished and created the office of Prime Minister. In a bid to protect the Zambian assets and other forms of wealth a leadership code was created. It proscribed the top leadership from accumulating wealth. The key issue was to provide service to Zambians while wealth was meant for the benefit of all Zambians.

The nationalization was one of the features of the second republic and in addition many parastatals were created.

Appointment to senior government posts and parastatals largely depended on the patronage of an individual to the party UNIP. This resulted into administrative in efficiencies as ill qualified people who incompetent start running the affairs of the state and parastatals, ultimately the economy started nose diving and dictatorial tendencies set in.

In 1980 and 1990 there were coup attempts which were as a result of resentment from Zambians.

2.4 THE TYPE OF GOVERNANCE IN THE THIRD REPUBLIC

There was demand all over the world for multi partism and liberalisation of the economy. The UNIP government had attempted to resist it but to no avail. The was pressure from donors, the church, students and labour Union for Zambia to return to multiparty democracy.

The president then, Dr. Kenneth Kaunda appointed the Mvunga constitution review commission which recommend the return to multi party politics. In 1991 a new constitution was put in place to provide for multiparty democracy.

The 1991 elections were organised based on the new constitution which saw Fredrick Chiluba being elected as president of Republic of Zambia, under the Movement of the Multiparty Democracy (MMD).

The third republic can be identified as being in phases, the new culture government under president Chiluba, the new deal government under Levy P. Mwanawasa, the Rupiah Banda regime, the Micheal Sata Chilufya regime and the Edgar Lungu regime under the patriotic front as from 2011.

During the MMD government a number of reforms were initiated by President Fredrick Chiluba. Among them were liberation of the Zambia economy. The emphasis was on the private sector as being the engine of economic development.

Parastatals which were depending on state funding for their operations were privatised. The liberalization of the economy averted the short fall of essential commodities such as soap, cooking oil and sugar.

The MMD government adopted the structural adjustment programme (SAP) as one of the economic management policies. SAP included downsizing the government. This meant freesing of certain posts in governments and reducing labour force.

The regime under Chiluba also impose wage freeze where civil servants were not entitled to pay rise.

On the otherhand cost sharing measures were introduced where patients were supposed to meet part the cost of their medical expenses. User fees were introduced in hospital, clinics and schools.

Following the implementation of the structural adjustment programme many jobs were lost and mass unemployment arose. Chiluba regime consequently lost popularity among Zambians.

The Mwanawasa regime followed the same MMD policies but placed move emphasis on the fight against corruption. The new deal government identified corruption as one of ills imp lunging on the development of the country and denying the Zambia people improved services from the government.

The new deal government showed commitment to fighting corruption by lifting the immunity of president Chiluba to allow him defend himself against allegation of corruption in courts of law.

The new deal government embarked on development projects ZANACO Bank a state enterprise, had some of it shares sold to RABO Bank of Netherlands in order to improve its productivity and profitability.

The new deal government committed itself to infrastructure development such as the construction of Chipata – Muchinji rail line, Kazungula and Chembe bridges.

* 1. GOVERNANCE UNDER RUPIAH BANDA’S REGIME

On the demise of the late president Mwanawasa, Banda Rupiah took over the realms of power. He ruled from 2008 -2011. He continued with the late Mwanawasa’s development project, though little emphasis was made on the fight against corruption.

This regime embarked on the construction of new secondary schools and rehabilitation of township roads. Additionally, building of additional police officers houses were witnessed in this regime.

2.6 GOVERNANCE UNDER MICHELA CHILUFYA SATA’S REGIME

It is well settled that Sata’s regime was pro-poor and operated on the philosophy of ‘money in your pockets.’’ He ruled the country from 2011 after deafiting the incumbent president Rupiah Banda in the general elections to 2015 when he passed on while serving as president of the Republic of Zambia.

His regime was to mitigate the suffering of poor majority Zambians by increasing the tax thresholds and this translated into many Zambian workers being exempted from taxation. For example, people who were getting three thousand Kwacha and below were exempted from paying tax. The aim was increase people’s disposable income. He further increased salaries for civil servants in an precedence manner, to match with the economic situation at that time.

He embarked on infrastructural development such as the construction of the roads under link Zambia 8000. He wanted to open most parts of Zambia to development. People in rural areas such as farmers were enabled access to markets for the farm products the construction industry grew because of the conducive environment created the government.

In order to increase access of the Zambian people to government services the Sata regime created new districts.

The chief feature in Sata’s regime is that of infrastructure development. The other distinguishing feature is the accessing of Euro-Bond (money that was used for infrastructure development.

Micheal Chilufya Sata reinstated the ideals of Zambia as a Christian nation, “I will rule Zambia based on ten (10) commandments as obtainable in the Bible,”.

This regime initiated the rehabilitation and expansion of national airports. It also embarked on upgrading clinics to hospitals. Furthermore, Micheal Chilifya Sata regime upgraded Provincial Commanding Officers to Commissioner with a view of providing better police service.

**2.7 GOVERNANCE UNDER EDGAR CHANGWA LUNGU REGIME.**

President Lungu took over the realms of power in 2016 upon the demise of president Sata. He continued with philosophy of the Sata Regime, probably because the party manifesto of PF hand to be followed. President Edgar Lungu took over power in a popular vote under the same PF party.

President Lungu like his predecessor, Micheal Chilufya has relentlessly continued with infrastructure development.Among many notable developmental features in Edgar Lungu Regime is the enhanced infrastructure development. Many schools and hospitals have been built while some clinics have been upgraded into hospital. Roads are being constructed and bridges such as the joint intergovernmental project of the Kazungula bridge.

Social cash transfer has been enhanced in order to improve the lives of the poor. There is also an increased access to university education by implementing the conversion of some government colleges into universities.

President Edgar Lungu’s government has encouraged a sustainable way of funding road construction and maintenance by introducing toll gate fees.

Sustainable development goals (SDGs) are a new universal set of goals, targets and indicators that United Nations member states are expected to use frame their individual nation agendas and political policies over the period of fifteen (15) years, and Zambia is not an exception. End hunger, achieve food security and improved nutrition, and promote sustainable agriculture is one of the goals. In line with this, president Lungu government has promoted the growth of agricultural activities in the country. The government has also encouraged positive economic suggestions and contributions from partners in development such as the Economic Association of Zambia.

President Edgar Lungu’s regime has made strides towards bettering of the Republic’s Constitution by signing amended constitution in law.

The government’s vision and desire are to improve the living standards of the general populace. This has led to rural areas been connected to the country’s nation grid through rural electrification programme.

ACTIVITY

1. Compare and contrast colonialization and neo-colonialism.
2. Discuss the salient features of the patriotic front regime.

**UNIT 3**

3.0 GOALS AND PRINCIPLES OF GOOD GOVERNANCE

 INTRODUCTION

Governance can be enhanced when goals and principles of governance are adhered to. In order to enhance governance, participation, accountability, rule of law, responsiveness, equity and inclusiveness and above all effectiveness and efficiency must be strictly implemented.

**LEARNER OUTCOMES**

By the end of this unit learners should be able to:

1. Illustrate that accountability and the rule of law are cardinal for good governance to exist.
2. Explain that equity and inclusiveness as one of the principles of governance.
3. Explain how good governance can be attained.

Good Governance is a relative term. It may mean governing people or organizations in the way they like it. At the most it could be governing by way of following the principles of governance whilst observing the collective goals of stakeholders. These are as follows:

1. Rule of Law

This entails that laws must be accessible to all citizens and must applied equitably and fairly. That all citizens must be answerable to the same laws whether poor or rich.

1. Transparency

The governance system which is transparent in their dealing on issues affecting the stakeholders is said to be good governance. This includes involving all stakeholders either directly or indirectly through the representative when making decisions.

1. Participation

All citizens are expected to participate in the national activities. Participation in economic, social and political activities could be enhanced by strengthen citizenship education by government complemented by other stakeholder such as nongovernmental organisation.

1. Responsiveness

A good governance system must be responsive to the needs of all stakeholders and should be done within a specified time frame and in a responsible manner.

1. Consensus

In good governance there is always consultations and at times arbitration, mediation and reconciliation. Individual interests must be subjected to group interests. Consensus is key in governance for the system to be acknowledged and appreciated by stakeholders.

1. Equity and Inclusiveness

In a multi ethnic and multiracial society every member must be taken on board whether men or women, youths or senior citizens.

This also means consulting the stakeholders on the best use of the resources available for their benefit.

1. Accountability

Accountability as principle of governance means being answerable. Governments, the private sector including civil societies must be accountable to the public for their decisions and actions.

ACTIVITY

1. Identify and discuss with examples principles that enhance good governance.

**UNIT 4**

4.0 CHIEFS AND THE LEGAL FRAMEWORK IN INDEPENDENT ZAMBIA

INTRODUCTION

The legal framework involving chiefs had to change after independence in order to be in conformity with what the political leaders perceived to be an ideal legal framework for chiefs in a young independent nation.

LEARNER OUTCOMES

By the end of the unit learners should be able to:

1. Identify the legal provisions affecting chiefs in Zambia.
2. Explain how the legal framework on traditional leadership has enhanced good governance.
3. To make suggestions on how the legal framework could be improved further in Zambia.

During colonial times chiefs adapted to new found responsibilities, carefully balancing the requirements of the Colonial State with the expectations of the rural populace. In the process, it was argued that beyond these requirements, Chiefs also leveraged their influence, assisted by the vast wealth of native treasuries, to support the political struggle and development of rural entrepreneurship. With the advent of independence, the political spectrum was soon to be shattered. On Zambia attaining her independence the authority of chiefs was altered. In particular, it focused on the key institutional changes that have emerged since independence, and the extent to which they have shaped the role of chieftaincy in modern Zambia.
The emergency of Zambia in 1964 marked a momentous occasion of political emancipation from both Britain and the white supremacies. Zambia was now an independent political state able to determine its place in the world. However, as many have noted, in many respects this was only the beginning of the struggle for true self determination. The real struggle that lay ahead for her government was how to turn the achieved political independence into true internal cohesion and viable economic independence in the long term. Zambia of course is not unique in this respect. All new nations strive to be economically independent and ensure that they manage any external pressures that threaten internal cohesion. But in Zambia this problem was particularly acute, for two reasons:

First and foremost, the country’s economy was quite exceptionally dependent on copper, which placed Zambia’s economy at the mercy of unpredictable world demand for copper. Moreover, under colonial rule the country had had little stake in, let alone control over the mining industry – mining was essentially a foreign business (and many would argue that it still is). But what made the situation even worse was the fact that at independence, Zambia had to rely on Rhodesia, South Africa or Mozambique for nearly all communication with the outside world, for much of its trade, for skilled manpower and for employment of its citizens. This dependence on the white supremacies presented a significant challenge to Zambia’s political independence.

Secondly, at independence the nation emerged with deep regional divisions, often reflected in different political bases for the competing parties of UNIP and ANC. In addition to this cultural diversity, the Zambian government inherited a very unequal society, with the Copper belt dwellers more well off than their rural counterparts. This aggravated the regional rivalries or “tribalism” during and after independence. There was thus considerable scope for hostile foreign powers to exploit internal disaffection for their own ends.

Thus, at the time of independence national unity seemed essential, not only to confront the tasks of economic development but counter internal subversion and external attacks. Chiefs and Native Authorities (NAs) were an embodiment of these twin threats. NAs and their treasuries had become quite powerful prior to independence, spawning the emergence of a new “boma class” that was principally seen by many rural dwellers as beneficiaries of colonial rule. And whilst it is correct to observe that the "boma class" and NAs, were broadly supportive of the independence struggle their continuous allegiance to the colonial state generated deep suspicions, which were probably justified. In the eyes of many Zambian politicians the role played by the NAs was typically one which restrained the nationalist movement. They saw the local administration a function of the colonial state and the chieftaincy as an anachronistic vestige of the old Northern Rhodesia that had no place in the new Zambia political landscape. Simply put, NAs' powers had to be curtailed because the loyalty of chiefs to the UNIP government was questionable.

The economic arguments for reform appeared strong. Zambia had inherited an inefficient and fragmented administrative structure: a diffuse collection of government departments enjoying a large measure of autonomy and only loosely controlled by any central, coordinating body, whether bureaucratic or political. The immediate task for the government was how to transform the inherited structure of provincial administration - the focal point of the colonial system of government - into an instrument of economic development. The challenge for the government was how to design a system that achieved their stated economic objectives, but also allowed the party to reassert its authority and minimize future imbalances of political power.

The government’s preferred method was to abolish the old system of provincial and district government, and replace it with a new, more limited structure. From government’s perspective this reformed provincial and district government arrangement was intended to coordinate and implement government policies and provide a link between government and the new structure of party power, in the process wrestling power from the Chiefs to the ruling party. The aim was to take forward. To that effect, the NAs and local administration were stripped of most of its predecessor's functions, which were distributed among central government ministries and their agencies, as follows:

1. The Local Courts Department of the Ministry of Justice took over the reorganization and running of the old Native Authority courts.
2. Responsibility for law and order was devolved on the police, although local authorities retained a small force of constables to assist in the enforcement of council bye-laws.
3. The Ministry of Local Government became responsible for supervising the rural local authorities through its own cadre of local government officers.
4. The other important functions of NAs such as responsibility for agriculture, conservation and primary education, were passed onto to Central Government.

In short, the reforms streamlined the local system, but also led to the centralization of responsibility. That in itself is not unusual, but it is interesting that central government assumed responsibility for certain functions that appear could have been performed locally e.g. conservation. There’s also the wider question of whether by eliminating Chiefs from administrative responsibility they ended up removing the people’s ownership of the development process. It might be argued that at that time many people associated themselves on tribal lines, and a coherent approach to development probably required significant involvement of chiefs in the day to day administration of affairs, with gradual reduction of their influence over time. Clearly for the government of the day, this was not a concern, probably because they had already concluded that the interests of the people and chiefs were not always aligned, or a mechanism could not easily be developed that created positive incentives for chiefs to act in peoples' interests. The new changes to local administration caused some disquiet among chiefs. In the successive years, partly due to pressure from chiefs and partly due to political imperatives, some attempts were made to placate traditional leaders. Four areas can be readily identified as significant in shaping the relationship between traditional authorities and the State.

4.1 SOME STRIKING LEGAL PROVISIONS ON THE INSTITUTION OF TRADITIONAL LEADERSHIP
The chiefs are formally recognized in Zambian lawthrough two separate legislation:

a) The Chiefs Act (1965) defines a chief as a person who is recognized by the President under the provisions of the Act as the Litunga of Western Province, a Paramount Chief, Senior Chief, Chief or Sub-Chief or a person who is appointed as Deputy Chief. The Chiefs Act also empowers the President with the ability to withdraw recognition of Chiefs. In practice this does not mean someone stops being a chief as per [Masebo’s clarification in 1995](http://zambian-economist.blogspot.com/2008/06/masebos-threat-to-chiefs.html)), but it does mean that the said chief would not enjoy certain privileges. These include withdraw of “subsidies” set out under the Chiefs Act, as well as other entitlements such as subsidised vehicle loans. For their part, chiefs have a responsibility to maintain public order in their area of influence. It requires them *“*to preserve the public peace in his area and to take reasonable measures to quell any riot, affray or similar disorder which may occur in that area”.

b) The Zambian Constitution, since 1965 has always contained provision for chieftaincy. The current constitution specifically defines the institution of chief as “a corporation sole with perpetual succession and *assets* with capacity to sue and be sued and to holdor properties in trust for itself and the peoples concerned*”,* it also makes references to the Chiefs Act (1965) in terms of defining who might be recognized as chief.

Furthermore, the loss of administrative power following the abolition of NAs continues to be partially been offset at the local level by counter vailing legislation*.* As the political imperatives changed towards “single party participatory democracy”, further political reforms were undertaken. At the local level, the Development of Villages and Registration Act (1971) was aimed at getting chiefs more involved in the economic development of areas through formal registration of villages and its inhabitants; the establishment of Village Productivity Committees, and; establishment of Ward Councils and Ward Development Committees. Chiefs also may, at any time, within their area attend a meeting of the Productivity Committee, the Ward Council or the Ward Development Committee and address the respective members on any subject conducive to the well-being of the villagers in the area. The Act is still in force, with some minor amendments in 1994.

These provisions are reinforced by the Local Government Act (1995), which provides for representation of chiefs at the council level. Under Act, the composition of local council shall include, “two representatives of the Chiefs, appointed by all the Chiefs in the district”. However, chiefs are forbidden to hold Mayoral offices, perhaps to ensure that they remain non-partisan in their activities. More on this issue in later blog on chiefs as agents of political change.

Taken together the Local Government Act (1995) and the Development and Registration of Villages Act (1971) provides the main institutional framework on how chiefs are supposed to be integrated in development at the local level. Many including President Mwanawasa noted the weaknesses of the current framework, especially the Development and Registration of Villages Act which was clearly developed to favour the one party state agenda.

Perhaps a fundamental point to emphasise is that previous legislation has missed a fairly basic point. The incentives for chiefs to get involved in development also appears weak. It’s clearly one thing to give chiefs a right to get involved in local discussions and planning, it’s quite another thing to ensure that their participation is meaningful and generate positive social returns. If the current government wants to involve chiefs in development, it clearly needs to focus on how it can shape their incentives much more strongly than previous governments have done.

**4.2. POWER OVER LAND**

On the otherhand chiefs continue to retain significant de-facto power over land*.*Zambia inherited four categories of land in 1964: State Land (formerly Crown Land); Freehold Land; Reserves and Trust Land. But this changed after independence, when chiefs were relieved of their *de jure* responsibilities for land allocation. The Land (Conversion of Titles) Act (1975), vested all land in Zambia in the hands of the President, to be held by him in perpetuity on behalf of the people of Zambia. Freehold land held by commercial farmers was converted into leaseholds for 100 years and unutilized tracts of land were taken over by the state. Freehold titles in residential areas were similarly treated. All sales of land *per se* (excepting the developments on the land such as buildings, farm infrastructure, etc. were prohibited.

However, in spite of these legislative changes, chiefs’ de facto position remained broadly unchanged as they were not replaced by effective structures. Indeed, in 1985, partly to gain favour with the chiefs and partly in recognition of their custodianship of customary law and rights, government decided that the chiefs ought to be formally consulted when customary land was being granted for leasehold purposes. These powers are confirmed by the Lands Act (1995), which continues to be the substantive land law in place. A significant concession considering customary land accounts for 94% of the land, giving chiefs significant amount of influence. This power is often exhibited through the way chiefs allocate land.

Formerly, chiefs did not allocate land directly to their subjects who used it. Land was allocated to sub-chiefs who in turn alienated it’s to village headmen. The headman then allotted land to heads of subsections or heads of families and they distributed the land to their dependents. Each of the persons granted land in this way was therefore sort of secure in his rights and could not be repossessed without fault. He could transmit his rights to heirs, but could not transfer them to anyone else without the permission of his seniors. If rights are vacated they rest in the next senior in the hierarchy. In many parts of Zambia, this practice continues but increasingly, with the attraction of cash from foreign investors, increasingly chiefs have directly started involving themselves in the allocation of land.

Another mischief that has emerged as result of the increasing lucrative nature of land is the desire for some [chiefs to go beyond their existing boundaries](http://zambian-economist.blogspot.com/2008/06/masebos-threat-to-chiefs.html). Significant succession disputes have developed, with anyone with a hint of royal connection seeking to be a chief. The current power struggle could largely be attributed to in adequate powers conferred on the chiefs by the Land Act (1995) and the lack of clear territorial boundaries among chiefdoms.

The government of course would argue that it’s precisely for this reason why the Lands Act (1995) still vests all land in the President who is required to give consent to a person who wishes to sell, transfer or assign any land. These powers which are delegated to the Commissioner of Lands are meant to act as a natural break on irrational behaviour from chiefs.

In addition, to deal with the problem of investors, the Land Act permits the President to alienate land to a non-Zambian who is a permanent resident and to those non-Zambians who are investors within the meaning of the Investment Act 1993. Through this mechanism it is hoped that chiefs would be more shielded from foreign investors by making it easy for foreign investors to approach the government directly. This practice of course has raised concerns among traditional leadership. The mineral exploration rights which are granted through the Ministry of Mines, with chiefs only knowing about it when a would be investor appears with a [prospecting licence for the area under their chiefdom.](http://zambian-economist.blogspot.com/2008/07/chiefs-mining-licenses-and-mozambique.html)
Successive Zambian governments have always struggled over the role of the chiefs in land administration and a great deal of ambiguity surrounds their current status. Chiefs and many of their supporters argue that chiefs have the traditional leadership has been adequately involved in land administration.

 Many argue that chiefs are not well informed about the law and there are many widespread reported incidents of ‘land grabbing’ by government officials. To complicate matters if customary land is leased and for some reason is repossessed, it no longer falls under the jurisdiction of the chief. This means that once land is alienated under leasehold, all customary rights to that land are extinguished and so is the authority of the chief over it
However, chiefs retain some advisory role at the national level in the House of Chiefs. The House of Chiefs serves as an advisory body to the Government on traditional, customary and any other matters referred to it by the President. In all appearances very similar to House of Lords in UK, but in substance no more powerful a smaller part of a weak government ministry. The House of Chiefs consists of 27 members over a three-year-term rotating membership. It has no legislative function: it may consider bills but not block their passage.

The legislation must be made wider in order to enable traditional leadership to more involved in the administration of various aspects affecting their areas of jurisdiction. For example in South Africa there is a traditional leadership and governance framework Act of 2003 which provides for recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for the functions and roles of traditional leaders; to provide a dispute resolution and the establishment of the Commission of Traditional Leadership Disputes and Claims; to provide for a code of conduct; to provide for amendments to the Remuneration of Public Office Bearers Act, 1998; and to provide for matters connected therewith.

**ACTIVITY**

1. Discuss the process of alienating land in Zambia.
2. To what extent, in your own view, do you think the tradition leadership is involved in land administration in Zambia?
3. What role does the House of Chief play in Zambia in relation to democracy and good governance?

**4.3 CHIEFS AND THE CONSTITUTION**

According to a recent change in the constitution chiefs are supposed to remain nonpartisan. The constitution bars chiefs from active participation in politics. It says “A person shall not, while remaining a Chief, join or participate in partisan politics”.

From the foregoing, it is evident that apart from the advisory role that the House of Chiefs play, the representatives in the House of Chiefs are more like civil servants directly under the control of a government Ministry. It would appear that they are there to give legitimacy to the argument that “government consults traditional leaders”. It’s much worse than this of course, because the House of Chiefs comes with significant spend from tax payers’ money. Chiefs get paid for sitting on the House of Chiefs in the same way that MPs do, which has led many people, including chiefs to question its value for money.

4.4 ROLE OF TRADITIONAL LEADERS AND CUSTOMARY JUSTICE MECHANISMS

4.4.1 GENDER ISSUES

Traditional leaders, such as chefs, elders, and customary judges have a critical role to play in reducing violence against widows. For many women around the world, community-based, customary justice mechanisms are the only available method of redress. While traditional practices often are used to justify violence, culture is dynamic and can change through training, public education, and access to new information.

Legislation should allocate funds to train customary and traditional leaders on violence against women and violence against widows specifically.

Legislation should allocate funds to train customary and traditional leaders on inheritance and succession practices that protect women’s and girls’ rights and provide enhanced tenure security.

Legislation should support the development of paralegal systems that bridge the gap between formal laws and justice systems and the customary governance systems that control many women’s daily lives.

Legislation should consider creating explicit links and channels through which information can flow between the customary and formal justice sectors to ensure better monitoring of cases of violence against women, in particular widows.

Take, for example, in Kenya, the Turkana Women in Development Organization (TWADO) runs a paralegal program specifically focused on monitoring cases that involve violence against women and children in the remote Turkana region of Kenya. Women paralegals are trained on human rights, gender equity, and relevant Kenyan laws. They are then seconded to customary dispute resolution processes in Turkana, where they provide input to cases that relate to women’s rights. They also monitor the system for cases that should be referred to the formal courts and encourage families to use that process.

In Togo, the NGO Alafia, in conjunction with UN Women, provided training for community leaders and other stakeholders on the rights of women and widows in particular. The training assisted the local chief in Woame, Kloto Prefecture to make determinations in inheritance cases. When confronted with a case of a brother who was threatening to kill his sisters if they did not forfeit all property after the death of their father, the Chief ruled that the estate should be equitably divided in accordance with the Togolese family code. See: Fighting widowhood practices that enable violence against women In Togo, OHCHR, n.d.

Zambia: Women for Change in Zambia uses grassroots, human rights education to conduct community dialogues on traditional norms and practices in rural communities. The group established a Traditional Leaders Programme that works with chiefs and village heads to re-examine and abolish customs that discriminate against women including early marriage. Using local trainings, community dialogues, regional SADC trainings for traditional elders, and international exchanges between traditional leaders in Zambia and Tanzania the program has seen important impacts, such as the banning of widow-cleansing practices by chiefs along with fines imposed upon those found engaging in the practice, as well as the appointment of women village headpersons.

**4.5 HOUSE OF CHIEFS**

The House of Chiefs is established under Article 169 of the Constitution of Zambia as amended under Act No. 2 of 2016.  It is as an advisory body on traditional, customary and any other matters referred to it by the President. The House is required to meet at least twice a year although the President could call for it to sit as and when need arises. The Secretariat of the House of Chiefs is headed by the Clerk of the House who is assisted by the Deputy Clerk. The House of Chiefs is responsible for performing the following functions as provided for under Article 169(5) of the Constitution of Zambia (Amendment) Act, No. 2 of 2016:

1. Consider and discuss a Bill relating to custom or tradition referred to it by the President, before the Bill is introduced into the National Assembly;
2. Initiate, discuss and make recommendations to the National Assembly regarding socio-economic development in the Province;
3. Initiate, discuss and decide on matters relating to customary law and practice;
4. Initiate, discuss and make recommendations to a local authority regarding the welfare of communities in a local authority;
5. Develop and implement procedures and guidelines on resolution of chieftaincy succession and boundary disputes;

**UNIT 5**

5.0 THE CONSTITUTION

INTRODUCTION

As a Commonwealth country, it is inescapable that the Zambian Constitution and constitutional principles are to be based on the mother of all commonwealth legal systems. The Zambian Constitution is a derivative of the English Legal System by virtue of it being the former colonial master.

Like many other commonwealth countries, Zambia adopted a legal system akin to that of the United Kingdom and hence, whenever the judiciary in Zambia cites precedents, it does not restrict itself within the jurisdiction of Zambia but also applies precedents of other commonwealth countries within its judicial system.

In that respect, the constitutional definition in Zambia does not stand alone and, within its definition, should be embedded the doctrinal concept that promotes constitutionalism in the day to day deliberations within machineries of the country that the document exists to guide.

In lay terms, a constitution is a set of rules, which govern an organization. it is important to point out that every organization, whether social club, trade union or nation state, which has defined objectives and departments or offices established to accomplish those objectives, needs a constitution to define the powers, rights and duties of the organization’ s members.

The aforesaid set of rules, in addition to regulating the internal working of an organization, also makes provisions for the manner in which the organization relates to outside bodies. it therefore can be safely said that a constitution looks both to internal and external regulation of the body to which it relates.

Additional to the functions of defining powers and duties and relationships with other bodies, a constitution fulfills two related purposes — those of definition and evaluation. In its defining function, the constitution is both descriptive and prescriptive. Hence, a constitution will both define the manner in which the rules in fact operate and dictate what ought to happen in a given situation. As such, the prescriptive nature of a constitution sets a standard of conduct or behaviour that is regarded as correct and which is expected to be adhered to by those to whom the rules are addressed.

Constitutional rules whether written or unwritten, facilitate the stability and predictability of behaviour. When such prescriptive rules exist, they provide a standard against which actual conduct can be judged or evaluated. If an accusation is made that a member of an organization has acted ‘unconstitutionally’ the speaker is claiming that those accused have acted in a manner which breached the required standards of behaviour as laid down in the body generally accepted pre-determined normative rules. A constitution, addition to being descriptive, normative and prescriptive, is evaluative and judgmental.

LEARNER OUTCOMES

By the end of the unit learners should be able to:

1. Define the constitution and discuss the sacrosanct nature of the Zambia constitution.
2. Explain why a concrete constitution is said to be a grundnorm where all roads of law lead to.
3. Discuss the various modes of adopting the constitution.

5.1 DEFINING CONSTITUTIONS

Professor KC who defines the constitution of a state as:

...the whole system of government of a country, the collection of rules which establish and regulates or govern the government.

Thomas Paine’s old definition of a constitution is that:

A constitution is not the act of a government, hut of a people constituting a government, and a government without a constitution is power without right constitution and a government is only the creature of a constitution.

A constitution is therefore a body of laws supreme to all other laws that may exist in a state or an organization. In Zambia, the republican constitution affirms this supremacy of the constitution to any other law that may exist.

“This constitution is the supreme Jaw of Zambia and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, he void”.

In Zambia as in many other commonwealth jurisdictions, courts have the power to review any statutes passed by the legislature and to declare them invalid where they become inconsistent with provisions of the constitution.

5.2 SOURCES OF THE CONSTITUTION

In Zambia where the constitution is fully codified, the document is drawn consequent to consultations with different stakeholders in the country. As stated above, Zambia being a former colony of the United Kingdom has adopted not only that country’s legal system, but also the mode in which the constitution is made.

The United Kingdom being without a codified constitution has its legislature as the only mode of enacting statutes/Acts of Parliament. As the country does not have one single document called the constitution, it draws its laws from a range of statutes enacted by its houses of parliament (Houses of Commons and Lords). It is such as those statutes that, in Zambia have been codified and have become the county’s constitution.

* 1. MODES OF ADOPTING THE CONSTITUTION

5.3.1 PARLIAMENT AND NATIONAL ASSEMBLY

Like in the United Kingdom, Zambia has its National Assembly (Parliament) as the organ for enacting and/or amending the constitution. Zambia has been using parliament to make any changes to its constitution from the time she attained independence in 1964.

Unlike in the United Kingdom where cabinet presents Bills to parliament for debate before being enacted into Acts of parliament, in Zambia, the president appoints a constitutional review commission as provided under the inquiries Act (find Act and its relevant provisions). The commission gathers evidence from the public and sends its recommendations to the president. Upon presentation to the president and his cabinet, they select within the recommendations what they like and refer their selected recommendations to parliament for enactment.

The recommendations are then subjected to three readings in parliament whereupon, there has to be a two-thirds majority after the second and third readings in favour of the recommendations. If parliament attains a two thirds majority in favour of the recommendations on the second and third readings, the Bill is then sent back to the president for the presidential prerogative of ascent whereupon the recommendations/Bill is signed by ‘the president and the same becomes the supreme law and hence constitution of the country.

As Parliament is the organ constituted and entrusted by electorates to legislate, this mode of enacting a constitution is the surest and unambiguous way of amending and enacting a constitution.

* + 1. REFERENDUM

The other mode that would be used to enact a constitution is through a Referendum. In this way, a panel of experts or a constitutional review commission formulates a draft constitution, which is then submitted to the people who then puts it to a vote by either approving the draft with a “Yes” vote or rejecting it with a “No” vote.

Adopting the constitution through a referendum may prove costly and unpopular as, some of the submissions of the experts may not be wholly accepted by the people and hence would be rejected which would mean sending it back to the experts for further alterations to be made before it can be put to another vote.

Unlike method above where the a commission receives recommendations from the public hence popular, the submissions of the experts may not necessarily reflect the aspirations of the people on whose behalf the constitution is made and in instances like this, a constitution may not really stand the test of time as a huge segment of society may not really be pleased with the contents of the constitution proposed by the experts and may call for the amendment of the document within a very short space of time thereby draining the resources of a country.

* + 1. CONSTITUENT ASSEMBLY:

This is another way of enacting a constitution and as desired by the people of Zambia in the Mungomba constitutional reviewcommission, the government of the republic of Zambia under the presidency of Mr. Levy Patrick Mwanawasa (SC) waived provisions in the constitution under review at the time which required parliament to be the body through which a constitution should be enacted and opted to have the constitution enacted through a constituent assembly.

A Constituent Assembly is a group of people who have been elected /selected for the purpose of making a Constitution. Arguments may be presented in favour of enacting a constitution via this mode as opposed to the conventional mode through parliament.

Contrary to statutes, a constitution is a document that contains supreme laws that are backbone of a country. In this regard, whereas parliament should be left at liberty to enact statutes as the situation seem fit, such if used to adopt a country’s constitution would be at the whim of the party with the majority seats in parliament to simply put the recommendations for the constitution to two third majority vote without really considering the effects that bad recommendations within the draft would have on a country as a whole.

It may be true that parliament is a representation and-reflection of democracy in any democratic society and hence arguments would be presented that parliament should be left to enact the constitution as, the party with the majority in parliament would represent the wish of the majority electorates hence as democracy is a representation of the majority therefore, parliament would only represent the majority wish in enacting the constitution.

The notion is true with statutes. However, where the concerns are those of a constitution, it is vital that the aspirations of the absolute majority in the country are fully represented and not the majority party in parliament. The constitution being a document that should carry the wishes and aspirations of every citizen of the country should only be enacted on non-partisan grounds and hence, a Constituent Assembly where impartial and politically declined people are elected or selected to enact the constitution may present as the ideal mode for its enactment.

5.3.4 CONSTITUTIONAL CONFERENCE:

This is a mode where all political players are represented. This mode usually works well in countries emerging from civil strife and wishes to come together and forge ahead with a common goal notwithstanding political differences. It is important in such instances that all political players arc gathered together to formulate and enact a constitution if it is to get the full recognition and loyalty from all parties that may have previously been engaged in warring, then all have to congregate, submit and play a part in the enactment of the constitution so it can be respected by all as it would be the result of everyone.

5.3.5 NATIONAL CONSTITUTIONAL CONFERENCE:

The national constitutional conference (NCC) was the brain child of the Zambian government. This mode of adopting the constitution was similar to constituent assembly and constitutional convention. The only distinguishing feature of the national constitutional conference was that its birth was as a result of an Act of parliament of 2007. The other feature was that the Act also established the composition of the NCC.

It is, therefore, clear that the constituents of the NCC was not elected by people in different constituencies. It is important to note that the mode used in the adoption of the constitution and the whole process of the constitution making must be accepted by the people in order for the document to be accepted and respected by the citizenry at large. It, therefore follows that the legitimacy of the constitution so adopted will largely depend on it process of adoption.

5.4 FUNCTIONS OF THE CONSTITUTION

As stated above in a, the constitution is a document that contains rules that an organization or state governs by. The main functions of constitutions in different countries Zambia inclusive, is that of description and prescription of guidelines on how those that hold power (government) in a country are expected to use the powers conferred on them so as not to overstep that thereby infringing on the freedoms and rights of people they govern.

However, the constitution does not only provide guidelines of how the state is to relate with the subjects (citizens) of a country, it also sets guidelines on how individuals within a state should relate with each other and with the state. It also confers on individuals, rights and freedoms that they may enjoy and an infringement of the same should automatically confer on the individual whose rights and freedoms are infringed.

The constitution therefore describes the rights and freedoms that individuals have in a country and also prescribes how they can seek redress against the state should their constitutional rights be infringed without just cause.

The current constitutional contains a number of 1-luman Rights that every Zambian by virtue of nationality enjoys and would seek redress with the appropriate organs should they feel that their constitutional rights are infringed. The Human Rights under the constitution range from:

* The right to respect for human dignity
* The right not to be subjected to corporal punishment
* The right to strike and not be subjected to criminal sanctions
* The right to equal pay for equal work
* The right to peaceful assembly without prior authority
* The right to petition government and get a response thereof
* Freedom of demonstration
* The right to administrative justice
* The right to culture
* The right to equal treatment
* The right to freedom of information
* The right to political participation
* Academic and intellectual freedom
* The right to a clean environment
* The right to found a family and protection for the family.

These are some of the right contained in Zambia’s constitution but are by no means the only ones. Further, the constitution also provides for the rights of specific groups in society that have been, by nature disadvantaged than others.

Article 57 of the Zambian constitution provides for the rights of women in the country.

Women shall have equal rights with men in the enjoyment of the rights and freedoms, guaranteed by this constitution and shall in particular;

1. have equal rights with men with respect to marriage;
2. have rights to acquire, administer, control, enjoy and dispose of property (including land) and shall enjoy the same rights with men with respect to inheritance;
3. have the right to equal treatment and opportunity to participate in the political, economic, social and cultural life of the nation.
4. All laws, customary practices, and stereotyped attitudes that are against the dignity, welfare or interest of women or which otherwise adversely affect their physical and mental wellbeing is prohibited.
5. Women shall the right to claim from their employer and such employer shall provide maternity leave with full remuneration.
6. Nothing contained in this Article shall preclude measures designed to achieve adequate protection and advancement of persons or groups or categories of persons disadvantaged, by a long history of unfair. discrimination, in order to facilitate their full and equal enjoyment of all rights and freedoms.

***Article for the rights of Children,***

1. Every child shall, where the nature of the right or freedom in question permits, be entitled to the enjoyment of all the rights and freedoms guaranteed by this constitution on equal basis with adult persons and shall, in addition, be entitled to the rights and freedoms guaranteed by this Article.

2. Every child shall be entitled to:

1. the right to a name and nationality
2. the right to be cared for by its parents or legal guardian
3. protection against physical or mental ill-treatment and all forms of neglect, cruelty, or exploitation; and
4. the right to basic education.

3. No child shall be employed or permitted to engage in any occupation or employment, which would prejudice or interfere with his or her health, education, or physical, mental or moral development.

4. Juvenile offenders and children in correction, foster ship, or rehabilitation institutions or orphanages shall bc kept separate from adults.

1. Juvenile offenders shall be tried in juvenile courts, which shall use special trial and sentencing procedures, which reflect the special needs of juvenile offenders.
2. Children born out of wedlock shall have equal rights and entitlement with those born in wedlock.

The constitution however, does not only provide for the rights and freedoms of the people, it also prescribes how those rights and freedoms would be enjoyed and in what circumstances such rights and freedoms can be curtailed.

Article 62 the Zambian constitution:

*Locus Standi*: In any claim of infringement of rights and freedoms, the question arises, who has the right to bring an action before the courts of law for the redress of the rights claimed to have been infringed.

In matters patterning contracts, only them that are party lo the agreement. Have the right to bring an action to court for breach of contractual obligation. However, in the general principle of the law, breaches would arise that would have a general effect not only to those against whom they directly affect, but also the effects of such breaches would also by felt by the public in general. In this regard therefore, it is vital that the constitution actually defines clearly who has the right to bring an action for breach or infringement of human rights, whether only they that are directly affected or those also that have been indirectly affected by the breaches or infringements as they may arise.

Under the current draft constitution, recommendations were made for the widening of *locust standi*. in the constitution under review, only those persons, whose rights have, are or are likely to be infringed, can bring a legal action for redress. The recommendations in the draft constitution are allows even the following to seek redress: (a) a person acting in his/her interest; (b) an association acting in the interest of its members; (c) a person acting on behalf of another who is not in a position to seek such redress in his or her own name; (d) a person acting as a member of or in the interest of a group or class of persons, or (e) a person acting in the public interest.

For further reading on the constitution, students are encouraged to be conversant with the draft constitution and independently assess the submissions that have been made and make informed and impartial judgments as to its contents. Students are also encouraged to assess the aforementioned modes of adopting a constitution and formulate an independent mind as to, which of the modes of adoption would be ideal in a democratic country.

* 1. SOURCES OF LAW IN ZAMBIA

INTRODUCTION

In summary we would argue that the bulk of the Zambian law is English law inherited from our colonial masters, Britain. However, this law is supplementary by our own customary law.

LEANER OUTCOMES

By the end of the unit learners should be able to:

1. Identify the sources of law in Zambia.
2. Bring out the circustanc3s under which common law may be applied by the courts in Zambia.
3. Justify why the courts must be autonomous.

The following are the sources of law in Zambia from a broader perspective:

a) The Constitution of Zambia

b) Customary law

c) Statutory instruments.

d) Common law

e) Judicial precedents ( ratiodecisis)

f) Acts of Parliament

g) By laws

6.1 THE CONSTITUTION OF ZAMBIA

The constitution of Zambia is the supreme law of the land. This means that any other law is subordinate to it. If any other law is found to be inconsistent with the constitution that other law must be struck down by the courts to the extent of its inconsistence by the courts.

The constitution of Zambia is concrete; it cannot easily be changed by Parliament. Take for instance, the Bill of Rights also known as Human Rights part of the constitution can only be changed by Zambians themselves by way of a Referendum. It would therefore be asserted that the Zambian constitution is protected.

6.2. CUSTOMARY LAW

This form of law is derived from the traditions, and other norms of our society. For example one may choose to contract marriage under customary law which is potentially polygamous. The bulk of this law is enforced by local courts.

6.3 STATUTORY INSTRUMENTS

These are pieces of legislation made by line ministries in order for them to expedite their administrative functions. A typical example of how such laws could come about is when the ministry of Health, during an outbreak of cholera, proscribes the general public from having gatherings or large meetings.

6.4 COMMON LAW

This is law that issues from the practices and traditions of the commonwealth countries. If a lacuna is seen to exist in the Zambian laws the courts may look beyond the boundaries of the country and discover how a similar case was handled by courts in that other commonwealth country.

This practice makes the law to be applied in a uniform manner, to some extent, within the commonwealth community. In a nutshell one would aptly say that these are judicial precedents drawn from countries in the commonwealth community.

It is also aptly submitted that common law is only appli3d by the Zambian courts where there is a lacuna in our own laws. In their dictum judges may argue out a gap in our laws by referring to similar cases dealt with by other countries within the commonwealth jurisdiction.

6.5 JUDICIAL PRECEDENTS

These are judge made laws also known as ratio decisis. In order for the law to be uniform courts decide cases in alike manner. Similar cases decided on by the courts become a point of reference in making future judgments.

6.6 ACTS OF PARLIAMENT

Acts of Parliament are also known as statutes. These are laws made by Parliament. They are introduced into Parliament for debate as private bills or government bills. These bills become part of the Zambian laws after the president has assented to them.

6.7 BY LAWS

These are laws made by the councils. They are only applicable within the boundaries of the respective councils. By laws are may differ from one district council to another. Take for instance some councils have passed laws within their chambers such as grain levy or anybody owning a bicycle within its jurisdiction are asked to pay levy.

In order to foster democracy these by laws are made by the representatives of the people called councilors. These are elected in the Local government elections together with the Mayors.

**UNIT 7**

7.0 COURT STRUCTURES IN ZAMBIA

INTRODUCTION

The court structure in Zambia is as follows using the bottom up approach;

Local court, small claims court, the magistrate’s court, the High court, the Appeals court, the constitution court and the Supreme Court.

The Industrial relations court has now been annexed to the High court for Zambia under the amended 2016 constitution. The Constitution court is the court that handles constitution matters.

The Supreme Court is at the apex of the judicial system though for issues concerning the constitution, the Constitution Court decisions are final. Sometime there have been attempts for the aggrieved parties to take constitutional matters to the Supreme court once not satisfied with the constitution court`s holdings.

LEARNER OUTCOMES

By the end of the unit learners should be able to:

1. Explain the court hierarchy in Zambia
2. Distinguish between the alternative dispute resolution and litigation
3. Discuss the functions of the Constitution Court

7.1 LOCAL COURT

This is the court which handles the bulk of cases concerning customary law. Grievances about , inter alia, marriages contracted under customary law, property settlement. However, it must be noted that there have been instances where the higher courts have overturned the Local Court decisions.

7.2 MIGISTRATES COURT

Magistrates’ court also known as subordinate court are able to hear both civil and criminal cases. Felonies committed which are beyond the jurisdictions of the magistrate’s courts are committed to the High court.

7.3 HIGH COURT

The High Court for Zambia is a court of both first instance and that of appeal. It hears and superintends on both civil and criminal cases.

7.4 INDUSTRIAL RELATIONS COURT

This is the court that hears issues concerning industrial disputes. Disputes between employees and employers are dealt with in this court. The 2016 constitution has annexed the Industrial relations court to the High Court for Zambia. Its no longer on its own.

COURT OF APPEAL

This court is not a court of first instance. It is only able to hear appeal cases only.

7.5 CONSTITUTION COURT

The constitutional court is court tasked by the constitution to hear cases related to constitutional matters only. This court is headed by the president of the constitutional court such as issues relating to election disputes.

7.6 SUPREME COURT

This is a court of last resort. It is the highest court in Zambia. It is headed by the Chief Justice.

The supreme court judges sit in old numbers such that when it comes to voting over a case before there must never be a tie.

COURTS AND GOVERNANCE

Courts all over the world are at the center of resolving disputes between warring parties. Where conflicts cannot be resolved outside courts by way of alternative dispute resolution such as arbitration, mediation and conciliation courts remain the only hope. Aggrieved parties look on to courts for justice.

Courts in Zambia by resolving disputes through litigation in a transparent and fair manner are actually fostering democracy and enhancing good governance.

**ACTIVITY**

1. In a well thought brief discuss the hierarchy of court system in Zambia.
2. Give your own reasons why you think the Industrial relations court has been annexed to the High Court for Zambia?
3. What would be merits for pursuing the alternative dispute resolution especially in resolving disputes of commercial nature?

THE RULE OF LAW

CONSTITUTIONAL CONCEPTS

Constitutional Governance

The doctrine above represents one of the most challenging concepts of constitutional law. In the study of the rule of law, it is important to recognize and appreciate the many rich and varied interpretations which have been given to it, and to recognize the potential of the rule of law for ensuring limited governmental power and the protection of individual rights, than to be able to offer an authoritative, definitive explanation of the concept.

The doctrine may he interpreted either as a philosophy or political theory that lays down fundamental requirements for law, or as a procedural device ‘b3r which those in power rule under the law. Hence, the essence of the rule of law is that of the sovereignty or supremacy of law over man.

The rule of law insists that every person - irrespective of rank and status in society - be subject to law. For citizens, the rule of law is both prescriptive - dictating the conduct required by law - and protective of citizens - demanding that government acts according to law. The rule of law underlies the entire constitution and, in one sense, all constitutional law is concerned with the rule of law and cannot be viewed in isolation from political society. The emphasis on the rule of law as a yardstick for measuring both the extent to which government acts under the law and the extent to which individual rights are recognized and protected by law is inextricably linked with democratic liberalism.3

With respect to the above ideology of the rule of law, it is hence only meaningful to speak of the rule of law in a society which exhibits the features of a democratically elected, responsible - and responsive - government and a separation of powers, which will result in a judiciary that is independent of government. Therefore, in liberal democracies, the concept of the rule of law implies an acceptance that law itself represents a good’; that law and its government is a demonstrable asset to society.

However, dissenting ideologies to the concept of the rule of law held by liberal democracies is that held by Marxist theorists. The Marxist view concerning the rule of law is that, the law serves not to restrict government and protect individual rights but rather to conceal the injustices inherent in the capitalist system. Marxists accordingly believe that the concept of the rule of law - denoting some form of morality in law - represents no more than a false idealistic of law designed to reinforce the political structure and economic status quo in society.

The rule of law, as understood in liberal democracies, also has little relevance in a totalitarian state. While it may be true that such a state will be closely regulated by law, there will not be under the law - as adjudicated upon by an independent judiciary - which is insisted upon under the liberal tradition.

In the traditional Oriental society, the Western preference for 1w is an alien notion. In relation to traditional Chinese society, David and Brierley wrote:

For the Chinese, legislation was not the normal means of guaranteeing a harmonious and smooth-working society. Laws, abstract un nature, could not take into account the infinite variety of possible situations. Their strict application was apt to affect man’s innate sense of justice. To enact laws was therefore seen as a bad policy by traditional Chinese doctrine. The same exactitude which laws establish in social relations, and the way in which they fix the rights and obligations of each individual, were considered evils, according to the Chinese, not benefits. The idea of rights’; an inevitable development of the laws themselves, ran counter to the natural order. Once individuals think of their ‘rights’ there is, it was thought, some form of social illness; the only true matter of concern is one’s duty to society and one’s fellow men.

The enactment of laws is an evil, since individuals, once familiar with them, will conclude that they have rights and will then be inclined to assert them, thereby abandoning the traditional rules of propriety and morality which should be the only guides to conduct. Legal disputes become numerous, and a trial, by reason of its existence, is a scandalous disturbance of the natural order which may then lead to further disturbances of the social order to the detriment of all society.

In Japan, despite the nineteenth century adoption of codes4 based on French and German models, law, in western sense, remained irrelevant to traditional Japanese life:

Still essential for the Japanese are the rules of behaviour (*Giri-Ninjo*) for each type of personal relating established by tradition and founded, at least in appearance, on the feelings of affection (*ninjo*) uniting those in such relationships. A person whose does not observe these rules is seeking his own interest rather than obeying the noble r part of his nature; lie brings scorn upon himself and his family. Apart from the contracts arising between important but depersonalized business and industrial concerns, one does not attempt to have one’s rights enforced in a court of law even though this is permitted by the various codes.

As the various notion of the rule of law is dependent upon the political foundations of a 2, so, too, it is dependent - according to the approach adopted to the concept - upon a nation’s economic resources. It may be that law as a mere regulator of individual behaviour, is perfectly feasible in an impoverished state, and accordingly, a state which maintains law and order, and no more, can conform to a narrow interpretation of the rule of 1w which insists simply on a citizen’s unquestioning compliance with rules of the law. However, if the rule of law implies more than mere regulation by law and is elevated to a theory guaranteeing freedom from hunger and homelessness and entitlement to a basic decent standard of life, then economic conditions are a paramount importance to conformity with the rule of law. Such an approach is adopted by the International Commission of Jurists in the New Delhi Declaration of 1959, included - alongside traditional civil and political rights - the realization of social, economic, cultural and educational standards under which the individual could enjoy a fuller life within the ambit of the rule of law.

A V Dicey`s and the Rule of Law

Alvin Venn Dicey first published his *Law of the Constitution*, based on lectures he gave as a Vinerian Professor of English Law at Oxford, in 1885. In his analysis of the English constitution, Diccy offered his views on the concept of the rule of law. Till this present day, his views continue to exert influence on the concept of rule of law in constitutional law.

Dicey argued that the rule of law - in its practical manifestation - has three main aspects:

* No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraints. Waddington v Miah5’, Burma Oil v Lord Advocate6 R v B7.
* No man is above the law; every man and woman, whatever be his or her rank or condition, is subject tithe ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. *Malone v Metropolitan Police Commissioner;* and
* The general principles of the constitution (as, for example the right to personal liberty, or the right of public meetings) are, with us, the result of judicial decisions determining the rights of private persons in particular eases brought before the courts.

**JUDICIAL REVIEW**

Government and the Governed

Judicial review is the means by which, and grounds upon which administrative authorities - whether ministers, government departments, local authorities or others with law making and administrative powers - are confined by the courts within the powers granted to them by parliament. It is for a court to determine - following the granting of an application for judicial review - whether the body in question has acted intro or ultra vires (that is, inside or outside its powers). Judicial Review therefore represents the means by which the sovereignty of parliament is upheld and the rule of law applied.

It is also important to note that judicial review is confined to matters of public rather than private law. Thus, where a relationship between an aggrieved citizen and a body is based, for example, on the law of contract, judicial review will not lie. *R v City Panel on Takeovers and Mergers ex porteDatajinplcO’Reilly v Mackman.*

It is necessary before bringing an action for judicial review that in the interest of good administration - that aggrieved individuals have ‘sufficient interest’ - or locus standi - in the matter to bring it to court*. Inland Revenue Commissioner v National Federation of Self-Employed and Small Businesses Ltd11* There are numerous grounds on which judicial review may be sought. A body may act ultra vires if it uses its powers for the wrong purpose, Attorney *General v Fulham Corporation*,’12 or if it abuses its discretion with which it has been invested *Padfield v Minister of Agriculture Fisheries and food.’*

The law imposes standards or reasonableness upon administrative bodies, and failure to act in a reasonable manner may cause a body to act ultra vires*. Associated Provincial Picture Houses Ltd v Wednesbury corporation* A body acts ultra vires if it is conferred with delegated powers but delegates them further to another*. Barnard v National Dock Labour Board,’ Vine v National Dock Labour Board.*

Administrative bodies would also act ultra vires in instances where they are required to adopt particular procedures in the exercise of their powers; should they not do so, and the procedures are judicially deemed to be ‘mandatory’ (compulsory) rather than ‘directory’ (advisory). If a public body under a duty to act fails to act at all, the court can order it to do so by an order of mandamus.

The rules of natural justice also must be observed in decision making: where an individual has a right or interest at stake because of an administrative decision, he is entitled to a fair treatment R v IRC cx pane Preston; Wheeler v Leicester City Council.

All the grounds under which review would be brought, have been rationalized by the supreme court in the commonwealth (House of Lords) into three principal categories; irrationality, illegality and procedural impropriety *Council of Civil Service Unions v Minister for the Civil Service.*

Albeit the concept of judicial review and its importance in the administration public functions, the powers of courts to exercise review only goes as far as mailers which it is competent to determine. It is this which has introduced the concept of justifiability and this doctrine of justifiability is what has undermined the concept of the rule of law as established in *Council of Civil Service Unions v Minister for the Civil Service.*

However, notwithstanding the establishment of the law in the case above, the doctrine of judicial review represents a bedrock for the application of the rule of law, keeping those with law making and discretionary powers within the law.

**THE DOCTRINE OF SEPARATION OF POWERS**

The Doctrine of Separation of Powers

The separation of powers is a doctrine, which is fundamental to the organization of a state

- and to the concept of constitutionalism - in so far as it prescribes the appropriate allocation of powers, and limits of those powers, to differing institutions. The extent to which powers can be, should be, separate and distinct was a central feature in the formulating, for example, both the American and French revolutionary constitutions.

The identification of the three elements of the constitution derives from Aristotle in 384- 322 BC. In the Politics, Aristotle proclaimed that:

There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the constitution is bound to correspond to the differences between each of these elements. The three are, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element.

In any state three essential bodies exist: The Executive, Legislature and Judiciary. The essence of the doctrine is that there should be, ideally, a clear demarcation in function between the legislature, executive and judiciary in order that none should have excessive power and that there should be in place a system of checks and balances between the institutions. The separation of powers interacts with both the rule of law and parliamentary sovereignty. The independence of the judiciary ensures that the executive will be kept in the legal powers conferred by parliament, thus simultaneously upholding the rule of law and sovereignty.

Writers in antiquity wrote on the doctrine of separation of powers as a means for protecting liberty and security within the state. Viscount Henry St John Bolingbroke in Remarks on the *History of England22*advanced the idea of separation of powers. 1-Ic was concerned with the necessary balance of powers within a constitution, arguing that the protection of liberty and security within the state depended upon achieving and maintaining equilibrium between the crown, parliament and the people.

Addressing the respective powers of the king and parliament, Bolingbroke observed that:

‘Since the division of powers and these different privileges constitute and maintain our government, it follows that the confusion of them tends to destroy it. This proposition is therefore true; that, in a constitution like ours, the safety of the whole depends on the balance of the parts”.

Baron Montesquieu stressed the importance of the independence of the judiciary stating that:

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty ... Again, there is no liberty if the power of judging is not separated from the legislature and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to the executive powers, the judge might behave with violence and oppression. There would be an end to everything, if the same man, or the same body, whether of the nobles or the people, were to exercise those three powers that of enacting laws, that of executing public affairs and that of trying crimes or individual causes.”

A number of interpretations ensue from the concept if separation of powers propounded by Montesquieu. Sir Ivor Jennings has interpreted Montesquieu’s words to mean not that the legislature and the executive should have no influence over the other, but rather that neither should exercise the power of the other.

Sir William Blackstone, a disciple of Montesquieu, adopted and adapted Montesquieu’s strict doctrine, reworking his central idea to incorporate the theory of mixed government. While it was of central importance to Blackstone that, for example, the executive and legislature should be sufficiently separate to avoid ‘tyranny’, he nevertheless viewed their total separation as potentially leading to dominance of the executive by the legislature. Thus, a partial separation of powers was required to achieve a mixed and balanced constitutional structure.

The Contemporary Doctrine

It is vital for the student of constitutional law to understand that the separation of powers doctrine does not insist that there should be three institutions of government each operating in isolation from each other. Such an arrangement would, indeed, be unworkable, particularly under s constitution dominated by the sovereignty of parliament. Under such an arrangement, it is essential that there be a sufficient interplay between each institution of the state. For example, it is the executive for the most part, to propose legislation for parliament’s approval. Once passed into law, the judiciary upholds Acts of Parliament. A complete separation of the three institutions could simply result in legal and constitutional deadlocks. Hence, rather than a complete separation of power, theconcept insists that the primary functions of the state should be allocated clearly and that there should be checks to ensure that no institution encroaches significantly upon the functions of the other.

DEFINING INSTITUTIONS

The Executive

This is a branch of the state that formulates policy and is responsible for its execution. The sovereign (president/queen/king) is the head of the executive. The president elected from a political party in a general election constitutes and heads the executive (cabinet) which he appoints from members of parliament elected to the legislature from the party on whose candidature the president is elected to the presidency. In addition, the Civil Service, local authorities, police and armed forces, constitute the executive in practical terms.

The Legislature

The president in parliament is the sovereign law making body in Zambia. Formerly expressed, parliament comprises the president and the National Assembly at Lusaka. All Bills must be passed by the National Assembly at Lusaka and receive the presidential assent to become law (statutes/Acts of Parliament).

Members of the National Assembly/legislature are directly elected to the house from their respective constituencies by the electorate and are directly answerable to them. Under the current constitution, parliament has a maximum term of five years. The house is made up of the majority party: the single political party that secures the highest number of the seats at the parliamentary and general election which is also the party from where the president is elected to the presidency. In turn, the president selects his or her cabinet from the Members of Parliament from his or her party thereby forming the executive. The opposition parties comprise the remainder of the total seats in parliament. The Official Opposition is the party that represents the second largest party in terms of elected Members. In principle, the role of the Official Opposition is to act as a government in waiting, ready at any time to take over office following a general election.

The Vice President is leader of government business in parliament. During enactment of statutes (Acts of Parliament), Bills are introduced to the House by either the Vice President as leader of government, a Minister or Assistant Minister. Bills are then taken through three stages of reading at which point, in the second and third readings, there should be a two-thirds majority vote in favour of the proposed Bill approval before the presidential assent.

The National Assembly can also dissolve itself if two-thirds of members vote accordingly after two years of existence.

The Judiciary

This is the branch of the State that adjudicates upon conflicts between State institutions, between State and individual, and between individuals. The judiciary is independent of both Parliament and the executive. It is the feature of judicial independence, which is of prime importance both in relation to government according to law and in. the protection of liberty of the citizen against the executive.

Blackstone observed with regard to the judiciary:

“In this distinct and separate existence if the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by crown, consists one main preservative of the public liberty which cannot subsist long in any State unless the administration of common justice be in some degree separated both from the legislative and from the executive power”.

Whilst a high degree of judicial independence is secured under the constitution, there are several aspects of the judicial function which reveal an overlap between the judiciary, parliament and the executive. The first lies in the leader of the judiciary in the country being the minister of Justice. The leader of the judiciary has both parliamentary and judicial functions. The leader of the judiciary is also a member of the executive arm of government. He is a senior member of the cabinet and, as such. May be dismissed by the President. It is this feature of the leader of the judiciary’s office, which gives rise to the greatest disquiet when evaluated against the doctrine of the separation of powers, For the obvious impression is given that there is too close an association between the head of the judiciary and the central body of the executive - the cabinet.

Such an association has however been defended by senior judicial officers. In the writings of Lord Chancellor Birkenhead for example defended the link between the head of the judiciary and the Cabinet in 1922.

In his view he stated:

“It is difficult to believe that there is no necessity for the existence of such a personality, imbued on the one hand with legal ideas and habits of thought and aware on the other of the problems which engages the attention of the executive government. In the absence of such a person, the judiciary and the executive are likely enough to drift asunder to the point of a violent separation, followed by a still more violent and disastrous collision”.

More recently, Lord Hailsham argued that it is vital that:

‘The independence of the judiciary and the rule of law should be defended inside the Cabinet as well as in Parliament. The Lord Chancellor must be, and must be seen to be, a loyal colleague. not seeking to dodge responsibility for controversial policies and prepared to give to Parliament justification for his own acts of administration”.

In Zambia, the Justice Minister is also leader of the judiciary and a member of the Executive. It would seem that there is in fact a direct relationship between the two organs, which would seem to defeat the concept of separation of powers.

The Office of Attorney General

The Attorney General (AG) is the principal law officer of the government. The Attorney General is a Member of Parliament of the ruling party and holds ministerial office, although he is not normally a member of the Cabinet. He is the chief legal advisor of the government, answers questions relating to legal matters in parliament and is politically responsible for prosecution services.

The Attorney General is also leader of the Zambian Bar and presides at its general meetings. The consent of the Attorney General is required for bringing certain criminal actions, principally ones relating to offences against the state and public order and corruption. The Attorney General sometimes appears in court as an advocate in cases of exceptional public interest, but he is not allowed to engage in private practice. The Attorney General is also conferred with powers to terminate any criminal proceedings by entering a nolleprosequi.

OFFICE OF SOLICITOR GENERAL

The Solicitor General is an officer of the government immediately subordinate to the Attorney General, The Solicitor General is usually a Member of Parliament of the ruling party. He acts as deputy to the Attorney General and may exercise any power vested by statute in the latter (unless the statute otherwise provides) if the office of Attorney General is vacant or the Attorney General is unable to act through illness or has authorized him to act.

DIRECTOR OF PUBLIC PROSECUTION (DPP)

The DPP is head of the country’s prosecution service. Unlike in other countries (England and Wales) where the DPP is appointed by the Attorney General, in Zambia, the DPP is an appointee of the president but discharges his functions under the superintendence of the Attorney General. The DPP through the prosecution service is responsible for the conduct of all criminal prosecutions instituted by the police and may intervene in any criminal proceedings when it appears to him to be appropriate.

Relationship between: The Executive and Legislature; Legislature and Judiciary;

Executive and Judiciary.

In order to fully understand the concept of the separation of power, it is necessary to evaluate the manner in which, and extent to which, separate functions are allocated between the differing bodies and kept separate. This task is most conveniently undertaken by examining the relationship between first, the executive and legislature, secondly, the legislature and judiciary and, thirdly, the executive and the judiciary.

EXECUTIVE AND LEGISLATURE

Parliament provides the personnel of government. Ministers appointed by the president to Cabinet must be Members of Parliament, It is thus immediately apparent that the executive, far from being separated from the legislature, is drawn from within its ranks. Due to this link between the executive and legislature, some writers have denounced the theory of separation of powers. In the English Constitution, Walter Bagehot denounced the separation of powers in the English constitution from where the Zambian system derived. He however did recognize and appreciate the clear merits the link between the two organs. According to Bagehot, the close relationship between executive and parliament represent the efficient secret of the English constitution’ which,

“May be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in alt the books, the goodness of our constitution lies in the entire separation of the legislative and executive authorities, but in truth its merits consists in their singular approximation. The connecting link [between the executive and Parliament is the Cabinet”.

Prima fade, the close union between the executive and the legislature would suggest that the potential for abuse against which Montesquieu warned exists at the heart of the constitution. However, this would be so if it were to be demonstrated that the executive controls Parliament a phenomenon that shall be examined in Chapter 4. The constitutional principle behind the union of the executive and the legislature deriving from historical practice, is that of ‘responsible government’: that is to say, that the powers of government are scrutinised adequately by a democratically elected Parliament to whom every member of government is individually and collectively responsible.

LEGISLATURE AND JUDICIARY

The perception that Parliament is sovereign and that the judiciary is subordinate to Parliament, is paradoxical to the assertion that the judiciary is independent. Under the English law conventions from where the Zambian system borrows the bulk of its legal system, are Parliamentary conventions dictating that there should be no criticism levelled at the judges from members of the executive to reinforce their independence - but not from other Members of Parliament. Parliamentary practice prohibits the criticism of judges other than under a motion expressing specific criticism. It was however notregarded as a breach of conventional rules when the then British Prime Minister Margaret Thatcher, in Parliament, criticised the light sentence imposed on a child molester.25

There have also been other incidents where judges have been criticised in Parliament. In 1977, for example, motions were tabled for the dismissal of judges who had reduced a sentence for rape.Further, a judge who described a rape victim of contributory negligence was controlled in terms of what they may, or may not; say is through the powers of the speaker of the House.

THE SUBJUDICE RULE

Where civil proceedings are either before a court or awaiting trial, Members of Parliament are barred from raising them in debate. If the matter has yet reached the court, debate may be barred if the Speaker considers that there would result a real and substantial danger of prejudice to the trial arising as a consequence. No reference may be made to criminal proceedings from the time of the charge being made until the final appeal is determined.

JUDGES AS LEGISLATORS

One of the most debated aspects of the relationship between the legislature and the judges lies in the question: ‘Do judges make law?’ in constitutional terms, the issue is whether by making law - either by virtue of the doctrine of precedent or through the interpretation of statutes - the judges are usurping the legislative function or, in other words, violating the separation of powers. Statutory interpretation is not however straightforward, even though Acts of Parliament are couched in detailed language in order to maximise clarity and minimise vagueness or obscurity. Despite the attempt to achieve clarity in statutory language, it is artificial to deny that judges ‘make law’.

Every new meaning conferred on a word, every application of a rule to a new situation, whether by way of statutory interpretation or under common law, ‘creates’ new law. Judges have themselves abandoned the fiction of the ‘declaratory theory’ which asserts that they do not ‘make’ law but merely discover its true meaning. From the separation of powers perspective, judicial law making should cause disquiet only if judges display overtly dynamic law making tendencies.

In Magor and St Mellons Rural District Council v Newport Corporation, Lord Denning MR was accused by Lord Simonds in the House of Lords of ‘naked usurpation of the legislative function’.

Lord Simonds, in the House of Lords, reviewing Lord Denning’s approach, roundly rejected Lord Denning’s broad gap filling’ attitude to interpretation:

The court, having discovered the intention of Parliament and of ministers too, must proceed to till in the gaps. What the legislature has not written, the court must write. This proposition, which restates in a new form the view expressed.. In the earlier case… cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And is less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If the gap is disclosed, the remedy lies in an amending Act.

Placed within the context of separation of powers and the position of judges as subordinate to Parliament, it can be seen that the courts developed the common law to a point where Parliament felt it necessary to legislate*. Burma Oil v Lord Ath’ocote,* further illustrates the point. The government of the United Kingdom being dismayed at the implications of the House of Lords decision over the compensation rights for property destroyed in wartime, passed the War Damages Act 1965 to nullify the decision retrospectively. Such as this, demonstrates the term sovereignty and supremacy of Parliament.

EXECUTIVE AND JUDICIARY

With regard to the relationship between the executive and the judiciary there are several matters with implications for the separation of powers requiring examination: the attitude of the courts in matters entailing the exercise of prerogative powers; parliamentary privilege; judicial review; the role of judges in non-judicial functions; and the role of the Law Officers of the state.

*PREROGATIVE POWERS*

Prerogative powers have significant implications for the separation of powers. Being the residue of presidential powers, the prerogative is part of the common law and hence amenable to the jurisdiction of the courts. Today, most of the prerogative powers are exercised by government departments in the name of the president. Therefore, the substance of many prerogative powers is political, entailing matters of policy which the judges are not competent to decide on or, matters which, if ruled on by the judges in a manner inconsistent with the interpretation of the executive, would place the judges in a sensitive constitutional position and open to accusations of a violation of the separation of powers. That is, however, not to suggest that the courts have no role to play with respect to prerogative powers. The traditional role of the courts is to rule on the existence and scope of the prerogative, but - having defined its existence and scope - to decline thereafter to rule on the exercise of the power.

However, in *Council of Civil Service Unions vMinister of State for Civil Service* the House of Lords made it clear that the courts have jurisdiction to review the exercise of executive powers irrespective of whether the source of power is statutory or tinder the prerogative. Having seemingly extended the jurisdiction of the courts in relation to the prerogative, the house of Lords, nevertheless, proceeded to rule that there exists a wide range of ‘nonjusticiable’ matters which should be decided by the executive rather than the courts: a clear expression of the separation of powers.

By way of further example of the relationship between the executive and the courts in prerogative matters, the power to enter treaties under international Jaw is a hallmark of a sovereign State and derives from the presidential prerogative. Courts in the British and commonwealth countries have consistently declined to become involved in matters of treaty making or its implications. In 1993, Lord Rees-Mogg sought to challenge ratification of the Maastricht Treaty under the prerogative by an application for judicial review, the court declined jurisdiction. *R v Secretary of State for Foreign and Commonwealth Affairs cx pane Bees-Mogg.*

At the time, the Speaker of the House warned the courts against interference with the business of Parliament.33 To claim and exercise jurisdiction over such a matter would place the judges above the executive - effectively alter the balance within the constitution and place ultimate power in an unelected, unaccountable judiciary.

LAW OFFICERS OF THE STATE

The Law Officers of the State - the Attorney General and the Solicitors General - are members of the government. The Attorney General may also be a member of the Cabinet. The Attorney General is bound by Conventions, which serve to limit the overlap in functions. Thus, where his consent to prosecution is required, by convention the Attorney General must avoid party political considerations, and may not take orders from government. This is a particularly delicate matter when essentially political prosecutions are being contemplated.

The Law Officers are advisers to government and its ministers, and, by convention, the advice must never be disclosed. However, in 1986, this convention was breached when Leon Brittan, then Secretary of State for Trade and Industry, revealed advice on the Westland Helicopter rescue plan.

JUDICIAL REVIEW

Judicial review of administrative action is designed to keep those persons and bodies with delegated powers within the scope of the power conferred upon them by Parliament: the doctrine of intra vires. Thus, if a minister of the state or a local authority exceeds the power granted, the courts will nullify the decision taken and require that the decision- maker reach a decision according to the correct procedure. Judicial review is concerned with the process by which decisions are made, not with the merits of the decision itself, nor with the merits of the legal rules which are being applied by the administrator,

From the perspective, it may be said that the judges are merely upholding the will of Parliament in controlling the exercise of powers delegated by it to subordinate bodies. It could be said that the judges are here to uphold both the rule of law and the sovereignty of Parliament. From a different perspective however, questions arise for the separation of powers. If Parliament confers on a minister of the State the power to decide a matter as he thinks fit’, to what extent is it constitutionally proper for a court of law to intervene and question the manner of the exercise of his decision making powers? Does this represent an intrusion into executive power on the part of the judiciary? Does it amount to judicial supremacy over the executive?

Judicial review thus presents a constitutional paradox, representing, on the one hand, a check on the executive - arguably infringing the doctrine of separation of powers - and, on the other hand, keeping the executive within its legal powers, thus buttressing the sovereignty of Parliament and the rule of law.

ACTIVTY

1. Discuss A V Dicey`s doctrine of separation of powers.
2. In a judicial context explain what is meant by” the rules of natural justice”.
3. Why is judicial review import in a welfare society, like Zambia?

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