UNIVERSITY OF LUSAKA

SCHOOL OF LAW

INTRODUCTION TO LAW (L103)

MODULE

COURSE DESCRIPTION

Introduction to Law is a first-year unit that explores the nature of the common law and the processes by which law is made in Zambia. Students are introduced to core legal knowledge and skills necessary for study and practice.

COURSE OBJECTIVE

The course aims to:

a) Introduce students to the transition to university and tertiary study of law.
b) Provide foundational knowledge of the Zambian legal system.
c) Introduce skills necessary for the study of law.

LEARNING OUTCOMES

At the completion of this unit, you should be able to:

1. Describe the foundations of the Zambian legal system to contextualise the core knowledge, skills and relevant professional development required for legal practice.

2. To develop students' intellectual skills of fact-finding, analysis, reasoning, evaluation and communication necessary for further study in law.

3. Define and discuss the role of law and legal practitioners in the broader community, and the importance of socially responsible and ethical behaviour in the legal profession.

4. To encourage students, in their consideration of solutions to legal problems, to think critically and logically.

5. Effectively communicate in appropriate legal terminology.

APPROACHES TO LEARNING AND TEACHING

The course is a combination of content and skills that will develop the course learning outcomes. Therefore, the course is taught through lectures.

COURSE STRUCTURE

The content of this course has units which include:

UNIT 1 CONCEPT OF LAW

- ✓ What is Law?
- ✓ Law and Morality
- ✓ Law and Justice
- ✓ Legal System
- ✓ Legal right

UNIT 2 SOURCES OF LAW

- ✓ Constitution
- ✓ Statute/legislation
- ✓ Judicial decisions
- ✓ Common law
- ✓ Custom
- ✓ Scholarly works

UNIT 3 NATURE OF LAW

- ✓ Nature of law
- ✓ Classification of law
- ✓ Basic principles of legal liability

UNIT 4 LAW MAKING AND DISPUTE RESOLUTION

- ✓ Law making process
- ✓ Dispute resolution
- ✓ Alternative Dispute Resolution

UNIT 5 ROLE OF LAW AND THE LEGAL PRACTITIONER

- ✓ Role of law in society
- ✓ Ethics for lawyers
- ✓ Conduct of lawyers
- ✓ Membership to Law Association of Zambia
- ✓ Retainer

UNIT 6 ETHICS OF A STUDENT OF LAW

- ✓ Attributes of a law student

RECOMMENDED READINGS

Beth Walston-Dunham *Introduction to Law* (6th ed.) (Delmar Cengage Learning, 2011)

Glanville William *Learning the Law* 15th edition (London: Sweet & Maxwell)

Jaap Hage & Bram Akkermans (eds.) *Introduction to Law* (Springer International Publishing, 2014)

James R. Elkins 'the Legal persona: An essay on the professional mask' (1978) *64 Virginia Law Review 5* 735-762

Lovemore Madhuku *An Introduction to Zimbabwean Law* (Weaver Press: Harare, 2010)

Phil Harris An Introduction to Law (7th Edition) (Cambridge University Press, 2007)

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UNIT 1

THE CONCEPT OF LAW[1]

1.1 Introduction

In order to understand what law is, one has to appreciate the reason for the creation of "law". Law is defined as rules or guidelines that are laid down in form of legislation in order to provide the existence of order in society. Laws are important in that they regulate the conduct of persons in society taking into consideration that its absence may create anarchy. Therefore, in as much as the government creates laws in order for its citizens to abide by in turn the state too is bound by such rules (laws) that are laid down, the essence of such is to create a balance in society. Some rules are referred to as norms. In consideration of what has been stated, different definitions have been given to the term law. Laws are rules laid down by the Government which citizens are expected to conform to.

1.2 Learning objectives

After studying this unit you should understand the following main points:

a) What law is;

b) the ways in which the law interacts with other concepts; and

c) the purpose and functions of law.

1.3 What is law?

Law refers to rules and regulations that govern human conduct or other societal relations and are enforceable by the state. It is the quality of enforceability by the state that distinguishes law from other rules. There are, of course, other rules that govern human conduct such as moral rules, religious directives and organizational rules. These other rules may even be more effective in ensuring compliance with a particular type of conduct. They may even be more acceptable, however, it is not the effectiveness of rules or their goodness/badness that determines the legal quality. It is, in fact, the sole factor of enforceability by the state that determines whether a rule is law or not.

[1] Most of the information in this chapter was taken from **L Madhuku *An Introduction to Zimbabwean Law* (Weaver Press: Harare, 2010)**

What distinguishes a legal rule from any other rule is that a legal rule is one that is recognized as law and is enforceable by the state. In order to understand the nature of law, reference must be made to the two main theories of law, namely, the *natural law theory* and the *positivist theory*. According to the theory of natural law, law cannot be separated from the precepts of morality, justice or fairness. It says that a set of moral principles exists that have validity and authority independent of any human authority.

These moral principles, which have a higher status than any human-made rules, constitute what is termed 'natural law'. Any human-made law that contradicts 'natural law' is invalid. In other words, a law that is unfair or immoral, in the sense that it is contrary to natural law, is no law at all. The Latin maxim '*lex iniusta non est lex*' (an unjust law is no law at all) aptly underscores the main idea of natural law. By contrast, the positivist theory says law is law, regardless of its moral content and regardless of whether it is just or unjust. The positivist theory distinguishes law *as it is* from law *as it ought to be*. There is, therefore, such a thing as an unjust law, a bad law, an immoral law, and so on. What law is, is one thing, but its goodness or badness is another.

The positivist theory of law is the prevailing doctrine in the definition of law. It is applied by almost every legal system in ascertaining what the law is in any given situation. In other words, when answering the question – what does the law say in this situation? – One does not attempt to establish what is just or morally acceptable in the given situation. Instead, one must simply ascertain the applicable rule of law, regardless of whether it is seemingly just or unjust, fair or unfair, moral or immoral. What matters is whether or not it is a rule recognized and enforceable by the state. If it is enforceable by the state, it is law.

1.4 Law and Morality

Law is law, regardless of its moral content. However, most legal rules are derived from morality. This means that in such instances, the law is used to enforce morality. Law-makers seeking to enact new laws to regulate human conduct usually convert into law their deeply held moral convictions. Morality is the bedrock of law but it is not law. Take, for example, the following rule: 'Thou shall not kill'. This is a rule of morality. If the state decides to recognize and enforce it, it also becomes a legal rule. If the state decides not to convert it into law, it remains a moral rule only. A moral rule is converted into law in three main ways. First, a moral rule that is considered by a given society as so important as to require legal backing is converted into law by the simple device of enacting a piece of legislation incorporating that moral rule. Once enacted, the piece of legislation becomes the source of the legal rule, but this does not take away the fact that its real source is morality.

The second way in which a moral rule may be converted into law is in the so-called 'grey areas' of the law, i.e., where the law is unclear and the courts resort to moral principles in interpreting

the law. An interpretation made by a court is legally binding for the purposes of the issue at stake and, as shall be seen later under the common law system, it becomes, in appropriate cases, part of the law. In this way, moral principles are converted into law via the device of being utilized in the interpretation of unclear legal provisions.

The third way in which a moral rule may be converted into law is through custom. Some moral rules, by sheer force of their wide acceptance and observance, may graduate into a binding custom. As is explained later, custom is a source of law.

1.5 Law and Justice

Law is law, regardless of whether it is just or unjust. Most legal rules are designed to achieve the ends of justice. As with morality, law-makers seeking to enact laws to regulate human conduct usually justify their enactment on the basis of justice. The 'difficulty' with justice is that it is almost impossible to state exactly what it is. It is submitted that justice is fairness. That fairness lies at the core of justice is reflected in almost all attempts to define justice.

1.6 Legal system

A legal system is the sum total of the law of a given society, and includes the way(s) it is made, how it is enforced and the institutions involved in its making and enforcement.

1.6.1 Purpose and function of law

The traditional approach to the role and function of law is that it has two main purposes, namely, (i) to do justice, and (ii) to preserve peace and order. Although legal theories are divided on the proper role of law, this traditional approach is a useful starting point to understanding the various purposes and functions of law.

a) To do justice

Law must serve the ends of justice, and this function is accepted by all legal systems. It has already been said that the 'problem' with justice is that it is difficult to say what justice is. Moreover, what is just for one person may not be just for another? Accordingly, to say that law must serve the ends of justice is to promote the view of justice shared by those whose perceptions dominate a given society. Whatever the prevalent notion of justice, what is undeniable is that law ought to serve the ends of justice.

b) Preserve peace and order

The first and foremost purpose of law is to maintain peace and order in the community. Man must live in society if he is to achieve his full development. Society, however, cannot exist without law, for without rules of conduct there cannot be order, and without order there cannot be peace and progress. While the preservation of peace and order is an important function of law, it cannot truly be described as the 'first and foremost purpose'. To describe it as such may seem to suggest that peace and order can be pursued to the exclusion of everything else. This is not so. The preservation of peace and order must be sought with due regard to justice and respect for fundamental human rights.

c) To enforce morality

This purpose of the law is separate from that of promoting justice in one respect: justice is merely one component of morality. Morality that is not covered by the concept of justice may be enforced by law. The main difficulty remains that alluded to in the above passage that is, establishing the nature of morality. The dominant view is that law has a legitimate purpose to enforce morality. Differences arise as to the extent of the use of law in this regard, it being clear that not every moral rule needs to be enforced by law. Some have argued for a very minimal role for law, while others have gone for the maximum possible under the legal system.

d) To protect the interests of the ruling class

According to the Marxist theory of law, law has one main purpose: to protect and promote the interests of the ruling class. The Marxist theory was developed by Karl Marx (1818–83) and Friedrich Engels (1820–95). It is built on the principles of dialectical materialism that view all things and phenomena in nature as interconnected and conditioned by each other. More fundamentally, the theory is founded on the thesis that it is the material conditions of society that determine everything else in human institutions. These material conditions fnd expression in the economic structure of society. Marx distinguished between the economic structure of society (which he called the 'base') and the superstructure, which was determined by the base. Law is a component of the superstructure and is controlled by the base (the economic structure). As the ruling class owns the means of economic production, it controls the base and uses the law to protect its interests.

The ruling class suppresses other classes in order to remain in control of the economic means of production. Under capitalism, the ruling class suppresses and exploits the working class. In this regard, it deploys the law as an instrument of suppression and exploitation.

There is a great deal of substance in the Marxist conception of law. However, the theory exaggerates the extent to which law is an instrument of ruling class interests. While law is, in

many respects, an instrument of class rule, it is also, in other respects, a phenomenon that has life outside the realm of class struggle.

1.7 Legal right

There are two elements of law: *legal right* and *legal personality*.

1.7.1 Legal right

A legal right may be defined as 'an interest conferred by and protected by the law, entitling one person to claim that another person or persons either give him/her/it something, or do an act for him/her/it or refrain from doing an act'. There are, of course, other rights such as moral rights, which entitle persons to claim from others that they do or not do certain acts. But a right is a *legal right* if – and only if – it is conferred and protected by law.

A legal right entails either a positive or negative duty on another. It entails a positive duty when the claim is that the other must perform an act. It is negative when the other person is restrained from doing an act. In general, this leads to two groups of legal rights: *personal rights* and *real rights*. A *personal right* is directed at a particular individual to do or refrain from doing an act. A *real right* is not directed at any particular person but is binding on all persons, requiring them all to refrain from doing an act. It is called 'real' because it arises from a person's exclusive interest in or benefit from a thing. All other persons are bound to respect this interest in or benefit from the thing in question. A typical real right is ownership of property. The owner of a piece of property is entitled to prevent all other persons from interfering with his/her enjoyment of the privileges of ownership.

1.7.2 Legal personality

Legal rights are enjoyed only by legal 'persons'. A human being is a person at law (therefore, a legal person). However, a human being is not the only person recognized by law. The law endows other entities with the capacity to acquire rights and incur obligations. A legal person is also defined as 'somebody who, or *something which*, can have legal rights and can also be bound by legal rights, i.e., be subject to legal duties.'

Other entities endowed with legal personality are generally referred to as 'juristic' or 'artificial persons'. A company is the most notable example of a juristic person; even non-lawyers know that a company is a separate legal person from its shareholders and officials.

UNIT 2

SOURCES OF LAW

2.1 Learning objectives

After studying this unit you should understand the sources of law as they apply to Zambia.

2.2 Constitution

This is the supreme or highest law of the land, otherwise referred to as the *Grund norm* of the land and no other law may be in conflict with it. It is the primary source of law because it is the supreme law of Zambia and if any other law is inconsistent with it, that other law, to the extent of such inconsistency, is null and void.[2] The Constitution of Zambia is the primary source of law in Zambia It governs the organization of the political state and its relations with its citizens. It creates the executive, legislature and judiciary functions of the state. As was discussed earlier, the executive, legislature and judiciary are state organs.

Under the concept of separation of powers, the enactment of laws is reserved for the legislature. The interpretation of the law is the work of judiciary. The role of the executive is policy implementation and to sometimes act as the brainchild and/or hatchery of certain Bills (or proposed laws). Nevertheless, there is a lot of overlapping of these functions, which in essence compromises the independent running of three institutions, each from the other. A classic example is given of this overlapping is where a Cabinet minister (Executive) is a member of parliament (Legislature) and at the same time a Minister of Justice (Judiciary).

That the Constitution is the supreme law of Zambia entails that the existence and validity of other laws in the country depends on the extent to which such other laws are consistent with the provisions of the constitution. This relationship between the constitution and other laws was ably explained in the case of ***Thomas Mumba v The Attorney General*** in which Mr. Justice DK Chirwa had this to say:

> *In countries like Zambia where there is a written constitution, the Constitution is the supreme law, any other laws are made because the Constitution provides for their being made; and are therefore subject to it. It follows therefore that unless the Constitution is specifically amended, any Act that is in contravention of the Constitution is null and void.*[3]

[2] Article 1(1)
[3] (1984) ZR, 38

This case confirms the position that the validity of all other laws depends on the extent to which such laws are consistent with the provisions of the constitution. In that case, the applicant was standing trial in the subordinate court for an offence under the Corrupt Practices Act. Section 53 (1) of the Act required that where such an accused elected to say something in his defence, he had to say it on oath only (thus excluding the option to make an unsworn statement). The defence submitted that the provisions of section 53(1) of the Act were in contravention of Article 20 (7) of the Constitution. At the hearing of the matter in the High Court, Counsel for the Applicant submitted that the provisions of section 53 (1) of the Corrupt Practices Act contravened the provisions of Article 20 (7) of the Constitution in that the said section compelled the accused, if he elected to say something in his defence to give evidence, whereas Article 20 (7) of the Constitution stated that one, in a criminal matter, should not be compelled to give evidence. It was submitted that since the section was in conflict with the Article of the Constitution, it should be declared null and void and unconstitutional.

In response to the submissions by Counsel for the Applicant, it was submitted on behalf of the Attorney General that section 53 (1) of the Corrupt Practices Act was not in conflict with the Constitution in that the section did not compel an accused person to give evidence and that as such the accused person's right to remain silent was still maintained. The State further submitted that all the section in question said was that if the accused person elected to say something he had to do so on oath. After considering arguments from both counsel, the learned Judge had this to say:

> *In countries like Zambia where there is a written constitution, the Constitution is the supreme law, any other laws are made because the Constitution provides for their being made; and are therefore subject to it. It follows therefore that unless the Constitution is specifically amended, any Act that is in contravention of the Constitution is null and void.*
>
> *There is no doubt that the provisions of Section 53 (1) of the Corrupt Practices Act is in direct conflict with the provisions of Article 20 (7) of the Constitution. Under ordinary interpretation of statutes one would have said that the latest Act impliedly repealed or amended the old Act but there can be no implied amendment to the Constitution. The Constitution is sacrosanct and it cannot be amended by implication. To amend the Constitution certain requirements have to be met as provided for in Article 80 of the Constitution and a certificate has to be issued or inserted on the Bill as provided for under Section 5 (3) of the Acts of Parliament Act, Cap. 16. The Corrupt Practices Act does not in its own body purport to amend the Constitution. Section 64 of the Act amends the Penal Code and Section 65 ceases the application of the Prevention of Corruption Act, 1916 of the United Kingdom to Zambia. Section 53 (1) of the Act, therefore, is blatantly in conflict with Article 20 (7) of the Constitution. This conflict cannot even be resolved by reference to Article 20 (12) of the Constitution as sub-article (7) is not mentioned in that sub-article. Neither can it be resolved by reference to the general derogatory Article 26 as Article 20 is deliberately left out.*

The case of ***Christine Mulundika & 7 Others v The People*** is another case which confirms the position that the validity of all other laws depends on their conformity with the constitution.[4] In that case, the appellants had challenged the constitutionality of certain provisions of the Public Order Act, Cap. 104 of the Laws of Zambia, especially section 5(4) which required any person wishing to hold a peaceful assembly to obtain a permit and contravention of which was criminalised by section 7 of the same Act. The challenge related both to the requirement of a permit and the prosecution based on the absence of such permit and was grounded on the fundamental freedoms and rights guaranteed by Articles 20 and 21 of the Constitution. A subsidiary challenge related to the exemption of certain offices from the need to obtain a permit which is said to be discriminatory contrary to Article 23 of the Constitution. The Supreme Court held that the then section 5(4) of the Public Order Act, Cap. 104 of the Laws of Zambia contravened Articles 20 and 21 of the constitution and was null and void and therefore invalid for unconstitutionality. The Court further held that the invalidity and the constitutional guarantee of the rights of assembly and expression precluded the prosecution of persons and the criminalisation of gatherings in contravention of section 5(4) of the Act. "Accordingly", stated the court, "a prosecution based on paragraph (a) of section 7 which depended on subsection 4 of section 5 would itself be inconsistent with the constitutional guarantees and equally invalid".

Further reading: Resident Doctor's Association of Zambia & Others v. The Attorney General (SCZ Judgement No. 12 of 2003)

2.3 Legislation

Legislation is also referred to as statutory law and covers those rules of law made directly by the legislature. Each state has an organ responsible for law-making, and this is what is referred to as the legislature. The legislative authorities of the state promulgate law in various statutory forms such as Acts of Parliament.

Legislation by Parliament is embodied in a specialized legal document called an Act of Parliament. It is only through these Acts that Parliament can make law. Parliament is entitled to delegate its law-making powers to the ministers, local authorities and other state institutions. When these authorities exercise this delegated power, they create what is called 'delegated legislation' (subsidiary legislation) that is embodied in specialized legal documents called 'statutory instruments'. Accordingly, there are two recognized forms of legislation in Zambia: Acts of Parliament and statutory instruments.

[4] (1995) ZR,

A statutory instrument has the same legal status as an Act of Parliament, except that it must be consistent with the relevant Act of Parliament delegating the authority to make that statutory instrument. When it is consistent with the relevant Act, it is said to be *intra vires*. The relevant Act is called the 'parent Act' or the 'enabling Act'. A statutory instrument that is inconsistent with the enabling Act is said to be *ultra vires* and, for that reason, is void. For a statutory instrument to be *intra vires*, it must meet two requirements. First, it must be within the powers of the delegated authority. Second, it must not be grossly unreasonable.

Under Zambia law, there is one piece of legislation that is supreme and overrides all other laws to the contrary – the Constitution of Zambia. The Constitution is itself an Act of Parliament but it is superior to all other Acts of Parliament. Article 1(1) of the Constitution says that '[t]his Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.' Accordingly, even an Act of Parliament that has been duly passed and signed into law by the president is void if it is contrary to the Constitution. The reason why any Constitution is given this special place in the hierarchy of laws is that, in principle, it is considered to be the word of the people themselves. In other words, it is legislated by the people. In many democratic systems of government, constitution-making involves the direct participation of the people through a referendum, thus reducing the role of the legislature to the mere formality of 'enacting the Constitution as approved by the people'.

2.4 Judicial decisions

Judicial decisions are a source of law. A judicial precedent is where past decisions create law for judges to refer back to for guidance in future cases. Precedent is based upon the principle of *stare decisis et non quieta movere*, more commonly referred to as 'stare decisis', meaning to "stand by decided matters". Stare decisis is based on the common law tradition, past court decisions become precedent for deciding future cases. Lower courts must follow the precedent established by higher courts. That is why Magistrate Court and High Court must follow the precedents established by the Supreme Court. This disadvantages of this doctrine are threefold:

a) Doctrine brings in a measure of inflexibility in the law
b) Doctrine resists change needed to meet new conditions but
c) Occasional overruling of cases ensures some growth in the development of the law.

The doctrine of state decisis promotes uniformity of law within a jurisdiction, makes the court system more efficient and makes the law more predictable for individuals and businesses.

Further reading: March Corporation Limited & Development Bank of Zambia v. The Attorney General (S.C.Z Judgment No.3 of 1999).

A binding precedent is where previous decisions must be followed and is created when the facts of a latter case are sufficiently similar to the facts of a previous case. The doctrine of precedent is often referred to as being a rigid doctrine. Within the court hierarchy, every court is bound to previous decisions made by courts higher than them, however, not everything mentioned in a judgment as indicated above creates a precedent. The only part of the judgment which binds subsequent courts is the *ratio decidendi*. This simply means the reason for the decision. The *ratio decidendi* consists of the legal principles that the court applied to the material facts in order to come to a decision.

It is not easy to find a direct indication of which section constitutes the ratio decidendi when reading a case. You have to discover it yourself and this entails knowing the specific applicable law quite well. From this it follows therefore that the whole judgment in itself is not necessarily a precedent that must be followed. A court has to decide on the facts of the case and the law that applies to the facts of the case. The facts of different cases are often similar, but they are never exactly the same. The courts finding of what the facts of the case before it were, are not binding, a finding purely on facts creates no precedent.

Persuasive remarks or comments by a judge do not create precedents. Obiter dicta *(obiter dictum)* literally means "remarks in passing". These are casual remarks by the judge and are not directly relevant and applicable to the resolving of the dispute before the court. It is not necessary for the court to take them into account in order to reach a decision. Obiter dicta are not binding but they can sometimes have a persuasive force.

The general rule of precedents is that the *ratio decidendi* (or reasons for the decision) is found in the judgment of the majority and not in the minority judgment. Where a binding judicial precedent is not followed, this would lead to appeals. If the party is unhappy with the decision, that party can appeal to a higher court. On appeal, the court studies the typed record of the court aquo and then listens to arguments made by the legal representatives. When the appeal is upheld, it means the decision of the court is confirmed. In criminal matters an appeal may be lodged against conviction, against sentence or both. A court higher up in the hierarchy of courts will consider the decision.

2.5 Common law

The term 'common law' has been used in three different senses, namely:

1. The law applicable to all people of a given society regardless of race, tribe and sex.

2. As part of a classification of legal systems which have the influence of the English common law as distinct from those which have been termed civil law systems with a Roman law basis.

3. As that portion of the law which is not derived from legislation and emanates from a collection of principles made by judges in the course of resolving issues brought before the courts.

The third sense is the most appropriate starting point to an understanding of the 'common law' as a source of law. It developed in medieval times when English kings established a system of central codes to administer justice throughout the land. The law that they administered was common to the entire kingdom and it became known as common law. This law derived from general custom of the English people. Judges were seen as the living oracles of the law. Through them, the habits of a people spoke with force of law. These judges spoke through the cases they decided. The king's justice was administered by those courts through a series of writs designed to provide remedies for various problems. The writs shaped the growth of substantive law, in its early stages the law was creative. This system, though creative at times, became more rigid as it matured. One way of getting round this rigidity on the system was through legal system. The effect of such fiction was to maintain the formal rules of the past while eliminating much of their inconvenience.

2.6 Custom

Customs are rules that become binding in the course of time through observance by the community in question. They are not necessarily written down. In other words, the community becomes accustomed to regulating its relationship in a particular way, with many of its members regarding that particular way of doing things as legally binding. There are two types of custom: first, general custom, which applies in such fields of law as banking, commercial law, and international trade law and so on. Second, African customary law, which regulates the life of indigenous Africans.

a) General custom

This is a rule of conduct obligatory on those within its scope, established by long usage. A valid custom has the force of law in that community. A **valid custom** must be **very old, certain, reasonable and not repugnant** to statute law or morality though it may differ from common law. Generally, customs are those which are found generally throughout the country. Particular customs are the usage of a particular trade. The onus is on the person who relies on the existence of a custom to prove each of the four requirements specified above. Problems are likely to arise with some of the requirements. For example, given the varying conceptions of reasonableness,

different courts may come to opposite conclusions about whether or not an alleged custom is reasonable.

b) African customary law

This is the law derived from customs of the people. Custom itself is a rule of conduct obligatory on those within its scope, established by long usage. Law can also be said to be a rule or conduct or action recognized by custom or decreed by formal enactment considered binding on the members of a nation, community or group. Custom and law are but two different sides of the same coin. Customs precede the law. The combination of the two words to form customary law simply means the law derived from custom. But can we really ask the question "What is African Customary Law?" We think not. We think the appropriate question should be "What are Africa's customary Laws? This is because there are so many communities in Zambia with custom akin to each community. There are of course customs which are general to the country as a whole. The customs of cleansing a surviving spouse is of the people who are organized on tribal or ethnic language basis. It was adequate while it served those small communities whose mode of food production was at subsistence level and produced for their own consumption.

Customary law is unwritten, it is informal and flexible. It is kept and transferred from generation to generation through oral traditions. Since it is not written down, it is difficult to study and can consequently be hard to know it. This is because it is too ambiguous. Hence if customary law is to play a constructive role in promoting economic development, it will have to change. In its present form it cannot adequately serve an economically, socially and physically organized modern society. Although it can be said that customary law has a more direct impact on most Zambian people, this is bound to change as more and more Zambian people are absorbed into modern economy. Customary law will continue, however, to be sufficient instruments for adjudication of disputes for a long time to come in areas of land holding, marriage and intestate succession or inheritance.

Applicability of customary law

In Zambia, customary law is inapplicable if it is repugnant to natural justice or morality. A point to note is that these expressions have not been judicially defined and their meaning remains vague. But one thing clear about this expression is that they gave wide discretion to the British judges to strike down any African customary law they deemed barbarious. This was clearly so in the **Matembula case** where pointing out custom was held to be unacceptable as against justice in England as people see it. In fact it would not be an over statement to say that repugnant to natural justice depended entirely upon the experience or attitude on the officer reviewing the particular case.

2.7 Scholarly works

Scholarly works refer to writings by leading authorities in the field of law. They are regarded as sources under the heading of common law because of their special nature. Reference must also be made to modern textbooks and scholarly articles or publications. Though these have no inherent authority of their own, they may be regarded as very persuasive sources of law where neither legislation nor case law is in point, or where they are explaining a legal point which is not clearly covered in legislation or case law. The persuasive nature of an opinion of an author depends, *inter alia*, on the standing of the author in the field of law in question, the reputation of the author among judges, the scholarly level of the piece of work involved and the degree to which the nature of the presentation is convincing.

Activity:

1. What are the sources of law in Zambia?
2. What are the facts, holding and reasoning in the *Resident Doctors* case?
3. What is the significance of 17th August 1911?
4. What do you understand by the following terms:

    i. Stare decisis,
    ii. Ratio Decidendi,
    iii. Obiter dictum, and
    iv. Res judicata?

5. What is the Court hierarchy in Zambia and under what Articles of the Constitution are these Courts established?

UNIT 3

THE NATURE OF LAW

3.1 Introduction

The law affects every aspect of our lives; it governs our conduct from the cradle to the grave and its influence even extends from before our birth to after our death. We live in a society which has developed a complex body of rules to control the activities of its members. There are laws which govern working conditions, regulate leisure pursuits, and control personal relationships (e.g. by prohibiting marriage between close relatives).

As discussed in chapter one, law is a set of rules, enforceable by the courts, which regulate the government of the state and govern the relationship between the state and its citizens and between one citizen and another. As individuals we encounter many 'rules'. The rules are designed to bring order to a particular activity. Other kinds of rule may really be social conventions, such as not speaking ill of the dead. In this case, the 'rule' is merely a reflection of what a community regards to be appropriate behaviour. In neither situation would we expect the rule to have the force of law and to be enforced by the courts.

3.2 Learning objectives

After studying this unit you should understand the following main points:

d) the nature of law;

e) the ways in which the law may be classified, including the differences between public and private law, civil and criminal law and common law and equity; and

f) the basic principles of legal liability, such as the distinction between civil and criminal liability.

3.3 Nature of law

The nature of law can be regarded to be both prescriptive and protective in nature. It is prescriptive in the sense that it dictates the conduct required by man and protective i.e. requires that governments do not act arbitrary that is against the law. This provides for protection of citizen's rights. This general question about the nature of law presupposes that law is a unique social-political phenomenon, with more or less universal characteristics that can be discerned through philosophical analysis. Philosophical inquiry about the nature of law is called, is meant

to be universal. It assumes that law possesses certain features, and it possesses them by its very nature, or essence, as law, whenever and wherever it happens to exist. However, even if there are such universal characteristics of law, the mention of law has always been controversial.

Law, however, is also a normative social practice: it purports to guide human behaviour, giving rise to reasons for action. An attempt to explain this normative, reason-giving aspect of law is one of the main challenges of general jurisprudence. These two sources of interest in the nature of law are closely linked. Law is not the only normative domain in our culture; morality, religion, social conventions, etiquette, and so on, also guide human conduct in many ways which are similar to law. Therefore, part of what is involved in the understanding of the nature of law consists in an explanation of how law differs from these similar normative domains, how it interacts with them, and whether its intelligibility depends on other normative orders, like morality or social conventions.

3.4 Classification of law

There are various ways in which the law may be classified; the most important are as follows:

1. **Public and private law**

   (a) Public law

   Public law is concerned with the relationship between the state and its citizens. This comprises several specialist areas such as:

   (i) *Constitutional law*

   This is a branch of law that stems from a document referred to as a Constitution the law that provides for fundamental principles according to which a state is governed and defines the various branches of government within the state. The body of rules and regulations defining the role, powers, limitations and structure of different entities (executive, legislature and judiciary) within a state. Constitutional law is a branch of public law that is law which regulates the relationship between the citizen and the state which involves the exercise of state power.

   (ii) *Administrative law*

   Administrative law is that branch of law that governs the scope and activities of government agencies. This is dealt with through numerous ways, chief

among them; judicial review, which basically entails interrogating the legality of decisions made by government bodies and Agencies.

(iii) *Criminal law*

Criminal law is concerned with ensuring that wrongful acts that pose a threat to the good order of society are dealt with. Thus, criminal law makes such anti-social behaviour an offence against the state and offenders are liable to punishment. The state accepts responsibility for the detection, prosecution and punishment of offenders.

(b) *Private law*

Private law is primarily concerned with the rights and duties of individuals towards each other. The state's involvement in this area of law is confined to providing a civilised method of resolving the dispute that has arisen. Thus, the legal process is begun by the aggrieved citizen and not by the state. Private law is also called civil law and is often contrasted with criminal law.

2. Criminal and civil law

Legal rules are generally divided into two categories: criminal and civil. It is important to understand the nature of the division because there are fundamental differences in the purpose, procedures and terminology of each branch of law.

a) *Criminal law*

The criminal law is concerned with forbidding certain forms of wrongful conduct and punishing those who engage in the prohibited acts. Criminal proceedings are normally brought in the name of the People and are called prosecutions. In c**riminal cases** you have a **prosecutor** who **prosecutes** the accused in the **court**. The consequences of being found guilty are so serious that the standard of proof is higher than in civil cases: the allegations of criminal conduct must be proved **beyond a reasonable doubt**. If the prosecution is successful, the defendant is found **guilty (convicted)** and may be **punished** by the courts. If the prosecution is unsuccessful, the defendant is found **not guilty (acquitted)**.

b) *Civil law*

Civil law deals with the private rights and obligations which arise between individuals. The purpose of the action is to remedy the wrong that has been suffered. Enforcement of the civil

law is the responsibility of the individual who has been wronged; the state's role is to provide the procedure and the courts necessary to resolve the dispute. In **civil proceedings** a **claimant** sues a **defendant** in the **civil courts**. The claimant will be successful if he can prove his case on the **balance of probabilities**, i.e. the evidence weighs more in favour of the claimant than the defendant. If the claimant wins his action, the defendant is said to be **liable** and the court will order an appropriate remedy, such as damages (financial compensation) or an injunction (an order to do or not do something). If the claimant is not successful, the defendant is found **not liable**.

The distinction between the criminal and civil law does not depend on the nature of the wrongful act, because the same act may give rise to both civil and criminal proceedings. Consider the consequences of a typical motor accident. Julie is crossing the road at a zebra crossing when she is struck by a car driven by Gordon. An ambulance takes Julie to a local hospital where it is discovered that she has sustained a broken leg. Meanwhile, the police have arrived at the scene of the accident and they breathalyse Gordon. The result is positive and Gordon is charged with a criminal offence based on driving with excess alcohol. He appears before the local magistrates' court and is convicted. He is disqualified from driving for 18 months and fined K400. The fine is paid to the court: it does not go to compensate the victim of the criminal act. Julie must pursue a separate civil action against Gordon to remedy the personal wrong she has suffered. She sues Gordon in the tort of negligence, seeking damages for the injuries she has sustained. The case is heard by the court where Gordon is found liable.

3. Common law and equity

Legal rules may also be classified according to whether they form part of the common law or equity. The distinction between these two systems of law is rooted in history and can only be understood properly by examining the origins of English law. English legal development can be traced back to 1066 when William of Normandy gained the crown of England by defeating King Harold at the Battle of Hastings. Before the arrival of the Normans in 1066 there really was no such thing as English law. The Anglo-Saxon legal system was based on the local community. Each area had its own courts in which local customs were applied. The Norman Conquest did not have an immediate effect on English law; indeed, William promised the English that they could keep their customary laws. The Normans were great administrators and they soon embarked on a process of centralisation, which created the right climate for the evolution of a uniform system of law for the whole country.

a) Common law

The Norman kings ruled with the help of the most important and powerful men in the land who formed a body known as the Curia Regis (King's Council). This assembly carried out a number

of functions: it acted as a primitive legislature, performed administrative tasks and exercised certain judicial powers. The meetings of the Curia Regis came to be of two types: occasional assemblies attended by the barons and more frequent but smaller meetings of royal officials. These officials began to specialise in certain types of work and departments were formed. This trend eventually led to the development of courts to hear cases of a particular kind.

The courts which had emerged by the end of the 13th century became known as the Courts of Common Law and they sat at Westminster. The first to appear was the Court of Exchequer. It dealt with taxation disputes but later extended its jurisdiction to other civil cases. The Court of Common Pleas was the next court to be established. It heard disputes of a civil nature between one citizen and another. The Court of King's Bench, the last court to appear, became the most important of the three courts because of its close association with the king. Its jurisdiction included civil and criminal cases and it developed a supervisory function over the activities of inferior courts.

The Normans exercised central control by sending representatives of the king from Westminster to all parts of the country to check up on the local administration. At first these royal commissioners performed a number of tasks: they made records of land and wealth, collected taxes and adjudicated in disputes brought before them. Their judicial powers gradually became more important than their other functions. To begin with, these commissioners (or justices) applied local customary law at the hearings, but in time local customs were replaced by a body of rules applying to the whole country.

When they had completed their travels round the country, the justices returned to Westminster where they discussed the customs they had encountered. By a gradual process of sifting these customs, rejecting those which were unreasonable and accepting those which were not, they formed a uniform pattern of law throughout England. Thus, by selecting certain customs and applying them in all future similar cases, the **common law** of England was created.

A civil action at common law was begun with the issue of a writ which was purchased from the offices of the Chancery, a department of the Curia Regis under the control of the Chancellor. Different kinds of action were covered by different writs. The procedural rules and type of trial varied with the nature of the writ. It was essential that the correct writ was chosen, otherwise the claimant would not be allowed to proceed with his action.

b) Equity

Over a period of time the common law became a very rigid system of law and in many cases it was impossible to obtain justice from the courts. The main defects of the common law were as follows:

- The common law failed to keep pace with the needs of an increasingly complex society. The writ system was slow to respond to new types of action. If a suitable writ was not available, an injured party could not obtain a remedy, no matter how just his claim.

- The writ system was very complicated, but trivial mistakes could defeat a claim.

- The only remedy available in the common law courts was an award of damages. This was not always a suitable or adequate remedy.

- Men of wealth and power could overawe a court, and there were complaints of bribery and intimidation of jurors.

It became the practice of aggrieved citizens to petition the king for assistance. As the volume of petitions increased, the king passed them to the Curia Regis and a committee was set up to hear the petitions. The hearings were presided over by the Chancellor and in time petitions were addressed to him alone. By the 15th century the Chancellor had started to hear petitions on his own and the Court of Chancery was established. The body of rules applied by the court was called **equity**.

The early Chancellors were drawn from the ranks of the clergy and their decisions reflected their ecclesiastical background. They examined the consciences of the parties and then ordered what was fair and just. At first, each Chancellor acted as he thought best. Decisions varied from Chancellor to Chancellor and this resulted in a great deal of uncertainty for petitioners. Eventually, Chancellors began to follow previous decisions and a large body of fixed rules grew up. The decisions of the Court of Chancery were often at odds with those made in the common law courts. This proved a source of conflict until the start of the 17th century when James I ruled that, in cases of conflict, equity was to prevail. For several centuries the English legal system continued to develop with two distinct sets of rules administered in separate courts.

Equity is not a complete system of law. Equitable principles were formulated to remedy specific defects in the common law. They were designed to complement the common law rules and not to replace them.

3.5 Basic Principles of Legal Liability

It is a basic function of the law to set out the circumstances in which a person may be required to answer for his actions. Legal liability describes a situation where a person is legally responsible for a breach of an obligation imposed by the law. Such obligations may arise from the operation of either the civil or criminal law.

a) Civil liability

As we have already seen, the civil law is concerned with the rights and duties which arise between private individuals. The aim of taking legal action is to put right a wrong which has occurred, often by means of an award of compensation. The areas of civil liability which have the greatest impact on businesses are liability in contract and tort.

b) Contractual liability

Contractual liability arises when two or more persons enter into a legally enforceable agreement with each other. The law of contract is concerned with determining which agreements are binding, the nature and extent of the obligations freely undertaken by the parties and the legal consequences of breaking contractual promises.

c) Tortious liability

A tort consists of the breach of a duty imposed by the law. The law of tort seeks to compensate the victims of certain forms of harmful conduct by an award of damages or to prevent harm occurring by granting an injunction. Examples of torts include negligence, nuisance, trespass, defamation (libel and slander) and conversion.

d) Criminal liability

A crime is an offence against the state. The consequences of a criminal conviction are not confined to the punishment inflicted by the court. The sanctions are so severe that the criminal law normally requires an element of moral fault on the part of the offender. Thus, the prosecution must establish two essential requirements: *actus reus* (prohibited act) and *mens rea* (guilty mind). For most criminal offences, both elements must be present to create criminal liability.

UNIT 4

LAW MAKING AND DISPUTE RESOLUTION

4.1 Learning objectives

After studying this unit you should understand the process of making law as well as the different modes of resolving disputes.

4.2 Law Making Process

Law making will normally be preceded by identifying a problem. Law is a system of rules that are created and enforced to regulate behaviour. An example of the identification of such a problem can be the disposal of waste in a residential area. Therefore, in order to regulate or prohibit such behaviour, Parliament can create law which regulates the disposal of waste. The starting point would be the creation of a bill. A bill refers to a draft of a proposed law presented to parliament for discussion. Therefore, before there is the creation of law there is the existence of a bill.

Stages

(a) **First Reading**

A bill is published in the government gazette. Publication is a notification to the people generally for them to make comments or instruct their MPs on what line they should take when the bill reaches the National Assembly. After a stated period, the bill will be submitted to the National Assembly for first reading. This first time reading is of mere formality. Nothing else is done to it. The first reading of the Bill is formality. A Bill is presented and read for the first time. The presentation of the Bill is done by the Minister or the Private Member responsible. Only the title of the Bill is read out. There is no time limit that is provided for between the times that the Bill is published by the Government Printer and when it should be read for the first time in the National Assembly except for a constitutional Bill. In the case of a Constitutional Bill, it should be published in the Government Gazette for not less than thirty (30) days before the First Reading. After the Bill is read for the first time, the Bill is referred to the appropriate Portfolio Committee for consideration.

The Committee has the power to summon witnesses to contribute to the efficacy and objectives of the Bill. Witnesses include Ministers, Permanent Secretaries and other stakeholders. Witnesses should convince the Committee on the purposes and appropriateness of the Bill. It is important, therefore, that the witnesses that appear before the Committee are adequately

prepared. The proceedings of the Committees are open to the public and the media. The Committee produces a report that is taken into account during the second reading stage of the Bill.

***(b)* Second Reading**

This is the most important stage in the legislative process of a Bill. At this stage, the principle behind the Bill is debated in the House in great detail. The Cabinet Minister or Member responsible for the Bill discusses the principles and objectives of the Bill and takes into account the contents of the report of the Committee that considered the Bill. At the end of the debate, the House decides whether to proceed with the Bill or not. If the majority of the Members choose to proceed, the speaker orders the Bill to be read a second time. If on the other hand, the majority decline, then the Bill is withdrawn and it cannot be reintroduced during the same session. In the case of a Constitutional Bill, when the question is put by the Speaker that the Bill be read a second time, a vote is immediately conducted and the Bill requires the support of at least two-thirds of all Members of the House.

***(c)* Committee Stage**

At this stage, a Bill is ordered to be considered by the Committee of the whole House. The Committee examines the Bill in detail, clause by clause. If there are any amendments to the Bill either as a result of the Committee's Report on the Bill or by the Cabinet Minister or Private Member responsible for the Bill, the amendments are presented to the Committee of the Whole House at this stage for adoption or otherwise. The Deputy Speaker is the Chairperson of the Committee of the Whole House. At the stage of the Committee of the Whole House, Members of Parliament are free to speak more than once and are free to introduce various amendments to the Bill.

***(d)* Report Stage**

The Report Stage is when the amendments made at Committee State are reported to the Whole House. At this stage, the House has an opportunity to reflect on the amendments. Only additional amendments to the Bill not moved at Committee Stage are considered. If a Bill has not been amended at Committee Stage, the Third Reading is proceeded forthwith without the Report Stage.

***(e)* Third Reading**

At the Third Reading stage of a Bill, the Bill is reviewed in its final form and no debate takes place. When the question has been put and agreed to, the Bill is passed and, therefore, is

presented to the President for assent. A Constitutional Bill has to be passed at Third Reading with at least two-thirds majority of all Members of the National Assembly.

(f) Presidential Assent

A Bill is presented to the President for his assent only after three days from the date of the Third Reading of the Bill except for Bills relating to raising of revenue and expenditure. If the President gives his assent, the Bill becomes an Act of Parliament or law and takes effect immediately it is published in the Government Gazette. The President can, however, withhold his assent to any Bill, in which case the Bill is returned to the National Assembly. Such a Bill is returned to the House with a message for the National Assembly to reconsider the Bill. If the National Assembly thereafter passes the Bill on a Motion supported by a two-thirds majority, the Bill is again presented to the President. When a Bill is again presented to the President for assent, the President should assent to the Bill within twenty-one days of its presentation unless he sooner dissolves Parliament.

Activity

In considerable detail, explain the process of law making? Open class discussion

4.3 Dispute Resolution

Dispute resolution refers to the various ways several different processes used to resolve disputes between parties. This includes adjudication, negotiation, and mediation inter alia.

4.3.1 Adjudication (Court system)

Adjudication is a process by which a court resolves a dispute. It involves parties taking their legal dispute to a court of law for determination by an independent and impartial judicial officer. The mandate of courts to adjudicate on disputes is inherent in the very constitutional set up of countries whereby the responsibility of interpreting the law is vested in the judicial organ of the state. It offers several advantages which include the following:

a) Matters are heard and determined by persons who are impartial, independent and with no interest whatsoever in the subject matter of the dispute;

b) Parties to matters heard and determined through litigation are given reasons for the decision of the court and can appeal up to the highest court if not satisfied with the reasons given by lower courts;

c) Through the doctrine of *res judicata*, litigation brings disputes to finality;

d) Through the doctrine of precedent, litigation contributes towards the development and growth of law;

e) Litigation creates stability in society by preventing aggrieved persons from taking the law in their own hands.

Although it has several advantages, adjudication equally has some disadvantages which include:

a) Litigation is costly i.e. it is not economical when compared to ADR methods;

b) Litigation is time – consuming i.e. matters take long to be concluded in the courts of law;

c) Litigation does not allow parties to make a decision mutually beneficial to them since they have no option but to follow what the court has decided;

d) In jurisdictions where the doctrine of precedent applies, litigation may lead to injustice because lower courts do not question the decisions of higher courts.

It is against the background of these disadvantages that there has been growing interests among advocates worldwide in the use of ADR methods to resolve their client's disputes more economically and efficiently. In the face of bottlenecks and backlogs in court systems, coupled with spiralling legal costs and fees, courts and other members of the legal community have been part of the movement seeking means other than litigation for resolving disputes.

4.3.2 Alternative Dispute Resolution Mechanisms

The term "alternative dispute resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. It is an effort to arrive at *mutually acceptable decisions* and an alternative to adversarial processes such as litigation or administrative processes that result in "win/lose" outcomes. The term ADR can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of ADR.

Elements

Alternative Dispute Resolution has four elements that are essential to the successful use of any ADR method. These are: 1) existence of an issue in controversy; 2) voluntary agreement by both parties to participate in the ADR process; 3) voluntary agreement by both parties on the type of ADR method to be used in lieu of formal litigation; and 4) participation in the process by officials of both parties who have authority to resolve the issue in controversy.

Characteristics

Although the characteristics of numerous ADR process vary, all of them share a few common elements of distinction from the formal judicial structure. These elements permit them to address development objectives in a manner different from judicial systems. They include the following:

a) Informality

ADR processes are less formal than judicial processes. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or rules of evidence. This informality is appealing and important for increasing access to dispute resolution for parts of the population who may be intimidated by or unable to participate in more formal systems. It is also important for reducing the delay and cost of dispute resolution. Most systems operate without formal representation.

b) Application of Equity

ADR processes are instruments for the application of equity rather than the rule of law. Each case is decided by a neutral third party, or negotiated between parties to the dispute themselves, based on principles and terms that seem equitable in the particular case, rather than on uniformly applied legal standards. ADR systems cannot be expected to establish legal precedent or implement changes in legal and social norms. Thus, ADR systems tend to achieve efficient settlements at the expense of consistent and uniform justice.

c) Direct Participation and Communication between parties

ADR systems involve more direct participation by parties to the dispute in the process and in designing settlements, more direct dialogue and opportunity for reconciliation between them, potentially higher levels of confidentiality since public records are not typically kept, more flexibility in designing creative settlements, less power to subpoena information, and less direct power of enforcement.

Benefits of using ADR

The benefits of ADR include the following:

a) Voluntary nature of processes

All ADR methods are voluntary in nature i.e. No one is coerced into using ADR procedures. Parties choose to use ADR procedures because they believe that ADR holds the potential for better settlements than those obtained through litigation.

b) Expedited procedures

All ADR procedures are less formal. This prevents unnecessary delays and expedites the resolution process.

c) Active participation of the parties

Parties to the dispute actively participate.

d) Confidential nature of Processes

Parties can participate in ADR procedures, explore potential settlement options, and still protect their right to present their best case in court at a later date without fear that data divulged in the procedure will be used against them.

e) Greater Flexibility in the Terms of Settlement

ADR procedures provide an opportunity for parties to craft settlements that can better meet their combined interests than having an imposed settlement by a third party. This is because ADR enables parties to avoid the trap of deciding who is right or who is wrong, and to focus on the development of workable and acceptable solutions. ADR procedures also provide greater flexibility in the parameters of the issues under discussion and the scope of possible settlements. Participants can "expand the pie" by developing settlements that address the underlying causes of the dispute, rather than be constrained by a judicial procedure that is limited to making judgments based on narrow points of law.

f) Saving in Time

With the significant delays in obtaining court dates, ADR procedures offer expeditious opportunities to resolve disputes without having to spend years in litigation. In many cases,

where time is money and where delayed settlements are extremely costly, a resolution developed through the use of an ADR procedure may be the best alternative for a timely resolution.

g) Cost Savings

ADR procedures are generally less expensive than litigation. Expenses can be lowered by limiting the costs of discovery, speeding up the time between filing and settlement, and avoiding delay costs. These front-end expenses are often the most costly components of legal costs. These savings are in turn passed on to the taxpayer. Relieving the burden on the courts caused by unnecessary or inappropriate lawsuits can help save valuable public resources.

4.3.2.1 Negotiation

A negotiation is a **formal discussion** between parties who are trying to resolve their dispute without the involvement of a third party. The discussion may be initiated by any of the parties to the dispute and may take place at such venue and time as may be agreed by all the affected parties. Direct, face-to-face negotiation between the parties, without the use of a third party, involves the exchange of offers and counteroffers and a mutual discussion of the strengths and weaknesses of each party's position. This method is usually most effective if both parties have an incentive to reach an agreed settlement. In order for any negotiation to succeed, the parties must: a) *Identify issues upon which they differ; b) Disclose their respective needs and interests; c) Identify possible settlement options; and d) Negotiate terms and conditions of agreement*. The aim is that each party should be in a better position than if they had not negotiated.

4.3.2.2 Conciliation

To conciliate is to make somebody less angry or to make somebody friendlier with a view to "pacifying" the situation. The process of conciliation involves a conciliator whose role is to calm parties to the dispute so that they can discuss or solve their problems in a calm and successful manner. The conciliator does not make any decision for the parties.

4.3.2.3 Mediation

Mediation is helpful when the parties are not making progress negotiating between themselves. It is simply negotiation with the assistance of a neutral third party. The neutral third party is called the mediator who should be impartial and acceptable to both parties. His role is to assist or guide the parties in reaching agreement on a mutually acceptable solution by creating a "safe" environment for the parties to share information, address underlying problems, and vent emotions. Although the mediator makes recommendations about the process, the parties themselves make the important decisions about the problem-solving process and the outcome.

A successful mediation can give the parties the confidence in themselves, each other, and consensual processes, to negotiate without a third party in the future.

The main characteristic features of mediation include the following: a) to reach at a decision that is 'mutually beneficial' to all the parties to the dispute. It is not a 'winner takes all situation'; b) Mediation is 'consensual' in nature: parties can only go to mediation if they have all agreed that the dispute be referred to mediation; c) in mediation proceedings, parties themselves make the decision, not the mediator; d) the mediator is appointed by the parties to the dispute and his/her role is not to make the decision for the parties but to assist parties reach at a decision; e) a decision arising out of mediation proceedings is not binding and parties are at liberty to abandon the proceedings at any stage before the decision is made; e) the venue, time and language for mediation proceedings are all agreed by the parties themselves; f) mediation proceedings are confidential in nature and may only be disclosed with the express permission of all the parties concerned; and g) mediation proceedings are informal in nature when compared to litigation.

4.3.2.4 Arbitration

The essence of arbitration is that a third party renders an opinion about how the dispute should be settled. The arbitration award (i.e. the decision of the arbitrator) can be binding or non-binding, depending on the contract or other agreement of the parties.

In binding arbitration, the parties select an arbitrator or panel of arbitrators who help design the arbitration process, conduct a hearing, evaluate the evidence and make an award. The award is then binding on the parties and may be entered and enforced as a judgment by the court. There is very limited opportunity to appeal an arbitration award. A non-binding arbitration is identical to binding arbitration except that the parties are not bound by the result and either party still has the option to proceed to court if they do not accept the arbitration award.

i. Agreement to arbitrate

Parties may only go to arbitration if they have voluntarily agreed that their dispute will be resolved through arbitration. The parties' voluntary agreement for their dispute to be resolved is called an 'agreement to arbitrate'. An agreement to arbitrate may take the form of a clause in the contract or a separate agreement.

ii. Arbitration hearing

Typically, an arbitration hearing proceeds in the same way as a trial before a judge except that in the case of an arbitration hearing, the proceedings are not conducted in the courtroom and the strict rules of evidence and procedure are not followed.

The following are the characteristic features of proceedings relating to binding arbitration:

- There is formal presentation of each party's case, much like a trial, though not necessarily done in a courtroom. The Arbitrator controls the parties' case presentation and the reliability of the evidence presented;

- During the presentation of the case, strict rules of evidence and procedure may not be followed;

- Each party's evidence is presented by way of documents, depositions, affidavits or oral testimony of witnesses, with full cross-examination.

- The Arbitration panel consists of one to three arbitrators;

- Unlike mediation proceedings during which private conversations between the parties and between a party and the mediator are not uncommon, private conversations between parties and the arbitrators are forbidden;

- The arbitration panel has full responsibility for rendering justice on the facts and law and its award is binding and enforceable in the same as a judgement of the court.

Evidently, therefore, an arbitration hearing is a modified form of trial which does not use a traditional judge. Consequently, the cost and time savings in arbitration are usually not as significant as the savings provided by other forms of ADR. It must be noted that Arbitrators are usually selected on the basis of their expertise in the area of dispute. For example, an arbitration panel for a construction contract dispute might include an engineer, a contractor and an attorney.

iii. Arbitral award

The decision of the Arbitrator or panel of arbitrators is called an 'award'. The award must be in writing and signed by the arbitrator or arbitrators where they are more than one. Every award is supposed to contain the reasons advanced for the decision of the arbitrator or panel of arbitrators.

iv. Arbitration in Zambia

In Zambia, Arbitration is governed by the **Arbitration Act No. 19 of 2000**. In terms of section 6 of the Act, the following matters are not subject to arbitration:

i. An agreement that is contrary to public policy;
ii. A dispute which in terms of any law may not be determined by arbitration;
iii. A criminal matter or proceeding except if permitted by law or the Court grants leave for arbitration to take place;
iv. A matrimonial cause;
v. A matter incidental to a matrimonial cause unless the Court grants leave for arbitration to take place;
vi. A matter involving the determination of paternity, maternity or parentage of a person; or
vii. A matter involving the interests of a minor or other person under legal incapacity unless such minor or person is represented by a competent person.

Activity

1. What do you understand by ADR?
2. Name the ADR mechanisms you know?
3. Discuss some of the advantages and disadvantages of each ADR method you have learnt.

UNIT 5

ROLE OF LAW IN SOCIETY AND THE LEGAL PRACTITIONER

5.1 Learning objectives

After studying this unit you should understand the following main points:

a) What is the role of law in society; and

b) Who a legal practitioner is the conduct expected of him/her.

5.2 Role of Law in Society

The law is important for a society for it serves as a norm of conduct for citizens. It was also made to provide for proper guidelines and order upon the behaviour for all citizens and to sustain the equity on the three branches of the government. It keeps the society running. Without law there would be chaos and it would be survival of the fittest and everyman for himself. Not an ideal lifestyle for most part.

The law is important because it acts as a guideline as to what is accepted in society. Without it there would be conflicts between individuals, social groups and communities. It is pivotal that we follow them. The law allows for easy adoption to changes that occur in the society.

Society is a 'web-relationship' and social change obviously means a change in the system of social relationship where a social relationship is understood in terms of social processes and social interactions and social organizations. Thus, the term, 'social change' is used to indicate desirable variations in social institution, social processes and social organization. It includes alterations in the structure and functions of the society. Closer analysis of the role of law vis-à-vis social change leads us to distinguish between the direct and the indirect aspects of the role of law.

1. Law plays an important indirect role in regard to social change by shaping a direct impact on society. For example: A law setting up a compulsory educational system.

2. On the other hand, law interacts in many cases indirectly with basic social institutions in a manner constituting a direct relationship between law and social change. For example, a law designed to prohibit polygamy.

Law plays an agent of modernization and social change. It is also an indicator of the nature of societal complexity and its attendant problems of integration. Further, the reinforcement of our

belief in the age-old panchayat system, the abolition of the abhorable practices of untouchability, child marriage, sati, dowry etc are typical illustrations of social change being brought about in the country trough laws.

Law is an effective medium or agency, instrumental in bringing about social change in the country or in any region in particular. Therefore, we rejuvenate our belief that law has been pivotal in introducing changes in the societal structure and relationships and continues to be so.

Law certainly has acted as a catalyst in the process of social transformation of people wherein the dilution of caste inequalities, protective measures for the weak and vulnerable sections, providing for the dignified existence of those living under unwholesome conditions etc. are the illustrious examples in this regard. Social change involves an alteration of society; its economic structure, values and beliefs, and its economic, political and social dimensions also undergo modification. However, social change does not affect all aspects of society in the same manner.

While much of social change is brought about by material changes such as technology, new patterns of production, etc., other conditions are also necessary. For example, as we have discussed it before, legal prohibition of untouchability in free India has not succeeded because of inadequate social support.

Nonetheless, when law cannot bring about change without social support, it still can create certain preconditions for social change. Moreover, after independence, the Constitution of India provided far-reaching guidelines for change. Its directive principle suggested a blueprint for a new nation. The de-recognition of the caste system, equality before the law and equal opportunities for all in economic, political and social spheres were some of the high points of the Indian Constitution.

5.3 Ethics for Lawyers

Ethics is a code or behaviour or conduct relating to a particular profession, which is considered as being correct conduct e.g. the ethics of the medical profession. Which forbids a doctor from having an affair with a patient. Similarly fondling during an examination is unethical and can have serious repercussions. Similarly with lawyers, especially in divorce cases where the client is emotionally vulnerable, a lawyer must not have intimate relations with a client. If you do, say in a divorce case, you are not promoting reconciliation between the two parties and there is a conflict of interest. It also breaches the ethics and duty of a lawyer.

Legal ethics are further defined as the *minimum standards of appropriate conduct with the legal profession, involving the duties that its members have one to another, to their clients and to the courts.*

The etiquette of the profession - *the study or observance of these duties and the written regulations governing these duties.*

Etiquette relates to the formal rules of correct and polite behaviour among members of the legal profession and also polite behaviour before a court of law, before which a lawyer practices and earns his living.

A legal practitioner must conduct himself in the most exemplary manner in that he must set an example. Professional conduct is a set of rules or regulations, formal and informal that governs all members of the legal profession in both their professional and private lives. Therefore, the purpose of these rules is to provide a Bar of sound and safe practice for advocates to protect the public whose money and affairs are entrusted to advocates and to maintain the integrity and very high reputation of the profession. Any breach of these rules of conduct can, and in some cases e.g. the misuse of client's money, will lead to disciplinary proceedings taken against the advocate by the disciplinary committee of the Law Association of Zambia that has the power to enforce the rules. The ultimate sanction is to be stuck off the Roll (Register of names of lawyers) of legal practitioners "on the recommendation of the disciplinary committee". A profession is an occupation that requires specialized training e.g. in law, medicine and theology.

5.3.1 Traits of the Legal Profession

Legal professional practice is founded on the bar of theological esoteric[5]. It requires a long period of training and socialization. The practice of the profession is motivated by the idea of altruistic (i.e. unselfish) concern for the welfare of others.

Control

As regards control, is there over-recruitment into the profession in Zambia? In every profession, each profession wants to guard its own and there are rules as to who is permitted to enter the profession/be admitted to the Bar (for lawyers). This is part of the control environment put in place to safeguard the reputation of the profession. Professionals, as a group, will tend to enforce a code of ethical practice.

- ✓ A lawyer is expected to be sympathetic and patient to his/her client. E.g. when taking instructions, a lawyer must listen patiently to learn what the client is saying. He/she must ascertain the material facts and in simple language make sure that the client understands his/her advise.

[5] Difficult to understand or knowledge restricted to a limited set.

- ✓ A lawyer should establish with his/her client a relationship of mutual confidence through his understanding of the law. The approach to a case should be orderly and logical and a lawyer should be prepared to examine the weaknesses of his client's case and be prepared to meet those weaknesses. Learn as much as possible about your client's background so that you can advise him appropriately.

- ✓ DO NOT RUSH TO LITIGATE - negotiate the case to suit your client's interest. Only litigate if all else fails. Avoid drawing your client into unnecessary and costly litigation. Try negotiation for an *ex curia* settlement or arbitration. If you go to court there is no guarantee that you will win your case. The other party may be more eloquent or better-researched even if their case is inherently weaker, and may win. First, write a letter of demand to the other party and thereafter negotiation takes place and hopefully an ex curia settlement can be reached before any court action arises. As per Denning M.R. *"A decision to go to court is not a healthy one at all."* Rule 39 of S.I 51 of 2002 states *"A practitioner shall encourage clients to reach a solution by settlement outside court rather than start legal proceedings."*

5.4 Legal Profession in Zambia as Compared to the Legal Profession in England

The legal profession in Zambia is based on and is highly influenced by the legal profession in England. The professional standards of conduct that pertain in England and Wales are followed in Zambia, save that in England there exists a division in the profession comprising barristers and solicitors, whereas in Zambia there is a diffused profession where advocates are both barristers and solicitors. A barrister is a higher division of the profession in England and is normally involved with advocacy work in the courts. A barrister will normally accept instructions or cases that have passed through a solicitor and until a solicitor's brief is ready, a barrister will not take an action to court. A barrister has no actual relationship with the client. The solicitor is the agent of the client and it is a solicitor who professes to be knowledgeable. The primary work of a solicitor is to do the groundwork that a barrister will then present in court. However, in Zambia, the advocate is in direct contact with the client and this can be cheaper and better in that the client is directly dealing with his advocate rather than working through an intermediary.

Advantages of a Diffused Profession

(a) It is cheaper on both sides in that the client will have easy access to his advocate and the advocate easy access to the client.

(b) It is more expedient in that the client only has to deal with one person.

(c) It exposes an advocate to many other fields. He must deal with many different types of client who come to see him with many different types of case.

Disadvantages of a Diffused Profession

(a) An advocate may not be good at advocacy work in court but good at doing the background work, while another may be a good court room advocate but not good at preparing cases.

(b) It can be expensive if a client is dealing with a very senior lawyer as there is a graduated fee structure depending on a lawyer's seniority at the Bar, with State Counsel at the top of the hierarchy. It is important from the outset (*ab initio*) to explain to a client how much your legal fees are likely to be as this allows the client to make an informed choice about what action to take.

5.5 Conduct of Lawyers in and out of Court

- ✓ Section 85 of Cap 30: an advocate is an officer of the court. As an officer he has an equal responsibility as any judge or magistrate to dispense justice and not to win cases at all costs. Once a client comes to you, desist from telling him that you will win his case whatever the facts - unethical.

- ✓ An advocate has a duty to his client, a duty to the court and a duty to advance the course of justice. He/she is under a duty not to suppress evidence and to tell the truth even if you loose your client. The paramount duty is to the court. If you are a prosecuting counsel you must not press for a conviction but leave it to the court to do justice. If you know of a credible witness who can testify then call that witness. You must make available all relevant authorities i.e. statutes, decisions etc. you may be aware of, even if they hinder your client's case. As an officer of the court, you must always be polite.

- ✓ Rule 35 and 35 of S.I. No. 51. Prepare very well and be punctual. You have to wait for the court not vice versa. Because of your duty to the course of justice, you must be a master of your case, you must know the facts, understand the legal principles etc. If you are relying upon some legal authority, you must have that authority with you in court in case it has to be referred to by the court. Never inconvenience the court by forgetting such authorities. Use proper language in court but use words in common use i.e. study the use of words and speak well, audibly and eloquently. Lawyers must have clear, thoughtful and logical minds. .

- ✓ Be courteous Always be polite. Once the bench has made a decision you may say "Much obliged My Lord" i.e. be thankful even if the decision is against you. Section 85 of Cap 30: Officer of the court, i.e. the lawyer has a duty to the court but also to his client. There is a potential conflict of interest. How do you reconcile the two? There is a contractual duty to your client but a paramount duty to the court I\to assist it to advance the course of justice. I.e. at the end of the day, the highest duty is to the court even if this means loosing your client and his fees.

- ✓ Try to stick to a standard dictionary, do not use big or antiquated words

- ✓ Do not mislead the court e.g. by swearing an affidavit that you know contains untruth. In order to obtain a judgment, Sebastian S. Zulu alleged in an affidavit that four judges had met to decide the fate of Kambarage Kaunda, as they wanted to punish him and his mother Betty Kaunda by convicting him. One judge dealt with the matter and there was no collusion. SS Zulu was found guilty of perjury and contempt of Court and convicted, The SCZ reduced sentence from 12 months with hard labour to a 3 month suspended sentence. See S.S Zulu v The People [1990/92] ZLR 62; s 52 of Cap 30; s 116(3) of the Penal Code and O. 52 of the RSC.

5.6 LAZ Membership

S.5. (1) Every person who immediately before the commencement of this Act is a member of the Law Society shall, on that date, become a member of the Association without payment of any entrance fee. [Side note reads "Qualifications for membership"]

(2) Any of the persons referred to in s.s.(3) and (4) who applies for membership[6] in the prescribed manner and pays the prescribed fees shall be admitted as an ordinary member or an associate member, as the case may be, of the Association:

Provided that-
(i) a person who has been expelled from the Law Society or the Association shall not be admitted or re-admitted as a member without the approval, at a meeting of the Council, of not less than two-thirds of the total membership thereof;
(ii) no person who, whether in Zambia or elsewhere, has been suspended from practice or whose name has been struck off a roll of practitioners (by whatever name called) shall be qualified to become a member unless the period of his suspension has expired or his name has been restored to such roll.

[6] Candidature must be supported by one full LAZ member, but the Council has the discretion.

(3) Ordinary membership shall be open to any person who is ordinarily resident in Zambia and who-

(a) is admitted to the roll of practitioners in Zambia or is qualified to practice elsewhere as a lawyer[7]; or

(b) has been awarded the degree of Bachelor of Law by the University of Zambia or has obtained a degree or other qualification acceptable to the Association for purposes of membership.

(4) Associate membership shall be open to any person who-

(a) is in regular attendance at the School of Law at the University of Zambia OR any University Established under the Higher Education Act, or is a full-time student at a university elsewhere engaged in a programme leading directly to a degree acceptable to the Association for purposes of membership; or

(b) is an articled clerk[8] serving under articles of clerkship in accordance with the Legal Practitioners Act; or

(c) is engaged in a programme of study acceptable to the Association for purposes of associate membership; or

(d) is a managing clerk employed by a legal practitioner in Zambia.

6. Members of the Association shall pay into the funds of the Association such periodical subscriptions as may from time to time be prescribed. Subscriptions

7. A member of the Association may be expelled or suspended therefrom upon such grounds and in such manner as may from time to time be prescribed:

Provided that no member shall be expelled or suspended unless he has been afforded a reasonable opportunity of answering any allegations made against him.

8.(1) Any member of the Association may resign therefrom in such manner as may be prescribed.
Resignation and cessation of membership

[7] A lawyer from another commonwealth country may not practice in Zambia i.e. have the right of audience in court until he applies to C.J. May be required to sit for one or more LPQE course.

[8] Attached to a law firm as an articled clerk for five years under the supervision and guidance of a senior partner and then sit the exam to become a practitioner. Not a common occurrence, although not unknown. They have experience but lack in in-depth knowledge of the law especially jurisprudence.

(2) Any member of the Association who ceases to be qualified for membership under section five shall thereupon cease to be a member.

9. Members of the Association shall have such rights, privileges and obligations as may be prescribed. Rights, etc., of members

5.7 Function of the Legal Practitioner's Committee (LPC)

(7) The functions of the Practitioners' Committee shall be-

(a) to exercise on behalf of and in the name of the Association the powers of the Association relating to the issue of practicing certificates pursuant to the provisions of Part V of the Legal Practitioners Act; Cap 30.

(b) to exercise on behalf of and in the name of the Association the powers of the Association relating to the Compensation Fund in accordance with the provisions of Part VI of the Legal Practitioners Act; Cap. 30

(c) to exercise on behalf of and in the name of the Association the powers conferred upon the Association by section sixty-nine of the Legal Practitioners Act; Cap. 30 [Relates to dishonest practitioners and use of their assts to compensate clients].

(d) to exercise the functions vested in the Remuneration Committee established pursuant to section seventy of the Legal Practitioners Act; Cap. 30

(e) to exercise the functions vested in the Association pursuant to the Legal Practitioners (Disciplinary Proceedings) Rules and the Legal Practitioners (Disciplinary Proceedings) (Practitioners' Clerks) Rules; Cap. 30

(f) to exercise on behalf of and in the name of the Association the functions of the Association pursuant to Part VIII of the Legal Practitioners Act; Cap. 30 [Deals with client's funds and how to deal with them - very important area and it comes up in exams].

(g) to exercise any functions vested in the Association by regulations made pursuant to section ninety of the Legal Practitioners Act; Cap. 30 [Deals with regulations made by the C.J. or his delegate e.g. practice directions.]

(h) to exercise such other functions as may from time to time be delegated to the Practitioners' Committee by the Council or by the Association in general meeting.

14. Whenever it becomes necessary or desirable for the Association to appoint a representative to serve on any board, committee or other body, such representative may be appointed by the Council or by the Association in general meeting.

15. The proceedings of the Council and of every committee appointed pursuant to section thirteen shall be regulated in such manner as may be prescribed.

5.8 Principles that Govern Professional Conduct

Professional conduct is governed by several cardinal principles:

First, an advocate should not do anything in the course of practicing as an advocate or permit another person to do anything on his or her behalf that will compromise or impair, or is likely to compromise or impair, any of the following:

(a) The advocate's independence or integrity
(b) A person's freedom to instruct a lawyer of his or her choice
(c) The advocate's duty to act in the best interests of the client
(d) The good repute of the advocate or of the advocate's profession
(e) The advocate's proper standard of work
(f) The advocate's duty to the court.

Second, an advocate is an officer of the court and should conduct himself appropriately - the authority for this is s.85 of the Legal Practitioner's Act. An advocate, practicing or not, remains an officer of the court unless suspended or debarred. Certain standards of behaviour are required of an advocate as an officer f the court and as a member of the legal profession, in both his professional and private life. Disciplinary sanctions may be imposed on him if his conduct tends to bring the profession into ridicule.

Thirdly, as regards taking instructions:

(a) It is fundamental to the relationship that exists between an advocate and his client that an advocate should be able to give impartial and frank advice to his client free from any external or adverse pressure or threats or interests which would destroy or weaken the advocate's professional independence or the judicial relationship with the client. [Do not shock the client with an exorbitant fee note after work is done without telling him how work will be costed - must discuss fees at the initial meeting when taking instructions.]
(b) An advocate must avoid being placed in a position where his interests or the interests of a 3rd party to whom the advocate may owe a duty, conflict with the client's interest. If

there is a conflict, do not proceed to take instructions but refer the client to another advocate who does not have such a conflict.

(c) An advocate must not allow the client's interest to override the advocate's professional judgment. He must not compromise. He must not act for a client who insists that the advocate works for him in a way that is contrary to law or a rule or principle of professional conduct.

5.9 Retainer

An advocate is generally free to decide whether to accept instructions from a particular client or not. I is undesirable that an advocate should accept instructions to sue a professional colleague with whom, or with any of whose partners, he or she is on friendly terms. In these circumstances, the client should be advised and assisted to find representation elsewhere, preferably outside the lawyer's own area.

A client who does not have mental capacity cannot retain an advocate. He cannot give instructions to a lawyer that the lawyer can act on.

Instructions must be refused in the following circumstances:

(a) An advocate must not act or, where relevant, must cease to act further, where the instructions would involve the advocate in a breach of law or a breach of the principles of professional conduct, unless the client is prepared to change his/her instructions accordingly.
(b) An advocate accepting instructions is under a duty to observe the rules of professional conduct. A client must accept limitations imposed by such rules.
(c) An advocate must not act or continue to act in circumstances where the client cannot be represented with competence or diligence. [Competence e.g. he has insufficient skill/competence in a specialized field e.g. company liquidations, Diligence e.g. where he has insufficient time to devote to the matter.]
(d) An advocate must not accept instructions where he/she suspects that a client was under duress or undue influence when giving the instructions.
(e) Where instructions are received, not directly from the client, but via a third party purporting to represent the client, the advocate should obtain written instructions from the client that he/she wishes the advocate to act. If in doubt, the advocate should seek to see the client or take other appropriate steps to confirm the instructions.
(f) An advocate must not act or must decline to act further where there is a conflict of interest between:
    a. The advocate and the client or prospective client
    b. The advocate's firm and the client or prospective client

c. An exiting client &/or a former client and the client/prospective client.

Note: Disclosure of the conflict of interest to the client/prospective client does not permit instructions to be accepted even if the client consents.

5.9.1 Appointment Leading to Conflict

An advocate must decline to act where he or she, or an employer or an employee, or relative holds some office or appointment which may lead to a conflict of interest or which might give the impression to the public that the advocate is able to make use of such an appointment for the advantage of the client.

5.9.2 Advocate as Witness

An advocate must not accept instructions as an advocate for a client if it is clear that he/she or a member of his/her firm would be called as a witness on behalf of the client unless his/her evidence is purely formal. [Also an advocate should not be a surety.]

5.9.3 Client's Malice

An advocate must refuse to take action that he believed is solely intended to gratify a client's malice or vindictiveness.

5.9.4 Another Advocate Instructed

An advocate must not accept instructions in a matter where he believes that another advocate is acting for the client in respect of the same matter until the first retainer has been determined.

5.9.5 Duties Owed by an Advocate during Retainer

(a) Care and Skill

An advocate who has accepted instructions on behalf of a client is bound to carry out those instructions with diligence and must exercise reasonable care and skill. An advocate must act with his/her client's express or implied authority. He must NOT act on his own but must follow instructions. Note: he should not act through a third party but rather get instructions from the client in writing to confirm instructions given through the third party. It is therefore essential that from the outset an advocate agrees clearly with his/her client the scope of the retainer and subsequently to refer an matter of doubt to the client. If an advocate limits the scope of his retainer it is good practice for the limits of the retainer to be precisely defined and communicated

in writing to the client. This communication should state the duties to be carried out and the fees to be charged. If there are subsequently extra duties, then additional fees may be payable.

(b) Confidentiality

An advocate must keep his client's business/affairs confidential. Instructions must be kept in absolute confidence. This duty of confidence extends to advocate's staff, whether admitted to the bar or not, and it is the responsibility of the advocate to ensure compliance. Note: the duty is also owed to prospective clients i.e. people making initial enquiries about representation before becoming clients and also the duty is owed to client's who have long since passed away.

UNIT 6

ETHICS OF LAW STUDENT

6.1 Learning objectives

After studying this unit you should understand the ethics of a student of law and the attributes that they should possess.

6.2 Attributes of a Law Student

The study of law involves a student engaging in legal profession that is built upon the highest ethical and professional standards and such study should not only embrace the academic substance of the law, but also requires a sincere commitment to professionalism. The hallmark of an enlightened and effective system of justice is adherence to standards of professional responsibility and civility. Integrity and courtesy are indispensable to the practice of law. The conduct of law students should at all times exhibit professional integrity and personal courtesy in the fullest sense of those terms.

Law students should conduct themselves in a manner that preserves the dignity and honour of the Law School and the legal profession, where courtesy and civility are observed as a matter of course.

Law students must maintain the following attributes:

a) To be appropriately dressed as in required by the university regulations and the legal profession.

b) Behave in a civil, professional and courteous manner at all times.

c) To speak and write in a civil and respectful manner in all communications.

d) Not to engage in any conduct that diminishes the dignity or decorum of the School environment.

e) Not to bring the profession into disrepute by making unfounded accusations of impropriety or personal attacks upon others and, absent good cause, not to attribute improper motive or conduct to others.

f) To refrain from acting upon or manifesting racial, gender or other bias or prejudice toward others.

g) Not to misrepresent, mischaracterize, misquote facts or authorities in any oral or written communication.

The portrayal of good ethics is crucial to education of future lawyers as it has an effect on the public perception about the legal profession. Lawyers have to make choices all the time, so students need to be prepared to do so. Ethical decision making should be taught to students, giving them the necessary tools to go through a discernment process.

Law and lawyers have a lot of influence on the society, and governments constantly try to reduce their influence.

Further Reading:

James R. Elkins 'the Legal persona: An essay on the professional mask' (1978) *64 Virginia Law Review 5* 735-762

Glanville William *Learning the Law* 15th edition (London: Sweet & Maxwell)

Activity

1. What are ethics?
2. Why are these important to a Lawyer?
3. Must lawyers be of high integrity? Give reasons for your answer.
4. Is there any penalty for unethical conduct?