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INTRODUCTION
The Module aims at introducing you to law regulating administrative law and process. You will be introduced to the various legal controls of administrative power and process.

MODULE OBJECTIVES
On completion of this module you should be able to:
(a) Explain various principles of administrative law.
(b) Explain the law regulating powers and procedures of administrative organs of the state.
(c) Identify various non-judicial systems of control of administrative power.
(d) Explain judicial processes for control of administrative power and process in Zambia.
(e) Critically analyse the effect of gender on administrative law, policy and process.

TIME FRAME
You are expected to complete this module in 15 weeks.

STUDY TIPS
- As you go through the module you will come across margin icons that serve as signposts. These icons are intended to assist you navigate through the module.
- There are several activities interspaced in the learning activities that will allow you to reflect on the topics in the units.
- A list recommended and prescribed books has been attached to enable
you access the detailed data.

**STUDY SKILLS**
As a distant learner, you will be taking control of your learning environment. You will therefore need to balance your use of time. You also need to reacquaint yourself in areas such as essay writing as well as coping with examination pressure.

**NEED HELP**
In case you have any problems and questions, you may use the services of the Institute of Distance Education at the University of Zambia or contact the Course Coordinator.

**ASSESSMENT**

- Continuous Assessment 40%
  - 1 Test 25%
  - 1 Assignment 15%

- Final Examination 60%

**ACKNOWLEDGMENTS**
This module was prepared by Chipo Mushota Nkhatia and Felicity Kayumba Kalunga.
UNIT ONE: INTRODUCTION TO ADMINISTRATIVE PROCESS AND ADMINISTRATIVE LAW IN ZAMBIA

1.0 Introduction
These lectures focus on introducing you to the Zambia administrative process and administrative law. The unit defines administrative law and lays a foundation for better understanding of other components of this module. It also discusses the development of administrative process in Zambia.

1.1 Objectives
By the end of this Unit, you should be able to:

- Define administrative law.
- Identify and explain the sources of administrative law in Zambia.
- Explain the administrative process in Zambia and its development;

1.2 Definition of administrative law

<table>
<thead>
<tr>
<th>ACTIVITY</th>
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<tr>
<td>What do you understand by administrative law?</td>
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You probably came up with a number of answers to the above question. Your answers could have ranged from functions of administrative law to descriptions of public administration and the law regulating the public administration. As you may have noticed by attempting to answer the above question, it is impossible to give any precise definition of administrative law. Let us consider some of the definitions given by scholars below:

B.L. Jones attempts to define administrative law as follows:

Administrative law has come to … be viewed as the study of the rules and procedures that on the one hand serve to promote good administrative practice in governmental agencies, and on the other hand
provide mechanisms of redress, judicial or otherwise, when grievances have arisen as a result of decisions or actions of government.

The above definition is descriptive of the functions of administrative law. But it helps in conceptualising the subject matter of the subject. According to another author, Milton M. Carrow, administrative law is:

… [The law] dealing with the powers of administrative agencies as they affect persons outside the government, with the process through which the powers are exercised and with the controls over such powers and processes.

Carrow further cites Frankfurter in *The Task of Administrative law* as saying:

…administrative law deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies.

According to Hart in *Some Aspects of Delegated Rule-Making*, Administrative law includes the law that is made by, as well as the law that controls the administrative authorities.

Ivor Jennings defines administrative law as the law “relating to administrative authorities.”¹

Many scholars have attempted to define administrative law. Many of these definitions have been criticised for their failure to differentiate administrative law from constitutional law. They have also been criticised for being too wide.²

Given the above mentioned criticisms, administrative law can be defined as the law that governs those who administer government affairs. It focuses on the procedures and powers used by public officers and institutions responsible for the performance of State functions. It is the branch of law that focuses on the laws governing the public administration of the Country.

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¹ Administrative Law [www.dejurislawnotes.in/administrativelaw.com](http://www.dejurislawnotes.in/administrativelaw.com) accessed on 21st May 2013
1.3 Conceptualising Administrative Law
Administrative law is a difficult subject to conceptualise. There is no clear course to follow when studying it as may be the case with other subjects such as tort, contract, constitutional law etc. ‘The subject is circular, for no one part of it can be studied satisfactorily in isolation before proceeding to the next.’

Perhaps an understanding of the nature scope and function of administrative law can help us conceptualise the term ‘administrative law.’ This also helps us understand what is properly a subject matter of administrative law as well help you decide the right action for a grievance so as not to disrupt smooth public administration or seeking to check functions that are not properly the province of administrative law

1.4 The scope of administrative law
Administrative law is a branch of public law. It can be described as the ‘study of rules and procedures that on one the hand serve to promote good administrative practice in governmental agencies and on the other hand provide mechanisms of redress, when grievances have arisen as a result of decision or actions of government.’ Administrative law keeps governmental powers within their legal boundaries so as to protect the citizens against abuse of power by public administrators.

The subject of administrative law is concerned with 3 aspects of public administration, namely, power, process and controls. It deals with the structure, powers and functions of the public authorities and bodies. It also addresses limits to their powers, the method and procedures for exercising those powers and functions. By control, administrative law is concerned with the safeguards provided against abuse of administrative power.

It is also concerned with legal remedies available to the person whose rights and/or interests are negatively affected by the exercise of power by public authorities.

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3 D.C.M Yardley, The principles of Administrative law (1986) 19
5 Milton M. Carrow, Background of administrative law (New York: Orangeburg)1948
Administrative law generally covers a vast area. This is because it is potentially relevant to every use of public power or performance of public functions. The field of administrative law, to a large extent overlaps with Constitutional Law as well as other disciplines on governance such as political science and public administration. The relationship between constitutional law and administrative law is developed further when we consider the historical development of administrative law in Zambia. Suffice to mention that while both subjects are concerned with organs of the state and their relationship with each other and the citizens, administrative law is concerned only with one organ of the state, the public administration.

Administrative law is distinct from political science in that it focus on legal rather than political power. The distinction between administrative law and public administration is that the focus of administrative law is the legal control of administrative powers as opposed to the sort of issues that are of interest in management science such as efficiency, decentralisation, and management generally.\(^7\)

Administrative law should also distinguished from judicial review. Judicial review focuses narrowly on the aspect control or checking of exercise of administrative authority by the courts while administrative law is wider in scope. It focuses both on empowering proper public administration as well control of administrative authority.

### 1.5 The domain of administrative law

Traditionally, it was sufficient to look at the source of power to determine whether the decision maker is within the ambit of administrative law. It was sufficient to determine that the actor derives power from legislation (substantive or subordinate) and the fact that the decision affects public interest.

This test is no longer true in modern society as the growth of the welfare state in the 20\(^{th}\) century saw the expansion of public power into what formerly were considered private life such as consumer contracts, property rights and employment.\(^8\) Further, privatisation of predominantly government enterprise saw functions that were considered as properly state functions being performed by private authorities.

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\(^7\) Cora Hoexter, *Administrative Law in South Africa* (Cape Town: Juta & Co Ltd, 2007)

\(^8\) Cora Hoexter, *Administrative Law in South Africa*
The relevant test that courts have accepted involves not only an examination of the source of power but also the nature and of functions concerned to determine the public law element of the decision in question.

The concern of administrative law is the exercise of administrative authority that is of a rule making, adjudicative or investigatory discretionary character.

1.5.1 Problem Of The classification Of Functions
As stated in above, the domain of administrative law in determining what matters are subject to control by administrative law was determined by the source of power that the functionary was performing. To determine amenability to administrative law controls, the courts used a separation of functions test. With this test, there was a separation of functions into categories at which levels of discretion would diminish in the following descending order:

- Executive which is the policy making function. The function exercises a lot of discretion;
- Legislative which is the rule making function. At this level the authority exercises a lot of discretion;
- quasi-judicial functions in which the decision maker has to make decisions of a judicial nature;
- purely administrative functions for which there is relative degree of discretion although not much; and
- Ministerial functions for which there is no exercise of discretion.

The degree of control by the courts would differ according to the levels of discretion involved in the decision making. The courts' power of review is greatest at the level with the least discretion, in this case ministerial functions, and least at the level with the greatest discretion in this case, executive functions.

There is however a problem with the separation of functions approach as you will notice that there is no clear separation of functions that public authorities perform. The duty to procedural fairness has become a relevant ingredient even for decisions
of a legislative nature due to the constitutional content of administrative law which elevates the centrality of the bill of rights.

Further, the growth in privatisation has blurred the distinction between public and private functions. There are elements of public law in contract when dealing with public procurement. Also, private functionaries are increasingly performing public functions such as licensing, electricity and water supply etc.

1.5.2 The Functionary Test
The functionary test requires that only a public officer should be subject to administrative law control. But this is not the end of the inquiry. It should also be established that the functionary is performing public functions. The traditional test was the source of power. The test has now expanded to look at not only the source of power but also the nature of the function as stated above.

An authority is said to be performing public functions when his/her function seeks to achieve a collective benefit for the public or a section of the public. They are also said to exercise public functions where they participate in matters of public interest or when amenability to their jurisdiction is by compulsion or coercion.

Using this test, it is possible for traditionally private bodies to exercise public functions and are arguably amenable to administrative law control or remedies for any person who suffers loss at the exercise of their functions.

1.6 Sources of administrative law

All sources of law are sources of administrative law. These are the Constitution, legislation, delegated legislation, judicial precedent, English common law, equity, customary law and authored works.

**Constitution:** The Zambian Constitution is the supreme law of the land. It stipulates fundamental principles for the governance of the Country. The Constitution is a source of administrative law in that it creates many administrative institutions and ascribes powers and functions for them. It provides constitutional limits on exercise
of power hence contributes to the goals of administrative law aimed at curbing abuse of powers.

**Legislation and Delegated Legislation:** Legislation comprises of Acts of Parliament, also known as Statutes. These are enacted by Parliament since it is the law-making body of the Country. Parliament also has the powers, in accordance with the Constitution, to delegate its law-making functions to a lower body. Legislation that emanates from such delegation is referred to as delegated legislation. Both legislation and delegated legislation form an important source on administrative law in that some of the administrative agencies are created by Acts of Parliament. Since administrative law comprises of law that is made by and controls the administrative authorities, you can consider legislation and delegated legislation as important sources of administrative law.

**Government Circulars**

Administrative agencies are media through which laws are made, like Parliament itself. One of the ways through which such rules are made is through government circulars. Whereas the Constitution and Acts of Parliament permit these administrative agencies to make laws, such laws are different from the law governing their powers and processes. See the case of *Muyawa Liuwa v The Attorney General* (1982) Z.R. 39.

**Judicial Precedent:** Judicial precedent is also referred to as ‘judge-made law’. It emanates from judicial pronouncements that are made by the courts when deciding cases before them. With each judgement, the Courts set precedent that may either be binding or persuasive on themselves and other courts. As judges are meant to interpret the law, any administrative laws enacted by Parliament or its delegate that is interpreted by the courts in cases properly before them form part of administrative law. Judicial precedent also forms an important source of administrative law in that courts often are called upon to determine whether public power was properly exercised. The exercise of public power is a subject of administrative law and thus court decisions in this regard inevitably form part of administrative law.
**Conventions:** This law refers to the practices observed over time that are generally accepted as part of administrative law. Convention, in this regard, would also constitute customs and practices that are part of administrative law. Carrow writes:

The formal procedural determinations made by administrative agencies, whether by rule or order, govern the administrative process of the particular agency affected until changed by legislation or judicial decision. The procedures so established are as much the concern of administrative law as are the ones formulated by statute or as a result of judicial law making.

It is evident from the above quotation that administrative agencies may make rules over time that crystallize into authority that is binding on them until changed by legislation or judicial decisions. Such rules are just as much a part of administrative law as the rules enacted by Parliament or judicial pronouncements.

**English Common Law and Equity:** These form part of administrative law in that many aspects of administrative law that were developed through the English Common law system have not been changed by statute. Since Zambia largely inherited its administrative process from the English law system, most of the common law applicable in the UK is still applicable to Zambia. Further, under the English legal system, equity follows the law, which means that so far as the common law produces as injustice, equity could be invoked to redress the situation. For example, if the use of discretionary powers leads to an unjustifiable violation of an individual's fundamental right, equity could be invoked to redress the situation.

**Customary law**

Zambia has a dual legal system. Customary law is a source of administrative in so far as it ascribes public power and provides methods of control of such public power. Examples of customary law public authority include, chiefs, headmen etc. under customary law
ACTIVITY

Critically discuss the sources of administrative law in Zambia.
UNIT TWO: HISTORICAL DEVELOPMENT OF ZAMBIA’S ADMINISTRATIVE PROCESS

2.0 Introduction
In this unit, you trace the development of administrative law in Zambia. Understanding the historical development of the administrative process will help you to analyse the value of constitutional developments in the growth of administrative law and process in Zambia. The last part of the unit specifically analyses the relationship between Constitutional Law and administrative law and highlights the constitutional context of administrative law in Zambia.

2.1 Historical background
Zambia has undergone many stages of development in its political, social and economic sectors. Until independence, in 1964, the British Government’s purpose for Zambia, among others, was to empower the local population to run their own affairs. After independence, the new government committed itself to the realisation of a humanistic society. Since the end of the one-party rule, successive Zambian governments have committed to transforming Zambia into a democracy. They have declared their interest in improving the welfare of the people. It is the primary responsibility of the State to meet the socio-economic needs of the Zambian people and to ensure that fundamental human rights are respected, promoted and protected.

The State has had the responsibility of transforming Zambia into a democracy and promoting and protecting citizens’ rights since independence. Although all organs of the State are equal in importance, a huge part of this responsibility falls within the ambit of the executive organ.

By the Zambian Constitution, the executive organ of the State is responsible for administration. The administration of a country entails formulating policies and implementing those policies and laws in accordance with the governance structure. These policies and laws are meant to address the many challenges the Country is facing. The legislature and the judiciary also play an important role in the administration of a country in the making and interpretation of the law. They too carry out some administrative functions in the fulfilling their constitutional functions.
The process of transforming Zambia into a “Modern State” became the Government’s priority at independence, in 1964. This meant that the State had to create institutions that would drive this process. The 1964 Constitution, inherited from the colonial masters, provided for certain key institutions that would be responsible for administration. Subsequent Zambian constitutions have reinforced the creation of these institutions. However these institutions have not always been adequate. The creation of new institutions has not alleviated the problem of their adequacy to meet the envisaged transformation. This is because these institutions have largely been adopted with little or no adjustment to the Zambian social and economic context. They have largely been distant from the people, who are either ignorant of their existence or ignorant of their functions and their importance. John Sangwa writes to this effect that: (J. Sangwa. Control of Administrative Decisions in Zambia. Unpublished).

The Government remains the critical player in the realization of these goals. In order to achieve these objectives various administrative agencies have been and others still need to be created. The making of these institutions pose a serious challenge of ensuring that they indeed discharge their functions and use the powers vested in them for the purpose specified in the empowering legislation.

The challenge is serious in Zambia given its history, as a British protectorate. The western style of government in place was imposed on the territory without regard to the economic and social forces present, and without paying attention to whether the necessary factors were present to sustain such a system. The institutions of government have remained distant and without relevance to the majority of the people. However, the impact of colonial rule is irreversible. The responsibility of those running government is to ensure that the existing administrative agencies and those to be created are relevant to the pressing needs and aspirations of the country and that they meet these challenges.

It is evident from the above that our administrative process commenced with the inheritance of our national Constitution, which created various administrative
agencies. Many administrative agencies that have been created since independence have largely followed the western style of administrative process.

Over the years these administrative agencies have shaped the administrative process in Zambia. Laws and policies have also been created to ensure that the administrative process meets its objectives of transforming Zambia. John Sangwa identifies ways in which the administrative agencies created since independence have been instrumental in meeting the objects of good administration, and thus contributing to the transformation process. He states that;

The very nature of the parliamentary system in Zambia provides a way of securing proper exercise of power. The constitutional institutions such as the Commission for Investigations, the Auditor General's Office are important in securing an open and accountable government. The tribunals created under various statutes provide channels for speedy resolution of conflicts arising in specified areas. Public inquiries initiated by the President, in exercise of his powers under the Inquiries Act, help find solutions to issues of public concern. Judicial review of administrative actions however, remains the most employed method of keeping public officers in check and compelling them to do that, which they are by law obliged to do. The nature of the Constitution in Zambia raises other issues concerning the powers of the High Court to review the actions of legislative and executive branch of government.

These institutions and systems will be discussed in the subsequent units. For now, it is important to note that administrative agencies can be created by the Constitution and by Acts of Parliament. Similarly, administrative systems can be created by the various the Constitution, Acts of Parliament and subsidiary legislation.
ACTIVITY:

Discuss any three administrative agencies created by the 1964 Independence Constitution.

How were these used to ensure proper administration of the Country?

What were the weaknesses of these institutions in the administration process?

2.2 Constitutional Foundation of Administrative Law

As noted above, a lot of administrative law definitions have been criticised for failing to differentiate from constitutional law. This is largely because many aspects of administrative law are dependent on the constitutional makeup of a country. Although administrative law bases its authority on powers granted by the Constitution, there is a difference between constitutional law and administrative law.

Activity

1. What type of constitution does Zambia have?
2. What about the Britain?
3. Explain the features of the Zambian Constitution.
4. Explain the main features of the British Constitution?
5. Give examples of some principles of our Constitutional law

Constitutional law in Zambia is based on the concrete type of constitution. This means that Zambia has a document (referred to as the Constitution of the Country) which contains the most important laws of the land and which are ordained by the people of Zambia. This constitution commands superiority over all other laws that are enacted
by the Zambian Parliament or customary law (Art. 1(1) of the Constitution of Zambia).

The Constitution provides for the establishment of the main institutions of government, prescribes their powers and also their relationship with one another. Thus our constitutional law refers to the laws that govern the formal rules of how the Country will be organised and how various State organs will be established and what functions, powers and duties they will have. (Parts VI-X of the Constitution). Administrative law, on the other hand, focuses on the powers vested in governance institutions and how they are used.

The constitutional foundation of administrative law incorporates the following principles and doctrines:

1. Constitutional supremacy;
2. Constitutionalism;
3. Separation of powers; and
4. The rule of law.

Zambia’s administrative law is affected by the nature of our constitution. Let us examine this relationship by looking at 3 principles of Zambia’s constitutional law that affect administrative law. This is largely also a reflection of Zambia’s legal history which is based on the English constitutional law.

2.2.1 Separation of powers
The doctrine of separation as promulgated by A.V. Dicey promotes the idea of separation of governmental functions between separate functionaries. The principle requires that these functions of government should not be versed in one person and that each governmental body should not usurp the powers of the next.

It is embodied in Zambia’s constitution which allocates executive functions to the president and the civil service, law making to the legislature and interpretation of laws and adjudication to the judiciary.

There is however no strict separation of functions as the executive is given power to make subsidiary legislation, the legislature has power to make judicial decisions in respect of its members and enacting governmental policy whereas the judiciary can
be said to make law when they interpret law or enact rules of procedure and perform executive functions as supervising estates of minors or giving licences to money lenders.

The effect of this principle on administrative law can be summed up as follows:

1. Courts should not usurp powers properly allocated to the executive and public administration. (implemented through strict procedures and qualifications for review and discretionary remedies).
2. Administrative law should promote good administration and control maladministration. In exercising control, government should not be crippled.

2.2.2 Rule of Law
This is another important constitutional doctrine which postulates that (A.V. Dicey):

i) Law is better than anarchy – laws must be faithfully and correctly executed by administrative officials.

ii) Government according to law- No man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land.

iii) Equality before the law – No man is above the law...every man is subject to the ordinary law and amenable to the jurisdiction of ordinary courts.

Governmental power should be exercised in manner prescribed by law. Every exercise of administrative power must therefore derive it's authority from a legal provision and not arbitrarily or according to the whims and caprices (sudden, impulsive, unpredictable) of the administrator.

Arbitrary means not planned or chosen for a particular reason, not based on reason or evidenced; based on preference other than reason or necessity.

Administrative law seeks to ensure that administrative power is regulated by law and is exercised within the confines prescribed by law

The rule of law also entails equality before the law. There must be an independent judicial body to which everybody should be subjected to. The rule of law gives
legitimacy to ordinary courts to review administrative actions without subjecting them to special courts or tribunals.

2.2.3 Constitutional Supremacy
The doctrine of constitutional supremacy can be summed up as follows:

1. All institutions derive their legitimacy from the people through the constitution.
2. All law is subject to the constitution.
3. All acts or omissions should be in conformity with the Constitution.

Activity
Contrast constitutional supremacy with parliamentary sovereignty which entails the following:

1. Parliament can make and unmake any law whatsoever. No person or body is recognised by law as having a right to override or set aside the legislation of parliament.
2. Parliament can alter maximum duration of its life; confer legislative and judicial powers on organs of the executive; exclude access to court.
3. Courts have no jurisdiction to question validity of enactments of Parliament.
4. Royal prerogative to make law exists at the sufferance of Parliament.
5. Legislation is a combined act of the queen plus the 2 houses of parliament.

The doctrine of Parliamentary Supremacy has a legacy on Zambia’s legal system and judicial policy. Judges are often faced with conflicting ideas of defending the will of parliament vis a vis constitutional supremacy.

See In re Nalumino Mundia (1970) Z.R. 70 where it was held that the High Court has no power to interfere with exercise of jurisdiction of national assembly in the conduct of its proceedings.

See also:
The doctrine of constitutional supremacy has challenged the traditional domain of administrative law as follows:

1. Whereas statute could make a provision excluding review of exercise of executive authority, it is now possible to challenge such authority based in the supremacy of the constitution which gives original and unlimited power to the judiciary to safeguard human rights and protect the constitution.

2. Courts have power even to review exercise of discretionary authority and that Parliament being subordinate to the constitution cannot enact legislation that ousts the courts’ jurisdiction.

3. Ultra vires as a ground for review has been broadened to include moral legitimacy of the constitution and principles of constitutional democracy.

2.2.4 Constitutional Principles and values

Article 8 of the Constitution sets out the following national values and principles:

(a) morality and ethics;
(b) patriotism and national unity;
(c) democracy and constitutionalism;
(d) human dignity, equity, social justice, equality and nondiscrimination;
(e) good governance and integrity; and
(f) sustainable development.

Article 173 sets prescribes values and principles of the public service which include:

(d) encouragement of people to participate in the process of policymaking;
(e) prompt, efficient and timely response to people’s needs;
(g) accountability for administrative acts;
(h) proactively providing the public with timely, accessible and accurate information; and
(i) merit as the basis of appointment and promotion.
These values apply to all levels of government and state institutions.

2.2.5 Centrality of human rights
The effects of having a written constitution is that it elevates the position of human rights which are entrenched under the Zambian Constitution.

Some instances of maladministration are therefore a domain of constitutional law since they centre on infringement of entrenched rights. This has somewhat narrowed the scope of administrative law.

2.6 Unit Summary

This unit has given you an introduction to administrative law. It has looked at the genesis of the administrative process in Zambia. It also discussed the concept of administrative law and the sources of administrative law. This background information is necessary for your continued understanding of what administrative law is and how administrative process are controlled or managed in Zambia.
UNIT THREE: ZAMBIA’S ADMINISTRATIVE PROCESS.

3.0 Introduction
This unit introduces you to Zambia’s administrative process. You should note that the detailed study of structure and functions of the public administration are typically a subject of public administration. The aim of this unit to provide you with the necessary brief introduction to the structure and functions of the public administration to provide the contextual basis for your engagement with the concepts of power and control that are covered in the subsequent units.

3.1 Values and principles of public service

The Constitution of Zambia has set out values and principles intended to guide functionaries engaged in the public service. These values are intended to guide governance at all levels. The constitution defines “public service” as:

service in the Civil Service, the Teaching Service, Defence Force and National Security Service, the Zambia Correctional Service, the Zambia Police Service, Emoluments Commission, State Audit Commission, Lands Commission, Electoral Commission, Human Rights Commission, Gender Equity and Equality Commission, the Anti-Corruption Commission, Drug Enforcement Commission, the Anti-Financial and Economic Crimes Commission, the Police and Public Complaints Commission, and service as a constitutional office holder, service in other offices, as prescribed.

Article 173 (1) of the Constitution sets out the following governance values and principles that should apply at all levels of governance:

1. maintenance and promotion of the highest standards of professional ethics and integrity;
2. promotion of efficient, effective and economic use of national resources;
3. effective, impartial, fair and equitable provision of public services;
4. encouragement of people to participate in the process of policymaking;
5. prompt, efficient and timely response to people’s needs;
6. commitment to the implementation of public policy and programmes;
7. accountability for administrative acts;
8. proactively providing the public with timely, accessible and accurate information;
9. merit as the basis of appointment and promotion;
10. adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups; and
11. representation of persons with disabilities in the composition of the public service at all levels.

These values and principles should be adhered to at every level of government. There is also a constitutional obligation to engender government positions for gender equality and an obligation to include youth and persons with disabilities (art. 259).

3.1 The National government

Zambia is a democratic state with a unicameral parliament. The President is the Head of State and Government. Article 90, executive authority derives from the people and must be exercised in a manner compatible with social justice and for people’s wellbeing and benefit. President is head of state and governance.

Cabinet composed of the President, Vice president, Ministers and Attorney General as ex-officio member is responsible for performing executive functions. At national level, administrative functions of governance are performed by public officers appointed by the President directly or by a relevant Service Commission created by the Constitution or statute. (Article 185 of the Constitution).

Article 91, president or delegates are to uphold following values in exercise of executive power:

1. respect, uphold and safeguard this Constitution;
2. safeguard the sovereignty of the Republic;
3. promote democracy and enhance the unity of the Nation;
4. respect the diversity of the different communities of
5. Zambia;
6. promote and protect the rights and freedoms of a person; and
7. uphold the rule of law

3.2 General Principles of devolved governance

The Constitution defines “devolution” as ‘a form of decentralization where there is a transfer of rights, functions and powers or an office from the central government or State institution to a subnational authority or the bringing of a service that is provided at central government level to, or opening of a branch of a public office or institution at, a sub-national level, and the word “devolved” shall be construed accordingly.’ Decentralization is difficult to define. It involves the transfer of power and administrative functions from the central government to local government units. Devolution results in political and administrative autonomy to provinces or districts. In decentralization, functions and government authority are delegated. In devolution, functions and government authority are vested on local authorities on an autonomous basis by a separate legal arrangement. (Beyani, 1984).

Part IX of the Constitution sets out principles of devolved governance. It states government should be devolved from national government to local government. The Constitution sets out the following principles of devolved governance in article 147 as follows:

1. good governance, through democratic, effective and coherent governance systems and institutions;
2. respect for the constitutional jurisdiction of each level of government;
3. autonomy of the sub-structures; and
4. equitable distribution and application of national resources to the sub-structures.

The local government is to be exercise through substructures funded by government.
3.3 The Provincial Government

Provincial government consists of provincial minister, permanent secretary and other staff as prescribed. Provincial secretariat performs provincial functions.

Article 150(1) – Provincial secretariat is made up of the following:

(a) Provincial Minister;
(b) a provincial Permanent Secretary; and
(c) other staff, as prescribed.

(2) The provincial secretariat shall have overall responsibility of the Province and perform other functions as prescribed.

Provincial minister is appointed by President from among MPs. This is contrary to what was submitted in the Technical Committee draft Constitution. Provincial ministers were supposed to be appointed from outside National Assembly.

Provincial minister is head of government at provincial level. Should ensure that policies are implemented in all districts in the province. Ensure that concurrent functions of the province and the local authorities are performed in accordance with the Constitution and the law.

3.4 The Local Government

Local government system is based on democratically elected councils. Mandated to promote democratic and accountable exercise of power. The local government should ensure that substructures offer services in equitable manner.

3.5.1 Functions

Article 152 (1) a local authority shall:

1. administer the district;
2. oversee programmes and projects in the district;
3. make by-laws; and
4. Perform other prescribed functions.
National and provincial government not to interfere in the operations of the local government.

Local government headed by elected mayor and assisted by councilors.

Article 153 A council shall consist of the following councillors—
(a) Persons elected in accordance with clause (1);
(b) A mayor or council chairperson elected in accordance with Article 154; and
(c) Not more than three chiefs representing chiefs in the district, elected by the chiefs in the district.

3.5.2 Control of power
Councilors are collectively and individually accountable to national government and residents of ward in the performance of their functions.

3.6 Chieftaincy
Exist in accordance with customs and traditions of their people. Chieftaincy is corporation sole with power to sue or be sued, also to hold property in trust for subjects.

4.7.1 Functions
To be prescribed. Chiefs Act, Cap 287 of the Laws of Zambia contains the functions. The main function as prescribed has largely remained the preservation of public security. Can arrest people committing a breach of peace. Constitution recognizes broader functions such as making a chief eligible as councilor once elected by chiefs to represent the chieftaincy on the council. Responsible for management and control of natural resources in the chieftaincy. At national level, influence is through the House of Chiefs.
UNIT FOUR: KEY CONCEPTS IN ADMINISTRATIVE LAW

4.0 Introduction
This Unit seeks to introduce you to key concepts in administrative law to enable you critically discuss the administrative process in Zambia.

4.1 Power, Process and Function
a) Power

Black’s Law Dictionary – Ability to act or not to act. A person’s capacity for acting in such a manner as to control someone’s response.

Webster’s Dictionary - the ability to act so as to produce some change or bring about some event.

E. Allan Farnworth, Contracts – capacity to change a legal relationship.

Milton Carrow states with relation to the use of “power” in administrative law that:

“Applied to administrative agencies, legislatures and courts it is apparent under this definition that power is exercised when an authoritative determinant is made affecting persons or property. Formally, there are issued in the form of rules and orders, statutes and decisions. Informally, powers are exercised through machinery established to effect settlements of disputes by the courts or administrative agencies.”

b) Process

Black’s Law Dictionary defines “process” as ‘procedure or proceeding’.

Carrow states that the “result and the “something” produced constitutes the rule of order in the administrative process, the statute in the legislative process and the decision in the judicial process”. It is clear from Carrow’s discussion that all organs of the state can exercise power in various processes. These processes are expected to yield a tangible result such as a rule or order or court judgment; depending on the organ that is exercising the power.

c) Function

Black’s – activity that is appropriate to particular business; office; duty
Carrow - Sometimes it is rightly used to mean “a job to be done”.

The three terms are sometimes used interchangeably in administrative law to denote exercise of administrative authority.

d) Duty

Blacks - legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right.

Webster – obligatory task; moral or legal obligation

4.2 Sources of power

There are various sources of administrative which are further discussed below.

a) Legislation

Administrative power is mostly derives from statutory powers. Duties play a part but the bulk of it comes from power. Duties are obligatory. Powers give some element of discretion. Statutes usually define power and prescribe the process by which power is to be exercised. Statutory power is the easiest to understand. Disputes on administrative law are invariably an issue construction of statutes to find the intention of Parliament.

Construction of power or duty

Discretionary power is usually couched in permissive language such as “may” or “it shall be lawful” compared to obligatory language such as “shall” or “must”. This is not always a clear cut distinction. It is subject to the rules of statutory interpretation.

b) Delegated legislation

Article 67(1) of the Constitution gives Parliament authority to confer on any person or authority power to make statutory instruments with the effect of law. Section 2 of the Interpretation and General Provisions Act⁹, defines a Statutory Instrument as “any proclamation, regulation, order, rule, notice or

⁹ Cap 2 of the Laws of Zambia. See also Article 139(1) of the Constitution
other instrument (not being an Act of Parliament) of a legislative, as distinct from an executive, character”.

This delegated authority should ensure that all rules, regulations, by-laws or orders so made are in conformity with the parent or main Act enacted by Parliament. (Compare provisions of article 167(3) of the Constitution)

Any provision of a statutory instrument which is inconsistent with any provision of the parent Act is void to the extent of the inconsistency (section 20(4) of Cap 2).

On that basis, delegated legislation is a source of power as well as a function in that it may be challenged as a form of improper exercise of administrative authority. (direct and indirect challenges under judicial control)

c) Prerogatives

Prerogative powers originate from royal prerogatives of the crown. Even in the UK such power no longer applies in respect to the rights of people. Courts use prerogative to describe crown power that is not statutory. In Zambia, it would be the equivalent of executive power that is given by the Constitution to the president to for example create ministries, grant pardons, to summon or dissolve Parliament, sign international treaties. Such powers are not however beyond the reach of judicial control.

d) Contractual powers

Public authorities frequently acquire power by contract. Frequently, where contractual power will derives from statute as for example the cabbage collection licences, rules of administrative law will apply. Where a public authority’s contracts are made merely in exercise of commercial liberty, such fall outside administrative law since the law of contract would apply.
ACTIVITY
Professor Craig states that the purpose of administrative law is to help contain ministerial powers as are delegated to ministers. He states to this effect that “It [administrative law] was designed to ensure that those to whom such grants of power were made did not transgress the sovereign will of Parliament.” Professor Craig made this comment with the UK governance structure in mind. Critically discuss this sentence in the context of Zambia’s constitutional order.

4.3 Scope of Power – Jurisdiction
1. A statutory power is to be construed as impliedly authorising everything that may be incidental or consequential to the power. Section 25 of the Interpretation and General Provisions Act states:

   Where any written law confers a power on any person to do or enforce the doing of an act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

This rule of construction is not to be interpreted narrowly.

However, one of the key functions of administrative law is to see to it that administrative authority is not exercised arbitrarily. This imposes a duty on the actor to act within the boundaries of the law. Any act outside the boundaries defined by statute arbitrary ultra vires. To determine the proper scope of administrative power, courts would look to the construction of the law that gives the power.

a) Jurisdiction
Refers to objective boundaries of administrative authority and the way in which the authority would be controlled traditionally by courts and also other legal controls.
i) Liberty to error

It is inherent in all discretionary power that it includes the power to decide freely, whether wrongly or rightly, without liability to correction, within the area of discretion allowed by law. Certain statutes give immunity to authorities when they act in good faith. The highest level of discretion, the lowest level of control. In such instances, the administrator has a free hand and his decisions cannot be questioned save by appeal. (Distinction between appeal and review).

ii) Principle of objectivity

The principle of objectivity requires that the authority should not be judge of its own jurisdiction. The exception relates judicial authority.

iii) Ultra vires

The ultra vires principle provides the objective boundaries of jurisdiction. The term “ultra vires” is synonymous with “outside Jurisdiction” or “in excess of power.”

b) Jurisdictional and Non-jurisdictional facts – How to determine

A jurisdictional fact is that which is condition precedent to the exercise of administrative power. A factual situation that must exist before administrative authority is invoked. Example, the Health Professions Act no. 24 of 2009 states at s. 8, “the [Medical] Council shall register a health practitioner as medical doctor.” For a person to be registered as such, he/she must be a medical doctor. Whether or not a person is a medical doctor is a jurisdictional fact to be determined by the court where there’s a dispute. Power to determine jurisdictional facts inevitably lies with the court even where the law says “if the Council is satisfied…”

c) Jurisdictional law

Where the law sets up boundaries or conditions precedent. This is strictly speaking, an example of ultra vires, if such conditions are not followed.
d) Administrative cases
Statutory conditions are almost always said to be jurisdictional issues. The law however sometimes prescribes that the administrator determines some jurisdictional issues. The determining factor would be the intention of Parliament: A matter for statutory interpretation.
Example premises in Cap 112 Regulation 8

e) Summary
Errors of fact would be quashed if:

i) They are jurisdictional in nature; or

ii) Found on the basis of no evidence (unreasonable); or

Wrongly, misunderstood or ignored.

Errors of law would be quashed if they are jurisdictional or are erroneous on the face of the record.

2. Legal power also defines the scope of power by stating whether the authority is discretionary or ministerial. “Discretionary power” refers to the freedom to decide on a course of action, from several options. Discretionary power is the ability to make decisions or act according to one’s own judgment. It is statutory power conferred by legislation or delegation to a minister or any other governmental official.

Ministerial power is defined as an action or decision that conforms to an instruction or approved procedure. This kind of power does not involve discretion or policy making. The courts provide a means of checking or controlling ministerial power. The principle of Ultra Vires helps the courts achieve this. This principle can be discussed from a narrow and broad sense. From a narrow sense, it captures the idea that those to whom power is granted should only exercise that power within their designated area. In a broad sense it provides a justification for constraints upon the way in which power is given to a minister.

3. Another important concept on scope of power relates to determining the functionary. The common law principle of delegatus delegere non potest is directive in this regard. Where a statute expressly confers a certain power on
a public authority, such authority should not be delegated to a functionary who is not the person on whom the power is expressly conferred. Where such power is delegated without express authority of the empowering provision, a decision made by the delegate is subject to review for want of authority or on grounds of illegality. There must be authority to delegate in the empowering provision. Even where there is a power to delegate, the courts, using the classification of functions were stricter when it came to exercise of power involving discretion which is ordinarily not delegable. Reverend Lameck Joshua Kausa V The Registrar Of Societies (1977) Z.R. 195 (H.C.)

4.4 Express Requirements and Conditions for exercise of public power  
a) Mandatory and Directory Conditions  
Parliament may set conditions about procedure for exercise of certain powers. Where such conditions are mandatory or directory. Non observance of a mandatory condition is fatal and may render exercise of power invalid. Where the condition is merely directory, non-observance of the condition would not matter much and the court ought to defer to the procedure adopted by the functionary.

The distinction is not clear cut as the same condition may be both mandatory and directive. Sometimes legislation prescribes the consequences of non compliance of a condition.

b) Procedure and formal requirements  
Procedural safeguards often imposed for the protection of persons likely to be affected by the decision are normally regarded as mandatory. We will look in more detail on procedural safeguards when we consider principles of natural justice and legal justice.

c) Time Limits
where time limits are prescribes, delay in exercising power within the prescribed time limit may be fatal. Eg s. 5 of the Lands Act – consent to assign or transfer land is supposed to be given in 45 days.
e) Failure to state reasons – a component of natural justice and legal justice eg. S. 5 President must give reasons for refusal of consent to transfer land.

f) Provisions as to irregularity – some statutes state the effect of non-observance of its requirements. Irregularities may be cured depending on whether they are mandatory or directive as shown above. E.g. s. 5 Lands Act, Consent to transfer land will be deemed if not granted within 45 days.

**g) Conclusiveness**

1. Where any written law confers any power or imposes any duty, the power may be exercised and the duty shall be performed from time to time as occasion requires. S. 24, Interpretation and General Provisions Act. There is an exception where the decision affects legal rights in which case, the argument on finality becomes relevant. The courts would require that once made, such decision would not be recalled or revised. If the authority has powers of review, there is need for such power to be expressly stated by the empowering statute. Mistake may be an exception.

**4.5 Administrative Discretion**

Definition

- Generally refers to the freedom to decide on a course of action, from several options.

- Ability to make decisions or act according to one’s own judgment.

2. Important principles about discretionary power:

a) Delegation is not allowed. *Kausa v Attorney General; Folayinka Esan v Attorney General* Selected Judgment No. 47 of 2016. (Notice declaring appellant as PI signed by Immigration officer with Minister’s declaration as provided under s. 35 of the Immigration and Deportation Act.) Should be distinguished from lawful agency although the line is thin.

b) Surrender, abdication or dictation of authority by another is a ground for control of exercise of discretionary authority.
c) Over-rigid policies or precedent not desirable in exercise of discretion. Distinguish these from policies of a legal nature, e.g. national policies that are considered binding.

d) No fetter of discretion by contract or estoppel.

### 5.2 Abuse of Discretion

Laws give unbound discretion to administrative authorities. Administrative law seeks to control administrative authority and guard against abuse of discretion using the following principles and features:

1. All power has legal limits
2. Courts should limits in a way that strikes the most suitable balance between executive efficiency and legal protection of the citizen
3. Courts frown on arbitrary power and unfettered discretion and have devised a network of principles that require that power should be exercised reasonably, in good faith, for proper purpose only, and in accordance with the spirit as well as the letter of the empowering Act (and the Constitution).
4. Courts must at all time confine themselves to applying recognisable principles of law since at all costs, they must not expose themselves to the charge of usurpation of executive power. (There should be a right balance between judicial activism and usurpation of power rightly assigned to the executive arm of government).

Let us discuss 2 these principles in more in more detail.

1. All power has legal limits
   - Legal limits may be given by the text of the empowering legislation or by recognised principles of law lawful exercise of power intended to define the jurisdiction of authority. The principle of objectivity is important here.

   The Supreme Court in the case of **Attorney General v Roy Clarke (2008)** *Z.R. 38* where the Supreme Court stated:
There is nothing like unfettered discretion immune from Judicial Review. We want to emphasize that in a Government under law, like ours, there can be no such thing as unreviewable discretion.

- Prerogative powers also have legal limits although they have traditionally been unquestionable. The position is that prerogatives do not per se provide unreviewable powers save that most of the powers they confer are the kind that courts do not concern themselves with. For example, signing of treaties as opposed to a decision that affects rights of a person such as issuing or cancelling a passport which would affect a citizen’s right to leave and enter the country – R v Secretary of State for Foreign and Commonwealth Affairs ex p. Everett [1989] QB 811 (refusal of passport held to be reviewable but relief refused).

- Let us consider the following examples:
  a) Legal Provisions

  Article 91 (3) of the Constitution

  The President shall, in exercise of the executive authority of the State—
  (a) respect, uphold and safeguard this Constitution;
  (b) safeguard the sovereignty of the Republic;
  (c) promote democracy and enhance the unity of the Nation;
  (d) respect the diversity of the different communities of Zambia;
  (e) promote and protect the rights and freedoms of a person; and
  (f) uphold the rule of law.

  Article 92 (1)

  The President shall perform, with dignity, leadership and integrity, the acts that are necessary and expedient for, or reasonably incidental to, the exercise of the executive authority

  See Maxwell Mwamba and Stora Solomon Mbuzi v the Attorney (1993)3 LRC 166 (although decided on locus stand).
2. Discretion must be exercised reasonably and in good faith and that irrelevant considerations should not be taken into account.
   - Courts when constructing powers take the view that Palriament could never intend to give power to act in bad faith. **R v Commission for Racial Equality Ex p. Hilligton LBC [1982]QB 276**
   - This principle justifies the identified grounds for judicial review.
   - Using the grounds of illegality, procedural impropriety and reasonableness discussed later under judicial review, courts questioned or limited discretionary powers as can be seen in the following examples:
     i) Royal pardon can be reviewed if granted by fraud, mistake or improper reasons – **R v Home Secretary ex p. Bentley [1994] QB 349**
        Walkins LJ – if, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and in our judgment would be entitled to do so.
     ii) **Sharp v Wakefield [1891] AC 173**
        When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to the private opinion, according to law not humour. It is not to be arbitrary, vague or fanciful but legal and regular. And it must be exercised within the limit, to which an honest man cometen to the discharge of his office ought to confine himself.

Affirmed in **Attorney General v Roy Clarke (2008) Z.R. 38.**

3. **Courts control of discretionary authority.**
   - Justification for judicial interference is adherence to rule of law.
   - Courts have devised a network of principles that require that power should be exercised reasonably, in good faith, for proper purpose only, and in accordance with the spirit as well as the letter of the empowering Act (and the Constitution).
   - In so doing, the courts should not itself usurp the power rightly assigned to the executive.
- The law uses the following mechanisms to try and strike the right balance:
  a) Review vs appeal
  b) Application for leave as a sieve
  c) Judicial deference to administrative experience and expertise.

  Sondashi v AG, SCZ Judgment No. 27 of 2000.

4.6 UNIT SUMMARY
This unit has discussed the key concepts in administrative law. It is important for you
to understand them and be able to apply them to the administrative processes that
exist in Zambia. They are also necessary for you to critique the existing Zambian
administrative processes and legal framework.
UNIT FIVE : PROCEDURAL JUSTICE

5.0 Introduction
This unit introduces you to the various procedural safeguard that administrative law puts in place to promote good administrative processes and protect the public from abuse of administrative authority.

5.1 Objectives
By the end of this unit, you should be able to:

- Explain the rules of natural justice and their significance in administrate law.
- Analyse various legal provisions on procedural fairness in the exercise of administrative authority and their application.

5.2 Procedural fairness
Procedural fairness guarantees the right to fair administrative process. It also promotes the right to participation by people who are likely to be adversely affected by the exercise of administrative authority. Procedural fairness has the value of legitimising the outcome of an administrative function. Procedural fairness is not secondary. It legitimises wide administrative powers given by substantive law. Procedural rules restrict administrative freedom and may be costly in terms of time and money. But the restriction should be seen more as protective and promoting efficiency so long as courts do not let them run amok. A decision made in compliance of procedural fairness requirements will be acceptable and of good quality. Justice and efficiency are complimentary.

In Zambia, there is a Constitutional mandate for procedural fairness under article 173 (1) which include the following:

a) Encouragement of people to participate in the process of policy making;

b) Accountability for administrative acts;

The Bill of Rights also contains provisions on procedural fairness under article 18. The obligation for procedural fairness is not restricted to court but also other bodies performing adjudicative functions. To this effect, article 18(9) provides:
Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

Other procedural fairness principles and procedure are found in various pieces of legislation examples of which are considered below.

5.3 rules of natural justice
Natural justice can be defined as the natural sense of what is right or wrong; fairness. It refers to rules that courts have devised to ensure fairness in the administrative process. The principle of natural justice has wide application including wide discretionary powers. They apply to judicial powers, administrative powers, and sometimes powers created by contract (e.g. employment law). In administrative law, natural justice comprises 2 fundamental rules of fair procedure:

1. A person may not judge in his/her own cause (nemo judex in causa sua); and
2. A person’s defence must always be fairly heard (audi alteram partem).

Traditionally, natural justice has been confined to these 2 rules although in some cases, judges have extended it to the requirements to give reasons for a decision and decisions to be based on evidence of probative value. The 2 principles are espoused below.

5.3.1 The rule against bias
The rule against bias is popularly known by the Latin expression, “nemo judex in re sua.” This means that a judge is disqualified from determining a case in which he/she may, or may be suspected to be biased. The rule also applies to persons performing administrative functions. Let us examine this rule in more detail.

1. Causes of prejudice
   a) Direct pecuniary interest however slight.
      Any direct pecuniary interest resulted in automatic disqualification. The line is drawn where interest is too slight to be appreciated.
   b) Intermingling of functions
Where the judge has participated in a decision that comes before him/her. If judge was the only a member of a larger group that decided, it might be decided on the question degree of involvement.

c) Personal relationships – read the case of Locabail (UK) Ltd, Regina v Bayfeilds Properties Ltd [2000] QB 451; [2000]1 All ER 64

2. The test of bias

The test for bias is that of “real likelihood of bias” understood as possibility rather than probability. The relevant question to ask is “given the interest of the functionary, it is possible or likely that he or she is biased?” One need not establish that it was in fact probable that the administrator was or could be biased. In the case of R v Gough [1993] AC 646. Porter v Magill [2002] 1 All ER 465, the following was set as the test for biasness:

“the Court must first ascertain all circumstances which make a hearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a danger the two being the same that the tribunal was biased.”

The test is not that of a reasonable person. The courts assume the position of the reasonable administrator. By the time the matter comes to court, the court, armed with evidence on the factors that gave rise to the challenge and is no longer concerned with appearance of bias, but with actual bias, however unconscious.

3. Exemptions to the requirement of compliance with the rule against bias.

Although a strict requirement of procedural fairness, natural justice must, in certain instances, give way to necessity. For instance, where there is no suitable person to substitute the apparently biased decision maker. This is intended for administrative convenience. This usually arises in instances where the law vests authority in a certain public officer. That should be the person to act as transfer of authority is a type of ultra vires.
Another instance in which the rule against bias may be waived is where statute seeks to exempt the rule against bias. If that is the intention of the statute, it must say so expressly and clearly. Another exception is where the protection against bias is waived by the person subjected to the authority of the administrator. A person may be said to have waived to requirement for compliance of the rule against bias by continuing to subject oneself to the jurisdiction of the administrator after becoming aware of the disqualification.

4. Effects of prejudice.
If the decision is objected to under judicial review, it would be ultra vires and as such void. The declaration of the decision as void is subject to the rule on waiver of disqualification. The decision may be voidable if is subject to appeal. This means that the decision only becomes invalid after it has been declared so on appeal.

6.1.2 Right to a fair hearing
This right is expressed by the Latin expression “Audi alteram partem” which is translated as “hear the other side”. In R v Chancellor of University of Cambridge (1723) Str 557, Foretescue J expressed the right to a fairing as follows: ‘even God himself did not pass sentence on Adam before he was called upon to make his defence.’

Traditionally, the nature of power being exercised determined the requirement for natural justice requirements. Using this qualification, judicial and quasi-judicial power required strict adherence of rules of natural justice while purely administrative power did not need strict adherence to rules of natural justice.

The decision in Ridge v Baldwin [1964] AC 40 challenged the classification of power as the basis for natural justice requirements. In that case, it was held by Lord Reid that natural justice should be applied universally.

1. General Aspects of Fair Hearing
   a) It usually depends on subject matter. There are no rigid rules.
b) Requirements for natural justice depend on circumstances of the case, nature of inquiry, authority under which tribunal is acting and subject matter to be dealt with etc.

c) Necessity may waive requirement for fair hearing e.g. in cases of emergency.

2. Legitimate expectation

In *Re Westminster CC [1986] AC 668 at 692*, the Court stated that ‘…the duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation.’ This position was upheld by Lord Diplock in the case of *Council for Civil Service Union v Minister for Civil Service Unions [1985] AC 374*. Whether an expectation exists or is in fact legitimate is a question of fact and requires investigation of many circumstances. Clear statutory words override expectation.

3. Procedure for hearing

A hearing is usually oral but it may be sufficient that the person has been given an opportunity to make representations in writing.

For oral hearing, the following should be observed:

a) Consider all relevant evidence which a party wishes to submit;

b) Inform every party of all evidence that has been taken into account;

c) Allow witnesses to be questioned (cross examination);

d) Allow comment on evidence and argument on whole case.

e) Fair hearing requirements should not be sacrificed for speed. Necessary adjournments should be allowed.

4. Reasons for decision not strictly an aspect of natural justice but a value of fair process.

5. Hearing after process allowed but usually before a different composition as the first tribunal would be biased.

6. Examples of cases where right to hearing is necessary:

a) Wide discretionary power.

b) Policy questions – compare claim to policy provisions. Under this, a written submission would suffice.
c) Licensing and commercial regulation. Dr. Zhen Qing Wang v Health Professions Council Of Zambia 2012/HK/339 (Unreported)
e) Suspension from office.
f) Offices held at the pleasure (no requirement for hearing).

7. Exceptions
   ▪ National security
   ▪ Aliens
   ▪ Where claim of procedural irregularity would not give a different result.

6.2 procedural requirements under the law

Statute may provide for procedural safeguards. Where they're not sufficient, courts will employ rules of natural justice to supplement statutory provisions
UNIT SIX: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN ZAMBIA

6.0 INTRODUCTION
As already discussed, the need for administrative action in a modern society cannot be overemphasized. However, with this need, arises the need to control the exercise of power in order to safeguard individual rights and uphold constitutionalism. This Unit seeks to discuss the concept of judicial review, as a means of controlling administrative action. It will start by defining judicial review and discussing the grounds for judicial review. It will then discuss the limitations on judicial review. A conclusion will be drawn at the end.

6.1 JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN ZAMBIA
Administrative actions are those actions taken or made by public authorities from all arms of government (the executive, legislature and judiciary). Public authorities are expected to act in accordance with the law and, in particular, the Constitution. W. Wade and C. Aforsyth in their book *Administrative Law 7th ed* (London: Oxford Press, 2000) identify the following as public authorities: parliamentarians, central government officials, local government officials and the courts. Administrative actions of the executive and legislature are controlled by the courts in many ways. The most common way of controlling such administrative actions is by judicial review.

Judicial review is a process through which the courts scrutinize administrative powers of the executive and legislature to ascertain their legality. A.W.Chanda defines judicial review as:

“… the power of the Court, in appropriate cases before it, to declare a governmental measure either contrary to, or in accordance with, the Constitution or other governing law, with the effect of rendering the measure invalid and void or vindicating its validity and so putting it beyond challenge in the future.”

Thus judicial review operates on the premise that the courts have the power to determine whether legislative or executive powers have been exercised according to law. It allows a person affected by a decision made by a public authority to challenge that decision in court.
The justification for judicial review is based on the constitutional principles of constitutionalism, rule of law and separation of powers. These imply that certain limitations must be placed on the use of governmental powers to avoid arbitrariness and violation of individual rights that are inherent in government. Judicial review, in particular, is a means of controlling executive and legislative powers of government. However, there are a number of factors that limit the ability of the judiciary to effectively review actions of the executive and legislature. These are discussed in detail below.

6.2 grounds for judicial review

Judicial review in Zambia depends on common law grounds. There are currently 3 grounds summarized by Lord Diplock in *Council for Civil Service Union v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935 as illegality, irrationality and procedural impropriety. These grounds have been upheld in several Zambian cases including *Derrick Chitala v. The Attorney General* SCZ Judgment No.14 of 1995. The grounds review are not absolute but may expand to include grounds such as proportionality. (See *Attorney General V Roy Clarke* (2008) Z.R. 38 Vol. 1 (S.C.)). Let us discuss these grounds in more detail.

6.2.1 Illegality

According to Lord Diplock, the decision maker must understand correctly the law that regulates his/her decision making power and must give effect to it.

Illegality has been interpreted in a much broader way than the traditional ground of *ultra vires*. Strict adherence to ultra vires promotes the doctrine of parliamentary sovereignty but does not adequately protect individual rights and control administrative authority. Under illegality, it is broadly interpreted to cover grounds where an administrative authority acts with improper motives, takes into consideration factors that ought not to be taken into consideration and or fails to take into consideration factors that he/she ought to.

Some of the pertinent question to ask are:

1. Was the decision made by the lawful authority?

   *Nyampala Safaris & others v ZAWA & others*
By various leases dated 16th April 196, the applicants were granted hunting concessions with option for renewal.

Applicants duly followed conditions of the leases. On 19th Jan 2001, the President of the Rep of Zambia announced that government had banned safari hunting and issuance of hunting concessions. In Dec 2001, ZAWA, successor of National Parks and Wildlife Service invited offers for grant of hunting concessions in all hunting blocks including those offered to applicants under 1996 agreements. On 28th Nov. 2002, ZNTB held extraordinary meeting chaired by Minister of Finance & national planning which approved tenders for hunting concessions in game management areas. Tenders for applicants were unsuccessful. Successful bidders were communicated through the PS in the Ministry of Tourism. In terms section 5(1) of the Zambia Wildlife Act, the power and authority to grant hunting concessions is vested in ZAWA

Held

The relationship between ZAWA and ZNTB is a statutory one and no government department or parastatal can award a contract (depending on the amount involved) without the approval of ZNTB

The authority to grant hunting concession was with ZAWA which awarded the concessions in question. ZNTB merely approved ZAWA’s recommendations and granted ZAWA requisite authority to award concessions to successful bidders in accordance with provisions of the ZNTB Act.

2. Did the authority exceed the powers authorised by the empowering provision (statute or regulation)?

3. Did the authority misconstrue his/her powers?

4. Did the administrator fetter his discretion or fail to act?

Padfield v Minister of Agriculture Fisheries and Food [1968] 1 All ER 694 at 699

the minister refused to refer to a complaint to a statutory committee because he might be politically embarrassed by a favorable fining, despite the fact that he had a statutory role to play in the referral of complaints.
The court cannot determine the right way to exercise powers, but can determine parameters

6.2.2 Irrationality
Wednesbury unreasonableness - It applies to a decision which is so outrageous in its defiance of logic or accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it. (Associated Provincial Picture House Ltd. v Corporation [1948] 1CB 223, 1947] 2 All ER 680.

Under this ground, the court will inevitably venture into the merits or substantive grounds. The relevant test is however not what the court would have decided under the circumstances is but rather what a decision maker placed in similar circumstances as the one questioned would have arrived at a different decision.

6.2.3 Procedural Impropriety
Covers failure by an administrative tribunal to observe procedural rules that are expressly laid down law and denial of natural justice discussed in unit 5.

6.4.4 Problems of categorisation of grounds
It should be borne in mind that the categorisation of grounds is not watertight. In many instances, they appear to be overlapping. 10 Boddington v British Transport Police 1998 2 All ER 203 per Lord Irvin:

Categorisation if types of challenge assist in an orderly exposition of principles underlying our developing public law. But these are not watertight compartments because the various grounds for review run together. The exercise of power for an improper purpose may involve taking irrelevant considerations into account or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision to a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.

Activity
Discuss the application of the principles on grounds of review by the courts in the following cases:

- Frederick Jacob Titus Chiluba V Attorney-General Appeal Number 125 Of 2002

6.3 remedies for judicial review

Order 53 rule 1 provides as follows:

(1) An application for—
   (a) an order of mandamus, prohibition or certiorari, or
   (b) an injunction under section 30 of the Act restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to—
   (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,
   (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
   (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

Order 53 rule 7 provides that the court can award damages where the applicant has pleaded for damages arising from the matter to which the action relates and the court is convinced that the matter could be suitable for award of damages.
Rule 2 states that the reliefs set in in rule 1 can be claimed in the alternative or in addition if it arises out or, connected to or related to the same matter. Let’s discuss the remedies in more detail and their application in Zambian courts.

6.3.1 Certiorari

Certiorari is employed to quash a decision which has been made and not intended or prospective decisions of a variety of public bodies. It is a discretionary remedy. Certiorari will not lie unless something has been done that a court can quash. It is different from prohibition in that prohibition is not available unless there is something that remains to be done that the court can prohibit. Historically, certiorari was used to control the judicial functions of inferior courts and tribunals, but today this remedy is available against all public bodies.

Certiorari may be ordered to quash a decision for excess or lack of jurisdiction, error of law on the face of the record, unfairness and breach of the rules of natural justice, or decisions made in bad faith or produced by fraud or perjury. In The People v. Minister of Information and Broadcasting Services ex parte Francis Kasoma, an order of certiorari was issued by the High Court to quash the decision of the Minister to create a statutory body known as Media Council of Zambia. The decision was quashed on the premise that it was made in bad faith, and that the rules of natural justice were never observed in that the people who were to be affected by the decision were never heard before the decision was made.

A court that quashes a decision has power to remit the decision to the decision maker so that a decision can be made in accordance with the judgment passed by the court. The court can also order a stay of the decision after granting leave where the applicant is seeking an order of certiorari.

6.3.2 Prohibition

Prohibition will issue to prohibit ongoing or the future decisions and determinations of some public and quasi-public bodies which may be challenged by way of certiorari.

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12 1995/HP/2959
As already noted prohibition is not available unless something remains to be done, which the court can prohibit. It is often convenient to apply for both certiorari and prohibition. Certiorari lies to quash what has already been done and prohibition to prohibit the public body from continuing to do that which is not within its authority to do. It is a discretionary remedy and is to be granted easily.

6.3.3 Mandamus

Mandamus will issue to compel the performance of a public duty, in all cases where there is a legal right but no specific legal remedy for enforcing the right. An applicant will often seek order of certiorari and mandamus together, for instance certiorari to quash an unlawful decision, with mandamus to compel the public body to re-take that decision in accordance with the law, as helpfully clarified by the court. In *The People v. The Attorney, ex parte, Derrick Chitala*, the applicant applied for certiorari to quash the decision by government to have the constitution enacted by parliament and mandamus to compel the government to have the constitution brought into effect by way of constituent assembly and referendum as recommended by the Constitution Review Commission. See also *The Minister Of Information And Broadcasting Services The Attorney General V Fanwell Chembo & Others* The applicant seeking to enforce a statutory right must show that the public body is under statutory duty whose performance is not a matter of discretion. Mandamus will issue to enforce the performance of a statutory duty to exercise a discretion, or to exercise a genuine discretion, or to exercise a discretion based on the appropriate legal principles.

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15 Section 22 of the State Proceedings Act provides that where there is a judgment against the state and a certificate of judgment has been issued by the Court the Permanent Secretary in the Ministry of Finance shall pay. In *The People vs. The Permanent Secretary Ministry of Finance, ex parte Stickrose (Pty) Limited*, the applicant Stickrose got a judgment against the Government of the Republic of Zambia in 1996, for the of over US$1 million inclusive of interest. From the time of the judgment the government had been paying the judgment in bit and pieces and the payment were at irregular intervals. The applicant applied for an order of mandamus to compel the Permanent Secretary to pay the judgment debt within 14 days from date of the order. By consent an order of mandamus was issued against the Permanent Secretary compelling him to pay the judgment debt within 30 days from date of the Order.

Statutory tribunals may be ordered by mandamus to “hear and determine according to law.” Such a tribunal may have refused to hear the case, or may have acted in a manner amounting to a refusal. Mandamus may lie to compel a chief of police to enforce the law.¹⁷

An applicant before applying for mandamus must prove that he had demanded performance of the duty and that performance has been refused by the authority obliged to discharge.

Mandamus, as a remedy enjoys a close relationship with the other remedies. Mandamus is not the appropriate means of enforcing a duty to abstain from acting unlawfully. If a public authority threatens to act ultra vires, the appropriate remedy will be prohibition, an injunction or a declaration, and not an application for mandamus not to exceed the powers conferred by law. If an inferior tribunal exceeds its jurisdiction, prohibition and not mandamus lies to compel it to stay within legal bounds, and certiorari, not mandamus lies to prevent it from acting upon its final order.

**Discretion in Certiorari, Mandamus and Prohibition**

The granting of certiorari, prohibition and mandamus is discretionary. The court will in all cases consider whether the conduct of the applicant is such as to dis-entitle him the relief. This may be due to undue delay, unreasonable or unmeritorious conduct, acquiescence in the conduct complained of, or waiver of the right to complain.

The court will not grant an order which is unnecessary or futile. The court may refuse mandamus where practical problems would arise from making the order, or where the form of the order would require detailed supervision by the court, or where the applicant has already obtained that which he sought to obtain by way of judicial review.

6.3.3 Declaration

A declaration states the right of the parties without any reference to the enforcement of those rights, and although binding, cannot as such be enforced. It is a formal statement by the court pronouncing upon the existence or non-existence of a state of affairs. It declares what the legal position is and what the rights of the parties are.

A declaratory judgment must be contrasted with an executory, or coercive judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, to pay damages or to refrain from interfering with the plaintiff’s right. If the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant’s property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant. The court may for example declare that the applicant is a Zambia citizen, where the citizenship of the applicant is in issue before the court, or that the notice served on him by a public authority is invalid and of no effect, where the legality of the service is in issue. A declaration pronounces on the legal position.

The court will grant a declaration only where the applicant has real interest in raising a question of law, and where there is another party who has a true interest in opposing the declaration sought. In deciding whether to grant a declaration or grant an injunction the court must have regard to:

1. the nature of the matters in respect of which relief may be granted by order of mandamus, prohibition and certiorari;

2. the nature of the persons and bodies against whom the relief may be granted by such orders; and

3. all the circumstances of the case. It must consider that it would be just and equitable to make a declaration or grant an injunction.
The court will expect a public body to abide by a declaration, even though it is not an order. A local authority which defied a declaration that it was to make a hall available for an election meeting faced contempt proceedings.\(^{18}\)

### 6.3.4 Damages

The court may award damages where, and only where, the applicant has joined a claim for damages to his application and the court is satisfied that if the claim had been made in private law proceedings, the applicant would be awarded damages.\(^ {19}\) It follows that unlawful actions or decisions, or instances of maladministration, do not themselves given rise to an award of damages. The applicant must show, for example a breach of contract or negligence on the part of the public body.

Applicants may also claim on the basis of the tort of misfeasance in public office. This is available only against public officer who have exceeded their powers or acted in bad faith or without reasonable cause, and who have been actuated by malice against the applicant.\(^ {20}\)

### 6.3.5 Interlocutory relief: Injunction and Stay

An injunction is a judicial remedy by which a person is ordered to refrain from doing (restrictive injunction) or to do (mandatory injunction) a particular thing. The court has the power to grant an interim injunction or an interim stay. An injunction has the benefit of enforceable sanction. An injunction cannot be ordered against the state,\(^ {21}\) although it may be possible to obtain a stay.\(^ {22}\)

An injunction may be a final order granted on conclusion of proceedings or an interim order. A final injunction granted on an application for judicial review is indistinguishable from an order of mandamus and prohibition. An injunction may be granted to prevent ultra vires acts by public bodies. The main importance of the injunction in Order 53 proceedings is that, unlike the prerogative orders and

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19Order 53 r 7(1).
declarations, it may be granted at an interlocutory stage on an interim basis to preserve the status quo until a final hearing of the case.

Where a court concludes that a public body’s decision is susceptible to judicial review, a concomitant to granting leave will, if necessary be to maintain the status quo pending the determination of the full application. Interim relief may be granted in one of the two forms:

1) an interlocutory injunction, and possibly

2) a stay of proceedings.

An interlocutory injunction is one granted before the trial for the purpose of preventing any change in the status quo from taking place until the final determination of the merits of the case. Interim injunctions may be prohibitory or mandatory.

The test to apply in determining whether or not to grant an interlocutory injunction in an application for judicial review is broadly similar to that applied in private law proceedings. But the nature of public law litigation require some modifications to the test at the interlocutory stage.

The first question as to the adequacy of damages as an adequate alternative remedy will usually be less relevant. In judicial review, there will often be no alternative remedy in damages because of the absence of any general right to damages for loss caused by unlawful administrative action per se. In cases involving the public interest, for example, where the party is a public body performing public duties, the decision to grant or withhold interim injunctive relief will usually be made not on the basis of the adequacy of damages but on the balance of convenience test. In such a case the balance of convenience must be looked at widely taking into account the interest of the general public to whom the duties are owed.

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23 Factortane Ltd. v Secretary of State for Transport (No. 2) [1991] AC 603
Read the case of Dean Namulya Mung’omba Bwalya Kanyanta Ng’andu And Anti-Corruption Commission V Peter Machungwa Golden Mandandi And Attorney-General²⁴

ii) Stay of Proceedings

Under Order 53, the court is empowered to grant a stay of proceedings where the application is for an order of certiorari or prohibition. Where leave is granted to apply for judicial review the court will usually grant an injunction in order to maintain the status quo. Authorities are divided on the scope and effect of the stay in the UK. The Court of Appeal in R v. The Secretary of State for Education and Science, ex p. Avon C.C.²⁵ held that the term includes executive decisions and process by which the decision was reached and may be granted to prevent a minister from implementing a decision. On the other hand the Privy Council in Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Limited²⁶ held, obiter that a stay of proceedings is merely an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached. The object is to avoid the hearing or trial taking place. The position in the UK awaits clarification by the House of Lords.

In Zambia the position R v. The Secretary of State for Education and Science, ex p. Avon C.C., has been followed. In Winter Kabimba vs. Lusaka City Council and the Attorney General²⁷ the Supreme Court stayed the implementation of the decision by the Minister of Local Government transferring the applicant to another district, until after the hearing and determination of the case on merit. The stay was granted after the Minister had already made the decision to transfer the applicant. The effect of the stay was to stop the implementation of the decision and maintain the status quo until after the matter was determined on merit.

²⁴ SCZ Judgment No. 3 Of 2003
It must, however, be noted that the decision of the Privy Council in Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Limited\textsuperscript{28} was never mentioned in arguments before the Supreme Court. Similarly in The People v. Minister of Information and Broadcasting Services, ex p Francis Kasoma,\textsuperscript{29} the court granted a stay of the Minister’s decision to create the Media Council of Zambia. Due to the express prohibition against the issuing of injunctions against the State or public officer,\textsuperscript{30} applications for “stay” is the most viable option, if the intention is to maintain the status quo until after the determination of the case on merit.

The principal features of a stay is that, unlike an injunction, it is an order directed not at a party to the application but at the decision making process of the court, tribunal or other decision maker, or administrative body or officer. Again authorities are divided as to the effect of non compliance with the stay. One view is that an order for stay is not capable of being breached by a party to the proceedings, or anyone else, and may not be enforceable by contempt proceedings.\textsuperscript{31} The other view is that a stay is an order of the court breach of which will be punishable as a contempt of court. Although this has never been considered by the court, there is a strong possibility, given the court’s position on the stay, so far, that the courts in Zambia will take latter position on the stay.

In Zambia where an interim injunctive remedy is not available against the state, public officers or Ministers, the stay is an important injunctive interim remedy.

6.4 Limitations of Judicial Review

In as much as administrative actions are subject to judicial review, there are a number of limitations regarding the extent to which such review can effectively be applied. These include:

i. **Controversy on the subject matter for judicial review:** This complex society that Zambia has developed into (and which it continues to develop into) creates uncertainties on which issues are subjects of judicial review. It is important to ascertain the subject matter for judicial review to avoid

\textsuperscript{28}[1991] 1WLR 550, at 556  
\textsuperscript{29}1995/HP/2959.  
\textsuperscript{30}See Section 16 of the State Proceedings Act.  
\textsuperscript{31}Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Limited [1991] W.L.R 550, 556
encroaching on the jurisdiction of another organ of the State, hence abrogating the doctrine of separation of powers. Strict adherence to the doctrine of separation of powers or misinterpretation of the doctrine of separation of powers by some members of the judiciary is a limitation on judicial review. Some members of the judiciary may be uncertain when a particular act requires reviewing or when such act is not subject of judicial review. This poses a limitation on the ability of the judiciary to effectively control executive and legislative action.

Separation of powers (which divides the authority of government into the three main organs of government) entails that one organ of government must not carry out the functions of another organ of government. The courts are often conscious of not abrogating the doctrine of separation of powers. If the subject matter for judicial review is not correctly ascertained, then the judiciary itself will be abusing their authority. This defeats the constitutional law principle of constitutionalism, which seeks to control or limit the use of power by all organs of the State. As earlier noted, the principle of constitutionalism, among others, justifies the administrative law practice of judicial review. If the judiciary effectively checks the use of power by the executive and the legislature, the executive and legislature must equally be able to check the use of power by the judiciary. All organs of the State ought to respect and adhere to the doctrine of separation of powers whilst effecting checking the exercise of power within the limits allowed by the Constitution and legal framework as a whole.

The real value of the doctrine of separation of powers lies in maintaining the balance of power among the various organs of the State. In Re Nalumino Mundia (1971) ZR 70 (HC) the Petitioner applied to the High Court for an order of certio rari directed to the Chairman of the Standing Orders Committee of the National Assembly, requiring him to remove an order suspending him from the National Assembly. He argued that the Order was violated the National Assembly's own Standing Orders. The Court held that it does not have power to interfere with the exercise of the jurisdiction of the National Assembly in the conduct of its own internal proceedings. This case illustrates the fact that even though the decision questioned was that of a public body
(i.e. the National Assembly), the Courts were reluctant to review the decision of the public body for fear of abrogating the doctrine of Separation of Powers. Whether this decision of the High Court is correct depends on whether one thinks the matter was a subject of judicial review or not. Various legal practitioners have held different view on the matter.

It is evident from the above mentioned case, and the case of The People v. Attorney General Ex Parte Derrick Chitala (1995-1997)ZR 91 that the courts do not want to interfere in all administrative acts. Therefore, the Courts will exercise their powers of review if they are of the view that the case can succeed on merit. In The People v. Attorney General Ex parte Derrick Chitala the Supreme Court refused to grant leave to appeal for judicial review because the relief that the applicant was seeking (i.e. Certiorari and Mandamus) was not available against the President and his Cabinet. The Court held that leave to appeal for judicial review could not be granted as certiorari and mandamus were remedies available to public bodies exercising judicial or quasi-judicial functions.

There are numerous examples, in the recent past, of issues that the courts may be reluctant to intervene, by way of judicial review, for fear of abrogation of the doctrine of separation of powers. These include the Government’s decision to remove fuel subsidies, donating 150000 tonnes of maize to neighbouring country-Zimbabwe, donating fuel to neighbouring country-Malawi. The courts would be reluctant to question such decisions as they are beyond their jurisdiction and would border on abrogation of the doctrine of separation of powers. This would be so irrespective of the fact that the decision was made irrationally or unreasonably.

Further, many administrative decisions or actions are excluded from judicial review by Statutes. The Constitution permits Parliamentarians to enact laws in line with the Constitution. If such laws exclude certain matters from being reviewed by the Courts, an aggrieved party cannot have recourse in judicial review. Examples of such matters include decisions involving the use of certain prerogative powers like the power to make treaties or grant of hours.
This is because the nature and subject matter of particular prerogative powers are not amenable to judicial process.

ii. **Judicial Review is restricted to decisions of Public Bodies and not Private Bodies:** Connected to the issue of subject matter for judicial review is the restriction of judicial review to decisions of public bodies. Judicial review is available only to check the decisions of public bodies, and not private bodies. Thus, some private bodies may make decisions that affect the public but those decisions will not be amenable to judicial review. For example, a political party may decide to expel its Member of Parliament (MP), thus calling for fresh elections. Members of the constituency where such an MP hails will not be entitled to apply for judicial review of the decision of the political party and yet public resources were used to vote this person into office, and will be used for the by-election. In the case of **Ludwig Sondashi v. Godfrey Miyanda (1995) SCZ 1** the appellant was expelled from the respondent’s political party and sought judicial review and a declaration of wrongful expulsion. The Court held that the wrong procedure had been used to challenge the Party’s decision. The Court held that the internal affairs of a political party were private matters and thus judicial review could not lie against the political party. Similarly in **Nkumbula v. The Attorney General (1978) ZR 388 HC** the United National Independence Party was held to be a club and therefore not subject to judicial review, but private law.

In determining whether or not the body whose decision is being challenged on an application for judicial review is a public body as opposed to private body, the courts look at the functions exercised. In the case of **R v. City Panel on Takeovers and Mergers Ex Parte Datafin Limited (1987) QB 815**, City Panel was subject of judicial review despite its lack of statutory source of power. This was because it was a body exercising public functions analogous to those which could have been, in the absence of the Panel, exercised by a governmental department. Accordingly, if a body is set up under a statute then the source of power brings the body within the scope of judicial review. However, the court in **R v. City Panel Takeovers** recognised that in some cases the matter is unclear and if this exists, it is necessary to look beyond the source of power and consider the nature of the power being exercised.
iii. **Judicial Review cannot be sought as of right:** Judicial review can only be commenced at the discretion of the Court and not by right. This means that, by law, an applicant must be granted leave to apply for judicial review by the Courts. If the courts do not see the need for judicial review, they will not grant the leave to apply for it.

iv. **Lack of Locus Standii:** A legal scholar, Anthaverdi (U, Anthaverdi. Judicial Review of Administrative Actions and Principles. India: Ormanial University, March 2008, argues that certain administrative acts are excluded from judicial review due to procedural problems. Some of the Court’s self-limitations are that such review lies only if the application is made by a party who has a legal standing. This is known as *Locus Standii*. If a person does not have sufficient interest in the matter for which judicial review is being sought, the Courts cannot grant leave to apply for judicial review to such a person. Having locus standii means that one’s interests have been sufficiently affected by the decisions of a public officer.

v. Without standing, the court has no jurisdiction to entertain an application for judicial review. The rationale for the requirement of *locus standi* is to enable administrative law meet its twin functions of empowering administration and at the same time control use of administrative authority and encourage citizen participation. At the first stage of the application, the leave stage the court will consider the *locus standi* of the applicant. The aim of the requirement is to discourage professional litigants and busy bodies from paralysing administration with frivolous lawsuits.

vi. In *R v Inland Revenue Commissioners, ex p. National federation of Self-Employed and Small Businesses Ltd* [1982] A.C 617, [1981]2 All ER 93, it was held that to pass the test of standing to sue, the applicant must have a personal interest in the matter as the decision being challenged affects them or to their detriment.

vii. The Courts in Zambia have taken a liberal approach to the issue of locus standi.

viii. In *Maxwell Mwamba and Stora Solomon Mbuizi and the Attorney* SCZ Judgment No. 10 of 1993, The Applicants who were members of an
opposition party challenged the appointment by the President of two members of his political party, who had previously been investigated for trafficking in drugs. The substance of the case was that by appointing the two members of Parliament to ministerial positions the President had acted contrary to the provisions of Article 44 of the Constitution. They were not themselves directly affected by the appointments. The four Judges of the Supreme Court (the majority) observed:

 ix. “However, on the question of locus standi, we have to balance two aspects of the public interest, namely desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private “Attorney Generals” to move the Courts in matters that do not concern them...For the present purposes, we are prepared to proceed, without coming to any firm conclusion on the point, on the footing that the appellants have a legitimate interest in the national leaders and the governance of the country.

 x. Based on this standard, the Court has allowed many applications including those where the applicant has no direct interest in the decision challenged.

 In Nkumbula v. The Attorney General (1972) ZR 204 (CA) the Court held that a party must have standing before he or she can invoke the Court’s jurisdiction on judicial review. The court defined the sufficient interest that a person must have in order to bring an action in judicial review (i.e. the necessary locus standii) as imminent danger that an applicant has of coming into conflict with statute or danger that the applicant’s rights or normal business or other activities have been or will be tampered with or by or under the public authority’s decision.

 In Maxwell Mwamba and Stora Solomon Mbuyi v. the Attorney General the Court stated that “a citizen has a right to sue on constitutional issues unless the Constitution itself explicitly or by necessary implication has taken away that liberty.” The implication of this holding was that the Court could only grant leave to appeal for judicial review to people who presented cases concerning a direct infringement of their rights by public authorities. If a decision of a public authority did not infringe the rights of an applicant for
judicial review, such an applicant would not be entitled to commence an action for judicial review.

This means that interest groups cannot commence an action in judicial review on behalf of their members. This is particularly problematic considering the financial constraints most Zambians face, coupled with the high cost of litigation. Many Zambians cannot afford the costs involved in the complex and costly process of judicial review. Thus these cases are rarely litigated as the requirement of locus standii prevents third parties from intervening in judicial review proceedings.

xi. Judicial Review is reactive and not proactive. It waits for a public officer to commit a wrong before one can invoke it. That is to say, a public officer must either act or fail to act contrary to the powers and functions ascribed to them, and such action or inaction must lead to a violation of a legal or fundamental rights of a claimant (In this sentence “action” also refers to “decision”). Only then can a claimant bring an action in judicial review for the courts to reconsider the decision or lack of decision or action or lack of action of the public officer.
UNIT SEVEN: PROCEDURE FOR JUDICIAL REVIEW

ACTIVITY
Answer the following questions.

1. What do you understand by the phrase practice and procedure?
2. Which court has jurisdiction over judicial review matters?
3. What is the procedural law applicable in judicial review matters?
4. How many stages are there and what happens at each stage of application?

7.0 Introduction
Actions for judicial review are tried in the High Court. Article 234 of the Constitution gives the High Court original and unlimited jurisdiction to determine any matter under any law subject to provisions in the Constitution and laws. In terms of procedure in prosecuting the application, the law applicable is Order 53 of the Supreme Court Rules, 1999 also known as the white book which is applicable to Zambia.

7.1 Law Applicable
As stated in the introduction, actions for judicial review are tried in the High Court. The law prescribes the procedure to be followed in the High court for various matters. Section 10 of the High Court Act, as amended by Act No. 16 of 2002, provides that:

The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act … or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in
the High Court of Justice. Provided that the civil court practice of 1999 or any other rules of practice issued after 1999 in England shall not apply unless they relate to matrimonial causes

The above provision empowers courts to adopt procedure observed in the High Court of England where the local law does not provide for practice and procedure. Judicial review is one such action for which there are no provision in the local law for procedure. The High Court relies the procedure set out in Order 53 of the Rules of the Supreme Court, 1999, with necessary modifications as far as the circumstances under the Zambian legal system permit.

**ACTIVITY**

Read the following cases:

**Newplast Industries Limited v. Commissioner of Lands and Another (2001) ZR 51, 54** and **Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General SCZ Judgment No. 14 of 1995**

Explain the application of English procedural law to Zambian Courts.

Having discussed the source of law for the procedure, let us now look at how the matter is determined and what documents are filed in court. In the following sections, we look at who can bring an action for judicial review and against who? What documents are filed? How is and where the hearings are held? And what reliefs are given?

**7.2 Parties to Judicial Review Proceedings**

The term “parties” refers to persons who are engaged in a dispute on which the court must make a determination. The term includes persons who sue, are sued or are likely to be affected by an order of the court.

i) **The Applicant**
In Judicial review proceedings, the Applicant is the person who commences the matter in court. There are however certain restrictions on who can commence judicial review proceedings which flow from the object of administrative law to empower administration. The applicant should therefore be the person with *locus standi* to issue judicial review proceedings. By *locus standi*, we mean a person whose interests have been directly or sufficiently affected by the decision they seek to challenge.

Rules 3 (1) and 3 (7) of Order 53 provides:

1. No application for judicial review shall be made unless leave of the Court has been obtained in accordance with this rule...
2. The Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates.

An Applicant must therefore satisfy the court of their standing to sue before the application for judicial review can proceed to the substantive stage.

**ii) The Respondent**

Judicial review is a public law remedy concerned with the exercise of public administrative authority. Before an action for judicial review can be commenced, the applicant must ascertain that:

1. The decision maker is a “public law” person or body,
2. The decision maker is exercising “public law” powers and not merely by agreement of the parties; and
3. The decision, will, if validly made, lead to administrative action or abstention from action, by an authority endowed by law with executive powers.

The test used by the courts to determine the public law element of the power is the source of power and the nature and function of the power.

1. The source of power
Any individual or organisation exercising statutory power or acting under subordinate legislation was traditionally thought to have been public in its origins. However, this test is only valid as far as it relates to determination of the public law component. What is more important is the nature of the challenged decision. It ought also to be properly seen as a “public law” function.

b) Nature or functions of power

The traditional analysis of functions by public bodies was that they were “judicial,” “quasi-judicial,” “administrative or managerial” or “executive” in nature. The first three types of functions generally attracted judicial review. However the content of natural justice or the duty to the act fairly would differ according to the judicial extent of the functions concerned to determine the amenability of the proposed respondent to judicial review, and whether the precise conduct challenged is a “public law” action or decision.

Judicial Review will therefore lie against the improper exercise of public power. In determining the nature of power challenged, one should be mindful of the special position of the Zambian Constitution. Using the constitutional framework, you should distinguish between legislative functions which are not amenable to judicial review from administrative or executive functions.

Judicial review will not lie against a body or person performing private functions (Law v National Greyhound Racing Club Limited [1983] 3 All ER 300)

Take note of the holding of the Supreme Court concerning who should be a respondent in judicial review proceedings in Dr. Ludwig Sondashi v Brigadier General Godfrey Miyanda, MP (Sued as National Secretary of the Movement for Multi-Party Democracy) S.C.Z. Judgment No. 1 of 1995.

The Supreme Court commenting on whether or not a decision by a political party to expel its member was amenable to judicial review stated that:

In this case we have no hesitation in agreeing with the learned trial judge that a political party so far as its domestic concerns are concerned is a private association and its tribunals deal with private law not public law. We say this despite the fact that the result in this case would be that the
appellant would lose his seat in Parliament, which of course is a public matter, but that fact in itself does not affect the functional status of the tribunal about which the court is being asked to concern itself, that is, as a private tribunal. In this connection, it is of interest to note that in the United Kingdom the cases of *John v Rees and Ors* (1) and *Lewis v Heffer & Ors* (2) which were cases relating to the Labour Party, a political party in the United Kingdom, in which it was argued that decisions had been improperly arrived at according to the rules of the organisation, were both commenced by writ, and similarly, in this country, cases relating to domestic tribunals such those of political parties should be commenced by writ.

Judicial review would therefore not be the correct procedure when the decision challenged is not a public law decision.

### 7.3 The Application

An applicant in judicial review proceedings cannot proceed until leave of court (permission) is given to proceed with the application. There are therefore 2 stages the hearing of judicial review proceedings set out in Order 53 of the Rules of the Supreme Court, 1999, namely:

i) Leave stage; and

ii) Substantive hearing.

The 2 are discussed in detail under this section.

### 7.3.1 Leave Stage

This is the first stage in the judicial review proceedings. At this stage, the court is interested in establishing the following:

1. The applicant must demonstrate “sufficient interest” in the matter;
2. The applicant should have a case sufficiently arguable to merit investigation at a substantive hearing;
3. The applicant must apply for leave promptly and in any event within 3 months from the date of the decision challenged (unless the court enlarges time); and
4. The applicant has exhausted all local remedies.
The purpose of leave was stated by Lord Diplock in the case of *R. v. Inland Revenue Commissioners*, ex p. *National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617, p.642; [1981] 2 All E.R. 93, p. 105. According to Lord Diplock the purposes of the leave stage are to:

i) prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error; and

ii) remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

To serve the above purposes, a court hearing an application for leave to commence judicial review proceedings should only grant the order for leave, if on the material available and without going into the matter in depth, the court thinks that there is an arguable case for granting the relief claimed by the applicant. In *R. v. Secretary of State for the Home Department*, ex p. *Rukshanda Begum* [1990] C.O.D. 107, the Court of Appeal held that the test to be applied in deciding whether to grant leave to move for judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full inter partes hearing of a substantive application for judicial review. The applicant must therefore state all material facts at the application for leave, to help the court decide if there is a case suitable for determination on the merits.

Forms and pleadings

Under this section, we look at the forms and pleadings that are filed in an application for judicial review. Caution should be taken when reading the Rules of the Supreme Court (White Book) and the forms so that they are applied within the context permitted by the Zambian legal system. For example, under Order 53 rule 3(2) where the rules say 'file in the crown office,' the phrase has to be substituted by “the High Court” so as to apply the English rules in substantial conformity with the Zambian legal system.

According to Order 53 rule 3, an application for leave must be made ex-parte to a judge by filing:

(a) a prescribed form known as a notice of application for judicial review (Form No.86A on volume 2 of the White Book) containing a statement of the following:

(i) The name and description of the applicant;

(ii) the relief sought and the grounds upon which it is sought;

(iii) the name and address of the applicant’s advocates (if any); and

(iv) the applicant’s address for service; and

(b) an affidavit verifying the facts relied on.

Leave may be granted ex-parte without a hearing unless a hearing is requested or is ordered by the court. The court hearing the application for leave can grant the leave absolutely, grant leave with conditions or on terms or refuse the application for leave.

According to Order 53 rule 3(4), where the application is refused or granted with terms, the application can be renewed to a judge sitting alone in the Queen’s Bench division. The application of this rule in Zambia where the High Court does not have different divisions is that the dissatisfied applicant appeals to the Supreme Court. This position of law was confirmed by the Supreme Court in the case of Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General S.C.Z. Judgment No. 14 of 1995.
Where an application is seeking an order of prohibition or certiorari, the court may order that the leave should operate as a stay of the proceedings to which the application relates until determination of the matter or when the court orders.

7.3.2 Substantive Application

Forms and pleadings

Order 53 rule 5 prescribes the manner in which the application for judicial review is made after grant of leave. The application is made by filing a notice of motion to a judge in open court unless the court directs that the application should be made by originating summons in chambers. The application must be made within 14 days of the grant of leave.

The motion should be set for hearing within after at least 10 days from the date when the motion is served on the interested parties unless the court directs otherwise. The applicant should also serve the respondents, or all parties concerned with affidavits and grounds relied on

Hearing

The hearing of judicial review proceedings is held inter partes. The court has power to hear any person who claims to be likely to be affected on application of that person. This power is exercised notwithstanding the fact that the person who wishes to be heard was not served with the motion and affidavits. The High Court when hearing applications for judicial review exercises the same powers to grant interlocutory reliefs as it does in other proceedings subject to limitations on reliefs discussed in the section on reliefs.

Appeals

The Appeals against Judicial proceedings lie to the Court of Appeal. An appeal may lie against an order denying leave to apply for judicial review or against the substantive application.
7.4 UNIT SUMMARY
The previous unit discussed judicial review and the grounds for judicial review. This unit has discussed the procedure for judicial review. It has looked at how an action for judicial review is commenced and the rules governing it. It has also discussed the substantive application of judicial review. This unit has discussed who can bring an action for judicial review and how this can be done under the law applicable in Zambia.
UNIT EIGHT: NON-JUDICIAL CONTROL OF ADMINISTRATIVE AUTHORITY

8.0 Introduction

There are various channels, apart from courts, in which administrative power may be challenged. The type of channel would most of the time be dictated by the relevant statutory provisions giving power to administrative authorities. Administrative control mechanisms have a number of advantages against judicial mechanisms. They tend to be efficient both in process as well as results they render. Parliament when it assigns power often provides for systems of redress to person affected by exercise of administrative power. These include the following:

1) Conferring new jurisdiction on courts;
2) Creating a machinery to resolve disputes or inquire into the maladministration e.g. creation of tribunals;
3) Leaving authority to the authority with primary responsibility for scheme, e.g. through an internal administrative appeals or requirement of a public inquiry before making certain decisions.
4) The Constitution has created autonomous institutions to control exercise of administrative authority e.g. the Human Rights Commission and the Public Protector. These are classified Constitutional mechanisms as opposed to administrative

We begin with administrative mechanisms.

8.1 Administrative Institutions

8.1.1 Administrative Tribunals

Administrative tribunals are bodies or institutions created by legislation to provide redress for disputes arising out of the state or exercise of power given by law. In Zambia, there is no uniform approach to creation of tribunals. All tribunals are created by various statutes e.g. Lands Tribunal Act, No. 39 of 2010; Tat Appeals Tribunal Act, No. 1 of 2015; Capital Markets Tribunal under the Securities Act, No. 41 of 2016. Some tribunals are functional while others are not.
Tribunals may be permanent or ad hoc. Permanent tribunals are those that are created and operate even where no specific matter is brought before it. Examples of Permanent tribunals include the Lands Tribunal, Tax Appeals Tribunal, and Capital Markets Tribunal. Ad hoc tribunals on the other hand are not created permanently. They are created as need arises to address a specific matter for which they are created. Examples of ad hoc tribunals include the tribunals created under the Parliamentary and Ministerial Code of Conduct Act, Cap 16.

Another important distinction to be made concerning tribunals is that some tribunals are created as first instance tribunals. This means that they have original jurisdiction to entertain matter brought before them. A good example of first instance tribunal is the Lands Tribunal. There are also appellate tribunals which have jurisdiction to entertain matters on appeal from the decision of the administrator. A good example of an appellate tribunal is the Tax Appeals Tribunal.

Advantages of Tribunals compared to courts

a) Specialised knowledge:
   i) Examples include:
      a) Lands Tribunal composed of Lawyers, planner, representative of House of Chiefs, surveyors;
      b) Tax Appeals Tribunal composed of 3 lawyers, 2 certified accountants and 2 people from business community.
   ii) Facilitates quick settlement of disputes;
   iii) Fair outcomes;
   Economical solutions

b) Flexible procedures

c) No monopoly by the legal profession. Liberalised right of audience. Eg. Section 12 of Inquiries Act. A person can be represented by counsel or other person.

d) Safeguard is that almost all tribunals are obliged to give reasons for their decisions and their decisions are appealable to court on questions of law.
1. Procedures followed.
   a) Different procedures created by statute.
   b) Judicial type follow similar procedure as courts although less rigid. E.g Lands Tribunal and TAT.
   c) Inquiry tribunals – Eg. Parliamentary and Ministerial Code of Conduct
   d) Given powers to summon witnesses.
   e) Also provides for appeal procedures where a person is dissatisfied with the decision of the tribunal.

2. Several statutes create mechanisms for appeal or review of exercise of administrative authority to a tribunal. E.g. decisions of Lands Tribunal are subject to appeal to the Court of Appeal.

3. There is usually a mandatory requirement for fair procedures regardless of nature of hearings.

   Christopher Lubasi Mundia v Attorney-General (1986) Z.R. 37 (S.C.) – Inquiry to inquire into riots and consider removal of appellant from office as secretary of ZNPF following series of wild strikes. Appellant sought right to counsel and to cross examine witnesses called by the Commission of Inquiry. High Court held that Commission was administrative inquiry and as such not bound by rules of evidence and procedure.
   Supreme Court Held, inter alia that;
   1. The Inquiries Act gives right to legal representation to a person who is subject of an inquiry.
   2. To be fair, representation carries with it right to cross examine witnesses.

8.1.2 Commissions of inquiry
Another administrative mechanism for control of administrative authority is the appointment of a commission of inquiry under the Inquiries Act, Cap 41. Section 2 of the Inquiries Act empowers the president to appoint a Commission of Inquiry in matters that the president considers of public welfare. E.g CRC, Legal and Justice Sector Reforms Commission. Commissions of inquiry operate within the terms of reference issued by the president. Upon completion of inquiry, a recommendation is made. The Commission enjoys broad powers of investigations in any matter of individual injustice or administrative abuse of power or authority including power to summon witnesses to appear before it. There is a right to be represented by
counsel. On completion of investigation, the Commission submits report to the President who makes a decision. The President is however not bound to follow recommendations of the Commission.

8.1.2 Appeals to ministers
Some statutes provide for a system of appeals to a minister. E.g. s.115 of Environmental Management Act; s16 of Societies Act, Cap 119, decision against refusal of registration or cancellation may be appealed to the Minister within 21 days or such extended time as permitted by the Minister. There is also a power to appeal to Minister under the Immigration and Deportation Act, No. 18 of 2010.

8.1.3 Public hearings
Provided by certain laws as precondition to making of certain decisions. For example, the Environmental Management Act, No. 12 of 2011, Environmental Impact Assessment Regulations No. 28 of 1997, Regulations 8(2) and 10(2) of the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations require a developer to ensure that the views of all interested and affected persons are taken into account when preparing an Environmental Impact Statement. See the obiter dicta in Martha Kangwa & 29 Others v ZEMA & Others SCZ No. 49 of 2014.

Public hearings are usually conducted so that people most affected by administrative decision have a chance to be conducted. There is usually an obligation to give reasons as to why views have not been considered. There is often a reserve power to refer the matter to review by the court.

8.2 Constitutional oversight Bodies
Constitutions provide for autonomous oversight bodies to control exercise of governmental power and protect rights of people grieved by exercise of governmental authority. The typical institutions are Ombudsman and national human rights institutions.

The 1974 Resolution of the IBA sets out traditional functions of an ombudsman as follows:
An office provided for by the constitution or by action of legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies and employees or who acts on his/her own motion and has power to investigate, recommend corrective action and issue reports.

Importance of offices is to provide a safeguard to ordinary citizens against wide discretionary powers of government. Mainly 2 types: NHRI and Ombudsman (Public advocate). They are effective when they are independent of government interference. Paris Principles have identified key conditions for effectiveness of ombudsman offices, namely, (i) composed of independent appointee; (ii) members enjoy satisfactory conditions of service; (iii) adequate funding.

8.2.1 Human Rights Commission
Zambia’s Human Rights Commission is established pursuant to Article 230 of the Constitution. It was first established in 1996 under article 25 following the 1993 Bruce Munyama Commission of Inquiry into human rights violations under the one party state. The Commission recommended establishment of a permanent HRC.

According to article 230, the Human Rights Commission should ensure that the Bill of Rights is upheld and protected. The jurisdiction of the Commission is investigation of human rights violations although it can also investigate maladministration of justice. It can investigate government and private entities accused of violating human rights.

The functions provided by Constitution and the Human Rights Commission Act, Cap 48 (s. 9) as follows:
   a) investigate and report on the observance of rights and freedoms;
   b) take necessary steps to secure appropriate redress where rights and freedoms are violated;
   c) endeavour to resolve a dispute through negotiation, mediation or reconciliation;
   d) carry out research on rights and freedoms and related matters;
   e) conduct civic education on rights and freedoms; and
   f) perform such other functions as prescribed.
The powers of the Human Rights Commission are set out in section 10 of the Human Rights Commission Act as follows:

The Commission shall have powers to investigate any human rights abuses-
(a) on its own initiative; or 
(b) on receipt of a complaint or allegation under this Act by-
   (i) an aggrieved person acting in such person's own interest; 
   (ii) an association acting in the interest of its members; 
   (iii) a person acting on behalf of an aggrieved person; or 
   (iv) a person acting on behalf of and in the interest of a group or class of persons.

(2) The Commission shall not have powers where a matter is pending before a court.

8.2.2 The public protector
The office of the Public Protector is established by article 243 of the Constitution. First established in 1974 as Commissioner for Investigations following recommendations by the Chona Constitution Commission when transitioning to the One Party State. Created by Commission of Investigations Act, Cap 39 created the office.

The powers and procedures for conducting the Public Protector's work are prescribed in the Public Protector Act, No. 15 of 2016. The following highlights important sections of the Act on powers. Kindly read the full text of the Act.

- Functions – s6.
- Powers – art 245.
- Investigations s13
- After investigation s. 16

To be effective, the public protector must be an independent appointee; reporting to Parliament instead of President; have adequate funding; wide scope of investigation powers (including president).
8.3 unit summary
The mechanisms highlighted in this unit though not exhaustive are some of the methods of checking administrative authority and making those vested with power accountable. They are useful in ensuring that administrative authority is checked without crippling administration with lawsuits. As noted however with each mechanism, there are certain limitations that are akin to the process that might require a judicial intervention
UNIT NINE: PARLIAMENTARY CONTROL OF ADMINISTRATIVE AUTHORITY

9.0 introduction

The separation of powers invokes a system of checks and balances. Through this system, Parliament performed a key function in controlling executive and governmental power. The controls are principally done in 3 distinct ways, namely:

1. Oversight on executive functions;
2. Oversight on public spending; and
3. Oversight of legislation

The 3 broad areas are further discussed.

9.1 oversight over executive functions
this is principally done in 3 ways, namely, through parliamentary questions to ministers, debates in Parliament and Parliamentary Committees.

1. Parliamentary questions
Parliamentary questions provide members from all political parties an opportunity to interrogate ministers on current issues and events. The questions provide a useful way in which back benchers can raise their concerns publicly and expect a ministerial answer. The limitations of the process are as follows:

   a) Only effective when Parliament is in session. Criticism is that when Speaker is appointed by President, the scheduling would favour agenda of executive. Speaker should be appointed using a fairly independent procedure and be given mandate the schedule the sittings of parliament.
   b) Conflict of interest between the politicians and the governed – recall of MPs,
   c) Competence of MPS to effectively present questions of their constituencies – educational qualifications (art. ...., competence, capacity and composition (gender equality and disability– Article .... of the house are useful in this regard).
2. Parliamentary debates.
Standing orders present an opportunity for debate. Government business tends to take priority. Members can seek leave from the speaker to hold debate on matters of public importance. The limitations of this process include:
   a) access to information;
   b) willingness of MPs to question the executive about their action or inaction; and
   c) Independence of the Speaker.

3. Parliamentary committees.
These normally comprise all political parties. The principal role of Parliamentary Committees is to oversee key areas of public life such as health, education, etc. Parliamentary Committees are composed of MPs possessing certain qualifications and expertise relevant to the Committee’s mandate. The Committee can also summon experts on matters of concern. Limitations of this process of control include:
   a) Limited access to information;
   b) Committees may not address individual grievances resulting from maladministration;
   c) Lack of expertise by members.

9.2 Oversight over Public Spending

National Assembly provides oversight over public spending in a number of ways. First, MPs approve expenditure through enactment of Finance Control and Management Act. Parliament also approves annual budget bills through enactment of Appropriation Act. Additional expenses are approved through enactment of Supplementary Appropriation legislation. The ideal situation is avoid supplementary budgets so that the Appropriation Act is comprehensive. Supplementary appropriation should only be accepted in matters of emergency.

Another way by which National Assembly controls exercise of administrative authority is through the Public accounts committee. The Public Accounts Committee ensures that public expenditure is in line with the approved budgets. The Auditor
General submits report to Parliament for scrutiny. Administrators are called to appear before the public accounts committee to answer queries on spending.

The limitations on effective exercise of this control function by National Assembly include:

a) Lack of or limited expertise of members;
b) Inadequate publicity;
c) Corruption; and
d) The lack of transparency in procurement processes.

9.3 Oversight over Legislation

The vast majority of laws are government inspired. Members should debate bills and approve them. The following are some of the limitations on the effective control over legislation by the National Assembly:

a) Limited access to information;
b) Limited or lack of expertise in appreciating effects of the bill on rights – partnership with NHRIs could be useful.
c) Limited opportunities to introduce private members bills.
d) Inadequate research facilities and capacity.

e) Lack of independence by parliamentarians in the absence of strict provisions on floor crossing.

In conclusion, you will note that National Assembly can provide useful checks on exercise of administrative authority when its limitations are well noted and minimised.
MODULE SUMMARY

This module has given an introduction to administrative law in Zambia. It began with a discussion on the administrative process in Zambia, definition of administrative law, the relationship between administrative law and constitutional law in Zambia, sources of administrative law and key concepts in administrative law. It then proceeded to discuss the scope of administrative law in Zambia and the concept and processes of judicial review in Zambia. It concluded by discussing the judicial and non-judicial mechanisms for control of administrative action in Zambia.

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