

THE 'IS' AND THE 'OUGHT' OF THE LAW

2001-2005

BY

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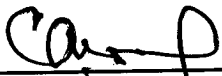
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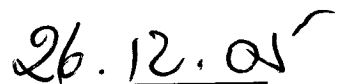
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**Carlson Anyangwa (Prof)
Supervisor**



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Dedicated to

My one and only love, my mother, Ened Nauluta Chirwa. You and only you will always be my number one. You taught me to be the best that I can be in life. I will never forget your teachings. I will always love you...may your soul rest in eternal peace. Till we meet again.

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I would also like to thank my family for being there and helping me through out my stay at this university. My special thanks and love goes to my four sisters, Charity, Rosaria, Lizzy and Pamela. These four have been my father and mother for as long as I can remember. They have helped to shape my life. This book is for them.

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ABSTRACT.

The 'is' and 'ought' of the Law is a debate that has gone on for a long time, and still is on-going. This obligatory essay is a mere small contribution to what already exists. The only significant difference is that the debate has been argued in connection to Zambia.

Topics such as Constitution making process, Abortion, polygamy/bigamy, have been looked at in line with the 'is' and 'ought' of the Law in Zambia. The task in this paper has been to critically analyse the Positivist and Naturalist conception of Law. This has been achieved by first having looked at the way each school of thought views law and then going on further to critically analyse the various weaker points of each school. Lastly, the paper has supplied its own view of what the law should be in terms of the Constitution making process in Zambia, Abortion and Polygamy/Bigamy in Zambia.

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CHAPTER ONE

1.0 INTRODUCTION

The “is” and “ought” of the law? The ‘is’ of the law is what is in actual existence at that particular moment, while the ‘ought’ of the law is what no one can actually point to because no one knows what it is. It is merely what in one’s own estimation should be the law and this can differ from one person to the next as has been proven due to the many theorists who have debated on this issue.

The on-going debate has brought about a lot of conflict on what ought to be the law in place of what is the law. And as such many different societies strive to come up with laws that they feel in their own estimation would work favorably for their society. This they do by constantly changing their laws through the use of the constitution. A good example of this practice is Zambia, which has gone through four constitutions since 1964 when it attained independence. The problem is not the contents of the constitution itself but rather the process of making the constitution. Many people do not abide by it not because what is enshrined is necessarily bad but because they were not involved in the process of making it, so they fail to identify themselves with it.

Law should be used as an instrument for promoting a proper social order and as such should be regarded as a social necessity. Without the law, persons in society, although they would naturally tend towards wanting to do what is

right, would be affected by the hardships they face everyday and as such would not even bother to strive towards doing what is right but would take the law into their own hands. However, there needs to be an accepted or general standard of law, which, everyone would accept and follow willingly. Thus it would be better for the law- makers to go out in the field and find out what the populace lacks and implement the law in a fashion that caters for that. Only then would people follow the law.

Zambia like many societies in existence today has faced problems with the law in actual existence. What the law is, and what the people in society are doing are two different things altogether. Thus the purpose of this research paper will be to examine the constitution of Zambia, the law on abortion and polygamy in Zambia. These subjects have been of major concern in Zambia and the world in general. Is the law what it ought to be in regard to these subjects or not?

The above subjects will be the focus of the ensuing chapters. We will now deal with the views of the schools of thought that have debated on the 'is' and 'ought' of the law. Although there are many different schools of thought on the subject, this research paper will focus on two schools of thoughts being the *Naturalist school of thought* and the *Positivist school of thought*. The former can in the view of the writer be regarded as the school of the 'ought' while the latter as the school of the 'is'.

1.1 The Naturalist School Of Thought

Natural law theory generally comprises an approach, which seeks to explain law as a phenomenon whose existence is an expression of some higher law, to which it must necessarily approximate.¹ Natural law theories are either secular or theological in their identification of the ‘higher law’, which governs human society.

1.2 Theological theories

These regard the universe, including human society, as having been created and as being currently governed by some deity, who has laid down constant principles, which must eternally control all of creation. These principles have been made known to humanity through revelation in the scriptures, and they are common for all societies. Such principles provide the morality, which must govern all human communities, and they constitute a higher law to which all social arrangements, including the laws created by people, must strive to approximate.²

1.3 Secular theories

Followers of this school believe humans have a certain conception of morality, which is intrinsic to them and to their nature. This morality, which sometimes manifests itself in the form of conscience, is made up of basic principles, which form a basis for proper human action. These principles are

¹ Chinhengo Austin. *Essential Jurisprudence*. Cavendish Publishing Co. London. 2000:17

² Ibid

identifiable through the application of reason, which is a faculty or capacity that all humans have, enabling them to understand the universe. These principles make humanity tend towards the virtues, such as justice and kindness, and away from the vices, such as malice and violence. Such principles, then, ought to form the proper basis for law making and, to this extent, they constitute a 'higher law' to which all human laws must strive to conform.³

Modern theories have concentrated on the notion of the 'common good' which is seen as the basis for the existence of society, and argued generally that law must conform to or advance the requirements of the general welfare if its existence and operation is to be justified and if society is to continue to exist and function as a viable entity.⁴

The main presuppositions of Natural law theory is that it is based on value judgments, which emanate from some absolute source and which are in accordance with nature and reason. These value judgments express objectively ascertainable principles, which govern the essential nature of persons and of the universe. The principles of Natural law are immutable, eternally valid and can be grasped by the proper employment of human reason.⁵

Many natural law theorists have a theological view of the universe and of human society. This means they regard the world as having an ultimate purpose. This refers to some state of perfection, towards which society must

³ Ibid p.18

⁴ John Finnis. *Natural law and Natural Rights*. Clarendon Law Series. Clarendon Press. Oxford. 1980:18

⁵ Chinhengo Austin. *Essential Jurisprudence*. Cavendish Publishing Co. London. 2000:18

inexorably advance. All human laws must be created in such a way that they provide the optimum conditions, resources and opportunities for the attainment of the desired goal. Therefore, these laws must be constantly evaluated in light of the principles of natural law.

The important question concerning the nature of law is, therefore, not what the law is at any point in time, since this may not be a true reflection of the principles of natural law, but what the law *ought to be*, in order for it to be a true reflection of such principles. A law which substantially deviates from these principles is not only a bad law, but can be as invalid as well, since it does not truly reflect the model of what law ought to be.

The question of what the law ought to be is an important question of morality, since it is ultimately based on the value judgments of persons in society, which are properly reached at after the exercise of reason. Natural law theorists, therefore, tend to start from an assessment of what the moral attitudes are of people in society. From this, they deduce what the desired state of perfection and the moral principles leading to it should be. This is what is meant by the assertion that natural law theorists try to derive an ought from an is, that is, from the 'is' of actual existing moral attitudes to the 'ought' of what must be the desired and, therefore, proper set of social arrangements. It is then on this basis that they proceed to evaluate the laws that are actually in place—the law that is—and decide whether they are valid or not depending on whether they are what they ought to be.

Probably the most significant contribution of natural law theory to legal discourse is its invitation to all and sundry to critically reflect upon the law

as social instrument for attaining various ends, which may be shared by the majority of people in a community or by a few persons in a position of political control. The emphasis on the link between law and the moral values and aspirations of persons in society is recognition of the extent to which law controls the every day lives of citizens. An appreciation of this fact will allow us to see law as something which can be used positively or negatively and, as such, something which we need to be constantly evaluating if we are not to allow society to slide into tyranny and chaos.⁶

1.4 The Main Criticisms Of Natural Law theory

The attempt by natural law theorists to derive *ought* propositions from *is* propositions is neither logically possible nor defensible.

Natural lawyers are wrong to place a strong connection between law and morality. Although law may sometimes reflect morality, the two are distinct phenomena and should be recognized as such. An analysis of the one should therefore not impinge upon our conception of the other. A law can be valid because it has been created validly, even though it may offend our moral sensibilities. However, it does not necessarily mean that because procedure is valid then the content is also valid. This is the mistake that the critics of the natural school of thought make. Naturalists have no problem with procedure, what they instead have a problem with, is the content of the law. Should a law that completely goes against what is morally right be implemented just because the procedure is valid?

⁶ Chinhengo Austin. Essential Jurisprudence. Cavendish Publishing Co. London. 2000:26

Morality is a matter of personal value judgments, which may change erratically for a variety of reasons. It is therefore undesirable to base the development of law, with its necessary requirement for certainty and predictability, on moral considerations, as the natural lawyers would have us do. However, the critics of this school have overlooked the fact that morality is not only a matter of personal value judgments; there is also common morality. These are morals that have existed for a long time such that no one even questions them but follows them instinctively. Further, these morals have been in existence from generation to generation and have not changed with the passage of time. Thus, the argument that the law would not be certain and predictable is untrue, for the law itself is not static but dynamic. The appeal by some natural law theorists to the existence of a 'higher law,' which should be a measure of moral and legal propriety, is an appeal to irrationality, since it is not possible objectively to demonstrate the existence of such principles.

1.5 The Positivist School of Thought

Legal positivism, in its widest sense, is the view that the study of the nature of law is a study of law *as it is*, and not *as it ought* to be. The word 'is' connotes the existence of some fact or set of facts determinable by observation and experiment- by empirical means.⁷ In general it comprises an approach to the question of the nature of law, which regards the law's most important feature as being the fact that it is specifically created and put forward- 'posited' by certain persons in society who are in positions of power

⁷ page 19, Introduction to legal theory by Finch, 2nd ed. Universal law Pub co.

and who, then, provide the sole source of the validity and authority of such law.

For legal positivists, the issue raised by the question ‘what is law?’ is essentially a question of fact, to be answered by empirical reference to, and an analysis of, objective social phenomena. Therefore, there is nothing objectionable, according to positivists, in discussing the merits of laws and suggesting reforms, but only from the data, as it actually exists in the legal system of various societies. In legal theory, it requires mainly the factual identification of the law. In making such analysis, only such material as can be factually identified as being legally relevant should be taken into account. According to positivism, first of all, there is a morally neutral test for determining what the law is thus binding on both citizens and legal officials. This is because the law is a distinct phenomenon which its own terms, even though it may have some similarities or connections with other social phenomena such as morality, religion, ethics and so on.

Positivists answer the question ‘what is law?’ by phrasing two questions as follows:

1.6 What is the law?

This is a question of fact, involving an attempt to explain the actual incidence of law in various societies and to identify and analyse its basic characteristics, structures, procedures and underlying concepts and

principles. In legal theory, this is normally referred to as the *is* question, since it requires mainly the factual identification of law.⁸

1.7 What is good law?

This is a normative question, comprising an evaluation of the existing law and seeking to judge it in terms of goodness or badness by reference to some standard, which specifies a goal that a good law must aspire. In legal theory, this is generally referred to as the *ought* question, since it involves an assessment of the existing law in terms of whether or not it is what it ought to be by reference to the desired goal and the accepted standard of good law.

The above questions bring about the issues of hard and soft positivism. The former refers only to the positive law: there are no objective, universal facts about morality, about what the law ought to be like. The latter refers to the fact that in addition to the positive law, objective moral facts do exist.⁹ The factual identification of law should be a scientific and analytical enterprise, which ought to be pursued independently of the normative enterprise of the evaluating such law. For positivists, any consideration of the moral, political, religious, ethical and other values which the law may or may not satisfy must be deferred until the question of what actually comprises that law itself has been properly and adequately answered. The basic argument of positivists is that the issues of fact concerning the existence, validity and authority of law, and the issues of evaluation of such law in terms of its

⁸ Opcit. P.28

⁹ <http://www.utexas.edu/courses/phl347/lectures/lec23.html>.

adequacy and propriety on the basis of some standard, must be kept separate, and questions relating to them must be answered separately.

Legal positivists seek to provide a formula, which can be used to identify law either generally or in specific societies and systems. Most positivists believe that it is possible to provide, in this manner, a neutral and universally acceptable device by which investigation into the nature of law may be carried out. Different positivists have provided different formulae, either in the form of singular definitions of what constitutes law or through generalized descriptions of the essential characteristics, which anything must possess in order for it to qualify as law. However, these are only differences in perspective and in emphasis, and all these theories remain positivist in nature.

There are three notable positivist theorists. These are John Austin, Jeremy Bentham and Hans Kelsen.

1.8 John Austin

His concept of law is an imperative one influenced by his preparatory studies, which had impressed upon him the powerful position occupied by the sovereign in municipal law. He spoke of law as being grounded in 'natural reason,' but that it became 'law' only by virtue of the command of a

sovereign.¹⁰ The most essential characteristic of positive law, according to the Austinian doctrine, consists in its imperative character. Law is conceived as a command of the sovereign.¹¹ “Every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.”¹²

Austin argued for a distinction to be made between ‘analytical jurisprudence,’ looking at the basic facts of the law, its origin, existence and underlying concepts on the one hand, and ‘normative jurisprudence’ on the other hand, which would be concerned with the question of the goodness or badness of the existing law. The factual questions of the existence or otherwise of the law should be answered before questions of what the law ought to be could be considered.¹³

1.9 Jeremy Bentham

He was a utilitarian who believed that, once laws had been properly identified and analysed scientifically on the basis of positivist principles, they could then be judged as to their propriety on the basis of the principle of utility. He was bitterly scornful of the pretensions of natural law. But he had his own gospel, that of utility, and he wished to test every law to see if it led to the greatest happiness of the greatest number.¹⁴

Bentham was a reformer who believed that laws should be created in accordance with the principle utility, that is, that laws should be aimed at

¹⁰ RWM Dias. Jurisprudence. 1985:344

¹¹ Edgar Bodenheimer. Jurisprudence. The Philosophy and Method of the Law. 2001:97

¹² Austin, The Province of Jurisprudence Determined, ed. HLA. Hart. 1954:350

¹³ Chinhengo Austin. Essential Jurisprudence. 2000:32

¹⁴ George Whitecross Paton. A Text-Book of Jurisprudence. 1972:5

advancing the greatest happiness of the greatest number of persons in society. He rejected the natural law approach which contended that laws should be judged in respect of their goodness or badness in accordance with the requirement of some higher law and did not believe in the notion of natural rights, which he famously described as being ‘nonsense on stilts.’ For Bentham, only happiness was the greatest good. The ‘art of legislation’ consisted in the ability to tell or predict, that which would maximize happiness, and minimise misery in society. The ‘science of legislation,’ on the other hand, comprised the adequate and effective creation of laws, which would advance or promote social happiness or pleasure whilst, at the same time, reducing social pain and misery.¹⁵

1.10 Hans Kelsen

He was the proponent of the pure theory of law. As a theory it is exclusively concerned with the accurate definition of its subject matter. It endeavors to answer the question, what is the law? But not the question, what ought it to be? It is a science and not a politics of law. That all this is described as a ‘pure’ theory of law means that it is concerned solely with that part of knowledge, which deals with law, excluding from such knowledge everything, which does not strictly belong to the subject matter law. That is, it endeavors to free the science of law from all foreign elements.¹⁶ Kelsen regards the law as a system of coercion, concerned primarily with the application of sanctions to persons who have acted in certain specific ways. The law is constituted by norms. Kelsen’s legal norms are not a static and

¹⁵ Chinhengo Austin. *Essential Jurisprudence*. 2000:30

¹⁶ Dennis Lloyd. *Introduction to Jurisprudence*. 1959:306-307

disparate set of instructions or directives to officials to apply sanctions in a haphazard manner.¹⁷ A legal norm is not valid because it has a certain content that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way-ultimately in a way determined by a presupposed basic norm.¹⁸

The legal norms are arranged in a dynamic hierarchy, with each norm deriving its validity from another norm, which occupies a position higher up in the hierarchy. These norms range from the general, which are higher norms, to the particular, which are lower norms. The ultimate validity of all legal norms is predicated upon a hypothetical basic norm or *Grundnorm* which occupies the highest position in the hierarchy, and beyond which no other norm may exist. The basic norm is, in a way, the ‘mother of all norms’ and can sometimes be identified with, although it is not, the historical first constitution of a society.¹⁹

1.11 Criticisms of the Positivist School of thought

Austin’s characterization of a sovereign requires that that person or body of persons be identifiable as a matter of fact as the person/s who is/are habitually obeyed by the bulk of the members of a society. This presents a problem of the continuation of legislative authority in the sense that, where a ruling sovereign passes away and a new one is installed, there cannot be in

¹⁷ Opcit p.40-41

¹⁸ Joel Feinberg and Hyman Gross. *Philosophy of Law*. 1986:39

¹⁹ Chinhengo Austin. *Essential Jurisprudence*. 2000:41

the first instance a habit of obedience to that new sovereign which may give him or her or them authority to make laws. Does this then mean that the new sovereign is no sovereign at all and, therefore, cannot make valid laws?

Austin's model characterizes all laws as the commands of a sovereign. Therefore, all laws owe their existence, validity and authority to a particular and determinate sovereign and, practically, there can be no law without a sovereign expressing wishes in the form of commands. The problem that this raises is one of the continuing validity of laws when the sovereign who is their author is no longer in existence.

For Austin, every law must have a sanction for it to have validity, since the imperative conception of law contends that all laws are in the form of commands expressing the will of a sovereign, and a command is distinguished from other expressions of will by the fact that commands invariably carry with them the threat of some harm, pain or evil, which may realistically be applied in the event of noncompliance by the subject. One problem, which this notion raises, is fairly obvious, and this is the fact that not all laws carry with them the threat of a sanction. Some laws are merely regulatory and prescribe for people how they must act, without necessarily threatening punishment.

The sovereign should not be above the law. It is not necessary for legislators themselves to be above the law in order for their legislative activity to produce valid legal instruments.

Austin's conclusion that international law is not law, but 'positive morality' merely because no specific sovereign can be identified as being the author of its rules and, since obedience to these is a matter of choice for the various states, results from a confusion between the lack of the systematic structures identified with questions of validity of laws.

The requirement that the sovereign in a politically independent society be indivisible fails adequately to explain the existence of multiple law making bodies in some jurisdictions, for example, federalist societies such as the US, as well as in parliamentary democracies, where the law making structures are decentralized.

Kelsen's theory has been criticized for its extreme emphasis on the formal identification of the elements of law, excluding as it does such factors as politics, morality and questions of justice.

Kelsen's approach, and his emphasis on the role officials in the occurrence and existence of the law, meant that he ultimately saw little distinction between the state and its law. Kelsen saw the state as the personification of all law, and his view thus disregards, the perspective of the ordinary citizens in a society and their interest in the development of the law.

Kelsen's theory equates the existence of the law with its validity. What this means is that the validity of laws in kelsen's scheme has nothing to do with the legitimacy of the law making authority and, indeed, any usurper can create valid laws once they establish themselves and start to apply sanctions efficaciously, causing the basic norm to change. In this regard, kelsen's

theory has been criticized for providing legitimacy to political regimes, which do not have a mandate from the citizens to rule and to make law.

Finally, it must be noted that the identification of the basic norm in any society is an extremely problematic exercise. Since that norm does not have a specific content, and since it is primarily presupposed, its role in the validation of the other norms in the hierarchy can be fraught with obscurities. Since the *Grundnorm* plays such a pivotal role in the validation of the other norms of a system, it follows that any problems which might arise with its identification and explication may affect the entire coherence and consistency of the hierarchy which it supports, thus depriving the concept of a legal system of its very foundations.

From the ensuing analysis of the two schools, it will have become obvious that naturalists think mainly in a continuum and positivists in the time frame of the present. The former include a moral element in their conception of law since they think of it as an indispensable factor in the continued existence and functioning of law; the latter exclude a moral element since they are mindful of the necessity of having clear-cut means of identifying laws for the practical purposes of the present, unclouded by impalpable moral considerations. So for a good deal of the time the two sides appear to be operating on different planes.

However, it is clear on the is/ought dichotomy that a total separation of the 'is' and the 'ought' is not possible. Law is what its makers think it ought to be. For instance, in rule-making or enacting of laws, it is undeniable that moral, social, political and other such factors make them what they are; and

where there is no authority on a point, the judge will declare the rule to be what he feels it ought to be. A separation of law from morals is not possible when the moral quality of law is one of the factors that brings it into being and determines its continued existence; all such factors are a part of the concept of law as a continuity, functioning phenomenon.

On the other hand, long ago Hume pointed out the fallacy of trying, as he put it, to derive “ought” from “is” and that a normative statement could not be inferred from a purely factual one. So too, the efforts to define moral norms in terms of something else, which can be ascertained or verified as a fact, such as pleasure or utility, involve a similar confusion termed as “the naturalistic fallacy.” There is, in other words, an unbridgeable gap between ‘ought’ and ‘is’ or norm and fact, but this does not mean, as has sometimes been thought, that ‘ought’ statements occupy a special world of existence of their own distinct from physical reality.

In the ensuing chapters, the writer will endeavor to explain the best method possible to use in regard to the issues of the constitution, land distribution, child defilement, abortion and bigamy in Zambia, by using the is/ought dichotomy.

CHAPTER TWO

2.0 CONSTITUTION MAKING PROCESS

The focus in this chapter will be an analysis of constitution making process in Zambia. It will inter alia review the process that Zambia has been using in the past, how effective/ineffective it has been. Firstly, therefore, we will analyze the meaning of a Constitution, and then move on to analyze and give a critic of its making process in Zambia.

2.1 What is a Constitution

The constitution of any state is regarded as that society's life-blood. Progress or development of that nation depends on the make-up of its constitution. A constitution can build or destroy a society. Therefore, it is important to ensure that the constitution of any society is one, which endeavors to advance the aspirations of the people in that society.

According to A. W. Chanda,¹ ***"A constitution is a formal document, which creates the organs of government, defines their functions, defines their relationship inter se and delimits their relationship with individuals."***

Although a constitution and statutes are both 'laws,' a constitution is said to be of higher dignity than an ordinary enactment and is often perceived as ***"the supreme law of the land."***²

The constitution is binding on all persons in the Republic and all legislative, executive and judicial organs of the state at all levels.³ The courts have the

¹ Paralegal Manual. Legal Resources Foundations. Government Printers. Lusaka. 2001:1-2

² See Article 1(3) of Chapter One of the Laws of Zambia.

³ See Article 1(4) of Chapter One of the Laws of Zambia.

power to review any statutes passed by parliament and to declare them invalid if they are inconsistent with the Constitution.

Kelsen, a proponent of the pure theory of law had this to say:

“Legal norms are not a static and disparate set of instructions or directives to officials to apply sanctions in a haphazard manner. They are arranged in a dynamic hierarchy, with each norm deriving its validity from another norm, which occupies a position higher up in the hierarchy. These norms range from the general, which are higher norms, to the particular, which are lower norms. The ultimate validity of all legal norms is predicated upon a hypothetical basic norm or Grundnorm, which occupies the highest position in the hierarchy and beyond which no other norm may exist. The basic norm is, in a way, ‘the mother of all norms.’⁴

Kelsen argued that every system of law must have a basic law upon which all other laws depend. This basic law or *grundnorm* is the country’s constitution. Therefore, it is imperative that it is fashioned in such a way that it meets the necessary needs of the people in that society. It should be all encompassing; taking great care to ensure that it rises above all trivialities. This therefore means that the mode of adopting or enacting it should be just as important as its content.

There are various ways of adopting or enacting a constitution: These are:

⁴ Chinhengo Austin. Essential Jurisprudence. Clarendon Press. London. 2000:41

1) By parliament enacting the constitution: Zambia has used this method since independence. The president appoints a constitutional review commission under the inquiries Act, which gathers evidence from the public and sends its recommendations to him. The president and his cabinet then select the recommendations they like and refer the same to parliament for enactment.

The objective of the Inquiries Act is, ***“to provide for the issue of commissions and for the appointment of commissioners to inquire into and report on matters referred to them; to prescribe their functions; and to provide for matters incidental to or connected with the foregoing.”***⁵ This is the legal basis that the President of the Republic of Zambia has for appointing the Constitution Review Commission which looks into the matter of adopting or enacting a Constitution for Zambia.

Section two of the said Act states that: ***The president may issue a commission appointing one or more commissioners to inquire into any matter, in which an inquiry would, in the opinion of the President, be for the public welfare.***

The above provision basically empowers the president of Zambia to appoint a commission that would look into or inquire into a matter that in his opinion is for the welfare or benefit of the public. This, in essence is the power that this particular Act grants the President.

The Act however, does not state anywhere that the president is supposed to

⁵ See the Inquiries Act, Chapter 41 of the Laws of Zambia.

appoint a Constitution Review Commission, with the kind of task that the same has been given. The work of this particular commission has been to find out what is the best mode of adopting or enacting a Constitution for Zambia. This, in essence, means that there is no question on whether a new constitution is needed or not. The only question is finding out the best mode of adopting or enacting a Constitution. Therefore, why go through the elaborate process of choosing a commission, just for that simple task? It would be understandable if the question was on whether a constitution is needed or not.

From a thorough examination of the Act, it seems that this Act has either been abused or misunderstood. Section 14 gives a detailed explanation of the powers of commissioners. And nowhere does it state that commissioners are to inquire into the best way of doing something. The Act is there for the purpose of appointing a commission that would go out there and investigate into a problem that has been referred to them. After their findings, they are required to make recommendations to the president, which he can accept, or not. This, in the writer's view is the reason why this Act has thus been used.

In the case of *Nkumbula V. the Attorney General*⁶ *the president at the time had announced that the cabinet had taken a decision that the future constitution of Zambia should provide for a one-party participatory democracy, and that a commission would be set up with the task of determining the form which that one-party democracy should take. The function of the commission would not be to consider whether or not there should be a one-party democracy.*

⁶ (1972) ZR

From the above historical background, it is clear to see that the Act has been abused tremendously. Clearly, the president had no intention of asking the commission to inquire into the question of whether the people of Zambia wanted a one-party participatory democracy or not. To him, it was already a foregone conclusion. He was in essence, telling the commission what and how to do their job. And since the Act was basically set up for the aim of inquiring into issues, what issue were they then inquiring into at the time?

In the opinion of the writer, this Act has been abused by the presidents of Zambia, for the simple reason that it is the one Act that gives them power to appoint commissions whose findings come to them and they have the discretion of adhering to their advice or not. And herein lies the problem. The people have no say so in the matter because the president will say the Act grants him the power to do as he does.

A similar problem arose in the case of *Derrick Chitala V. The Attorney General*,⁷ *where the appellant contended that the decision to have the constitution enacted by the National Assembly had been taken in bad faith and was contrary to the recommendations of the Mwanakatwe constitution review commission and was not in furtherance of the general objectives and purposes of the Inquiries Act.*

It is evident from the above that the Act has merely been a mere smokescreen that the president and his cabinet uses to be able to achieve

⁷ (1995-97) ZR

their own objectives which never fall in with what the people want. However, for a constitution to be accepted by the people of a specific society, it needs to be legitimatised. We will look at this process in detail after we outline the other methods of adopting or enacting a constitution.

2) ***Through a referendum***: A panel of experts or a constitutional review commission formulates a draft constitution, which is then submitted to the people who must either approve by voting “Yes” or “No.”

3) ***By a Constituent Assembly adopting a constitution***: This is a group of people who have been selected or elected for the purpose of making a constitution. Recent examples of this method of adopting a constitution include Namibia, Nigeria, South Africa, Ghana, and Uganda.

4) ***Through a constitutional conference***: At which all political players are represented. French speaking countries, e.g. Congo, Gabon, Ivory Coast, Mali, have used this method.⁸

2.2 Legitimacy of the Constitution

“A constitution has to be legitimate. This means that it has to be concerned with how to make it command the loyalty, obedience and confidence of the people. A major cause of the collapse of constitutions in many new states has been the lack of respect for the constitution among the populace and the politicians themselves.

A constitution should be generally understood by the people and be acceptable to them. And to achieve this, a constitution needs to be put

⁸ A.W. Chanda: Paralegal Manual. Legal Resources Foundations. Government Printers. Lusaka. 2001:1

through a process of popularization, with a view to generating public interest in it and an attitude that everybody has a stake in it, that it is the common property of all. The people must be made to identify themselves with the constitution. Without this sense of identification, of attachment and involvement, a constitution would always remain a remote artificial object, with no more real existence than the paper on which it is written.”⁹

“Since the 1960s when most countries in Africa achieved independence there has been a remarkable output of national constitutions in almost every state in the continent. The tragedy, though, is that most of these constitutions tend to be seriously deficient in quality and in meeting the legitimate expectations of the people for which they are drafted. More often than not, they correspond to the particular taste of succeeding political regimes. Introduced and adopted at fairly short intervals, they are always short-lived. The result is chronic constitutional instability in the continent. Generally drafted by a political coterie, in a hurry, upon a calculation of exigencies, without meaningful public participation and without even consultation with other major stakeholders, many of these so-called constitutions are often a mere collection of the rules of convenience administered by each ephemeral regime. They never really constitute the legal basis of the states themselves. Aware of the precarity of his own power and the fleeting nature of his own regime, each succeeding head of state never bothers to produce a durable constitution. Consequently, the basic law of many an African state has become a precarious document that inevitably perishes with the particular regime, which introduced it.”¹⁰

⁹ A.W Chanda. Paralegal Manual. Legal Resources Foundations. Government Printers. Lusaka. 2001:2

¹⁰ Carlson Anyangwe. The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy. Zambia Law Journal. Volume 29. 1997:1-2

Zambia has had several constitutions. The 1964 Independence constitution, which created multi-party presidential system. The 1973, One party Constitution. The 1991, multi-party constitution and finally the 1996 amendment Constitution.

When adopting the current Zambian constitution, the Constitutional Review Commission was duly selected. In one of its terms of reference, the CRC was mandated to recommend the best method of adopting the Constitution. After addressing itself to the need for legitimacy and durability of the Constitution and the views of the people, the Commission found it *‘unavoidable and compelling to recommend unanimously adoption by a constituent assembly and a national referendum.’*¹¹

Carlson Anyangwe in his article on the Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy¹² stated that, *“The Government vehemently rejected this recommendation and stood firm by its decision to have the Constitution adopted instead by Parliament, which is heavily dominated by the ruling party. This, at once, triggered a heated and sustained (and sometimes acrimonious) debate between those who favored adoption by Parliament and those who favored adoption by a constituent assembly and a national referendum. The sentiments and emotions ventilated by either side were so strong that it looked as though the Constitution would stand or fall depending on its mode of adoption. Whatever hidden political agendas and calculations may have informed either side, for the jurisprudent and constitutionalist the issue was of*

¹¹ Report of the Constitutional Review Commission, 204.

¹² Zambia Law Journal. Volume 29. 1997: 1-2

paramount importance because of the self-evident need to invest the Constitution with popular legitimacy and the character of autochthony.”

The argument advanced by the ruling party through out the debate was that the Constitution can only be adopted through parliament because parliament is the only formal and legal body recognized for enacting Laws in Zambia. Which statement or argument is not valid at all? Legally speaking, the Constitution, as has been explained above, does not have a specific mode of adoption either in itself or otherwise. It must be highlighted here that, the process of Constitution making is crucial and cannot be treated like ordinary law to be modified or replaced by ordinary legislation. The Constitution must be perceived as a higher law, authorizing and governing ordinary law and commanding adherence to constitutional precepts. The Constitution of Zambia being the supreme law of the land is the one that has the legal right to set up all the three organs of the government. Article 1(4) states that “*this Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.*” In other words it gives birth to them and declares that their existence shall be subordinated to it. Quite clearly, by virtue of its supremacy as stated above its adoption can only be by a higher body or through its own adoption.

Having said that, it would be interesting to look back at history and evaluate the methods of adoption that have been used and how they have impacted our Zambian democratic rights so that it is shown that an alternative method is the only way forward. Muna Ndulo says, “*You can interpret or re-*

interpret history but you cannot repeal it.”¹³

The first colonial constitutions that we ever had were a series of structural decrees by the British government enacted through Orders-in-Council. The flexibility of these Constitutions lay in the ease with which they could be changed in response to pressures and crises.¹⁴

The 1964 Independence Constitution also came as an Order-in-Council accompanied by an Independence Act enacted by the British Parliament. The Order's Schedule II set forth the Constitution of Zambia.¹⁵ In 1972, the government announced that it had decided to turn Zambia into a one party state. This came into being on 25th August 1973 and it should be noted that debate was limited and even those who tried to oppose its introduction were beaten up and harassed by the government machinery. It was simply enacted by the National Assembly and assented to by the president. This clearly shows that from way back, Zambia has always used the method of enacting its constitution through the National Assembly and then have it assented to by the President. It is evident that nothing has changed and each incumbent president would like to use this power to the fullest.

Among its notable recommendations was the one that needed to limit and curtail the presidential powers. The government rejected this recommendation. Another rejection was the presentation to the electorate of three presidential candidates; they preferred the naming of one candidate

¹³ Muna Ndulo. The Constitutions of Zambia. Zambia Law journal. Volume 30. 1998:4

¹⁴ S. Mubako. Zambia's Single Party Constitution-a search for unity and development. Zambia Law Journal. Volume 5. 1973:67

¹⁵ Muna Ndulo. The Constitutions of Zambia. Zambia Law Journal. Volume 30. 1998:5

only.¹⁶ In 1991, Zambia had another chance to redeem itself constitutionally. As the '*winds of change*' came to Zambia, the government in power was faced with the daunting task of choosing which method of Constitutional adoption it was going to use. At first resistance, the government announced that it should go by way of a referendum but in 1990 it changed its mind and abandoned the referendum. Rather it promptly amended the Constitution to permit formation of other parties by repealing certain articles in the Constitution. In 1996, another Constitution came into being. This was said to be the Constitution that was going to stand the test of time. It had the support of the people and everybody was ready to embrace and participate in the Constitution making process. People made submissions and most of them were being made for the third time. Come adoption time, the government rejected the one recommendation among the many it had rejected that had received the most submissions and substituted it with one of its own. They refused to put the constitution to the Constituent Assembly followed by a referendum. Government maintained that the 1996 Constitution was not a new constitution but merely an amendment, when it is evident to see that the whole constitution has been completely changed leaving out only Article 79 and Part III of the Constitution. What kind of amendment is this if three quarters of the document has been altered? The effect of that act killed the national unitary spirit that had engulfed Zambia. It divided Zambia into two polarized camps. You are either a Zambian or non-Zambian. The one Zambia one Nation motto was rendered to mere words. Lastly, in 2005, we are still grappling with the same problems of Constitutional adoption.

¹⁶ Ibid

The question one may ask is what is the essence of going back into history? What knowledge or lessons are we drawing from there? Is it really relevant to bring out all that now and lastly what is the relevance of all that to the question in issue? Well, to start with, it should be stated that, only when history is told could one draw an inference from it. Therefore, the synopsis above shows that historically, we have been in the habit of using parliament as a legal body to adopt our Constitution. Historically, each time we have made recommendations as people of Zambia, the government in power has deliberately ignored those recommendations and substituted them with their own. Basically, what has been the end result is not a people driven Constitution but one that has been written by the government itself. As a result, each government that is in power in accordance with the agenda that it wants to push has used the Constitution to push that agenda forward. Hence the people end up as spectators with no affinity whatsoever for the Constitution or respect. And the so-called constitution review commission ends up being a mere smokescreen for use by the government to the point where it acts merely as the government's agents while the government as the principal directing the commission on what to do.

Notwithstanding the above, it should be noted that while ordinary law may be adopted and altered by legislative majorities of whatever size, the adoption of a Constitution and its amendment require much more, widespread participation by the citizenry and the achievement of a broad based consensus. The process must take in the full view of the country. After all, the aim of the Constitution-making process is the achievement of a Constitution that is legitimate, credible and enduring, that guarantees rights and freedoms perceived to be fundamental, and that provides a structure for

the effective achievement of its economic development and for the welfare of its citizens.

Therefore, if the Constitution has not given Parliament the legal right to adopt it, where is parliament deriving its authority? By advocating for parliament to be the sole adopter of the constitution are we implying that parliament is above the Constitution and so has the power to adopt it? In order to come up with a sound analysis, it is important to look at what has been said by the two schools of thought identified in the question. But before we do that, it is important to remind ourselves about the purpose of law. What part does law plays in our midst? Law enactment must be regarded generally as a social issue and the law itself as a social tool, which should be used with care to solve social and economic problems. This means therefore that our legislators should be limited to our written Constitution. If the Legislators are limited by our Constitution, we can therefore conclude that they are not the sovereigns. And if they are not the sovereign, who then is the sovereign in our legal system? One way to deal with that would be to maintain that in such a case, it is the persons having the power to adopt the Constitution who are the sovereign. In this case, like in the United States where the Constitution is supreme, the electorates have the power.¹⁷ The implication of this provision is that, the people shall be the main and only body that shall have a final say over what kind of adoption method they are going to use and through what body. *Therefore, if the sovereign is the people, then Austin's conception of law as involving a relation of habitual obedience between the sovereign and the subject becomes trained to the*

¹⁷ See Article 1(2)

*breaking point.*¹⁸

Accordingly, the State cannot claim that Parliament is the only legal body in Zambia that has the authority to adopt the constitution. The people must have their say in the matter. And besides that, Zambia is a democratic country, which simply means, a government by the people for the people and of the people. Important changes that pertain to the human rights of the people cannot be left in a small group of people to tamper with, more especially if that group has got a reputation of disregarding the wishes of the people. Article 79 of the Constitution states that part III of the Constitution cannot be altered without putting it to a referendum. The implication is that, Parliament has limited rights under the Constitution and these rights are only concerned with amending other parts of the Constitution. But once we talk of adopting a new constitution that will touch on Part III, then the task is beyond parliament. The people in that case must have a say. In other words, *putting the adoption to the people is another way by which a constitution may be adopted.*

So while proponents of the adoption of the Constitution through Parliament may argue that it enjoys legitimacy having been popularly elected in a free and fair election, therefore it reflects the will of the people of Zambia. The president was elected on less than 29% of the total vote that was cast during the last election. Who then will represent the other 71% of the people that did not vote for him? If we go by the views of **Bentham**, we are going to find that he is promoting the interest of the majority. The business of government, according to him, was to promote the happiness of the society

¹⁸ Benditt. Laws, Rules and Principles. Stanford University Press. London. 1978:66

by furthering the enjoyment of pleasure and affording security against pain. 'It is the greatest happiness of the greatest number that is the measure of right and wrong.' In other words, the law must tilt in favor of those who make the majority. Therefore, if the majority of the Zambian people decide that the adoption of the Constitution shall be by whatever method, that is a political decision rather than a legal one.

Government as representatives of the people cannot claim to have a better road map than what the people themselves have decided for themselves. And if it is a political decision made by the people, through consensus, it is up to the people themselves to give it the validity that it needs. Therefore, in a system where the government in power does not enjoy the full support of the people as was evidenced by the vote they received, they should listen to the people more than to themselves.

In proposing the importance of adopting the constitution through a Constituent Assembly one can also consider the failures of the past constitutions that Zambia has had since independence. Why have these Constitutions failed to stand the test of time? These failures can be attributed to the fact that the people have not sanctioned the past Constitutions nor have they derived their legitimacy directly from the people. This direct sanction of the people does not imply representation by deputies in parliament but rather the direct participation of the individual. On the other hand, a Constituent Assembly ensures direct participation of the individual, as the composition of the assembly will be larger, more inclusive and broad

based.¹⁹

It is further argued that although the constituent assembly will not necessarily include every Zambian, it is contended that it will at least achieve proportional representation and besides that, parliament itself will be represented on that group. Therefore, it could be argued that law enactment, as a tool for economic and social development should be regarded as a two-way dimensional exercise involving a reciprocal duty relationship by which the performance of the parties can be evaluated.

The point we have reached thus far is this, a legal system must try to embody not only rules of various sorts, but also many principles. It must look to intuition or reason and to what is the reasonable thing to do in the circumstances. Laws are good only if they reflect and appeal to the time and place fitting to the current. If the Law was good when it was enacted at a particular time and place, it might not be good at another time in the future. In other words, a strict observation of the law should not be allowed if it would lead to the oppression of the weak. This is because most laws in Zambia were written to push a particular agenda in the minds of those in power. They may have gone through the procedures that are so critical to a positivist and yet the intention of the initiator of the law was to discriminate and oppress against another human being. Therefore, even though certain critics may scoff at natural law it has no form and varies from one area to the other.

¹⁹ Carlson Anyangwe. *The Zambian Constitutions*. Zambia Law Journal, Volume 29. 1997

CHAPTER THREE

3.0 ABORTION AND POLYGAMY/BIGAMY IN ZAMBIA

In this chapter we will examine the law on abortion and the polygamy/bigamy issue in Zambia. We will further look at whether the law is, as it ought to be or not, in terms of these subjects. The first part of the chapter will look at abortion in Zambia, in terms of the ‘is’ and the ‘ought’ of the law. The second part of the chapter will bring out the two issues of polygamy and bigamy, and how most people in Zambia fail to notice the difference between the two.

In Zambia like any other society, one danger of arguing for or against a position is that everyone thinks you are saying, “*there ought to be a Law.*” Take the issue of discrimination on the basis of sex or gender as an example. If you argue against it, people assume you want to prohibit discrimination. If you argue for the right to discriminate, they assume you want to return to the old laws of relegating women back to the kitchen.

“*There ought to be a law*” is the unspoken message underlying much of public discourse. And that message makes people reluctant to listen impartially because agreement might lead to yet another regulation. On the issues that the writer will be addressing, a legal view as well as a personal view or opinion will be given. This is because the issues will involve in the author’s opinion, personal ethics, and public policy.

What is *the law* on a particular issue? Lawyers are usually interested in answering this question before proceeding to substantive issues. To them everything has to have a basis in the law if they are to address themselves to it. The answer to the above question will be one part of the focus of chapter three while the other will deal with the ‘ought’ aspect.

3.1 The Abortion Laws in Zambia

In this part of the chapter we will discuss the 'is' of the law in terms of the controversy on abortion.

The laws dealing with abortion in Zambia are the Termination of Pregnancy Act 1971,²⁰ the Penal Code,²¹ and to some extent the Constitution of Zambia (1991) (as amended 1996)²² by its recognition of the child's right to life and protection against the arbitrary deprivation of its life.²³

Before 1972, the Penal Code was the law mostly used in dealing with abortion cases. To this date as will be later shown, the Penal Code is still extensively and exclusively used by the police in dealing with abortion cases.

Sections 151, 152, 153, and 221 deal with different situations under which persons may be found guilty of felonies in relation to abortion. Under section 151, any person who with intent to procure the miscarriage of a woman by unlawfully administering or causes her to take any poison is guilty of a felony. Section 152 deals with the situation where a woman unlawfully administers to herself any poison intended to bring about an abortion.

3.2 Termination of Pregnancy Act 1972

This Act was enacted as a response to the ruling in the case of *The People vs. Gulshan, Smith and Finlayson*.²⁴ The facts of the case were that three doctors were charged with conspiring to procure an abortion contrary to sections 151 and 394 of the Penal Code. The charges arose when one Rosalinen Gulllaid, an unmarried expatriate and administrative assistant at a certain college visited the accused's surgery. In August 1970 she thought she was pregnant and so wished to verify that fact, and if possible, have the pregnancy terminated.

²⁰ Chapter 304 of the Laws of Zambia

²¹ Chapter 87 of the Laws of Zambia

²² Chapter 1 of the Laws of Zambia

²³ Article 12(2)

²⁴ (HP) No. 11 of 1971

Dr Gulsham confirmed her suspicions where upon she asked for termination because according to her, she could not afford to have the baby and that she had to go back to the United States to get married after her contract came to an end, whereupon her pregnancy was terminated. The reason advanced on the termination form signed by Dr. Gulsham was:

“Emotionally unstable and cannot cope with the pregnancy.”

In November of the same year, she had another pregnancy terminated and the reason this time was

“Threatens to do anything to get rid of the pregnancy which she cannot cope with.”

At the trial, the substantial reason given by the doctors turned out to be personality disorder. The doctors pleaded not guilty stating that they had acted in good faith. Two other doctors were called and they confirmed the reasons for terminating the pregnancy. In answering the question “what is unlawful abortion?” the learned Chief Justice adopted the judgment of

Mac Naughten J. in R vs. Bourne²⁵

He stated: “In my view, I would lay down the law as being that an abortion is lawful where it is done in good faith, and with reasonable grounds and adequate knowledge to save the life and prevent grave permanent injury to the physical or mental health of the mother.”

Furthermore it was held that the burden of proving that the procurement of an abortion was unlawful beyond any reasonable doubt fell on the prosecution. Since the prosecution failed to do so in this case, the three doctors were acquitted.

Shortly after this ruling in 1971, the Zambian Parliament enacted the Termination of Pregnancy Act on Friday 13th October 1972 after much debate. According to Kaunda²⁶ most members of parliament greatly opposed passing the bill arguing that the foetus has an inviolable right to life. The then Minister of Legal Affairs and Attorney General, Mr. F. Chanda settled the MPs feelings by stating that the enactment of the Act would actually make the law more strict since it would require three doctors of which one was a specialist to determine genuine medical grounds for an abortion and that this was more restrictive than the then existing law which allowed for termination of a pregnancy if the parents or the husband of the woman were

²⁵ (1938) 2 All ER 615

²⁶ Kaunda S, Abortion Law in Zambia, Is it Adequate (1998) p.14

available and signed a consent form. The health of the woman was still given primary consideration during the debate and thus finally the bill was enacted into statute law.

After the enactment of the Act, some organizations and in particular the catholic church raised strong oppositions against the provisions of the Act arguing that the circumstances under which an abortion could be performed were so wide and open to abuse and that there would be serious repercussions brought on by the new law.²⁷

The provisions of the Act are indeed wide and have been subject to abuse to the effect that abortion is not even illegal in Zambia under the Act.

Section 3 of the Termination of Pregnancy Act provides that:

S. 3(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if and two other registered medical practitioners. One of who has specialized in the branch of medicine in which a patient is specifically required to be examined before a conclusion could be reached that the abortion should be recommended, are of the opinion, formed in good faith:

- a) That the continuance of the pregnancy would involve:
 - 1) Risk to the life of the pregnant woman
 - 2) Risk to injury or mental health of the pregnant woman; or
 - 3) Risk of injury to the physical or mental health of any existing children of the pregnant woman, greater than if the pregnancy were terminated, or
- b) That there is a substantial risk if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

In the author's opinion, terms such as "*risk of injury to the mental or physical being of the pregnant woman or the foetus...*" have not been defined by the Act and as such the provision is open to abuse since the determination of the matters appears to be a subjective one left in the hands of the doctor.

²⁷ Declaration of the Zambia Episcopal Conference on Abortion (1972) p.6

Under the Act, there is need to have three doctors present before an abortion can be carried out and one of these should be a specialist. This rule is however not strictly adhered to. Rather all that is obtained are the signatures of three doctors. This is the state of things at the University Teaching Hospital (UTH).

This being the state of affairs at UTH, it is not surprising to find that the numbers of abortions that are performed at the hospital are higher than they would be, if the law were strictly adhered to as was initially intended during enactment. Thus between the years January 2002 and September 2005, there have been 512 abortions that had been conducted. The procedure is done at a prescribed fee of K10, 000 and this fee has seen an increase in the number of abortions performed. Between August 2003 and March 2005, the fee was K200.000 but after seeing a decrease in the number of patients at the hospital, administrative policy demanded that it be reduced to the current fee of K10, 000 and hence the recent increase in the number of abortions.²⁸

3.3 Moral Arguments Against Abortion

In this part of the chapter, we will deal with the '*ought*' question. Is the law on abortion what it ought to be or not?

It can be safely stated that the anti-abortionists' appeal against laws that liberalize abortion are firmly rooted in religious, ethical and moral grounds. They argue that when abortion becomes a matter of personal choice, it signals the abandonment of the respect for life.²⁹

In effect, the focus is on the sanctity of life and the felt need to protect the foetus, which is seen as a voiceless human being, against destruction. Christians take the lead on the aspect of sanctity of life and uses the Holy Bible as its authority for holding the view that all life is sacred and sacrosanct. They see life as a divine gift from God and belonging to him. As such, no person has any right to take the life of another. Naturalists have their foundation in this belief as well.

²⁸ This was according to statistics given at the UTH.

²⁹ Sarvis B. and Rodman H; The Abortion Controversy. (1974) P.23

Chewe,³⁰ in her paper on abortion law discloses that in African traditions, children were generally regarded, as a sign of wealth and instances of abortion were rare due to the fact that early marriages were quite common and there was thus no such thing as an unwanted child. It was only when there was a pregnancy out of wedlock or as a result of rape or incest that abortion was resorted to. Even under these circumstances, the act was conducted in secrecy. This indicates then that abortion must have been regarded as an evil act.

Pro-abortionists have attacked the above views and beliefs. According to them, personhood at conception is a mere religious belief and not a provable biological fact. They point to the fact that religions differ on the definition of 'persons' or when abortion is morally justified. For instance, they say that Mormon and some fundamentalist churches believe in personhood at conception; Judaism holds that it begins at birth whilst ensoulment theories vary widely within Protestantism.³¹ With much vigour, they go further in their arguments by stating that if fertilized ova were considered persons, we would require them to carry passports, be counted in the census and be registered and buried, including all spontaneously aborted foetus.³² Indeed, they conclude that if abortion were considered by society to be murder, there would be millions of women behind bars.

At this point, the alleged disparities in the concept of personhood by the different faiths indeed appear to weaken the anti-abortionists' argument. However, anti-abortionists still firmly believe that the foetus is a human being who should be given the protection of the right to life as any other human being.

3.4 Why Abortions should be regarded as illegal

Laws supporting abortion kill babies:

To prohibit abortions vastly decreases them. Abortions should only be absolutely necessary in only two cases; the mother's health or the baby's health.

A fetus is more than a piece of tissue:

³⁰ Chewe A.K; The Effectiveness of Abortion Law in Zambia; (1996) P.19

³¹ <http://www.wcla.org/articles/procom.html>

³² Moore C. E; International Inventory On Induced Abortion. (1974). P.13

Neither science, medicine, nor philosophy supports capricious abortions. In fact, there is a narrow band of belief in science, medicine, religion, and philosophy that life is valuable, should be supported, and should not be killed when killing is reasonably avoided. In fact, those who believe strongly in science, in medicine, in religion, or in philosophy are some of the strongest opponents of abortion.³³

Legal abortion is discriminatory:

Legal abortion discriminates against babies. Any law, which allows the callous, cold-blooded killing of a life, must be considered as discriminatory. Law proscribes even the cold-blooded killing of animals, yet some campaign for less restriction on killing unborn babies. Legal abortions also discriminate against fathers.³⁴

The law is very clear on issues of abortion. It is a felony if a woman is with child and any person (including the woman herself) unlawfully administers to her any noxious drug or unlawfully uses any instruments, etc., with intent to procure her miscarriage. It is otherwise if it is done in good faith in order to save the life of the woman, or to prevent her becoming a physical or mental wreck.³⁵

Further, the felony committed by any person who with intent to destroy the life of a child capable of being born alive, by any willful act causes a child to

³³ <http://www.mrdata.net/books/9reasons.htm>

³⁴ Ibid

³⁵ P.G. Osborn. A Concise Law Dictionary. 1964:3

die before it has an existence independent of its mother is called child destruction.³⁶

There is of course charged controversy over a pregnant woman's right to opt for the termination of her pregnancy where the woman's life or physical health is endangered if pregnancy were to be carried to full term. For pro-woman activists, it is the woman's right to choose to end her pregnancy, while those who support a pro-life position, such a choice is an abortion, which must be equated with murder. Under the legal orders of a number of foreign states, human embryos and fetuses are not accorded full legal status as legal persons.³⁷

In Zambia, before 1973, B.A. Doyle, said, '*An abortion is lawful where it is done in good faith, and with reasonable grounds and adequate knowledge, to save life or prevent grave permanent injury to the physical or mental health of the mother.*'³⁸

Regardless of the fact that the law is clear on this issue, young girls and women usually those who are unmarried treat pregnancy and the life they carry within so lightly. They behave as though what they are carrying is of no consequence. Once they get pregnant and discover they do not want the child, they simply terminate it as though it was a mere inconvenience. *Is the law what it ought to be then on the subject or not?*

³⁶ ibid p.69

³⁷ Simon E. Kulusika. The Rights of the Foetus: An Overview. Zambia Law Journal. Volume 36 of 2004.

³⁸ The People v. Bill Gulshan. Michael E. Smith and John D. Finlayson (1971) SJS 30 at 31

There is no problem with the law as it is written down; the problem is with the attitudes of the people and the implementers of the law. The people in charge of putting it into effect do not put in much effort. Young women abort all the time without anyone bothering to report them. And even if they were to be reported, it is not clear whether anything would be done. Usually people are never concerned about matters, which do not touch them on a personal level. They just equate it to the fact that if a pregnant woman wishes to terminate her unborn child, then it is her business.

However, the above should not be the case. Although the law sometimes makes demands on us that we feel are harsh, it always tells us what we must do, not merely what it would be virtuous or advantageous to do. And it requires us to act without regard to our individual self-interest but in the interests of other individuals, or in the public interest more generally. That is to say, law purports to obligate us. But to make categorical demands that people should act in the interests of others is to make moral demands on them. And as such these moral demands must be extended to the unborn child. Life does not only begin at birth but rather at the moment of conception when the sperm fertilizes the egg.

Every person therefore, should be made to be responsible for his or her actions. When a young woman engages into sexual intercourse, she should be able to take into consideration all resulting consequences, for to every action there is a result. The moment she conceives, she has a moral and legal obligation to take full responsibility for her actions.

The Christian view on the status of the foetus is based on the fundamental theological postulate of the origin of creation and the sanctity of life. God Almighty is the creator of everything in the heavens and on earth. He is also the giver of life and He is the only one who can take away the life of a

human being. Accordingly to the Christian teaching, a foetus is the creation of God and no one has the discretion to destroy it. This argument is advanced on the basis that life begins from conception.³⁹

There is therefore need for everyone to recognize the fact that a person (human being) possesses a right by virtue of being a moral person, and so a foetus should be treated in the same manner although it has not proceeded out of the womb. Therefore, lawmakers should ensure that there is more rigidity in terms of the law on abortion. As Feinberg stated, ‘A highly developed foetus is much closer to being a commonsense person with all the developed traits that qualify it for personhood...’⁴⁰

In essence, the foetus becomes a moral person at the moment of conception because a human being’s life span is a continuum and one stage of development cannot be detached from the others without causing fatal disruption. It is meaningless to focus on viability as the sole stage where the foetus becomes a moral person and ignore the critical moment of conception.⁴¹

³⁹ Opct at p.120

⁴⁰ Quoted from Simon E. Kulusika. The Rights of the Foetus: An overview. Volume 36 of 2004:12-127.

⁴¹ Ibid

3.6 Polygamy/Bigamy in Zambia

3.7 Polygamy

In this part of the chapter, we will first of all establish the ‘*is*’ part of the law before we move on to the ‘*ought*’ question. Proponents of this assertion state that the law is as it is (i.e. posited by the law makers) not as it ought to be.

Therefore, as long as procedure has been taken and people abide by it then it is law regardless of what anyone else might say.

*Mankind has practiced polygamy-a state of having more than one spouse, for thousands of years. Many of the ancient Israelites were polygamous, some having hundreds of wives. King Solomon is said to have had seven hundred wives and three hundred concubines. David had ninety-nine and Jacob had four. Advice given by some Jewish wise men state that no man should marry more than four wives. No early society put any restrictions on the number of wives or put any conditions about how they were to be treated. Jesus was not known to have spoken against polygamy. As recently as the seventeenth century, polygamy was practiced and accepted by the Christian Church.*⁴²

Monogamy was introduced into Christianity at the time of Paul when many revisions took place in Christianity. This was done in order for the church to conform to the Greco-Roman culture where men were monogamous but

⁴² file://A:\polygamy.htm

*owned many slaves who were free for them to use: In other words, unrestricted polygamy.*⁴³

There are three kinds of polygamy practiced in western societies:⁴⁴

1. Serial polygamy, that is, marriage, divorce, marriage, divorce, and so on any number of times;
2. A man married to one woman but having and supporting one or more mistresses;
3. An unmarried man having a number of mistresses.

Polygamy is a practice that is allowed in African societies. In Zambia where we have a dual system of law, one can either marry under customary law where polygamy is allowed, or under statutory law where only monogamous marriages are allowed. There is only one choice to make; one cannot have the best of both worlds.

3.8 Marriage in Zambia

Mushota,⁴⁵ in her book entitled '*Family Law in Zambia*' stated that ***“parties to a marriage may marry under civil law and be governed by the Marriage Act, Chapter 50 of the Laws of Zambia and other written laws, common law and rules of equity, or they may choose to marry under customary law that applies to them, or in the case of inter-ethnic marriages, a customary law of one of the parties to the marriage.”***

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Lillian Mushota. Family Law in Zambia. Cases and Materials. 2005:55

In practice although the people of Zambia largely marry under customary law, the vast majority of those who choose civil marriages also combine with processes required for contracting a valid customary marriage, such as engaging into marriage negotiations through families, they depend very much on the consent of parents, without which there can be no marriage.⁴⁶ The two laws are blended without one disrupting the other.

The Marriage Act recognizes customary marriages, which are valid under the customary laws of the parties. Customary marriages are potentially polygamous and include essential elements such as consent of the parents, payment of *lobola* and other marriage payments.⁴⁷

3.9 Bigamy

This is a criminal offence of having two or more wives or husbands at the same time.

Both the Marriage Act,⁴⁸ and the Penal Code hold that it is an offence for a man or woman who is already married to contract into a second marriage while the other spouse is still living.

The onus is always on the prosecution to establish the case beyond all reasonable doubt. There is no burden on the accused to establish his innocence and if upon consideration of the whole of the evidence adduced I am left with a reasonable doubt the accused is entitled to an acquittal.⁴⁹

Under section 166 of the Penal Code, the offence of bigamy is committed if a person whose spouse is still living goes through a ceremony of marriage with another which, but for the earlier subsisting marriage, would have

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ S.38 of Cap 211

⁴⁹ The People V. Nkhoma. (1978).

resulted in a valid marriage. If a competent court has declared the earlier marriage void or if the earlier spouse has not been heard of as being still alive for a continuous period of at least seven years before the second marriage, these factors constitute a defence. It goes without saying, also that if the earlier marriage has been validly dissolved before the second marriage, the offence cannot be committed. Mistake of fact is also a defence if at the time of the second marriage; the accused honestly believed that the first marriage had been validly dissolved. This defence was recognized and considered by Forster, A.J., in the case of *The People v. Frank Chitambala*.

The offence of bigamy is one example of certain laws, which are sometimes totally strange once transported from England to Zambia, and once they are applied to indigenous Zambians. In England polygamy is a totally unacceptable state of affairs. There, the only marriage the law recognizes is a contract for the voluntary union of one man and one woman to the exclusion of all others, until that union is terminated by death, or is dissolved or annulled by statute or by decree of a competent tribunal. It is therefore an offence to have a plurality of wives.⁵⁰

The English law on bigamy was brought to this country with the obvious intention that it should regulate the marital affairs of the white immigrants. It was for this reason that up until 1963, this law did not apply to indigenous Zambians who were not at liberty to marry under the Marriage Act.⁵¹

This law did not apply to the indigenous Zambian for the simple reason that polygamy is a well-established institution, which is governed by the various customs or customary laws of the parties concerned. To this day, a plurality of wives is still lawful provided that the person concerned steers well clear of the Marriage Act and those Christian Churches, which recognize monogamy and monogamy only.⁵²

From 1963, the law was amended to allow those indigenous Zambians who so wished to contract a one man and one-woman type of marriage. In terms of s. 166 of the Penal Code, bigamy is committed whenever the second marriage is void by reason of a subsisting first marriage. In the premises bigamy can be committed where a marriage under the Act takes place when another marriage under the Act is subsisting, as in the *Chitambala* case, or

⁵⁰ Muna Ndulo. A Case Book on Criminal Law. 1982:303

⁵¹ Ibid

⁵² The People V. Nkhoma (1978) P.304

where a marriage under the Act takes place where a customary marriage under the Act will be void since there would result two wives, which that law does not accept.⁵³

Having established the ‘*is*’ part of the law, we will now turn to look at the ‘*ought*’ part of the law. *Is the law what it ought to be or not?*

In Zambia, cases of men committing the offence of bigamy are so common such that it has almost become a norm. The problem is that in Zambia we have a dual system of law being statutory and customary law. The former allows only the marrying of only one woman while the later as many as a man might want. Men in general tend to overlook the strict rules and apply a double standard. It does not matter to them whether one wife is married under customary while the other under statutory law. To them it is of no consequence. This system has become so common place such that even the women affected do not feel like doing anything about it for fear that they might end up homeless if the man ends up choosing the other woman. Therefore women tend to turn a blind eye to such occurrences. It was established in the *Nkhoma* case that comparing the two provisions of s.38 of the Marriage Act and s.166 of the Penal Code, brings us to the same conclusion, that, a customary marriage is equally a valid marriage for purposes of considering a second “Marriage Act” marriage as bigamous.

However, there have been a few cases where women and men affected have stood up for their rights and taken the bigamous man to court.

⁵³ Ibid

There is definitely need to revise the current law on bigamy. The 'ought' of Law demands that before any law is enacted, the needs and aspirations of the people should be taken into consideration. What is the purpose of having a law that only manages to bring confusion and does not sort out any problem. In the author's opinion, it would have been better to have left the state of affairs where marriage is concerned, the same as they were before statutory law came in. statutory law has not really solved any problems. The majority of the Zambian people still contract into customary marriages, even those who are educated.

Therefore, it is imperative that men and women should be educated on the importance of such issues. It is to be hoped that some sense could be drummed in men and who are educated and know about this law yet do not understand the seriousness of their actions. Or else, it would be better to revert to the old ways of doing things.

CHAPTER FOUR

4.0 CONCLUSION

In this paper, our task has been to critically analyze the Positivist and Naturalist conception of law. This has been achieved by first having looked at the way each school of thought views law and then going on further to critically analyze the various weaker points of each school. Lastly, the paper has supplied its own view of what the law should be in terms of the *Constitution* of Zambia, *abortion* and *polygamy/bigamy* in Zambia.

Legal positivism, in its widest sense, is the view that the study of the nature of law is a study of law *as it is*, and not of law *as it ought* to be. The word ‘is’ connotes the existence of some fact or set of facts determined by observation and experiment-by empirical means.⁵⁴

Therefore, there is nothing objectionable, according to positivists, in discussing the merits of laws and suggesting reforms, but only from the data on the law as it actually exists in the legal system of various societies. In legal theory, it requires mainly the factual identification of the law in making such analysis, only such material as can be factually identified as being legally relevant should be taken into account. According to positivism, first of all, there is a morally neutral test for determining what the law is thus binding on both citizens and legal officials. This is because the law is a distinct phenomenon which can originate, exist and be explicable only within its own terms, even though it may have some similarities or connections with other social phenomena such as morality, religion, ethics

⁵⁴ Finch. Introduction to Legal Theory. 2nd Edition. Universal Law Publishing Co. 1954:19

and so on. Positivists are mainly concerned with the definition of law, so as to differentiate it sharply from other theories and so as to identify with certainty the political schools which have the characteristics of law.

The distinctive feature of positivism is its love for order and procedure. The maintenance of the legal order in a state requires that somebody's ideas about what the law should be must be rejected in favour of somebody else's ideas about what it should be. It requires in short political authority to make laws, to enforce and administer laws, and thus determine what laws have this authority, to the exclusion of what other people may believe they should be.

Most positivists like *John Austin* view law in its proper sense as a command; a command, which is significant of desire, directed by one rational being to another rational being and backed by a threat of evil if the wish is not complied with. For one thing, command and duty are according to Austin, correlative terms. The threatened evil for non-compliance is called a sanction, and whenever there is a sanction in the offing there is a command, thus a duty. Accordingly, the notion of a command implies a relation of superiority and inferiority. Superiority in this account has to do with power.

The problem that arises with Austin's conception of law comes from how one is supposed to identify the sovereign in a system like ours where the constitution is the supreme law of the land. Who then is the sovereign in our set up? Is it the people as citizens or is it the legislature? To say it is the legislature would be wrong because the constitution is the mother to the

legislative institution.⁵⁵ It gives birth to it. It is also clear that in our modern society, there may be none that has all the attributes of a sovereign, for ultimate authority may be divided among organs and may be limited by law.

What the law should be and what it is, is not an easy matter. The officials who administer and apply the law may well have different ideas as to what it should be from those of the legislators who enacted it or the judges who declared it; and the adjudicator's ideas may be enforced by him as law.

Another problem that arises is that not all laws emanate from the will of a sovereign. Sometimes customs are properly recognised as laws by the courts more especially in our set up and even by our constitution. On the issue of marriages contracted through customary law, these are held to be potentially polygamous even though statutory law does not allow such. This is because in our set up, polygamy is allowed as long as one marries under customary law and does not make a mistake of marrying under statutory law to another spouse. Our customary law cannot be said to be an expression of the legislative will. Therefore treating all laws as commands conceals important differences in its social functions. For example, laws conferring the power to marry command nothing; they do not oblige people to marry.

Another criticism of positivism is that it fails to give morality its due. For instance, on the controversy of abortion, the law allows one to abort as long as they give reasons that are specified for in the Termination of Pregnancies Act. This Act has been thoroughly abused, in that pregnant women merely have to claim under the specific given in the Act as to why they would like

⁵⁵ See Article 1(4)

to terminate a pregnancy, and they would, without anyone questioning the rightness or wrongness of it. This is morally wrong, yet positivists would aver that the law is at it is. Morality is about common good that is inherent in each one of us. If laws are to be given life, they need to reflect its moral character. It is beyond doubt that moral considerations are relevant and must be reflected in our law. As *Finnis* says, the reasons we have for establishing, maintaining or reforming law include moral reasons and these reasons therefore shape our legal concepts.

The central claim of a theory of the law is that *what naturally is, ought to be*. The 'is' implies the 'ought' as a necessary consequence of its existence. The law of nature ought to be the governing law for all things, including mankind and human relations. The fundamental hypothesis behind this theory is that there is a law or a body of laws, which governs all things, whether these be gravity, motion, physical and chemical reactions, animal instincts or the action of man. It might be said that the law of nature ordains certain actions and reactions and the corollary might be added that anything, which happens to the contrary, is happening contrary to nature. Its advantage is in its universal applicability and flexibility. The law of nature stands as an eternal rule to all men, legislators as well as others. Therefore, if the law is found to be repugnant with nature, that law is bad and need not be followed.

Law derives from our right to defend ourselves and our property, not from the power of the state. If law was merely whatever the state decreed, the concept of the rule of law and legitimacy could not have the meaning that they plainly do have.

Natural law theory is often condemned as basically reactionary, untrue, inadequate and derived from questionable logical foundations. This is because the advocates of natural law are not logically consistent. They shift from one extreme to the other so much that it is difficult to say what their definition of law is. Mostly, the definition will be in accordance with the nature of man trying to define it.

Naturalists are wrong to place a strong connection between law and morality. Although law may sometimes reflect morality, the two are distinct phenomena and should be recognised as such. An analysis of the one should therefore not impinge upon our conception of the other. A law can be valid because it has been created validly, even though it may offend our moral sensibilities.

Morality is a matter of personal value judgements, which may change erratically for a variety of reasons. It is therefore undesirable to base the development of law, with its necessary requirement for certainty and predictability, on moral considerations, as the Naturalists would have us do. The appeal by some Natural law theorists to the existence of a higher law, which should be a measure of moral and legal propriety, is an appeal to irrationality, since it is not possible objectively to demonstrate the existence of such principles.

Our general concept of law should however depict law as a general rule of human conduct, which should engulf the whole community without being personal in nature. Force should be the essence of this law so that whenever

it is passed it should be enforced. If the law cannot be enforced, it loses its effectiveness.

From the above analysis of both theories, the view that is presented to us is that law has been reduced to a one-dimensional exercise. Each concept of law emphasises one Supreme Being as the law giver. The naturalists state that the law should emanate from a sovereign being while their counterparts contend that it should be legislated by an intelligent being that is above everyone else. This simply excludes 95% of the people from the equation from full participation in the law making process. People need to participate and make contributions in any area that concerns them. Therefore the state as well as the populace needs to merge in the process of law making so that whatever law comes out will be a product of the majority of the people and not a privilege of the few.

Finally, the shortcomings in the theories of natural law and positivism have motivated writers like **Fuller** to adopt a harmonization of the two theories. Fuller says that his approach has nothing to do with any “**brooding omnipresence in the skies.**”⁵⁶ Fuller sees the need for moral considerations but he attempts to give his theory some definite dimensions and purpose. Fuller’s adherence to natural law, he says, is motivated by his attraction to the “**good order**” and “**workable arrangement**” of the natural law but by its commitment to ultimate ends. His view is that law enactment should be a two dimensional exercise involving both the citizens and the rule maker. And the writer is definitely in full agreement. This would be the only way to solve a lot of problems that Zambia is facing right now.

⁵⁶ Lon Fuller, the morality of law. 1996:96

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