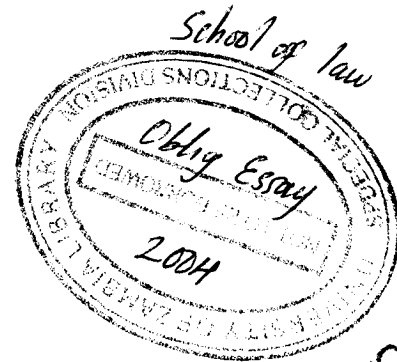


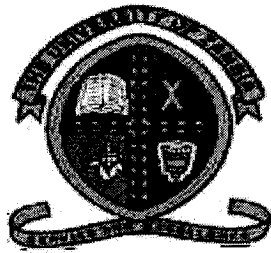
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STUDY ON THE CONTROVERSY
SURROUNDING THE MEDIA BILLS.

BY

HAMWELA, AUGUSTINE, M.



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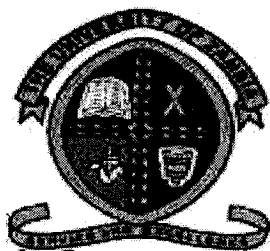
**THE IMPLICATIONS OF ARTICLE 81 OF THE ZAMBIAN
CONSTITUTION ON THE PRINCIPLE OF PARLIAMENTARY
AUTONOMY; A CASE STUDY ON THE CONTROVERSY
SURROUNDING THE MEDIA BILLS.**

BY

Hamwela, Augustine, M.

**A Dissertation paper submitted to the University of Zambia in
partial fulfilment of the requirements for the award of the
Degree of Bachelor of Laws (LL.B)**

NOVEMBER 2004



THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the dissertation paper prepared under my supervision by Hamwela, Augustine, M., entitled:

The Implications of Article 81 of the Zambian Constitution on the Principle of Parliamentary Autonomy; a Case Study on the Controversy Surrounding the Media Bills;

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to the format laid down in the regulations governing dissertation papers.

**Mr. Enoch Mulembe
(SUPERVISOR)**

DATE

DECLARATION

I, *Augustine M. Hamwela*, Computer Number: 99163055, DO HEREBY declare that the contents of this Dissertation Paper are based on my own findings. The works used herein that are not my own, I have endeavoured to acknowledge.

I, THEREFORE, declare that all errors and other shortcomings contained herein are my own.



SIGNATURE

DATE

DEDICATION

For my beloved mum and dad, Bertha and Augustine, who taught me to see, less and less with my eyes, more and more with my mind. You saw the dream you planted take flight; now behold the reality.

ACKNOWLEDGEMENTS

The moment I have long feared is glaringly before me. How does one express one's gratitude when one has so many people to be thankful to, so many blessings to be grateful for? My heart goes out to all of you good people I mention here. Please do not think me ungrateful if I fail to prove worthy of the task. Kindly charge it to my head; rest assured, I thank you in my heart.

I am grateful to God for his great and unfailing love and grace-the primary reason I am writing these words today. He has been faithful to me; a silent mentor, a constant guide. His presence in my life has been and, I pray, shall continue to be, as gentle as the breeze.. I thank his instruments, my parents, who have moulded me into what I am today.

I thank my aunt, Mrs Bibianna Chibomba Kalenga, who never stopped believing in me, for her love and support. I find myself at a loss of how to repay your kindness. While I am here, I thank, also, my cousin Twaambo, who never finished reading my Chapter One. Need I elaborate?

To the Gwaba's; Jones Regis, Muuka, Yolante, Twaambo, Bibianna and Frank, I say bravo! You are all such wonderful people. I couldn't have picked a better nursery. It is my constant prayer that God grant you, a hundredfold, the measure of love you have shown me, and others.

Thanks go to my two sisters on campus, Sara and Mutinta, for their faith in me, even when I most doubted, and for all those dicey nights on campus, when I could have gone hungry. You half wrote this paper! To the rest of my siblings, Chisengele, Sika, Virginia, Eunice, Paul and Chisuwu, never relent in your dedication and unfailing support. I, in my turn, will always endeavour to reciprocate; and for Mweemba, who has the great misfortune of having me as a role model.

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We shall not despair, for there is a greater love that holds us, and our memories will remain, much-cherished souvenirs.

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ABSTRACT

At the risk of monotony, one dares to add their voice to the age-old problem of flagrant excesses in governmental power. Where, however, the existing constructional framework of the nation exacerbates these excesses, it becomes necessary to rethink certain attributes of that framework, and to propose ways and means of stemming the problem. This issue acquires gravity when the source of the problem is, to a great extent, the written constitution of the land, that very sacrosanct document not amenable to constant tinkling, and usually perceived as containing unimpeachable wisdom.

This paper proposes a critical review and reformulation of Article 81 of the Zambian Constitution, for its perceived detrimental impact on the autonomy of the Zambian Parliament, that August house whose independence is a *sine qua non* to good governance, observance of the rule of law and ultimately, economic and social development. The experience, in the year 2002, with the Media Bills, clearly showed the hidden power inherent in that Article, and the use to which it can be put. The paper discusses these issues, and proposes changes to our constitution framework.

CHAPTER ONE

1.0 CONCEPTUAL BACKGROUND

1.1 Introduction

From age to age, much intellectual ink has spilt in countless endeavours to postulate the most efficacious techniques and laws for the governance of men. More spills today. The root of the problem cannot be put in a more articulate manner than Lord Acton stated nearly two centuries ago in his epic warning.¹

“Liberty is not a means to a higher political end. It is itself the highest political end....Liberty is the only object which benefits all alike and provokes no sincere opposition....The danger is not that a particular class is unfit to govern. Every class is unfit to govern....Power tends to corrupt, and absolute power corrupts absolutely.”

There is no practical difference, in the writer's opinion, between a lawless state, and one which, though it has laws, the same are mere window dressing; susceptible to be ignored at will. In the first case, those entrusted to govern, or more appropriately, those that entrust themselves with the mandate to govern-if that were possible-have the great fortune of not being encumbered by laws that strictly delineate their power. In the second case, the ruler takes little or no heed to the restrictive prescriptions written into the law. Sometimes, when he is very lucky, the very law that ought to impose limitations upon his power to govern confers upon him such an undue advantage, that it becomes an instrument, rather than a remedy

¹ Lord Acton. ‘*Power Corrupts*’ In Jim Powell. *The Triumph of liberty*. (2000) New York; Free Press

for tyranny. Needless to say, in both instances the resulting casserole is abusive, arbitrary, whimsical, and capricious rule; that avowed enemy of modern liberalism.

Various concepts have been contrived, or have evolved over time, to mitigate this manner of rule. Discussed in this chapter are four concepts of immense importance, *viz.*, democracy, constitutionalism, the rule of law, and the separation of powers. This paper asserts that Article 81 of the *Zambian Constitution*² offends each of these concepts, and is, to that end, a threat to good governance. Here, a concise conceptual background is laid, as a springboard for various arguments that are to follow later in the dissertation.

1.2 Democracy: the Ideal and the Practice

The liberal concept of representative democracy epitomises the modern idea of good governance. Implied by it are various principles, contrived over time, to the end of ensuring that those entrusted with the duty to govern, do so in manner that accords with the welfare of the governed, over and above their own. Gradually, the concept has tended to acquire a character worthy of a term of art. It imports certain key tenets of widespread acceptance.

‘Democracy’, is a common enough term. It is usually construed to mean, a government by the people, in whom the supreme power is vested, exercised on their behalf and for their benefit, by their agents, elected in a free electoral system. Rarely is an attempt made to define the concept, without reference being made to the now legendary words of

² Chapter 1 of the laws.

Abraham Lincoln. Democracy, he averred, is a government; 'of the people by the people for the people'.³

In sum, Professor B.O. Nwabueze adds his voice. He asserts:

“The underlying idea here is the popular basis of government, the idea that government rests upon the consent of the governed, given by means of elections in which the franchise is universal for both men and women, and that it exists for their benefit.”⁴

Ideally, ordinary citizens elect officials to make critical political decisions, formulate policy and administer programmes for the public good, in the name of the people. Such officials deliberate on complex public issues in a thoughtful and systematic manner that requires an investment of time and energy, which is practically impossible for the vast majority of private citizens.

The three fundamental attributes of any democracy are, constitutional government, equality before the law and respect for human rights. These are further divided into the various tenets or pillars of democracy, viz., sovereignty of the people, majority rule and minority rights, constitutional limits on government, government based on the consent of the governed, social, political and economic pluralism, values of tolerance, pragmatism, cooperation and compromise, and the guarantee of basic human rights.⁵

With particular bias to the present discussion, the tenets of constitutionalism, pragmatism, tolerance, cooperation and compromise, are particularly of the essence. These are normally absent in the infancy of a democracy. Conflicts of interest are bound to arise in

³ United States Information Agency (1991) *what is Democracy?* p 5.

⁴ B.O. Nwabueze. *Constitutionalism in the Emergent States*. (1973) London: C Hurst & Co. p 1.

⁵ Op. Cit

every society. It is a matter too plain to contest that such tensions are present in every democracy. Tolerance, then, becomes an indispensable virtue for any progressive democracy. Consensus must be arrived at by giving effect to the principle of 'give and take'.⁶

1.3 Constitutionalism

The concept under present discussion is inextricably intertwined with that of democracy. In fact, no regime can stake a genuine claim to democracy unless it is constitutional. As Wheare observes:

“Universal suffrage can create and support a tyranny of the majority or of a minority or of one man.... The absolutisms of the twentieth century have usually been based upon universal suffrage-and a compulsory universal suffrage at that. Have not modern tyrannies been returned to power by majorities of over 90 percent?”⁷

Professor Nwabwueze suggests that the litmus test for democracy is whether the government is limited by pre-determined rules.⁸ Herein lies the gist of the concept of constitutionalism. Like most necessitous things, government reveals a paradox. Nwabwueze writes:

“Government is universally accepted as a necessity, since man cannot fully realise himself - his creativity, his dignity and his whole personality - except within an ordered society. Yet, the necessity for government creates its own problems for man, the problem of how to limit the arbitrariness inherent in government and to ensure that its powers are to be used for the good of the society. It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism. Constitutionalism recognises the necessity for government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a “limitation on

⁶ Ibid at p 18

⁷ Wheare. *Modern Constitutions*. (1966) p 139, as cited in Supra note 3 at p 2.

⁸ Supra note 3 at p 2.

government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of laws”⁹. Arbitrary rule is government conducted not according to pre-determined rules, but according to the momentary whims and caprices of the rulers; and an arbitrary government is no less so because it happens to be benevolent, since all unfettered power is by its very nature autocratic.”

One fallacy must be dispelled at the outset. The mere fact that a country has a written constitution does not entail that its government is a constitutional one. Indeed, the constitution of the land is, most often, the bedrock of constitutionalism. The true test, however, is whether, in practice, the constitution imposes meaningful limitations upon the government.¹⁰ A constitution that leaves sufficient latitude for whim and caprice to sneak in can hardly be said to be the bedrock of constitutionalism.

A key question that Nwabwueze poses, one that is unavoidable in any concise exposition of the concept, is: what is the nature or extent of the restraints necessary to make a government truly constitutional? Is it possible to identify standard incidents that must be invariably present, individual and in sum? Professor de Smith answers this latter question in the affirmative. He writes:

“A contemporary liberal democrat, if asked to lay down a set of minimum standards may be very willing to conclude that constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective guarantees of fundamental civil liberties enforced by an independent judiciary, and he may not easily be persuaded to identify constitutionalism in a country where any of these conditions is lacking.”¹¹

⁹ C.H. McIlwain. *Constitutionalism; Ancient and Modern*. (1947) Cornell University Press. Pp 21-2 as cited in supra note 3 at p 1

¹⁰ Supra note 3 at p 2.

¹¹ de smith. *The New Commonwealth and its Constitutions*. (1964) p 106, as cited in supra note 2 at p 10

It is evident that a vibrant opposition is indispensable if an incumbent government is to be held accountable to the governed. Accountability “presupposes freedom on the part of the people at all times, directly or through their elected representatives, to question or criticise the actions of the government....”¹² It follows that any power in the government, enabling it to undermine legitimate opposition, is flagrantly inimical to constitutionalism.

Two further principles merit discussion, on account of the fact that they augment constitutionalism in any country. These are; the doctrine of the Separation of Powers and the concept of the Rule of Law.

1.4 The Separation of Powers

The need for differentiation of governmental function has been articulated in various ways by a myriad of scholars over the years. The famous words of John Locke, perhaps the forerunner of the doctrine, are, however, oft repeated for their force and clarity. He wrote:

“It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands, the power to execute them, whereby they may exempt themselves from obedience of the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government.”¹³

Montesquieu, largely inspired by Locke, asserted:

“Political liberty is to be found only where there is no abuse of power. But constant experience shows us that every man invested

¹² Supra note 3 at p 12.

¹³ John Locke. *Two Treatises Of Civil Government*. (1950; Vol. 751) London; J.M. Dent & Sons Ltd. p 190.

with power is liable to abuse it and to carry his authority as far as it will go. To prevent this abuse, it is necessary from the nature of things that one power should be a check on the other.”¹⁴

It has long been recognised that the functions of government are differentiable according to their distinctive features. The doctrine of the separation of powers advocates for the vestment of the three types of governmental function in three distinct organs of the state, viz., the legislature, the executive and the adjudicature. This is seen as a recipe for curtailing abuse of power. Originally, the concept was construed to mean three distinct things. Firstly, that the same persons must not constitute more than one organ of government; secondly, that no one organ should interfere or control, to any degree, the other organs; and finally, that no organ should exercise the function of the others.¹⁵

Lessons of experience have informed that strict adherence to these three principles would render government too inflexible, and governance virtually impossible. As such, various practices in modern governance depart markedly from their prescriptions. In practice, as professor Nwabwueze notes, ¹⁶it is inevitable that agencies will overlap in their functions, and so also may personnel. This fact, however, is merely a qualification rather than an out-and-out negation of the ideal of the division of function and agencies, since only one organ retains the preponderance of each particular function, so that exercise by any other organ is subordinate.

The American developed model of checks and balances also serves to augment the Separation of Powers. The idea of checks and balances presupposes that a specific function is assigned to a given organ, subject to a power of limited interference by

¹⁴ Montesquieu. *L'esprit Des Lois*, as cited by F.H. Lawson and D.G. Bentley. *Constitutional and Administrative Law*. (1971) London; Butterworths Pp 69-70.

¹⁵ B.L. Jones. *Garner's Administrative Law*. (1989; 7th ed.) London; Butterworths Pp 8 and 9

¹⁶ Supra note 3 at p 13.

another organ, to ensure that each organ keeps within the sphere delimited to it.’¹⁷In this way, each organ of the state acts according to pre-determined rules, on account of the checks effected by the other organs which act as watch-dogs. Ultimately, constitutional rule is reinforced.

1.5 The Rule of Law

This concept of utmost importance has no defined, nor readily definable content. It implies the subordination of all authorities; executive, legislative, adjudicative and others, to certain principles that would generally be accepted as characteristic of law. It also implies respect for the supreme value of, and dignity of the individual.¹⁸

Professor A.V. Dicey, regarded as something of an expert in this area, ascribed three meanings to the concept, two of which are briefly espoused here. In the first instance, Dicey avers that the concept entails ‘government under law’.¹⁹ This principle commonly referred to as the notion of ‘legality’, entails that for any action or forbearance, the responsible governmental body or officer must point to the law for their authority. Failure so to do renders the act *ultra vires*, and thus susceptible to impugnation by the courts.

The second meaning is that all persons are equally subject to the law; that no person is above it. Lord Denning put it succinctly when he wrote; ‘Be you ever so high, the law is above you’²⁰.

¹⁷ Ibid at p 20

¹⁸ David M Walker. *The Oxford Companion of law* (1980) New York; Clarendon Press. P 1092

¹⁹ Supra note 13 at p 12

²⁰ *Gouriet v Union of Post Office Workers and Others* [1977] CA

In modern parlance, however, the rule of law refers to a body of political opinion about what the detailed rules of law should provide in matters both of substance and of procedure. If the law is not to become merely a means of achieving whatever political ends a particular government may favour, the rule of law must go beyond the principle of legality. The inherited experiences and values of the legal system are relevant not only for the question; what legal authority does the government have for its acts? But also the question; what legal powers ought a government to have? Here, the issues of justice and fairness come in. Even though a law exists, further questions must be asked of it; is it fair and just? Does it reflect the moral values of society? What ought to be the appropriate law? Etcetera.

1.6 Conclusion

Very little can be added to what has been laid down above. Suffice it to say that democracy is an inescapable necessity in any modern system of government. It precludes the abuse of power that is virtually inevitable in any attempt at governance unrestrained. To be meaningful, however, democracy must be coupled with constitutional rule. This in turn entails adherence to the doctrine of separation of powers and the principle of the rule of law-the practical manifestations of modern limited government.

CHAPTER TWO

2.0 PARLIAMENTARY AUTONOMY: THE ZAMBIAN EXPERIENCE

2.1 Introduction

One may wonder why the issues raised by Article 81 of the Zambian Constitution have never arisen in all forty years that Zambia has been independent. This chapter demonstrates the reason. Before venturing to propose changes to our constitutional framework, it becomes necessary to assess where we have been, highlight where we have failed and suggest reasons why. This chapter sets out Zambia's experience in as far as the principle of parliamentary autonomy goes. It is the writer's contention that parliamentary autonomy is a *sine qua non* to good governance. This chapter will demonstrate that lack of the one, has contributed to the absence of the other, in these past forty years.

There is indeed much to be said about the virtues of an independent Parliament. The incumbent Speaker of the National Assembly, Honourable Amusa K. Mwanamwambwa, MP, put it candidly when he wrote:

“The National Assembly is the repository and custodian of the democratic ideals of representative and participatory government. It is the source of all legislation, which the Executive implements and the Judiciary adjudicates. Parliament is therefore the axis of the doctrine of Separation of Powers and the principle of checks and balances.”

“Parliament is where freely elected representatives of a free people debate and approve the nation's aspirations, ambitions and objectives. It is the duty of Members of Parliament to criticise the Government constructively and to hold it accountable, more efficient and mindful of its duty to the nation. Therefore, in its practice and procedure, Parliament should transcend

political, religious and social differences and work for the unity and development of the whole nation.”

“The Zambian Parliament has gone through a remarkable evolution since independence in 1964, growing in the number of Members, officers and Sessional Committees, in order to execute its functions more efficiently....”²¹

It is hard to deny the wisdom of the words in the first two paragraphs of this quote. To say, however, that there has been a ‘remarkable evolution’ anywhere near Manda Hill, over and above one of increased numbers, would, in the writers opinion to be substantiated hence, be to tell a lie. In this respect, quantitative over qualitative maturity is hardly worth writing home about.

2.2 The Ideal

Parliamentary autonomy is an integral component of any progressive democratic society. The crux of the issue is that, in the discharge of the executive function, government will, inevitably, interfere with the rights of individual citizens. The Parliamentary system is designed to provide a check on the executive, in the form of an independent, autonomous and robust legislature.

It is assumed, here, that MPs represent the interests of their constituents. The ideal situation is that the MP must explain to the constituents, the various decisions, and policies of the government. Conversely, the constituents must be given an opportunity to present their grievances to their local MP, who ought to follow up these issues with the relevant authorities. In an appropriate case, the MP should raise these issues in Parliament. Government can, in this way, be compelled to justify any decision taken, and

²¹ The Research Department, National Assembly. (2004; 2nd Ed.) Lusaka, Zambia.

at times, to abandon objectionable policies. All this presupposes that MPs owe their primary allegiance to the electorate.²²

MPs ought to be proactive; to have an unwavering eye on issues pertaining to the governance of the state, and to stand up and challenge any false step by the executive. Their ever-present voices in Parliament are a critical catalyst to good governance. A one party system, *de facto* or *de jure*, is lacking in this attribute. In a healthy democracy, where the legislature is truly representative, the incumbent regime has no choice but to compromise with the opposition MPs in the legislature, if they are to secure passage of their policies. They are, thus, kept on their best behaviour.

2.3 The Practice

2.3.1 1964 to 1973

As far as the Zambian experience, in these forty years that the country has been independent, goes, these ideals would sound utopian. At independence, Zambia was a promising multi-party democracy. As fate would have it, the United National Independent Party, UNIP, had won an overwhelming majority in the elections of January 1964. At independence, the country's Legislature was constituted of UNIP with 56 elected MPs, the African National Congress, ANC, with 8 MPs and the National Progressive Party, NPP, with 10 MPs elected on the reserved European roll. With this majority, UNIP was able to dominate proceedings in Parliament. From the early years, UNIP felt that a one party state was both desirable and inevitable. It was expected that

²² John Sangwa. Materials on Administrative Law: *The Presidential Parliamentary System of Government as a Non Judicial Mechanism of Administrative Control*. (Unpublished).

this would happen automatically through the ballot box, rather than via deliberate legislation. These hopes were dashed when the ANC increased its representation in Parliament to 23 in the 1968 elections. Although UNIP had won 81 seats, the fact that the ANC was growing, rather than decreasing in popularity, was a serious source of concern.²³

UNIP launched a massive intimidation campaign to either frighten ANC MPs or induce their defection. For instance, after 1968, the Speaker of the National Assembly refused to recognise the ANC as an Official Opposition Party, leading to its loss of perquisites. The MPs and other ANC members were harassed physically, denied amenities, discriminated against and victimised in various ways. This sustained harassment of the ANC led to massive defections by its MPs, so that -by 1971, the party only had 14 MPs in the National Assembly. There were no signs that the ANC would die a natural death. In 1972, former President Kenneth Kaunda announced that, in response to the demands by an 'overwhelming majority' of the people, Cabinet had decided that Zambia should become a One-Party State. This decision was implemented in 1973. Needless to say, during the period discussed above, Parliament cannot be said to have had even the slightest trace of autonomy.²⁴

2.3.2 1973 to 1991

During the reign of one-party rule, the Legislature was nothing more than a circus. The National Assembly was comprised of the Speaker and 135 MPs, 125 of whom were elected. Membership of the Party was a prerequisite for election to the National

²³ AW Chanda, *Zambia: A Case Study on Human Rights in Commonwealth Africa*; A Thesis Submitted to the Yale Faculty, in Conformity to the Requirements for JSD Degree (New Haven, 1992) 404.

²⁴ Ibid at Pp 406-7.

Assembly. In fact, the Central Committee, the primary Party organ, had the power to either endorse or refuse to endorse one's candidature. It did in fact use its power to veto the candidacy of outspoken MPs such as Michael Chilufya Sata and Valentine Kayope.²⁵

Over two-thirds of the MPs in the Assembly were bound by the principle of Collective Responsibility, being part of Government in various capacities, viz., Minister, Minister of State, District Governor and Member of Central Committee. This gave government an automatic majority in the National Assembly.²⁶

The official position was that the National Assembly was merely an agent of the Party. As such, its role was to clothe the decisions of the Party with legal force, with the barest minimum of debate on these policies. In fact, MPs were part of the policy-making organ of the Party. The revered President Kaunda, solidly drove this point home, in an address to the UNIP National Council on the 12th of December 1977, when he said:²⁷

“Parliament is not an opposition device to the Party itself or to other Party institutions. Under our system, I regard Parliament as a committee of the National Council, charged with the responsibility of enacting laws of this country.”

Any MP who refused to toll the Party line was called a counter-revolutionary, indisciplined, misguided and various others of Kaunda's choice epithets, and was threatened with serious reprisal. In his famous 'Watershed speech' to the National Council, of June 29th, 1975²⁸, the President stated that it was most 'unprincipled and undemocratic' (another two of his choice epithets), for any MP, who had the chance to discuss Party policy in the National Council, to 'somersault' in the National Assembly

²⁵ Ibid 449

²⁶ Ibid 442

²⁷ Cited Ibid

²⁸ Times of Zambia, July 1, 1975, at 1, Col 2, as cited by Chanda, above..

and begin condemning a collective decision to which he was a party. Most MPs were fully cognisant of which side their bread was buttered on, and so they steered clear of confrontations with the all-powerful President. Only a handful did not curve in to these strong-arm tactics. These bore the brunt of his wrath.

All these factors, in sum, militated against the prospect of an autonomous Parliament. In fact, this period was the darkest spell in as far as parliamentary independence is concerned, because the incumbent regime unashamedly reiterated the fact that Parliament was subservient to the Party, and that it was a mere rubber stamp, as it were.

2.3.3 1991 to 2004

The elections of 1991 saw the reinstatement of multi-party politics in Zambia. A glimmer of hope flickered. Many thought that perhaps this time round, Zambia would do a better job at instilling democratic principles into its various institutions. In so far as the Legislature is concerned, the country might as well have remained a one-party state, because, in that year, the MMD won an overwhelming majority in Parliament, scooping 125 of the total 150 seats. Parallels with the First Republic are evident. The same weaknesses in the Independence Constitution that led to the failure of multi-party politics are still inherent in the 1991 Constitution. The primary problem is that the Executive is far too powerful. The consequence has been that the Executive branch of Government completely controls the National Assembly. Sangwa²⁹ argues that the only restraint available is the morality of those wielding power, and from the Zambian experience, they rarely are moral.

²⁹ Supra note 22 at 16

In the Chiluba regime, most decisions in Parliament were reached at caucus meetings at State House. MPs owed their allegiance not to the electorate, but primarily, to the ruling party and its President. There is a great deal of indebtedness among MPs, to the executive. Our representatives in Parliament have collectively traded the authority vested in them by the Constitution, in return for personal and collective favours.³⁰ The dangled carrot comes in many forms. It includes offers of Ministerial position, the practice of giving vehicles to MPs at the beginning of their term, and the hefty tax-free gratuity that they are entitled to. They have little choice but to toll the Executive line.

In the elections of 1996, the MMD sought to wipe out any opposition in Parliament. They used various underhand methods. The most controversial where the use of the questionable Nikuv electoral register, and the constitutional amendments of 1996, clearly intended at barring former President Kaunda from contesting. The MMD scooped 130 seats. Sangwa contends that this marked the death of the Parliamentary system in Zambia, and was a negation of the democratic gains of 1991.³¹

The elections of 2001 saw the MMD acquire a very slight majority in Parliament. In fact, this was only after factoring in the nominated MPs. This was a positive step in the hitherto unrealised dream of an autonomous Legislature. Most people thought that perhaps at last Parliament was representative enough to challenge the Executive. As a matter of fact, in the early days of its life, the current Parliament did seem to possess the requisite calibre of men and women of integrity. The executive, however, was not slow to go to work on the opposition MPs. A number of Ministerial appointments from among

³⁰ Ibid.

³¹ Ibid at 18.

the opposition MPs, and a few Bribe-induced defections later, the *status quo* was reinstated. Some of the firebrands of the opposition camp, namely Sylvia Masebo and Dipak Patel are now the bolts and nuts of the Executive. The President has filled the Front Bench to capacity. Effectively, the initial majority of the opposition in Parliament has been completely diluted. Parliament is an appendage of the Executive again.

2.4 Conclusion

Though it cannot honestly be said that the Legislature is independent today, it is true to say that it is far more representative than it has ever been. On account of this, various impediments to Parliamentary autonomy in our constitutional structure, which were not evident before, become visible now. For the reasons articulated above, Private Members' Bills would have been viewed as anathema by past regimes. Today, the prospect of such Bills finding their way to our statute books is a real one, and everything humanly possible ought to be done to remove any pitfalls in this path, particularly now that we are at cross roads in respect of our constitutional framework. All the potential loopholes need to be looked at. From this premise springs the discussion that is to follow, as regards Article 81 of the Constitution.

CHAPTER THREE

3.0 THE PROBLEM OUTLINED

3.1 Introduction

This chapter discusses, in depth, the constitutional provision in issue. It sets out to lay the history of this provision in Zambia; the rationale for its retention in many a constitution the world over, and the manner in which the provision has manifested itself in various jurisdictions around the world.

3.2 The Problem

Article 81 of the Zambian Constitution provides:

Except upon the recommendation of the President signified by the Vice-President or a Minister, the National Assembly shall not-

(a) Proceed upon any Bill (including an amendment to a Bill) that, in the opinion of the person presiding, makes provision for any of the following purposes: .

(i) For the imposition of taxation or the alteration of taxation otherwise than by reduction;

(ii) For the imposition of any charge upon the general revenues of the Republic or the alteration of any such charge otherwise than by reduction;

(iii) For the payment, issue or withdrawal from the general revenues of the Republic of any moneys not charged thereon or any increase in the amount of such payment, issue or withdrawal; or

(iv) For the composition or remission of any debt due to the Government; or

(b) Proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding, would be to make provision for any of those purposes.

3.3 The History of the Clause in Zambia

From 1890, when the first instruments of constitutional significance to what is today Zambia were issued by the British government, to 1964, the year that Zambia became an independent State, the Government of Northern Rhodesia was premised upon two interdependent principles of subordination, *viz.*, the subordination of the Colonial Legislature to the Executive, and that of the Colonial Government to the Imperial Government.³²

As Sangwa correctly notes:

The constitutional arrangements were authoritarian, with the Governor and his predecessors wielding most powers. The traditional constitutional devices which make up the foundation of western constitutionalism, namely, separation of powers, checks and balances and protection of individual human rights, were missing.

One constitutional technique aimed at perpetuating Executive control over the legislative process, was to place the strings of the national purse firmly in the hands of the Executive, so that throughout the colonial period, whichever authority had the power to legislate, could only do so, in matters that had implications on the national revenue and expenditure, with the consent of the executive authority.

In the period between 1899 and 1911, Northern Rhodesia was administratively divided into two territories; North-western and North-eastern Rhodesia. Pursuant to the *North-Western Rhodesia Order in Council, 1899*, the High Commissioner for South Africa was

³² J.P. Sangwa. *The Making and Remaking of Constitutions in Zambia; The Need for a New Perspective*. L.L.M. Dissertation. (1994) University of Zambia..

both the Chief Executive and one-man-Legislature for North-Western Rhodesia.³³ The High Commissioner was empowered to legislate, and he did so through what were known as '*Proclamations*'. Where, however, these proclamations involved the raising of, or appropriation of revenue, the consent of the British South African Company had to be procured beforehand.³⁴

With respect to North-Eastern Rhodesia, governed under the *North-Eastern Rhodesia Order in Council, 1900*, legislative authority was vested in two offices; a Company appointed Administrator, on his own or in consultation with an Advisory Council, which Council, incidentally, was never constituted, and the High Commissioner for the British Protectorate of Nyasaland. The Administrator was also Chief Executive Officer. He was subject to the same fetter as regards legislation that had financial implications.³⁵

On account of the complete fusion (in the case of North-Western Rhodesia) and the partial fusion (in the case of North-Eastern Rhodesia) of executive and legislative authority in the same office, the practical effect of the subordination of legislative to executive authority was toned down in the early days of constitutional development.³⁶

In 1911, the two territories were amalgamated to form Northern Rhodesia, pursuant to the *Northern Rhodesia Order in Council, 1911*. During this period, executive authority was vested in a Company-appointed Administrator, while legislative authority was vested solely in the High Commissioner. Article 27 of the Order in Council required that the

³³ Articles 5 and 7..

³⁴ Article 8.

³⁵ Supra note 32

³⁶ Ibid 113.

High Commissioner secure the consent of the Company before proclamations with financial implications took root.

This gradual metamorphosis from a hitherto highly rudimentary governmental structure to a more organised constitutional order, took a quantum leap in 1924. In that year, the Company relinquished the reigns of administration in Northern Rhodesia to the British Crown. The Governor replaced the Administrator and assumed the position of Chief Executive. He exercised the jurisdiction of His Majesty, within Northern Rhodesia, on His Majesty's behalf. He was assisted by an Executive Council, a body whose members he appointed, and which was constituted to advise the Governor. The Governor was all-powerful; the Council having very little influence over him.³⁷

An important innovation of the 1924 Order in Council was the introduction of the Legislative Council. This body, constituted by His Majesty, was presided over by the Governor and comprised more nominated than elected officials. The Governor towered over and dominated the Legislative Council.³⁸ There is no doubt that the legislature was subordinate to the Executive.

In particular, the Governor retained immense control over the initiation of legislation. In fact, members of the Legislative Council could only propose a Bill, Vote, or Resolution, where it intended to impose a tax or other charge on the public revenue, with his consent.³⁹

³⁷ Ibid 134-5

³⁸ Ibid 136

³⁹ Ibid 138

At the advent of self-rule in 1964, the Zambian Constitution of that same year, vested the legislative power of the Republic in the Parliament of Zambia, which consisted of the President and a National Assembly. Article 74 of that Constitution was drafted in exactly the same terms as the present-day Article 81. The constitutional changes of 1973 and 1991 left the said Article completely untouched, so that for the forty years that Zambia has been a sovereign State, the said constitutional provision has remained wholly unchanged.

3.4 The Rationale

It is proposed to commence this analysis of the aforesaid Article and like constitutional provisions, with the most illuminating words of Professor B.O. Nwabwueze.

“A coordinated machinery of government under the leadership of a President or Prime Minister, such as exists under the parliamentary system, necessarily accords primacy to the executive. The President coordinates and therefore dominates both the executive and legislative processes of government. Thus, even the government of Britain, universally acknowledged to be perhaps the most liberal constitutionalist regime, accords a ‘genuine primacy to the executive’⁴⁰....The problem which the primacy of the executive under this kind of government poses to constitutionalism is one of how to safeguard and maintain the independence of the legislature in the face of it. How is the control implied in the executive’s coordinating role to be prevented from becoming so complete as to reduce the legislature to utter impotence?”⁴¹

The presidential parliamentary system practiced in Zambia, a unique cross between the presidential and parliamentary systems of government, is not immune from the problems arising out of the need to strike a delicate balance between the primacy of the executive

⁴⁰ D.C.M. Yardley. ‘*The Primacy of the Executive*’. *Parl. Affairs* (1967-8) Vol. XXI. p 155.

⁴¹ B.O. Nwabwueze. *Presidentialism in Commonwealth Africa*. (1974) New York. St. Martin’s Press. p 255

and the independence of the legislature. Article 81 as set out above is a key player in this constitutional tag-of-war.

Legislation involves three basic powers and functions, namely; the formal legislative power which entails that the power to make law is the sole prerogative of the legislative branch of government, and that any exercise of the power by other branches ought to be a mere delegation, and thus subordinate; the legislative initiative, which, as the name discloses, refers to the power to initiate legislation; and finally, the freedom to enact laws and approve other measures introduced before it by the government. The issues raised by Article 81 hinges around the power of legislative initiative.⁴²

Theoretically, every Member of Parliament has the capacity to initiate any Bill or Motion. The practice on the ground, however, is that there are several impediments that stand in his or her way. Article 81 is a classic example. The rationale for this, and like constitutional provisions, is that good and orderly government requires that only those directly involved with the day-to-day administration of government, and, by necessary implication, possess an intimate connection with it, ought to have the prerogative to propose national revenue and suggest the best ways and means to raise finances for it. It is further argued that financial chaos would ensue if every MP was empowered to propose expenditure, since members would inevitably compete among themselves to secure as much of the public funds as they possibly can, for the constituencies and interests they represent.⁴³

⁴² Ibid at Pp 256-72

⁴³ ibid at p 273.

This, and like constitutional contrivances, that essentially render legislative initiative an executive preserve, are further justified upon the premise that there lies an undeniable nexus between finance and policy. Since policy is, inarguably, also a preserve of the executive, and is in fact implied in the right to govern, it comes as no surprise that various constitutions give effect to provisions that require executive consent as a condition precedent to the initiation of legislation with revenue and expenditure implications.⁴⁴

Further, high policy legislation must, it is argued, be a preserve of the executive, on account of the fact that much of it is highly complex and technical, and has far reaching ramifications, well beyond the capacity of the ordinary run-of-the-mill MP. These may involve issues that revolve around the administration of the nation, and can only be understood by an insider, as it were, having a particular knowledge or experience in issues such as fiscal policy, social reform, economic development and even pure administration. There is, thus a danger that if a mere MP introduces such legislation, it is likely to lack depth and insight.

Further, such Bills require to be drafted in a manner that accords with particular rules and technicalities, without, at the same time, lacking in the requisite simplicity that is the hallmark of any good piece of legislation. There is also the requirement to consult, as thoroughly as possible with all relevantly interested groups. It is highly unlikely that any one MP can muster the facilities needed for this process.⁴⁵ All these factors militate against Private Members' Bills in the area of policy related legislation.

⁴⁴ Ibid at p 268.

⁴⁵ Ibid at 271.

The reasonable conclusion to be drawn from the preceding section of this dissertation is that, those that have written into constitutions, provisions such as Article 81, intend to foster good governance, to the end that those better able to comprehend the *nitty-gritty* of governmental policy be the ones that initiate particular kinds of legislation. Their intentions are hardly assailable to condemnation. The practice, nonetheless, may well be.

3.5 A Comparative Study of Various Jurisdictions

It is imperative in a paper of this nature, to draw insight from the experiences of other jurisdictions whose legal systems are more developed. A brief discussion on the position in five different jurisdictions from around the world follows.

3.5.1 The United States of America

Comparatively, the position in the United States of America, where no such restriction as exists in the Commonwealth, with respect to Members' rights of initiative *vis a vis* financial matters, is that there are far more Private Members' Bills. In the US, Congressional leaders exercise the final discretion as to which Bills should be introduced. It is noteworthy that the American Presidential system, where Executive Ministers are not members of Congress, is partly responsible for this state of affairs. The growing trend, however, is that major policy legislation hails from the executive arm of Government.⁴⁶ The important thing to note is that there is no fetter on the right of Members to initiate legislation on any subject.

⁴⁶ Ibid at p 272-3..

3.5.2 The United Kingdom

Professor John Alder⁴⁷ notes that the position in England is that, in the case of legislation involving the raising of new taxes or new public expenditure, there must be a special resolution by the Commons, proposed by a Minister, before the Committee stage. The similarity immediately becomes apparent. This is no surprise on account of Zambia's history. In fact, the constitutional legacy left by the colonial masters is starkly evident in this regard. It must be recalled that the 1964 Constitution was largely handed to our early leaders at Westminster. In respect of Article 81, the position laid down at Westminster is still law. It is dangerous to cut-and-paste provisions in this manner. It is no secret that the constitutional frameworks of the two countries, as well as the level of maturity exhibited in politics in the two nations, differ markedly. After all, the legislature in England can bring down the Government by a vote of no confidence if it frustrates legislation; something that cannot occur in Zambia.

3.5.3 Australia

The Constitution of the Commonwealth of Australia under Chapter 1 provides:

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is herein-after called "The Parliament," or "The Parliament of the Commonwealth."

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

⁴⁷ John Alder. *Constitutional and Administrative Law*. (1994; 2nd ed.) London; Macmillan Press. 454

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

3.5.4 South Africa

The Constitution of the Republic of South Africa provides:

73. (1) Any Bill may be introduced in the National Assembly.

(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly; but only the Cabinet member responsible for national financial matters may introduce a money Bill in the Assembly.

77. (1) A Bill that appropriates money or imposes taxes, levies or duties is a money Bill. A money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money or the imposition of taxes, levies, or duties.

3.5.5 Canada

The Principle Constitutional Document in Canada (1867) provides under Part II:

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed..

The positions in Canada and, particularly, in Australia, provide an interesting departure from the general position in the Commonwealth. Whereas the position in Zambia, South Africa and the United Kingdom is that any Bill, Vote or Motion that has financial implications, regardless of whether or not the primary purpose of such Bill, Vote or

Motion is the appropriation of State funds or imposition of taxation, cannot be initiated without the consent of the Executive, the two jurisdictions seem only to have such a restriction in respect of such measures if the Bill, Motion or Vote has, as its primary purpose, appropriation or taxation. For instance, what is prohibited in respect of Australia under s. 50 above is; ‘a vote, resolution, or proposed law for the appropriation of revenue or moneys...’, and under s.54 of the Canadian Constitution; ‘any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost’

It is only where the Bill, etc, is *for* the purpose of appropriation or taxation, not where it merely has that consequence incidentally, that the prohibition applies. The Australian Constitution goes further to provide: ‘a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences (sic), or fees for services under the proposed law’. In the *Zambian* case, Bills, etc, for appropriation and taxation, and; “any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding, would be to make provision for any of those purposes,”⁴⁸ are all outside the competence of individual Members to initiate without the consent of the President. This, it is submitted is far wider than is necessary, and is undesirable in a democratic society. This is particularly so because the discretion to be exercised by the ‘person presiding’, invariably a minion of the ruling party, is at large.

⁴⁸ Article 81 (b)

3.6 Conclusion

If the rationale for provisions in the nature of Article 81 is to ensure that only those directly involved with the day-to-day running of the affairs of the State, retain control over legislation involving the revenue and expenditure of the State, it is hard to justify the terms in which Article 81 is drafted. Admittedly, the position has remained this way mostly by accident. It has been reprinted verbatim since it was handed down at Westminster in 1964. Fortuitously, the Executive stumbled onto it and demonstrated its adverse effects during the Media Bills debacle. It is a provision that is highly susceptible to abuse. Its purpose is a good one. The problem is that in the manner in which it is currently drafted, it does far more than it is intended to. It is that spill over effect which ought to be corrected. The Canadian and Australian positions provide very helpful insight on how to go about remedying this mischief.

CHAPTER FOUR

4.0 THE CASE STUDY

4.1 Introduction

Prior to the year 2002, the issues raised by Article 81 of the Zambian Constitution would have been considered academic and moot. The reasons for this are evident from Chapter two prior, where it is made explicitly clear that a robust Parliament is something alien to Zambia, so that Private Members' Bills were a phenomenon unheard of in these parts. This, perhaps, would account for the scarcity of intellectual literature in this area of our constitutional law. Suffice it to say that the narrative that follows shortly makes it abundantly clear that the issues raised in this paper, in respect of the constitutional provision under discussion, are real, and constitute a genuine threat to our young democracy. The bulk of this chapter is constituted by an interview with a someone who had personal experience with the Media and Information Bills.

On the 4th of October 2004, I was privileged to conduct an interview with Mr. Patrick Matibini, a lecturer of high standing in the School of Law, at the University of Zambia, and also a prominent practicing lawyer in Lusaka, with immense experience in the areas of constitutional and administrative law. In fact, Mr. Matibini was responsible for the drafting of the Media and Information Bills at the centre of controversy.

As a background question, I asked Mr. Matibini how he rated the performance of the Zambian Parliament since the advent of multi-party rule in 1991. It was his considered