

**THE EXTENT AND LIMITS OF PARLIAMENT'S POWER
OF LEGAL PUNISHMENT**

By

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Lusaka,

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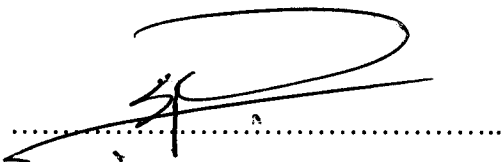
**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

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Obligatory Essay on

**THE EXTENT AND LIMITS OF PARLIAMENT'S POWER
OF LEGAL PUNISHMENT**

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Submitted to the University of Zambia in partial fulfillment of requirements of the
Bachelor of Laws (LL.B) Degree programme.

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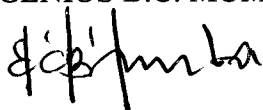
DECLARATION

I Eugenius B.C. Mumba, do hereby declare that this dissertation is my authentic work and that to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of a Bachelor of Laws degree. All other works referred to in this dissertation have been duly acknowledged.

Made this14th..... day of December 2004,

by the said EUGENIUS B.C. MUMBA

at Lusaka



DEDICATION

This study is dedicated to those who strive for preferential treatment of people suffering injustice, in particular the poor.

PREFACE

Although Parliaments or Legislatures are generally understood as being central to representative, democratic government, and although comparative legislative studies have shown how legislative systems, institutions exercise their functions, studies on ways in which they exercise their powers, immunities and privileges are relatively few. Uncertainty and disagreement persist with regard to such important matters as the extent and limits of Parliament's power of legal punishment, how they exercise such power in relation to the functions of other organs of government such as the judiciary.

In this regard, recent applications of Parliament's power of legal punishment has called into question the interpretation that once seemed plausible of Parliament as a court but which no longer fits with new evidence that disputes this on the basis of *inter alia* the doctrine of separation of powers.

Although we cannot obviously cite all of the significant cases that have fuelled this problem, we have tried to provide some direction to the resolution of this matter by including cases that are cross-national in scope as well as views of scholars and Parliamentarians that test and develop hypotheses which are significant for comparative research.

To this end, the study comprises five chapters. Chapter One deals with the concept of Parliament and underlining, in part, the changes which have taken place in respect of its roles over time, including influences brought about by the democratisation of institutions of governance. Chapter Two addresses the rationale or purpose of the powers, privileges and immunities of Parliament. In Chapter Three, we analyse the power of Parliament to deal with acts which are regarded by the House or Committees of Parliament as offences against them. Chapter Four on the other hand examines the veracity or otherwise of the

concept of criminal law powers of Parliament. Chapter Five deals with how over the years Parliament's power of legal punishment, and specifically of the National Assembly of Zambia, has become untenable with the emergence of responsible government which espouses the doctrine of the separation of powers.

Lusaka, 2004

E.B.C.M.

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The author, however, unreservedly takes responsibility for any omissions which may blemish this dissertation.

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INTRODUCTION

At the end of the 1980s, a global democratic wave reminiscent of the rights movement on the scale of England's King John's proclamation of the Magna Charta in 1215,¹ heralded the demise of undemocratic or simply dictatorial regimes. Those regimes yielded "to a new era of democracy, and popular participation in governance."² For some, this meant that the pursuit of governments founded on the great principles of constitutionalism had "come as a product of permanent helpfulness and value,³ of good governance and, therefore, not to be "flouted ... overthrown and treated as mere historical curiosities rather than living principles"⁴ of transparency, accountability and rule of law.

The performance, however, of some governance institutions has, for some time now, been declining.⁵ For instance, while "some 42 African countries have held multi-party presidential or Parliamentary elections"⁶ in the last decade or so, "precepts of liberty and the dictates of justice" have not only been "treated lightly and unconcernedly when they

¹ D.W. Guthrie, Magna Charta. In: C.E. Gerhart et al, *The Lawyer's Treasury* 70 (1950).

² African Development Bank, *Annual Report 99 (2001)*

³ M.N. Butler, The Changing Foundations of Government. In: C.E Gerhart et al, *Ibid*, at 196

⁴ *Ibid*, at 196

⁵ B.J. Phiri et al, *Protecting the Reputation and Standing of the Institution of Parliament and Parliamentarians: A Study of Perceptions, Realities and Reforms in Zambia*. Commonwealth Parliamentary Association, University of Zambia, Monash University of Australia 34 (2003).

⁶ See *supra* note 2.

appear to stand in the way of some immediate interest, some individual ambition or some group privilege”⁷ but also have literally been thrown overboard in many of those countries.

In Zambia, the legislative arm of government, that is, the National Assembly, using the powers and privileges inherited from the concept of British Parliamentary sovereignty and those granted by the Constitution has often been indicted for breaking principles of liberty and justice.⁸

STATEMENT OF THE PROBLEM

Over the years, and since the First Session of the First National Assembly which began its sittings on 10th March, 1964,⁹ criminal proceedings have been instituted against some Members of Parliament, the press and individual citizens by the National Assembly for alleged infringement of its powers, privileges and immunities pursuant to the National Assembly (Powers and Privileges) Act, Cap 12 of the Laws of Zambia.¹⁰

Among those indicted and sentenced on account of the aforementioned provisions include individuals and institutions.¹¹

In all of these and other similar cases, and by virtue of its powers, privileges and immunities, a belief had been created, rightly or wrongly, that Parliament was an extraordinary “court” with power to punish for offences against it. It is also canvassed

⁷ See supra note 3 and 4.

⁸ See supra note 5, at 26

⁹ National Assembly, *Abstract Series, Sittings and Time spent in the House 1964 to 2004* (2004).

¹⁰ Constitution of Zambia (Amendment), No. 18 (1996)

¹¹ National Assembly, *Parliamentary Debates 1971, 1976, 1977, 1983, 1993 and 1996*

that any appeal against Parliament's powers to punish lies with the House itself, and that its decision can not therefore, be challenged "in any court of law or place outside the Assembly" as that would more over constitute a contempt. ¹²

OBJECTIVES OF THE STUDY

The grant of independence to former British colonies, included among other things a requirement that the new states would have governments modelled on the British system "with a constitution" as the *grund norm*. ¹³ This applied to Zambia as well. In practice, that requirement implied having a system of government with *checks and balances* or a necessary constitutional divide between the organs of government commonly referred to as the doctrine of *separation of powers*.¹⁴ That is, the legislature, charged with law-making, the Executive to formulate government policy and enforce the laws made, and the judiciary to adjudicate or interpret laws; ¹⁵ so that "to the end it may be a government of laws, not men." ¹⁶

In time, however, and with Parliament's claim of unlimited power to inquire into any matter whatsoever and exercise penal powers if it deemed that necessary, it became propitious to question such privilege in respect of the limits of powers of Parliament to inflict punishment. ¹⁷ Thus, arising from these concerns, this study has four general objectives:

- (a) to identify Parliamentary powers and privileges which have adversely affected the citizen's perception of Parliament's power to impose sanctions;

¹² Ibid., 1993

¹³ See supra note 5, at 12

¹⁴ Baron de Montesquieu *The Spirit of Laws* (1748)

¹⁵ See supra note 13

¹⁶ L .D. Sills (Ed.) *Encyclopedia of the Social Sciences*, Vol. 3, (1968).

¹⁷ E. McWhinney *The Competence of Parliament and the Limits of Criminal Law. Canadian Parliamentary Review*, Summer, (1996).

- (b) to identify institutional weaknesses in management, monitoring and analysis of offences against Parliament;
- (c) to contribute to the demarcation and delimitation of the powers of each respective organ of government based on a constitutional provision or any other written instrument, which is unchangeable by the arbitrary action of any one organ; and
- (d) to make recommendations on what reforms should be effected to modernise existing practices of Parliament in respect of its power to institute criminal proceedings and inflict punitive sanctions against any erring parties.

Taking into account the above four mentioned general goals, this study is designed to achieve three main specific objectives as follows:

- (a) to identify areas of disagreement between Parliament and the courts of law in the application of legal sanctions and their reputation and standing in Zambia, respectively;
- (b) to assess the impact of various judgments against breach of Parliamentary powers and privileges on the competence of Parliament's power of legal punishment; and
- (c) to study the reasons that have made Parliament's power to punish for breach of its powers and privileges most controversial and least acceptable.

HYPOTHESIS AND RESEARCH QUESTIONS

This study is premised on the hypothesis that effective and competent discharge of Parliament's power of legal punishment requires specialised skills, notably the ability to blend technical and legal competence with useful political knowledge so that offences can be both well written and truly reflective of their intended substance.

In order to investigate the veracity or otherwise of this hypothesis, this study is intended to answer, *inter alia*, such questions as:

- What formal authority, constitutional, legal, or political does the National Assembly have to carry out its mandate?
- Is there enough staff with the necessary knowledge needed to assist the legislators carry out their duties?
- Is the legislature allowed to introduce legislation independently, or must all proposals emanate from the executive?
- Does the definition of Parliament as “sovereign” apply to Zambia?

These and similar questions should establish what laws are in force to avoid ambiguity and guess work in relation to Parliament’s exercise of its power to punish those who breach its privileges or refuse to implement legislative wishes.¹⁸

SIGNIFICANCE OF THE STUDY

The study of the limits of Parliament’s power of legal punishment is a very worthwhile enterprise, because it is a rich source of ideas that can inspire and encourage necessary reform of Parliament, “[t]he people’s branch of government”,¹⁹ an institution where citizens’ interests, preferences expressed through public policies are made effective by legislating them into law.

¹⁸ J. Hatchard and M. Ndulo *The Law of Evidence in Zambia-Cases and Materials* 1 (1991).

¹⁹ Centre for Democracy and Governance USAID *Handbook on Legislative Strengthening* 1 (2000)

Also and as already alluded to in the hypothesis and research questions, this study is significant in bringing to the fore possible ‘conflicts’²⁰ in the relationship between the Legislature and the Judiciary.

LITERATURE REVIEW

According to Valentine and Françoise, “examples of ... offences [against Parliament] are:”... insulting members, refusal to obey an order of Parliament, publishing slander or libel on Parliament or its Members, attempting to influence by fraud, threat, or intimidation the vote, opinion, judgment or action of members.”²¹ Judgment of offences, however depend on whether a particular Parliament recognizes the concept of breach of privilege or contempt. For this reason, in countries where no special recognition obtains in respect of offences against Parliament, “persons committing such offences are tried by courts of law”; while in countries which have “given special recognition in law” to offences against Parliament “may be dealt with either by Parliament itself, acting as a court of law and using special procedures.”²²

The powers of Parliament to judge offences are, in the opinion of Hogg, “marks of the successive struggles which had to be undergone before Parliament could achieve its purpose efficiently.”²³ In this regard, parliamentary procedure refined over the years, is said to have brought about the realisation of this purpose; which is: “a devise for government by discussion”.²⁴ The assumption that Parliament ought to wield juridical powers in order to achieve its purpose efficiently has, however, been disputed. Komberg,

²⁰ K. A. Mwanamwambwa, *Parliament and the Judiciary*, (2001).

²¹ H. Valentine and M. Françoise *Parliaments of the World – A Reference Compendium* 215 (1976)

²² Ibid.

²³ Q. Hogg, *The Purpose of Parliament* 2 (19??)

²⁴ See supra note, at 3

for example, has cast doubt on such foundation of Parliament's penal jurisdiction owing to democratisation of society and the need to identify the just manifest and latent powers of the legislature within a country's constitutional arrangement.²⁵

This view is shared by Hollis who has expressed the view that parliamentary sovereignty need not imply that Parliament "can do anything" including judgment of offences.²⁶ In this regard, Hollis has given the example of entry by European countries into the European Union and the surrender, to a certain degree, of national Parliaments sovereignty in that the European Court "may have to decide that an act of 'a member state' is inconsistent with overriding community law"²⁷

In Zambia, save for judicial decisions, there is hardly any authoritative literature regarding the extent and limits of the Parliament's power of legal punishment. For example, although in the case of *The People v. Speaker of the National Assembly, Ex-Parte Harry Mwangi Nkumbula*²⁸, an *Order of Mandamus* was issued against the Speaker of the National Assembly, this and subsequent cases have not precipitated into the research and review of the National Assembly's (Power and Privileges) Act, Cap 12 of the Laws of Zambia.²⁹

The publication *The Parliament of Zambia*³⁰ has not changed matters either. This is because, Chibesakunda was more concerned with providing the reader a readily available textbook on the historical development of the Parliament of Zambia, with special reference to how it transacts its business. Thus the hall-mark of his book is parliamentary procedure and practice in the National Assembly of Zambia. Similarly, in a more recent study by Phiri

²⁵ A. Komberg et al, *Legislature and Societal Change – The Case of Canada* (1973)

²⁶ C. Hollis, *Parliament and its Sovereignty* 11 (1973)

²⁷ See supra note 26, at VIII – IX

²⁸ [1970] SJ 229

²⁹ See supra note 10

³⁰ N.M. Chibesakunda, *The Parliament of Zambia* (2001)

et al on “Protecting the Reputation and Standing of the Institution of Parliament and Parliamentarians: A study of Perceptions, Realities and Reforms in Zambia,”³¹ the authors intent was to assess causes of the Members of Parliament’s poor reputation both inside and outside Parliament.³²

In view of the foregoing, it is evident that much more need to be done to systematically assess and evaluate the extent and limits of Parliament’s power of legal punishment in Zambia. This study could, therefore, be pioneering in that respect.

METHODOLOGY

This study is mainly desk-based research. This means that various books and journal articles were borrowed from the University of Zambia Main Library and the National Assembly Members’ Library for reading. In addition to desk-based research, certain stake holders, notably Members of Parliament and academicians were interviewed without necessarily using a written questionnaire.

CHAPTER OUTLINE

Chapter One: Role and functions of Parliament

Chapter One defines the concept of Parliament and underlining, in part, the changes which have taken place in respect of its roles over time, including influences brought about by the democratisation of institutions of governance.

³¹ See supra note 5

³² See supra note 5, at 8

Chapter Two: Parliamentary powers, privileges and immunities

This Chapter addresses the rationale or purpose of the powers, privileges and immunities of Parliament.

Chapter Three: Sources of Parliament's Power of Sanctions

The Chapter discusses the power of Parliament to deal with acts which are regarded by the House or Committees of Parliament as offences against them. It attempts to answer the questions: what are the sources of the claim of unlimited power of inquiry of Parliament and does this amount to Parliament being a court of law?

Chapter Four: Extent and limits of Parliament's Power of Legal Punishment

The veracity or otherwise of the concept of criminal law powers of Parliament is given centre stage, by looking at judicial precedents of Parliament's power of legal punishment.

Chapter Five: Recommendations and Conclusion

The Chapter wishes to establish the way forward in relation to whether Parliament's power of legal punishment, and specifically of the National Assembly of Zambia, has become untenable with the emergence of responsible government which espouses the doctrine of the separation of powers.

CONCLUSION

The extent and limits of Parliament's power of legal punishment depend on whether a particular Parliament recognizes in law, the concept of breach of Parliamentary privilege. In jurisdictions where that is not the case, offences against Parliament are dealt with by the established courts of law. This position is preferred, in part, by the well-evidenced inadequacies of Parliaments to handle highly technical criminal, as distinct from political processes. This is reinforced by the latter-day emergence of responsible government with

necessary constitutional divide between the organs of government commonly referred to as the doctrine of separation of powers.

CHAPTER ONE

ROLE AND FUNCTIONS OF PARLIAMENT

The concept of “parliament” is derived from the Latin word *parliamantum* or the French word *parler*, and means to speak³³. Initially, it referred to “the great assemblies of magnates” during the early middle Ages which were called to advise the King.³⁴ In today’s usage, the word Parliament is invariably used to refer to the “legislature” as:

“[T]he people’s branch of government, the institution where citizen interests and preferences are expressed and transformed into policy, and the point at which, at least potentially, people most close engage their government.”³⁵

In this regard, it is recorded that while the early *English Parliaments* were mere consultative fora with membership and business procedures regulated by the monarch³⁶, they underwent a remarkable transformation to a level where parliamentary role and functions took a position of strength³⁷. The major function which changed forever the role of the House of Commons, the equivalent to Parliament, was the financial needs of the Monarch. For example, “in 1295... the summoning of the celebrated *Model Parliament* ...on 13 November ...was called because the King stood in urgent need of money”.³⁸

As the financial needs of the Monarch increased so was the need to raise levels of taxation, which led to the taxed people demanding a say in the process and their

³³ N Wilding and P Handy *An Encyclopaedia of Parliament*- Fourth Revised Edition 520 (1972)

³⁴ E May *Parliamentary Practice*- 21st Edition (1989)

³⁵ USAID *Handbook on Legislative Strengthening* 1 (2001)

³⁶ See *supra* note 33 at p522

³⁷ *Ibid* p523

³⁸ *Ibid* p524

representatives insisting that their grievances “should be redressed before they would make any grant of supply.”³⁹ This eventually led the British Parliament beginning to pry into the activities on which the tax was spent. As the governing process began to embrace a myriad of activities, it became incumbent upon Parliament to devise mechanisms by which to carry out various functions more effectively in order to ensure that its representation role was achieved. One such mechanism has been the creation of committees which are defined as:

“a composition of a number of Members of Parliament specially named or regularly appointed to consider, inquire into or deal with particular matters or Bills”⁴⁰

Committees of Parliament are, therefore, constituted to address a specified mandate whose terms of reference and remit are spelt out.⁴¹ Over the years, the common desire to exercise control through elected representatives over Executive actions on issues of governance and financial matters has increased. One such example of an historical milestone in British constitutionalism is the petition of right 1642, which began with the sombre words of:

“Humbly show unto our Sovereign Lord the King, the Lords Spiritual and Temporal, and Commons in Parliament assembled that Your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tillage, aid, or other like charge, not set by common consent in parliament”⁴²

In subsequent years and as Executive activity increased, it became imperative that Parliaments also increased their oversight mechanisms. The compelling reason, therefore, and from which the origins of parliamentary role and functions expressed through committees can be traced was the need for Parliaments to study in a more detailed

³⁹ Ibid p525

⁴⁰ Ibid p611

⁴¹ M Werunga Parliamentary Committee System: The Kenyan Experience (1999)

⁴² Lively and A Lively (Eds.) Democracy in Britain 40 (1994)

manner and with sufficient time and clarity issues being referred to them by using committees as “miniature “ Parliaments.”⁴³

The rationale behind the role and mandate of parliamentary committees is therefore, to be found in the doctrine of separation of powers; the concept that the legislative, judicial, and executive organs of government ought to be separate and distinct. According to this doctrine, each organ of government works according to its own authority, forming, therefore, a check or balance against any abuse of power by the remaining two organs. That means “all ... remain in *statue quo* because any aggressive impulse is sure to be checked”⁴⁴ by the other.

In this behalf, it has been observed that in the majority of cases, scholars on this matter believe that “modern Parliaments have three main functions and identify these as:

1. The legislative function
 - Including participation in the making of public policy through law making, parliamentary inquiries;
2. The oversight function
 - Carried out mainly, but not exclusively, by the *loyal opposition*; and
3. The representative function
 - That allows Members to address the problems of their constituents and promote their interests.”⁴⁵

This is why it is now canvassed that the addition of the aspect of representation to the list of the role and functions of parliaments, is functionally, the legitimisation of the institution of Parliament and the basis upon which “the public recognition and acceptance

⁴³ N M Chibesakunda Development of the Committee System in Zambia for Legislative Process: Scrutiny of Policy and Administration. In: The Table Vol. XIIX 46 (1981)

⁴⁴ P A Rahe Republics, Ancient and Modern: Classical Republicanism and the American Revolution (1992)

⁴⁵ A Danahoe A Commonwealth of Parliaments. In: A Imlach (Ed.) The Parliamentarian 361 (1999)

of the right of Parliament, and the government generally, to act in some manner and the corresponding obligation of citizens to abide by that action,"⁴⁶ is based.

⁴⁶ Ibid, p 362

CHAPTER TWO

PARLIAMENTARY POWERS, PRIVILEGES AND IMMUNITIES

The powers, privileges and immunities of each House of Parliament and of the members and the committees of each House are collectively referred to as *parliamentary privilege*. The term "parliamentary privilege" refers to two significant aspects of the law relating to Parliament: the privileges or immunities of the Houses of Parliament, and the powers of the Houses to protect the integrity of their processes, resulting particularly in the power to punish for breach or contempt of privilege⁴⁷. Parliamentary privilege exists for the purpose of enabling the House(s) of Parliament to carry out effectively their primary functions⁴⁸, which are to inquire, to debate and to legislate effectively⁴⁹. In this regard therefore, when discussing parliamentary privilege the gist is based on:

"[t]he rights, powers and immunities, which belong in law to a Legislative Assembly, its Committees, Members and Officers".⁵⁰

The existence of parliamentary privileges enables Parliament including its committees and Members to proceed with its business without interference or molestation and to protect it against unwarranted attacks upon its authority.⁵¹ This is in order to cover the possibility that no law defining such privileges is enacted by Parliament⁵². This position is the actual practice today in all commonwealth countries and in following this tradition, Zambia passed its own **National Assembly (Powers and Privileges) Act** on the 28th

⁴⁷ E Campbell *Parliamentary Privileges in Australia* 17 (1965)

⁴⁸ Ibid. p 19

⁴⁹ Ibid. p 20

⁵⁰ Ibid. p 116

⁵¹ Ibid, p 119

⁵² D Lee *The Power of Parliamentary House to send for Persons Papers and Records* 8 (1999)

September 1956] (since amended), eight years before gaining self-government.⁵³

This was passed under Article 87 (2) of the constitution which states that:

“Notwithstanding sub clause (1) the law and custom of the Parliament of England shall apply to the National Assembly with such modifications as may be prescribed by or under an Act of Parliament.”

In interpreting these privileges, therefore, regard must be had to the general principle or rationale that the privileges of Parliament are granted to the House and its members in order that:

"[t]hey may be able to perform their duties in Parliament without let or hindrance."⁵⁴

In particular, the freedom of speech has always been regarded as essential to allow the House to debate and inquire into matters without fear of interference⁵⁵. Any statement made in Parliament is absolutely privileged and cannot be made the subject of inquiry in a court of law or other constituted authority⁵⁶.

In Zambia, when parliamentary privileges and immunities are discussed, reference to particular advantages, which guarantee the 'effectiveness' of Parliament and its Members and officers and without which Parliament would not function properly, is considered. Commenting on Erskine May's book *Parliamentary Practice*, Sir Charles Gordon offers a more appropriate definition of Parliamentary privilege on which the Zambian Parliament has based its version of parliamentary privilege⁵⁷. In his edition Erskine May states that:

⁵³ See The Laws of Zambia

⁵⁴ Report of the Committee of Privileges In: Captain R Case, House of Commons, 164 (1939-40), para. 19

⁵⁵ E May, *Parliamentary Practice*- 22nd Edition 70(1997)

⁵⁶ Ibid

⁵⁷ Sir Charles Gordon *Parliamentary Privilege* In: E May *Parliamentary Practice*- 20th Edition 70 (1983)

"Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals."⁵⁸

In Zambia, for instance, the 'House accords the highest regard to all its privileges, whether held individually or collectively. This is backed by the fact that the first duty performed by a newly elected or re-elected: Speaker when he/she presents Himself/herself to the President before taking the Chair is to make a specific claim, on behalf of the House and its Members, for all their undoubted Rights and Privileges⁵⁹. The Speaker makes this claim in fulfilment of his role as the custodian of the Powers, Privileges and Immunities of Parliament.⁶⁰

In the Zambian case, there are two main sources of Parliamentary privilege namely:

- (a) The Zambian Constitution;
- (b) The National Assembly (Powers and Privileges) Act Cap 12 of the Laws of Zambia. The third source can be considered to be the National Assembly of Zambia Standing Orders which govern procedure in the Zambian Parliament. In considering these sources of parliamentary privilege, the following constitutional provisions should be noted.

Privileges Obtained From the Constitution

Article 87 of the Constitution which gives effect to the **National Assembly (Powers and Privileges) Act Cap 12** of the Laws of Zambia firmly guarantees the Privileges and Immunities of Parliament. Article 87(1) states that:

⁵⁸ E May Parliamentary Practice- 20th Edition 70 (1983)

⁵⁹ National Assembly of Zambia Standing Order No. 3 (7)

⁶⁰ See supra note 33 at p 571

“The National Assembly and its members shall have such privileges, powers and immunities as may be prescribed by an Act of Parliament”.

Article 87(2) goes on to state that:

“Notwithstanding sub clause (1) the law and custom of the Parliament of England shall apply to the National Assembly with such modifications as may be prescribed by or under an Act of Parliament”.

These provisions are strengthened by other constitutional provisions such as Article 86 (1) on Procedure in the National Assembly, which states that:

“Subject to the provisions of this Constitution, the National Assembly may determine its own procedure”.

The effect of these provisions is that constitutionally, the National Assembly of Zambia has been given blanket cover over the determination or classification of what it considers to be breach or contempt of its privileges. As to how Parliament may react to such breach or its power of legal punishment is a matter we shall refer to later in Chapter four.

Privileges Obtained From an Act of Parliament

In Zambia, privileges of all the Members of Parliament irrespective of their rank or post within government are contained in the provisions of the **National Assembly (Powers and Privileges) Act Cap 12** of the Laws of Zambia. This is an Act to declare and define certain powers, privileges and immunities of the National Assembly and of the Members and Officers of the Assembly.

Cap 12 of the laws of Zambia specifies some of the privileges such as:

- freedom of speech in Parliament;⁶¹

⁶¹ Section 3 of the Act

- immunity to a member from any proceedings in any court in respect of anything said or any vote given by him in Parliament or' any committee thereof;⁶²

immunity to a person from proceedings in any court in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings;⁶³ while under Part II of the **National Assembly (Powers and Privileges) Act** the following are the actual privileges and immunities of the Assembly and its officers as stated by the Act:

-

*(i) Freedom of speech and debate.*⁶⁴

*(ii) Immunity from legal proceedings.*⁶⁵

*(iii) Freedom from arrest.*⁶⁶

*(iv) Exemption from certain services.*⁶⁷

*(v) Power to exclude Strangers.*⁶⁸

*(vi) Evidence of Proceedings in Assembly or Committee not to be given without leave.*⁶⁹

(vii) Civil process not to be served or members arrested on civil process within

⁶² Section 4 of the Act

⁶³ Section 5 of the Act

⁶⁴ Section 3 of the Act

⁶⁵ Section 4 of the Act

⁶⁶ Section 5 of the Act

⁶⁷ Section 6 of the Act

⁶⁸ Section 7 of the Act

⁶⁹ Section 8 of the Act

Before the effect of the afore side provisions is examined in chapter three of this work, and in particular the seemingly blanket cover given to parliament over the determination or classification of what it considers to be breach or contempt of its privileges, it would be appropriate to examine the position obtaining in other jurisdictions in this behalf.

1. THE UNITED KINGDOM

The statutory existence of parliamentary privilege in relation, for example to freedom of speech, dates from the adoption of the English Bill of Rights in 1689. Though meant to counter the challenge of the Crown, it also prohibited actions of any kind against members or what they might say or do in Parliament by any person outside the House. Section 9 of the same statute declares that, the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.⁷¹ This privilege up to date permits members to freely speak in the Chamber or in Committee during a sitting while enjoying complete immunity from civil or criminal prosecution for any comment they might make. Though this is criticized, the freedom to make statements or allegations about outside bodies or persons which they genuinely believe at the time to be true or at least worth of investigations is fundamental as there would be no freedom of speech if everything had to be proven true before it is uttered

The whole scope and application of privilege, in the United Kingdom, was later reviewed by a Select Committee on Parliamentary Privilege in 1967 to 1968. This matter was re-examined again in the Third Report of the same Committee in 1977⁷². Having examined all aspects of privilege in the House, the Committee especially came down against the suggestion that statute. In spite of this, the Committee recommended significant reforms in handling privilege complaints. This was agreed to in order to ensure that the House

⁷⁰ Section 9 of the Act

⁷¹ P Evans, *Parliamentary Committee System: The UK Experience* (1999)

⁷² *Ibid*

exercise its penal jurisdiction sparingly and only when it was satisfied that to do so was essential in order to provide reasonable protection for the House, its Members or its Officers for such improper obstruction or attempt at or threat of obstruction as causing, or likely to cause, substantial interference with the performance of their respective functions and protection of their immunities, powers and privileges.

2. AUSTRALIA

In 1987, the Australian Parliament passed legislation declaring, clarifying and substantially changing the law of Parliamentary privilege. In this respect, the Australian Parliamentary privileges Act 1987 was occasioned by two judgements of the Supreme Court of New South Wales which severely restricted Parliament's privilege of freedom of speech⁷³. This legislation reaffirmed Section 9 of the Bill of Rights 1689, which declares that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament⁷⁴.

The statutory declaration of the parliamentary view of freedom of speech was accomplished in several stages. The first stage made it clear that the Australian Houses of Parliament possessed the privilege of freedom of speech in the terms of the Bills of Rights. For the purpose of the 1689 Bill of Rights section 9, the privilege of freedom of speech covered the proceedings in Parliament. This meant all words spoken and acts done in the course of, or for the purposes of or accidental to the transacting of the business of the House or Committees has published, or authorized the publication of a document or a report of oral evidence.

⁷³ P Evans Parliamentary Privilege: Legislation and Resolution in the Australian Parliament (1999)

⁷⁴ Ibid

3. INDIA

The power, privileges and immunities of each House of Parliament and of the Members and the Committees of each House are set out in Article 105 of the Indian Constitution. The Article comprises four clauses (1) says that “subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament”. Clause (2) declares that “no member of parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any Committee thereof and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings”. Clause (3), which has undergone an amendment under the Indian Constitution 44th Amendment Act, 1978, read before the amendment as follows: “in other respects the powers, privileges and immunities of each House of Parliament, and of the Members and the Committees of each House, shall be such as may from time to time be defined by Parliament by law, and until so defined shall be those of the House of Commons of Parliament of the United Kingdom and of its Members and Committees at the commencement of this Constitution”. After the aforesaid amendment, clause (3) now reads as follows: “(3) in other respects, the powers, privileges and immunities of each House of Parliament, and of the Members and the Committees of each House, shall be such as may from time to time be defined by Parliament by law, and until so defined, shall be those of that House and of its members and committee immediately before the coming into force of section 15 of the Indian Constitution (Forty – fourth Amendment) Act, 1978.” Clause (4) reads thus: “(4) the provisions of clause (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliaments or any committee thereof as they apply in relation to Members of Parliament.”⁷⁵

In their review of the working of the Indian Constitution article 194 similarly sets out the powers, privileges and immunities of the House of the Legislature of a State, of its

⁷⁵ National Commission to Review the Working of the Constitution, Immunity of Legislators 2 (2002)

members and the committees of the House of such Legislature⁷⁶. In this regard, it was pointed out that the provisions of Article 194 of the Indian Constitution are identical to the provisions in Article 105 in all respects. Hence, whatever is said with respect to Article 105 of the Indian Constitution, applies equally to Article 194 of the Indian Constitution. The Indian Constitution Review Commission has further elaborated on this matter.

The freedom of speech guaranteed by Clause(1) to the Members of Parliament is in addition to the freedom of speech and expression guaranteed to the citizens of India by Article 19 (1) (a) of the Indian Constitution and that the freedom of expression guaranteed to the Members of Parliament is not subject to the reasonable restrictions contemplated by Clause 2 of Article 19 of the Indian Constitution⁷⁷. The said freedom is available only within the House of Parliament and is subject to the provisions of the Constitution which regulate the procedure of Parliament, namely, Articles 118 and 121 of the Indian Constitution. The said right is also subject to the Rules and Standing Orders regulating the procedure of Parliament. It has also been held that even if a Member of Parliament makes a statement in the House which is defamatory of a citizen, no action can be taken by that citizen for defamation against such Member⁷⁸. While the interpretation of Clause (1) of Article 105 of the Indian Constitution has not attracted any controversy, the interpretation placed by the majority in the decision of *PV Nasimha Rao v State*⁷⁹ has brought the said controversy to the fore. It is therefore, necessary to examine the position under this Clause.

In the case of *Tejkiran Jain v N Sanjeeva Reddy*⁸⁰, it was held that the Article confers immunity *inter alia* in respect of anything said in Parliament. The word *anything* is of the widest import and is equivalent to *everything*. The only limitation arises from the words in

⁷⁶ Ibid

⁷⁷ Ibid p3

⁷⁸ Ibid

⁷⁹AIR 1998 SC 2120

⁸⁰ (1970) 2 SCC 272

Parliament which means during the Sitting of Parliament and in the course of the business of the House. The concern is therefore only with speeches made in the Lok Sabha. Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any court. This immunity is not only complete but is as it should be. It is of the essence of Parliamentary system of government that the peoples' representatives should be free to express themselves without fear of legal consequences. What they say is only subject to the discipline of the Rules of Parliament, the good sense of the Members and the control of proceedings by the Speaker.

The Tejkiran Jain was a case where certain individuals had filed a suit for damages in respect of defamatory statements alleged to have been made by certain Members of Parliament on the floor of the Lok Sabha during a call attention motion. Such action was held to be not maintainable⁸¹.

In Zambia, the National Assembly Standing Orders, the National Assembly (Powers and Privileges) Act have set out the guidance for the public, in relation to acts, which Parliament may treat as breach or contempt. This is, however, not intended to be an exhaustive or all inclusive list and does not derogate from Parliament's power to determine that particular acts could constitute contempt. This is because each House has the right to judge whether conduct amounts to improper interference in the business of the House and hence contempt.⁸²

⁸¹ Ibid p4

⁸² P S Pachauri, The Law of Parliamentary Privileges in the UK and India 16 (1971)

CHAPTER THREE

SOURCES OF PARLIAMENT'S POWER OF SANCTIONS

One of the most enduring concerns of modern day democracies is to understand the sources of Parliament's power of sanctions, in particular, claim of legal power of punishment by committal for contempt⁸³ or breach of parliamentary privilege the purpose of which is already dealt with in Chapter two.

In interpreting this concern, a cardinal point is that those with a dissenting view consider Parliament's legal power of sanctions an aberration of the doctrine of separation of powers,⁸⁴ the most distinct exposition of which was stated by John Adams in 1780, who, when putting his case for the Massachusetts Constitution stated:

“In the government of this commonwealth, the legislative department shall never exercise the executive and judiciary powers or either of them: the executive shall never exercise the legislative and judicial powers or either of them: the judiciary shall never exercise the legislative and executive powers; or either of them”,⁸⁵

so that in effect only the rule of law, concerned with adherence to the purpose for which the exercise of certain power is granted, can prevail.⁸⁶

Yet this device of correction, welcome as it is, stops short of a general power necessary to correct excesses in the exercise of power granted constitutionally or by practice and convention to the Houses of Parliament.

⁸³ See supra note 23 at 49

⁸⁴ See supra note 14

⁸⁵ See supra note 16

⁸⁶ A E Bradley et al, *Constitutional and Administrative Law-Ninth Edition* 547 (1977)

One way of dealing with this issue is to analyse the sources of Parliament's power of sanctions and the attendant question of parliamentary sovereignty and how Parliament is to be defined in this context.

There are, historically and by statute three main sources of Parliament's power to sanction for offences against it; namely:

1. Power obtained from the Common Law

The origin of Parliament's Common Law power to sanction for breach or contempt of parliamentary privilege is to be found in the "Speaker's customary petition for the recognition of privileges and in particular the members freedom of speech",⁸⁷ and also in the Medieval concept of Parliament as primarily a court of justice with power to punish even for the most trivial faults.⁸⁸ In this regard, the power to fine or imprison for contempt which hitherto belonged to courts of records, at Common Law, was also claimed and exercised by the Commons. Their claim for designation as court, though virtually abandoned by modern legislative bodies has none the less not led to any consequent surrender of all the concomitant powers.

Instead the power of commitment for example, remains, exercised by parliaments, distinctly accepted by the Lords in *Ashby White*,⁸⁹ repeatedly recognised by the courts in the *Brass Crosby's case*,⁹⁰ and the case of *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*.⁹¹

⁸⁷ See supra note 23, at 47-8

⁸⁸ H Graham, *The Mother of Parliaments* 177-8 (1910)

⁸⁹ (1704) L 1 (1701 – 05) 714

⁹⁰ (1771) 95 ER 1005

⁹¹ (1993) 100 DLR (4th) 212 ISCR 319

This was also virtually admitted by the House of commons in the United Kingdom, earlier on, when it resolved in 1837, that:

“by the law and privilege of parliament, this House has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit or other proceeding, for the purpose of bringing before any court or tribunal elsewhere than in Parliament, is a high breach of such privilege, and renders all parties concerned therein amenable to its just displeasure, and to the punishment consequent thereon.”⁹²

2. Power obtained from Parliamentary Law

The same power of a House of Parliament to protect and defend its privileges now extends by parliamentary law, born and developed through practice and procedure, standing orders to all other actions which can be deemed a breach and contempt of the privileges of Parliament. In this regard, it has been agreed that parliamentary privilege would largely be meaningless if the legislature lacked legal power to ensure that its rights and privileges are administered in accordance with the legislature’s historic claim to the exclusive right to determine the ambit of its own privileges. Also, and more fundamentally, parliamentary privilege can not stop at mere recognition of claim of privilege but must encompass respect of such privileges, as part of the fundamental law of a country, which are constitutional.⁹³

In this context, the Legislature has found it expedient by the law and custom of parliament to treat any encroachment upon its exclusive jurisdiction as a contempt and breach of privilege.⁹⁴ In the last resort, and based on parliamentary law, it is

⁹² United Kingdom, House of Commons Journals Vol. 92, 418-20 (1837)

⁹³ Supra see note 91, at 269-270

⁹⁴ S A De Smith, Parliamentary Privilege and the Bill of Rights In: Modern Law Review No. 5, 465 and 470 – 1 (1958)

open to the Legislature to impose its own view by committing to prison persons whom it claims to have violated its privileges and by abstaining from specifying in the warrant for commitment the facts alleged to constitute the breach of privilege or contempt. This happened when Pemberton and Jones, two judges of the King's Bench, were committed for overruling a plea to the jurisdiction of their court when it committed Stockdale and his solicitor for successfully bringing action against Messers Hansard;⁹⁵ and when it committed the Sheriff of Middlesex for executing a lawful judgement of a court.⁹⁶

However, it is to be noted that dramatic cases of this nature and the successful imposition of one point of view is not to be equated with an authoritative declaration of the law. For what Parliament does, is not to take over judicial power but merely to preserve its dignity.

3. **Power obtained under the Constitution**

In a claim for parliamentary privilege, there is also a theory which dispels the view that this is dependant on the Speaker laying claim on behalf of the members and on the Executive or presidential grant of the same. This has been found wanting because such rights and privileges, as earlier pointed out, "are now part of the law of the court *to be enjoyed by members* even though the Speaker did not ask for them *and the President or the Executive* did not confirm them, the Speaker's petition *being therefore*, a mere formality."⁹⁷ This view is based on constitutional and parliamentary law which recognises the power of both historic and modern Parliaments in the enjoyment of privileges as a cornerstone of the law pertaining to parliamentary *summons* or *subpoena*.

⁹⁵ See supra note 83, at 49

⁹⁶ Ibid

⁹⁷ L A Abraham and S C Hawtrey, A Parliamentary Dictionary - Second Edition 157 (1964)

Hence enshrined within state constitutions, statutes, and the established rules, procedures and conversions of legislative bodies, is the authority *to determine their own procedure* and the concomitant power necessary to their proper functioning such as the power to send for persons, papers and records.

Thus as the Speaker of the Canadian House of Commons put it: “The special privileges that members of the House of Commons enjoy are part of the constitutional law of Canada.”⁹⁸ It is important to note, in this regard, that under Section 18 of the Constitution of Canada Act 1867, the Parliament of Canada enacted Section 4 of the Parliament of Canada Act, which provides the Senate and the House of Commons, respectively, and the members thereof the power and privilege to enjoy and exercise:

- (a) such and the like privileges, immunities and powers as, at the time of the passing of the Canadian Constitution Act, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with this Act; and
- (b) such privileges, immunities and powers as are defined by an Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

In New Zealand, Section 242 of the New Zealand Legislature Act 1908, provides that the privileges of the House of Representatives shall be the same as the UK House of Commons in 1865. Similarly, Section 49 of the Constitution of Australia declares that, until the Commonwealth Parliament declares, the Privileges of the Senate and House of Representatives shall be the same as those of the United Kingdom House of Commons at the time of the establishment of the Commonwealth, in 1901.⁹⁹ Between 1865 and 1901, the only significant addition

⁹⁸ Canadian House of Commons, Debates 4309 (1991)

⁹⁹ In 1987, the Commonwealth Parliament enacted the Parliamentary Privileges Act 1987

to the privileges of the United Kingdom House of Commons was the power to administer oaths to witnesses, which was declared by statute to be a privilege in 1871.

In Zambia, although the Constitution does not define what the privileges, immunities and powers of the National Assembly to sanction are, it does provide for the proscription of offences considered to be in contempt of Parliament. Article 87 (2) of the Constitution of Zambia in particular states that the law and custom of the House of commons of the United Kingdom shall apply to the National Assembly, with such modifications as may be prescribed by an Act of Parliament.

In commonwealth counties, reference to law and custom of the House of Commons of the United Kindom in respect of legislative privileges and power of commital is derived from the colonial period when, in granting a legislative assembly to a colony by the British government, the grant also carried with it as an adjunct legal power necessary for that body to carry out its functions including punishment for breach of privilege.

This feature of the British constitutional order, granting the commons or in essence the House of Lords judicial power is entirely foreign in other jurisdictions. This is because to uninitiated eye, it portrays Parliament as sovereign, legally omnipotent and without regard to most scrupulous constitutional limitations in practice. It remains to be seen, therefore, whether this apparent mystical element of legal omnipotence can be sustained in other jurisdictions such as Zambia.

CHAPTER FOUR

EXTENT AND LIMITS OF PARLIAMENT'S POWER OF LEGAL PUNISHMENT

The British Parliament, from whose historical practice and conventions the Standing Orders and Practice in the Parliament of Zambia have been so largely received, was in its origins a High Court of Parliament. The earliest known ancestor of Parliament was the mediaeval *Curia Regis*, in which judicial, executive and legislative functions were fused, and this derived ultimately from the pre-Norman Conquest, Anglo-Saxon, Witan. But the process of attrition of the judicial functions of Parliament was well under way by the 14th century and was completed with the outcome of the great English constitutional battles of the 17th century.¹⁰⁰

The United States Constitution was heavily influenced by 17th century English Puritan (Cromwell) constitutional theory. One example of such influence was the direct incorporation of the English constitutional institution of impeachment in Article II of the United States Constitution. This particular constitutional adoption incidentally took place at a time when the institution of impeachment had virtually disappeared in Great Britain.

There is little doubt that, in its "classical" constitutional use in England, impeachment,¹⁰¹ together with its constitutional analogue, *attainder*, referred to high political acts of judgement against the King's Ministers, rather than legal trials in the strict sense in which issues of criminal conduct would have to be proved. The popularity of *attainder* rather than impeachment with accusers arguably stemmed from the fact that an act of *attainder* was not necessarily preceded by a full trial in which the accused person could defend himself. The summary character of *attainder* gave way to the development by the early 18th century, of Cabinet Government, with Cabinet responsibility before Parliament.

¹⁰⁰ See Coke's Institute of the Laws of England Vol. 4 p 11

¹⁰¹ C J Boulton (Ed.) Erskine May's treatise on the law, Privileges, Proceedings and usage of parliament 67-8 (1989)

Archaism, therefore, could explain the disappearance of *attainder*, rather than any reaction to the frequently, in legal terms, arbitrary, capricious and politically vengeful character of the practice of *attainder*.

In an expert opinion given prepared for the American Senate Committee on Campaign Activities (Ervin Committee) Edward Mc Whinney, a Canadian Parliamentarian directed attention to the schism, in English Constitutional history and practice, between impeachment (*attainder*) of a “criminal” character, - that is, for acts alleged to warrant an impeachment where what was complained of was the manner of exercise of the political discretion of the accused.¹⁰² American constitutional law, Mac Whinney observed, took a course different from that of Great Britain or, by legal reception, Canada, because of the explicit separation-of-powers and the system of inter-institutional checks-and-balances found in the American Constitution. Added to this were the well-evidenced inadequacies of Members of Parliament to handle highly technical “criminal”, as distinct from “political” process, as one of the factors hastening their demise in Great Britain itself.¹⁰³

In addition to this was the latter-day emergence of the constitutional principle of equality before the law or Rule of Law which rejected any special legal regime – substantive or procedural- for Members of Parliament because of their Parliamentary status, as such. In more contemporary legal parlance- amply recognised by Professor Dicey, it implies the subservience of all players in the affairs of the state to the principles of the law of the land.¹⁰⁴ This principle is recognised in most British-derived legislatures, with the strict statutory limitation for example upon those legislatures’ powers to sanction unless by the legal pre-condition of a prior conviction by the regular courts. This is in view of the dictates of the doctrine of separation of powers also known as *Tria Politica*, popularly attributed to the French writer Baron de Montesquieu.¹⁰⁵ The doctrine was primarily aimed at restricting

¹⁰² See supra note 17, at 7 (1996)

¹⁰³ Ibid

¹⁰⁴ M D Walker *The Oxford Companion to Law* 1093 (1980)

¹⁰⁵ See supra note 14

the institutionalised power of the state within legal limits.¹⁰⁶ Montesquieu did not envisage a complete separation of these organs of the State but insisted that “there would be an end of everything if the same person or body whether of the nobles or of the people, were to exercise all these three powers”.¹⁰⁷ One of the founder framers of the American Constitution, Alexander Hamilton, declared that “there can be no liberty where the Legislative and Executive powers are united in the same person or body of magistrates” to which another American Constitutional framer, James Madison, added “ambition must be made to counter ambition”.¹⁰⁸

It is now widely held by many experts and students of constitutional law that three basic and essential functions in the administration of any independent and democratic state are *legislative, executive and judiciary*. It is also widely accepted that the functions of these agencies should, as far as is possible, be kept separate from each other to prevent the concentration of power in any one of them which might lead to tyranny or oppression, “lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner”.¹⁰⁹

It can be seen therefore, that the basic principle of the doctrine of separation of powers is linked to the maintenance of fundamental liberties or freedoms which in the Zambian Constitution are found in Part III and more specifically being Articles 11 to 26 of the Constitution of Zambia as read with Article 28 of the Constitution of Zambia thereof.¹¹⁰ The concept is one of providing checks and balances for democratic governance of society. These liberties or freedoms are, as some writers have put it, natural rights which are indispensable to the true development of the citizen and which ought to be enjoyed by all members of the community. Closely related to the elaboration of the doctrine of separation of powers is one English judge Justice Donaldson who considered it to be the

¹⁰⁶ S I Benn and R S Peters, *Social Principles and the Democratic State* (1959)

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ See the *Laws of Zambia*

duty of Courts to ensure that the government of the country was conducted in accordance with the Rule of Law.¹¹¹ That is to say, the law binds everyone together; and neither subjects and nor the state are above the law.

In Zambia, by Article 91(1) of the Constitution of Zambia, the Judicature of the Republic of Zambia is established. The Zambian Judicature consists of the Supreme Court of Zambia, the High Court of Zambia and such other courts as may be prescribed by an Act of Parliament. Article 92(2) of the Constitution of Zambia states that judges of the Courts shall be independent, impartial and subject only to the Constitution. Article 91(3) of the Constitution of Zambia further provides that the Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament. Provisions of Articles 91(2) and 91(3) of the Constitution of Zambia are considerably innovative and a great step forward in the promotion of the independence of the Judiciary. Exceptional incidents where the Courts of Law have intervened in what appeared to be the domestic affairs of Parliament, as in the cases of *The People v the Chairman of the Standing Orders Committee of the National Assembly, ex-parte Nalumino Mundia*¹¹² and *The People v The Speaker of the National Assembly, ex-parte Harry Mwanga Nkumbula*¹¹³ have been recorded.

These cases raised important constitutional issues concerning the extent of the High Court's jurisdiction in relation to the affairs of Zambian Parliament, a point which led to considerable conflict in England in reconciling the law of privileges of Parliament with the general law. The Court refused Mundia's application for an order of *certiorari* (to quash) the three month suspension imposed on him. In the earlier case of Nkumbula the Court permitted the Order of *mandamus*- (to command) to issue against the Speaker ordering him to comply with the relevant section of the Constitution of Zambia at the time. The distinction between the right of the National Assembly to manage its own internal affairs (i.e. disciplining a Member of Parliament) and the discharge of obligations

¹¹¹ *Lee V Secretary of State for Education and Science (1967)*

¹¹² (1971) ZR

¹¹³ See supra note 28

imposed by the Constitution on the Speaker of the National Assembly was reaffirmed. Professor James T. Craig, former Dean of the School of Law at the University of Zambia wrote a comment on the relationship between Parliament and the Courts based on these two cases.¹¹⁴ In that scholarly commentary, Craig noted that the courts can also declare an Act of Parliament or part of it is *ultra vires* certain constitution provisions of the such as those affecting the fundamental rights and freedoms of the individual found under Articles 11 to 26 of the Constitution of Zambia. For example, in the case of *Thomas Mumba*,¹¹⁵ Justice Dennis Chirwa declared Section 53(1) of the Corrupt Practices Act to be contrary to Article 20 of the Constitution of Zambia at the time and therefore null and void.

Conflicts between Parliamentary privileges and the demand for Parliament to assert its own authority as far as its own internal proceedings are concerned appear to go on unabated and have definite implications in the Legislature's relationship with the Judiciary. For example, on 17th March 1994, the Speaker of the Lok Sabha, Shri Shivraj V Patil informed the House that the Supreme Court of India, on 9th March 1994, had served a notice on the Secretary General requiring him to appear before the Supreme Court either personally or through counsel in the matter of writ (civil) petition. This was in the case for the Secretary General against the admission of the writ petition, which was challenging, *inter-alia*, the constitutional validity of Section 8A of the Salary, Allowances and Pensions of Members of Parliament Act, 1954, as amended till 1982 vide the Salary, Allowances and Pensions of Members of Parliament (Amendment) Act, 1982.

In response to this, the Speaker informed the House that "as per well established Practice and Convention of the House, the Secretary General, Lok Sabha has been asked not to respond to the notice. The Union Deputy Minister in the Ministry of Law, Justice and Company Affairs Honourable Mr. Azad Shri Ghulam Nabi was requested to take such action as he might deem fit to appraise the Supreme Court of India of the correct

¹¹⁴ See *Zambian Law Journal* 1971/72 at p 143

¹¹⁵ (1984) ZR 38

constitutional position and the well established Conventions of the House.¹¹⁶ Furthermore on 30th March 1994, the Speaker himself was the subject of a notice to appear before the Supreme Court. This was again in a matter of writ petition originally filed before the Rajasthan High Court and withdrawn to the Supreme Court. The writ of petition was challenging the method of transfer of Judges of High Courts and appointments of Judges of the Supreme Court and High Courts. Referring to the ‘well-established practice and convention of the House’, the Speaker once again requested the Minister of Law, Justice and Company Affairs to appraise the Supreme Court of the correct constitutional position and the well-established conventions of the House, “and that the Speaker [was] not responsible for the transfer of Judges”¹¹⁷ In this instance, the Speaker demonstrated that if he was loathe of the Judiciary’s interference in the business of the House, he was equally averse to the House’s in the affairs of the Courts. Indeed, a recent ruling delivered in the Sri-Lanka Parliament on 20th June 2001,¹¹⁸ may require that we look at Parliament’s legal powers in relation to those of the Judiciary. In that case, the Supreme Court of Sri-Lanka issued a Stay Order restraining the Speaker from appointing a Select Committee of Parliament to inquire into the conduct of the Chief Justice consequent to a motion of impeachment against him, being forwarded to the Speaker, in terms of the Constitution and Standing Orders. This move by the Judiciary to intervene and interfere with the proceedings of Parliament was ruled on by the Speaker.

In making the ruling, Speaker Bandaranaike told the House that “I am also deeply conscious of my responsibility and obligation as your Speaker and as the custodian of the historic rights and privileges of this Assembly and its Members, to be ever vigilant against such infusions from any place outside this House, which have the effect of impeding the conduct of the affairs of Parliament on the supposed ground of enforcing the constitutional or legal right of others¹¹⁹.” The Speaker added that the exclusion of the jurisdiction of the

¹¹⁶ A Makower and P Helme (Editors), Writ served on the Secretary-General in The Table Vol. 63, 64-5 (1995)

¹¹⁷ Ibid, at p 65

¹¹⁸ A Bandaranaike Ruling on Order of Supreme Court Restraining Speaker of Parliament of Sri Lanka from Appointing a Select Committee of Parliament Regarding a Motion for the Impeachment of the Chief Justice (unpubl Parliament of Sri Lanka, Colombo, June 2001)

¹¹⁹ Ibid

courts to exercise any control over the acts of the Speaker and the officers of the Legislature had been recognized in the law of the country for over half a century, having been provided for in Section 29 of the Sri Lanka State Council (Powers and Privileges) Ordinance No. 27, of 1942.

Speaker Bandaranaike further referred to judgments from the United Kingdom, such as the observation by Stephen in *Bradlaugh V Gossett*¹²⁰ which stated that “it seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulations of its own proceedings within its own walks is concerned, and that even if that interpretation should be erroneous, this court has no power to interfere with it directly or indirectly.”¹²¹

Speaker Bandaranaike also quoted extensively from his Sri Lanka Parliament’s Powers and Privileges Act of 1953, and stated that the cumulative effect of these provisions placed the question of the exercise of the Speaker’s powers wholly outside the control of any court. Of particular significance was Section 9 of the Sri Lanka Parliament’s Powers and Privileges Act of 1953 which expressly provided that “all privileges, immunities and powers of Parliament shall be part of the general and public law of Sri Lanka.” The Speaker concluded that the right therefore, of the Speaker to appoint a Select Committee, in terms of the said Standing Order 78 was also a proceeding of Parliament having the privilege of immunity from being impeached, questioned or interfered with by any court of law. He concluded his decision thus:

- “1. The Supreme Court had no jurisdiction to issue the interim orders restraining the Speaker of Parliament in respect of the steps he is empowered to take under Standing Order 78A.
2. The aforesaid interim orders dated 6th June 2001 are not binding on the Speaker of Parliament.

¹²⁰ (1884) 12 QBD 271

¹²¹ Ibid

3. There is no legal obligation to comply with the said orders.”¹²²

Infringement on Parliamentary Privilege need not necessarily arise out of decisions of the Judiciary. They might arise out of seemingly innocent statements from the courts that may have the effect of casting aspersion on Members of Parliament and the House of Parliament.¹²³

Justice Joyal of Canada, presiding in a case in which a public official had sought an injunction against his dismissal, communicated before the House of Commons is reported to have said:

“I am concerned as a citizen that with immunity, a Minister of the Crown can get up in the House – on the basis of I don’t know what and say I am going to fire this guy and everybody is up and cheering. I was thinking of those people around the guillotine. I don’t know whether I have a right to intervene. But it left a bad taste in my mouth”¹²⁴

This sweeping statement by the Judge from the bench was perceived as being intrusive and totally inappropriate. A member from the Government side, thereafter, raised a question of privilege and argued that Justice Joyal’s remarks constituted a *prima facie* case of contempt of Parliament, and suggested three possible courses of action: first, that the House decide to move a motion of censure; second; that the matter be sent to a committee where it could be debated and appropriate action determined; and third, that the judge be called to the Bar of the House to explain the context and intentions of his remarks. Speaker Gilbert Parent decided to take the matter under advisement. Meanwhile, the next day Justice Joyal admitted using “inappropriate language” and said that he had not intended to be disrespectful of Members of Parliament.

¹²² See supra note 117

¹²³ R Marleau, Relationship between Courts and Parliament in Canada: The Joyal Affair. In *The Table*, Vol 64, 15-19 (1996)

¹²⁴ Ibid

The Canadian Judicial Council then informed the House through the Clerk that the Council had initiated proceedings against Justice Joyal for the remarks attributed to him. When the Speaker tabled this letter before the House, he also stated that:

“[T]here is a necessary constitutional divide between our legislative and judicial branches. That divide should be bridged only when one institution seeks to vigorously support the role of the other.”¹²⁵

Although the Canadian Judicial Council concluded that Justice Joyal’s conduct did not warrant a formal investigation, it did express disapproval of the comments made thus:

“...your comments in this matter fall outside of the sphere of proper judicial expression. Although the incident in Parliament was described in the material, which was filed, your comments were extraneous to the issues before you. They were gratuitous and insulting to Parliament.”¹²⁶

The Chairman of the Judicial Panel looking into the case urged restraint, that “such restraint in relation to Parliament will complement Parliament’s restraint in relation to the Judiciary. The beneficiary will be the Canadian Parliament [who], ultimately, both institutions were created to serve.”¹²⁷ Copies of these documents were forwarded to the Clerk of the House, and when they were tabled in the House the Speaker stated that he considered “this matter [...] closed.”¹²⁸ In some instances, Parliament and the Executive may find themselves on the same side in court as a result of the action of a third party. In 2000, in New Zealand, a private company obtained an injunction in the New Zealand High court to prevent the Clerk of the House presenting a bill for the Royal Assent.¹²⁹ The bill, the New Zealand Forests (West Coast Accord) Bill, was designed to prohibit the

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ D Batt and G Devine (Editors), Attempt to prevent Royal assent. In *The Table*, Vol. 69, 101-3 (2001)

logging of native forest on the west coast of the South Island of New Zealand, which, as a consequence, would abrogate an Accord reached in 1986 between the Government, local authorities, conservationists and the timber industry which had allowed sustained logging. The bill did not also propose to compensate loggers for any losses they would incur as a result of the change of policy.

While the bill was before a select committee, the leading saw miller and processor in the area issued legal proceedings against the Government, seeking damages and an injunction in respect of an alleged breach of contract and of rights under *Magna Charta* and the New Zealand Bill of Rights Act 1990. The company also sought an injunction against the Clerk of the House to prevent the Clerk from presenting the bill for Royal Assent if it did not contain any provision for compensation of saw millers for the prohibition of sawmilling.

The Clerk of the House was represented by Counsel and the Privileges Committee recommended to the Speaker to intervene in the action by instructing Counsel to present submissions on parliamentary privilege. The courts also granted leave for the Speaker to intervene. Predictably, the Clerk refused to agree to withdraw the bill for Royal Assent. The plaintiff sought an interim injunction to restrain the Clerk from presenting the bill for Royal Assent until trial of the action. At the same time, the Attorney-General and the Clerk of the House applied to the court to have the action struck out.

The court made no finding whether the plaintiff did have contractual rights under the 1986 Accord. The Government argued that the mere promotion of legislation could not affect contractual rights and that introducing a bill could not be a breach of contract when the actual enactment of such legislation would not itself be a breach.

On the attempt to prevent Royal Assent, the court ruled that if Parliament was required by any "manner and form" provision concerning the procedure to be followed in passing legislation, the court had jurisdiction to ensure that there had been compliance. The court found that "manner and form" applied to legal requirements concerning the process, and

did not apply to content of legislation, which was the matter in dispute whether the bill should provide for compensation.

The Judge, however, did make a very important distinction when he said that he saw “no reason why the court could not intervene in a “manner and form” case between Third reading and the Royal Assent and that the submission of a bill for the Royal Assent was not a “proceeding in Parliament” protected from judicial scrutiny by Article 9 of the New Zealand Bill of Rights 1988”¹³⁰

In this case, the court was powerless to stop Parliament from making the legislative changes that were proposed whether they were contrary to the New Zealand Bill of Rights Act or not since there is, in New Zealand, no supreme law inhibiting Parliament’s legislative powers, provided that Parliament proceeded in accordance with any legally prescribed forms. “If the content of legislation was offensive the remedies were political and electoral, not judicial.”¹³¹ The court then dismissed the application for an interim injunction and struck out the actions against the Government. The bill was thus assented to without any provisions for compensation for loss of logging rights.

The other aspect in the relationship between Parliament and the Judiciary, which has become quite significant in the last two decades or so, is the globalisation of justice, which in some cases, has superseded national legal systems.

International Criminal Tribunals, for example, such as the Bosnia War Crimes Tribunal, transcend national boundaries in their jurisdiction. Almost every country in the world has acceded to one or more international conventions in which they agree to not only domesticate international law, but to agree to abide by the decisions of international courts or tribunals. A good example of such a case involving an international court and a

¹³⁰ Ibid

¹³¹ Report on the Proceedings of the 12th Conference of the CPA Speakers and Presiding Officers, unpubl, Trinidad and Tobago, 1994

national court and Parliaments is *the case of Demicoli*, a Maltese national.¹³² The case was discussed by Speaker Dr Gonzi of the Maltese Parliament in his presentation at the 1994 Conference of Commonwealth Speaker and Presiding Officers entitled “Relationship between Parliament and the Judiciary, with references to the Immunity of Parliamentary Proceedings and the Powers of International Courts.

The Demicoli case arose out of an article that appeared in a Maltese political satirical periodical called “MHUX fl –Interesstal-Poplu” (NOT in the people’s interest) in 1986 and which carried an offending phrase “send in the Clown” in relation to two Members of Parliament. The two Members then brought a breach of privilege complaint in the Maltese Parliament against the editor of the periodical, Mr Carmel Demicoli. The Speaker decided that there was indeed a breach of Privilege, and this meant that the House had to go into the details of the case and eventually decide on the punishment. A day was then fixed for the case to be heard in Parliament and Mr Demicoli was ordered to be brought before the Bar of the House. A few days before the hearing, Mr Demicoli presented an application to the country’s Constitutional Court arguing that Parliament had no right to hear the case because Parliament was prejudiced as it would be both judge and prosecutor.

Parliament, however, proceeded to hear the case (a possible deviation from the *sub-judice* rule) since the case was before the Constitutional Court. The two Members who had presented the breach of privilege complaint participated in the debate that took place, and at the end of the debate, Mr Demicoli was found guilty by a resolution of the House but punishment was postponed to a future sitting. Meanwhile, the case continued on the Constitutional Court and, on a final appeal of a decision before the Highest Court of the Land, decided that Parliament had every right to hear the case and to punish the individual concerned. Following this decision, the House proceeded to fine the editor.

The chief difficulty arose out of the fact that the Maltese Constitution has a chapter that deals specifically with human rights. One of the rights is that a person accused of a

¹³² [Carmel] Demicoli v Malta 13057 / 87 (1991) ECHR 37 (27 August 1991)

criminal charge has the right to be heard by an impartial tribunal. In addition, Malta was party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPGRFF) which Malta signed in 1966. Every Maltese citizen who accordingly felt that one of the fundamental freedoms mentioned in the ECPHRFF was breached was entitled to seek redress in the local courts. If not satisfied, the individual could appeal to the international court known as the European Court of Human Rights. Because Malta was a Signatory to the ECPHRFF which established the Court of Human Rights, the decisions of this court are enforceable in Malta and binding on the government as far as the enforcement of that decision was concerned.

Therefore, after the Maltese court decision, Mr Demicoli petitioned the European Court, arguing that one of the articles of the conventions confirmed that an individual charged with criminal offence has a right to be judged and heard by an independent and impartial tribunal. In its decision delivered in August 1991, the international court stated that the two Members who had presented the breach of privilege complaint had actually participated in the debate and had voted in the resolution to fine the editor. The European Court therefore, decided that this fact placed in doubt the impartiality of Parliament when it was exercising its judicial or quasi-judicial function in deciding the guilt of Mr Demicoli. The court, therefore, unanimously concluded that there was breach of fundamental right for which Mr Demicoli suffered, and ordered the Maltese government to remedy the situation.

According to Speaker Dr Gonzi, “one could say that the European Court was basically saying that the procedures adopted by the Maltese Parliament in deciding this breach of privilege breached a fundamental human right of an individual.¹³³ He further continued that “one could possibly argue also that the Maltese Parliament did not have the right to adopt those procedures in order to enforce its privileges and to take action when one of its privileges is breached.¹³⁴ Speaker Gonzi further stated in his presentation that “comparing Parliament’s Privilege with the individual’s human right, according to the European

¹³³ Ibid

¹³⁴ Ibid

Court's judgment, it is the fundamental human rights that win and Parliament must follow procedures that give due respect and protection to the fundamental human rights, and again that in its capacity as the "prime guardian of the [R]ule of [L]aw, Parliament even in its own independence and sovereignty, needs to act in a way that necessarily confirms basic precepts of natural justice and fundamental rights and fundamental freedoms".¹³⁵

The Demicoli case of course raised a lot of issues. These included the inter-play between Parliament and human rights, the encroachment by international treaties on supremacy and sovereignty of the state, and whether a breach of privilege can be considered a criminal offence or not. More fundamentally, the case did bring to the fore the fact that once Parliament decides to exercise judicial or quasi-judicial functions, it opens up a plethora of possibilities, arguments and counter-arguments about what the proper exercise of those powers should be. An additional complication is that once a country accedes to some international treaty, the country to some extent abrogates certain negative aspects of sovereignty and this includes the application of legal matters. This extrapolates the realm of law-making from national parliaments to international bodies. Judicators follow the same pattern. The Demicoli case is a rare instance of breach of Privilege being decided upon by an international court. It is to be expected, however, that where cases of breach of Privilege touch on fundamental human rights, the judicators might just move beyond parliamentary jurisdiction. An indication, therefore, that Parliament's power of legal punishment is not only limited by Domestic Law but also by the principles of International Law.

¹³⁵ Ibid

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

Parliament's power of legal punishment relates to matters of breach of privilege or contempt of Parliament, two terms, which are often used interchangeably. Strictly speaking, the terms refer to distinct classes of offences: the former referring to infringements of specific privileges and immunities, such as breach of members' freedom of speech, impeachment of parliamentary proceedings outside parliament, arrest of members in civil cases, whereas the latter refers to those offences which prejudicially affect the dignity and authority of the Houses of Parliament. Contempt of Parliament includes misconduct of witnesses before Members or strangers in the presence of a House of Parliament; libellous reflections on the House and its members and disobedience to the rules and orders of the House.¹³⁶ The occurrence of breach of privilege and contempt of the House may be considered to be the same insofar as certain particular cases bear elements of both contempt and breach but the two conceptual domains should be treated differently.

Under Parliamentary Law, breach of privilege is an offence punishable by the House¹³⁷ and is normally considered, when any individual or authority disregards or attacks any of the privileges, rights and immunities, either of the Members individually or of the House in its collective capacity. Besides these, other actions such as those in the nature of offence against the authority or dignity of the House, exemplified by disobedience to legitimate orders of the House or libels upon the House, its Members, Committees or Officers also constitute breach of privilege of the House.

¹³⁶ See supra note 101, Chapter 8 Part A

¹³⁷ See supra note 47

Under Parliamentary Law, the House also claims the right to punish as contemptuous, actions which, while not breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members or its officers.¹³⁸ In this case contempt of Parliament is any conduct (including words), which improperly interferes, or is intended or likely to improperly interfere, with the performance by either House of its functions, or the performance by a Member or officer of the House of his duties as Member or officer.¹³⁹ The scope of contempt is broad, because the actions, which may obstruct a House or, one of its committees in the performance of their functions are diverse in character. Each House has the exclusive right to judge whether a conduct amounts to improper interference and hence contempt.¹⁴⁰

Thus in the analysis of the way offences against Parliaments are dealt with, two distinct approaches emerge. The first approach concerns Parliaments which do not make a distinction in law between offences against Parliament and offences against other public authorities. In this regard, Parliament is not protected for its own sake but because it is part of the machinery of government which has to preserve its dignity in all circumstances. In Argentina, for example:

“Offences against either House of Congress are dealt with by ordinary rule of law, unless the offence is not defined by law, in which case, the Congress, in accordance with a judicial decision and with the consent of the Supreme Court, itself tries the defendant”¹⁴¹

The second approach relates to Parliaments of countries such as the United States of America and Sri-Lanka which have granted themselves special protection under the

¹³⁸ See supra note 55, at 6469

¹³⁹ Ibid, p 108

¹⁴⁰ See supra note 82

¹⁴¹ See supra note 21, at 226

Constitution against offences, which may be committed against them. For example, in the United States of America:

“Offences against Congress are dealt with by both the Congress itself and the Courts of law. After an individual has been cited for contempt for an offence by a majority vote of either House, the citation is then referred to the United States Attorney for indictment and prosecution in the District Court. The defendant enjoys all the rights of a trial and appeal accorded to defendants in all criminal cases. Each House also possesses the common law right to try an offender before the Bar of the House and to imprison anyone found guilty.”¹⁴² [In this respect,] offences against either House of Congress are dealt with by ordinary rule of law... or if the defendant is tried by the House itself, by that House. However, in the latter instance imprisonment cannot last beyond the particular session of the Congress.”¹⁴³

The Zambian Parliament belongs to the second approach. In Zambia, the National Assembly Standing Orders together with the National Assembly (Powers and Privileges) Act ¹⁴⁴ set out the guidance for the public, in relation to acts, which Parliament may treat as breach or contempt. As already stated in the previous chapter, this is not intended to be an exhaustive or all-inclusive list and does not derogate from Parliament’s power to determine that other particular acts could constitute contempt.

In this regard, the House has developed an historical right to punish for actions, which, while not breaches of any specific privilege, are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its officers or its members.

For as Gladstone has observed:

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ See supra note 110, Cap 12

“Breach of privilege is a very wide net, and it would be very undesirable that notice should be taken in this House of all cases in which Honourable Members are unfairly criticized. Breach of privilege is not exactly to be defined. It is rather to be held in the air to be exercised on proper occasions when, in the opinion of the House, a fit case for its exercise occurs. To put this weapon unduly in force is to invite a combat upon unequal terms where so ever and by whomsoever carried on.”¹⁴⁵

Speeches or writings containing vague charges against members or criticizing their parliamentary conduct in a strong language particularly in the heat of a public controversy, without, however, imputing any *mal fides* are not treated by the House as a contempt of breach of privilege. This notwithstanding, Parliament has accused newspapers and certain individuals of violating Parliamentary privileges in the manner in which they report and comment on parliamentary proceedings, respectively. Newspaper editors who, in the eyes of Parliament have erred in the manner in which they published news from the National Assembly have been severely reprimanded before the House, threatened with stiff punishment and forced to apologise.¹⁴⁶ For example, in an editorial published on 28th January, 1970, the then Times of Zambia Editor-in-Chief, Dunstan Kamana described Parliament as “Zambia’s most expensive rubber stamp” after the House passed a Constitutional Amendment Bill that had been initially thrown out of Parliament.¹⁴⁷ He was reprimanded before the House. Yet another Times of Zambia Editor-in-Chief, John Musukuma was scolded before the House for quoting from uncorrected transcripts of the daily parliamentary debates.

In 1980, the Speaker of the National Assembly, Robinson Nabulyato told the Editor-in-Chief of the Times of Zambia that:

¹⁴⁵ Gladstone E W Breach of Privilege In: Bwembya J M, Parliamentary Privileges and the Media (unpubl), April 14, 2002.

¹⁴⁶ F Kasoma The Press in Zambia 198 (1986)

¹⁴⁷ Ibid

“The House would have decided on a much stiffer punishment like sending you to prison or levying a heavy fine on you, since your paper is in the habit of committing these breaches.”¹⁴⁸

As recent as February 1996, Nabulyato, acting as Speaker of the National Assembly, found Post Newspaper editors Fred M'membe and Bright Mwape and freelance columnist Lucy Sichone guilty of contempt of Parliament¹⁴⁹. The three scribes had written articles commenting on criticism voiced in Parliament by the then Vice President, General Godfrey Miyanda concerning a decision by the High Court to rule that legislation requiring that police permits be granted to those wishing to hold public rallies and demonstrations was unconstitutional. The Speaker sentenced them to indefinite imprisonment and ordered their arrest. Lucy Sichone went into hiding but M'membe and Mwape spent 24 days in jail before the High Court ruled that they should be released as the circumstances under which they were arrested were unlawful. The court found them in contempt of Parliament under legislation dating back to British colonial rule but it did not think that the Parliament had such legal power to send them for incarceration indefinitely.¹⁵⁰

On 9th March 1999, the Deputy Speaker of the National Assembly, Simon Mwila, directed the Minister of Defence to take action against The Post Newspaper for publishing a report critical of Zambian military capability in its issue No. 1183 of the same day. The Post Newspaper stated that Zambia did not have the military capacity to defend itself against Angola in the event of military attack. The paper was placed before the table of the House by one Member Christopher Chawinga who said that The Post Newspaper had “undressed” Zambia as a nation by comparing the defence capabilities of Angola with Zambia, thereby putting the lives of Zambian citizens at risk. By the end of

¹⁴⁸ Ibid, at p 157

¹⁴⁹ Fred M'membe and B Mwape v The Speaker of the National Assembly and the Commissioner of Prisons and The Attorney-General [1996] HP/1199

¹⁵⁰ Ibid p20

the week, 12 Post Newspaper reporters had been arrested and charged with espionage, only to be later acquitted by the High Court.

Whether these incidents are sufficient to reveal an adversarial relationship between Parliament, the press and individuals with Parliament having the legal power to deal with breaches remains to be proven. In citing these and other cases before, what recommendations and conclusion can be made in regard to Parliament's power of legal punishment? It is to be noted that Article 1, clauses (3) and (4) of the Constitution of Zambia expressly declares that the Constitution is the highest law in the hierarchy of domestic norms and prevails in the event of a clash with any legislation. In the words of the Constitution, Article 1 provides that:

“(3)... if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void,” and

“(4) This Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the state at all levels”¹⁵¹

The Zambian Constitution also radiates a positive view of fundamental rules for the protection of persons, their rights, values and property. In this regard, the Constitution contains a selection of some of the most important legal rules to govern the protection of such rights under Part III of the Constitution, titled “Protection of the Fundamental Rights and Freedoms of the individual,” especially the provisions of Articles 11 to 32 of the Constitution of Zambia. Some of the essential features expressed in terms of the Rule of Law are contained in the provisions under Article 18(4) of the Constitution of Zambia embodies two forms of protection by the proposition that:

- (i) a person cannot be held liable, punished for an act which at the time of its commission was not an offence (anti-legislation with retrogressive effect); and that

¹⁵¹ See the Laws of Zambia, Revised Edition, Act 1996

- (ii) a penalty shall not be imposed for a criminal offence severer in degree or description than the maximum penalty that might have been imposed for the offence at the time it was committed.

Article 13 of the Constitution of Zambia, on the other hand reinforces the protection of personal liberties by barring deprivation of personal rights unless as provided for by law and such law must be specific and pursuant to a court's decision.

Similarly, Article 16 of the Constitution of Zambia protects a person from being deprived of personal property unless expressly provided for by law as in satisfaction of a court sentence or order for breach of law, educational or welfare requirements of a person to age eighteen, preventing spread of infectious or contagious diseases, safety and treatment of persons with unsound mind or drug addicts, preventing unlawful entry in the country, affecting an expulsion or extradition and court order for a person to remain in a specified area within Zambia.

The Constitutional supremacy and endorsement of the rule of law by incorporating definite Articles for its protection asserts also the logical requirement for their protection. Par III of the Constitution is not alterable by ordinary means. The rationale being to ensure that the power of alteration is resorted to only when compelling reasons dictate such a course, rather than for transient self-serving interests¹⁵² If, however, circumstances dictate that it ought to be altered, Article 79 of the Constitution of Zambia stipulates that:

“(3) A bill for alteration of Part III...shall not be passed unless before the first reading of the bill... it has been put to a National Referendum with or without amendment by not less than fifty percent of persons entitled to be registered as voters for the purpose of presidential and parliamentary elections.”¹⁵³

¹⁵² B O Nwabueze, *Judicialism in Commonwealth Africa* 31 (1977)

¹⁵³ See *supra* note 150

Finally, and if the presence of such Articles in the Constitution to safeguard the rule of law does not amount to a clear wake up call and the law is breached, Article 94 of the Constitution of Zambia as conferred on the High Court:

“(I)...unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.”¹⁵⁴

In the light of the foregoing, it is to be observed that although the existence of criminal legal system is related to the conviction that crimes will continue to take place, the prospect of punishment does deter some crime. However, even if a parliamentary legal system cannot guarantee absolute deterrence, prospective libellous activity can be obviated by the system itself. For this reason, Parliament’s power of legal punishment should be maintained precisely because of the need to punish breaches that will continue to disrespect parliamentary privilege, immunity and power. For a “system of restraints... has no value if, when the restraints are transgressed, no means of enforcing them exists.”¹⁵⁵

None the less, the existence of a system of legal punishment should respond to the continued need to protect the purpose for which the institution of Parliament exists and to provide redress to victims of violations and not merely as a grand inquisitor punishing even for the most trivial reflections on it.

However, in regard to the future operation of Parliament’s power of legal punishment, the aforesaid limitation does not mean that general deterrent effect on future breaches is unimportant. There is need to realize that total deterrence of breaches and contempt of parliamentary privilege, immunities and power are not realistic objectives per se. This is because there will always be individuals who would not abstain from violating them because of the deterrent effect of the existence of Parliament’s power of legal

¹⁵⁴ Ibid

¹⁵⁵ See supra note 153, at xi

punishment. These would have to be stopped by the action of the same parliamentary privileges.

It is, therefore, the potential capacity of Parliament's power of legal punishment to neutralize violators in their tracks that should be the focus of parliamentary law, rather than the hope or expectation of absolute deterrence. Such legal power must be conceived as a mechanism to restrain and suppress grave breaches rather than expect it to carry out, potentially, judicially derived deterrence that must be for the courts of law proper.

CONCLUSION

This study, though preliminary in certain respects shows that the exercise of Parliament's power of legal punishment is a complex matter involving the Legislature, the Executive and the Judiciary. One principle pertinent to the exercise of Parliament's power of legal punishment is the doctrine of separation of powers, the view that some form of interrelationship between the three fundamental powers is necessary to guard against arbitrariness on the part of one or more of the three organs of government. While Parliament should be sovereign, it cannot, in the complex modern society, be *legibus solutus*, for it is bound by certain legal rules of structure and procedure and by certain traditions or basic norms.¹⁵⁶ In this regard, the central conclusion must be that the historical judicial powers hitherto practiced by the earliest ancestor of Parliament, the medieval *Curia Regis* have become obsolete with the emergence of responsible government and the dictates of the concepts of separation of powers whose normal means of guaranteeing the independence of the three organs of government must be retained to oversee Parliament's own exercise of the power of legal punishment. The building of any measure of due process of law, as has been so far realized in the United States demands that all players respect the role and functions of other players while protecting their own interests.

¹⁵⁶ D Basson and H Viljoen, South African Constitutional Law – The Concept of Separation of Power and Sovereignty of Parliament as *legibus solutus* 193 (1988)

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