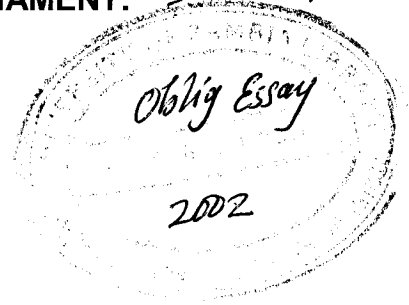


**PENAL JURISDICTION OF PARLIAMENT:** *School of law*

**AN OVERVIEW**



**BY**

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**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**

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**PENAL JURISDICTION OF PARLIAMENT:**

**AN OVERVIEW**

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**Dr. ALFRED CHANDA LLB.,LLM. PHd**

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## DEDICATION

*To my father, the late Timothy Jiranda Kankasa, military officer, diplomat politician, unionist, and dedicated father who started it all.*

*Our hearts bleed father for you not seeing the success of your efforts.*

*To my Queen mother, Chibesa Bessie Kankasa Chibesakunda, who had to be strong suddenly for our sake and who in turbulent times was father, mother, guardian, counselor and role model to ten children.*

*To my wife Sindiso Khumalo Ngatsha Kankasa for giving my life a true meaning.*

*To my three children, Mpande, Timothy Jiranda and Makole Chilufya Kankasa, who have made my life such a challenge.*

*To my sisters and brother, ba Chipepo, ba Tukiya, Mumeka, Kalonde, Mwansa, Makole, Bezo and Kapiji, for being there for me.*

*May the almighty God richly bless you all.*

*To the late, Mumba Marco "Cobra" Kankasa I will always love you my brother, always*

*To all my nephews and nieces, It has always been a pleasure having you guys around. Take heed of our sacrifices and be better people to continue the family tradition of achievers.*

*May God bless you all and reward you richly*

## ACKNOWLEDGEMENTS

*I wish to express my heartfelt gratitude to my supervisor Dr. Alfred Chanda for the amount of patience, tolerance, keen interest and valuable time he spent going through my work. I also wish to thank him for his valuable ideas, comments and suggestions that have greatly improved this paper.*

*I also wish to thank my wife Sindiso Khumalo Ngatsha Kankasa for assisting me in my research and her valuable insights. May I also thank my employers, the National Assembly of Zambia, especially through the Clerk's Office for granting me time off to pursue my legal studies whose culmination is this research. May I also thank all those who assisted me in editing the final manuscript of this Obligatory Essay.*

*Special thanks go to my friends Godfrey N. Haantobolo, Moomba Maimbo and James Chungu for always being there when I needed them. Thanks guys.*

## INTRODUCTION

Modern Parliaments today are considered as remarkably versatile institutions. They serve as Houses of debate, makers of laws, makers as well as breakers of elected governments, as Courts, and as well as the source of all taxation measures. With all these functions and given the critically important role that a Parliament plays in the political life of a state, it is surprising to find out how difficult it is to find anything like an official “owner’s manual” explaining in detail the operations of Parliament especially its practices and traditions. The reason is partly the result of our common-law heritage, which builds on precedent and stubbornly refuses to codify itself. Books that do record parliamentary law and procedures are not numerous and in the absence of comprehensive rulebooks for each Parliament over the years, they have taken on a quasi-biblical stature<sup>1</sup>.

This revered status and the huge ignorance generally, of Parliamentary Law and its powers, and specifically, of Parliament’s penal jurisdiction even among Members Parliament, lawyers, judges, civil servants and academics has always been a cause of concern. This Essay looks at the doctrine of Parliamentary Penal Jurisdiction by giving an outline of where these powers originated from, views of eminent writers and parliamentary academicians who have written extensively on the subject. The Essay will thereafter look at the Zambian position on this issue of conflict between the judiciary and legislature and how the courts have ruled over this exercise of parliament’s penal jurisdiction despite Parliament’s views on the matter.

The Essay ends with a conclusion and gives recommendations.

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<sup>1</sup> Derek Lee: *The Power of Parliamentary Houses to send for Persons, Papers and Records*, University of Toronto Press Pg.

## **CHAPTER I: SEPARATION OF POWERS**

Chapter 1 looks at the doctrine of the separation of powers and gives a brief history of its origin and evolution. In doing this, the chapter gives a insight of the relationship between the Judiciary and the Legislature, making special reference to the exercise of the power of committal by the House and the Courts objection to this.

### **1.1 DOCTRINE OF SEPARATION OF POWERS**

The separation of powers has come to be generally accepted as a fundamental attribute of representative and constitutional government. The English philosopher, John Locke, was the first in 1690 to delineate the functions of a legislature to define the rights of individual, and of an executive to enforce them. Montesquieu, in 1748, was the first to expound this doctrine elaborately, and drew a distinction between the legislative, the executive and judicial powers, which, he proposed, should be handled by separate and distinct bodies.<sup>2</sup>

Locke recognised only one power, the legislative power, and argued that this power was divided between the King and Parliament. What Locke argued for essentially was limited government. The Legislature, which appointed a government, was to be answerable to the people, with whom it had entered into a social contract to protect the people's natural rights in return for their acquiescence. This idea of a social contract meant that government rested upon men and not the divine right of kings. Whenever the government abused this trust, or used its powers arbitrarily, it could be legally dissolved and a new government established in its place<sup>3</sup>.

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<sup>2</sup> Encyclopaedia Britannia(1963). London

Montesquieu inspired by the English Constitution, argued in his "Spirit of Laws" that liberty was most effectively safeguarded by the separation of powers. He stated that in a properly run community, the citizens establish a constitution, which, first, stipulated what the whole government may or may not do; secondly, established certain governmental agencies and provides a procedure for selecting their members; and thirdly, it allocated certain powers to each agency. Montesquieu argued that these powers allocated among three main agencies should be legislative, which should be the power to make laws; executive power, that is the power to enforce laws; and judicial power to interpret the application of laws and also to punish the breaking of the laws.<sup>4</sup>

The idea of separation of powers, according to Montesquieu was to have a government strong enough to maintain law and order without allowing it to grow so strong as to become tyrannical. Given such an arrangement, the three arms of government variously work in concert to preserve law and order, but no single arm should ever control the whole or greater part of government. Montesquieu strongly believed that any concentration of power in any single arm of government would result in tyranny, whether that power is concentrated in an elected and responsible representative assembly or an irresponsible hereditary monarch. Thus, only a genuine separation of powers would protect the liberties of men against the aggressions of government.<sup>5</sup>

Since Montesquieu, the idea of separation of powers has been given constitutional expression in many countries, notably the United States. John Adams stated the most distinct exposition of its intent in 1780, when putting his case for the Massachusetts Constitution:

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<sup>3</sup> Ibid

<sup>4</sup> Encyclopaedia of the Social Sciences (1968) Vol. 3, New York, Macmillan Co. and the free Press Pg.

<sup>5</sup> Ibid

*"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws, not men."*<sup>6</sup>

In the doctrine of separation of powers, one sees, therefore, that law and order, stability and the preservation of the rights of citizens, are assured by the countervailing forces of the three arms of government effecting for and against each other "**checks and balances**".

From the foregoing it can be stated that in order to understand parliamentary law and to define the powers existent in this it is important from the foregoing to note that principally, in parliamentary forms of Government there are three organs of the state namely the Executive, the Judiciary and Parliament. The basis of the functioning of these organs is based on the doctrine of "**separation of powers**", which states that:

*Functions designated to each of the organs of Government should not be exercised by another.*<sup>7</sup>

The principles under this doctrine of "separation of powers" state that responsibilities and controls should be dispersed rather than centered in one place. This doctrine of separation of powers calls for the distribution of power among the three main organs of Government in a manner that makes them

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<sup>6</sup> Ibid

mutually independent of one another. It requires organisational arrangements, which enable each branch to exercise its designated powers without being obliged to submit to the dictates of the other two. None of the three branches is supposed to be superior to the other(s) and none are answerable to the other(s) in the use of its discretionary powers<sup>8</sup>. On this, American president Thomas Jefferson in a letter to Charles Hellstedt, wrote-

*"The Constitution of the United States having divided the powers of government into three branches, legislative, executive, and judiciary, and deposited each with a separate body of magistracy, forbidding either to interfere in the department of the other."<sup>9</sup>*

In other words, based on the classificatory division of the functions of Government into Legislation (rule making), Executive (administration or rule application) and the Judiciary (adjudication or the settlement of controversies arising out of the former two) the doctrine of separation of powers is the normative principle, which stipulates that the functions of Government should not be entrusted to the same persons if society is to be libertarian rather than authoritarian<sup>10</sup>.

But admittedly, in our system, the Constitution has not clearly demarcated the responsibilities between the three wings of Government, leaving the onus on each wing of government to ensure that it performs its constitutional functions without hindrance or interference from other wings.

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<sup>7</sup> Norman Wilding and Phillip Laundry: *An Encyclopaedia of Parliament* (4<sup>th</sup> ed.) Cassell Pg. 128

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Chibesakunda N M : *Separation of Powers*. Paper presented to Namibian National Assembly 1998. Pg 7

It was this unclear demarcation that gave rise in 1996 to a seemingly alarming legal situation, which became a source of concern to legal and political observers in Zambia. This, apparently, was the antagonism, which developed between the Legislature and the Judiciary as a result of the Legislature's application of its **powers of committal** on a group of journalists who were found guilty of breach/contempt of the House as a result of their reporting of House proceedings.

The Judiciary saw the action by the Legislature as a direct defiance of the belief in the **"separation of powers"** as the Judiciary believed that such powers exclusively belonged to it. The judiciary then ignored the cries of Parliament of the Judiciary's interference in its operations and allowed the accused through their lawyers to proceed to challenge the power exercised by the Legislature through the judicial process. The legislature then vehemently resisted this attempt to curb its powers, creating a confrontation between the two arms of government.

This conflict between Parliament and the Judiciary in reality is an age-old argument between the two as to whether Parliament was or is the highest Court in the land. It is an argument which questions the role Courts are supposed to play in the internal affairs of Parliament especially in interpreting the rights, privileges and immunities of Parliament and its Members. This argument has raised a number of questions with regard to the relationship between Parliament and the Courts.

The Courts' stand on the issue has been that, Parliament is not the highest Court of the land. This is because the powers and privileges that Parliament enjoys are part of the law of the land and as such the Courts are

bound to decide on any question of privilege arising in a case within their jurisdiction and to decide according to their interpretation of Law.<sup>11</sup>

The Courts draw their argument from the point that the administration of public institutions is done through statutes, which are enacted through the political process. As these statutes are legal instruments, which confer legal powers and impose legal duties, the Courts have the mandate to ensure that the exercise of power is done in conformity with the rules laid down in the statutes when these institutions exercise their power.<sup>12</sup> This argument is based on the interpretation of Article 1(3) and (4) of **the Zambian Constitution** (1996) which state that

*1(3) this Constitution is the supreme law of Zambia and if any law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void*

*1(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*

Arguing on the basis of the Constitution, the Courts have argued that one of the roles of the Courts is to ensure that public institutions and officers exercise their power according to the empowering statute of these institutions. It is in this way that all developed legal systems control the actions of their public bodies and the most effective method by which this is done is through judicial review, which is-

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<sup>11</sup>Pachauri: *The Law of Parliamentary Privileges in U.K and India*, Institute of Constitutional and Parliamentary Studies New Delhi 1971 Pg. 17

<sup>12</sup> Ibid

*"The means by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies. It is a specialized remedy in public law."<sup>13</sup>*

Parliament's argument, on the other hand has been that, with the British influence on our parliamentary tradition one should always bear in mind the principle of **Supremacy of Parliament**, which underscores the fact that Parliament can make or unmake any law in the land. This tradition is legally evident by the fact that whenever the Courts rule against the legality of a given law, Parliament normally enact the same law but in a different form, effectively over-ruling the Courts<sup>14</sup>. This is why normally in Westminster styled jurisdictions, Parliament is considered supreme under the Constitution as Parliament can change the law in any way it chooses.

However this line of argument is debatable under Zambian Law because Zambia as has been mentioned is a constitutional democracy, which by virtue of Article 1 of the Constitution makes the Constitution and not Parliament supreme.

In order to attempt to clear some air on this antagonism, the research in this Essay has been centered on the **parliamentary powers of committal**, which is the power of Parliament to commit to prison anyone either a member or a stranger in exercise of its penal jurisdiction. In practice, most commonwealth courts including Zambian courts have admitted<sup>15</sup> that parliamentary proceedings are absolute and cannot be interfered with by Courts. However, the implication of this has been that there has been some other Court rulings in Zambia which

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<sup>13</sup> Gordon R J F: *Judicial Review: Law and Procedure Sweet and Maxwell London (1985)* Pg 3

<sup>14</sup> Supreme Court ruling on the Constitutionality of Public Order Act

<sup>15</sup> *Fred Mmeembe and Bright Mwape V The Speaker of the National Assembly, the Commissioner of Prisons*

have contradicted this, creating certain gray areas in matters regarding the breach or contempt of parliamentary powers, privileges and immunities especially with the claim that Parliament has absolute power to judge and punish for such violations<sup>16</sup>.

In this regard, Parliaments have summarily stated that apart from civil and criminal offences or other cases handed over by Parliament itself to other organs, such as the Courts, the Courts are not competent to handle parliamentary issues concerning its powers and privileges.

In order to understand this complex topic completely, this research has reviewed books by authorities such as Eskiné May and others. It has also analysed past and present records for statements of the law and precedent. This is with the aim of providing an up-to-date consolidation, of both the law and precedent, of what really constitutes the Penal Jurisdiction of Parliament. This has been a tall order in that in the absence of a codified procedure reflecting the application of this power, it has only been Parliamentary records which over time (under Common Law) have fully reflected the operation of this power by Parliaments in various contexts and situations.

It has been of critical importance and necessity to compare years of precedents and examples of Parliaments applying this law (and privilege) as this is the only way to prove the existence of this power. It has been these real examples of the use of this power, which have given life and practical meaning to the otherwise plain abstract statement of this parliamentary privilege. It is also important to note that this power to commit, as a law of Parliament, is considered to be constitutional in nature. It is so fundamental that it has

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*and the Attorney General (1996)* unreported H.C.J No.X of 1996

<sup>16</sup> *Bradlaugh v Gosset* 12 QBD 271 Pg. 285

scarcely been altered over the centuries, and as a matter of law, cannot be altered except by the express will of a Parliament itself.

In compiling precedents of the use of this power, examples from several Commonwealth jurisdictions (such as Canada, United Kingdom, Australia, New Zealand, India, etc) have been selected. This is with the aim of demonstrating that parliamentary practice and tradition in the Commonwealth permits that precedents of legislative or judicial value from a particular country can be used as precedents by another. In Zambia this application of foreign precedents is given form under National Assembly Standing Order No. 204, which states that;

*In a case not provided for in the rules of procedure, or in a case where there is a difference of opinion as to the interpretation of any such rules, Mr. Speaker shall decide, taking into account the customs and usages of the Assembly since its inception and the relevant practice in other Commonwealth Parliaments.*

To this end Commonwealth Parliaments have been exercising these penal jurisdiction even in jurisdictions independent of the House of Lords. This, although common amongst Commonwealth countries is an unusual circumstance since similar or identical laws in different societies normally evolve differently as they adapt to the particular needs of that society. However, under the British Commonwealth, there are reasons that have allowed these varied Parliaments to share identical laws and maintain their commonality over many years under parliamentary practice, procedure and tradition.<sup>17</sup>

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<sup>17</sup> Eskine May: Parliamentary Practice (22<sup>nd</sup> ed.) Butterworth London Pg. 206

From this undertaking, it is of importance to note the following factors about this power of committal. Some scholars argue that the power to commit emits from the fact that the Privy Council, which is the highest Court in the land, is a component of the House of Lords.

This is not true in that when the unitary medieval Parliament was divided into a house distinct from the Crown, the Lords as original Members of the King's Court had as clear a title as any other Superior Court to punish for contempt. The rights of the Commons as a separate House were less certain. But an important step forward was taken in 1415 when the Commons obtained from the Crown, the services of the Sergeant-At-Arms. With this officer, the House was able to execute its orders and he carried a Mace as the symbol of the House's new corporate authority, which enabled the House begin to develop and exercise its judicial jurisdiction. With this jurisdiction came the powers of acquittal and arrest and these powers conferred upon the Sergeant-At-Arms came to be identified as the powers of committal of the House<sup>18</sup>. This penal jurisdiction today forms the basis of the power of enforcement of parliamentary privileges, powers and immunity and its exercise has depended in the first instance on the powers vested in the Sergeant-At-Arms by the House through the sovereign.<sup>19</sup>

Of this power of committal the following are important to note. Firstly, that parliamentary penal privilege, born and developed in the Parliament of the United Kingdom was exported to most colonial parliaments when the colonies gained their independence. This was demonstrated in the case of ***Chenard and Co. v Joachim Arissol***<sup>20</sup> where the Privy Council held that, -

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<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> (1949) A.C 127

*the power to provide for the privileges of the Houses of legislatures by law in a colony or dominion was inherent in the legislature concerned if it had the power to make for peace, order and good government of the colony.*

The result has been that in most countries of the Commonwealth their constitutions or statutes contain provisions that either confer privileges on their Houses of Legislatures or permit their legislatures to apply privileges, as are those applicable to the British House of Commons.

Secondly it should be noted that because this body of law applies only inside Parliaments it has not been subjected over time to the many influences for change, which prevail in society at large.

Thirdly since each jurisdiction normally only has at most a lower house and an upper house, the number of bodies actually using and applying this area of law are relatively few. These factors have allowed the continuation of a rather remarkable commonality among these many jurisdictions when it comes to parliamentary privileges.<sup>21</sup>

Lastly when articulating the various components of the law pertaining to these parliamentary "penal powers", references has been made to court judgments and reasons behind such decisions in order to establish and demonstrate why these powers exist.<sup>22</sup>

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<sup>21</sup>Ibid

<sup>22</sup> While parliaments have consistently maintained their own authority to decide on and administer their privileges' (manifested by the 1837 UK House of Commons resolution) judicial pronouncements arising from litigation which test parliamentary law are mostly simply instructive to Parliament and it's Members.

This research thus discusses and analyses in principle the ramifications these powers have on any aggrieved person's ability to obtain any relief against Parliament in the course of them being committed by Parliament. It also will also discuss and analyse the various views that have been expressed by members of the public, eminent scholars and writers in favour or against this power.

## **1.2. SUMMARY**

In summary the chapter has to some detail looked at the relationship of the Judiciary and the Legislature and through the doctrine of the separation of powers as expounded by eminent political thinkers like Locke and Montesquieu and why the judiciary objects to the use of the powers of committal by Parliament. The chapter also looked at the courts position and Parliament's position and its arguments especially the fact that no organ can interfere in its internal operations. The chapter ends by stating the course the research will take in order to establish the legislative claim that parliament does have this right to commit.

## CHAPTER II: PARLIAMENTARY PRIVILEGES

Chapter 2 highlights the definition and scope of parliamentary privilege and its relation to parliamentary powers and immunities. It thereafter looks at the definitions of concepts such breach of parliamentary privilege and contempt of Parliament by looking at the origin, interpretation and application of breach or contempt of Parliamentary Privileges through their historical development within the existing laws and positions concerning Parliamentary Privileges. It thereafter looks at parliamentary privileges in Zambia and their sources.

### 2.1. DEFINITION AND SCOPE OF 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 the 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 privilege<sup>23</sup>. These immunities and powers are very extensive, and they carry with them great responsibilities. They are deeply ingrained in the history of free institutions, which could not have survived without them. These Parliamentary privileges exist for the purpose of enabling the House(s) of the Parliament to carry out effectively its primary functions<sup>24</sup>, which are to inquire, to debate and to legislate effectively<sup>25</sup>.

In this regard therefore when discussing parliamentary privilege the gist is based on:

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<sup>23</sup> Enid Campbell: *Parliamentary Privileges in Australia.*, Melbourne University Press 1965 pg. 17

<sup>24</sup> Ibid. at 19.

<sup>25</sup> Ibid. at 20

*“the rights, powers and immunities, which belong in law to a Legislative Assembly, its Committees, Members and Officers”.*<sup>26</sup>

It can therefore be stated that 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. Put in another way, Parliamentary Privileges mean that Parliament has certain rights and immunities that are essential if Parliament was to operate effectively<sup>27</sup>.

In Commonwealth countries, it is a common feature for framers of Constitutions to provide in their constitutions provisions for such powers and privileges for the House and members, etc. as were/are possessed and enjoyed by the House of Commons at the commencement of an independence Constitution. This is in order to cover the possibility that no law defining such privileges is enacted by Parliament<sup>28</sup>. This position is the actual practice today in all commonwealth countries.

The **Zambian Constitution Act No. 17 of 1996**, for example, under Article 87 (2) 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.*

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<sup>26</sup> Ibid. at 116.

<sup>27</sup> Ibid. at 119.

<sup>28</sup> Derek Lee: *The Power of Parliamentary Houses to send for Persons Papers and Records.*, University of Toronto Press 1999 Pg. 8

In following this tradition, Canada for example has under section 4 of its **Parliament of Canada Act**, the following provision:

*The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise*

- (a) *such and the like privileges, immunities and powers as, at the time of the passing of the 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 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*<sup>29</sup>

By reason of section 4(a) of the **Parliament of Canada Act**, the Senate and House of Commons in Canada each possess the same privileges as existed in the United Kingdom House of Commons at the time of Confederation, in 1867

To stress this point further, in Canada, the privileges, immunities, and powers held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, are defined by the **Parliament of Canada**

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<sup>29</sup> The provisions in clause (a) were first enacted in 1868, in An Act to Define the Privileges, Immunities and Powers of the Senate and House of Commons and to Give Summary Protection to Persons Employed in the

Generally speaking, therefore, among the powers, privileges and immunities of the House of Commons applying to the Zambian National Assembly, by virtue of Article 87(2) of the **Constitution of Zambia Act 1996** are:

- Immunity to a member from any proceedings in any court in respect of any thing said or any vote given by him in Parliament or any Committees thereof.
- 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.
- Prohibition of the courts to inquire into proceedings of Parliament.
- Freedom from arrest of Members in civil ceases is not permitted during the continuance of the session of the House and forty days before its commencement and forty days after its conclusion.
- Right of the House to receive immediate information of the arrest, detention, conviction, imprisonment and release of its Member.
- Prohibition of arrest and service of legal process within the precincts of the House without obtaining the permission of the Chairman/Speaker.
- Prohibition of disclosure of the proceeding or decisions of a secret sitting of the House.
- Members or Officers of the House cannot give evidence or produce documents in courts of law, relating to the proceedings of the House without the permission of the House.
- All Parliamentary Committees are empowered to send for persons, papers and records relevant for the purposes of the inquiry by a Committee. A witness may be summoned by a Parliamentary Committee who may be required to produce such documents as are required for the use of a Committee.

- The evidence tendered before a Parliamentary Committee and its report and proceedings cannot be disclosed or published by anyone until these have been laid on the Table of the House.
- The power to order the attendance at the Bar of the House of persons whose conduct has been brought before the House on a matter of privilege.
- The power to order the arrest and imprisonment of persons guilty of certain enumerated contempt.
- The power to regulate its proceedings by standing rules and orders having the force of law.
- The power to suspend disorderly Members or expel Members guilty of disgraceful and infamous conduct.
- The right of free speech in Parliament, without liability to action or impeachment for anything spoken therein<sup>34</sup> (This includes the immunity of Members from legal proceedings for anything said by them in the course of parliamentary debates and immunity of parliamentary witnesses from being questioned or impeached for evidence given before either the House or its committees.; and
- The right to control its own proceedings, including the right to order the publication and non - publication of its proceedings and the manner in which its records are to be kept.

From the above-mentioned one can see that parliamentary privileges, though part of the law of the land<sup>35</sup>, are to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of the House and exist because the House cannot perform its functions without unimpeded use of the services of its members<sup>36</sup>. Other rights and immunities such as the power to

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<sup>34</sup> As established by Article 9 of the *Bill of Rights 1688* of the U K

<sup>35</sup> As stated in *Sttockdale v Hansard (1839) 9 A & E 1;3 St Tr N.S 736*

<sup>36</sup> Derek Lee: *The Power of Parliamentary Houses to send for Persons Papers and Records.*, University of

punish for contempt and the power to regulate its own constitution belong primarily to the House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that Members enjoy these privileges<sup>37</sup>.

In interpreting these privileges, therefore, regard must be had to the general principle that the privileges of Parliament are granted to members in order that

*"They may be able to perform their duties in Parliament without let or hindrance."<sup>38</sup>*

They apply to individual members "only in so far as they are necessary in order that the House may freely perform its functions. They do not discharge the member from the obligations to society which apply to him as much and perhaps more closely in that capacity, as they apply to other subjects."<sup>39</sup> Privileges of Parliament do not however place a Member of Parliament on a footing different from that of an ordinary citizen in the matter of the application of laws, unless there are good and sufficient reasons in the interest of Parliament itself to do so.<sup>40</sup>

What this demonstrates is that parliamentary privilege, and the immunity that comes in respect to the exercise of that privilege, are founded upon necessity meaning the content and extent of parliamentary privileges has evolved with reference to how necessary it has been.<sup>41</sup> What this signifies is that

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Toronto Press 1999 Pg.182

<sup>37</sup> Ibid Pg. 192

<sup>38</sup> Report of the Committee of Privileges in Captain Ramsay Case, House of Commons, 164 (1939-40), para. 19 ( M.N Kaul & S.L Shakhder: *Practice and Procedure of Parliament* (5<sup>th</sup> ed.) Metropolitan book co. PVT ltd Pg. 193).

<sup>39</sup> Report of the Committee of Privileges in Lewis Case, House of Commons; 244 (1951), para. 22 (Kaul & Shakhder, Ibid).

<sup>40</sup> Report of the Committee of Speakers, 1956, para. 18; (Kaul & Shakhder, ibid).

<sup>41</sup> Eskine May: *Parliamentary Practice* (22<sup>nd</sup> ed.) Butterworth Pg.103

Parliamentary privilege and the breadth of individual privileges encompassed by that term are accorded to members of the Houses of Parliament and the legislative assemblies because they are judged necessary to the discharge of their legislative function.<sup>42</sup>

In *Precedents of Proceedings in the House of Commons*<sup>43</sup> John Hatsell defined at p. 1 the privileges of Parliament as including those rights, which are:

*...absolutely necessary for the due execution of its power.*<sup>44</sup>

It is thus clear that the privileges inherent in legislative bodies are fundamental to our modern systems of government<sup>45</sup> and are a tradition of great importance as these privileges are considered to be part of the fundamental law of our land, and are therefore constitutional.<sup>46</sup>

This constitutionality has been questioned in some jurisdictions, as authorities have expressed concern that their Supreme Courts only have declared *inherent* common law privileges as part of the Constitution, and not those privileges enacted by statute.<sup>47</sup>

To elaborate this point, the Supreme Court of Canada in 1993, in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,<sup>48</sup> examined the status of parliamentary privilege, and confirmed

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<sup>42</sup> Per Lamer, at 224 DLR.

<sup>43</sup> (3<sup>rd</sup> ed. 1796) vol. 1,

<sup>44</sup> Ibid

<sup>45</sup> Ibid at 232 DLR

<sup>46</sup> Ibid at 269-270 DLR

<sup>47</sup> For example, see Michael Bonsaint, "Parliamentary Privilege: The Impact of New Brunswick Broadcasting Co. v. Nova Scotia" in (Winter 1996/97) Canadian Parliamentary Review 26, and Heard, p. 401.

<sup>48</sup> 100 DLR (4th) 212, [1993] 1 SCR 319. The decision was delivered January 21, 1993.

inherent common law privileges as part of the Constitution of Canada when it decided that <sup>49</sup>:

*.....legislative bodies possess those historically recognized inherent constitutional powers as are necessary to their proper functioning.*

Furthermore, in 1996, in **Harvey v. New Brunswick (AG)**,<sup>50</sup> in a concurring judgment, commented on, in *obiter dicta*, by Per McLachlin J ( other judges L'Heureux-Dube, Gonthier and Iacobucci, concurred), that the constitutional status of statutory privileges was recognised and it was clearly shown in this case that judicial pronouncements on the subject of parliamentary privilege, while instructive, were cautioned by the "*judicial exclusion*" principle articulated in the 1837 House of Commons resolution on the subject. This is why a large proportion of Parliamentary Privilege found in the British Commonwealth is to be found embedded within English Parliamentary tradition.

From this premise, British Commonwealth legislative bodies have a proper claim as inherent privileges, those rights, which are necessary for their capacity to function as legislative bodies.

In conformity to this principle it has been felt with no doubt that Parliaments in the British Commonwealth have the right of protecting themselves from all impediments to the due course of their proceedings.

Looking at the purpose and extent of these parliamentary privileges, there is no doubt whatsoever that Parliament has absolute need for all the privileges that it claims in order for it to function properly. By the same token, the House needs to have full control over all privileges and ensure that they are not abused or

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<sup>49</sup> [Per McLachlin (L'Heureux-Dube, Gonthier and Iacobucci, concurring), at 265 DLR].

<sup>50</sup> 137 DLR(4th) 142.

misused, the results, which would result in the total breakdown of order in the maintenance of order and discipline in the House. This applies to Members and outsiders.

## 2.2. PARLIAMENTARY PRIVILEGE AND ITS RELATION TO PARLIAMENTARY POWERS AND IMMUNITIES

The term “**privilege**”, in relation to parliamentary privilege, refers to immunities from the ordinary law, which is recognised by the law as a right of the Houses and their members. Privilege in this restricted and special sense is often confused with privilege in the colloquial sense of a special benefit or special arrangement. The word “**immunity**” is best used in relation to privilege in the sense of immunity under the law<sup>51</sup>.

Of these immunities, one of the principal immunities is the freedom of parliamentary debates and proceedings from question and impeachment in the courts, whose most significant effect is that members of Parliament cannot be sued or prosecuted for anything they say while debating in the House<sup>52</sup>. This immunity is important to this research as it will set the argument as to why in the Zambian Parliament the Speaker had exercised his powers of committal.

This immunity known as the right of freedom of speech is undoubtedly, the best - known parliamentary privilege, because it has the effect of ensuring that members, witnesses and others cannot be sued or prosecuted for anything they say or do in the course of parliamentary proceedings. This freedom of speech has always been regarded as essential to allow the Houses to debate and inquire into matters without fear of interference<sup>53</sup>.

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<sup>51</sup> Norman Wilding and Phillip Laundy: *An Encyclopedia of Parliament*, 4<sup>th</sup> ed. Cassell Pg 50

<sup>52</sup> Ibid

<sup>53</sup> Eschine May: *Parliamentary Practice* (22ed) Butterworth Pg. 70

Any statement made in Parliament is absolutely privileged and cannot be made the subject of inquiry in a court of law or other constituted authority<sup>54</sup>. The freedom of speech in Parliament actually refers to the immunity of questioning or impeaching the proceedings of the Parliament. Statutory recognition of the privilege of freedom of speech in Parliament had its genesis in the famous Bill of Rights<sup>55</sup>, the ninth article of 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 outside of Parliament.*

In jurisdictions such as India, Freedom of speech has been codified in statutes such as the **Parliamentary Privileges Act 1987**. The Act declares the scope of freedom of speech in parliamentary proceedings. "Proceedings" are defined in this Act as:

*all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:*

- (a) the giving of evidence before a House or a committee, and evidence so given;*
- (b) the presentation or submission of a document to a House or a committee;*
- (c) the preparation of a document for purposes incidental to the transacting of any such business; and*

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<sup>54</sup> Ibid

<sup>55</sup> Ibid

- (d) *the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.*

It is therefore not lawful in any court or tribunal to question the truth, motive, good faith, or intention of any person by reference to parliamentary proceedings, or to draw any inferences or conclusions from those proceedings. This does not however prevent the use of proceedings of Parliament in court to establish a material fact; for example, to prove that a person was at a particular place at a particular time, to test the fairness and accuracy of a press report of parliamentary proceedings, or to prosecute certain offences against Parliament.<sup>56</sup>

In the United Kingdom, the **Parliamentary Papers Act 1992**<sup>57</sup> is significant in that it provides a definition of the term "**proceedings in Parliament**" and provides for the protection of Hansard and other documents published under the authority of the House or a committee.

Section 3(2) of the PP<sup>58</sup> Act provides that the term "**proceedings in Parliament**" includes all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the House or a committee. Sections 3(3)(a) - (g) of the PP Act<sup>59</sup> provides that "**proceedings in Parliament**" include:

- *giving evidence before the House, a committee or an inquiry;*
- *evidence given before the House, a committee or an inquiry;*

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<sup>56</sup> Norman Wilding and Phillip Laundry: *An Encyclopedia of Parliament* 4<sup>th</sup> ed. Cassell Pg.571  
<sup>57</sup> (the PP Act)

<sup>58</sup> Parliamentary Papers Act 1992

<sup>59</sup> Ibid

- *presenting or submitting a document to the House, a committee or an inquiry;*
- *a document laid before, or presented or submitted to, the House, a committee or an inquiry;*
- *preparing a document for the purposes of, or incidental to transacting business mentioned in paragraph (a) or (c);*
- *preparing, making or publishing a document (including a report) under the authority of the House or a committee;*
- *a document (including a report) prepared, made or published under the authority of the House or a committee.*

Parliamentary privileges are, therefore in relation to parliamentary proceedings, fundamentally designed so that M.Ps need not consider that they are hindered in any way in speaking (inside parliament) on behalf of their voters. Moreover, witnesses to parliamentary committees gain certain protection so that information is forthcoming without fear of legal penalty.

### **2.3. PARLIAMENTARY PRIVILEGES IN ZAMBIA**

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.

Erskine May in his book "**Parliamentary Practice**"<sup>60</sup>, offers a more appropriate definition of Parliamentary privilege on which the Zambian Parliament has based its version of parliamentary privilege. In his book, Erskine May states that:

*"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."*

In other words, parliamentary privileges are supreme over other privileges that may be held or enjoyed by other Bodies or individuals.

It is indeed a heavy task to attempt to catalogue all the possible privileges, which are made available to parliament for the proper execution of its functions. However, particular privileges may be regarded as falling into two categories namely, those enjoyed or which apply to the House as a whole and those enjoyed by individual Members of Parliament, which are the main topics of this Essay.

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 him/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 Privileges<sup>61</sup>. The Speaker makes this claim in fulfillment of his role as the custodian of the Powers, Privileges and Immunities of Parliament.<sup>62</sup>

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<sup>60</sup> 20<sup>th</sup> Edition, by Sir Charles Gordon on page 70

<sup>61</sup> National Assembly of Zambia Standing Order No. 3(7)

<sup>62</sup> Norman Wilding and Phillip Laundry: *An Encyclopedia of Parliament* 4<sup>th</sup> ed. Cassell Pg 571

## 2.4. SOURCES OF PARLIAMENTARY PRIVILEGES IN ZAMBIA

In the Zambian case, there are two main sources of parliamentary privileges namely:

1. The Zambian Constitution
2. The National Assembly (Powers and Privileges) Act<sup>63</sup>

The third source can be considered to be the National Assembly of Zambia Standing Orders, which govern procedure in the Zambian Parliament.

### 2.4.1. Privileges Obtained From The Constitution

Article 87 of the Constitution, which gives effect to the **National Assembly (Powers and Privileges) Act**<sup>64</sup> firmly guarantees the Privileges and immunities of Parliament. Article 87(1) states that:

*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..*

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<sup>63</sup> Cap 12 of the Laws of Zambia

<sup>64</sup> CAP 12 of the Laws of Zambia

These provisions are strengthened by Articles such as Article 86 (1) on Procedure in 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 some form of free will in determining or classifying what it may consider to be a breach or contempt of its privileges.

However, the Courts in Zambia have differed with Parliament on this view and in the case of **Dr. Ludwig Sondashi vs the Attorney General and the Speaker of the National Assembly**<sup>65</sup> this was evidently demonstrated. In response to the Respondents lawyer's argument that and I quote;

*To grant the application will create a crisis between the two arms of government, namely the legislature and the Judiciary as the former may not be held in contempt for disobeying any order that may be made by this Court as prayed. It is my submission that Parliament is not inferior to this Court. This is the essence of the immunity of Parliament from outside jurisdiction over its proceedings. This is the strongest point for the doctrines of the separation of powers to be employed at full throttle. I can only advice the applicant to appeal to the plenary Assembly for the reversal of the order made by the Standing Orders Committee thereby restoring his rights as a Member from the date he ws suspended up to the date such*

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<sup>65</sup> 1998/HP/111

*rights are restored. He can do this by petition filed on his behalf by his party, the National Party.*

Judge Tamula Kakusa replied as follows;

*This approach as reflected in the text above ought to be of concern to the legal profession. That approach is inconsistent with the concepts of the Rule of law and Constitutionalism. The question of superiority or inferiority is legally and practically irrelevant. This country has a written constitution. This is the starting point*

To stress his point further in reference to Articles 86(1) and 87(2) the judge went on to rule that;

*Where, needless to say, the law and custom of the Parliament of England is inconsistent with the Constitution of Zambia, our Constitution will prevail. The reading I have done suggests that in the United Kingdom the High court would most likely have held that it lacked jurisdiction on an application such as this. The decision which is basis of this judgment was made in Parliament by one of the Committees on behalf of the National Assembly.*

This point of argument by the judge was evident enough to demonstrate that the courts were ready to challenge Parliament on its internal acts if they felt that these were inconsistent with the Constitution, which was the supreme law of the land.

#### 2.4.2. Privileges Obtained From An Act Of Parliament

Elements of Parliamentary Privilege are normally contained in legislation, which describes, according to the legal expert Enid Campbell,

*" the rights, powers and immunities..." granted to the Parliament and its Members and Officers to ensure the independence of Parliament from the Executive (that is, the Crown and the Government).<sup>66</sup>*

Such independence enables Parliament to carry out its work without hindrance or fear of prosecution.<sup>67</sup>

In Zambia, privileges of all Members of Parliament irrespective of their rank or post within government are contained in the provisions of the **National Assembly (Powers and Privileges)**.<sup>68</sup> This is an Act to declare and define certain powers, privileges and immunities of the National Assembly and of the Members and officers of such an assembly.

**The National Assembly (Powers and Privileges) Act** has so far been enacted by Parliament in pursuance of Articles 87 (1) of the Constitution to define the powers, privileges and immunities of the House and of the Members and the committees thereof. In the absence of any such law, the powers, privileges and immunities of the House of Parliament and of the Members and the committees would have thereof being in actual practice governed by the precedents of the

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<sup>66</sup> Enid Campbell: *Parliamentary Privileges in Australia.*, Melbourne University Press 1965 Pg. 59

<sup>67</sup> Ibid

<sup>68</sup> Act CAP 12 of the Laws of Zambia.

British House of Commons as they existed on the date the Zambian Constitution came into force.<sup>69</sup>

The **National Assembly (Powers and Privileges) Act** specifies some of the privileges. These are:

- freedom of speech in Parliament;<sup>70</sup>
- 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<sup>71</sup>,
- 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.<sup>72</sup>

Courts in this regard, are prohibited from inquiring into the validity of any proceedings in Parliament on the ground of an alleged irregularity of procedure.<sup>73</sup> No officer or Member of Parliament empowered to regulate procedure or conduct of business or to maintain order in Parliament can be subject to a court's jurisdiction in respect of exercise by him of those powers.<sup>74</sup> No person can be liable to any civil or criminal proceedings in any court for publication in a newspaper of a substantially true report of proceedings of either House of Parliament unless the publication is proved to have been made with malice. This immunity is also available for reports or matters broadcast by means of wireless

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<sup>69</sup> See Article 87(2) of the Zambian Constitution

<sup>70</sup> Section 3

<sup>71</sup> Section 4

<sup>72</sup> Section 5

<sup>73</sup> Section 8

<sup>74</sup> Ibid

telegraphy.<sup>75</sup> This immunity, however, is not available to publication of proceedings of a secret sitting of the House.<sup>76</sup>

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;

**(i) Freedom of speech and debate**

Section 3 of the Act states that,

*There shall be freedom of speech and debate in the Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly.*

**(ii) Immunity from legal proceedings**

Section 4 states that,

*No civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, the Assembly or to a committee thereof or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.*

**(iii) Freedom from arrest**

Section 5 states that,

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<sup>75</sup> Ibid.

*For the duration of a meeting members shall enjoy freedom from arrest for any civil debt except a debt the contraction of which constitutes a criminal offence.*

**(iv) Exemption from certain services**

Section 6 (1) states that,

*No member or officer shall be required to serve as an assessor at any proceedings in any court or other place.*

Section 6 (2) goes on to say,

*Save by the leave of the Assembly first obtained, no member or officer shall be required, while attending the Assembly, to attend as a witness in any civil proceedings in any court or in any proceedings before any commission appointed under the Inquiries Act, unless that court or commission holds its sittings at the seat of the Assembly.*

**(v) Power to exclude Strangers**

Section 7 (1) states that,

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<sup>76</sup> Art. 361 A (1), Proviso.

*No stranger shall be entitled, as of right, to enter or remain within the precincts of the Assembly Chamber and the Speaker or any officer authorised in that behalf by the Speaker may at any time order any stranger to withdraw therefrom.*

Section 7(2) goes on to state that,

*The Speaker may issue such orders, as he may in his discretion deem necessary or desirable for the regulation of the admittance of strangers to, and the conduct of strangers within, the precincts of the Assembly Chamber.*

And 7 (3) states,

*The exhibition in a conspicuous position in the precincts of the Assembly Chamber of a copy, duly authenticated by the Clerk, of any orders made by the Speaker under this section shall be deemed to be sufficient notice to all persons affected thereby.*

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

Section 8 (1) goes on to state that,

*No member or officer and no person employed to take or transcribe minutes of evidence before the Assembly or any committee shall give evidence*

*elsewhere respecting the contents of such minutes of evidence or of the contents of any document laid before the Assembly or committee, as the case may be, or respecting any proceedings or examination held before the Assembly or committee, as the case may be, without the special leave of the Assembly first had and obtained.*

And section 8 (2) states that,

*The special leave referred to in subsection (1) may be given during a recess or adjournment by the Speaker*

**(vii) *Civil process not to be served nor members arrested on civil process within precincts of the Assembly Chamber***

Section 9 states that,

*Notwithstanding anything to the contrary, no process issued by any court of Zambia or outside Zambia in the exercise of its civil jurisdiction shall be served or executed within the precincts of the Assembly Chamber while the Assembly is sitting, or through the Speaker or any officer of the Assembly, nor shall any member be arrested on civil process, save by the leave of the Speaker first obtained, while he is within the precincts of the Assembly and while the Assembly is sitting.*

## 2.5. BREACH / CONTEMPT OF PARLIAMENTARY PRIVILEGES

As it has been stated forehand, Parliamentary privilege is the sum of the peculiar rights enjoyed by the House as a constituent part of Parliament and by members of the House individually, without which they could not discharge their functions, efficiently and effectively, and which exceed those possessed by other bodies or individuals<sup>77</sup>. When any of these rights and immunities, both for the members, individually, and of the assembly in its collective capacity which are known by the general name of privileges, are disregarded or attacked by any individual or authority, the offence is called a breach of privilege or contempt of Parliament, and is punishable under the law of Parliament<sup>78</sup>.

Breach of Privilege and Contempt of Parliament are terms, which often are used interchangeably. Strictly speaking, they refer to distinct classes of offences: the former to infringements of specific privileges and immunities (for example breach of members' freedom of speech, impeachment of parliamentary proceedings outside parliament, arrest of members in civil cases); the latter to those offences which prejudicially affect the dignity and the authority of the Houses of Parliament (for example misconduct of witnesses, 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)<sup>79</sup>

However the occurrence of a breach of privilege and contempt of the House although considered to be the same are quite different

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<sup>77</sup> Eskine May: *Parliamentary Practice* (22<sup>nd</sup> ed) Butterworth Pg. 64

<sup>78</sup> Ibid

<sup>79</sup> Eskine May : *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (London) Ch 8 Part. A

Breach of privilege is an offence punishable by the House<sup>80</sup> which 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 offences against the authority or dignity of the House, such as disobedience to its legitimate orders or libels upon itself, its Members, Committees or Officers also constitute breach of privilege of the House.

Therefore, when any of these rights and immunities are disregarded or attacked, the offence is called a breach of privilege and is punishable under the law of Parliament.

The House also claims the right to punish as contempt 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."<sup>81</sup>

Contempt of Parliament therefore comprises of any conduct (including words), which improperly interferes, or is intended or likely improperly to 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 a member or officer.<sup>82</sup> 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 conduct amounts to improper interference and hence contempt<sup>83</sup>.

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<sup>80</sup> Enid Campbell: *Parliamentary Privileges in Australia*, Melbourne University Press 1965 Pg. 85

<sup>81</sup> Eskine May: *Parliamentary Practice* (22ed) Butterworth Pg. 6469.

<sup>82</sup> Erskine May's definition is to be found in the 22<sup>nd</sup> ed (1997), 108.

<sup>83</sup> Pachauri P S : *The Law of Parliamentary Privileges in the UK and India*, Tripathi Private Limited 1971 Pg

The cardinal point is that in cases of breaches of privileges, the remedy lies within Parliament itself.

Contempt of the House may therefore be defined generally as "any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency directly or indirectly, to produce such results." It may be stated that it is not possible to enumerate exhaustively every act, which might be construed by the House as contempt of the House.<sup>84</sup>

Therefore, generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.<sup>85</sup>

It must be noted in Zambia that the underlying mischief of contempt of Parliament in the case of members is considered under The National Assembly Standing Orders, under Orders 66 to 70, which refer to disorder in the House. The Standing Orders have a vague or no description at all of what may be contempt. Its provisions concerning non-members merely refer the removal of strangers who misconduct themselves<sup>86</sup>. **The National Assembly (Powers and Privileges) Act**<sup>87</sup> however has some form of guidance for the public, in relation to acts, which the Parliament may treat as breach or contempt<sup>88</sup>. This is not intended to be an exhaustive or all-inclusive list of contempt and does not

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<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> Standing Order No. 200

<sup>87</sup> Cap 12 of Laws of Zambia

<sup>88</sup> Sections 3 to 9 of the National Assembly (Powers and Privileges) Act Cap 12 of the Laws of Zambia

derogate from the Parliament's power to determine that particular acts constitute contempt.

Furthermore, as a physical manifestation of the privilege of the Parliament each House has a Bar or barrier beyond which strangers i.e. non-members are not permitted. Indeed, no person who is not a Member or Parliamentary Officer may be present on the floor of the House during session, without the permission of the Speaker. Anyone, "called to the Bar of the House" to perhaps give evidence or offer reasons for their actions and be cross-examined by Members must come to this Bar.

Parliament has found persons and organisations guilty of contempt and in some cases Parliament has imposed penalties. It has also accepted apologies and remedial action, and has preferred to adopt the course of educating people involved with Parliament inquiries in their responsibilities. In this respect the Parliament has been much more lenient with contempt of the House than are the courts with contempt of court.

## **2.6 SUMMARY**

In pursuing the argument of research followed in this Essay, the chapter has attempted to demonstrate how an incorrect reflection of the proceedings of the House can or cannot be considered to be a breach or contempt of the proceedings of the House. Theoretically the chapter has demonstrated:

- Parliament's historical right to protect itself of its privileges, 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. Such actions though called "breaches of privilege" are more properly distinguished as "contempt".<sup>89</sup>

- The House's claim of right to punish actions of breach of privilege and contempt of the House in relation to making speeches or to printing or publishing any libels reflecting on the character or proceedings of the House or its committees or on any member of the House for or relating to the character or conduct of a Member of Parliament. Such speeches or writings are punished by the House as contempt on the principle that such acts "tend to obstruct the Houses in the performance of their functions by diminishing the respect due to them."<sup>90</sup>
- The Objection of the Courts to Parliament's unilateral use of its penal powers as they say this is unconstitutional given that the Constitution is the supreme law of the land which give certain rights and liberties and Parliament has not demonstrated the legal basis of these powers in Zambia apart from the use of precedent from other Commonwealth countries.<sup>91</sup>

However it should be noted that in order to constitute a breach of privilege, a written imputation upon a Member of Parliament must concern his character or conduct in his capacity as a member of the House.<sup>92</sup> Reflections on members otherwise than in their capacity as members do not, therefore, involve any breach of privilege or contempt of the House.

Similarly, speeches or writings containing vague charges against members or criticising their parliamentary conduct in a strong language particularly in the heat of a public controversy, without, however, imputing any *mala fides* are not treated by the House as a contempt or breach of privilege.

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<sup>89</sup> Ibid.

<sup>90</sup> Ibid

<sup>91</sup> Ludwig Sondashi Vs. The Attorney General and the Speaker of the National Assembly.

To this Gladstone has observed that:

*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 hon'ble 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 Indeed, it is absolutely necessary that there should be freedom of comment.*

The above mentioned are some of the basic criteria which are usually applied to privilege cases arising out of reflections on the House, its members, etc. However, the decision on the question as to whether there has been a breach of privilege or contempt of the House depends upon facts and circumstances of each case. No two cases are identical and, therefore, the House or its Committee of Privileges has some freedom in appraising the facts in the case before it and coming to a conclusion.

From the study of cases, however, it may be stated that when either a Member or the House complain of a false reflection, the House itself or the Chair or any individual member are generally guided by the following principles;

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<sup>92</sup>Sections 3 to 9 of the National Assembly (Powers and Privileges) Act Cap 12 of the Laws of Zambia

- (1) Penal proceedings for breach of privilege should not be taken unless the attack on the House, its Presiding Officer or members is of a serious nature and is calculated to diminish the respect due to the House and thus lessen its authority.
- (2) The law of parliamentary privilege should not be administered in a manner, which would fetter or discourage the free expression of opinion or criticism.

To illustrate this the next chapter will look directly at the Power of Committal of Parliament

*"to prevent or punish conduct which tends to obstruct, prejudice or abuse parliamentarians while in the exercise of their responsibilities".<sup>94</sup>*

By this means, the House is enabled to safeguard and enforce its necessary authority without the compromise or delay to which recourse to the ordinary courts would give rise.<sup>95</sup> The act or omission, which attracts the penal jurisdiction of the House, may be committed in the face of the House or of a committee, within the House<sup>96</sup> or outside it. It is not necessary that there should have been a breach of one of the privileges enjoyed, collectively or individually, by the House. Anything done or omitted, which may fall within the definition of breach or contempt, even if there is no precedent, may be punishable<sup>97</sup>.

Erskine May, having cited all the various authorities on this point, lays down the following broad principle:

*"The power of Committal, with all the authority which can be given by law being established, it becomes the keystone of parliamentary privilege and contempt; and if the warrant recite that the person to be arrested*

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<sup>94</sup> Report of the Committee on Contempt of Court, Cmnd 5794 (1974) para. 2.

<sup>95</sup> *Burdett v Abbot* (1810) 104 ER 554, 558; Select Committee on Proceedings relating to Sir Francis Burdett, Second Report, CI (1810) 732; Lord Denman CI in *Sheriff of Middlesex (1840)* 113 ER 419 esp. at 426; and I Hatsell, App 6. Cf also *Demicoli v Malta*, where the European Court of Human Rights considered proceedings taken under the European Convention on Human Rights against the Maltese House of Representatives for an exercise of penal jurisdiction in response to the publication of an allegedly defamatory charge against members of that House. The court judged the impartiality of the House as adjudicating body open to doubt, because the members who had allegedly been defamed participated in the finding of guilt and the determination of sentence. The Maltese House was therefore in breach of the Convention (ECHR 33/1990/224/288) (1991)).

<sup>96</sup> In some cases the fact that the act is done within the precincts of the House is the essence of the offence. Thus, the arrest of a Member on a criminal charge, if effected within the precincts of the House, while it was sitting, would constitute a contempt, but not if it took place beyond the walls of Parliament, see Report from the Select Committee on the Official Secrets Acts, HC 101 (1938—39) pp 23 and 95.

<sup>97</sup> It has been held, however, that the Lords, while exercising a legislative (as opposed to judicial) capacity, are not a court of record *R v Flower* (1799) 101 ER 1408.

<sup>97</sup> Dereck Lee: *The Powers of Parliamentary house to send for Persons, Papers and Records*, University of Toronto Press Incorporation 1999 Pg. 184

*has been guilty of a breach of privilege, the courts of law cannot inquire into the grounds of the judgement, but must leave him to suffer the punishment awarded by the Commons House of Parliament by which he stands committed.*<sup>98</sup>

Very many cases are recorded in the journals of the various Legislatures of the Commonwealth as of the exercise by those Legislatures of the extreme powers of committal for breaches of privileges. Though doubts have always been entertained as to the powers of these Legislatures, in this particular, it has never failed, when the occasion arose, to assert what was believed to be privileges incidental to a Legislative Assembly.<sup>99</sup>

### 3.2. HISTORY OF PARLIAMENTARY POWERS OF COMMITTAL

The origin of the power to punish for contempt is probably to be found in the medieval concept of the English Parliament as primarily a court of justice. This power of commitment remains, exercised by the House,<sup>100</sup> and has distinctly been accepted by the Lords in cases such as ***Ashby v White*** in 1704<sup>101</sup> meaning that this power is recognised by the courts.<sup>102</sup>

Sir Erskine May has referred to the power to commit as “the keystone of Parliamentary privilege and contempt.”<sup>103</sup> Between 1547 and 1810, it has been claimed that the UK House of Commons committed “a little less than a thousand”

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<sup>98</sup> Eschine May: *Parliamentary Practice* (22ed) Butterworth Pg 113

<sup>99</sup> Ibid

<sup>100</sup> It was calculated in I 8 1 0 that the number of instances of committal of delinquents at the order of the Commons was ‘little less than a thousand’ (C W Williams *Wynn Argument upon the Jurisdiction of the House of Commons (1810) 7*). Between 1810 and 1880 there were a further 80 committals. The latest case in the Commons of detention of a Member is that of *Bradlaugh* (CI (1880) 235), and in respect of a non-Member, that of *Grissell* in the same year (CI (1880) 77).

<sup>101</sup> LI (1701—05) 714.

<sup>102</sup> *The Aylesbury Men, R v Faty* (1704) 92 ER 232; *Brass Crosby’s case* (1771) 95 ER 1005; *Burdelt v Abbot* (1810) 104 ER 501; *Sheriff of Middlesex (1840) 113 ER 419*; Select Committee on Printed Papers, HC 305, 397; HC 39 (1847).

persons to prison.<sup>104</sup> Persons committed in the United Kingdom and Canada have included judges,<sup>105</sup> Justices of the Peace,<sup>106</sup> the Lord Mayor of London (who was also a Member of the House),<sup>107</sup> sheriffs,<sup>108</sup> religious figures,<sup>109</sup> and prothonotaries. The UK House has committed even the Sergeant at Arms himself.<sup>110</sup>

On the other hand, though the Commons formerly imprisoned offenders for a time certain, it has subsequently been considered as without the power to commit for a period beyond the end of the session.<sup>111</sup> This is that a House may not commit an offender beyond the duration of a session.<sup>112</sup> However, the House

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<sup>103</sup> Bourinot J G: *Parliamentary Procedure and Practice* (4<sup>th</sup> ed.), p. 60. Anson, p. 157.

<sup>104</sup> McGee (2<sup>nd</sup> ed.), p. 506, citing C. Wittke, *The History of English Parliamentary Privilege*, (New York: DaCapo Press, 1970), p. 137. See also May (21<sup>st</sup> ed.), 103, fn. 6, citing *Wynn's Treatise on the Jurisdiction of the House of Commons*, p. 7.

<sup>105</sup> Two judges were committed in the UK in 1681: May (6<sup>th</sup> ed.), p. 69. (UK House of Commons *Journals* (vol. 10), (July 19, 1689), pp. 213, 227). In 1838, the Newfoundland House of Assembly imprisoned a judge of the colony's Supreme Court, F leading to the decision in *Kielly v. Carson (1842)*, 4 Moo. PCC 63: John Courage, "Parliamentary Privilege in Newfoundland: The Strange Case of *Kielly vs Carson*", in Canadian Parliamentary Review 4 (Autumn 1981), p. 10.

<sup>106</sup> Hatsell J: *Precedents of Proceedings in the House of Commons* 4<sup>th</sup> ed. Rothmans Reprints Inc 1971 pp. 132-133.

<sup>107</sup> Eskine May: *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (London) (6<sup>th</sup> ed.), p. 70. This led to *The Case of Brass Crosby (1771)*, 3 Wils. KB 189, where the Court refused to discharge the prisoner, See *infra* pp. 195-196.

<sup>108</sup> In 1840, the UK House of Commons committed the Sheriff of Middlesex to the custody of the Sergeant at Arms UK House of Commons *Journals* (January 211840), (vol. 95), p. 19: In 1838, the Newfoundland House of Assembly committed a sheriff Courage, p 10

<sup>109</sup> In 1809, a Reverend was committed for tampering with a witness in that he advised the witness to flee the country to avoid attendance at a committee May p 95 Another Reverend was ordered into the custody of the Sergeant at Arms for failing to attend before the House as ordered UK House of Commons *Journals* (vol 34) (February 16 1774) p 465 A priest was committed in 1642 UK House of Commons *Journals* (vol 2), (October 11, 1642), p 803

<sup>110</sup> In 1675, the UK House of Commons called upon the Sergeant at Arms to give an account of the escape of four persons who were committed by the House the previous day to his custody "[T]he House altogether unsatisfied with the Account given and the Excuse him made, for not executing the Order of this House", the House resolved 'That Sir James Norfolk the present Sergeant at Arms attending this House for betraying his Trust, in not executing his Office according to the Order of this House be sent Prisoner to the Tower of London. The House then passed an Address to the King requesting the appointment of another Sergeant at Arms After noting that Sergeant at Arms Norfolk 'did withdraw himself, without Leave of the House' following the order for his commitment the House ordered the Sergeant at Arms *pro tempore* to apprehend Norfolk and bring him before the Bar of the House UK House of Commons *Journals* (June 2 1675) (vol 9) p 351

<sup>111</sup> Per Lord Denman CJ, in *Stockdale v Hansard (1839)* 112 ER 1112 esp. at 1156; HC 283, 142 (1839).

<sup>112</sup> Eskine May *Parliamentary Practice* (22<sup>st</sup> ed.), p. 104.

may recommit the offender in a subsequent session, or a subsequent Parliament.<sup>113</sup>

In Canada, the power of commitment has been exercised on a number of occasions. Federally, there has been only one person ordered committed, that being R.C. Miller, in 1913.<sup>114</sup> Prior to Confederation, people were committed at least three times in Lower Canada, in 1817, 1833, and 1835, and at least four times in the Legislative Assembly of the Province of Canada, in 1846, 1849, 1858, and 1866.<sup>115</sup> In 1838, the New Foundland House of Assembly committed two officials to prison.<sup>116</sup> The House of Assembly of Nova Scotia arrested the Deputy Secretary of the Province in 1759, and committed a former Member in 1829.<sup>117</sup> Two persons were committed in 1892 by the Legislative Assembly of British Columbia.<sup>118</sup> Although not employed frequently, commitment is still a form of coercion or punishment that is used in modern times. As recently as 1995, the Legislative Council of Western Australia committed a person, Brian Easton. Mr. Easton spent seven days in Casuarina Prison, as recommended by the Select Committee of Privilege.<sup>119</sup>

A person ordered to be committed is committed either to the Sergeant at Arms, or to state prisons.<sup>120</sup> If an offender is not already in custody of the Sergeant, the House will order the Speaker to issue a warrant to the Sergeant to take the person into custody. When the House orders a person to be committed to prison, two warrants are issued by the Speaker by order of the House: one requiring the Sergeant to deliver the offender to the prison, and the other ordering the warden

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<sup>113</sup> *ibid.* p. 109.

<sup>114</sup> Beauchesne, Arthur: *Rules and Forms of the House of Commons of Canada* (6<sup>th</sup>ed), Toronto Carswell Co. Ltd Pg 30

<sup>115</sup> Bourinot, John: *Parliamentary Procedure and Practice*, Montreal Dawson Brothers (4<sup>th</sup> ed) Pg 60,

<sup>116</sup> Courage Jonh: *Canadian Parliamentary Review*(1981) p. 10.

<sup>117</sup> *Ibid* p 10

<sup>118</sup> Legislative Assembly of British Columbia *Journals* (April 22, 1892), p. 142.

<sup>119</sup> See Heather Goodwin, Arran Stewart and Melville Thomas, "Imprisonment for Contempt of the Western Australian Parliament" in *.25 Western Australian Law Review* 187.

or keeper of the prison to keep the person in prison until the House otherwise directs. A refusal by the warden or keeper of the prison to receive and detain the offender on delivery of a warrant from the House "would be treated by the House as a gross contempt."<sup>121</sup>

In respect of a Speaker's warrant, if the form of the warrant is general, May states that,

*"it has been universally admitted that it is incompetent for the courts to enquire further into the nature of the contempt."<sup>122</sup> In addition, warrants are not vitiated by or reversible for irregularities of form".*

May further adds that:

*"the courts have considered it their duty to presume that the orders of the House and their execution are according to law. Such warrants are construed on the same principle as the writs of a superior court, and not as the warrants of a magistrate".<sup>123</sup>*

This principle applies equally in Canada. As Maingot<sup>124</sup> notes:

*"[t]he UK law applies in the case of the power of commitment by the House of Commons... one court will not question another court of*

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<sup>120</sup> Ibid. p. 104. Where a person "absconded in order to avoid being taken into custody, pursuant to the Order of this House, [he was] for his said offence committed to His Majesty's goal of Newgate." UK House of Commons *Journals* (March 23, 1827), (vol. 82), p. 351.

<sup>121</sup> Eskiné May *Parliamentary Practice* (22<sup>st</sup> ed.), p. 105. Maingot (2<sup>nd</sup> ed), p. 204.

<sup>122</sup> Eskiné May *Parliamentary Practice* (22<sup>st</sup> ed.), pp. 105

<sup>123</sup> Ibid., p. 105..

<sup>124</sup> Maingot Joseph, *Parliamentary Privilege in Canada* McGill-University Press (2<sup>nd</sup> ed.), pp.. 214.

*equal jurisdiction, and the House of Commons is a superior court for purposes of jurisdiction over matters of contempt".*<sup>125</sup>

Bourinot in his *Parliamentary Practice and Procedure*<sup>126</sup> further notes that:

*"it is established that the power of commitment for contempt is incident to every court of justice, and more especially belongs to the Houses of Parliament as essential to the maintenance of their undoubted rights and privileges; that it is incompetent for other courts to question the privileges of the houses of parliament on a commitment for an offence which they have adjudged to be a contempt of those privileges; that they cannot inquire into the form of the commitment, even supposing it to be open to objection on the ground of informality,<sup>127</sup> that when the houses adjudge anything to be a contempt or a breach of privilege, "their adjudication is a conviction, and their, conviction in consequence, an execution"<sup>128</sup>. Although by means of the habeas corpus act all persons who have prisoners in custody must produce them before the judges and it is competent in this way for the judge to look at the warrant of*

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<sup>125</sup> Ibid

<sup>126</sup> Bourinot, John: *Parliamentary Procedure and Practice*, Montreal Dawson Brothers (4<sup>th</sup> ed) pp 61,

<sup>127</sup> For example, as Blackstone J. stated, in *The Case of Brass Crosby (1771)*, 3 Wils. KB 189, at 205: "Little nice objections of particular words and forms, and ceremonies of execution, are not to be regarded in the acts of the House of Commons; it is our duty to presume the orders of that House, and their execution, are according to law."

<sup>128</sup> This is a quote from *The Case of Brass Crosby (1771)*, 3 Wils. KB 189, at 199.

*commitment. Yet the parties committed by parliament cannot be admitted to bail nor the causes of commitment inquired into by the courts of law. It has been so adjudged in numerous cases and has been confirmed by resolutions of the House of Commons and decisions of the courts"...*<sup>129</sup>

Therefore, when the House adjudge any thing to be a contempt, or a breach of privilege, their adjudication is a conviction, and their conviction is in consequence, an execution; and no Court can discharge or bail a person that is in execution by the judgment of any other Court. The House therefore having an authority to commit, and that commitment being an execution, the question is, what can the Courts do? They can do nothing when a person is in execution, by the judgment of an institution having a competent jurisdiction; in such cases, as Parliament does.<sup>130</sup>

In 1642, the UK. House of Commons expressly declared:

*"that neither the Court of King's Bench, nor any other Court, hath any Cognizance or*

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<sup>129</sup> Bourinot, John: *Parliamentary Procedure and Practice*, Montreal Dawson Brothers (4<sup>th</sup> ed) Pg. 61. May makes the same points. Eskiné May in *Parliamentary Practice* (21<sup>st</sup> ed.), p.107. Where, however, the warrant specifies the cause for commitment, and that cause is beyond the jurisdiction of the House, the court can release the person. Bourinot (4<sup>th</sup> ed.), pp and 61, May (21<sup>st</sup> ed.), pp. 107-108. In *Burdett v. Abbott* (1810), 14 East 1, Lord Ellenborough stated: "[if a commitment... did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or natural justice; I say, that in the case of such commitment, (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur,) we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded". (At 150-151) However, as Bourinot notes, "it is not necessary that any cause of commitment should appear upon the warrant nor that the prisoner should have been adjudged guilty of contempt." Bourinot (4<sup>th</sup> ed.), pp. 6 1-62. Thus, as May observes, "if the warrant states a contempt in general terms, the court is bound by it." May (2 1st ed.), p. 108. Lord Ellenborough stated, in *Burdett v. Abbott* (1810), 14 East 1, at 150, "if a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the Case of that Court, nor of any other of the Superior Courts, inquire further."

<sup>130</sup> *The Case of Brass Crosby* (1771), 3 Wils. KB 189, at 198, 199.

*Jurisdiction, touching the Commitment of any Person who stands committed by order of both or either of the said Houses of Parliament, or by Authority derived from both or either of the said Houses: But that it appearing, upon the Return of any such Writ, that any Person was so committed, the Court, from which such Writ issued, ought to surcease any farther proceeding thereupon, and to leave the Cause to both or either of the said Houses, by whom or by whose Authority such Person was so committed".*<sup>131</sup>

Similarly, in 1675, the UK House of Commons expressly resolved:

*"that no Person committed for Breach of Privilege, by Order of this House, ought to be discharged 'during the Session of Parliament, but by Order or Warrant of this House".*<sup>132</sup>

Again, in 1697, the UK House of Commons expressly 'resolved:

*"that no Person committed by this House, can, during the same Session, be discharged by any other Authority whatsoever".*<sup>133</sup>

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<sup>131</sup> UK House of Commons *Journals* (vol. 2), (February 9, 1642), p. 960.

<sup>132</sup> UK House of Commons *Journals* (vol. 9), (June 7, 1675), p. 356.

<sup>133</sup> UK House of Commons *Journals* (vol. 12), (March 22, 1697), p. 174. The resolution was passed as a result of the House of Lords ordering the release of the person (Charles Duncomb) committed by the Commons to the Tower of London. The House appointed a Committee to search for precedents "in what Manner this House... have asserted their ancient Rights and Privileges" in such cases. (*Ibid.*, p. 170).

It was on the basis of such decisions that in 1704, the UK House of Commons adopted the following three resolutions:

- That no Commoner of England, committed by the House of Commons for Breach of Privilege, or Contempt,' of that House, ought to be, by any Writ of *Habeas Corpus*, made to appear in any other Place, or before any, other Judicature, during that Session of Parliament, wherein such Person was so committed.
- That the Sergeant at Arms, attending this House, do make no Return of, or yield any Obedience to, the said Writs, of *Habeas Corpus*; and, for such his Refusal, that he have the Protection of the House of Commons.
- That the Lord Keeper [of the Tower of London] be acquainted with the said Resolutions; to the end that the said Writs of *Habeas Corpus* may be superseded, as contrary to Law, and the Privileges of this House.<sup>134</sup>

These resolutions were the result of the fact that the previous month, the House committed four persons for pleading upon a writ of *habeas corpus*. In addition, five persons who had been previously committed by the House to prison were then ordered to be discharged and delivered into the custody of the Sergeant at Arms, in order to circumvent any further attempt to secure their release by judicial process before the House of Lords.<sup>135</sup>

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Following the reading of previous precedents, the House adopted the resolution quoted above and ordered Charles Duncomb to again be committed, but this time to the custody of the Sergeant at Arms. •

<sup>134</sup> UK House of Commons *Journals* (vol. 14), (March 8, 1704), p. 565.

<sup>135</sup> UK House of Commons *Journals* (vol. 14), (February 26, 1704), p. 552.

This was not the first occasion of interference by the House of Lords in respect of persons committed by the Commons. In 1697, a Committee of the House of Commons cited numerous precedents where the House had "asserted their ancient Rights and Privileges" after the Lords had discharged, persons committed by the Commons. Excerpts of previous Journals of the House are included in the Committee's Report of 1697. See UK House of Commons Journal/s (vol. 12), (March 22, 1697), pp. 170-174

To this Pachauri<sup>136</sup> notes:

*"in this way the Officers of the House or the gaolers are not bound to make a return to a writ of Habeas Corpus in cases of persons committed to their custody by an order of the House. The House has thus interpreted the [Habeas Corpus Act] as not applicable to persons committed by the order of the House".*<sup>137</sup>

In modern times, however, the House has' permitted returns to writs of *habeas corpus*. However, there have also been occasions where a prisoner of a House has been released by a court, only to be ordered back into custody by the House again. For example, on February 3, 1873, the Legislative Assembly of Quebec ordered Ludger Denis Duvernay and Honoré Cotté into the custody of the Sergeant-at-Arms. On February 11, the Sergeant-at-Arms reported that the Court of Queen's Bench quashed the Speaker's Warrant and ordered the release of the two prisoners. On February 17, the House ordered them back into the custody of the Sergeant-at-Arms.<sup>138</sup>

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<sup>136</sup> Pachauri P S : *The law of Parliamentary Privileges in U K and India*, Tripathi Private limited Pg 282

<sup>137</sup> Ibid.

<sup>138</sup> Legislative Assembly of Quebec *Journals* (February 3, 11 and 17, 1875), (vol. 8), pp. 150-151, 200, 202-203, 261. On February 22, the Sergeant-at-Arms reported that the Court of Queen's Bench had again ordered the release of the two prisoners. Legislative Assembly of Quebec *Journals* (February 22, 1875), (vol. 8), pp. 301, 304. In 1764, the House of Assembly of Jamaica ordered three persons into custody, who were released by the Governor on *habeas corpus* in his capacity as Chancellor. He then prorogued the Assembly until the next day, whereupon the Assembly again ordered the three persons into custody. The Governor, again released the prisoners. Upon its next meeting, the House was cleared, the doors were locked, and the House resolved itself into committee. The committee reported "That his excellency, by taking upon himself, as chancellor, to hear and determine upon a matter which belonged to that house only to hear and determine upon, had acted in an unjustifiable manner, and was guilty of a flagrant breach, contempt, and violation of the rights and privileges of that house." The House resolved to draw up a remonstrance of the Governor's conduct and lay the matter before His Majesty the King. The next morning, the Governor prorogued the Assembly, and later dissolved it. The new Assembly met early the next year and, as part of the Address in Reply to the Speech from the Throne, indicated that the House desired that the record of the Governor's proceedings in granting *habeas corpus* be expunged as "we apprehend [them] to be absolutely destructive of one of the most essential privileges of the house." The Governor then prorogued the

Indeed, the Speaker's warrant to the Sergeant commands "all mayors, sheriffs, under sheriffs, bailiffs, constables, headboroughs and officers of the House to be aiding and assisting in the execution thereof."<sup>139</sup> Refusal to assist has been punished by the House.<sup>140</sup>

On one occasion, May notes that:

*"substantial military force was called upon... to lodge an offender in the Tower."*<sup>141</sup>

The offender, Sir Francis Burdett, was a Member of the UK House of Commons. A large mob of supporters had gathered and was intent on preventing his arrest. After being "resisted, and turned out of Sir Francis Burdett's private dwelling house by force", the Sergeant at Arms requested an opinion from the Attorney

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Assembly again. When the Assembly met again later that year and chose a Speaker, the Speaker refused to make the traditional claim for privileges to the Governor. The Governor dissolved the Assembly again. *The Annual Register, or a View of the History, Politics, and Literature, For the year 1765* (vol.9)(4<sup>th</sup> ed), (London: J. Dodsley, 1784), pp. 179-183.

<sup>139</sup> Eskine May *Parliamentary Practice* (22<sup>st</sup> ed.), p. 105-6. May also adds that "[t]he power of breaking open doors when necessary to effect an arrest in pursuance of an order or warrant of committal is claimed by both Houses." In 1660, for example, the UK House ordered a person (Maurice Tompson) to be sent for in custody. The Deputies of the Sergeant at Arms were "denied Admittance to him; and that slighting and contemptuous Words were given, touching the Warrant:" After examining the two Deputies at the Bar of the House, the House resolved "that the Sergeant at Arms be empowered to break open Mr. Tompson's House, in case of Resistance; and also to bring in Custody all such as shall make Opposition therein: And he is to call to his Assistance the Sheriff of Middlesex, and all other Officers, as he shall see Cause; who are required to assist him accordingly." 13K House of Commons *Journals* (vol. 8), (December 21, 1660), p. 222.

<sup>140</sup> In 1670, a Deputy to the Sergeant at Arms reported to the House that he was attempting to take a person, (Thomas Parsons) into custody when the Under Sheriff of the County of Gloucester (John Cox) "being required to give his Assistance, not only refused, but derided and slighted Mr. Speaker's Warrant, saying, he had something else to do." The next day, after the Deputy to the Sergeant at Arms had taken Parsons into custody, the Under Sheriff, as well as a Constable and other persons, assaulted the Deputy and assisted Parsons in his escape. The House found the Under Sheriff, the Constable and the other persons assisting them in contempt, and ordered the Sergeant at Arms to apprehend them and take them into custody. The House further ordered that "the High Sheriff of the County of Gloucester, and other Officers concerned, are to be required, by Warrant from Mr. Speaker, to be aiding and assisting in the Execution of such Warrant." UK House of Commons *Journals* (vol. 9), (January 24, 1670), p. 193. Similarly, the House committed a Constable in 1679 for "contemning the Orders of this House, by refusing to aid and assist the Sergeant at Arms attending this House. UK House of Commons *Journals* (vol. 9), (April 7, 1679), p. 587. See also May (21<sup>st</sup> ed.), p. 106, fn. I, and p. 130, fns. 2 and 3.

<sup>141</sup> Eskine May *Parliamentary Practice* (22<sup>st</sup> ed.), p. 106.

General as to “whether he may take to his assistance a sufficient civil or military force” to execute the warrant.<sup>142</sup> The Attorney General stated that:

*"for the purpose of executing the Warrant, he may take with him a sufficient force of such description as the nature of the case renders necessary. If he has reason to apprehend a degree of resistance, which can only be repelled by a military force, he may take such force with him".*<sup>143</sup>

This incident was the catalyst for the case Burdett v. Abbot<sup>144</sup> to which May states that,

*"established the power of the Sergeant 'at Arms to use force for the purpose of overcoming resistance in the execution of the warrant".*<sup>145</sup>

May has further stated that:

*"resistance to the officers of either House, or others acting in execution of the orders of the House, has always been treated and punished as contempt... The Commons committed the sheriff of London for, resisting the Sergeant at Arms with the Mace when ordered to free a Member, and delivered into the custody of the Sergeant at Arms judges who gave judgment*

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<sup>142</sup> UK House of Commons *Journals* (vol. 65), (April 9, 1810), p. 264.

<sup>143</sup> *Ibid.*, p. 264.

<sup>144</sup> (1810), 14 East 1.

*against the Sergeant for executing the orders  
of the House to arrest certain persons.”<sup>146</sup>*

Where the House has ordered a person committed to the custody of the Sergeant at Arms, it may also subsequently order the person released on bail, bond, or surety (or a combination).<sup>147</sup>

The House may also order the suspension (and effectual discharge) of an order for commitment in the event a person complies with a previous order. In 1689, the UK House ordered that a previous order to take a person into custody

*“be suspended, in ease he do attend the Committee  
this Afternoon”<sup>148</sup>*

The House may discharge or temporarily suspend an order for commitment where the House is of the opinion that extenuating circumstances warrant it,<sup>149</sup> such as the state of a person’s physical<sup>150</sup> or mental health.<sup>151</sup>

Where the House has committed a person, that person remains committed at the pleasure of the House or until the end of the session (subject to being

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<sup>145</sup> Eskine May *Parliamentary Practice* (22<sup>st</sup> ed.), p. 106.

<sup>146</sup> *ibid.*, pp. 106-7.

<sup>147</sup> For example, on January 19, 1640, the UK House ordered ten persons to be released on bail, bond and/or surety, and ordered that two other persons (one of whom was an Alderman) not to be bailed. UK House of Commons *Journals* (vol. 2), (January 19, 1640), pp. 69-70. Pachauri, pp. 262-263.

<sup>148</sup> UK House of Commons *Journals* (vol 10) (June 1 1689) p 162

<sup>149</sup> Where a Member of the UK House of Commons was expelled and ordered and committed to the Tower of London the House resolved the next day to suspend the order “for the Space of a Week for the settling and putting in Order his Papers and Affairs UK House of Commons *Journals* (vol 5) (September 7 and 8 1647) p

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<sup>150</sup> In 1647, a person (Sir Nicholas Kemish) previously committed by the House was ordered by the House to be released for two months “for Recovery of his Health, upon good Security given to the Sergeant”. (He was also ordered to “Return at the Time limited”). UK 1-house of Commons *Journals* (vol. 5), (September 7, 1647), p.295. In 1842, Obadiah Barwick Lucas, who had been committed by the House to the prison of Newgate for willfully giving false evidence before a committee, was discharged from imprisonment by the House after the House examined ‘the prisoner’s sister and the Surgeon of Newgate as to the prisoner’s state of health. UK House of Commons *Journals* (vol. 97), (April 26, 1842), p. 227

<sup>151</sup> See, for example, UK House of Commons *Journals* (May 24, 1830), (vol. 85) p.465

recommitted in the next session, as noted earlier). Where the person has been committed as a form of coercion, the House may release the person if he or she agrees to comply with the order of the House or committee which he or she has disobeyed.<sup>152</sup>

Alternatively, the House may order the person to remain committed and to be brought by the Sergeant at Arms, in custody, to either the Bar of the House or the committee, as the House or committee may from time to time direct (If the person has been committed to an official other than the Sergeant at Arms, the official will be ordered to bring the prisoner to the House or committee when required, or to release the prisoner into the custody of the Sergeant at Arms for that purpose).

Where the offender has been committed as a form of punishment, the House may choose to relieve the person of the punishment before the end of the session, where he or she petitions the House requesting this. However, where the offender does not acknowledge her or his offence in the petition and express "proper contrition", the petition will not be granted.<sup>153</sup> Where the petition is granted, the usual course of the House is to first order the offender to be 'brought to the Bar, whereupon the offender is informed of the decision of the House and discharged from further custody.'<sup>154</sup>

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<sup>152</sup> Dereck Lee: *The Powers of Parliamentary house to send for Persons, Papers and Records*, University of Toronto Press Incorporation 1999 Pg.191

<sup>153</sup> Eskine May *Parliamentary Practice* (22<sup>st</sup> ed.), pp. 63 For example, in 1689, a petition from three persons who were in the custody of the Sergeant at Arms by order of the House was read, but the petition was withdrawn because they had not "acknowledge[ed] the Offence for which they were committed." UK House of Commons *Journals* (vol. 10), (November 26, 1689), p. 294. In 1879, the House considered a petition, and resolved 'That John Sandilands Ward, having entirely F' submitted himself to this House, and expressed his sorrow and regret for his offence... be discharged out of the custody of the Sergeant at Arms on payment of his fees UK House of Commons *Journals* (vol. 134), (July 30, 1879), p. 385. In 1820, the House considered a petition even before it had completed its inquiry into a matter of privilege. The House resolved "That in consideration of the Petitioners having severally acknowledged their offence and expressed their contrition for the same this 'House is content to proceed no further in the matter of the said Breach of Privilege.'" The House then discharged an order, which would have required their attendance before the Bar five days later. UK House of Commons *Journals* (vol. 75), (June 7, 1820) pp 286-287

<sup>154</sup> Where persons were committed for breach of privilege against a Member, and that Member expressed his willingness that they be released without being brought to the Bar the House ordered them discharged out of custody without been brought to the Bar. UK House of Commons *Journals* (vol. 10), (December 20, 1690), p 514

In some cases, the House can also give special orders relative to the person under commitment, including:

- (a) that no person have access to the person under commitment, without leave of the House;<sup>155</sup>
- (b) that the person be denied “the use of pen, ink, and paper”,<sup>156</sup>

Where a person who has been committed by order of the House is needed as a witness before another court, permission of the House must be sought for his attendance<sup>157</sup>

### 2.3. DURATION OF POWER OF COMMITMENT

All persons who may be in the custody of the Sergeant-At-Arms, or confined in goal under the order of the House, must be released as soon as Parliament has been duly prorogued. Though some offenders deserve the severest penalties, yet as was stated that

*“If their offences being committed the day before the prorogation and the House orders their imprisonment, can only be held for a week as after this every court*

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<sup>155</sup> See, for example, UK House of Commons *Journals* (vol 18), p 177, (vol 19) pp 567, 625, (vol 21), pp 705, 811, 842 (vol 22) pp 157 163 (vol 24) pp 181, 184, (vol 26), pp 32-33 164 (vol 64), (February 16 1809) p 54

<sup>156</sup> See, for example, UK House of Commons *Journals* (vol. 19), pp. 567, 625; (vol. 21), pp. 811, 842; (vol. 24), pp. 181, 184; (vol. 26), pp. 32-33, 164.

<sup>157</sup> In 1835b the legal advisers for the prosecution before the Criminal Court were of the opinion that “they cannot safely go before the Grand Jury without the evidence” of a person committed by the House. The House ordered that the person be sent, but in the custody of the Sergeant at Arms. UK House of Commons *Journals* (vol. 90), (August 3, 1835), p. 509.

*will be bound to discharge them by habeas Corpus*<sup>158</sup>.

### 3.4. SUMMARY

From the forgoing, it can be stated that Parliament's disciplinary and penal powers are part of the control exercised by Parliament over parliamentary affairs. Parliament has long held these powers, over non-members as well as members. Most institutions exercise a degree of discipline over their members. So long as the disciplinary offences and the punishments are reasonable, and the procedures are fair, this is unexceptionable. However Parliament is unique in this manner in that it also possesses its own inherent powers of punishment over non-members. This penal jurisdiction is derived from the status of the High Court of Parliament and the need for each House to have the means to carry out its functions properly. If non-members improperly interfere with Parliament or its members or officers in discharging their public duties, Parliament for its own protection has given itself power to take appropriate action in response.<sup>159</sup>

This ancient practice by Parliament as other practices and procedure had been passed on to our modern days and today, most Parliaments in the Commonwealth countries have the power to imprison offenders. The power of the House to punish for contempt or breach of privilege has been aptly described as the "Keystone of Parliamentary privileges" and is considered necessary to enable the House to discharge its functions and safeguard its authority and dignity. It has been stated that without such a power, the House

*"would slip into utter contempt and inefficiency."*<sup>160</sup>

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<sup>158</sup> Ibid

<sup>159</sup> Eskine May *Parliamentary Practice* (22<sup>st</sup> ed.), p

<sup>160</sup> Ibid

On this same matter, eminent parliamentary scholars such as Shri M N Kaul and Shri S L Shakhder (with particular reference to the Lok Sabha)<sup>161</sup> have stated that:

*“Parliament and State Legislatures possess not only the power to punish for contempt but have also the right to judge for themselves what is not, as without this, privilege of punishing for contempt would be worthless.”*

In India therefore, the power of the Legislature to punish for contempt or breach of privilege is a constitutional provision. These powers conferred on the House of Parliament and State Legislatures to commit the offender to custody or prison has been exercised by Parliament and State Legislatures and upheld by the High Court.

The Zambian Parliament, apart from observing certain precedent set within the Commonwealth has also been granted this penal jurisdiction through the enactment of the **National Assembly (Powers and Privileges) Act.**<sup>162</sup>

This penal jurisdiction has enabled Parliament to exercise a power of committal, which is a focal point in the powers the House exercises when it is maintaining its dignity and privileges against those that demonstrate a breach or contempt towards the House. The penal Jurisdiction of the House is not confined to its own Members or to offences committed in its immediate presence, but extends to all contempt of the House, whether committed by members or any persons who are not Members, irrespective of whether the offence is committed within the House or beyond its walls. This penal power is the most potent weapon in the

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<sup>161</sup> Practice and Procedure of Parliament: on page 224

<sup>162</sup> Chapter 12 of the laws of Zambia

hands of a House of legislature, and gives reality to privileges of Parliament, emphasises its sovereign character and vindicating its own authority and dignity.

It may be mentioned that the Select Committee on Parliamentary Privilege of House of Commons (U.K.), in 1967 made the following recommendation:

*"The House should exercise its penal jurisdiction (a) in any event as sparingly as possible, and (b) only when it is satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its Officers from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions."*

Subsequently, The Committee of Privileges of the House of Commons in their Third Report (1976-77) reiterated this recommendation, and the House of Commons, U.K., adopted it on 6th February 1978.

By looking at the arguments presented in the Chapter, it has been well established that Parliaments in most if not all Commonwealth countries do exercise these powers of committal. The following Chapter will look at the relationship between Parliament and the media as the exercise of this power has mainly been directed at this sector.

## CHAPTER IV: PARLIAMENT AND THE MEDIA

Chapter 4 looks at Parliamentary Privileges, the Press and the exercise of the power of committal by Parliament as a preview of the attendant arguments for and against the use of these powers. This is so as it has been the media, which has been the major victim of its exercise.

### 4.1. PARLIAMENTARY PRIVILEGES AND THE PRESS

The Press is often called an extension of Parliament. It conveys to the people the substance of Parliamentary legislation and discussion and keeps the people informed of what is happening in Parliament.

Though what appears in the Press may influence the Members and provide them with necessary background, the material itself does not form an authentic record of facts and exclusive reliance cannot be placed by a Member of Parliament on the matter as reported, Thus, it has been ruled by successive Presiding Officers that questions, motions and other notices which are merely based on Press reports may not be admitted. The Member may be required to produce some other primary evidence on which his notice is based.<sup>163</sup>

Freedom of the Press has not been expressly provided for in most constitutions, but is implicit in the fundamental right of the "freedom of speech and expression" guaranteed to the citizens under the Bill of Rights contained in these constitutions as it has been settled by judicial decisions that freedom of speech and expression includes freedom of the Press.<sup>164</sup>

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<sup>163</sup>This position has been expounded by Speakers in Zambia throughout their rulings concerning Newspaper reports

<sup>164</sup> Pachauri: *The Law of Parliamentary Privileges in the U.K and India* Tripathi Private Ltd 1977 Pg.

In this regard it has been universally accepted that

*"every citizen has a right to offer fair criticism and/or comments on a matter which is of public concern and that it is not correct to suggest that a Member of Parliament is not liable to be criticised in the performance of his duties as such member. Fair comments or criticism by a citizen ... particularly a statement couched in proper language in which he puts forward his own version of certain facts, which may be contrary to something said on the floor of the House by a Member or Minister, will not be objectionable. When, however, the citizen exceeds the limit of fair comment or criticism and indulges in imputations of improper motive to a Member of Parliament, he brings himself within the penal jurisdiction of the House".<sup>165</sup>*

It has further been observed that:

*"while the House is conscious that the Press should have the liberty to express its views without fear or favour on matters of public importance ... this liberty should not be abused by distorting facts and attributing motives".<sup>166</sup>*

To comply with such demands, countries like India have fortified such beliefs by including them as constitutional provisions. Article 361A of the Indian Constitution for example provides that:

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<sup>165</sup> 3<sup>rd</sup> Report on Parliamentary Privileges in the house of Commons U.K

<sup>166</sup> Ibid

*"361A. (1) No persons shall be liable to any proceedings civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly, or, as the case may be, either House of the Legislature, of a State, unless the publication is proved to have been made with malice".*

The above protection has been accorded within the overall limitation that the House has the power to control and, if necessary, to prohibit the publication of its debates or proceedings and to punish for the violation of its orders. Normally, no restrictions are imposed on reporting the proceedings of the House. But when debates or proceedings of the House or its committees are reported *mala fide* or there is willful misrepresentation or suppression of speeches of particular members, it is a breach of privilege and contempt of the House and the offender is liable to punishment.<sup>167</sup> Further, the press is forbidden to publish any part of the proceedings or evidence given before, or any document presented to parliamentary committee before such proceedings or evidence or document has been reported to the House.<sup>168</sup>

However, as per Westminster tradition it is considered inconsistent with the dignity of the House to take any serious notice or action in the case of publication of every defamatory statement, which may constitute a breach of privilege or contempt of the House. Even use of such scurrilous expressions as '*dacoits*', '*smugglers*', '*bootleggers*', '*a bunch of thieves*', '*Chamchas*' and '*dogsbodyes*' in

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<sup>167</sup> Kaul and Shackdar: *Practice and Procedure of Parliament* (5<sup>th</sup> ed.) Metropolitan book co. PVT ltd

<sup>168</sup> Speakers Rulings, Lok Shaba

relation to Members of Parliament had been treated as 'not worth serious notice'<sup>169</sup>. As observed by the Chairman of the Indian Rajya Sabha in 1981 that :

*"the newspapers are the eyes and ears of the public and if every citizen has a right to criticise the action of others, so also the newspapers Whose profession is to turn the light of publicity on the irregularities of public actions. It is only when a point is reached and writing ceases to be journalistic vapouring and becomes an improper obstruction to the functioning of Parliament and its Members by patent falsehood or otherwise, that action to the extent of punishment is called for".<sup>170</sup>*

In this regard, therefore the cordial and co-operative relationship, which exists today, exists between Parliament and the Press represents the achievement of centuries of struggle between the champions of liberty and the forces of intolerance.

It should be noted that the reporting of parliamentary proceedings was for many years regarded as a flagrant breach of parliamentary privilege, and (an interesting survival from a less enlightened era) is still technically so today.<sup>171</sup> This freedom, which the press enjoys today, was not lightly won, and it was in comparatively recent times that unfettered journalism was accepted as a healthy and essential feature of a democratic society.

This action has enabled the press and Parliament have a healthy respect for each other, but today newspapers have been overstepping this respect to the

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<sup>169</sup> Ibid

<sup>170</sup> Ibid

<sup>171</sup> Ibid

point that Parliaments have had to proceed against persons who have transgressed the legitimate privileges of Parliament and its Members<sup>172</sup>.

This transgression has resulted in the summoning of various editors of different papers to appear before the bar of the House in various countries. In this respect the following are various examples from various Commonwealth countries where Editors or reporters had been summoned to the bar and have had their parliaments evoke their powers of committal as a last resort to try and control the disrespect of the House by the press.<sup>173</sup>

In 1721 the House of Commons exceeded its jurisdiction by assuming the right to punish a journalist for a purely political offence no breach of parliamentary privileges being involved. A newspaper of Jacobite sympathies called "Mist Journal" had advocated the restoration of the Pretender, and the matter was brought before the Commons who resolved that:

*"the said paper is a false, malicious, scandalous, infamous and traitorous libel, tending to alienate the affections of His Majesty's subjects and to excite the people to sedition and rebellion, with an intention to subvert the present happy establishment and to introduce popery and arbitrary power".<sup>174</sup>*

The proprietor of the Newspaper (Nathaniel Mist) was committed to prison and later deported from the Island.<sup>175</sup>

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<sup>172</sup>Norman Wilding and Phillip Laundy: *An Encyclopedia of Parliament* 4<sup>th</sup> ed. Cassell Pg. 573

<sup>173</sup> (We have cited those cases where the offenders were committed to jail sentences as those cases where the pressmen were just reprimanded or admonished are too numerous to mention)

<sup>174</sup> Norman Wilding and Phillip Laundy: *An Encyclopedia of Parliament* 4<sup>th</sup> ed. Cassell Pg. 573

<sup>175</sup> Ibid Pg. 574

In 1727 an enterprising publisher, Edward Cave was committed to prison by the House of Commons for supplying information on the proceedings of Parliament to his friend Robert Raikes for publication in the "Gloucester Journal". In 1729 Raikes himself had been summoned to the Bar of the house for censure and on this occasion the Commons resolved that:

*"it is an indignity to, and a breach of the privilege of this house for any person to presume to give in written or printed newspapers any account or minutes of the debates or other proceedings of this House".<sup>176</sup>*

In another case in 1771, two printers, Thompson of the "Gazetteer" and "New Daily Advertiser" and Wheble of the "Middlesex Journal", were summoned to the bar of the House of Commons for

*"misrepresenting the speeches and reflecting on several Members of the House".<sup>177</sup>*

When neither of them attended as directed they were ordered to be taken into custody. Wheble was arrested in circumstances suggestive of collusion and appeared before Wilkes (An alderman who was a former printer who wrote scathing political articles, making no efforts to conceal the names of those he assailed, a precaution which other writers observed in those days, until the weight of official displeasure descended on him with the publication of the famous "No. 45" in which he fiercely attacked the Kings Speech on the proroguing of Parliament. He later fled the country and was proclaimed an outlaw. He was elected Member of Parliament upon his return in 1771) who encouraged printers in their defiance of the House. Wilkes discharged the prisoner and bound him over to prosecute the person who arrested him.

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<sup>176</sup> Ibid

<sup>177</sup> Ibid Pg 575

Thompson was also arrested on the same day and appeared before another alderman named Oliver who discharged him on the ground that no accusation had been made against him. The following day a third printer named Miller of the "London Evening Post", another journal which had offended the house of Commons, was arrested by a House messenger on a warrant signed by the Speaker.<sup>178</sup>

Miller called for a constable who took both men before the Lord Mayor, Wilkes and Oliver. They dismissed the charge against Miller and committed the messenger for trial for assault. The House of Commons, on learning of these events, fumed with indignation and ordered the Lord Mayor and Oliver, who were members to attend in their places and for Wilkes to appear at the Bar. The Lord Mayor and Oliver were committed to prison (The Tower) for interfering in the internal affairs of Parliament.<sup>179</sup>

A serious case arose in Australia in 1955 when the proprietor of a newspaper in New South Wales, the "Banktown Observer," published defamatory allegations against a Member of the Lower House of the Federal Parliament.<sup>180</sup>

The complaints of the Members concerned were investigated by the Committee of Privileges, which reported that the proprietor and the writer of the offending article were guilty of a serious breach of privilege. The House unanimously agreed with the finding of the Committee and voted on division to commit both offenders to prison for three months.<sup>181</sup>

In 1955 Mr. R E Fitzpatrick and Mr. F Browne of the "Bankstown Observer" were found guilty of serious breach of privilege by publishing articles intended to influence and intimidate a Member in his conduct in the House and in attempting

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<sup>178</sup> Ibid Pg. 574

<sup>179</sup> Ibid Pg.576

<sup>180</sup> Ibid

to impute corrupt conduct as a Member for express purpose of discrediting and silencing him.<sup>182</sup> The House agreed to the report prepared by Privileges Committee and a motion was debated and agreed which committed Messieurs Fitzpatrick and Browne to four (4) months imprisonment.<sup>183</sup>

In 1952, for instance, in pursuance of a warrant issued by the Speaker of Assembly, Uttar Pradesh Sabha, Shri Mistry, the then acting Editor of "Blitz", a weekly news magazine, was arrested on March 11 at Bombay to answer a charge of breach of privilege.<sup>184</sup>

Shri Mistry was kept in custody at Lucknow for seven (7) days until 18 March 1952 when he was released in habeas corpus petition on the ground that Shri Mistry had not been produced before a magistrate within twenty-four hours of his arrest, which contravened the provision of article 22(2). In a civil suit subsequently filed by Shri Mistry, claiming damages for wrongful arrest and detention, the acting Chief Justice Coyajee of the Bombay High court held inter alia, that the House had power to order the supposed offender to be arrested and brought before the Bar of the House to answer a charge of breach of privilege. In this connection, the court observed:<sup>185</sup>

*".....the Legislative Assembly of Uttar Pradesh was fully entitled to protect its dignity by the exercise of the privilege expressly conferred on it under article 194 and in exercise of that privilege it issued a warrant which on the face of it states that it is for contempt of the House and therefore, that warrant being a general*

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<sup>181</sup> Ibid

<sup>182</sup> Ibid

<sup>183</sup> Ibid

<sup>184</sup> Parliamentary Penal Jurisdiction (Paper on Internet) Lok Shaba

<sup>185</sup> Ibid

*warrant is not subject to scrutiny and it can be validity executed.....*<sup>186</sup>

The Indian Parliament in reference to an Editorial of the Hindustan, a Hindi daily, was captioned "*Baseless, Absurd and Improper institution*". The Committee of Privileges to which the matter was referred by the House, held that the impugned statements and similar others in the Editorial cast serious reflections on the character and proceedings of Parliament and on the conduct of its members and thereby tended to bring the Parliament and its members into disrepute. However in view of the apology tendered and regret expressed by the Editor of the paper, the Committee recommended that no further action be taken in the matter.<sup>187</sup>

In another situation, the Chairman of the Privileges Committee in the Indian Parliament disposed a privilege notice arising out of a signed item of the Executive Editor of the Indian Express carrying the heading, "*Petty little lies in Parliament*" observing, inter alia, that

*"Newspapers always look into things closely and critically. the newspapers are the eyes and ears of the public and if every citizen has a right to criticise the actions of others, so also the newspapers whose profession is to turn the light of publicity on the irregularities of public actions."*

The Chairman further observed that:

*"it is only when a point is reached and the writing ceases to be journalistic vapouring and becomes an improper obstruction to the functioning of Parliament and its members by patent falsehood or otherwise,*

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<sup>186</sup> Ibid

<sup>187</sup> Ibid

*that action to the extent of punishment is called for. Then the House will never hesitate to do its duty towards itself".<sup>188</sup>*

In response to a further notice of breach of privilege of the House, the Chairman's attention was invited to certain observations of Acharya Rajneesh reported in the Nav Bharat Times of 3 August 1986, that

*"members of Indian Parliament are mentally under-developed. If investigations are made they would be found to have a mental age of 14 only".*

In response to this, the Chairman observed that,

*"we generally treat such remarks beneath our notice it is inconsistent with our dignity to attach any importance to the vituperative outbursts or irresponsible statements of a frustrated person".<sup>189</sup>*

He closed the matter exhorting to leave good men alone", and the newspapers not to give publicity to irresponsible statements against Members of Parliament as by doing so, they were not doing any service to the great institution of Parliament.

It is such rulings that have reconfirmed the House's right of privilege to determine what is contempt or breach.

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<sup>188</sup> Ibid

<sup>189</sup> Ibid

## 4.2. SUMMARY

From the foregoing the Chapter has demonstrated that that any publication by any person in a newspaper of a substantially true report of any proceedings of the House of Parliament is protected either under statute law or the Constitution from civil or criminal proceedings in court unless the publication is proved to have been made with malice.<sup>190</sup>

But when debates or proceedings of the House or its committees are reported *mala fide*, i.e., there is either willful misrepresentation or suppression of speeches of particular members or a garbled, distorted and perverted accounts of debates, it is a breach of privilege and contempt of the House. This was the position the House took in the case of *Fred M'membe and Bright Mwape Vs the Speaker of the National Assembly, the Commissioner of Prisons and the Attorney General (1996)*<sup>191</sup>. To illustrate this, in India for example, the Supreme Court has held that:

*"the House of Commons had at the commencement of our Constitution the power or privilege of prohibiting the publication of even a true and faithful report of debates or proceedings that take place within the House"*<sup>192</sup>.

*A fortiori the House had ... the power or privilege of prohibiting the publication of an inaccurate or garbled version of such debates or proceedings. Nor do we share the view that it will not be right to entrust our*

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<sup>190</sup> Ibid

<sup>191</sup> *unreported H.C.J No.X of 1996*

<sup>192</sup> *M.S.M Sharma v Shri Krishna Sinha AIR 1959 S.C 395*

*Houses with those powers, privileges and immunities, for we are well persuaded that our Houses... will appreciate the benefit of publicity and will not exercise the powers, privileges and immunities except in gross cases".*<sup>193</sup>

The speaker of the Indian Parliament further observed that:

*"the newspapers are eyes and ears of the public not present in the House. Unless the House puts a ban, the newspapers must be held to have the right to reproduce fairly and faithfully and accurately the proceedings or any part thereof without let or hindrance from any person not authorised by the House or by any law. The newspaper may not misrepresent by editing, adding or unfairly omitting to give a totally wrong impression".*<sup>194</sup>

However if a member publishes separately from the rest of the debate a speech made by him in the House, it becomes a separate publication unconnected with any proceedings in Parliament. He, therefore, cannot claim this privilege and he would be held responsible under the law for any libelous matter it might contain.<sup>195</sup>

As regards disclosures that may be made by a member on the floor of the House and his accountability to any outside body, it has, inter alia, been observed that:

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<sup>193</sup> Ibid

<sup>194</sup> House Parliamentary Debates of the Raja shabba 2 – 3 (1981) c.145

<sup>195</sup> Eskine May: *Parliamentary Practice* (22<sup>nd</sup> ed.) Buttersworth Pg 87

*"it would be impeding a Member of Parliament in the discharge of his duties as such member if he is to be questioned in any place outside Parliament for a disclosure that he may make in Parliament".*

The right of a Member of Parliament to function freely and without fear or favour is therefore in Zambia as is in India, as in the U.K. or other Commonwealth jurisdictions, a constitutional guarantee. This guarantee is subject only to the rules of the House and ultimately to the disciplinary jurisdiction of the House itself. Any investigation outside Parliament of anything that a member says or does in the discharge of his duties, as a Member of Parliament would amount to a serious interference with the member's right to carry out his duties as such member.

It was from this argument that the Zambian Parliament based its case in the following Chapter.

## CHAPTER V: ANALYSIS OF PROBLEM

Chapter V is the analysis of a trailblazing case that in a way set the Zambian position on this issue but came short of actually defining the position whether the Zambian Parliament did have penal jurisdiction. This was a result of inconsistencies in the Judge's Ruling which had its own factual and legal errors. Through the author's observations, this chapter will examine the attendant arguments for and against this power. This will be done through the analysis of the case of **Fred M'membe, and Bright Mwape Vs The Speaker of the National Assembly, the Attorney General and the Commissioner of Prisons.** This will be done in comparison with precedent, practice and procedure from other Commonwealth countries.

### 5.1. CASE STUDY

Most cases of contempt of Parliament in Zambia have been commonly associated with charging of Members of Parliament for contempt for various acts committed against the House. For non-members this was quite rare until the charging of Fred M'membe, Bright Mwape and Lucy Sichone for contempt of the House. Until this case rarely was the power of committal of the House mentioned in Zambia until the Speaker ordered the arrest of the trio using this parliamentary prerogative.

Our case study will involve an observation, analysis and critique of the judgement delivered by retired High Court Judge, Justice K C Chanda in the habeas corpus case of **F Mmembe and D Mwape v The Speaker of the National Assembly and the Commissioner of Prisons and the Attorney General**<sup>196</sup>

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<sup>196</sup> 1996/HCI/unreported)(High Court judgement No. X 1996)

The origin of this matter is that the Supreme Court of Zambia in early January 1996 delivered a judgment in which it nullified some sections of the Public Order Act,<sup>197</sup> which required political parties and other organisations to obtain permits from the police before they could hold any meetings or processions. Soon after the judgment was delivered the Honourable Vice-President and other Government Ministers raised protestation in Parliament against the judgment. On 29th January 1996 the two Applicants and a columnist, Mrs. Lucy Banda Sichone, wrote in the Post Newspaper articles opposing the Government's attack on the Supreme Court judgment. On 30th January 1996 the Vice President raised a point of Order and complained to the Speaker about the said articles in the Post Newspaper, which he alleged were a breach of the privileges and immunities of the House. Following that point of order by the Hon. Vice President, the Hon. Speaker made a Ruling in the House on 20th February, 1996 in which he found a '*prima facie*' case of contempt of the House against the three writers.

He decided that some of the terms and phrases used in all the three articles were injurious to and contemptuous of the dignity and standing of the House. He then referred the matter to the Standing Orders Committee of the House for further consideration. The Standing Orders Committee met on Thursday, 22nd February, 1996 and considered the case against the three writers and came up with a resolution that the three writers were guilty of gross contempt of the House and that they also committed a breach of privileges of the House. The Committee described the three articles as highly inflammatory, manifestly contemptuous and libelous and as aimed at bringing the House into odium and ridicule.

The Committee then meted out the punishment of committing the three to custody for an indefinite period from Friday 23rd February 1996 until they repented or until the House resolved to discharge them. Each of them was also

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<sup>197</sup> Cap. 104 of the laws of Zambia

any specific statutory authority or section of any written law. The absence of such citation of specific written laws the Judge stated could only mean that the Speaker and the National Assembly resorted to the common law power to punish for contempt.

In reply in the affidavit sworn by one, John Siame, Legal Counsel for the National Assembly, the Counsel admitted that the two Applicants did not receive their summons on 23rd February 1996 because they were not at their offices where the summons were attempted to be served on them. But he added that he could not know whether the Applicants became aware of the summonses on the same date of 23rd February or at the weekend as they claimed.

Mr Siame further admitted that the Counsel for Applicants was refused entry into the National Assembly grounds. He also explained that a decision of the Privileges Committee was final and was not subject to a restoration of, or ratification by the full House of the National Assembly. He further explained that committal to prison was made by the Standing Orders Committee and not the Speaker. The Advocate for the National Assembly denied the allegation that the two men were denied a fair trial.

At the hearing a number of arguments were advanced by lawyers of both sides. Mr. Sikota argued that the decision made by the Standing Orders Committee finding the Applicants guilty of contempt of the House should have been presented to the plenary session of the House for confirmation or ratification. This omission or procedural error rendered the alleged contempt of Court illegal and therefore a nullity. The learned Counsel, however, did not point his finger at any written law or rule, which demanded such ratification prompting the Judge to insinuate that Counsel was referring to Section 28(3) of the National Assembly (powers and privileges) Act.<sup>198</sup>

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<sup>198</sup> Cap 12 of the laws of Zambia

Mr. Sikota's second argument was that our Parliament was not a Court on the line of the British Parliament, because ours did not discharge judicial or *quasi-judicial* functions. Not being a Court, our Parliament could not therefore summarily deal with a case of contempt, he contended. If it did it was to conduct a formal trial where rules of natural justice and other judicial procedures would have come into play. He went on to argue that if our Parliament had no power to deal with a case of contempt committed in the fact of the Court in a summary manner, it therefore was not competent to summarily deal with an alleged contempt committed outside the precincts of the National Assembly.

The third argument by Mr. Sikota was that the High Court had jurisdiction to review any act done by our National Assembly because the Assembly was inferior to the High Court in the field of adjudication. But it was only supreme in the area of legislation.

To support this argument he cited Article 94 of our constitution which he said gave the High Court unlimited power to deal with any complaint emanating from an act done by any organisation or institution, including our Parliament. Counsel continued to say that it was a misconception to argue that our Parliament could not be questioned in any Court of law for what it did because there was no law or constitutional provision which ousted the jurisdiction of the High Court to enquire into Parliamentary actions. Sections 34 of the **National Assembly (Powers and Privileges) Act**<sup>199</sup> he said only referred to minor internal matters of the National Assembly.

Mr. Sikota further fortified his argument by citing the cases of Nkumbula, already referred to above, and *Siyunda Ilukena Vs. Attorney General*<sup>200</sup>. He explained that in the *Nkumbula case* the High Court issued an Order of *Mandamus* to force

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<sup>199</sup> CAP 12 of the Laws of Zambia

<sup>200</sup> 1993/HP/647

the Speaker to carry out a statutory duty, as he was required to do by the Constitution. Similarly, in the *Ilukena Case*, the High Court ordered the Speaker, by an Order of *Mandamus* to force him to release to the Court certain documents. He explained that these cases demonstrated the power of the High Court to check parliamentary actions, contrary to what section 34 of Cap. 12 implied.

Mr Sangwa in further buttress of Mr Sikota's contentions, submitted that the High Court had jurisdiction to enquire into all cases of imprisonment or detention of persons, whether they detained by the state or private bodies. He referred to Halsbury's laws of England volume 1, 4th edition, para 222.

He argued that the Zambian Parliament had no power to commit any person to prison not even its own Member of Parliament, because neither the **National Assembly (Powers & Privileges) Act**,<sup>201</sup> nor the constitution gives it any such powers. The issuing of the arrest order and the Committal Warrant were all illegal Counsel argued. He rejected an interpretation that section 28 of Cap 12 gives our Parliament power of Committal.

When asked by Court why the House of Commons possessed and exercised the power to imprison persons it found guilty of contempt of the House, Mr Sangwa replied that the commons exercised that power because the Courts in Britain had, by practice or tradition, extended that power to them. No such practice and convention has taken place in Zambia, he added.

The learned Counsel for the applicants added that such a position obtained in Britain because that Country did not have a written Constitution. In a country with a written Constitution, the power of Parliament to commit for contempt had to be specifically provided for, he said. Discussing the provisions of section 25 of the

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<sup>201</sup> CAP 12 of the Laws of Zambia

National Assembly Act,<sup>202</sup> Mr Sangwa said that prosecution for the charge of contempt under that section took place in the ordinary Courts of the land, away from Parliament and was conducted by the Director of Public prosecutions, as is provided for in section 27 of the same Act.

He added that if our Parliament had power to send any person to prison for contempt that power would have been specifically provided for in chapter 17 of the laws, in the Standing Orders or in the Constitution. On whether Zambian Courts had jurisdiction to entertain complaints arising from actions of our Parliament, the learned Counsel submitted that the High Court's unlimited jurisdiction given to it by Article 94 (1) of the Constitution included power to enquire into actions of the Speaker. In support of this argument, Mr. Sangwa cited two cases from other Commonwealth jurisdictions. He cited the case of *Smith V Mutasa*<sup>203</sup>, and an Indian special Reference case of (1964) India Laws Reports. In both cases he said, the Courts enquired into the actions of their Parliaments.

Miss Kunda, also for the Applicants submitted that section 34 of the **National Assembly (Powers and Privileges) Act**, did not oust the power of the superior Courts in this country to enquire into Parliamentary actions, but only stopped Courts from interfering with the purely internal operations of the House, which did not affect outsiders.

Finally, all the three Counsel for the Applicants asked the High Court to declare illegal the Speaker's order detaining their clients. They argued that the words in the articles they wrote in their Newspaper about the Speaker and the Vice-President did not ridicule the House or any of its Honourable officials. The writers were only siding with the Supreme Court's judgement that removed some

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<sup>202</sup> Cap 12 of the laws of Zambia

<sup>203</sup> 1990 Commonwealth Law Reports, page 87.

sections of the **Public Order Act**,<sup>204</sup> which demanded the obtaining of permits from the police by any persons who intended to picket, demonstrate or hold public meetings.

The two Counsels for the Respondent also presented their own arguments, *impugning those from the Applicant's Counsel.*

Mr Mukelabai stated that by 24th February, 1996 the two Applicants were aware that they had been summoned by Parliament, but deliberately and willfully failed to comply with the summons. They instead sent their lawyer Mr. Sikota who was not himself summoned, to find out why they had been summoned.

Mr. Kasote also submitted in support of Mr. Mukelabai that the Zambian Parliament had the power to find a person guilty of contempt even in his absence and that once the Privileges Committee so decided, that decision was final and did not require to be ratified by a resolution of the whole House. Mr Kasote also explained that the two Applicants had not as yet been finally sentenced for contempt of the House but had only been remanded in custody awaiting the final decision of the House.

In reply to arguments by the state, Mr. Sikota said that Cap 4 of the Laws only allowed the Courts of Zambia to borrow from the laws of England. It does not allow Parliament to do the same, because our Parliament is not a Court. He also explained that Standing Orders were not law upon which Parliament could base imprisonment of a person, but were mere guidelines or rules of procedure to regulate the arrangement of their business.

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<sup>204</sup> CAP 164 of the Laws of Zambia

Mr. Sangwa's final point of argument was that even if our Parliament had rules of procedure in dealing with contempt cases or other matters, those borrowed rules would be below our constitutional provisions.

The sum total of all the arguments presented before Court in this matter boiled down, as it were, to only two issues or, to be less simplistic, to two categories or classes of issues. The first category was the question of jurisdiction; namely whether the Superior Courts in Zambia (i.e. the High and Supreme Courts) have power to query the propriety or legality of any act done by our Parliament.

If they possess that power, how far are they allowed to go in reviewing parliamentary action? The second category of issue was whether the action taken by Parliament in putting the two applicants in prison was proper and legal.

Obviously, the second category could only be discussed if the Court found that it has jurisdiction to review parliamentary actions. If the Courts found that it did not have that power, it could not go on to consider the legality and propriety of what Parliament did in this matter.

In deciding the issue of whether the Zambian Court has jurisdiction to enquire into an action done by Parliament, Judge Kabaso Chanda had this to say

*I had to look at the decided cases of this country and of the Commonwealth countries cited to me as well as all our statutory laws governing the issue under discussion. Both sides referred to me the case of: The People Vs The Speaker of the National Assembly, ex-parte Harry Mwaanga Nkumbula<sup>205</sup> where the High Court readily entertained the*

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<sup>205</sup> 1970 Z,R,P 97.

application by Mr. Nkumbula seeking an order of Mandamus to force the Speaker to comply with constitutional provisions, to inform the National Assembly that a member of Parliament elected as a member of the African National Congress had ceased to be a member of that party. In that case the Court did not decline to hear the matter on the basis of lack of jurisdiction or on the basis of section 34 of the National Assembly (Powers and Privileges) Act, Cap. 17, which purports to oust Courts jurisdiction in such matters, and law was already in existence by that time, 1970, having been enacted 28th September 1956.

Mr. Sikota also referred Court to more Zambian cases in which he said, the courts dealt with matters involving activities of Parliament. He cited two cases. He referred Court to the cases of Siyunda liukena Vs. The Attorney General<sup>206</sup>, which like the Nkumbula case, involved an order of Mandamus against the Speaker. He further referred to Rupiah Banda and Stephen Moyo Vs. The Attorney General, which he said directed Parliament to follow, required procedures in ratifying emergency powers. Mr. Sangwa cited three foreign authorities, one from India, one from Zimbabwe and the third from Malta. The Indian Supreme Court case was cited as SPECIAL REFERENCE CASE NO. 1 OF 1964. By citing this case Mr. Sangwa advanced an argument

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<sup>206</sup> 1993/HP/647

*that by ruling inter alia, that the Indian High Court Judges acted properly in setting aside a contempt of Assembly sentence passed on one Keshav Singh, the Supreme Court of India determined that the courts in India had power to question an act done by Parliament in that country.*

*The Zimbabwean case, cited as Smith Vs Mutasa and Another 1990 Commonwealth Law Reports, is said to have asserted the right of Zimbabwean Courts to review any act done by Parliament. In that case the Supreme Court of Zimbabwe ordered Parliament to pay remuneration to Ian Smith a Member of Parliament, which Parliament had deprived him of. The Court declared the Supremacy of the Constitution over all other laws.*

*By citing the case of Carmel Demicoli V. Malta<sup>207</sup> to the European Commission of Human Rights, Mr Sangwa was driving a point home that breach of privilege is a criminal charge which should not be tried by Parliament itself but by the ordinary Courts of the land outside Parliament.*

The Judge went on to refer to the Zambian case of *Patel Vs. Attorney General*<sup>208</sup> which was a case referred from the Subordinate Court to the High Court to resolve a constitutional issue, where one of the Court's holdings was put in the following word:-

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<sup>207</sup> Application No. 130557/87

<sup>208</sup> (1968 Z.R.P. 99.)

*It is not the function of the Courts to impose their own views of what Parliament ought to do or to decide whether or not Parliament may have chosen a better way to accomplish a desired end, but, rather merely to consider whether what Parliament has done comes within Parliament's legislative competence.*<sup>209</sup>

This quotation was in line with Article 1 (2) of the (1991) constitution and both asserted the supremacy of the Constitution in this country. Although this holding in the Patel's case related to the Court's power to strike down any law made by Parliament which is incompatible with a constitutional provision, the case was also a declaration that Courts had a duty to see that what Parliament did was proper in law.

The Judge further argued that all the cases and the able arguments presented to him by all Counsel from both sides created in his mind an opinion that superior Courts in this country which, included the High Court, did not have power to enquire into the correctness and lawfulness of the legislative and administrative functions which affect the whole country and outsiders at large. And this power included complaints by Parliamentary Officials or employees involving allegations grave injustices done to them by the institution.

This conclusion of the judge did not only contradict Part III of the Constitution but other statutes and instruments, which enshrine the right of expression.

Having said that, the judge hence suggested the need to find a place for the meaning of section 34 of the National Assembly (Powers and Privileges) Act, Cap. 17 as amended by Act No. 23 of 1976. This section provided that;

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<sup>209</sup> Holding No. (14) Role of Courts in reviewing Acts of Parliament:

*Neither the Assembly, the Speaker nor any officer shall be subjected to the jurisdiction of any Court in respect of the exercise of any power conferred on or vested in the Assembly, the Speaker or such Officer by or under the Constitution, the Standing Orders and this Act.*

The Judge's position was that this purported ouster of Courts jurisdiction only referred to matters which belonged purely to the internal arrangement of Parliament, such as the date the House adjourns, cost-saving measures, power to remove strangers from the House, and a myriad of other internal administrative functions. However he was also of the view that, the Courts could intervene to settle a dispute between Parliament and any aggrieved individual who claims to have suffered grave injustice caused to him by Parliament. In this sense therefore, Orders of Certiorari, Mandamus and Prohibition can be issued against any of its committee, which exercised a quasi-judicial function, which was a contradiction to his earlier thoughts in his holding of the case.

On the issues relating to the question of jurisdiction that arose at the hearing of this matter questioning whether Parliament was a Court and if it was above the High Court, at par with it, or below the High Court, the Judge's view was that our Parliament is not a Court of law or a Court in any judicial sense, because, unlike its counter-part in Britain, it did not carry out judicial functions. The British Parliament was called the highest Court in the land because of the 'House of Lords' component. If the House of lords were abolished the British Parliament would cease to be a Court of law. Since our Parliament was not a Court in any sense of the term as already said, it is neither above, at par with nor a Court subordinate to the High Court the Judge stated.

To this the Judge added that he was not relegating our Parliament in the legislative sphere. He further stated that Subject to Article 1(2) of the Constitution, our Parliament was the highest legislative body, which was empowered by Article 62 of the Constitution to make and unmake the laws for this Republic. It was the Supreme legislative organ in the country.

He asked himself whether if our Parliament was not a Court, how it exercised the power to punish for contempt?

The next question the judge put forward was whether the action taken by Parliament to put in custody the two applicants was properly done and whether it was legal. In determining this issue the Judge considered section 25 as a whole, section 27, the implication of section 28 (3) and section 33 of the National Assembly Standing Orders, 1995. He also looked at the practice in the other Commonwealth Parliament, and the cases that have been cited to him by all Counsel involved in this matter. The book of Erskine May, Parliamentary practice<sup>210</sup>, substantially influenced his line of thinking on all the issues in this case.

Before making his final decision the judge stated that he had to answer the following questions;

1. Whether, though not a Court the National Assembly can commit a person to prison and so under what law?
2. Whether a proper procedure was followed in sending the two Applicants to prison
3. Whether in this case before Court the two articles by the two Applicants contained words or terms that were scandalous, contemptuous and meant to ridicule the House and bring it into odium.

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<sup>210</sup> 21<sup>st</sup> edition, Butterworths 1989

The judge went to state and I quote that

*the Zambian Parliament was not a Court of record. The British House of commons was also not a Court of record on its own, yet it has power to commit prison for contempt.<sup>211</sup> It has been argued by Mr Sangwa that the British Court have only recognised the power of the House of Commons to commit for contempt on traditional grounds, otherwise they say, it is not supposed to have that power, as it was not a Court of record.*

This contradicts Mr. Sangwa citation of case from the Maltese House of Representatives (already cited) which was not a Court of record, but exercised the power of committal and probably still did so and the case of the legislative Assembly of the State of Uttar Pradesh also not a Court of record, but yet it committed Keshav Sirgh to prison.

The Judge ended by saying that if he had time to look at the usage and practice of more other common law parliaments, like Australia and Canada, he strongly believed that he would have found the same practice, namely that those Parliaments who exercised the power of committal.

The judge went on to state that the reason why Commonwealth Parliaments exercise the power of committal is simply that it is the only way they can deter those who deliberately plan to ridicule its members and officials, or lower its dignity through odious utterances or writings. The Zambian Parliament was

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<sup>211</sup> (See chapter 8 of Erskine May),

based on the Commonwealth principle, which emulated a lot of its practice from Britain and other commonwealth countries.

On the basis of this argument the Judge went on to say that he found that our Parliament even in the absence of express constitutional or other statutory provisions, had the power to commit to prison any person whom it found guilty of contempt of it, or of breach of any of its privileges. As already said, there are no express provisions to that effect in our Constitution and in the National Assembly (Powers and Privileges) Act, Cap. 17. But the Judge noted that from the readings which he had just done that Parliamentary law which Mr Sangwa correctly called by the Latin name of 'lex Parliament' was largely a law which has been built up of practical experiences rather than express statutory provisions.

The Judge therefore ruled that the warrant of Arrest, the committed warrants and the whole procedure following in incarcerating the two young men was proper. The requirement of 'a resolution' as stated in section 28 (3) Cap. 17 were satisfied by the support the House gave to the Speaker's Ruling against the two Applicants.

As to the third question querying where the articles in the Post Newspaper, which Parliament complained of, were offensive, scandalous to or contemptuous of the House or any of its members or officials, the Judge had the following to say.

The judge stated that the test used in judging the effect of any word uttered or written against some one's integrity was the one in the law of defamation. And this test he continued was whether the word or phrase obtained or written tended to lower the person against whom it was used in the estimation of right-thinking members of his society generally. What was defamatory in one society could not be defamatory in another he continued. No proof of damage was required in

contempt because the test is subjective as each society decided what words or gestures were scandalous.

To this the Judge went on to say that the first Applicant, Fred M'membe was alleged to have used some words to the following effect: "*Ernest Mwansa's underwear is an imitation*" or "*Ernest Mwansa must shut up*" The meaning of the term "**underwear**" includes a vest, an underpants, a petticoat and brassiere, among other under clothes.

As a Zambian, the judge found this to be insulting and abusive language for anyone in the Zambian society to refer to the underpants of a grown up man or woman. Such language degraded, dishonoured and reduced the respectability of the person referred to by the term. Similarly, telling an honourable Member of Parliament and a Minister to shut up was humiliating, though on a lesser degree than the mention of his underpants.

The second Applicant Bright Mwape was also alleged to have used scandalous words in his article. The Judge stated that after having looked at the whole of his article and the Judge found nothing insulting in it. The Judge stated that if a member of Parliament makes a speech in Parliament and that speech was reported in the newspaper any member of the general public whether a newspaper writer or not, was entitled to comment on that speech whether in opposition to or in agreement with it. Such comment could not be said to be breach of privilege. There is no rule, anywhere in the world, which said that nobody could comment on speeches of Honourable Members of Parliament spoken in the House. To fortify this argument, the Judge gave examples of two judiciary notices:

Firstly the Judge mentioned that every year in this country the Minister of Finance presented his budget in Parliament and it was reported in the

newspapers. Thereafter, many members of the public and newspaper editors either supported or attacked the budget. The Minister of Finance or Parliament never charged anybody with breach of privilege.

Similarly, the Minister of Education makes speeches every year announcing the examination results of grade 7, grade 9 and grade 12 pupils. Again several members of the public and the newspapers make comment supporting the Ministry or attacking the Government for its inability to build more secondary schools in the country. The Minister of Education or Parliament has not complained about breach of privilege or libel. More fitting examples could be given he claimed.

On this premise, the judge concluded that he found that none of the two Applicants did any thing or uttered any word that breached a single privilege of our parliament.

In respect of contempt of the House, the Judge had already stated that Fred M'membe used some words in his article, which were abusive or insulting. His article established a *prima facie* case of contempt of Parliament. Bright Mwape did use some strong statements in his article but the Judge did not find any of them to be repulsive.

Lucy Sichone who was not before the judge that day was alleged to have referred to the Honourable Speaker of our Parliament as a grandmother in whose skirts the Vice President sought refuge. It is further alleged that she called the Vice-President a hypocrite and a coward.

The Judge said that the words and phrases used by Mrs. Sichone were in the judge's view, very strong and tended to lower the respectability and honour of the Speaker and the Vice President in the minds of the right thinking Zambians. In

other countries such articles could be dismissed or brushed aside as harmless free expression, but in Zambian society, the use of hateful and rude phrases against elders in society is contemptuous. The Judge concluded that her article established a Prima facie case of contempt of Parliament.

The Judge was thereof of the view that Parliament, would not have instituted this case if Fred M'membe and Lucy Sichone had not employed scornful language in their articles. It was obviously contemptuous to use abusive language against any grown up person, let alone a chief, a Magistrate, a Judge and or a Speaker.

Relying on the papers before him, the Judge hence found the offence of contempt of Parliament proven against Fred M'membe and Lucy Sichone, the Judge found Bright Mwape not guilty of it.

The Judge then urged Fred M'membe and Lucy Sichone to desist from the employment of scurrilous, provocative and demeaning phraseology in their writing. He appealed for the building of a sound, sane and decent journalistic base in our country stating that journalism of the gutters should be avoided at all costs no matter how carried-away a journalist may be one can still make one's point by the use of conventional journalistic terms without having recourse to invectives and other decadent expressions.

In conclusion the judge said that in deciding whether the two Applicants were to be released from custody or not, as they had not yet appeared before the Bar of Parliament to be formally informed of the intention of Parliament, he found it procedurally improper for any person to be sentenced in incarceration for contempt.

As one may be aware this case was prominent in Zambia as it was the first time ever that Parliament exercised its powers and privileges and committed to a jail sentence, two members of the press and a contributing columnist.

In analysing the Judge's thoughts in his ruling this paper will concentrate on the judgement delivered by Justice K C Chanda, Judge of the High court, especially the following holding;

1. **That the High Court (High Court) possesses no jurisdiction over major parliamentary actions, especially those that affect persons from outside Parliament. And that the purported ouster of the courts, jurisdiction by Section 34 of CAP 17 only refers to certain minor parliamentary action.**

This holding of the Judge is not factual, as section 34 of CAP 12 is very clear. He cannot say that it refers to certain minor parliamentary actions. The magnitude of a parliamentary action is not for him to quantify. Section 34 clearly states that:

*“Neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Assembly, the Speaker or such officer by or order this Act.”*

This Section gives Parliament complete autonomy over its actions. If the courts were to question any action of Parliament, it is only when the House acts outside the confines of our Constitution.

This point was clearly established in *the People Vs The Chairman of the Standing Orders Committee of the National Assembly ex parte Nalumino Mundia*<sup>212</sup> where the Courts refused to grant an Order of Certiorari because Mundia's case anchored upon the National assembly's own internal proceedings

This is demonstrated by the fact that the Courts of Law are empowered to review an Act if it passed, that does not conform to our Constitution. This is where the jurisdiction of the courts ends as in regards to Parliamentary action. Their jurisdiction if extended to internal operations of Parliament is limited to checking the impropriety of Parliament's actions

Therefore, the claim that the courts have or possess jurisdiction over major Parliamentary actions, especially those that affect persons from outside borders on the observance of constitutional provisions. Any other results will mean the courts infringing on the powers and privileges of the House as, Parliament under Section 25 of Cap 17 has powers to punish its Members, officials and even outsiders to an extent where it can either impose a fine, reprimand, admonish or commit someone to prison.

**2) That our Parliament is not a court in any sense at all.**

This holding of the Judge is not correct as why when charging one for contempt of the House and committing one to prison, Parliament is acting as a quasi-judicial body where rules of natural justice and other judicial procedures would come in play.

The key point here is that, the House has the power to commit and it is exercised as the house deems fit, but as long as the case is referred to the Standing orders Committee, at their discretion they can call upon the accused or his counsel to

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<sup>212</sup> 1971

appear before the House but once the resolution is passed and presented to the House, procedures benefiting the house are followed which should follow some rules of natural justice.

This overriding power has in reality contradicted various instruments concerning fundamental human rights. Zambia, which is a signatory to various human rights conventions, has even enshrined these rights in the Constitution, and being a constitutional democracy the provisions of the Constitution such as those protecting rights to liberty are superior that parliamentary privileges which are statute based.

**3) That our Parliament is the Supreme Legislative Organ in the land, with powers to make, amend, repeal or re-make any law. In the enjoyment of that power, it is only subject to the courts interference as provided for in Article 1(2) of the Constitution.**

This holding if looked at in a critical sense, is the cornerstone of the Judge's judgement. In this holding, the Judge recognises Parliament's right to the power of committal. The misconception held by the defence counsel in respect to this power, of committal comes misconceived as in all cases that Parliament has had before it, concerning a breach of parliamentary privilege in relation with the press, the pressmen brought before the House have only been reprimanded or admonished and have been asked to read out an apology, at the bar and have been forgiven. These cases have not be as serious as to warrant the house to use its power of committal as was the case.

To understand this better Section 25(g) of the National Assembly (Powers and Privileges) Act sets the tone by stating that :

*"Any person who -*

- (g) *publishes or prints any libel on any Member concerning his character or conduct as a Member and with regard to actions performed or words uttered by him in the course of the transaction of the business of the Assembly shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand Kwacha or to imprisonment with or without hard labour for a term not exceeding twelve months or to both such fine and imprisonment.”*

It was upon this Section that Parliament initiated proceedings against the defendants and it was under this Section that Parliament committed them to imprisonment.

However Parliament in this case did not observe section 27 of ***the National Assembly (Powers and Privileges) Act***<sup>213</sup> which stipulates that:

*No prosecution shall be instituted for an offence under this Act except by the Director of Public Prosecutions upon information given to him in writing by the Speaker.*

What this meant was that the prosecution of this case was not legally done, as there was no sanction to prosecute obtained from the Director of Public Prosecution. This was a point the Judge or the Counsels for the defence did not note and would have given better arguments for the defence.

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<sup>213</sup> CAP 12 of the Laws of Zambia

5) **That the use of abusive language in a statement, speech or writing can amount to contempt of Parliament.**

Section 25(g) clearly states this fact. A look at Section 19(d) and (e) which states that:

*Any person shall be guilty of an offence who*

- (d) shows disrespect in speech or manner towards the Speaker; or
- (e) commits any other act of intentional disrespect to or with reference to the proceedings of the Assembly or of a Committee of the Assembly or to any person presiding at such proceedings.”

also supports this holding expressed by the Judge.

6) **(To be pronounced later)**

*That in dealing with case of contempt, Parliament must follow the standard procedure of reading the charge to the accused, asking him why he should not be found guilty of contempt and so forth. Conviction and passing of sentence in absentia is an aberration of this natural justice procedure of any kind in absentia and merely driven to prison to serve the sentence. The person charged with the contempt has to appear before the bar. Failure by him to appear at the required time and date is no reason for dispensing with this legal procedure and rule of natural justice.*

This holding in its totality shows that when arriving to the conclusion of the facts that lead to this holding the Judge completely disregarded CAP 12, the Standing

Orders of the National Assembly and the Provisions in the Constitution concerning the Legislature.

Firstly, the judge cannot rule or judge on what or which procedure Parliament should follow when it uses its power of committal in a case concerning a breach of parliamentary privilege or contempt of the House.

Article 86(1) of our Constitution states that:

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

The following of standard procedure in trial cases is for courts to do. The House when dispensing with such case has established modus operandis that it follows that fits its practices and procedures. However being a Constitutional democracy where certain rights are enshrined in the Constitution, it is paramount that Rules of natural justice must always be observed when preparing to deprive someone of his liberty. This is so because the Constitution under Article 13 of Part III guarantees the right to liberty, which is not subordinate to Parliament's power to commit for contempt.

However Parliament's argument is one that surprisingly the Judge himself had agreed to in that while in principle Parliament is not a court, but has powers of committal, why then obligate it to procedures of a court, which it is not. The interpretation of a guilty verdict according to Parliament is a prerogative of the House, as the breach of its privileges or contempt of the House are matters solely determined by the House. In simpler terms, what can be a simple misunderstanding to outsiders can be a gross breach of privilege to the House and the courts cannot determine that for the House.

As to the failure by anybody to appear before the bar of the House, the National Assembly (Powers and Privileges) Act is very clear on that. In essence, the House does not have the time nor the pleasure to entertain persons summoned to it at their time. Laws, rules and precedence have set it that the House follows a procedure that will dispose of a case within the shortest possible time so as to permit the House carry out its business of legislation.

If the Honourable Judge had the time to seriously study the National Assembly (Powers and Privileges) Act, especially Section 3, 10, 11, 19, 23, 24, 25(f) and (g) 34; Articles of the Constitution concerning the Legislature especially Article 86(1) and 87 as well as the Standing Orders of the house profoundly, as well as having read cases that concerned issues relating to the supremacy he would have not made the contradictions noticed in his holding.

## **5.2. OBSERVATIONS**

The following are a result of a careful study and analysis of the transcript of the Ruling made by Justice C K Chanda when he passed judgement in the habeas Corpus case of Mr. F Membe and Mr. D Mwape on 27th March, 1996 in Zambia.

### Misconceptions

- 1) It is observed, clearly through the arguments put forward by the defence lawyers (Mr. S Sikota and Mr. Sangwa) that there is a very serious misconception by public lawyers, of the role of Parliament, its powers, privileges and immunity as a result of the Special Status Parliament holds in the society. In essence, the misconception lingers around what Parliament can or cannot do.

It's a great surprise that the learned lawyers centred their argument around the fact whether the courts of law had the right to inquire into the activities of Parliament rather than concentrate their argument on the powers of arrest and imprisonment of Parliament. *The Mundia Case* had proved this point.

These misconceptions thus, where as a result of a lack of proper research into the matter at hand and what it really concerned.

An example of this is the fact that was claimed by the lawyers and the judge himself when they said that the power of arrest of the House especially in Britain was the result of the House of Lords component in which within it exists the highest court of England similarly called the House of Lords.

Although true, with little research, this argument is not very factual because in 1415 when the Commons obtained from the crown the services of the Sergeant-At-Arms, the House of Commons began to develop its penal jurisdiction which was evidently shown in 1543 when the House of Commons vindicating its privileges of freedom for the first time and using its Mace as a symbol of that freedom, refused to obtain a writ from the Lord Chancellor (As the privileges of the House up to that time were depended on the protection of the House of Lords) being of clear opinion that all commandments and other acts of the Neather House were to be done and executed by their Sergeant-At-Arms without writ and only by show of his Mace which was his warrant.

This, as a precedent is a cornerstone to the practices of procedure and traditions in Parliaments especially Commonwealth Parliaments. This act of committal is and has become an act observed by all Parliaments, e.g. in

1955 the Australian Parliament arrested and committed journalists to prison for contempt of Parliament. The same happened in India in 1952. And as rightly said by the Judge(quote):

*“The reason why Commonwealth Parliaments exercise the powers of committal is simply that it is the only way they can deter those who deliberately plan to ridicule its Members and officials or lower its dignity through odious writing or utterances.”*

- 2) It is also observed from the defence’s arguments (where they claim that the detention of the two defendants was not subjected for ratification to the House) that certain parliamentary procedures were not clear to them.

Those who are clear on the various concepts that govern the House will agree that the Constitution of Zambia, Article 86(1) gives the House powers to determine its own procedure.

Thus the procedure of ratification by the house through a resolution from the Standing Orders Committee is deemed to have been followed as there was no objection in the House put on a substantive motion when this issue was raised as a point of order by the Vice-President and resolved by the House through the Standing Orders Committee whose resolution was read in the House by the Speaker. Even the Judge said:

*“The requirement of a resolution stated in section 28(3) Cap 17 was satisfied by the support the house gave to the Speaker’s Ruling against the two.”*

- 3) Thirdly, another misconception was observed when the Defence Counsel referred to the fact that our Parliament is not a Court on the line of the British Parliament because ours does not discharge judicial functions. Therefore not being a court, our Parliament cannot summarily deal with a case of contempt. It must conduct a formal trial where rules of natural justice and other judicial procedures would come in play. He went on to argue that if our Parliament had no powers to deal with a case of contempt committed in a summary manner, it therefore was not compelled to summarily deal with an alleged contempt committed outside the precincts of the National Assembly House.

Firstly, in all honest regard, the question of the House not having powers to commit any person for contempt of Parliament is a misconception on the part of the defence counsels. Simple reference to Section 19 of the **National Assembly (Powers and Privileges) Act**<sup>214</sup> which deals with contempt states that:

*“Any person shall be guilty of an offence who –*

- d) shows disrespect in speech or manner towards the Speaker; or*
- e) commits any other act of intentional disrespect to or with reference to the proceedings of the Assembly or of a Committee of the Assembly or to any person presiding at such proceedings.”*

Therefore, contempt of Parliament per se is strictly a matter purely determined by Parliament through its own interpretation of the situation. As it is completely an internal matter, Parliament may elect what

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<sup>214</sup> CAP 12 of the Laws of Zambia

references in relation to procedure; practices, traditions and precedence are to be employed to determine its case. However the prosecution of this contempt will have be sanctioned by the Director of Public Prosecutions<sup>215</sup>

The provision that states that sanction to be obtained from Director of Public Prosecutions hence contradicts the Judge's ruling where he states that:

*“On the basis of this argument I find that our Parliament even in the absence of express constitutional or other statutory provisions, has the power to commit to prison any person who it finds guilty of contempt of it, or of breach of any of its privileges .....*”

This is so because before any sanction is to be given by the Director of Public Prosecutions he has to ensure that no rights of the person to be prosecuted are infringed upon.

Secondly, on the question of conducting a formal trial where rules of natural justice and judicial procedures would come in play, this has to be observed as although procedure, practices, tradition and precedence of the House have shown and indicated that such formal trails cannot be practised in the House, the House at this point is time is acting as a quasi-judicial tribunal.

Therefore the arguments of the Defence Counsels indicating that Parliament is not a quasi-judicial tribunal is a show of how little understanding of the legal procedure in terms of the operations of tribunals.

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<sup>215</sup> Section 27 of the National Assembly (Powers and Privileges) Act CAP 12 of Laws of Zambia

Therefore to argue correctly if one was to observe the indication by the Judge, that Parliament has the power to commit for contempt and even imprison, Parliament has to be more obvious in its dealings such as the inclusions of some of these powers its claims into the Constitution and not just statute law. Articles such as Article 86 (1) of the Zambian Constitution support the right for Parliament to find a procedure to be practised to enable it to commit for contempt and imprison but let this procedure be enshrined in the Constitution so that it is within the boundaries of our common laws and the Constitution.

Finally, on the question of Parliament having no powers to deal with a case of contempt committed outside the precincts of Parliament, as Parliament, is not compelled to summarily deal with an alleged contempt committed outside the precincts of the National Assembly House is a complete misconception. This is so because though Parliament might not be a court in the judicial sense of Common practice, it is a court where citizen can send petitions for relief and it can even punish on its own motion or override court judgements by a simple enabling Legislation.

This is also reflected in the Judge's rules where he states that:

*“Although it is not a court, our Parliament has powers to punish for contempt, which power is inherent in the nature of its status to preserve its dignity and honour. In my view this power includes the common law power to imprison, and not only to reprimand as other lawyers think.”*

This view of the Judge has no legal basis as one should always note that that these powers are not expressly conferred on Parliament by the Constitution.

Despite the wording in Article 86(1) which states that

*Subject to the provision of the Constitution, the National assembly may determine its own procedure*

This article give the right to Parliament to determine its own procedure but obviously in conformity with the Constitution, hence Judge Kakusa's words when he said in the Ludwig Sondashi Vs the Attorney General and the Speaker of the National Assembly<sup>216</sup> case that

*Where, needless to say, the law and custom of the Parliament of England is inconsistent with the Constitution of Zambia our Constitution will prevail.*

The Judge goes on to refer to the comparison of the Indian Constitution to the Zambian Constitution, to which he stated was not correct as the Indian Constitution clearly expressed in its provisions such as article 122(1) that

*The validity of any proceedings in Parliament shall not be called in question on the ground of alleged irregularity of procedure*

And article 122(2), which states that

*No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure on the conduct of business or for maintaining order, in Parliament shall be subject to the jurisdiction of any Court in respect of the exercise*

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<sup>216</sup> 1998/HP/111

*by him of those powers*

However despite the theory of provisions being expressly provided for in the Constitution, conventional wisdom under the common law, which states that a House inherently possesses all powers and privileges necessary for its proper functioning<sup>217</sup> has contradict this. In 1993, in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*<sup>218</sup>, McLachlin J, writing for the majority, held:

*It seems clear that, from an historical perspective, Canadian of legislative bodies possess such inherent privileges as may be necessary to their proper functioning.*<sup>219</sup>

To stress the misconception by the Counsels, one looks at Heard's thinking when notes in his book *"The Expulsion and Disqualification of Legislators: Parliamentary Privilege and the Charter of Rights"* that,

*however, "past conflicts between legislatures and the courts reveal that necessity can be very much in the eye of the beholder"*<sup>220</sup> "

For example, referring to the decision in *Stockdale v be Hansard* in 1839,<sup>221</sup> Heard asserts that

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<sup>217</sup> *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 100 DLR(4th)212, [1993] 1 SCR 319.

<sup>218</sup> 100 DLR (4th) 212 [1993] 1 SCR 319 The decision was delivered January 21, 1993.

<sup>219</sup> [Per McLachlin Fore (L'Heureux-Dube, Gonthier and Iacobucci, concurring), at 269 DLR)

<sup>220</sup> Andrew Heard, *"The Expulsion and Disqualification of Legislators: Parliamentary Privilege and the Charter of Rights"* in (Fall 1995) 18 Dalhousie L.J (No. 2) 380, p. 389

<sup>221</sup> (1839),112ER1112(QB).

*“the judges were plainly mistaken in their view of what was necessary,”*<sup>222</sup>

In that case, the court rejected the view of the UK House of Commons that the House could, under parliamentary privilege, order publication of documents containing libelous material and thereby protect those persons publishing the documents from libel suits. The following year, the UK Parliament enacted the *Parliamentary Papers Act*, 1840,<sup>223</sup> overriding the court’s opinion and giving protection for publishing parliamentary proceedings. The first three sections of that Act “correspond exactly” with sections 7, 8 and 9 of the **Parliament of Canada Act**,<sup>224</sup> and were first adopted in 1868.<sup>225</sup>

Heard has concluded on this topic by expressing this view that

*When judges conduct an independent assessment of the competing arguments, they risk basing their judgment on an incomplete appreciation of political realities. In considering the necessity of a claimed privilege, judges should bear in mind two reasons why accepted parliamentary privileges enjoy an immunity from judicial review: legislators are best situated to judge what is necessary to the legislative process, and legislators are accountable to the electorate for their decisions. When faced with a claim to privilege, judges may have to defer at some point to the legislature’s judgment of what is necessary to its own*

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<sup>222</sup> Heard A, *“The Expulsion and Disqualification of Legislators: Parliamentary Privilege and the Charter of Rights”* in (Fall 1995) 18 Dalhousie L.J (No. 2) 380p. 390.

<sup>223</sup> 3&4Vict.,c.9.

<sup>224</sup> RSC 1985, c. P-i. See also the protections in ss. 306 and 307 of the *Criminal Code*, RSC 1985, c. C-46, in respect of publishing parliamentary papers containing defamatory libel, and reporting on parliamentary proceedings.

<sup>225</sup> Joseph Maingot, *Parliamentary Privilege in Canada*, (2<sup>nd</sup> ed.), (House of Commons of Canada and McGill-

*dignity and functioning. It should be sufficient for judges to ask whether the legislators have a sound argument, based on principle and practical concern that is directed to ensuring the basic integrity or efficient functioning of the assembly. Judges should be leery of substituting their own assessment unless the legislature's position is patently a cover for achieving general social policies, or partisan interests, under the guise of parliamentary privilege. This deference was plainly evident in the majority's application of the test of necessity in New Brunswick Broadcasting; as McLachlin J. concluded; "the legislative assembly always faces the ultimate sanction, that of the voters"*<sup>226</sup>

### **5.3. SUMMARY**

The classic definition of parliamentary privilege is found in Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21<sup>st</sup> ed.), the principal British authority on the subject who states that:

*Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the 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. Thus privilege, though part of the law of*

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Queen's University Press, 1997), p. 71

<sup>226</sup> Heard p.390

*the land, is to a certain extent an exemption from the general law.*<sup>227</sup>

Beauchesne's *Rules and Forms of the House of Commons of Canada*<sup>228</sup>, further defines by stating,

*The privileges of Parliament are rights, which are 'absolutely necessary for the due execution of its powers.'*

According to these authors, by law and privilege of Parliament, the 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 it into discussion or decision 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.

That is, for any court or tribunal to assume to decide upon matters of Privilege inconsistent with the determination of the House of Parliament thereon, is contrary to the law of Parliament, and is a breach and contempt of the Privileges of Parliament.<sup>229</sup>

Although courts have, over the years, occasionally rendered decisions on matters involving aspects of parliamentary privilege, records have not revealed any instance where a House has abandoned the position asserted by these 1837 resolutions. However the author Maingot in his book **"Parliamentary Privileges**

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<sup>227</sup> May (2 1st ed.), p. 69.

<sup>228</sup> Alistair Fraser, W.I.F. Dawson, and John A. Hoitby, *Beauchesne's Rules & Forms of the House of Commons of Canada*, (6<sup>th</sup> ed.), (Toronto: The Carswell Company Ltd., 1989), p. 11, to 24.

<sup>229</sup> UK House of Commons Journals (vol. 92) (May 30, 1837), pp.<sup>418-20</sup>.

*in Canada*<sup>230</sup> takes a different view to the contrary which is to be incorrect from the perspective of a House of Parliament.<sup>231</sup>

In this book, Maingot himself first acknowledges that the UK House of Commons “has yet to formally relinquish its claim that it alone is the institution that may define its privileges.”<sup>232</sup> As an authority for his subsequent remark that the House has abandoned its position, Maingot cites a memorandum by a former Principal Clerk of the UK House of Commons which was given to a committee in 1967.<sup>233</sup> Although he observed that the claim by the House to determine the extent of its own privileges had “not [been] admitted by the courts”, and that it might appear that the House had “tacitly abandoned” the claim, the former Clerk also recognized that the claim had “never [been] expressly renounced by the Commons”.<sup>234</sup> In any event, the Report of the Committee expressed *no view* on this aspect of the former Clerk’s memorandum. As his second authority, Maingot refers to *Pepper v. Hart*, [1993] AC 593, [1993] 1 All ER 42 (HL). In that case, Lord Browne-Wilkinson stated:

*“Although in the past the courts and the [UK] House of Commons claimed the exclusive right to determine whether or not a privilege existed, it is now apparently accepted that it is for the courts to decide whether a privilege exists and for the House to determine whether such a privilege has been infringed”.*

The learned Law Lord did not make it clear *who* had “now apparently accepted” this view. Furthermore, no position of a House could ever be altered by the opinion of any author or court, but only by the House itself.

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<sup>230</sup> 2<sup>nd</sup> ed. (House of Common of Canada and McGill-Queen University Press

<sup>231</sup> *Ibid* p. 300.

<sup>232</sup> *ibid.*, p. 271

<sup>233</sup> (See Report from the UK Select Committee on Parliamentary Privilege (Session 1966-67), HC 34).

<sup>234</sup> Maingot J, Parliamentary Privileges in Canada<sup>2nd</sup> ed. (House of Common of Canada and McGill-Queen

To answer Maingot's position, DeSmith in his "Parliamentary Privilege and the Bill of Rights", points out that :

*In the result, as every student of constitutional law ought to know, "there may be at any given moment two doctrines of privilege, the one held by the courts, the other by either House, the one to be found in the Law Reports, the other in Hansard, and no way of resolving the real point of issue should conflict arise." In the last resort it is open to the House 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, as when it committed Pemberton and Jones, two judges of the King's Bench, for overruling a plea to the jurisdiction of their court, when it committed Stockdale and his solicitor for bringing actions (which were successful) against Messrs. Hansard, and when it committed the Sheriff of Middlesex for executing the lawful judgment of a court; but the successful imposition of one point of view is not to be equated with an authoritative declaration of the law. Dramatic conflicts of this character have not arisen in recent times, partly because both Houses have shown greater forbearance in asserting their views and partly because the courts have trodden warily when*

questions of parliamentary privilege have arisen incidentally before them. Nevertheless, "the old dualism remains unresolved".<sup>235</sup>

DeSmith further writes:

*The House is entitled by the law and custom of Parliament to treat any encroachment upon its exclusive jurisdiction as a contempt and breach of privilege. Analogies with the concept of contempt of court are inapt; the concept of breach of privilege and contempt of Parliament is a larger one. In asserting its own view of privilege the House may come into conflict with the courts and may, indeed, fail to apply the law correctly; but the possibility of conflict is inescapable as long as the courts continue to maintain their views about jurisdiction in relation to matters of privilege and as long as there exists no tribunal des conflicts to resolve these differences when they arise; and the highest courts may also err in law. If the jurisdiction of the courts in relation to a matter of privilege is wrongfully invoked, the House is no more obliged to stay its hand than is a court or statutory tribunal invested with exclusive jurisdiction over a class of issue when one of the parties brings an action in the High Court in an attempt to have the issue determined there.*<sup>236</sup>

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<sup>235</sup> The previous passage and this passage are from SA DeSmith, "Parliamentary Privilege and the Bill of Rights", 21 *The Modern Law Review* (No. 5) (Sept., 1958)465, pp. and 470-1.

<sup>236</sup> *Ibid.*, pp. 473-4.

In this case the first question to be considered is whether contempt of Parliament by non-members should still attract any punishment at all. The Author believes it should. Take, as an example, the Investigatory work of committees. Powers must exist to ensure that committee investigations can proceed, that witnesses will attend and that papers will be produced. Apart from public officials and ministers, many interest groups and representative bodies, and many companies and private individuals, also appear regularly before select committees of both Houses. They almost always appear voluntarily.

However, occasionally witnesses are unwilling to appear, or information necessary to an inquiry is not willingly provided. In recent British cases orders had to be issued for the production of papers to a select committee.<sup>237</sup> If the work of Parliament is to proceed without improper interference, there must ultimately be some sanction available against those who offend: those who interrupt the proceedings or destroy evidence, or seek to intimidate members or witnesses; those who disobey orders of the House or a committee to attend and answer questions or produce documents.<sup>238</sup> Sometimes the conduct is a criminal offence. Then the criminal law should take its course.<sup>239</sup> In the case of non-members that will normally suffice. But unless a residual power to punish exists,

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<sup>237</sup> One order required the papers of a lobbying company to be made available to the parliamentary commissioner for standards in an investigation of allegations of improper payments to members. The second required the United Grand Lodge of England, the main governing body of the freemasonry in England and Wales, to identify which individuals, from lists supplied by the home affairs committee of names of police officers and others who had been connected with possible miscarriages of justice, were freemasons. The papers were produced: see minutes of proceedings of the committee on standards and privileges, 27 January 1997, HC (1996-97) 421; minutes of proceedings of the home affairs committee, 19 February 1998, HC (1997-98) 573.

<sup>238</sup> Retention by the two Houses of their contempt powers received strong support in evidence, e.g. Dr Geoffrey Marshall: 'The contempt power of each House of Parliament is essential and should be retained, not least for the discipline of its own members': vol 2, p 206. Although there is no modern case of the House of Lords using its contempt powers, the Clerk of the Parliaments considered that: 'the House must have the power to enforce its orders, to deal with serious impediments to, or interference with, its proceedings, and also, in the last resort, to deal with serious affronts to the dignity of the House. For these purposes it needs the power to punish for contempt just as the courts need that power': vol 2, p 58, paragraph 17.

<sup>239</sup> e.g. *R v Roche, R v Egan*, The Times 18 February 1971, p 4, in which gas canisters had been thrown into the Commons chamber.

the obligation not to obstruct will be little more than a pious aspiration. Some persons will cynically exploit the absence of a sanction from time to time.

For the same reason the author is in no doubt that, to be effective as a last resort, the punishments themselves must be meaningful. The prospect of being summoned to the bar of the House and reprimanded may be a sufficient sanction in many cases. For other non-members, perhaps with commercial interests involved, something tougher may be appropriate for a grave contempt.

It is the Author's observation that the better course is the enactment of a provision whereby in future the High Court will exercise, concurrently with Parliament, the jurisdiction currently possessed by Parliament to punish non-members for contempt of Parliament. The punishment would be a fine of unlimited amount.<sup>240</sup> Proceedings would be initiated and conducted on behalf of the House by the Attorney General. He would initiate proceedings on being requested by the Leader of the House acting on the advice of a committee for privileges, or the Speaker of the House acting on the advice of the Standing Orders committee of the House. These officers would refer a matter to the Attorney General only if they considered there was a prima facie case of contempt and that court proceedings were called for. The committees would meet in private, so as to reduce any risk of unfairly prejudicing the subsequent court proceedings. For the same reason, the decision to refer the matter to the Attorney General would be better made by the Leader of the House or the Speaker, in conjunction with the committees, rather than the whole House. The procedure in court would be comparable to that applicable to proceedings for contempt of court. Costs would lie in the discretion of the judge. Rights of appeal would be the same as those generally applicable to decisions of the High Court.

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<sup>240</sup> Contempt of court and contempt of Parliament are closely analogous. There is no limit upon the amount of a fine that the High Court can impose for contempt of court.

One important form of contempt is readily identifiable and definable as a criminal offence, namely, willfully failing to attend before the House or a committee when summoned or to answer questions or produce documents, or deliberately altering, suppressing or destroying a document. This has been recognised in the legislation establishing the devolved assemblies.<sup>241</sup> This should be used as a beginning.

This offence would necessarily apply to members and non-members. The Author attaches importance to the existence of a penal sanction for this type of contempt, although it is expected that this criminal offence would rarely, if ever, be committed. The circumstances would be extreme, when the evidence required was essential and all else had failed. Should such circumstances arise, fairness should be applied requiring that the same penalties should be applicable for the same offence whether it is committed by a non-member or a member. Members of the House are subject to disciplinary sanctions such as suspension and expulsion to which non-members are not subject, but we do not think this justifies excluding members from the scope of this criminal offence.

From the observations made in this Chapter, the next Chapter will contain the Author's Conclusions and Recommendations.

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<sup>241</sup> See footnote 47 above

## **CHAPTER VI : CONCLUSION AND RECOMMENDATIONS**

### **6.1. SUMMARY OF ESSAY**

Chapter 1 looked at the doctrine of the separation of powers and gave a brief history of its origin and evolution. In doing this, the chapter gave an insight of the relationship between the Judiciary and the Legislature, making special reference to the exercise of the power of committal by the House and the Courts objection to this.

Chapter 2 went on to highlight the definition and scope of parliamentary privilege and its relation to parliamentary powers and immunities. It thereafter looked at the definitions of concepts such breach of parliamentary privilege and contempt of Parliament by looking at the origin, interpretation and application of breach or contempt of Parliamentary Privileges through their historical development within the existing laws and positions concerning Parliamentary Privileges. It thereafter looked at parliamentary privileges in Zambia and their sources.

Chapter 3 examined the Power of Committal of Parliament, its origin, history and duration when applied. It looked at the existing law behind the penal powers of Parliament such as the general principles, statutory law, subsidiary legislation and case law on the subject in Zambia and compares it to similar statutes in other jurisdictions such as Australia, Canada, India, New Zealand, and the United Kingdom.

Chapter 4 looked at Parliamentary Privileges, the Press and the exercise of the power of committal by Parliament as a preview of the attendant arguments for

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and against the use of these powers. This is so as it has been the media, which has been the major victim of its exercise.

Chapter V was the analysis of a trailblazing case that in a way set the Zambian position on this issue but came short of actually defining the position whether the Zambian Parliament did have penal jurisdiction. This was a result of inconsistencies in the Judge's Ruling which had its own factual and legal errors. Through the author's observations, this chapter examined the attendant arguments for and against this power. This was done through the analysis of the case of **Fred M'membe, and Bright Mwape Vs The Speaker of the National Assembly, the Attorney General and the Commissioner of Prisons.** This was done in comparison with other cases, precedent, practice and procedure from other Commonwealth countries.

## 6.2. CONCLUSION

It there therefore be concluded that in the interests of fairness, there is still a lot to be understood of Parliaments Penal Jurisdiction. Great detail should be given to the study of this law and answers should be found as to whether the House should retain power to itself to make the decision on contempt matters, save that the House should not have power to increase the penalty above that recommended by the relevant law.

The Author concludes that it is desirable that the law of parliamentary privilege should be clearly and precisely stated, even if the code has to be amended from time to time to accord with changing conditions. If anyone were convicted of, and punished for contempt when there might, at the time of the contempt, have been doubt whether the conduct was contemptuous or not, there would be scope for argument that contempt should hence be codified.

The author further concludes that there is a case for codification as it might be possible to draw up some general code of what constitutes contempt if it is codified. This however would not be exhaustive, as there would always be a residual area, which could not be dealt with given the dynamic nature of parliamentary proceedings.

Parliament ought, if practicable, to retain certain jurisdiction over non-members, rather than find itself beholden to others, such as the courts, to provide protection. This is constitutionally desirable. Furthermore, Parliament is better placed than the courts to assess the seriousness or triviality of contempt. The balance between the freedom of the individual and the essential protection of Parliament involves considerations of a political character. Whether obstructive conduct can sensibly be overlooked or treated leniently or requires a tough response is a matter for the judgment of Parliament.

Parliament must, however, be practical. The desirability of retaining this jurisdiction must not be allowed to obscure the difficulties involved in such a process today. Parliament is not a court of law. It is one thing for the House to discipline its own members. That can be regarded as primarily an internal matter, even though suspension of a House member has unhappy consequences for the member's constituents. It is altogether different for the House to impose punishment, potentially serious, on non-members. By becoming members of Parliament, members agree to abide by the rules of the House, including the rules relating to discipline; outsiders have agreed to nothing.

The Author does not think it practicable for Parliament to provide, and be seen to provide, the procedural safeguards appropriate today when penalising persons who are not members of Parliament. A debate by the whole House, for instance, on whether to impose a fine on a non-member, and if so how much, is far removed from current perceptions of the proper way to administer justice.

Despite the weighty arguments of principle and the break with tradition involved, the Author has been constrained to conclude that for practical reasons punishment of non-members for contempt of Parliament should, in general, now be transferred to the courts.

Parliament should retain a residual jurisdiction. No Parliament based on the Westminster model has wholly abandoned its penal jurisdiction over non-members. The Author agrees that the practical reasons for transferring jurisdiction to the courts are not inconsistent with Parliament retaining a residual jurisdiction.

The next question concerns the form of the court proceedings. One possibility is that specific types of contempt should be made criminal offences. A difficulty with relying exclusively on criminal sanctions is that the more narrowly defined are the offences, the greater the risk they may be inadequate; the more widely drawn the offences, the greater the risk they may embrace conduct by a member over which the House would wish to retain exclusive disciplinary jurisdiction. Conduct could hardly be proscribed as a criminal offence when committed by a non-member but not when committed by a member.

The author believes that the residual jurisdiction retained by Parliament would be called for in three circumstances. First, the House should continue to exercise the power to search, and detain in custody for a short time, persons who misconduct themselves in the galleries of the House or elsewhere in the precincts, or who are suspected of having committed some other contempt of the House, including contravention of any rule or order of the House. These summary powers, needed to preserve security and good order, are best exercised by the Houses themselves.

Second is the case where the Leader of the House or the Speaker, as the case may be, is of the opinion that, if the contempt were admitted, the appropriate punishment would be a reprimand by the House and not a referral to the court. The non-member would be asked to consider this opinion. If he accepted it and acknowledged that he acted in contempt of the House, the House itself should dispose of the matter.

The third situation comprises the exceptional case, if special circumstances should ever arise, where either House wishes to exercise the penal jurisdiction itself. The author has no specific instances in mind, but the existence of this residual jurisdiction will serve as a reminder of the constitutional principle that Parliament itself has a penal jurisdiction over non-members.

As a whole it can be concluded that there were many major legal flaws in the interpretation of various written laws and rules concerning the understanding of parliamentary penal powers caused mainly by the defence counsels which in the end had a profound influence on the final judgement of the court. It must be first observed in this conclusion that the tempo of the case had changed from a trial on which two people had applied for *habeas corpus* against Parliament to a trial where the powers and privileges of the House were put under question and to whether they were not subject to the jurisdiction of the Courts of Law.

It must be made clear that it is not proper, under our existing laws for the courts to express themselves in the manner the judge did as regards to their jurisdiction over the House. It is not healthy for courts of law to start inquiring whether a matter is contemptuous of Parliament or not. This is a preserve of Parliament itself and all applicable laws including precedence are very clear on the sole power of Parliament to determine what constitutes contempt or breaches of parliamentary privileges.

This breach or contempt whether caused by an officer, Member or outsider is an internal preserve of the House and the courts have no jurisdiction whatsoever in the internal affairs of the House.

In conclusion, it must be established strongly to the judiciary that the National Assembly powers and privileges derive their base from the Constitution of Zambia and a written law, - the National Assembly (Powers and Privileges) Act CAP 17 is a factual proof of these powers and privileges. The other base are the precedents from other parliaments especially Commonwealth Parliaments to which the Parliament of Zambia has Constitutional right to observe and apply those precedents applicable to our situation.

Therefore, to avoid the erosion of the enshrined powers and privileges of Parliament as well as the possibility of allowing Parliament being made to be under the jurisdiction of the courts of law, the Author recommends that the recommendations put forward be considered appropriately. This antagonism can be avoided by the two parties (Legislature and Judiciary) if each party stays out of the internal affairs of the other. This is a very important and vital point to observe, as only in this way can we preserve the doctrine of the separation of powers. In the case of Frederick Jacob Titus Chiluba Vs The Attorney General<sup>242</sup> it was held that the Courts have jurisdiction to inquire into the workings of the National Assembly where certain of their actions have been questioned by an aggrieved party.

This was strengthened by his quotation from the case of Zambia Democratic Party Vs the attorney General<sup>243</sup> where the scope of Judicial Review was defined in the Zambian Courts by referring to Order 53/14/19 of the 1999 in which it was stated that

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<sup>242</sup> 2002/HP/0630

*The remedy of Judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for Judicial Review is made but the decision making process itself*

*It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given a fair treatment by the authority to which he has been subjected and that it is not part that purpose to substitute the opinion of the of the Judiciary or of individual judges for that of the authority constituted by law to decide matters in question<sup>244</sup>.*

The result of this holding was the granting of the former President of Zambia by the Courts a stay of execution in relation to the removal of his immunity by Parliament. This was after the legislature voted unanimously for the removal of his immunity but his lawyers have argued that proper procedure was not followed. An appeal has been made to the Supreme Court and as it is Parliament has made not comments whatsoever on the matter defining its position.

Furthermore in Chitala Vs the Attorney General<sup>245</sup> the Supreme Court explained Judicial Review in the following terms

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<sup>243</sup> SCZ Judgement NO. 39 Of 1999

<sup>244</sup> See Chief Constable of North Wales Vs Evans (19982 W>L R 1155 at 1160 1982 3 AER page 141 at Page 143 per Lord Hailsheim L.C.

<sup>245</sup> 1997 Zambia Law Reports at pg. 91

*After all, since Ridge vs Baldwin (1964) AC 40, the distinction between Judicial and administrative activities has been swept away and as a general proposition, the judicial review lies against inferior courts of law and against tribunals and any persons which perform public duties or functions.*

The Judge thus held that in the case of lifting the immunity of the president was not ultra vires the Constitution, but the question was on whether the mudus operanda was correct.

This will bring us to the situation that the Judge in the case of **Fred M'membe, and Bright Mwape Vs The Speaker of the National Assembly, the Attorney General and the Commissioner of Prisons** failed to solve.

The Question, which remains to be answered with the new developments, is, despite what has been discussed in the Essay, are the Courts the right organ to decide the proper procedure of Parliament or is it Parliament? Will Parliament refuse by not following the Courts orders and reacting by using its powers of committal against those who meddle in its internal affairs?

This question was answered in the some detail by the Judge in the Chiluba Case as depending on articles 1(3) and 1(4) he stated that on a deeper understanding of the concept of the rule of law and the notion of the separation of powers to be improper as the National Assembly would be seen to surpass the powers of the High Court as giving a hearing to an applicant would certainly entail sitting as a court, which is a function exclusively for the courts

### 6.3. RECOMMENDATIONS

The Author therefore recommends as follows:

1. Contempt of Parliament should be codified fully in statute. Contempt should comprise of any conduct, which improperly interferes with the performance of the House of its functions, or the performance by a member or officer of the House of his duties. It is partially codified in the **National Assembly (Powers and Privileges ) Act** under section 19, but to avoid misunderstandings it must be made more detailed
2. Parliament's power to imprison persons, whether members or not, who are in contempt of Parliament should be checked, save that Parliament should retain power to detain temporarily persons misconducting themselves within the precincts of Parliament.
3. For practical reasons Parliament's penal powers over non-members should, in general, be transferred to the High Court. Parliament should retain a residual jurisdiction, including power to admonish a non-member who accepts he acted in contempt of Parliament. Proceedings should be initiated on behalf of either House by the Attorney General, at the request of the Speaker, advised by the Standing Orders committee or of the Leader of the House acting on the advice of the Standing Orders committee.
4. Willful failure to attend committee proceedings or answer questions or produce documents should be made criminal offences, applicable to members and non-members, punishable in the courts by a fine of unlimited amount or up to three months' imprisonment. Parliament should

retain its existing disciplinary powers over members, except that the power to imprison should be replaced with a power to fine.

5. That Standing Order No. 137 is observed in the future, if ever-another case of this nature was to come before the House. It was fortunate for that the defence counsels were not conversant to the Standing Orders, otherwise they would have used this Standing Order, to strengthen their case.
6. That Seminars for journalists and lawyers be organised where roundtable discussions can be organised to enable an equal atmosphere where journalists and lawyers (especially government ones) can make as many inquiries and ask as many questions as possible about the House that will help in enlightening them on the powers and privileges of the house, its immunity, its precedence as well as any other contentious issues that are a result of misunderstandings with the House.
7. And lastly, that Parliament opens up and stops being a closed shop, as the remoteness of the House with the public has forced the public develop a perception not consistent with the true objectives of the House.
8. It should be accepted that the public has to a certain level a misguided feeling about the operations of the House and look with suspicion at most parliamentary decisions. To curb this, advertisements should be carried out that will inform the people that they are free to come to the House to listen to the debates without having to pass through the rigid process as is followed today.

In conclusion may it be mentioned that the penal nature of contempt of Parliament makes it particularly important that its scope should be clear and readily

understandable by all.<sup>246</sup> At present, this is not so. The Author recommends a definition of contempt should be codified, in the Constitution to avoid complications such as those mentioned in the Essay. The suggested definition should apt to cover new forms of obstruction, should they arise, as well as existing forms. In order to make this definition more informative and intelligible, it should be accompanied by a short list of some forms of contempt. This will help avoid legal bottlenecks and will make it easier for the House to act as it deems fit without fearing reprisal from the Courts.

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<sup>246</sup> The Lord Chief Justice of England, Lord Bingham of Cornhill, said in evidence

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